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UNITED STATES V. BOOKER: ONE YEAR LATER—CHAOS OR STATUS QUO?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MARCH 16, 2006

Serial No. 109–121

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UNITED STATES V. BOOKER: ONE YEAR LATER—CHAOS OR STATUS QUO?

THURSDAY, MARCH 16, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12:16 p.m., in Room 2141, Rayburn House Office Building, the Honorable Jeff Flake (acting Chair of the Subcommittee) presiding.

Mr. FLAKE [presiding]. This hearing will come to order. I am filling in for the Chairman, who will be here momentarily, but we will go ahead and get started.

Thank you for your indulgence. When we have floor votes, obviously, we've got to be on the floor, but thank you.

I am pleased to be here for this important hearing, the Subcommittee on Crime, Terrorism, and Homeland Security, to look at the impact of the Supreme Court decision, *United States v. Booker*. A lot of us have been anxious to hear, after all the hype of what this decision might mean, it will be nice to hear what it actually has met over the past year. So I look forward to the testimony of the witnesses. Thank you all for traveling here and for what you are doing.

Before introducing you, I should mention Chairman Coble has a statement which will be in the record, so I will not read that. Then I will turn the time over to Mr. Scott from Virginia for an opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you in the hearing on Federal sentencing since the *Booker-Fanfan* Supreme Court decisions. The title of this hearing is "*United States v. Booker:* One Year Later—Chaos or Status Quo?" When we are looking at the question posed by the title, it is clear from the recent Sentencing Commission Report on sentencing during this period, that the answer is clearly status quo. There is nothing to suggest chaos.

Given the fact that the *Booker* decision eliminated mandatory application of guidelines and required the courts to consider a broader array of factors, including the guidelines, it's amazing that there is not a more pronounced difference in sentencing when compared to pre-*Booker* sentencing. Indeed, expecting sentencing to be the same, despite the changes, would be—just doesn't make sense.

Yet, with over 69,000 cases in 94 districts during a time implementing the new sentencing regimen, judges sentenced within the

guidelines 85 percent of the time that did not involve a governmental motion. With any database this large, you can find whatever you're looking for. So those looking for an anecdotal evidence that there are more unjustified downward departures can point to the fact that the percentage of prosecutor- and judge-initiated downward departures were slightly up during this post-*Booker* period. They can look until they find a category that happens to show a greater rate of downward departures, and they, in fact, found one, where in one small category the downward departures were, percentage-wise, somewhat large.

Whether it is post-*Booker* or pre-*Booker*, you can't look at sentences based on the name of a crime and expect to come up with an intelligent analysis of the sentences. A sentence usually involves, or at least should involve, input and impact of the Federal prosecutor, the probation officer, defense attorney, possibly a victim, and a judge, looking at all of the facts and circumstances in that individual case. The impact is marginalized and nullified when the data is analyzed simply on the name of the crime or the code section they're prosecuted under, and not the details of the crime itself.

While it's good that we have given ourselves at least a year before we began to evaluate the impact of *Booker* and *Fanfan* on sentencing, given the continuing impact that practice, experience, feedback and appeals have had on focusing attention—focusing sentencing decisions, it would be premature, I believe, to take any action at this time until we've got more data that's clearly on the way.

The impact of appeals that are pending should be awaited. There have been several circuit court appeals decided, but they have not had another Supreme Court decision since the post-*Booker* context. There is at least one case that the Supreme Court has already taken, *Cunningham v. United States.*, which is due to be decided during the next term, and that would address some of the post-*Booker* issues including constitutionality of certain approaches. So any legislative action taken prior to that decision would clearly be premature.

Moreover, when we look at the data regarding the circuit appeals, what we see is that circuits are more prone to affirm within guidelines and above guideline sentences, than they are to affirm sentences that are below the guidelines. Of the appeal decisions issued since *Booker*, all but one sentence within the guidelines has been confirmed. Of the 21 appeals of departures, 15 have been reversed, only 6 have been affirmed. At the same time, 14 appeals above the guideline sentences have been affirmed, while only 2 have been reversed. The circuits all agree that even after *Booker*, they still lack jurisdiction to review the court's denial of a motion of downward departure.

So, Mr. Chairman, I think I have spoken long enough for you to get your statement in before—but, Mr. Chairman, I believe the sentencing data clearly reflects that there is no chaos in Federal sentencing that we need to fix at this time. However, there are some things that existed before *Booker* that adversely affect sentencing, and in my view, need to be addressed. Among them are mandatory minimum sentencing in general, the 101 sentencing disparity be-

tween crack and powder cocaines, and the astounding disparity in substantial assistance treatment given to offenders in different circuits. We will hear more about the details of these problems from our witnesses.

So, Mr. Chairman, I look forward to the witnesses, and look forward to your statement.

Mr. COBLE [presiding]. Thank you, Mr. Scott, and to Mr. Scott, and to Mr. Flake and Mr. Delahunt, and to the panel and to those in the hearing room, I apologize for my belated arrival, but this is one of those days if it could go wrong, believe me, it has gone wrong. So I am hoping here in the calm of the hearing room, Mr. Scott, things will slow down.

I am going to ask unanimous consent to have my written statement made a part of the record.

[The prepared statement of Mr. Coble follows in the Appendix]

Mr. COBLE. I will only say this, and I think I maybe told Mr. Scott this earlier, shortly after *Booker*, I called the late Chief Justice Rehnquist, and asked him for counsel and advice. I said, "Do you have any advice for me?" He said, "I think the best advice is just to be deliberate and thorough for several months," and that is what we have done. That brings us to this hearing today.

And I am delighted to welcome you all here, and it's the practice of the Subcommittee to swear in all witnesses appearing before it, gentlemen, so if you all would, please, stand and raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative. Let me suspend just a moment.

[Pause.]

Mr. COBLE. We have four distinguished witnesses with us today. Our first witness is the Hon. Judge Ricardo Hinojosa. Judge Hinojosa was nominated by Ronald Reagan and served as a United States District Judge for the Southern District of Texas. In addition, Judge Hinojosa is the Chairman of the United States Sentencing Commission. He joined the Commission in 2003 and has been chairman since January 31, 2004. Previously, the Judge served as a law clerk for the Texas Supreme Court, as well as working in private practice in McAllen, Texas. The Judge is a graduate of the University of Texas, and earned his J.D. at the Harvard University School of Law.

Our second witness is the Hon. William Mercer, Associate Deputy Attorney General, and United States Attorney for the District of Montana. Mr. Mercer has served in this dual capacity since 2005. Previously he served as Assistant United States Attorney for Montana. He currently serves on the Advisory Committee on Appellate Rules for the United States Court of Appeals for the Ninth Circuit, and has previously chaired the Attorney General's Advisory Committee Subcommittee on Sentencing Guidelines. Mr. Mercer was awarded his undergraduate degree from the University of Montana, his master's degree from Harvard, and a J.D. from the George Mason University School of Law.

Our third witness is the Hon. Judge Paul Cassell. Judge Cassell was nominated by President Bush and currently serves as a Federal District Court Judge for the District of Utah. He is also a pro-

fessor of law at the University of Utah. Previously he served as an Associate Deputy Attorney General, and as an Assistant U.S. Attorney in the Eastern District of Virginia. Judge Cassell clerked for the then-Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia. He received an undergraduate and law degree from the Stanford University.

Our fourth witness is Mr. James Felman, Partner at Kynes, Markman & Felman. Mr. Felman currently co-chairs the Practitioners Advisory Group to the United States Sentencing Commission, and served as President of the Tampa Bay Chapter of the Federal Bar Association. He is also a member of the Sentencing Initiative of the Constitution Project. Mr. Felman is also the author of numerous publications on the issue of sentencing, including "How Should the Congress Respond if the Supreme Court Strikes Down the Sentencing Guidelines?" He received his undergraduate degree from Wake Forest University, and I regret to advise you, Mr. Felman, I think they lost their initial game last night. I regret that as well. [Laughter.]

And a master's degree of law from Duke University.

Gentleman, we are delighted to have you all with us. We will, as we have previously reminded you, we would like to comply with the 5-minute rule. You will not be keel hauled if you violate it, but when you see the amber light appear on your panel, that is your warning that you will have a minute remaining before the 5-minute deadline. When the red light appears, that is your cue to wrap up. We are on a short leash today, all of us are. We will have votes on the floor, but I think we'll have enough time here to resolve the matters before us.

Judge, let me start with you, if I may.

TESTIMONY OF THE HONORABLE RICARDO H. HINOJOSA, U.S. DISTRICT JUDGE AND CHAIRMAN, U.S. SENTENCING COMMISSION

Judge HINOJOSA. Thank you, Chairman Coble, Ranking Member Scott and distinguished Members of the Subcommittee. Thank you for this invitation to testify today on behalf of the United States sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker* on Federal sentencing.

The Commission has spent the year since *Booker* collecting data and monitoring appellate court decisions so that it could determine what national sentencing trends have emerged since *Booker* was decided. Those determinations can be found in our recently released Booker Report. Because I wish to keep my remarks brief, I will not discuss in great length during my opening remarks the over 200 pages of detailed analysis about sentencing practices over time that are contained in our Booker Report. Instead, I will give you a brief overview of the Commission's approach to the Booker Report and a brief description of our findings.

The Commission looked at four topic areas as it prepared its Report. First: Has *Booker* affected the rates of imposition of sentence within and outside the applicable guideline range, if so, how has it affected sentence type and length, including the extent of departure or variance from the guideline range? Second: Has *Booker* affected Federal sentencing compared to sentencing practices occur-

ring prior to the decision? Third: In what circumstances do judges find sentences outside the guideline system more appropriate than a guideline sentence? In other words, for what reasons do judges impose non-guideline sentences, and have those reasons changed after *Booker*? Fourth: The Commission also sought to examine the appellate courts' responses to *Booker*, particularly whether they were developing case law on what constitutes an unreasonable sentence?

The Commission concludes that the *Booker* decision has had an impact on Federal sentencing. The magnitude of the impact depends on which historical period one compares post-*Booker* sentencing practices. The Commission data indicate that after *Booker*, conformance with the guidelines still occurs in the majority of cases. The rate of within-guideline range sentencing is 62.2 percent after *Booker*, compared with 64 percent in fiscal year 2001, and 65 percent in fiscal year 2002.

For the 7 months between October 1, 2002 and April 30, 2003, the date of enactment of the PROTECT Act, what we refer to in our report as the pre-PROTECT Act period, the within-guideline range rate was 68.3 percent. From May 1, 2003 to June 24, 2004, what we call the post-PROTECT Act period in our report, the within-guideline range rate was 71.7 percent. After *Booker* the Commission did detect an increase in below-range sentences. This increase was present both in the area of Government-sponsored below-range sentences, and non-Government-sponsored below-range sentences. Government-sponsored below-range sentences were imposed after *Booker* at a rate of 23.7 percent, compared to 22.3 percent in the pre-PROTECT Act period, and 22.0 percent during the post-PROTECT Act period.

The post-*Booker* Government-sponsored below-range rate is similar to rates from fiscal year 2001, which were 24.4 percent, and fiscal year 2002, which were 23.9 percent. Non-Government-sponsored below-range sentences were imposed after *Booker* at a rate of 12.5 percent compared to 8.6 percent in the pre-PROTECT Act period, and 5.5 percent during the post-PROTECT Act period. In fiscal year 2001, this rate was 11.1 percent, and in fiscal year 2002, it was 10.3 percent.

The Commission concluded in its Booker Report, that although sentencing practices have changed since *Booker*, the severity of sentences has not changed. The average sentence length has slightly increased nationally after *Booker* to 58 months, from 56 months in the pre-PROTECT Act period, and 57 months in the post-PROTECT Act period. The Commission's Booker Report also identifies certain areas that may be of concern to some, including some regional disparities.

After collecting data, monitoring appellate court decisions and issuing its Booker Report, the Commission believes that it is time for serious consideration of a legislative response to *Booker*. As anticipated by the decision itself, at 543 U.S. page 265, quote, "Ours, of course, is not the last word. The ball now lies in Congress's court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges for the Federal system of justice." End of quote. That is a quote from the *Booker* decision itself.

The Commission strongly believes that any legislation considered should preserve the core principles of the bipartisan Sentencing Reform Act of 1984 in a constitutionally sound fashion. The Commission believes that at the very least, the legislative response to *Booker* should include the following four adjustments, all of which can be made within the Sentencing Reform Act. First, the legislative response should include codification of the three-step process for imposing a sentence as outlined in my written testimony. Second, the Commission believes that any legislative response to *Booker* should address the appellate review process and standard. Third, as the Commission has noted throughout this testimony, timely and uniform use of sentencing documentation is imperative to the Commission's ability to accurately ascertain and report about national sentencing practices. Any legislative response should include the continued importance of proper and uniform sentencing documentation being sent to the Commission. Fourth, the Commission believes that a legislative response should clarify that a sentence reduction for cooperation or substantial assistance is impermissible absent a motion from the Government.

The Commission stands ready—and I'm just about done, Chairman Coble—the Commission stands ready to work with Congress, the judiciary, the executive branch, and all other interested parties in refining the Federal sentencing system so that it preserves the core principles of the bipartisan Sentencing Reform Act in a constitutionally sound manner that will lessen the possibility of further litigation of the system itself. Such an approach would be the best for the Federal criminal justice system.

Thank you very much, and I would be glad to answer any questions, and thank you so much for not acting like a Federal Judge and making me stop at the end of the 5 minutes.

[The prepared statement of Judge Hinojosa follows:]

PREPARED STATEMENT OF THE HONORABLE RICARDO H. HINOJOSA

PREPARED STATEMENT
Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

March 16, 2006

Chairman Coble, Ranking Member Scott, and distinguished Members of the Subcommittee, thank you for the invitation to testify today on behalf of the United States Sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker*[1] on federal sentencing.

I appeared before this Committee just a few weeks after the *Booker* decision in February 2005, and stated that the *Booker* decision was the most significant case affecting the federal sentencing guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta*.[2] My testimony this morning will focus on the Commission's activities since the *Booker* decision, particularly our work that culminated in our recently released report on the impact of *Booker*. The Commission remains uniquely positioned to assist all three branches of government in ensuring the continued security of the public while providing fair and just sentences. To fulfill this role, the Commission undertook a detailed review of post-*Booker* sentencing to help inform the ongoing debate about the future of federal sentencing policy. While the full impact of the *Booker* decision still cannot be ascertained from only one year's worth of data, the decision does appear to have had some initial impact on national sentencing practices.

Before I report some of the highlights of our *Booker* Report, I would like to reiterate certain principles I outlined to the Subcommittee last February that the Commission firmly believes still hold true. After *Booker* the Federal Sentencing Guidelines remain an important and essential consideration in the imposition of federal sentences. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing" subject to review by the courts of appeal for "unreasonableness."[3]

Many courts have adopted, as the Commission teaches, a three-step approach to determining federal sentences under the framework set forth by *Booker*.[4] First, pursuant to 18 U.S.C. § 3553(a)(4), a sentencing court must determine and calculate the applicable guideline sentencing range, since sentencing courts cannot consider the sentencing guideline range as required by *Booker* if one has not been determined. Second, the court the court should consider any traditional departure factor that may be applicable under the sentencing guidelines, since 18 U.S.C. § 3553(a)(5), which contemplates consideration of policy statements issued by the Commission, including departure authority remains intact after *Booker*.[5] Third, after consideration of the applicable guideline sentencing range and

[1] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005).
[2] *Mistretta v. United States*, 488 U.S. 361 (1989).
[3] *United States v. Booker*, 543 U.S., 124 S. Ct. at 767.
[4] *See, e.g.*, *United States v. Haack*, 403 F.3d 997 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005); *United States v. Christenson*, 403 F.3d 1006 (8th Cir. 2005); *see also* Proposed Rules Change to Fed. R. Crim. P. 11 (Pleas)(proposing to amend Rule 11(M) to correspond to the three-step approach to sentencing).
[5] *See United States v. Hughes*, __ F.3d __ 2005 WL 147059 (4th Cir. Jan. 24, 2005) at *3.

guideline departure factors, the court should consider the other applicable sentencing factors set forth under 18 U.S.C. § 3553(a) and if the court determines that a guidelines sentence (including any applicable departures) does not meet the purposes of sentencing, it may impose a non-guidelines sentence pursuant to *Booker*.

Although the *Booker* decision makes clear that sentencing courts must consider the guidelines, it does not make clear how much weight sentencing courts should accord the guidelines. The Commission firmly believes that sentencing courts should give substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose, and that *Booker* should be read as requiring such weight. During the process of developing the initial set of guidelines and refining them throughout the ensuing years, the Commission has considered the very factors listed at section 3553(a) that were cited with approval in *Booker*. Congress in fact mandated that the Commission consider all the factors set forth in 3553(a)(2) when promulgating the guidelines,[6] and they are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a).[7]

In addition, Congress through its actions has indicated its belief that the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guideline and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and over 680 amendments, many of which where promulgated in response to congressional directives, have withstood congressional scrutiny. Such congressional approval can only be interpreted as a sign that Congress believes the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. In short, sentencing courts should give substantial weight to the Federal Sentencing Guidelines as they are the product of years of careful study[8] and represent the integration of multiple sentencing factors.[9]

I. Ongoing Commission Activities

Notably, the *Booker* decision left intact all of the Sentencing Commission's statutory obligations under the Sentencing Reform Act. The Court stated, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly,"[10] and the Commission has set an aggressive agenda in each of these areas.

In October 2005, the Commission promulgated two emergency amendments. The first addressed intellectual property offenses as directed by Congress in the Family Entertainment and Copyright Act of 2005. The second amendment increased penalties for obstruction of justice offenses involving domestic or international terrorism as directed by the Intelligence Reform Act of 2004. The Commission also made changes during the 2004-2005 amendment cycle to the antitrust and identity theft guidelines.

On January 27, 2006, the Commission published a notice for comment in the *Federal Register* covering fourteen substantive areas of criminal law including, immigration, steroids, intellectual property, and terrorism offenses. To better inform our decision making process, we held two regional hearings on immigration and conducted a public meeting addressing the issue of attorney-client waiver

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[6] *See* 28 U.S.C. § 994(a)(2).
[7] *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).
[8] *United States v. Claiborne*, __ F.3d __, 2006 WL 452899 (8th Cir., Feb. 27, 2006).
[9] *Jimenez-Beltre*, __ F.3d __, 2006 WL 562154.
[10] *Booker* 543 U.S. at 264.

in the Chapter Eight organizational guidelines. We expect to submit amendments covering several of these areas to Congress on May 1, 2006.

The Commission also has increased its training and outreach efforts since *Booker*. In calendar year 2005, commissioners and Commission staff held training programs in all twelve judicial circuits and 61 districts, which resulted in the training of over 9,700 judges, clerks, staff attorneys, probation officers, prosecutors, and defense attorneys.

The Commission also has focused on its statutory duties with regard to data collection, analysis, and reporting. Under the Sentencing Reform Act, the Commission is statutorily charged with being the clearinghouse of federal sentencing statistics,[11] including the systematic collection and dissemination of information about sentences actually imposed.[12] Immediately after the Supreme Court's decision in *Blakely*,[13] which brought uncertainty to the federal sentencing system, the Sentencing Commission sought to refine its data collection and analysis to provide the criminal justice community with "real time" data on sentencing trends. The Commission's data collection was designed for annual reporting, not "real-time" reporting, and moving to real-time data collection continues to require significant resources.

After *Booker*, the Commission categorized sentences into eleven categories[14] designed to capture the nuances taking place in sentencing that previously had not existed. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limits, and unclear or incomplete documentation submitted to the Commission makes it even more difficult to characterize individual cases as falling into these categories. The Commission relies on documentation statutorily required to be sent by the courts under 28 U.S.C. § 994(w)(1): the indictment, written plea (if any), presentence report, judgment and commitment order, and statement of reasons form as the basis of its data files.[15] If the documentation is not complete or is filed untimely, our data files cannot account accurately for what is taking place at sentencing.

The Statement of Reasons is the form adopted by the Judicial Conference of the United States to report the sentencing court's reasons for imposing a particular sentence as statutorily required under 18 U.S.C. § 3553(c).[16] Unfortunately, individual courts are not bound to use the particular adopted form, and over the years the Commission has received many variations. After *Booker* it became evident that the pre-*Booker* form – in all its variations -- was not sufficient to capture sentencing practices in an advisory guidelines system. The Commission worked with the Criminal Law Committee of the Judicial Conference to revise the Statement of Reasons form so that it could capture all the nuanced aspects of sentencing in a post-*Booker* world. That document is relatively new, and as to be expected, the Commission has had some difficulty capturing some of the nuanced sentencing taking place prior to adoption of the form. This difficulty will continue until the form is used uniformly. For example, of the

[11] 28 U.S.C. § 994(a)(12).
[12] 28 U.S.C. § 994(a)(14-16).
[13] *Blakely v. Washington*, 542 U.S. 296 (2004).
[14] For a complete description of the eleven categories developed by the Commission after *Booker*, *see* p. D-4 of the *Booker* Report, available at www.ussc.gov.
[15] *See* 28 U.S.C. § 994(w)(1) requiring the chief judge of each court to submit this documentation to the Commission within 30 days of sentencing.
[16] The PROTECT Act amended 18 U.S.C. § 3553(c) to require courts, "at the time of sentencing" to state the reasons for imposing an outside-the-range sentence "with specificity on the written order of judgment and commitment." 18 U.S.C. § 3553(c)(2) (2005).

more than 65,000 cases reviewed by the Commission for its *Booker* report, approximately 45,000 of those cases used Statement of Reasons forms issued in December 2003 or thereafter, including the Statement of Reasons form issued in June 2005 in response to *Booker*. Of the remaining 20,000 cases, a variety of forms are being used.

The Commission applauds the advisory committee for the Federal Rules of Criminal Procedure on its efforts to impose uniformity with respect to use of the statement of reasons form.[17] Congress also has taken steps to address this documentation issue through the PATRIOT Act,[18] and the Commission looks forward to working with the Judicial Conference to devise one form to be used uniformly by all courts. More uniform completion of sentencing documentation will ensure that the Commission can continue to inform Congress, the Judiciary, the Executive branch, and the federal criminal justice community about emerging sentencing trends and practices.

II. The Booker Report

The Commission's emphasis on real-time data collection and analysis has enabled it to complete a comprehensive report on the impact of *Booker* in relatively short order. In August 2005, the Commission announced its decision to issue a report to examine whether any initial *Booker* impact could be determined and, if so, to determine the magnitude of such impact. The Commission sought to answer questions in three areas:

(1) Guideline Compliance: Has *Booker* affected the rates of imposition of sentence within and outside the applicable guideline range and, if so, how has it affected sentence type and length, including the extent of departure or variance from the guideline range?

(2) Historical Trends: Has *Booker* affected federal sentencing compared to sentencing practices occurring prior to the decision?

(3) Reasons for Sentences Imposed: In what circumstances do judges find sentences outside the guideline system more appropriate than a guideline sentence? In other words, for what reasons do judges impose non-guidelines sentences and have those reasons changed after *Booker*?

The Commission also sought to examine the appellate courts' responses to *Booker*, particularly whether they were developing case law on what constitutes a "reasonable" sentence.[19]

In compiling this "*Booker* report," the Commission reviewed three relevant time periods to ascertain historical sentencing practices and compare them with post-*Booker* practices:[20] (1) the pre-PROTECT Act period, which covers cases sentenced from October 1, 2002 to April 30, 2003, the date

[17] *See* Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States).
[18] *See*, Sec. 735 of H. Rep. 109-174, Pt I (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission").
[19] *See Jimenez-Beltre*, __ F.3d__, 2006 WL 652154 (1st Cir., Mar. 9, 2006)(en banc)("We have heard this case *en banc* to provide stable guidance in this circuit for the determination and review of post-*Booker* sentences.").
[20] The Commission customarily reports data by fiscal year, which runs October 1 through September 30. The Commission concluded, however, that use of the fiscal year data for its *Booker* report would not lend itself to meaningful analysis.

of the PROTECT Act's enactment;[21] (2) the post-PROTECT Act period, which covers cases sentenced between May 1, 2003 and June 24, 2004, the date of the *Blakely* decision; and (3) the post-*Booker* period, which covers cases sentenced between January 12, 2005 and January 11, 2006.

The Commission looked at national sentencing practices as well as sentencing practices for the four major offense types that comprise over 70 percent of the federal caseload: theft/fraud, drug trafficking, firearms, and immigration offenses.[22] The Commission also reviewed certain specific classes of offenders and offenses to ascertain post-*Booker* and historical sentencing practices. Because of the limitations set out above about the uniformity of sentencing documentation, some caution should be exercised in drawing certain conclusions from the post-*Booker* data,[23] but some observations can be made.

A. Guideline Conformance

One measurement of *Booker*'s impact on federal sentencing is the rate of sentences imposed in conformance with the guidelines. As indicated in *Booker*, courts must still "consider the Guidelines' sentencing range established for . . . the applicable category of offense committed by the applicable category of defender."[24] This means that the courts must continue to determine and calculate the applicable guideline range, consult the guidelines, and take them into consideration at the time of sentencing, an approach approved by a number of appellate courts.[25]

The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines after *Booker*. The national average for within-range sentences after *Booker* is 62.2 percent. By comparison, in fiscal year 2001 the within-range rate was 64.0 percent and in fiscal year 2002, it was 65.0 percent. In the pre-PROTECT Act period it was 68.3 percent, and post-PROTECT Act, the rate was 71.7 percent.

National data show that when within-range sentences and government-sponsored,[26] below-range sentences are combined, sentencing in conformance with the guidelines is 85.9 percent. This "conformance rate" remained stable throughout the year that followed *Booker*.

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[21] The Commission chose this seven-month period as representative of pre-PROTECT Act sentencing practices because it was during Fiscal Year 2003 that the Commission refined its methodologies for distinguishing government-sponsored from other downward departures. In its 2003 Departures Report, the Commission estimated the rate of government-sponsored departures for fiscal years prior to 2003. As such, for purposes of the *Booker* report, the Commission chose to report what it felt was the most reliable data available for capturing "pre-PROTECT Act" sentencing practices. *See Booker* Report at 53 n.265 (explaining methodology for determining pre-PROTECT Act period). For purposes of this testimony, other fiscal year estimates will be reported based on information prepared for the 2003 Departures Report, available at www.ussc.gov.

[22] Immigration offenses are broken into two categories: "alien smuggling offenses" sentenced pursuant to USSG §2L1.1 and "unlawful entry offenses" sentenced pursuant to USSG §2L1.2.

[23] For a discussion of the cautions associated with the *Booker* Report's data, *see Booker* Report at v-vi.

[24] *Booker*, 543 U.S. at 259.

[25] *See, e.g.*, *United States v. Vaughn*, 430 F.3d 518 (2nd Cir. 2005); *United States v. White*, 405 F.3d 208, 218 (4th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Stone*, 432 F.3d 651 (6th Cir. 2005); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041 (7th Cir. 2005); *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005); *United States v. Cantrell*, 433 F.3d 1269 (9th Cir. 2006).

[26] Government-sponsored, below-range sentences include sentences outside the range that were made for reasons such as "pursuant to plea," "deportation," and "savings to the government." *See also* discussion on page 20 of the *Booker* Report for more circuit decisions approving this approach to sentencing.

The post-*Booker* national conformance rate is comparable to historical sentencing trends, although the degree of comparability depends on the historical period being used for comparison. For example, based on the Commission's estimates of the rates of government-sponsored downward departures prior to 2003 combined with the rates of within-range sentences, the national conformance rate in fiscal year 2001 was 88.4 percent and in fiscal year 2002, it was 88.9 percent. In the pre-PROTECT Act period, the within-range and government-sponsored, below-range conformance rate was 90.6 percent and during the post-PROTECT Act period, it was 93.7 percent.[27]

During this Post-*Booker* period, 55 percent of the 94 districts (52) have compliance rates above the national average of 62.2 percent. Government-sponsored, below-range sentences still account for the highest percentage of below range sentences post-*Booker*, and these types of sentences have increased slightly since *Booker* was decided to 23.7 percent. This compares to a rate of 22.3 percent pre-PROTECT Act and 22.0 percent post-PROTECT Act. By way of comparison, the Commission estimates that the rate of government-sponsored, below range sentences in fiscal year 2001 was 24.4 percent and 23.9 percent in fiscal year 2002. [28]

In 33 districts that have a within-range compliance rate lower than the post-*Booker* national average, the reason is directly attributable to a higher percentage of government-sponsored below range sentences.

Commission data also indicate that the pattern of sentencing within-the-range has not changed after *Booker*. Approximately 60 percent of within-range sentences still are imposed at the bottom of the applicable guideline range.

The Commission conducted similar analyses for the four major offense types. [29] In post-*Booker* theft/fraud cases, the conformance rate is 83.0 percent, compared to 93.0 percent pre-PROTECT Act, and 91.8 percent post-PROTECT Act.

For post-*Booker* drug trafficking offenses, the guidelines conformance rate is 86.5 percent compared to 92.5 percent pre-PROTECT Act, and 93.7 percent post-PROTECT Act. The conformance rate for Post-*Booker* firearms offenses is 82.5 percent compared to 88.8 percent pre-PROTECT Act, and 90.0 percent post-PROTECT Act.

Alien-smuggling offenses sentenced after *Booker* demonstrate a conformance rate of 88.5 percent. This rate compares to 86.4 percent pre-PROTECT Act and 90.9 percent post-PROTECT Act. The post-*Booker* compliance rate for unlawful entry offenses is 89.5 percent compared to 88.0 percent pre-PROTECT Act and 91.1 percent post-PROTECT Act.

B. Sentence Length and Type

[27] For an illustration of this conformance rate over time, see Figure 3 of the *Booker* Report at 56.
[28] This could be viewed as a continuation in the trend toward more government-sponsored below-range sentences. *See* 2003 Departures Report at 31, 67 (discussing trend in increased rates of below-range sentences granted pursuant to USSG §5K1.1 from 1991 through 2001) available at www.ussc.gov.
[29] For reference to the national conformance rates for the four major offense types across time reported in this testimony, *see* *Booker* Report at E-1.

During the time periods reviewed by the Commission, the severity of sentences did not change. The average sentence length after *Booker* has increased nationally, including in the four major offense types with the exception of unlawful re-entry offenses.

Nationally, sentences in the pre-PROTECT Act period averaged 56 months. During the PROTECT Act period, sentences averaged 57 months. Post-*Booker*, the national average sentence is 58 months. Theft/fraud sentences also have risen throughout these periods averaging 16, 20, and 23 months respectively. Average sentences for drug offenses have risen from 80 months, to 83 months, to 85 months post *Booker*. Average sentences for firearms offenses have held steady at 60, 61, and 60 months. Similarly, average sentences for alien smuggling offenses have held steady at 16, 17, and 17 months post-*Booker*. Only sentences for unlawful re-entry have fallen post-*Booker*. Sentences in these cases averaged 29 months pre-PROTECT Act, 29 months post-PROTECT Act, and 27 months post-*Booker*.

Related to sentence length is the rate of imposition of sentences of imprisonment. According to Commission data, this rate has not decreased since *Booker*. Courts continue to sentence defendants to a term of imprisonment at a rate consistent with trends during the previous time periods examined. Courts also continue to sentence at the bottom of the applicable guideline range in nearly 60 percent of all cases sentenced within the guideline range.

C. Non-Government-Sponsored Outside-the-Range Sentences

The Commission did detect an increase in non-government sponsored, below- range sentences following *Booker*. These are sentences that are below the applicable guideline range and the court has: 1) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission[30] ("departures"); 2) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission, and additionally mentions *Booker* or cites to 18 U.S.C. § 3553(a) ("departure + Booker")[31]; 3) cited only *Booker* or 18 U.S.C. § 3553(a) ("variance")[32]; or 4) not indicated a reason that falls into the previous three categories.[33]

Based on the Commission's best attempts to categorize sentences after *Booker*, the Commission has determined that nationally about 12.5 percent of cases have non-government sponsored, below-range sentences attributable either to guideline departures or *Booker*. By comparison, the non-government sponsored, below-range sentence rate estimated by the Commission for fiscal year 2001 was 11.1 percent and in fiscal year 2002, it was 10.3 percent. During the pre-PROTECT period the rate was 8.6 percent and during the post-PROTECT Act period the rate was 5.5 percent.

Despite this increase in below range sentences from previous time periods, the degree to which sentences are below the range is somewhat smaller than what it was previously. During the post-*Booker* period, the median reduction being granted – either through departures or under *Booker* – is 34.2 percent below the minimum of the range. In fact, since *Booker*, courts have granted sentences 9 percent or less below the minimum of the range more frequently than they did before the decision. By comparison,

[30] *See Booker* Report at D-4 n.2 for a complete description of this category.
[31] *See Id.* at D-4 n.3.
[32] *See Id.* at D-4 n.4.
[33] *See Id.* at D-4 n.5.

during the pre-PROTECT Act period the median reduction was 40.0 percent, and in the post-PROTECT Act period it was 35.1 percent.[34]

Moreover, the rate of imposition of above-range sentences after *Booker* has doubled to 1.6 percent. During fiscal year 2001, it was at 0.6 percent and in fiscal year 2002, it was 0.8 percent. It remained at 0.8 percent throughout the pre- and post-PROTECT Act period. A multivariate analysis undertaken for this report confirmed that the likelihood of receiving an above-range sentence is higher post-*Booker* than pre-*Booker*.

The Commission looked at non-government sponsored, below-range sentences for the four major offense types. For theft/fraud cases, the post-*Booker* non-government sponsored, below-range sentence imposition rate (combining guideline downward departures and sentences based on *Booker*) is 14.2 percent. This compares to a non-government sponsored, below-range sentence imposition rate of 6.2 percent pre-PROTECT Act, and 7.3 percent post-PROTECT Act.

A review of drug trafficking cases demonstrates a non-government sponsored, below-range sentence imposition rate of 12.8 percent after *Booker*. This compares to 7.3 percent pre-PROTECT Act and 6.1 percent post-PROTECT Act.

The non-government sponsored, below-range sentence imposition rate for post-*Booker* firearms cases is 15.2 percent compared to 10.2 percent pre-PROTECT Act and 8.9 percent post-PROTECT Act.

Alien smuggling cases sentenced post-*Booker* demonstrate a non-government sponsored, below-range sentence imposition rate of 9.1 percent compared to 13.1 percent pre-PROTECT Act and 8.5 percent post-PROTECT Act. Unlawful entry cases demonstrate a non-government sponsored, below-range sentence imposition rate 9.5 percent compared to 11.6 percent pre-PROTECT Act and 8.6 percent post-PROTECT Act.

The Commission undertook a review of the reasons courts were giving for the sentences they impose. The Commission's data indicate that even post-*Booker* courts rely predominantly on traditional guidelines departure reasons for imposing an outside-the-range sentence. For traditional guidelines downward departures, courts cite criminal history, general mitigating circumstances, family ties, and aberrant behavior most often to explain a below-range sentence.

For cases in which a court relies solely on *Booker* to sentence below the range, the sentence is most often accompanied by a general citation to the *Booker* decision or factors under 18 U.S.C. § 3553(a) but also may include a citation to traditional guidelines departure reasons. Making up a significant portion of the Commission's "otherwise below the range" category, however, are those cases in which insufficient information in the documentation made it impossible for the Commission to ascertain what happened at sentencing. The Commission believes that more uniform sentencing documentation will help ensure the Commission's ability to capture what is taking place in courts after *Booker*.

The Commission also undertook a series of multivariate analyses as part of its review of post-*Booker* sentencing. Multivariate analyses are included to assess whether any changes in national sentencing trends are significant after controlling for a number of relevant factors. This is one statistical

[34] *See Booker* Report at 66 (chart explaining median decreases across time for all guidelines and four major offense types).

method employed to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The Commission undertook this type of analysis to determine what factors may be statistically significant in post-*Booker* sentencing compared with other time periods.

D. Specific Offense and Offender Issues

The Commission undertook several analyses focused on specific sentencing issues and offender groups that are of perennial interest to the federal criminal justice community, or for which the issue of a *Booker* effect naturally arises. Specifically, the Commission examined sentencing practices regarding the use of cooperation without a
government motion as a reason for the imposition of a non-government-sponsored, below-range sentence, sex offenders, crack cocaine offenders, first offenders, career offenders, and the rate of imposition of below-range sentences based on early disposition programs or other "fast track" mechanisms.

1. Cooperation Reduction without a Government Motion

The Department of Justice, in particular, has voiced concern that courts would use *Booker* authority to grant sentence reductions for defendant's cooperation absent a government motion, as outlined in 18 U.S.C. § 3553(e).[35] The Commission reviewed its data to ascertain whether these cases were occurring. The Commission's analysis suggests that these cases do occur post-*Booker*, as they did before *Booker*. The Commission cautions, however, that this data should be considered with the caveat that in many cases, the statement of reasons form may indicate that the court sentenced below the range for cooperation but does not indicate whether or not the government made a motion for substantial assistance. As such, the Commission's data may overstate the frequency with which this type of sentence is occurring.

Commission data indicate that post-*Booker* there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with the government was the only reason cited. In the remaining 230 cases, it was one of a combination of reasons for the below-range sentence. By comparison, there were 17 total cases in the pre-PROTECT Act period and 29 total cases in the post-PROTECT Act period.

The Commission compared the extent of reductions below the applicable guideline range in cases where it could determine the government moved for a substantial assistance reduction and cases where there was no motion or the documentation was unclear. In cases with a government motion, the median percent decrease below the applicable range was 50 percent (or 28 months) below the minimum sentence. In cases where there was no motion, or the documentation was not clear, the median percent decrease was 35.1 percent (or 13 months).

2. Sex Offenses

[35] *See* Hearing on: "Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines, before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives (Feb. 10, 2005) (Written Statement of Assistant Attorney General Christopher A. Wray at 15), available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf.

A major impetus for enactment of the PROTECT Act was congressional concern that the rate of downward departures was too great to control and deter crime, particularly sex offenses against children. Since 2003, a number of legislative changes and guideline amendments have increased punishment for these offenses. In order to ascertain sentencing practices post-*Booker*, the Commission divided sex offenses into two categories: 1) criminal sexual abuse offenses, including rape, statutory rape, and inappropriate sexual contact,[36] and 2) sexual exploitation offenses, including crimes related to the production, trafficking, and possession of child pornography.[37]

The Commission notes that with respect to the analysis undertaken for this class of offenses, conclusions are cautionary. Sex offense cases make up a small portion of the national sentencing caseload, and such a small number of cases potentially distorts both the percentages and averages reported. For example, during the pre-PROTECT Act period, the total number of sex offense cases included in the two categories outlined above was 563 cases. During the post-PROTECT Act period the number was 1,206 cases. Post-*Booker* the number of cases was 1,330. Also, the recent changes in the law have resulted in substantial increases in sentences and the full impact of these changes may still be working through the system.

With these caveats, the Commission's data suggest that the average sentence length for cases sentenced pursuant to the criminal sexual abuse guidelines have remained fairly constant. Imposition of below-range sentences has declined continuously for overall criminal sexual abuse cases, including during the post-*Booker* period. The rates of imposition of below range sentences for abusive sexual contact cases and sexual abuse of a minor decreased in the post-PROTECT Act period, but increased during the post-*Booker* period. The majority of below-range sentences involving criminal sexual abuse are imposed on offenders with little or no criminal history. The rate of above-range sentences increased after *Booker* for criminal sexual abuse and abusive sexual contact offenses, but that rate declined for offenses involving sexual abuse of a minor.

Sexual exploitation offenses, like criminal sexual abuse offenses, comprise a small number of federal cases. These cases follow the national trend of increased sentence lengths. In each of the three major classes of offenses – production, trafficking, and possession, sentence lengths have increased. For production offenses, average sentences have increased from 146 to 209 months over the three time periods. Average sentences for trafficking increased from 65 to 92 months over the same time periods, and average sentences for possession increased from 25 to 42 months.

The Commission's data suggest that the rates of below-range sentences in sexual exploitation offenses have increased following *Booker*. For production offenses, the rate of below-range sentences went from 3.8 percent pre-PROTECT Act to 2.5 percent post-PROTECT Act to 11.3 percent post-*Booker*. Similarly, rate of below-range sentences for trafficking offenses increased from 13.7 percent pre-PROTECT Act to 16.9 percent post-PROTECT Act to 19.1 percent post-*Booker*. The rate of below-range sentences for possession offenses also have increased since *Booker*. In the pre-PROTECT Act period the rate was 25 percent. During the post-PROTECT Act period the rate decreased to 16.6 percent but has increased post-*Booker* to 26.3 percent. The rate of imposition of above-range sentences has

[36] The criminal sexual abuse category includes offenses sentenced under USSG §§2A3.1 (Rape), 2A3.2 (Statutory Rape), 2A3.4 (Abusive Sexual Contact).
[37] This category of cases includes offenses sentenced under the section G guidelines covering sexual exploitation of a minor, including USSG §§2G2.1 (Production), 2G2.2 (Trafficking), 2G2.4 (Possession).

increased post-*Booker* for possession offenses, but has decreased over time for cases involving production or trafficking in child pornography.

3. Crack Cocaine Offenses

Some have speculated whether courts would use their *Booker* authority to express disapproval of the penalty structure Congress created to address crack and powder cocaine offenses, and the federal sentencing guidelines implementation of that penalty structure. Commission data do not indicate that this is occurring frequently after *Booker*. It does not appear that courts are using *Booker* or other 18 U.S.C. § 3553(a) factors to vary from the penalty structure on a frequent basis. The Commission reviewed 610 crack cocaine cases in which there was a non-government sponsored below-range sentence. In only 35 of those cases did the court indicate specific discontent with the 100-to-1 penalty structure for crack and powder offenses. Commission data indicate that the overwhelming majority of courts are not explicitly citing the crack/powder cocaine disparity as a reason to impose below-range sentences.

Sentencing practices regarding crack offenses generally have followed the same patterns exhibited nationally and within the other major drug types: powder cocaine, heroin, marijuana, and methamphetamine. Following *Booker*, 84.6 percent of crack cases were sentenced in conformance with the guidelines, including government-sponsored below-range sentences. This is comparable to the national sentencing rate of 85.9 percent. Sentence length for crack offenses also has remained fairly stable across time with post-*Booker* sentences averaging 124 months compared to 124 months pre-PROTECT Act and 127 months post-PROTECT Act.

To date, no circuit court has concluded that a policy disagreement with the crack and powder cocaine sentencing ratio is a proper basis for imposing a non-guideline sentence. The First Circuit reviewed a case in which the district court employed a 20-to-1 crack/powder ration, instead of the congressionally mandated 100-to-1 ratio.[38] The First Circuit reversed the decision noting that a district court's general disagreement with broad-based policies enunciated by Congress or the Commission, cannot serve the basis for sentencing outside the applicable guidelines range. The Fourth Circuit also came to a similar conclusion stating that "[i]n arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity that totally is at odds with the will of Congress."[39]

4. First Offenders

First offenders are defined as those with no prior contact with the criminal justice system whatsoever. The Commission's analysis suggests that the rate of imposition of below-range sentences for first offenders increased after *Booker*. During the pre-PROTECT Act period, first offenders received non-government sponsored, below-range sentences in 9.8 percent of cases. During the post-PROTECT Act period that rate was 6.1 percent. After *Booker*, the rate of non-government sponsored, below-range sentences is 15.2 percent. But the rate of above-range sentences for first offenders also has increased after *Booker* from .7 percent pre-PROTECT Act to 1.2 percent post-*Booker*. Even though first-time offenders are more likely to receive sentences either above or below the guideline range post-*Booker*, the proportion of them receiving imposition of prison time has remained constant. Moreover, the

[38] *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006). The First Circuit has agreed to hear this case *en banc*.
[39] *United States v. Eura*, No. 05-4437, 2006 WL 440099 (4th Cir., Feb. 24, 2006).

average sentencing length for this class offenders has remained constant: 37 months pre-PROTECT Act period, 39 months post-PROTECT Act period, and 39 months post-*Booker*.

5. Career Offenders[40]

The rate of below-range sentences for career offenders increased after *Booker*, the majority of these sentences being given in drug-trafficking cases. During the pre-PROTECT Act period, the rate of imposition of non-government sponsored, below-range sentences was 10 percent. That rate decreased to 7.3 percent during the post-PROTECT Act period and has increased to 21.5 percent post-*Booker*. Sentence length for career offenders has decreased after *Booker*, which continues a trend that began before *Booker*. The average sentence for career offenders during the pre-PROTECT Act period was 196 months. That average decreased to 190 months during the post-PROTECT Act period and decreased again to 180 months post-*Booker*.

6. Early Disposition Programs

Early disposition or "fast track" programs have existed in some form for a number of years, primarily in the border districts to assist in the burgeoning caseload faced by U.S. Attorneys' offices and the courts. In 2003, as part of the PROTECT Act, Congress formalized these programs by requiring the Attorney General to authorize their existence. Congress also directed the Commission to promulgate a policy statement authorizing a sentence reduction up to four levels if the government filed a motion for such departure pursuant to an early disposition program.

Currently, the Department of Justice has authorized early disposition programs in 16 districts. Some commentators, including the Commission in its 2003 Departures Report, have speculated whether courts that do not have an authorized early disposition program would use their *Booker* authority to grant below-range sentences on par with those that would be given in an early disposition program district. The Commission's data do not reflect that these concerns generally have been realized. In districts without early disposition programs, the data do not reflect widespread use of *Booker* to grant below-range sentences in immigration cases similar to those available in approved early disposition program districts.

The Commission has not identified any reported cases in which circuit courts have upheld sentences below the guidelines range in non-Early Disposition Programs districts, because the district court cited the resulting disparity between districts that qualify for early disposition program departures and those that do not qualify. Two circuits have rejected the defendant's argument that the sentence was unreasonable because the district judge failed to consider the unwarranted disparities in sentencing created by the existence of early disposition programs in other jurisdictions. These circuits explained that the policymaking branches of government can determine that certain disparities are warranted and thus courts need not avoid the disparity created by these programs.

E. Regional and Demographic Differences in Sentencing Practices

The Commission also undertook a review of what impact *Booker* may be having on regional and demographic sentencing practices. Commission data indicate that the regional disparity that existed prior to *Booker* continues to exist. There are varying rates of sentencing in conformance with the

[40] The Commission used the guideline definition of career offender for this analysis. *See* USSG §4B1.1.

guidelines reported by the twelve circuits. Consistent with the national trend, however, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*, both because of an increase in government-sponsored below range sentences and non-government-sponsored, below-range sentences.

The Commission undertook a series of multivariate analyses to ascertain what factors are statistically significant in sentencing post-*Booker* as compared with sentencing in the pre-PROTECT and post-PROTECT Act periods. The conclusions from these analyses are cautionary because although they control for a number of factors associated with sentencing, there exist factors that cannot be measured. Unmeasured factors in the analyses conducted may include, for example, violent criminal history[41] or the bail decision.[42] If these "unmeasured factors" were able to be included in the models, significance of demographic factors might change.

A detailed multivariate analysis conducted on post-*Booker* data demonstrates that male offenders continue to be associated with higher sentences than female offenders. This association was evident every year from 1999 through the post-*Booker* period.

Another multivariate analysis suggests that following *Booker*, black offenders are associated with sentences that are 4.9 percent higher than white offenders. Although this factor did not exist in the post-PROTECT Act period, it did appear in fiscal years 1999, 2000, and 2001.[43]

Another multivariate analysis suggests that following *Booker*, "other" race offenders – primarily Native Americans – are associated with sentences 10.8 percent higher than white offenders. This association also was found in fiscal year 2002.[44]

F. Appellate Review

No discussion about the impact of *Booker* on federal sentencing would be complete without examining the post-*Booker* appellate court decisions interpreting and applying *Booker*. Like the data on sentencing practices, the appellate law surrounding *Booker* continues to evolve. It took the appellate courts several months to wade through the procedural issues associated with *Booker* so it has only been within the last few months that the courts have begun in earnest to develop a post-*Booker* body of case law that gives some guidance about what constitutes an "unreasonable" sentence.

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[41] The presence of violent criminal history may lead the court to sentence higher in the prescribed range. The Commission's datafile does not have information on the type of criminal history behavior. In 2002, the Commission created a datafile which took a 25 percent random sample of cases sentenced in Fiscal Year 2000. This datafile looked more closely at offender's criminal conduct, including detailed information on the type of criminal history the offender had. Using this data (the Intensive Study Sample 2000, or ISS2000), it was found that 24.4 percent of white offenders had violent criminal history events, as compared to 43.7 percent of black offenders, 18.9 percent of Hispanic offenders, and 23.7 percent of "other" offenders.

[42] Offenders who are not given the opportunity to post bail, or may not be able to afford bail, are detained for the entire period before their sentencing. Thus, if an offender's final sentencing range is 6-12 months, and the offender serves 10 months in prison before the final adjudication of the sentence, the court could sentence the offender to "time served," and the sentence would be 10 months. An offender who was out on bail during this process may get a 6-month sentence for the same behavior, which the court may have wanted to impose on the first offender if the bail circumstances were similar.

[43] *See* Figure 13 of the *Booker* Report at 109.

[44] *Id.*

As the Supreme Court specifically stated in *Booker*, district courts must continue to determine and calculate the applicable guidelines range. In doing so, the courts have concluded that determination and calculation of the applicable guideline range continues to include judicial factfinding by the court to resolve disputed issues. Circuits that have ruled on this also have concluded that the resolution of disputed sentencing issues may be done using a preponderance of the evidence burden of proof.[45] The appellate courts also have upheld the post-*Booker* use of hearsay evidence and acquitted conduct when fashioning a sentence in the advisory guidelines scheme.

Courts have concluded that once a guideline range is determined and calculated, it must be considered by the sentencing court. This consideration is part of the sentencing courts overall consideration of the sentencing factors that must be considered in imposing a sentence.[46] The record on appeal must include sufficient evidence to demonstrate affirmatively the court's consideration of these factors, including the applicable guideline sentence.

1. Reasonableness Review

In *Booker*, the Supreme Court instructed the appellate courts to "review sentencing decisions for unreasonableness."[47] The reasonableness standard of review is not particularly clear-cut, having been inferred by Justice Breyer from "statutory language, the structure of the [Sentencing Reform Act], and the 'sound administration of justice'."[48] The appellate courts, therefore, have been somewhat cautious in developing guidance on a reasonable sentence.

Six circuits – the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth – have held that a sentence within the applicable guideline range is presumptively reasonable. These circuits declined to find a within-range sentence to be *per se* or conclusively reasonable because, in the view of some, to do so would be "inconsistent with the Supreme Court's decision in *Booker*, as such a standard would effectively re-institute mandatory adherence to the Guidelines.'"[49] This does not mean that a sentence outside the applicable guideline range is presumptively unreasonable, nor does it mean that a guidelines sentence is reasonable in the absence of evidence that a district court followed its statutory mandate to impose a sentence after having considered the applicable sentencing factors under 18 U.S.C. § 3553(a)(2). So far, only one appellate court – the Eighth Circuit -- has found a within-guideline range sentence to be unreasonable.

With respect to guideline departures, the circuit courts agree that after *Booker* they still lack jurisdiction to review a court's denial of a motion for downward departure, if it is clear that the court properly understood the authority to depart and chose not to exercise it.

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[45] *See Booker* Report at 22 *citing United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Ledesma*, No. 05-1563, 2005 WL 3477715 (3d Cir. Dec. 20, 2005) (unpub.); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006); *United States v. Tynes*, No. 05-13035, 2005 WL 3536189 (11th Cir. Dec. 28, 2005) (unpub).

[46] *See* 18 U.S.C. § 3553(a) listing the seven factors to be considered when imposing sentence.

[47] *Booker*, 543 U.S. at 264.

[48] *Booker*, 543 U.S. at 260-61, *citing Pierce v. Underwood*, 487 U.S. 552, 559-60.

[49] *See Booker* Report at 26 (citing *United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005) citing *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). *See also United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005); *Mykytiuk*, 415 F.3d at 607;*Talley*, 431 F.3d at 786)).

2. Jurisdiction

Separate and apart from the reasonableness analysis, circuit courts also are examining issues of jurisdiction. Congress provided for limited appellate review of sentences under the Sentencing Reform Act. Prior to *Booker*, neither the government nor the defendant had the right to appeal a sentence properly calculated within the applicable guideline range.[50] *Booker* did not excise this jurisdictional limit on appellate review and some have posited that the appellate courts do not have jurisdiction to hear a post-*Booker* appeal of a within-range guideline sentence. To date, that conclusion has not found support in reported appellate cases. Three circuits – the First, Eighth and Eleventh – have specifically rejected this argument.

As a final note on appellate review, the circuit courts have reasoned that *Booker* does not apply to mandatory minimum sentences, which are driven by statutes, not by the sentencing guidelines. Similarly, the post-*Booker* appellate courts have agreed that the fact of a prior conviction is not a fact that a jury must find beyond a reasonable doubt. Courts, therefore, that have considered the Armed Career Criminal Act have agreed that *Booker* does not have an impact, although they do differ on the extent of the exception.

III. Conclusion

The *Booker* decision has had an impact on federal sentencing. The magnitude of the impact depends on to which historical period one compares post-*Booker* sentencing practices. The Commission's review of historical sentencing practices does not indicate whether the post-PROTECT Act trend toward increased conformance with the guidelines system would have continued without *Booker*. Nor does it indicate that, absent the PROTECT Act, the rate of conformance with the guidelines would have decreased.

The Commission commends the Congress and the Department of Justice for the period of time they have allowed post-*Booker* sentencing to occur before considering what, if any, legislative action should be taken in response to the decision.

After a year of collecting data, monitoring appellate court decisions, and having issued its *Booker* report, the Commission believes that it is time for serious consideration of a legislative response to *Booker*. As anticipated by the decision itself:

> Ours of course is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution that Congress judges best for the federal system of justice.[51]

The Commission strongly believes that any legislation considered should preserve the core principles of the bipartisan Sentencing Reform Act of 1984 in a constitutionally sound fashion. The Commission believes that, at the very least, a legislative response to *Booker* should include the following four adjustments, all of which can be made within the Sentencing Reform Act.

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[50] See 18 U.S.C. § 3742(a).
[51] *Booker*, 543 U.S. at 265.

First, a legislative response should include codification of the three-step process for imposing a sentence. As outlined above, this approach ensures that the federal sentencing guidelines are afforded the appropriate consideration, determination and ultimately, the proper weight to which they are due under *Booker*. The sentencing guidelines embody all of the applicable sentencing factors for a given offense and offender. The Commission believes that the three-step approach to sentencing is consistent with the *Booker* remedy.

Second, the Commission believes that any legislative response to *Booker* should address the appellate review process and standard.

Third, as the Commission has noted throughout this testimony, timely and uniform use of sentencing documentation is imperative to the Commission's ability to accurately ascertain and report about national sentencing practices. Any legislative response should include the continued importance of proper and uniform sentencing documentation being sent to the Commission.

Fourth, the Commission believes that a legislative response should clarify that a sentence reduction for cooperation or substantial assistance is impermissible absent a motion from the government.

The Commission is considering holding its own *Booker* hearings.

The Commission stands ready to work with Congress, the Judiciary, the Executive branch, and all other interested parties in refining the federal sentencing system so that it preserves the core principles of the bipartisan Sentencing Reform Act in a constitutionally sound manner that would lessen the possibility of further litigation of the system itself. Such an approach would be the best for the federal criminal justice system.

Mr. Chairman, Ranking Member Scott, and Members of the Committee, thank you for holding this very important hearing. I will be glad to answer any questions you may have.

Mr. COBLE. Well, Your Honor, thank you for at least acknowledging the illumination of the red light. [Laughter.]

Judge HINOJOSA. Thank you, sir.

Mr. COBLE. Mr. Mercer.

TESTIMONY OF THE HONORABLE WILLIAM MERCER, PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL AND U.S. ATTORNEY FOR THE DISTRICT OF MONTANA, U.S. DEPARTMENT OF JUSTICE

Mr. MERCER. Chairman Coble, Congressman Scott, Members of the Subcommittee, thank you for the opportunity to appear before you today and for inviting the Department of Justice to testify about this important issue.

The Attorney General regards today's hearing as an important step, but certainly not the last step in the serious, frank, and ongoing dialogue of the Supreme Court's decision *United States v. Booker* has generated.

Since the *Booker* decision, Department of Justice representatives have been in discussion with interested parties. We hope and expect that this fruitful exchange will continue after today's hearing.

In the early 1980's, with crime rates at near record highs, Members of Congress from both political parties, working together, reformed Federal sentencing policy to replace a broken and weak system of indeterminate sentencing with a strong and honest determinate sentencing system that would more effectively fight crime and address inequities in sentences. The Sentencing Reform Act of 1984 brought about comprehensive reform. It created the United States Sentencing Commission, and in turn, the Federal Sentencing Guidelines. The fundamental principles underlying the act and the guidelines were: consistency, fairness and accountability in sentencing. Defendants who commit similar crimes and have similar criminal records are to receive similar sentences.

Today, serious crime is the lowest it's been in more than a generation. We believe that increased sentencing levels and more consistent sentencing practices have been responsible for much of this achievement. Yet, beginning with the Supreme Court's decision in *Blakely v. Washington*, the principles and practice of determinate sentences have been in jeopardy, putting at risk the progress we have made.

These developments culminated last year when the Supreme Court, in *Booker*, held that the Federal Sentencing Guidelines violated the sixth amendment right to a jury trial. As a remedy, the Court severed two provisions of the act, thereby rendering the guidelines advisory only, and weakening the standard review for Government appeals of sentences below the applicable guidelines range.

Given the great complexity of this issue, the Attorney General wanted to make sure that the department did not act precipitously. In the 14 months since the *Booker* decision, we have viewed Federal sentencing decisions with measured concern. At the same time, we have been careful not to draw premature conclusions. However, it is becoming increasingly clear that both anecdotal and statistical evidence demonstrate very troubling trends, a marked decrease in

within-guideline sentences, and increased inter- and intra-district disparity in sentences.

Some have suggested that there has been little change in Federal sentencing practices because the average length of Federal sentences has remained nearly constant at 56 to 58 months. While this is correct, we do not believe that this is the beginning and the end of the analysis. The department remains very concerned about the decline in compliance with the Federal Sentencing Guidelines because it is evidence of increasing disparity in Federal sentences. After passage of the PROTECT Act in 2003, there was an increase in the percentage of sentences imposed within the ranges set forth by the Federal Sentencing Guidelines from 65 percent in fiscal year 2002 to 72.2 percent in fiscal year 2004. However, in the year since *Booker* was decided, we have seen a 10 percent decline in the number of sentences within the guideline range.

This is a significant increase in downward departures. Indeed, nearly 8,200 defendants benefited from downward departures not endorsed by the Government in the period since *Booker* was decided. Moreover, we believe that the rise in sentences below the range is contrary to what Congress intended when it passed the PROTECT Act in 2003. The size in the individual departures is also troubling. The Sentencing Commission's report on post-*Booker* sentences indicates that a third of the defendants, approximately 2,700, who have received a downward departure not endorsed by the Government had their sentences reduced by 40 percent or more below the low end of the applicable guideline range.

Statistics also point to significant disparities between the circuits and within the circuits as the courts exercise their new authority. In the Fifth Circuit only 8.6 percent of defendants received departures not endorsed by the Government, whereas, in the Second Circuit, 23.1 percent of the defendants received departures not endorsed by the Government. The risks to fair and consistent treatment are not simply geographic. The Sentencing Commission's data just released similarly shows that Black defendants are now receiving longer sentences than their White counterparts, a result not observed after passage of the PROTECT Act. That same data also shows that despite Congress's repeatedly expressed concerns about sexually related offenses, *Booker* has resulted in judges increasingly sentencing defendants to below guideline sentences for these crimes.

While the data in the aggregate can be very instructive, it is also useful to look at particular outcomes and particular cases. My written statement identifies a number of cases, and there are many others worthy of analysis. The cases demonstrate two things. First, the new discretion given to district judges under *Booker* is undermining our ability to achieve the firmness and consistency necessary to accomplish Congress's purpose in establishing sentencing policies. Second, allowing appellate courts to review below guideline sentences under a reasonable standard cannot ensure achievement of the statutory purposes of punishment.

There are hundreds and hundreds of examples of sentences below the guidelines. As noted in our case examples, these decisions not only undermine the goal of minimizing unwarranted disparities in sentencing, but also impair key goals of the Sentencing

Reform Act: deterrence, promoting respect for the law, and incapacitation.

We know how hard Federal judges work to faithfully execute their duties every day. It is inevitable, however, that given broad discretion, well-intentioned judges will come to inconsistent and competing conclusions about what factors matter most heavily in sentencing. Ultimately, a system that produces such results is neither desirable, nor capable of sustaining long-term public confidence.

We believe there is a clear danger to the gains we have made in reducing crime, and achieving fair and consistent sentencing will be significantly compromised if mandatory sentencing laws are not reinstituted in the Federal criminal justice system. We believe reinstituting mandatory sentencing guidelines can be done best by creating a minimum guidelines sentencing system. Under such a system, the Sentencing Guidelines minimum would have the force of law, while the guidelines' maximum sentence would remain advisory. This would comport with the constitutional requirements of *Booker* because defendants, upon conviction, would always be subject to the maximum statutory penalty set by Congress, rather than being subject only to the maximum set in the guidelines. The Sentencing Guidelines would work in the same manner they have since their inception, with judges identifying aggravating and mitigating factors in individual cases with carefully measured judicial discretion, and with results that are certain, consistent and just.

Interestingly, experts of all political and ideological stripes predicted before *Booker* was decided that a purely advisory system would undoubtedly lead to greater disparity, and further, that over time this disparity is likely to increase. We believe that we are beginning to see the results of that problem.

Thank you again for the opportunity to testify. I look forward to your questions.

[The prepared statement of Mr. Mercer follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM W. MERCER

Department of Justice

STATEMENT

OF

WILLIAM W. MERCER
UNITED STATES ATTORNEY
FOR THE DISTRICT OF MONTANA
AND
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"FEDERAL SENTENCING AFTER *UNITED STATES v. BOOKER*"

PRESENTED ON

MARCH 16, 2006

I.

INTRODUCTION

Chairman Coble, Congressman Scott, members of the Subcommittee, thank you for the opportunity to appear before you today, and for inviting the Department of Justice to testify about this important issue. The Attorney General regards today's hearing as an important step – but certainly not the last step – in the serious, frank and ongoing dialogue that the Supreme Court's decision in *United States v. Booker*[1] has generated. Since the *Booker* decision, Department of Justice representatives have been in discussion with Members of Congress, the bench, the defense bar, and other interested groups, such as victims' rights advocates. We hope and expect that this fruitful exchange will continue after today's hearing.

In the early 1980s, with crime rates at near record highs, Congressmen and Senators from both political parties, working together, reformed federal sentencing policy. Members spoke passionately about the need to replace a broken and weak system of indeterminate sentencing with a strong and honest determinate sentencing system that would more effectively fight crime and address the gnawing problem of inequities in sentencing. The Sentencing Reform Act of 1984 was enacted

[1] 542 U.S. 296 (2004).

overwhelmingly and was signed into law by President Reagan. The Act brought about comprehensive reform; it created the U.S. Sentencing Commission and, in turn, the federal sentencing guidelines. The fundamental principles underlying the Act, and the mandatory sentencing guidelines it forged, were consistency, fairness, and accountability in sentencing: defendants who commit similar crimes and have similar criminal records receive similar sentences.

For more than 15 years, the guidelines mandated tough sentences, minimized unwarranted disparity and the impact on crime was spectacular. As a result of the Sentencing Reform Act[2] and the Protect Act,[3] along with steps taken by state legislatures to reform sentencing practices, and together with improvements to policing and other important criminal justice reforms, crime has been reduced steadily and, over time, dramatically. Today, serious crime is the lowest it has been in more than a generation. We believe that increased sentencing levels and more consistent sentencing practices have been responsible for much of this achievement. Yet, beginning with the Supreme Court's decision in *Blakely v. Washington*,[4] the

[2] Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[3] Pub. L. No. 108-21, 117 Stat 650, codified at 28 U.S.C. § 994(w) and 18 U.S.C. § 3553(c).

[4] 542 U.S. 296 (2004).

principles and practice of determinate sentences have been in jeopardy, putting at risk the progress we have made.

These developments culminated on January 12, 2005, when the U.S. Supreme Court, in *United States v. Booker*, by the narrowest of majorities, held that the federal sentencing guidelines violated the Sixth Amendment right to a jury trial. As a remedy, the Court severed two provisions of the Act, thereby rendering the guidelines advisory only, and weakening the standard of review for Government appeals of sentences below the applicable guidelines range. In the fourteen months since *Booker*, a clear picture has emerged as to *Booker*'s impact. While the federal sentencing guidelines are still calculated by district courts post-*Booker*, and remain a legally relevant factor in determining federal sentences, there has been an undeniable erosion in the rate of compliance with the guidelines and an appreciable and troubling increase in sentencing disparities across the nation. In short, both consistency and accountability are eroding.

Given the great complexity of this issue, the Attorney General wanted to make sure that the Department did not act precipitously. In the fourteen months since the *Booker* decision, we have viewed federal sentencing decisions with measured concern. Because of our belief that tough and consistent sentences have enhanced the safety of Americans and the fairness of our judicial process, federal prosecutors were instructed to take all available steps to promote continued

adherence to the sentencing guidelines. At the same time, we have been careful not to draw premature conclusions. However, it is becoming increasingly clear that, despite the Department's efforts, both anecdotal and statistical evidence demonstrate two very troubling trends: the first is a marked decrease in within-guidelines sentences, and the second is increased inter-circuit and inter-district sentencing disparity.

Some have suggested that there has been little change in federal sentencing practices because the average length of federal sentences has remained nearly constant at 56 to 58 months. While this is correct, the Department remains very concerned about the decline in compliance with the federal sentencing guidelines because it is evidence of increasing disparity in federal sentences. After passage of the PROTECT Act in 2003, there was an increase in the percentage of sentences imposed within the ranges set forth by the Federal Sentencing Guidelines, from 65% in FY 2002 to 72.2% in FY 2004. However, in the year since *Booker* was decided, we have seen a 10% decline in the number of sentences within the federal sentencing guidelines.

In addition, as shown in the U.S. Sentencing Commission's most recent statistics, "other downward departures" and sentences "otherwise below the range" jumped from 5.2% in FY 2004 (pre-*Blakely*) to 12.5% in FY 2005-2006 (post-

Booker). This is a significant increase, especially since it occurred over a relatively short period of time. Moreover, we believe that the rise in sentences below the range is contrary to what Congress intended when it passed the PROTECT Act in 2003.

The statistics also point to significant disparities between the Circuits, and within the Circuits, as the courts exercise their new authority. As just one example, judges in the District of Massachusetts, in the First Circuit, have relied on *Booker* to sentence 25.7% of defendants to sentences below the guidelines range. In the neighboring Northern District of New York, in the Second Circuit, only 8.9% of defendants have received such generous treatment. Differing jurisprudence among the Circuits will only serve to exacerbate disparities among similarly situated defendants. The risks to fair and consistent treatment are not simply geographic – the Sentencing Commission's data just released similarly shows that black and Native American defendants are now receiving longer sentences than their white counterparts. That same data also shows that, despite Congress' repeatedly expressed concerns about sexually-related offenses, *Booker* has resulted in judges increasingly sentencing defendants to below-guidelines sentences for these serious crimes.

Two examples illustrate the point. According to the Commission's data, in 9.2% of all cases involving criminal sexual abuse of a minor, judges rely on their

new discretion to sentence below what the guidelines advise. Similarly, judges are using *Booker* authority to give below-guidelines sentences in 20.9% of cases involving possession of child pornography. This state of affairs is of serious concern to us and is, we believe, contrary to the purposes of the Sentencing Reform Act and the PROTECT Act.

We welcome this hearing and are grateful to you, Mr. Chairman, for examining this important public safety issue and for shining light onto the impact of *Booker* on federal sentencing practice. We believe there is a clear danger that the gains we, as a country, have made in reducing crime and achieving fair and consistent sentencing will be significantly compromised if mandatory sentencing laws are not reinstituted in the federal criminal justice system. A majority of the Supreme Court contemplated that advisory guidelines would not be a permanent solution and anticipated that Congress would consider legislation in the wake of *Booker*. Indeed, Justice Breyer stated in his majority opinion that the "the ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[5]

[5] *Booker*, 543 U.S. at 265.

We urge this Subcommittee, the full Committee, and the Congress as a whole, to fully examine current sentencing practice as well as the short- and likely long-term impact of *Booker* and then to act to reinstitute mandatory sentencing in the federal criminal justice system. We believe reinstituting mandatory sentencing can be done best by creating a minimum guidelines system. Under such a system, the sentencing guidelines' minimum would return to being mandatory and again have the force of law, while the guidelines' maximum sentence would remain advisory. This would comport with the constitutional requirements of *Booker*, because defendants, upon conviction, would always be subject to the maximum statutory penalty set by Congress, rather than being subject only to the maximum set in the guidelines. Moreover, such a system would embody the time-tested values of the Sentencing Reform Act. The sentencing guidelines would work in the same manner they have since their inception; with judges identifying aggravating and mitigating factors in individual cases, with carefully circumscribed judicial discretion, and with results that are certain, consistent and just.

In the remainder of my testimony, I will first discuss briefly the advent of sentencing reform and the benefits that it swept in for our country. Next, I will lay out the federal sentencing experience since *Booker*, based on Sentencing Commission data, as well as specific case examples. We believe that, from this information, the Subcommittee can clearly see that the short- and long-term

implications of *Booker* are serious and that the need for legislative action is acute. And finally, I will discuss in greater detail our proposal for a minimum guidelines system. The Department of Justice is committed to working with Congress, the Judiciary, and other interested parties, to ensure that a new sentencing regime is put in place; that it is just and lasting, and that it carries out the fundamental purposes of sentencing for the American people.

II.

THE SENTENCING REFORM ACT OF 1984

Prior to the passage of the Sentencing Reform Act, the federal Government – and every state in the Union – embraced a sentencing policy focused largely on rehabilitating convicted offenders. The main components of the policy were unfettered judicial discretion and early release on parole, and the main products of the policy were uncertainty in sentencing, limited use of incarceration, and unjustifiable sentencing disparities. This weak sentencing policy contributed both to the high crime rates in the 1960s, 1970s, and 1980s and to unacceptable levels of unwarranted sentencing disparity. Senators Hatch, Kennedy and Feinstein have characterized the disparity and inconsistency that existed before the Sentencing

Reform Act as "shameful."[6] And in recent Senate hearings, Senator Patrick Leahy referred to the time before the Sentencing Reform Act as "the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect [a defendant's] sentence."[7]

In the years leading up to the passage of the Act, various studies documented widespread and unwarranted sentencing disparity. Moreover, Congress, the Department of Justice, and independent analysts recognized and documented that such weakness, inconsistency, and uncertainty in sentencing practices had far-reaching public safety consequences. Simply put, these characteristics of sentencing were incompatible both with effective crime control and with a fair system of justice. As a result, policymakers sought change.

After many years of reviewing various options for reform, Congress, together with the Executive Branch and many members of the Judiciary, came to a consensus that these problems could be addressed by a determinate sentencing system using mandatory sentencing guidelines created by an expert sentencing commission.

[6] Appellate Brief filed in *United States v. Booker* for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as Amici Curiae in Support of Petitioner, 2004 WL 1950640 **4, 6 (Sep. 01, 2004).

[7] *Blakely v. Washington and the Future of Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary,* 108th Cong. 8573 (2004), available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit id=2629.

Leaders of both parties drafted and then passed the landmark Sentencing Reform Act. Its guiding principle was consistency in sentencing, so that defendants who committed similar crimes and had similar criminal records would receive similar sentences. Another underlying principle was transparency, so that the parties, crime victims, and the public would know the factual and legal basis for a sentence. Together with appellate review of sentences, this provided real accountability in sentencing for the first time in American history.

Under the mandate of the Act, the Sentencing Commission was created and directed to establish a system of guidelines, structured to provide proportionality, with the force of law to provide predictability, and with appellate review to provide consistency. At the same time, the guidelines were to require each sentence to be appropriately individualized to fit the offender and the offense, and to require the court to state the reasons for the imposition of each sentence. Congress also directed the Commission to create the guidelines so that longer sentences would be mandated for especially dangerous or recidivist criminals. Finally, Congress made the Commission a permanent body, so that the guidelines could be amended as experience and circumstances dictated.

Over the last 15 years, the guidelines have been amended and refined on numerous occasions, as a result of input from Congress, judges, the Department of

Justice, defense attorneys, and others. They are a product of commissioners of both political parties, embody a careful balance of public interests and goals, and have been blessed through oversight of Congresses controlled by Republicans and Democrats.

As U.S. District Judge Paul Cassell of the District of Utah noted in a post-*Booker* opinion:

> "It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate the Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes."[8]

Specifically, the Sentencing Commission has incorporated in the Guidelines Manual those factors relevant to calibrating the appropriate punishment, given the particulars of the defendant's conduct and his criminal history. By creating a system to account for factors distinguishing the conduct of one defendant from another based upon considerations like the financial loss intended by the defendant, the number of victims, the use of violence, the seriousness of the physical injuries incurred by the victim, the criminal history of the defendant, and the drug quantity

[8] *United States v. Wilson*, 350 F. Supp. 2d 910, 915 (D. Utah 2005).

attributable to the defendant, the Commission created a scheme to achieve the statutory purposes of punishment stated in 18 U.S.C. § 3553(a).

Unsurprisingly, because the guidelines reflect the cumulative wisdom and policy judgment of two decades of policymakers, they have also contributed to a historic reduction in crime and significantly reduced unwarranted sentencing disparities -- the very objectives Congress sought to achieve in adopting the Sentencing Reform Act.

III.

THE IMPACT OF SENTENCING REFORM AND THE SENTENCING GUIDELINES

The guidelines' success in achieving Congress' goal of producing tough, consistent, and fair sentences, and reducing crime has been repeatedly documented. As to consistency, the Sentencing Commission's Fifteen Year Report, completed about a year ago, found that "[r]igorous statistical study both inside and outside the Commission confirm that the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences

among judges."[9] According to the 15 Year Report and the studies it cites, the guidelines have reduced unwarranted judicial disparity by at least one third.[10]

As to the rate of crime, there is little doubt that sentencing reform during the guidelines era has had a significant impact on the steep decline in crime in the United States. Crime rates are currently at a 30-year low, and studies confirm that changes in sentencing policy, both at the state and federal levels, are significantly responsible.[11] Over the last 20 years and following Congress' lead, many states have adopted guidelines systems and other related sentencing reforms. Congress also instituted mandatory minimum sentences, such as those contained in the Anti-Drug Abuse Act of 1986, to incarcerate drug dealers and reduce the violence associated with the drug trade; and once again, many states followed suit. Further, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act which provided significant financial incentives to states to pass truth in sentencing

[9] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing*, p. 140 (2004).

[10] *See id.* at 97-98.

[11] *See, e.g.*, Joanna Shepherd, *Police, Prosecutors, Criminals and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002); Peter W. Greenwood, *et al.*, *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law*, *in* Three Strikes and You're Out: Vengeance as Public Policy 543 (David Schichor & Dale K. Sechrest eds., 1996).

laws - requiring violent offenders to serve at least 85% of their sentences – and that led to prison expansion nationwide.

The new sentencing systems adopted by Congress and many of the states recognized the need to place public safety first. These systems sought to further that end through adequate deterrence, incapacitation of violent offenders, and just punishment. The result of these changes – as well as changes to policing levels and various other criminal justice reforms – has been a 26% drop in the overall violent crime rate during the last decade.

A few critics incorrectly claim that our sentencing system has been a failure and that our prisons are filled with non-violent first-time offenders. But the facts show otherwise. For example, approximately 66% of all federal prisoners are in prison for violent crimes or had a prior criminal record before being incarcerated.[12] Seventy nine percent of federal inmates classified as non-violent offenders had a prior arrest. The rap sheets of federal prisoners incarcerated for non-violent offenses indicate an average of 6.4 prior arrests with an average of at least two prior convictions.[13] Given the active criminal careers and the propensity for recidivism of most prisoners, we strongly believe that incapacitation works.

[12] Bureau of Justice Statistics, *Correctional Populations of the United States* (Nov. 1997).

[13] Bureau of Prisons, Office of Research and Evaluation (Nov. 2004).

As noted by Judge Cassell and others, "an expanding body of literature suggests that incarceration of dangerous persons in recent years has demonstrably reduced crime, through both incapacitation and deterrence."[14] These incapacitative and deterrent effects arise from a sentencing guidelines system which is tough, fair, and predictable. We believe that the evidence is clear: the Sentencing Reform Act and the 15 years of mandatory federal sentencing guidelines have been very successful. Unfortunately, the *Blakely* and *Booker* decisions have put this success at risk.

IV.

THE *BLAKELY* AND *BOOKER* DECISIONS AND THEIR AFTERMATH

About 21 months ago, at the end of its 2004 term, the Supreme Court in *Blakely v. Washington* held that the procedures of the Washington state sentencing guidelines were unconstitutional, and thereby cast doubt on the sentencing practices used in other states and in federal sentencing. That decision, and the subsequent decision in *Booker*, caused an upheaval in the federal criminal justice system and disruptions in state criminal justice systems across the country. The Court in *Booker* found the method by which the federal sentencing guidelines were applied

[14] *Wilson*, 350 F. Supp. 2d at 919.

for over 15 years violated the Sixth Amendment of the Constitution. As a remedy, the Court decreed the guidelines advisory only.

Since these two landmark decisions, lower federal courts have struggled to make sense of the decisions and the sentencing system left in their wake. Over these 20-some months, there has been an extraordinary number of published district and appellate court sentencing cases. At the same time, there has been an explosive burst of academic writings and symposia on sentencing. And the Sentencing Commission has been releasing nearly real-time data on federal sentencing practice for well over a year. From all of this, a fairly clear picture has emerged about how the post-*Booker* federal sentencing system is working.

First, the federal sentencing guidelines survived *Booker*. The guidelines do still exist, and they remain a legally relevant factor in determining federal sentences, because Rule 32 of the Federal Rules of Criminal Procedure requires that they be calculated. The *Booker* decision itself, and most of the Circuit Courts that have spoken on the issue, have said sentencing courts still ought to calculate the guidelines before imposing sentence. However, the precise role the guidelines play, the continuing validity of many of the finer points of the guidelines – such as the concept of departures – and the contours of appellate review of district court sentencing decisions all remain quite murky, as appellate courts issue widely

varying opinions on these subjects. As one Circuit Judge noted, "[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow."[15]

Second, it is undeniable that compliance with the guidelines – the percentage of cases sentenced within the guidelines range as calculated by the sentencing judge him or herself – has fallen significantly. In the nine months of fiscal year 2004 before the *Blakely* decision, 72.2% of all convicted federal criminal defendants were sentenced within the applicable guidelines range. Since *Booker*, only 62.2% of cases have been sentenced within the guidelines range. Every circuit and nearly every district court has seen a decline in guidelines compliance. In some circuits and districts, the rate of guidelines compliance is now astonishingly low. For example, in the Second Circuit, the guidelines compliance rate is at 50%. In the Eastern District of New York, guideline compliance has fallen to about 37%; in the Eastern District of Pennsylvania, it has fallen to 41%, and in the Southern District of Iowa it is 48%. Moreover, regional and other disparities in guideline compliance and sentencing have only worsened since *Booker*.

We know how hard federal judges work to faithfully execute their duties every day. It is inevitable, however, that given broad discretion, well-intentioned

[15] *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006).

judges will come to inconsistent and competing conclusions about what factors matter most heavily in sentencing. Ultimately, a system that produces such results is neither desirable nor capable of sustaining long-term public confidence.

Third, while judges are not solely responsible for the rate of guidelines compliance – as the compliance rate is also dependant on the use of substantial assistance departures and early disposition programs – the decrease in guidelines compliance after *Booker* is due almost entirely to judicial decisions. As Professor Frank Bowman recently pointed out, "[j]udges are using their new authority to reduce sentences below the range in almost 10% of all cases, and it is their exercise of this authority that is driving the decline in overall compliance rate."[16] This failure to comply with the guidelines has already meant reduced sentences in cases throughout the country, and if not addressed, will mean a steady erosion in the deterrent value of federal sentencing policy and, ultimately, in reduced public safety.

While data in the aggregate can be very instructive, it is also useful to look at outcomes in particular cases. I have identified a subset which suggests the problems in sentencing post-*Booker*. The cases demonstrate two things. First, the new discretion given to district judges under Booker is undermining our ability to

achieve the firmness, fairness, and consistency necessary to accomplish Congress' purposes in establishing sentencing policies. Second, allowing appellate courts to review below-guidelines sentences under a reasonableness standard cannot also ensure the statutory purposes of punishment.

1. ***United States v. Menyweather:***

The defendant, an administrative employee in the U.S. Attorney's Office in Los Angeles, pleaded guilty to mail fraud and admitted making unauthorized purchases on her Government credit card of between $350,000 and $500,000. The guidelines range called for a sentence of 21-27 months. The district court made an eight level downward departure and imposed a sentence of 40 days in a jail-like facility on consecutive weekends. The Government appealed, arguing that the district court abused its discretion by failing to provide reasons for the departure. The Ninth Circuit vacated the sentence and remanded the case for resentencing. *United States v. Menyweather*, 36 Fed. Appx. 262 (9th Cir. 2002) (*Menyweather I*).

On remand, the court re-imposed the same sentence. The Government appealed. The Ninth Circuit reversed and remanded the case for re-sentencing. *United States v. Menyweather*, 69 Fed. Appx. 874 (9th Cir. 2003) (*Menyweather II*).

[16] Frank O. Bowman III and Douglas Berman, *What's The Future of Federal Sentencing Policy?*, from the Debate Club in Legal Affairs, The Magazine at the Intersection of Law and Life, http://legalaffairs.org/webexclusive/debateclub_sentencing0106.msp.

On the second remand, the court reimposed the same sentence by granting an eight-level downward departure for mental and emotional conditions, diminished capacity, and extraordinary family circumstances. The Government appealed.

During the pendency of the appeal, the Supreme Court issued its opinion in *Booker*. In its first published opinion construing the reasonableness standard, the Ninth Circuit affirmed the sentence. *United States v. Menyweather*, 431 F.3d 692 (9th Cir. 2005) (*Menyweather III*). The appellate court found that the district court did not abuse its discretion in making the departure. In addition, applying the reasonableness standard, the court found that the length of the sentence was reasonable considering a combination of factors. In his dissent, Judge Kleinfeld disagreed with the factual and legal basis for the departure and the determination that a 40-day sentence can be a legal sentence under the reasonableness standard, given the facts of *Menyweather*. The matter is now pending on the Government's request for *en banc* review.

2. ***United States v. Leyva-Franco:***

This defendant, a resident alien at the time of the crime, entered his guilty plea for importing five kilograms or more of cocaine from Mexico. In 2001, he was sentenced to 48 months of incarceration. The court reduced his sentence on a number of grounds, including a downward departure of four levels for aberrant

behavior pursuant to U.S.S.G. § 5K2.20. To qualify for an aberrant behavior departure based upon the mandatory sentencing guidelines in effect in 2001, the district court needed to make four findings. First, as a threshold consideration, the court had to find that the case was an "extraordinary case." If it made such a finding, before making an aberrant behavior departure, it had to find that the behavior involved a "single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life."

The Government appealed the aberrant behavior departure and, in *United States v. Leyva-Franco*, 311 F.3d 1194, 1196 (9th Cir. 2002) (*Leyva-Franco I*), the Ninth Circuit reversed and remanded the case to the district court upon a finding that "there was an important unresolved objection to the presentence report." Although the Government had attempted to show that Leyva-Franco had admitted to a customs inspector that he had crossed the border numerous times with cocaine in the week prior to his arrest in order to preclude an aberrant behavior departure, the court refused to resolve this objection.

On remand, the district court imposed the same sentence after making a four-level departure for aberrant behavior. The Government appealed. The Ninth Circuit reversed and remanded the case to the district court because the court did not make

the threshold finding of extraordinariness. *United States v. Leyva-Franco*, 89 Fed. Appx. 50 (9th Cir. 2004) (*Leyva-Franco II*). The Government also argued that Leyva-Franco did not commit a single criminal transaction given that he had transported cocaine across the border the week before the crime for which he was convicted. The Ninth Circuit did not reach this issue; instead it remanded the case for a failure to resolve the threshold question. The court directed that both prongs of § 5K2.20 must be met based upon findings for the court to depart at re-sentencing.

On the second remand, the district court once again sentenced the defendant to 48 months and the Government appealed a third time. The Government lost the third appeal. *United States v. Leyva-Franco*, 2006 WL 64422 (9th Cir. 2006) (*Leyva-Franco III*). Citing *Menyweather*, the Ninth Circuit found the resulting sentence was "not unreasonable." In dissent, Judge Kleinfeld noted, "This defendant smuggled five kilograms or more of cocaine across the border. His sentence is around half of what similarly situated defendants ordinarily get." He added, "We held in a published opinion that the district court had to make a finding of fact as to whether it was true or false that the defendant had admitted smuggling drugs across the border before. The district court has still not made the finding. In its most recent iteration, the district court has said in substance that it would not

matter."

3. ***United States v. Rivas-Gonzalez*:**

The defendant entered a guilty plea to the charge of illegal re-entry after deportation. He was convicted of a drug distribution offense in Washington State in 1992 and, after serving his sentence, was deported to Mexico in July 1993. He illegally re-entered the United States soon thereafter and went undetected by federal authorities until his arrest in 2002. In the interim, he married and fathered two children. His sentencing guideline range was 27-33 months. The district court made an 8-level departure based upon the cultural assimilation of Rivas-Gonzalez. The departure was based upon a number of statements, including:

- Rivas-Gonzalez had not "simply popped across the border."[17]
- "[i]t seems to me that this is the kind of person that we want to have living in this country. He's a good citizen. Even though he isn't a citizen, he contributes far more to the community. And his connections with that and his cultural assimilation into the

[17] *United States v. Rivas-Gonzalez*, 384 F.3d 1034, 1042 (9th Cir. 2004).

community is far greater than many of the people who live here simply by birth."[18]

The Government appealed. We submitted:

"It defies logic and undercuts the underpinnings of our criminal justice system and the administration of justice to reward a defendant for having eluded law enforcement and the Immigration and Naturalization Service long enough to assimilate in the society and establish a family. It would be both ironic and counterproductive to allow preferential dispensation for defendants who have managed to break the law for a longer period of time. The court considered some of the factors in 18 U.S.C. § 3553(a) that it is required to weigh, but the sentence failed to afford adequate deterrence, reflect the seriousness of the offense, or promote respect for the law because the court did not consider these factors. These three interests advance the purposes of punishment established by the Congress in 18 U.S.C. § 3553(a)(2). A sentence of less than twenty-five percent of the bottom end of the applicable guideline range does not reflect the Sentencing Commission's considered judgments about optimal penalties for illegal reentry cases involving felons with a history of drug trafficking. It would not have been possible for the court to find that a sentence of six months effectively deters others (general deterrence) from committing the crime of illegal reentry. It would not have been possible for the court to have found that a six month sentence for the crime of conviction promotes respect for the law or reflects the seriousness of the offense. Congress has concluded that illegal reentry following deportation is a significant crime. The Sentencing Commission has concluded that illegal reentry by those with drug trafficking convictions is particularly deserving of additional incarceration -- even more so than those convicted of illegal reentry with prior convictions for other aggravated felonies."[19]

[18] *Id.*

[19] United States' Appeal Brief in *United States v. Rivas-Gonzalez*, 2003 WL 22723756.

The Ninth Circuit reversed the judgment and remanded the case to the district court.[20] In reversing, the Court noted:

> "Rivas's motivation for the illegal reentry was not a prior assimilation to our culture; instead, his motive in returning appears to have mirrored that of most immigrants who enter our country without inspection, *i.e.*, a desire to secure and enjoy a higher standard of living. Like other undocumented immigrants who may evade our law enforcement for years, Rivas, after his illegal reentry, may have developed social, economic, and cultural ties to the United States."21

Because the defendant sought further review before the Supreme Court, the case was pending at the time of the *Booker* decision. It was therefore returned to the district court after *Booker* was decided. Late last month, the district court imposed the same six-month (time served) sentence handed down at the time of the initial sentencing.

4. ***United States v. Edwards:***

Defendant was charged with four counts of bankruptcy fraud (violations of 18 U.S.C. § 152) and six counts of bank fraud involving multiple banks (violations of 18 U.S.C. § 1014) in two indictments. Edwards pleaded guilty to bankruptcy fraud (18 U.S.C. § 152(9)) and making a false statement to a bank (U.S.S.G. §2F1.1(b)(1)(K) (1998) and U.S.S.G. §2F1.1(b)(2) (1998).

[20] *United States v. Rivas-Gonzalez*, 384 F.3d 1034 (9th Cir. 2004).

[21] *Id.* at 1045.

The presentence report assigned Edwards a prison range of 27 to 33 months. Edwards had been convicted of bank fraud in the early 1990s for which he still owed a restitution judgment to the FDIC of nearly $1 million. Edwards' total offense level was based in part on a 10-level enhancement because the loss was between $500,000 and $800,000 (U.S.S.G. §2F1.1(b)(1)(K) (1998)), and two levels for more than minimal planning or more than one victim (U.S.S.G. §2F1.1(b)(2) (1998)). On the belief that it was limited by the holding in *United States v. Ameline,*[22] the court sentenced Edwards to probation for five years, including seven months of home detention with electronic monitoring.

The Government appealed, arguing that the district court failed to properly apply the sentencing guidelines and that the sentence was unreasonable. The Ninth Circuit reversed the judgment and remanded for resentencing.[23] In his dissent, Judge Kleinfeld wrote:

> "I would vacate the sentence because I cannot see how a sentence anything like the one imposed could be reasonable under 18 U.S.C. § 3553(a)(2)[fn omitted]. 18 U.S.C. § 3553(a)(2)(A) requires a sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. Edwards is a big time thief. He was convicted of bank fraud in Arizona and ordered to pay $3 million in restitution. Then he did it again, while on probation. He lied to a bank and tried to hide more than $600,000 from his creditors. The district court

[22] 376 F.3d 967 (9th Cir. 2004).

[23] *United States v. Edwards*, 158 Fed. Appx. 930 (9th Cir. 2005).

> spared him from prison on the theory that he had made 'life-changing determinations.' His victims deserve better, even if he has made 'life-changing determinations.' The majority holds that because we do not know if the sentence, after the *Ameline*[24] remand, will be different from the sentence imposed that we should not determine if this sentence is unreasonable. Our post-*Ameline* decisions have focused on the fact that "[b]ecause we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines," we should remand for resentencing in accordance with *Booker*. [fn omitted] In this case, I think we can safely conclude that the lenience did not result from the view that the Guidelines were mandatory."

On remand, the district court reimposed the same sentence of no incarceration.

5. ***United States v. Montgomery:***

In the Northern District of Alabama, Angela Montgomery was convicted of bank fraud. The fraud she was responsible for amounted to $1.5 million. After a perfunctory and boilerplate recitation of the statutory sentencing factors, the trial judge chose not to follow the sentencing guidelines, but rather to sentence Ms. Montgomery to 8 months' imprisonment. The government appealed, and under a reasonableness review, the Eleventh Circuit affirmed the sentence, focusing mainly on the fact that Ms.

[24] *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*).

Montgomery was a first offender and that the trial court believed that she would not commit a new crime.[25]

6. ***United States v. Medearis:***

In the Western District of Missouri, Mark Medearis committed a series of firearms offenses. The sentencing guidelines called for Mr. Medearis to be sentenced between 46 and 57 months in prison. However, because his family members and friends wrote to the judge claiming that Mr. Medearis had undergone a religious conversion since his crimes, the trial judge sentenced him to probation. That case is currently being appealed to the Eighth Circuit Court of Appeals.[26]

There are hundreds and hundreds more examples of judges reducing sentences below the guidelines that we could set out here, including drug trafficking cases, sex abuse cases, and even terrorism cases. These decisions not only undermine the deterrent and incapacitative effects of the sentencing guidelines but also create unwarranted disparities in sentencing.

When the guidelines are not followed consistently, each judge brings his or her own evaluation of sentencing factors to bear with the result that a defendant's

[25] *United States v. Montgomery*, 2006 WL 284205 (11th Cir. 2006).

[26] *United States v. Medearis*, No. 04-05031-CR-SW-ODS (W.D. Missouri, 2006).

sentence will be determined as much by the judge before whom he appears as the criminal conduct that he committed. This is bad public policy and dangerous for those who, historically, have been most disfavored in criminal sentencing.

Interestingly, experts of all political and ideological stripes predicted, before *Booker* was decided, that a purely advisory system would undoubtedly lead to greater disparity and further that, over time, this disparity is likely to increase.[27] At a hearing before the Sentencing Commission in November 2004, there was widespread agreement among all of the panelists, from law professors to public defenders, that advisory guidelines were not appropriate for the federal criminal justice system. For example, the Practitioners Advisory Group – a panel of defense lawyers brought together to advise the Sentencing Commission – stated that "rules that are mandatory are valuable in controlling unwarranted disparity, and in providing certainty so that defendants can make rational decisions in negotiating plea agreements and in trial strategy."[28] Similarly, a law professor testified that "[g]iven the fact that Congress has repeatedly expressed its commitment to uniformity (most recently in the Feeney Amendment), these solutions [advisory

[27] *See, e.g.*, Felman, James, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?* 17 FED. SENT'G REP. 97 (Dec. 2004).

[28] Letter from the Practitioners' Advisory Group to the United States Sentencing Commission 12 (Nov. 4, 2004), available at http://www.usscpag.com/index.asp.

guidelines] ignore the will of the ultimate decision-maker in this area."[29] We agree and believe that mandatory guidelines not only were successful but must be reinstituted.

V.

NEW SENTENCING REFORM LEGISLATION

Despite *Booker* and its aftermath, we are confident that working together with this Committee, the Senate, the Judiciary, the Sentencing Commission, and others, we can reinstitute a sentencing system that upholds the principles of sentencing reform: truth-in-sentencing, certainty, proportionality, and consistency in treatment of defendants. In formulating our position and our legislative proposal, we have consulted within the Department of Justice and with other branches of government, including the Judiciary, in order to consider and to evaluate carefully all of the various options which have been proposed to date.

After this review and evaluation process, we believe the simplest, most efficient, and most effective way of reinstituting mandatory sentencing is through a minimum guidelines system. Under this proposal, the guidelines minimum would once again be given the force of law. The maximum sentence allowable under law,

[29] Professor Stephanos Bibas, Submitted Testimony before the Sentencing Commission 5 (Nov. 17, 2004), available at http://www.ussc.gov/hearings/11_16_04/Bibas.pdf.

though, would be the statutory maximum as set by Congress. This would make clear that, based upon the jury verdict or a defendant's guilty plea, a defendant is always subject to the maximum statutory penalty defined by Congress. The guidelines maximum, however, would remain as an advisory benchmark for the sentencing judge. Under this system, the sentencing guidelines would once again work in the manner they have for nearly 20 years – identifying aggravating and mitigating factors to be determined by a judge – and controlling judicial discretion to bring a more certain, consistent and just result.

There are many advantages to the proposal. This system would preserve the traditional roles of judges and juries in criminal cases. It would retain the role of the Sentencing Commission. It would be relatively easy to legislate, would be easy in practice, the guidelines used would replicate the current guidelines, and it would fulfill the important sentencing policies embodied in the Sentencing Reform Act.

Further, we do not believe that a new enlarged sentencing range will result in an increase in the most severe sentences. Data from the Sentencing Commission shows that, under the current sentencing system with advisory guidelines, between 98% and 99% of sentences imposed are within or below the sentencing range. Only a tiny fraction of sentences imposed are above the sentencing range. In short, contrary to the frequent sentences below the guidelines, judges rarely sentence

above the guidelines range. Thus, a system that makes the upper end of the range advisory appears to provide appropriate protection against excessive sentences. Accordingly, under this proposal, advisory maximum sentences would be issued as part of the guidelines manual, which would give district and circuit courts across the country the benefit of the Commission's collective wisdom and statistical analysis regarding sentencing and would provide a suggested, though not legally mandated, maximum sentence similar to the current maximum. In addition, the Department would be free to issue an internal policy to require prosecutors to seek a sentence within the recommended range in the ordinary case.[30]

Some, including the Practitioner's Advisory Group, have expressed concerns about the constitutionality of this proposal, as it can survive only as long as the Supreme Court declines to extend the rule in *Blakely* to findings necessary to enhance a mandatory minimum sentence. We acknowledge that the proposal relies on the Supreme Court's holdings in *McMillan v. Pennsylvania*[31] and *Harris v. United States*,[32] which held that judges can sentence defendants based upon facts

[30] This is precisely what the Department did after the Supreme Court decided *Booker*. Deputy Attorney General Comey directed prosecutors to seek sentences within the applicable guidelines range.

[31] 477 U.S. 79 (1986).

[32] 536 U.S. 545 (2002).

found by the judge, rather than a jury, as long as these facts are not used to increase the maximum sentence a defendant faces. Thus, courts may impose mandatory minimum sentences based on their own fact-finding. There is no reason to believe that these cases have been weakened that allow judges to impose such mandatory minimums. Although *Harris* was a plurality opinion, it was issued only a few years ago, following *Apprendi v. New Jersey,*[33] which the Court explicitly found did not apply. And while *Blakely* has redefined what the "maximum sentence" faced by a defendant is, it has not undermined the concept that courts can find facts that determine mandatory minimum sentences *within* the maximum sentence. Thus, the Department's proposal appears to address the Court's concern and complies with *Blakely* and *Booker* by allowing only judicial fact finding within the maximum authorized by the jury's finding of guilt or the defendant's plea.

The suggestion that *Harris* and *Edwards* cannot be relied upon ignores the important doctrine of *stare decisis*. Unless the Supreme Court states otherwise, *stare decisis* should be our guiding principle, especially when "overruling [a] decision would dislodge settled rights and expectations or require an extensive legislative response."[34]

[33] 530 U.S. 466 (2000).

[34] *See Hubbard v. United States*, 514 U.S. 695, 716 (1995).

VI.

CONCLUSION

In sum, of all possible legislative solutions, the Department's proposal adheres most closely to the principles of sentencing reform, such as truth-in-sentencing, firmness, certainty, and fairness and consistency in sentencing. The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that serve the policies embodied in the Sentencing Reform Act. As we have for the last twenty years, we look forward to working with the Congress, the Commission, and others to ensure that federal sentencing policy continues to play its vital role in bringing justice and public safety to the communities of this country.

Thank you again for the opportunity to testify. I look forward to your questions.

Mr. COBLE. Thank you, Mr. Mercer.

Your Honor, Judge Cassell.

TESTIMONY OF THE HONORABLE PAUL G. CASSELL, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH

Judge CASSELL. Thank you, Mr. Chairman. I am pleased to be here on behalf——

Mr. COBLE. Judge, your mike's not hot.

Judge CASSELL. All right. Hopefully, it will be hot.

Mr. Chairman, I am pleased to be here on behalf of the Judicial Conference, and on behalf of hundreds of men and women around the country who serve on the Federal Bench and struggle every day to make the tough calls that are involved in sentencing decisions. We also appreciate the fact that Congress has waited before diving into the *Booker* issue, and by waiting, you now have the data, as Judge Hinojosa has mentioned, and the data shows quite clearly that what has happened in the last year is judges have imposed tough sentences that protect society, while tailoring some sentences to the unique individual circumstances of particular cases.

The most salient fact about *Booker* is shown on the chart here to the side. This is the bottom line average total of sentences that have been imposed over the last several years, and the bottom line is that last year judges imposed average sentences of 58 months as compared to 57 months in the year before *Booker*. This same pattern occurs across the most significant categories of Federal offense, drug trafficking, firearms, theft and fraud, all saw increases in average sentence length last year.

Rather than focusing on the overarching fact that judges have, in general, been tougher after *Booker*, what the Justice Department has done is cherry-pick a few individual statistic on variances from the guidelines. But the bottom line here is, again, as Judge Hinojosa mentioned, 93 percent of all the cases today are being resolved exactly the way they would have come out before *Booker*. And what of the roughly 7 percent of the cases that are coming out a bit different? On average, judges are going down about 12 months, hardly a significant change in the grand sweep of things.

Now, judges have exercised their newfound discretion responsibly in all categories of offenses, including that tiny sliver of the Federal docket that I know is of interest to Congressman Feeney and some others, the sex offense area. It has been said that there has been a fivefold increase in the cases in which judges have gone down for sexual exploitation of a minor. What that means in the Nation's Federal courtrooms is that in 2004, there were 2 such cases, in 2005, there were 11 such cases, hardly a dramatic increase given that the system prosecutes 65,000 offenders every year.

The reason for these adjustments is not, as some have tried to suggest, that we have some sort of soft spot in our heart for sex offenders. The reason is that Federal sex offense cases are not reflective of the Nation's criminal justice docket. About a half to two-thirds of these cases involve Native American defendants, who have committed State law crimes that end up being prosecuted in the Federal system solely because the defendants live within Federal jurisdiction. And indeed, if one looks at the big picture of all sex offenses, one finds that the overall situation has not changed

much since *Booker* for criminal sexual abuse, sexual abuse of a minor, exploitation of a minor, trafficking in child pornography and possession of child pornography, sentences all went up after *Booker*.

Turning to the subject of geographic disparities mentioned by Mr. Mercer, we believe that the most pernicious contributor to geographic disparity in Federal sentences today is the Justice Department's inconsistent approach to filing motions for substantial assistance reductions for defendants who cooperate with the Government. We pulled together some data that has been provided to us by the Sentencing Commission. You can see, we have adjacent jurisdictions in Pennsylvania, North Carolina—I will focus on the last two from my neck of the woods. Idaho, 30 percent of all of their criminal cases are resolved by a substantial assistance motion. In my State, next door, Utah, it is only 8 percent. There is no rational explanation for these kinds of disparities, as the Sentencing Commission has explained in a comprehensive report on the subject. Even more troubling is that the Sentencing Commission found that there were racial disparities in the way that the Government handles these motions.

While the department has not been able to put its own house in order, it has been quick to cast stones at particular judges who had to make some tough calls in post-*Booker* sentencing. In its prepared testimony, the department recites six individual cases that it believes demonstrate the need for reform. Four of those cases were decided before *Booker*. One of those cases is on appeal by the Government, and we don't know whether it's final. The sixth case, *United States v. Montgomery*, involved—although this isn't mentioned in the Government's testimony—a mentally ill defendant who was given a shorter prison term in a fraud case so that she could make greater restitution payments to her crime victim.

I would request the opportunity to provide more details about these particular cases, but the bottom line is that these six horror stories hardly are compelling examples of judges running amuck.

In conclusion, while there is no need for dramatic legislation in this area, I should mention several specific areas that would be appropriate for reform, such as restoring the Sentencing Commission to its traditional membership of at least three judges, creating standardized procedures for determining sentences, giving judges greater power to award appropriate restitution to crime victims, and to prevent profiteering by notorious criminals. In addition, we should eliminate inappropriate crack/power sentencing disparities. We should repeal unjustified mandatory minimums, and that the Congress should commission a report from the Sentencing Commission that would take a broad and global look at sentencing issues.

The Judicial Conference would be happy to work with the Department of Justice, this Subcommittee, and Members of Congress, to make sure that Federal judges continue to impose sentences that are fair and just to all concerned, just as Federal judges have been doing for the last year under *Booker*.

Thank you.

[The prepared statement of Judge Cassell follows:]

PREPARED STATEMENT OF THE HONORABLE PAUL G. CASSELL

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today on behalf of the Judicial Conference and its Criminal Law Committee to discuss developments in federal sentencing since the Supreme Court's decision in *United States v. Booker*.[1] My testimony today will explain why federal sentencing practices today remain about the same as they were before *Booker*. Accordingly, there is no need for any immediate action or "*Booker* fix" legislation. In particular, the Judicial Conference opposes a system of "topless" guidelines because it is not appropriate and would create grave risks of unsettling the system and it opposes mandatory minimum sentences. The Criminal Law Committee does, however, believe that some narrow areas may deserve consideration for possible legislation to improve the system – including restoring the traditional composition of the Sentencing Commission (a goal supported by the Conference), expanding judges' ability to impose supervised release and award restitution, eliminating unjustified mandatory minimum sentences, reducing the disparities in penalties for crack and powder cocaine, and encouraging the Sentencing Commission to undertake a comprehensive review of the current sentencing regime.

My testimony is divided into four parts. Part I reviews the data on federal sentences in the wake of *Booker*. The average sentence length before *Booker* was 57 months; the average sentence length after *Booker* was 58 months – showing, if anything, a slight increase in sentence severity. Moreover, there has not been a dramatic change in the percentage of cases falling outside the Federal Sentencing Guidelines after *Booker*. Even taking the critics own narrow view

[1] 125 S.Ct. 738 (2005).

of the appropriate measure of change – focusing narrowly on cases in which judges varied from the Guidelines – more than 90% of all cases are being resolved in the same way as they were before Booker.

Part II reviews the way in which federal appellate courts – including the United States Supreme Court – should be able to clarify important aspects of the new sentencing regime and reduce any disparities that have occurred in the immediate aftermath of *Booker*. Already the appellate courts are beginning to provide guidance on what is a "reasonable" sentence, the standard of appellate review mandated by *Booker*. As the circuits speak, it is to be expected that judge-to-judge and district-to-district variation will be reduced. And, of course, once the United States Supreme Court speaks on the subject, a clear law of the land will be set that will help bring uniformity to the system.

Part III reviews one alternative that has been urged as replacement for the current system: so-called "topless" Guidelines. Legislation adopting such a scheme would run the risk of disrupting the entire federal criminal justice system. The constitutional viability of the topless guidelines scheme hinges on the continuing validity of the Supreme Court's 5-4 decision in *Harris v. United States*[2] allowing judicial fact-finding at the bottom end of Guideline ranges. Since then, of course, the Court has handed down its opinion in *Booker (*and with several other similar earlier cases). These decisions affirm the importance of juries in criminal sentencing in ways that were not fully appreciated before. Many observers believe that *Harris* is no longer good law. If this is true, the constitutionality of any topless Guidelines scheme is certainly in

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[2] 536 U.S. 545 (2002).

question. To restructure the entire federal sentencing system on such constitutionally debatable foundations is a gigantic gamble.

Part IV explains that while there is no need for sweeping change, Congress may be able to draft narrow legislation in several specific areas that could improve the current sentencing process. In particular, Part IV presents for discussion some particular topics, including:

A. Restoring the Sentencing Commission to its traditional composition of "no less than" three federal judges;

B. Encouraging the Sentencing Commission to codify a standardized methodology for determining sentences, such as the three-step process currently recommended by the Commission;

C. Evaluating ways in which downward sentence reductions for substantial assistance are handled by judges *and* prosecutors;

D. Evaluating current procedures for appellate review;

E. Giving judges greater power to extend terms of supervised release for released offenders;

F. Authorizing judges to prevent criminals from profiting from their crimes;

G. Expanding the power of judges to award full and fair restitution to crime victims;

H. Repealing irrational mandatory minimum sentences;

I. Reducing the unsupportable disparities between the penalties for distributing crack cocaine versus powder cocaine;

J. Providing financial support for "boot camp" programs for certain non-violent, first offenders;

K. Improving community release as a way of transitioning offenders back into their communities; and

L. Encouraging the Sentencing Commission to undertake a comprehensive evaluation of the federal sentencing structure in the wake of *Booker*.

I am here today as the Chair of the Judicial Conference's Criminal Law Committee.[3] Our Committee is composed of distinguished judges from around the country, namely Judge Lance M. Africk (Louisiana Eastern), Chief Judge Donetta W. Ambrose (Pennsylvania Western), Judge Julie E. Carnes (Georgia Northern), Chief Judge William F. Downes (Wyoming), Judge Richard A. Enslen (Michigan Western), Chief Judge Jose Antonio Fuste (Puerto Rico), Judge David F. Hamilton (Indiana Southern), Judge Henry M. Herlong, Jr. (South Carolina), Judge Nora Margaret Manella (California Central), Judge Norman A. Mordue (New York Northern), Judge Wm. Fremming Nielsen (Washington Eastern), Judge William Jay Riley (Eighth Circuit), Magistrate Judge Thomas J. Rueter (Pennsylvania Eastern), and Judge Reggie B. Walton (District of Columbia).

Of course, the formal views of the judiciary on legislation must be made by the Judicial Conference. Because this hearing does not involve specific pending legislation, the Judicial Conference has not had an opportunity to give any final view on what kind of congressional action might be appropriate. Accordingly, my remarks today represent only the views of the members of the Criminal Law Committee about the general topic areas that we understand to be under general consideration. Because no specific legislation is pending, our thoughts are

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[3] I serve as a federal district court judge for the U.S. District Court for the District of Utah, having been nominated by President Bush in 2001 and confirmed by the Senate in 2002. I also continue to be a Professor of Law at the S.J. Quinney College of Law at the University of Utah, where I teach courses on crime victims' rights and criminal procedure. After graduating from law school in 1984, I clerked for then-Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia and Chief Justice Warren Burger of the U.S. Supreme Court. I then served for two years as an Associate Deputy Attorney General in the United States Department of Justice during the Reagan Administration and for three-and-a-half years as an Assistant United States Attorney in the Eastern District of Virginia.

necessarily preliminary – in the nature of thoughts for further discussion. Moreover, our Committee, whatever its views, serves only in an advisory capacity to the Judicial Conference and may not speak on its own for the judiciary. If Congress moves to consider specific legislation on sentencing practices, the Criminal Law Committee will be happy to review it and make appropriate recommendations to the Judicial Conference, which then may comment formally on the judiciary's behalf.

1. *Booker* Has Not Caused Much Change in Federal Sentences.

Since the Supreme Court's decision in *United States v. Booker*, the most notable fact about the federal system is how little things have changed. The most comprehensive data on federal sentencing practices comes from the United State Sentencing Commission, which has been carefully compiling data on *Booker*'s effects.[4] The most telling statistic is that sentences today are, on average, about the same (if not slightly longer) as compared to sentences before *Booker* (and its predecessor, *Blakely v. Washington*). Before *Blakely*, the average federal sentence was 57 months; after *Booker*, the average federal sentence was 58 months.[5] This stable pattern recurs across the four most significant categories of federal prosecutions:

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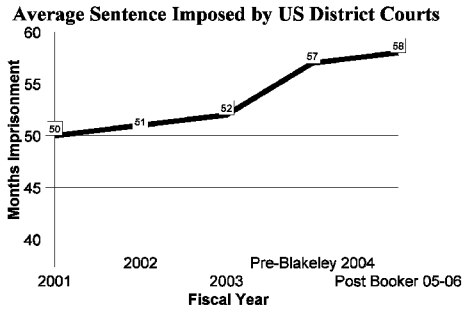
[4] U.S. SENTENCING COMMISSION, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON SENTENCING (Mar. 2006) (hereinafter *BOOKER* IMPACT REPORT).

[5] *BOOKER* IMPACT REPORT, *supra*, at 71.

AVERAGE SENTENCE IMPOSED

	Pre-*Blakely*	Post-*Booker*
Drug Trafficking	83 months	85 months
Unlawful Entry	29 months	27 months
Firearms	61 months	60 months
Theft/Fraud	20 months	23 months
ALL CASES	57 months	58 months

In sentencing, outcomes matter. Viewed from a nationwide perspective, aggregate sentencing outcomes remain basically unchanged after *Booker* (and have even increased slightly), as shown in the following chart.



Source: United States Sentencing Commission Data
Prepared by: The Administrative Office of the U.S. Courts

Apparently some observers view the issue not from the perspective of overall sentencing outcomes but rather from the perspective of the frequency of downward variances from the Guidelines. From a policy perspective, this approach can be less helpful, because each individual variance has to be judged by the facts of the particular case. Even taking this approach, however, there appears to be little need for immediate legislative action.

We understand that some observers claim that the case for congressional intervention is demonstrated by the following data collected by the Sentencing Commission:[6]

Position of Sentence Relative to Guideline Range	**FY2001**	**FY2002**	**FY2003**	**FY2004 (Pre-Blakely)**	**FY2005-06 (Booker)**
Within Range	64.0%	65.0%	69.4%	72.2%	62.2%
Upward Departures	0.6%	0.8%	0.8%	0.8%	0.3%
Otherwise Above Range	–	–	–	–	1.3%
Substantial Assistance Departure	17.1%	17.4%	15.9%	15.5%	14.4%
Other Gov't Sponsored Departures	–	–	6.3%	6.4%	9.3%
Other Downward Departure	18.3%	16.8%	7.5%	5.2%	3.2%
Otherwise Below Range	–	–	–	–	9.3%

[6] *BOOKER* IMPACT REPORT, *supra*, at D-10.

Observers critical of the current system apparently focus on the last two categories – "other downward departure" and "otherwise below range" – and contend that these are new, post-*Booker* reductions in sentences that are inappropriate.

This table reveals, if anything, that the system has not changed much after *Booker*. For starters, it is possible that at least some of the data reflecting court-initiated departures may actually include government-sponsored departures. But assuming the accuracy of the data and taking them in historical perspective, the system in 2005-06 was almost exactly the same as it was in 2001. In 2001, about 64% of sentences fell within the Guidelines; in 2005-06, about 62% of sentences fell within the Guidelines. The 2% difference is quite small and may well be attributable to the increase in government-sponsored departure motions, such as new "fast track" programs for immigration cases. (The Commission's data entry system before 2003 prevents further exploration of this possibility.)

Even taking a narrow, single-year view of the data, the system in 2005-06 was not very different than in 2004 before *Blakely* and *Booker*. In 2005-06, 62.2% of sentences were within the Guidelines, compared to 72.2% in 2004 – a difference of 10.0%. One way of viewing this difference is as follows:

Additional Upward Departures/Variances	0.8%[7]
Additional Government-Sponsored Departures	1.8%[8]
Additional Downward Departures/Variances	7.3%[9]
Total Difference after *Booker*	9.9%[10]

The critics of the current system apparently focus on the 7.3% of the cases in which there was an additional downward adjustment of the sentence. Against a backdrop of 0.8% more upward adjustments after *Booker* (and the Department's own decision to sponsor 1.8% more downward departures after *Booker*), this change does not appear significant. Put directly – even taking the critics own narrow view of the appropriate measure of change, *more than 90% of all cases are being resolved in the same way as they were before* Booker. And how much did the sentences change in the 7.3% of cases with a downward adjustment of some type? Here again, the Sentencing Commission's data suggest no basis for substantial concern. The median decrease in sentence was only 12 months.[11]

Finally, it must be remembered that in each of these cases a sentencing judge, after carefully considering all relevant sentencing information and the particular facts of the case, has

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[7] 1.3% "otherwise above the range" + 0.3% "upward departures" after *Booker*, compared to 0.8% upward departures before *Booker/Blakely*.

[8] 14.4% substantial assistance departures + 9.3% other gov't sponsored departures after *Booker*, compared to 15.5% substantial assistance departures + 6.4% other gov't sponsored departures before *Booker/Blakley*.

[9] 3.2% "other downward departures" + 9.3% "otherwise below range" after *Booker*, compared to 5.2% "other downward departures" before *Booker/Blakely*.

[10] Total not quite 10.0% because of rounding. For the underlying data, see *BOOKER* IMPACT REPORT, *supra*, at D-10.

[11] *BOOKER* IMPACT REPORT, *supra*, at D-25.

concluded that downward variance from the Guidelines is appropriate. The possibility that conscientious sentencing judges reached the right result in most of these cases should not be hastily dismissed. We also believe (based on anecdotal report from our colleagues around the country) that the majority of these variances have been given in cases that did not involve violent and repeat offenders. After *Blakely* and *Booker*, DOJ officials publically suggested that the toughest federal sentences should be directed toward violent and repeat offenders.[12] Similarly, Attorney General Gonzales during his confirmation hearings in January 2005 asserted that prison is best "for people who commit violent crimes and are career criminals," and he also stressed that a focus on rehabilitation for "first-time, maybe sometimes second-time offenders ... is not only smart, . . . it's the right thing to do."[13] In Attorney General Gonzales' words, "it is part of a compassionate society to give someone another chance."[14] When carefully examined, the facts of many of these variance cases seem likely to fit comfortably within the approach described by the Attorney General.

In light of all these points, it appears that there is no need for an immediate "*Booker* fix," especially if the fix carries its own substantial risks and costs.

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[12] *See* Testimony of Ass't Attorney General Chris Wray to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives at 8-9 (Feb. 10, 2005) (stressing that most federal prisoners "are in prison for violent crimes or had a prior criminal record before being incarcerated"); *see also* Letter to the Editor from Dan Bryant, Assistant Attorney General for Legal Policy at the Justice Department, WASH. POST, Dec. 24, 2005, at A25 (asserting that "[t]ough sentencing makes Americans safer by locking up repeat and violent offenders").

[13] *See* Transcript, Senate Judiciary Committee's hearings on the nomination of Alberto Gonzales, available at Professor Douglas Berman's excellent and indispensable website, http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/gonzales_hearin.html.

[14] *Id.*

II. The Appellate Process Should Be Allowed to Operate.

Even if the critics believe that the existing data demonstrate a problem in the system, it seems appropriate to wait before recommending dramatic legislative action. The data reflect the immediate attempts by trial courts around the country to put into effect *Booker*'s mandates. It would hardly be surprising to discover in the first year following a significant new Supreme Court decision invalidating important parts of the federal sentencing statute that efforts of district judges in 94 districts had produced a few rough edges. Those rough edges will disappear over time as experience develops with the new system.

Of particular importance is the ability of appellate courts – including the United States Supreme Court – to clarify important aspects of the new sentencing regime. Already the appellate courts are beginning to provide guidance to trial courts on what is a "reasonable" sentence after *Booker*.[15] As the circuits speak, it is to be expected that judge-to-judge and

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[15] *See, e.g., United States v. Cooper*, --- F.3d ---, 2006 WL 330324 (3d Cir. Feb. 14, 2006) (noting that "while [appellate courts] review for reasonableness whether a sentence lies within or outside the applicable guidelines range, . . . it is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable"); *United States v. Richardson*, --- F.3d ---, 2006 WL 318615 (6th Cir. Feb. 13, 2006) (explaining that the Sixth Circuit has established a rebuttable presumption of reasonableness where a defendant is sentenced within the appropriate Guidelines range); *United States v. Williams*, --- F.3d ---, 2006 WL 250058, at *1 (7th Cir. Feb. 3, 2006) (noting that "a sentence within the guidelines range will rarely be unreasonable"); *United States v. McMannus*, --- F.3d ---, 2006 WL 250240, at *2 (8th Cir. Feb. 3, 2006) (stating that "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling [its] justification [must be] based on the § 3553(a) factors"); *United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (vacating a sentence of probation because of concern that "the brevity of the term of imprisonment imposed by [the] sentence [did] not reflect the magnitude of the theft"); *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005) ("A discretionary sentencing ruling . . . may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence

district-to-district variation will be reduced. And, of course, once the United States Supreme Court speaks on the subject, a clear law of the land will be set that will help bring uniformity to the system. Obviously the Justice Department is in a good position to help secure that uniformity, as the Solicitor General's Office must have dozens and dozens of cases currently pending involving *Booker* issues. If the concern is clarity of existing legal standards, the Justice Department should be encouraged to ask for Supreme Court review of an appropriate case on the subject.

In the last few months, the appellate courts have been generally moving in the direction of forcing district courts into great compliance with the Guidelines. As Professor Douglas Berman has noted, "it seems all post-*Booker*-*within*-guideline sentences and nearly all above-guidelines sentences are being found reasonable, whereas many *below*-guideline sentences are being reversed as unreasonable."[16] As he catalogued the state of appellate court decisions just two weeks ago, the pattern is as follows:

Within-guideline sentences: No court of appeals has yet reversed a within-guideline sentence as unreasonable. Many courts have affirmed within-guideline sentences as reasonable; there are too many such cases to list.

Above-guideline sentences: Only one court — the Seventh Circuit, in the 2005 case of *United States v. Castro-Juarez*[17] — has reversed an above-guideline sentence as unreasonable. A number of cases, however, have affirmed above-guideline sentences as reasonable. These

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that lies outside the limited range of choice dictated by the facts of the case.").

[16]Douglas Berman, Sentencing Law and Policy: Tracking Reasonableness Review Outcomes (Mar. 3, 2006), http://sentencing.typepad.com.

[17]425 F.3d 430 (7th Cir. 2005).

include *United States v. Fairclough*,[18] *United States v. Smith*,[19] *United States v. Larrabee*,[20] *United States v. Jordan*,[21] *United States v. Winters*,[22] and *United States v. Shannon*.[23]

Below-guideline sentences: Thirteen cases involving below-guideline sentences have been reversed as unreasonable. These are: *United States v. Myers*,[24] *United States v. Gatewood*,[25] *United States v. Shafer*,[26] *United States v. Claiborne*,[27] *United States v. Eura*,[28] *United States v. Moreland*,[29] *United States v. Duhon*,[30] *United States v. McMannus*[31] (which reversed two sentences in one opinion), *United States v. Feemster*,[32] *United States v. Clark*,[33] *United States v. Pho*,[34] *United States v. Coyle*,[35] and *United States v. Saenz*.[36] By Professor Berman's tabulation, only a handful of cases where the defendants' sentences were below the guidelines ranges have been affirmed as reasonable. *United States v. Montgomery*[37] and *United States v. Williams*[38] were

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[18]— F.3d —, No. 05-2799-CR, 2006 WL 465367 (2d Cir. Feb. 17, 2006).
[19]— F.3d —, No. 05-30313, 2006 WL 367011 (5th Cir. Feb. 17, 2006).
[20]436 F.3d 890 (8th Cir. 2006).
[21]435 F.3d 693 (7th Cir. 2006).
[22]416 F.3d 856 (8th Cir. 2005).
[23]414 F.3d 921 (8th Cir. 2005).
[24]— F.3d —, No. 05-1543, 2006 WL 488411 (8th Cir. Mar. 2, 2006).
[25]— F.3d —, No. 05-1865, 2006 WL 452902 (8th Cir. Feb. 27, 2006).
[26]— F.3d —, No. 05-2049, 2006 WL 453200 (8th Cir. Feb. 27, 2006).
[27]— F.3d —, No. 05-2198, 2006 WL 452899 (8th Cir. Feb. 27, 2006).
[28]— F.3d —, No. 05-4437, 2006 WL 440099 (4th Cir. Feb. 24, 2006).
[29]— F.3d —, No. 05-4476, 2006 WL 399691 (4th Cir. Feb. 22, 2006).
[30]— F.3d —, No. 05-30387, 2006 WL 367017 (5th Cir. Feb. 17, 2006).
[31]436 F.3d 871 (8th Cir. 2006).
[32]435 F.3d 881 (8th Cir. 2006).
[33]434 F.3d 684 (4th Cir. 2006).
[34]433 F.3d 53 (1st Cir. 2006).
[35]429 F.3d 1192 (8th Cir. 2005).
[36]428 F.3d 1159 (8th Cir. 2005).
[37]No. 05-1395, 2006 WL 284205 (11th Cir. Feb. 7, 2006).
[38]435 F.3d 1350 (11th Cir. 2006).

the only two cases that Professor Berman could find after *Booker*.

Put simply, circuit courts are not showing undue deference when reviewing below-guideline sentences. Moreover, post-*Booker* cases are only now resulting in rulings that provide feedback to district courts on the meaning of reasonableness. Interestingly, the two latest post-*Booker* data runs from the United States Sentencing Commission show a slight up-tick in the number of nationwide within-guideline sentences: the total *post-Booker* within-guidelines sentences are up to 62.2% as of March, up from 61.9% in February and from 61.2% in January Although this by itself may not be a statistically significant change, one might speculate that the notable trend of appellate court reasonableness review could be leading district judges to adhere more often to the guidelines in some cases. In light of these decisions, there is every reason to expect that, over time, appellate review will produce greater compliance with the Guidelines.

We also understand critics of the current system to be concerned about whether existing appellate review will have sufficient "traction" to ensure that the congressional purposes of sentencing are achieved. Indeed, it is possible that in the hearing today, critics may point to individual sentences of individual judges as demonstrating the need for system-wide reform.

If the concern is a downward adjustment in any particular case, the appropriate remedy is obvious: the Justice Department can file an appeal. As just noted, the Justice Department has had considerable success in challenging below-Guideline sentences. On the other hand, pursuing a dramatic change such as a topless guidelines scheme poses considerable risks both of unsettling the system and requiring thousands of resentencings of in-custody defendants.

III. A System of Topless Guidelines Creates Grave Risk of Disrupting the Entire System.

If the Congress were to adopt a system of topless guidelines, it would run the risk of disrupting the entire federal criminal justice system. Observers of the current system, including the Justice Department, apparently all agree that the constitutional viability of the topless guidelines scheme hinges on the continuing validity of *Harris v. United States*.[39] In that 5-4 decision from 2002, the Supreme Court agreed that judges rather than juries could undertake fact-finding in connection with mandatory minimum sentences. Since then, of course, the Court has handed down its opinions in *Blakely* and *Booker*. These decisions affirm the importance of juries in criminal sentencing in ways that were not fully appreciated before.

In the wake of *Blakely* and *Booker*, serious questions have emerged about whether *Harris*'s doctrinal underpinnings have been so substantially eroded that it no longer remains good law. Many lower courts have pointedly noted this question, although they obviously remain bound to follow a Supreme Court decision until the Court itself says otherwise.[40] Legal

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[39] 536 U.S. 545 (2002).

[40] *See, e.g.*, *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence, but *Harris* has not been overruled. . . . We cannot question *Harris*' authority as binding precedent."); *United States v. Barragan-Sanchez*, 2006 WL 222823 at *2-3 (11th Cir. Jan. 30, 2006) ("The Supreme Court in *Booker* made no mention of *Harris*, nor has it overruled it since. Accordingly, while it is possible that *Booker*'s remedial scheme could implicate mandatory minimum sentences in the future, until the Supreme Court holds that mandatory minimums violate the Fifth and Sixth Amendments of the Constitution, we are obliged to continue following *Harris* as precedent."); *United States v. Lopez-Urbina*, 2005 WL 1940118 at *21 (5th Cir. Aug. 15, 2005) (unpublished opinion) ("We cannot hold that [cases like *Harris* have] been overruled absent express authority from the Supreme Court."); *United States v. Mackie*, 2005 WL 3263787 at *24 (2d Cir. 2005) (unpublished opinion) ("Regardless of the merits of this argument [that *Booker* undermines *Harris*], we must reject it. This court must adhere to Supreme Court precedent unless and until the Supreme Court itself overrules it."); *United States v. Malouf*, 377 F. Supp.2d 315, 326 (D. Mass. 2005) (stating that "the breadth of the holdings in *Booker* and

commentators, however, have not been as limited as courts in presenting their views on what the Supreme Court will do in the future. Many respected legal commentators have concluded that *Harris* probably does not survive the Court's decisions in *Blakely* and *Booker*.[41] As one example, it is noteworthy that Professor Frank Bowman (a former federal prosecutor and the first to opine about a topless scheme) has expressed his view that *Harris* is questionable because it creates "a strange asymmetry" in which jury fact-finding is required at the top of a guideline system but not at the bottom.[42] He concludes *Harris* "is in danger."[43]

In response to this issue, it might be argued that *Harris* is still "the law of the land" and that the Congress is entitled to rely upon it in drafting legislation. With respect, we believe that this point overlooks the equally salient fact that *Blakely* and *Booker*, too, are the law of the land. The ultimate question that the Supreme Court will have to decide, when squarely presented with

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Blakely have in fact overruled *Harris*").

[41] *See, e.g.*, Douglas A. Berman, *Tweaking* Booker: *Making Advisory Guidelines Work in the Federal System*, __ HOUS. L. REV. __ (forthcoming 2006) ("[T]he basic constitutionality of a topless guidelines system would necessarily be uncertain because it must rely upon the Supreme Court's *Harris* ruling . . . . [T]he enactment of a topless guideline system might well prompt the Court to make good on its threats to more directly police legislative definitions of crimes and applicable punishment."); Susan R. Klein, *Shifting Powers in the Federal Court: Symposium Issue: The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U.L. REV. 693, 740 (2005) ("Those who scoff at the notion of the Court overruling a constitutional decision [in *Harris*] only a few years old should stop and consider that such a decision would give federal judges, once again, primacy and discretion in sentencing."); Andrew Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 423 (2002) ("But if the Court is to remain true to the constitutional principles underlying *Apprendi*, it should eventually overrule . . . *Harris* . . . . "); Kevin R. Reitz, *Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 & n.54 (2005) ("*Harris* is a sizable hole in the constitutional Swiss cheese. . . .").

[42] Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL FORUM 149, 215.

[43] *Id.*

the question, is whether these two more recent precedents have so eroded the underpinnings of *Harris* that it is no longer good law (as many academic commentators believe).

The possibility that the Supreme Court will take a dim constitutional view of a topless guidelines scheme is enhanced by the very nature of the proposal. The scheme looks like a gimmick. It makes an end run around the Supreme Court's constitutional pronouncements that juries have an important role to play in criminal sentencings. It does this by restructuring the Guidelines so that they purportedly "recommend" the same high-end sentence of something like twenty years in prison for every federal crime from the most minor offenses to the most serious felonies. The absurdity of this open-ended recommendation is underscored by the fact that, if such a scheme were in place, the Justice Department would apparently direct its own prosecutors not to seek sentences at the high end of these very broad ranges. Unfortunately, however, the lack of meaningful tops on the Guidelines may exacerbate the problem of sentence disparity (and perhaps discourage some defendants from pleading guilty).

In the *Apprendi* decision that spawned *Booker*, the Supreme Court specifically warned legislatures against evading the constitutional protections of the Sixth Amendment by expansively extending the maximum range of all criminal sentences.[44] The topless guidelines scheme might well be the kind of legislative evasion that the Supreme Court had in mind.

In light of this uncertainty, rebuilding the entire federal criminal justice system around *Harris* is risky. Were the Supreme Court to determine that *Harris* did not survive *Blakely* and *Booker*, the topless guidelines plan would be rendered unconstitutional – creating another shock

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[44] *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000).

to a system that is still absorbing *Booker*'s effects. That shock would likely be far greater than that from *Booker*. The *Booker* remedial opinion was able to creatively preserve the federal sentencing system in a way that avoided the need to resentence most criminal defendants. But a topless guidelines scheme would likely either be constitutional or unconstitutional *in toto*. If unconstitutional, then every defendant sentenced under the scheme might have the opportunity to personally appear before the trial court for a resentencing.[45] Tens of thousands of criminal cases might be implicated in such a ruling. It is also not immediately clear how legislation could be written with any effective "fallback" or "severance" clauses to avert such a possibility. Retroactivity questions surrounding any rulings on these issues would be quite complex, with respect both to cases pending on direct appeal and on habeas. Moreover, during the time leading up to any Supreme Court ruling (a year or two, at least) extraordinary legal confusion and uncertainty could arise in the lower courts following the enactment of a constitutionally questionable structural change to the federal sentencing guidelines. These would truly be devastating consequences for a system that is just now becoming fully adjusted to *Booker*.

The case for waiting before making any dramatic changes in this area is reinforced by the Supreme Court's recent decision to grant certiorari in *Cunningham v. California*.[46] That case presents the issue of whether California's determinate sentencing scheme violates *Blakely* (the state predecessor to *Booker*). The defendant in *Cunningham* was convicted of one count of continuous sexual abuse of a minor. The statutory penalty for the crime was a sentence of either six, twelve, or sixteen years. Under California's penal code, when a statute specifies three

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[45] *See* FED. R. CRIM. P. 43(a)(3) (defendant's presence required at sentencing).
[46] 2006 WL 386377, No. 05-655 (U.S. Feb. 21, 2006).

possible sentence terms, the court must impose the middle of three possible sentences "unless there are circumstances in aggravation or mitigation of the crime." But California law requires the sentencing judge — not a jury — to determine whether aggravating or mitigating circumstances exist. On appeal, the California courts held that this determinate sentencing scheme does not violate *Blakely* or *Booker* because Cunningham's sixteen-year sentence was within the authorized range of punishment. *Cunningham* thus should clarify whether determinate sentencing schemes that specify more than one possible sentence violate the Constitution and thus provide further guidance for federal legislation in this area.

For all these reasons, for the Congress to move forward with topless guidelines, at least at this time, would be a giant gamble.

IV. Other Legislative Reforms.

A "go slow" approach for now would not imply that Congress could never do anything to improve the sentencing system after *Booker*. Some members of this Subcommittee may be interested in advancing legislation that would attempt to improve specific aspects of the current federal sentencing system. While only the Judicial Conference can speak for the judiciary, we on the Criminal Law Committee can express our willingness to review and discuss any legislation proposed by members of the Judiciary Committee and to pass along our views and recommendations to the Judicial Conference, which will determine the judiciary's official position on the legislation. In that regard, the Subcommittee may wish to examine and evaluate several areas that it might find worthy of further exploration. Again, our thoughts here must

necessarily be tentative, particularly since neither the Justice Department nor any member of this Committee has yet proposed – and the Criminal Law Committee and ultimately the Judicial Conference have not yet considered – specific "*Booker* fix" legislation. We simply indicate here some areas that might be possible starting points for discussion if legislation were to be pursued.

A. The Sentencing Commission Should Be Composed of No Less than Three Judges.

As one way of shoring up and improving the Guidelines system, the composition of the United States Sentencing Commission could be restored to the long-standing membership of "at least three" federal judges. A bit of history will demonstrate the usefulness of restoring the traditional approach.

When the Sentencing Commission was established "as an independent commission in the *judicial* branch of the United States,"[47] the Sentencing Reform Act of 1984 not surprisingly required that "[a]t least three" of the [seven voting] members shall be Federal judges."[48] This decision to require three judges on the Commission was a deliberate choice that was made by the legislative architects of the Sentencing Reform Act.[49] It also made sense to include judicial viewpoints within the Commission. Indeed, in *Mistretta v. United States*,[50] the 1989 case in

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[47] 28 U.S.C. § 991(a) (emphasis added).

[48] *Id.*

[49] *See* UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING, at http://www.ussc.gov/15_year/15year.htm. *See also* S. 1437, 95th Cong., 1st Sess. (1977) (proposing a sentencing commission whose members would be chosen entirely by the Judicial Conference of the United States).

[50] 488 U.S. 361 (1989).

which the Supreme Court upheld the constitutionality of the guidelines against a separation of powers challenge, Justice Blackmun characterized judges as "uniquely qualified on the subject of sentencing" when entering into the deliberations of the Commission.[51]

This was in place for nearly two decades from 1984 until 2003. So far as we are aware, there was no widespread criticism of this particular composition, which insured significant judicial representation on an important agency *within the Judicial Branch of government.*

Then, in 2003, the Sentencing Commission membership was suddenly changed by a provision in the "Feeney Amendment" – section 401 of the Prosecutorial Remedies and other Tools to end the Exploitation of Children Today (PROTECT) Act.[52] We agree that legislation altering the membership of the Sentencing Commission is something that Congress could reasonably evaluate. But what was particularly surprising was the hasty way in which Congress considered this significant change. On the House side, total debate on all the various provisions of the Amendment was restricted to 20 minutes.[53] On the Senate side, no hearings were held on the proposal, despite repeated and urgent requests from a number of Senators.[54] Perhaps even more surprising, Congress did not even consult with the Judiciary. Chief Justice Rehnquist articulated this concern about the process:

> The Judicial Conference believes that this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously

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[51] *Id.* at 404.

[52] Pub. L. No. 108-21, § 401 (2003).

[53] *See* H.R. REP. No. 48

[54] *See, e.g.,* 149 CONG. REC. S5113-01, S5116 (daily ed. April 10, 2003) (remarks of Sen. Kennedy) (his request for a hearing was denied); *id.* at S5133 ("This legislation overturns a unanimous Supreme Court decision, without a single day, hour, or minute of hearings.")

> impair the ability of courts to impose just and responsible sentences. Before such legislation is enacted there should, at least, be a thorough and dispassionate inquiry into the consequences of such action.[55]

Later, the Judicial Conference requested repeal of the measure, explaining: "Because the Judiciary and the U.S. Sentencing Commission were not consulted prior to enactment, the [Judicial] Conference [has] voted to support repeal of the . . . provisions of the . . . PROTECT Act limiting the number of judges who may be members."[56] In short, it seems hard to disagree with the assessment of one observer that the Feeney Amendment "was forced through the Congress with virtually no debate and without meaningful input."[57]

While the Feeney Amendment addressed many topics, the anti-judges provision was heavily criticized from the start[58] and it was never entirely clear who proposed the idea and why. To our knowledge, no one has subsequently justified in any detail the decision to reduce the number of judges. The provision to change the number of judges from "at least three" to "no more than three" was not even mentioned in the explanatory section of the Conference Committee report provided to members of Congress before they voted on the bill.[59] The only rationale we have been able to locate in the legislative record is a second-hand statement attributed to one member of Congress that "We don't want to have the Commission packed with

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[55] Letter of Chief Justice Rehnquist, *reprinted in* 149 CONG. REC. at S5120.

[56] *See* News Release, Administrative Office of the United States Courts, Sept. 23, 2003 *available at* http://www.uscourts.gov/Press_Releases/jc903.pdf.

[57] 50 CONG. REC. S8572-01, S8573 (daily ed. July 21, 2004) (remarks of Sen. Leahy).

[58] *See generally* Laurie Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J. (Aug. 6, 2003), *available at* 2003 WL-WSJ 3976244.

[59] *See* H. R. CONF REP. 108-066, *reprinted at* 149 CONG. REC. H2950, 2965 (daily ed. April 9, 2003).

Federal judges that have a genetic predisposition to hate any kind of sentencing guidelines."[60] Of course, many federal judges are, if anything, predisposed to favor the Sentencing Guidelines.[61] It may be worth recalling the originator of the very idea of federal sentencing guidelines was Judge Marvin E. Frankel of the United States District Court for the Southern District of New York.[62] In the years since the creation of the Sentencing Commission, many judges have served with distinction on the body with no evident predisposition to undercut the Commission's Guidelines.

Perhaps the reason for the Feeney Amendment change was some sort of symbolic attack on judges. But if so, this symbolism has been purchased at the price of creating a very real basis for defendants to attack the Guidelines on separation of powers grounds. As noted above, the presence of at least three judges on the Sentencing Commission may have been one reason why the Supreme Court upheld the constitutionality of the Sentencing Commission in *Mistretta*. Suggesting that this change in the composition of the Commission is serious enough to raise *Mistretta* concerns, Federal District Judge Owen M. Panner has described the situation in this way:

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[60] 149 Cong. Rec. at S5146 (Apr. 10, 2003) (statement of Sen. Leahy attributing quotation to Rep. Sessenbrenner).

[61] *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (Fall 1988); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (Spring 1990); William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63 (Winter 1993); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

[62] *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

> We are thus left with a strange creature that is nominally lodged within the Judicial Branch, and purports to be performing duties of a judicial nature, *yet need contain no judges*, does not answer to anyone in the Judicial Branch, and into which the Judicial Branch is assured no input, whether substantively or in selecting the members of the Commission.[63]

Judge Panner's conclusion led him to strike down the federal sentencing guidelines as violating the separation of powers doctrine and as therefore unconstitutional. It is noteworthy that *Detwiler* involves a serious sex offender – thus, the PROTECT Act may have, unwittingly, given ammunition to sex offenders to challenge their sentences. Judge Panner's remedy was to treat the guidelines as purely advisory.[64] Because the Supreme Court came to an equivalent conclusion in *United States v. Booker*,[65] Judge Panner's remedy was effectively mooted in that particular case. Yet his concerns and his reasoning remain a serious concern. Defense attorneys and academics have suggested that the Guidelines remain vulnerable to attack on precisely this ground.[66] As Harvard Law Professor Carol Steiker has written, "[as a result of the Feeney Amendment] the President's relationship to the Commission and its members is functionally no different than his relationship to any other independent agency within the Executive Branch."[67]

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[63] *See United States v. Detwiler*, 338 F. Supp. 2d 1166, 1173 (D. Or. 2004) (emphasis added).

[64] *Id.* at 1182.

[65] 543 U.S. 220 (2005).

[66] *See, e.g.*, Jaime Escuder, *Congressional Lack of Discretion: Why the Feeney Amendment is Unwise (and Perhaps Unconstitutional)*, 16 FED. SENTENCING REPT'R 276, 276-77 (April 2004); Memorandum of Amicus Curiae, Professor Carol Steiker, In Support of Defendant, *United States v. Dansby*, Criminal No. 03-10066-DPW (D. Mass. 2004).

[67] Memorandum of Amicus Curiae, Professor Carol Steiker, In Support of Defendant, *United States v. Dansby*, Criminal No. 03-10066-DPW (D. Mass. 2004) at 7.

And legal commentator Jaime Escuder has noted, "This new institutional arrangement is problematic because, by edging judges out of the sentencing process, the Feeney Amendment removes a critical check on the Executive's ability to design a sentencing structure that is biased in its favor. Thus, guidelines produced by a Commission dominated by the Executive would be constitutionally suspect as they would be tainted by the partiality of the Executive Branch."[68]

Even if there is not strictly speaking a constitutional requirement for restoring the judicial composition of the Sentencing Commission, good prudential reasons for doing so remain. Judges have considerable expertise on sentencing issues, as they regularly sentence defendants or review sentencing appeals in the course of their daily work. Indeed, it is hard to think of any group that, as a class, has more expertise in the area. For all these reasons, the Conference continues to urge this Subcommittee to pass legislation restoring membership of the Sentencing Commission to its traditional composition of "no less than" three judges.

B. Encourage the Sentencing Commission to Create a Standard Methodology for Determining Sentences.

The Criminal Law Committee would be interested in discussing whether ways can be found to have the Sentencing Commission promulgate a standardized methodology that district courts could use when determining an appropriate sentence. A standard methodology might be one way of minimizing unwarranted sentencing disparities.

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[68] Jaime Escuder, *Congressional Lack of Discretion: Why the Feeney Amendment is Unwise (and Perhaps Unconstitutional)*, 16 FED. SENTENCING REPT'R 276, 276-77 (April 2004).

The idea that we will be discussing and evaluating rests on clarifying whether judges should employ a three-step or two-step process in determining an appropriate sentence. The Sentencing Commission has generally recommended that sentencing judges employ a three-step method in determining an appropriate sentence: (1) determine the specific Guideline applicable, including resolving any disputed and relevant Guidelines issues; (2) determine whether any departures under the Guidelines are proper; and only then (3) determine whether some sort of "variance"[69] from the Guidelines is appropriate in light of all the sentencing factors spelled out in 18 U.S.C. § 3553(a).[70] Our understanding is that many district judges around the country have been following this general approach.

It does appear, however, that there may be a split in approach developing on this methodological issue. In *United States v. Arnaout*,[71] the Seventh Circuit held that "the concept of 'departures' has been rendered obsolete in the post-*Booker* world."[72] The Court in *Arnaout* stated, as it did in earlier in *United States v. Johnson*,[73] that "what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory."[74] In the Seventh Circuit, then, it appears that judges follow a two-step

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[69] *See United States v. Wilson*, 355 F.Supp.2d 1269, 1272 (D. Utah 2005) (explaining "departure" vs. "variance" language).

[70] See *House Judiciary Comm: Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm.*, 109th Cong., 1st Sess. 14-15 (2005) (statement of Hon. Ricardo Hinojosa).

[71] 431 F.3d 994 (7th Cir. 2005).

[72] *Id.* at 1003.

[73] 427 F.3d 423, 425 (7th Cir. 2005).

[74] *Id.*

process to determine an appropriate sentence – that is, first determining the guideline and then determining whether to reduce the sentence for any appropriate reason (based on a departure or otherwise).

The Fourth Circuit has specifically disagreed with the Seventh Circuit.[75] In an opinion authored by Chief Judge William Wilkins (a former chair of the Sentencing Commission), the Circuit held: "We believe, however, that so-called 'traditional departures' – i.e., those made pursuant to specific guideline provisions or case law – remain an important part of sentencing even after *Booker*."[76] The Fourth Circuit noted that "the continuing validity of departures in post-*Booker* federal sentencing proceedings has been a subject of dispute among the circuits."[77] It explained that, in contrast to the Seventh Circuit, the Sixth Circuit had stated that consideration of a departure is part of calculating the correct guideline range[78] and that the Eighth Circuit had held that district courts must decide whether a "traditional departure" is appropriate after calculating the guideline range and before deciding whether to impose a variance sentence.[79]

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[75] Academic commentators have disagreed as well. *See, e.g.*, http://sentencing.typepad.com/sentencing_law_and_policy/2005/12/booker_discussi.html (Prof. Douglas Berman opines that "[g]iven that the U.S. Sentencing Commission has stressed that departures are not obsolete after *Booker*, and that certain kinds of departures are expressly encouraged and discouraged by the guidelines, I find the Seventh Circuit's obsolescence assertion curious and in tension with its view that a guideline sentence is presumptively reasonable.").

[76] *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir. 2006).

[77] *Id.*

[78] *Id. (citing United States v. McBride*, 434 F.3d 470, 2006 WL 89159, at *4 (6th Cir. Jan. 17, 2006)).

[79] *Id. (citing United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006)).

Our limited point here is not to criticize any of the competing approaches to current law carefully adopted by the various circuits. Instead, we simply raise for this Subcommittee the idea that, for the future, it may be desirable to develop a standardized approach to the procedural issue of how judges should go about determining sentences. One possible way of handling the matter would be to direct the Sentencing Commission to promulgate policy statements or other appropriate guidance in the Guidelines manual for how to deal with the issue. But the more basic point is that it may be a desirable step towards avoiding unwarranted sentencing disparity to have all courts following the same methodology in determining appropriate sentences.

C. Review the Consistency of Substantial Assistance Sentence Reductions Across the Country.

It may be appropriate to consider ways in which the handling of sentence reductions for "substantial assistance" to government authorities could be improved. However, that any consideration of substantial assistance could appropriately scrutinize not only judicial discretion but also *prosecutorial* discretion.

The Justice Department has been concerned about cases in which trial judges have departed downward for "substantial assistance" to government authorities, even when the government had not made such a motion. As is well known, the law before *Booker* was that a court could not depart downward on this ground (also known as § 5K1.1 departure) without a government motion.[80] After *Booker*, while courts cannot use a "departure" for substantial

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[80] *See, e.g., Wade v. United States*, 504 U.S. 181 (1992) (court could only grant assistance departure if prosecutor's refusal was based on a constitutional motive); *United States*

assistance as a basis for lowering a sentence,[81] it appears that they can use a "variance"[82] to lower a sentence without a government motion.

From a national perspective, the number of non-government-sanctioned substantial assistance departures does not appear to be significant. Data released by the United States Sentencing Commission this week suggested that such a departure apparently occurred in perhaps 258 cases over roughly the last year. Given that there were more than 65,000 sentencings during the same period of time, this means that the issue arose in only about 0.4% of all cases (roughly 1 out of every 233 cases). Moreover, the Commission's data may overstate the true extent of this issue. The Commission was able to identify 258 cases in which a substantial assistance reduction was given and the Commission was unable to *confirm* a government motion. It is entirely possible that at least some of these cases involved situations where the government made a motion for a downward adjustment (or, perhaps, acquiesced in the adjustment) but that the Commission was merely unable to confirm the government's actions based on the records available – a possibility that the Commission itself acknowledges.[83] We hope to be able to review case files to determine whether this hypothesis is correct in the near future. Finally, and most significantly, of the 258 cases, it appears that the vast bulk involve situations where other good grounds existed for a downward reduction in sentence. The Commission reports that

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v. Abuhouran, 161 F.3d 206 (3rd Cir. 1998) (rejecting argument that court could reduce sentence for substantial assistance in the absence of a prosecutor's motion).

[81] *See, e.g., United States v. Vasquez*, 433 F.3d 666, 670 (8th Cir. 2006).

[82] *See United States v. Wilson*, 355 F.Supp.2d 1269, 1272 (D. Utah 2005) (explaining "departure" vs. "variance" language).

[83] *See* BOOKER IMPACT REPORT, *supra* note 4, at 113.

"[o]nly 28 of the 258 cases cite one of these reasons [i.e., substantial assistance] as the *only* reason for the non-government-sponsored, below-range sentence."[84]

Moreover, given the tiny number of cases involving this issue, any inappropriate actions by district court judges should be readily correctable by government appeal. In that connection, it is interesting to learn that there are virtually no published post-*Booker* appeals on this subject. Indeed, a preliminary review of appellate court decisions on this issue was unable to produce a single published decision rejecting a government appeal of a district court's substantial assistance reduction without a government motion. If such reductions are inappropriate and creating serious problems for the government, one would expect to see regular appellate court reversals of district court sentences. Perhaps such appeals are currently in "the pipeline." If not, the government's failure to file appeals in this area may be a simple continuation of the problem identified by the PROTECT Act, where Congress manifested its desire for the Justice Department to file more appeals of downward departures.[85] Perhaps any problem here can be solved not by changing the legal framework, but simply by the government availing itself of the existing appellate process. There is every reason to believe that the appellate courts are prepared and effective at dealing with any real, case-by-case post-*Booker* problems.

To be fair to the Justice Department, their concern about substantial assistance reductions without a government motion is understandable. The Justice Department might reasonably claim

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[84] *Id.* (emphasis added).

[85] Section 401(*l*) of the PROTECT Act required the Attorney General to submit a report "which state[d] in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act . . . to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse [sentencing] decisions" as downward departures."

superior institutional capacity to evaluate assistance from cooperators. And it is plausible that evidence might show that some defendants have declined to provide full cooperation to the government because they thought they could persuade a judge to nonetheless give them a sentence reduction. It would be worthwhile to examine any evidence the Justice Department has on this point and, if a real problem exists, work with the Department to discuss appropriate corrective legislation.

Nonetheless, even if there is a modest problem with defendants who decide to take their chances with a judge, today the far more widespread problem with substantial assistance motions is the radical inconsistency with how government prosecutors handle these motions from district-to-district.[86] This point was most powerfully raised in the Sentencing Commission's 1998 report – "Substantial Assistance: an Empirical Yardstick Gauging Equity in Current Federal Policy and Practice."[87] That report reached these disconcerting conclusions:

> First, this analysis uncovered that the definition of "substantial assistance" was not being consistently applied across the federal districts. Not only were some districts considering cooperation that was not being considered by other districts, but the components of a given behavior that classified it as "substantial" were unclear.
>
> Second, while the U.S. attorney offices are required to record the reason for making a substantial assistance motion, there is no provision that this

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[86] *See generally* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1344 (1993)

[87] U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE (1998). This report is available at this link: http://www.ussc.gov/publicat/5kreport.pdf.

> information be made available for review. It is exactly such a lack of review, inherent in preguideline judicial discretion, that led to charges of unwarranted sentencing disparity and passage of the SRA. . . .
>
> Third, the evidence consistently indicated that factors that were associated with either the making of a § 5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity. Expected factors (e.g., type of cooperation, benefit of cooperation, defendant culpability or function, relevant conduct, offense type) generally were found to be inadequate in explaining § 5K1.1 departures. Even more worrisome, legally irrelevant factors (e.g., gender, race, ethnicity, citizenship) were found to be statistically significant in explaining §5K1.1 departures. . . .[88]

Since this report was prepared in 1998, there is little reason for believing that substantial assistance practices have improved. Former Attorney General Ashcroft's memo addressing charging decisions of prosecutors provides no guidelines on § 5K1.1 motions, except to say that it is "not appropriate to utilize substantial assistance motions as a case management tool to secure plea agreements and avoid trials."[89] Moreover, an analysis of disparities in white-collar crime cases published in 2003 in *The Pepperdine Law Review* found widespread disparity:

> Downward departures for substantial assistance under Section 5K1.1 are a relatively significant source of white-collar sentencing disparity. . . . An analysis

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[88] *Id.* at 20-21.

[89] Memo Regarding Policy on Charging of Criminal Defendants, from John Ashcroft, Attorney General, to All Federal Prosecutors (September 22, 2003). This memorandum is available at this link: http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

of substantial assistance departures at the circuit and district level indicates the existence of disparity throughout the country.[90]

The most recent statistics from the Sentencing Commission confirm that government practices on substantial assistance motions continue to vary widely from district to district after *Booker*. To pick a few illustrations of geographically-adjacent jurisdictions with widely varying percentages of substantial assistance motions by the government:[91]

New Hampshire 27.6%	vs.	Massachusetts 9.9%
New Jersey 30.9%	vs.	Delaware 5.6%
Middle District of Pennsylvania 35.7%	vs.	Western District of Pennsylvania 11.9%
Eastern District of North Carolina 34.4%	vs.	Middle District of North Carolina 12.0%
Western District of Virginia 23.8%	vs.	Eastern District of Virginia 6.4%
Northern District of Mississippi 16.1%	vs.	Southern District of Mississippi 9.3%
Eastern District of Michigan 27.4%	vs.	Western District of Michigan 15.4%
Central District of Illinois 20.4%	vs.	Southern District of Illinois 4.2%
Eastern District of Wisconsin 13.9%	vs.	Western District of Wisconsin 3.8%
North Dakota 17.3%	vs.	South Dakota 5.0%
Eastern District of California 15.1%	vs.	Central District of California 4.8%
Middle District of Florida 22.9%	vs.	Southern District of Florida 9.4%
Idaho 30.5%	vs.	Utah 8.5%

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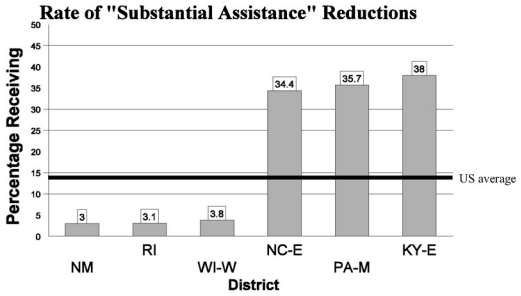
[90] Comment, Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 516 (2003).

[91] U.S. SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE CASES: DEGREE OF DEPARTURE BY SENTENCING DISTRICT (data as of February 22, 2006) (attached to this testimony as Appendix A); *see also BOOKER* IMPACT REPORT, *supra* note 4, at D-20 to 21 (reporting widely varying percentages of government-sponsored below-guidelines sentences).

To be sure, some part of the variations in these district may stem from legitimate differences in the kinds of cases being handled. But it is hard to understand, for example, why the number of government-sponsored motions for substantial assistance in my own District of Utah is *four times* lower than in the adjacent (and apparently quite comparable) District of Idaho.

The same pattern of disparity recurs if one looks not at all government-sponsored below-guidelines sentences, but government-sponsored substantial assistance sentences. Compared to a national average of 14.4% of cases in which a substantial assistance sentence is imposed, as shown in the following chart regional variations abound.



Source: United States Sentencing Commission Data
Prepared by: Administrative Office of the U.S. Courts

These data suggest tremendous disparity and unfairness in the way the Justice Department chooses to file its motions for substantial assistance reductions – indeed, the very kind of inter-district disparity that spawned the Sentencing Guidelines in the first place. Moreover, the number of defendants treated unfairly due to Justice Department disparity dwarfs the 258 cases

mentioned above in which judges may have initiated a variance for substantial assistance. Literally thousands and thousands of defendants are being treated unfairly if, as the data strongly suggests, prosecutors in different districts are using different standards for approving substantial assistance motions.[92]

In light of all these facts, the Criminal Law Committee would be interested in having a broad discussion with the Justice Department and this Subcommittee about ways in which the handling of substantial assistance issues might be improved – by both judges *and* prosecutors.

D. The Appellate Process.

Some members of this Committee may be interested in changing the standard of appellate review regarding sentencing decisions. Reasonable minds can differ on the subject of whether any change is needed, but if this Subcommittee decides to consider changes, the Criminal Law Committee would certainly be willing to discuss this subject.

The remedial opinion in *Booker* crafted the current "reasonableness" standard by excising other, unconstitutional provisions in the Sentencing Reform Act. As Justice Breyer explained, the Court was forced to "infer appropriate review standards from related statutory language, the structure of the statute, and the sound administration of justice."[93]

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[92] It also possible that similar disparity problems lurk in the way in which government prosecutors are handling "fast track" programs for illegal re-entry cases. *See generally* Comment, Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Polices Along the Southwest Border are Undermining the Sentenicng Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827; *United States v. Perez-Chavez*, No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252 (D.Utah May 16, 2005).

[93] *United States v. Booker*, 543 U.S. 220, 258 (2005) (remedial majority opinion).

The appellate court decisions on reasonableness have only recently begun to appear. Indeed, not every circuit has spoken on this subject. As the Sentencing Commission observed in its report on *Booker* released this week:

> [T]he evolution of appellate jurisprudence occurs gradually rather than overnight. Thus, issues known to be of interest to the Commission and the rest of the criminal justice community have not been answered in all circuits.[94]

And, of course, the Supreme Court has yet to weigh in on the subject of precisely what post-*Booker* appellate review is. In light of these facts, it may well be premature to reach any firm conclusions about the *post-Booker* standard of appellate review. The Justice Department is perfectly situated to help bring clarity to this area, by seeking certiorari from the Supreme Court in an appropriate case regarding appellate review standards. A Supreme Court decision on the subject would be an ideal way to both clarify what the current standard is and what room may constitutionally exist for corrective legislation.

If nonetheless the Subcommittee believes that some immediate change is required to the appellate review standard, the Criminal Law Committee would be glad to discuss the matter with this Subcommittee (and to refer proposed legislation to the Judicial Conference for its authoritative views on behalf of the Judiciary). Changing the appellate standard, however, is a complex enterprise. Just as "topless guidelines" may depend upon the continued viability of the *Harris* decision, so changing the appellate standard could also have constitutional implications under *Booker* itself. Moreover, members of this Subcommittee ought to be aware of two

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[94] *BOOKER* IMPACT STATEMENT, *supra*, at 35.

competing concerns when crafting such legislation: the need to recognize that trial court judges have primary, initial responsibility for imposing sentences and the need to allow appellate court panels sufficient power to insure that district judges have applied the law properly and exercised any discretion reasonably.

On the one hand, trial court judges must have primary, initial responsibility for determining criminal sentences. Judging generally, and sentencing particularly, should never become an act of bureaucratic administration. Sentencing is a quintessentially human event – a sentencing judge literally looks a defendant in the eyes when imposing a sentence. There would be a very high cost to our system of justice if responsibility for sentencing were simply shuttled off to appellate judges to be done on the basis of paper pleadings. Moreover, many sentencing decisions revolve around factual questions: Was the defendant a major player or a minor player in the criminal organization? Was a firearm used to commit the crime? Is the defendant truly remorseful for his actions? What were the physical, emotional, and financial consequences of the crime to the victims? These kinds of factual determinations are traditionally the province of the trial court, not the appellate court.

Even the Guidelines themselves recognize the fundamental fact that the most appropriate sentence cannot be calculated with mathematical precision. Each guideline range varies by 25% from the top to the bottom. Reasonable judges may, of course, differ within that range. In essence, sentencing involves the exercise of some judgment and federal district judges are in the best position to make those judgments initially, subject to appellate review to make sure they have acted properly.

On the other hand, of course trial court judges are imperfect and, on occasion, can make mistakes or idiosyncratic sentencing decisions. Sentencing decisions (no less than the manifold other decisions made by trial courts) should be subject to appropriate appellate review. Appellate review of sentences may play an important role in reducing disparities that could otherwise develop if each individual district court judge was given an unbridled, final say over what sentence should be imposed. It is no secret that different judges sometimes have different sentencing philosophies. Indeed, it was precisely this concern about disparate trial court decisions that lead Congress to pass the Sentencing Reform Act in 1984 and to create the sentencing guideline system.

The history of appellate review of sentences reflects these twin concerns. Before the Sentencing Reform Act of 1984, appellate court review of sentences was very limited. As the Supreme Court later described it, appellate review was virtually non-existent:

> For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long . . . . This led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge "sees more and senses more" than the appellate court; thus, the judge enjoyed the "superiority of his nether position," for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal.[95]

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[95] *Id.* at 363–64; *Mistretta v. United States*, 488 U.S. 361 (1989).

In 1984, Congress passed the Sentencing Reform Act. This Act "altered th[e] scheme" of virtually unreviewable sentences "in favor of a limited appellate jurisdiction to review federal sentences."[96] In particular, the Act authorized appellate review in four instances. Appellate courts were to determine whether the sentence: (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) was outside the applicable guideline range without adequate district court explanation or for impermissible reasons; or (4) was imposed for an offense for which there was no applicable sentencing guideline and was plainly unreasonable.[97]

In 1996, the U.S. Supreme Court said in *Koon v. United States*[98] that while these provisions manifested Congress's "concern[] about sentencing disparities," the Act did not, "by establishing limited appellate review, . . . vest in appellate courts wide-ranging authority over district court sentencing decisions."[99] *Koon* also quoted with approval the Supreme Court's 1992 decision in *Williams v. United States*:

> Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. . . . The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.[100]

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[96]*Koon v. United States*, 518 U.S. 81, 96 (1996).
[97]*See* 18 U.S.C. § 3742(e).
[98]518 U.S. 81 (1996).
[99]*Id.* at 97.
[100]*Id.* (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)) (quotation marks and citations omitted).

The Supreme Court in *Koon* thus held that a district court's decision to depart from the guidelines should be reviewed for abuse of discretion.[101]

The PROTECT Act of 2003 modified the *Koon* decision by requiring courts of appeals to "review de novo the district court's application of the guidelines to the facts" when reviewing certain sentences imposed outside of the applicable guideline range, a change the Conference has opposed.[102]

Then came the *Booker* decision in 2005. It excised as unconstitutional the provision in the Sentencing Reform Act that "sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range."[103] In its place, the Court in *Booker* read the Sentencing Reform Act "as implying th[e] appellate review standard [of reasonableness] — a standard," it said, that was "consistent with appellate sentencing practice during the last two decades."[104] The result is that today appellate courts review trial court sentencing decisions for "reasonableness" by examining "the factors set forth in 18 U.S.C. § 3553(a)" and "the now-advisory Guidelines."[105]

Given this history and the twin concerns of the need to individualize sentences and provide appellate review to protect against unwarranted disparities, crafting appropriate standards of appellate review is a difficult balancing act. We would hope that this Subcommittee would

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[101] *Id.* at 99–100.
[102] *See* 18 U.S.C. § 3742(e).
[103] 543 U.S. 220, 259 (2005) (citing 18 U.S.C. § 3742(e)).
[104] *Id.* at 261–62.
[105] *United States v. Kristl*, 437 F.3d 1050, 2006 WL 367848 (10th Cir. 2006).

consult with the Conference and with others interested in the subject before legislating in this area.

E. Expand Judicial Authority to Order Supervised Release.

The Criminal Law Committee would be interested in discussing and evaluating ways of expanding a judge's ability to monitor dangerous defendants by extending permissible terms of supervised release.

Current law imposes sharp limits on the length of time federal judges can supervise dangerous offenders (including some sex offenders) after they are released from prison. For example, under current law, a judge is generally only authorized to impose a five-year term of supervised release for conviction on a Class A or B felony and a three-year term of supervised release for a Class C or D felony.[106] It is noteworthy that, despite research suggesting that sex offenders are four times more likely than other violent offenders to recidivate,[107] these limits apply even in some sex offense cases. Although federal law permits a judge to impose a term of supervised release for any term of years or life in some cases, the judge may only order such lengthy terms of supervision in cases involving specifically enumerated offenses.[108]

Even when an offender is charged with multiple counts – each of which carries a term of supervised release – it is generally believed that the judge may not "stack" terms of supervised

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[106] *See* 18 U.S.C. § 3583(b) (noting time limits associated with Class A, B, C, D, and E felonies).

[107] *See* Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* at 1, available at: http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[108] *See* 18 U.S.C. § 3583(k) (identifying specified crimes that allow supervised release terms in excess of those otherwise authorized by § 3583(b)).

release (to be executed consecutively), but must impose them concurrently. A number of circuit courts have interpreted the language of 18 U.S.C. § 3624(e) as precluding the stacking of terms of supervised release.[109]

In some situations, the existing narrow limits on supervised release can restrict a judge from keeping supervision over a potential dangerous defendant after release even where additional supervision might be appropriate. For example, in *United States v. Philip Abraham Ochoa*,[110] I recently sentenced a previously-convicted felon and a documented Nortenos gang member. The defendant pleaded guilty to possession of a loaded sawed-off shotgun that he had been holding while driving in Salt Lake City traffic. He had previously been convicted of multiple felony counts over fifteen years, including Battery, False Imprisonment, Attempted Assault, Attempted Receipt of a Stolen Vehicle, Forgery, Assault, Theft, and Burglary, resulting in 19 criminal history points. With a resultant criminal history category of VI (the highest possible), and a base offense level of 17, the Guidelines recommended a range of 51-63 months in prison. Additionally, the Statutory Provisions for a supervised release term only allowed for a period of less than three years.[111] Given the defendant's criminal history, and especially given his gang membership and dangerous criminal activities, I believe that a three-year term of supervised release was much too short. Yet current law gave me no choice on the matter.

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[109] *See United States v. Danser*, 270 F.3d 451, 454 (7th Cir. 2001); *United States v. Alvarado*, 201 F.3d 379, 382 (5th Cir. 2000); *United States v. Bailey*, 76 F.3d 320, 323-24 (10th Cir. 1996); *United States v. Sanders*, 67 F.3d 855, 856 (9th Cir. 1995).

[110] Case No. 2:05-CR-594 PGC (D. Ut. Feb. 28, 2006).

[111] *See* 18 U.S.C. § 3583(b)(2).

Also worth discussing is whether an amendment to 18 U.S.C. § 3583(b), permitting judges to impose longer terms of supervised release in appropriate cases (those involving particularly dangerous defendants or aggravated crimes) would allow judges to better tailor their sentencings to the specific circumstances of the case and better protect the public from depredations by repeat offenders. For example, judges might be given the authority, if they thought it appropriate in light of all circumstances, to impose a term of supervised release twice as long as that otherwise authorized by statute in situations involving repeat criminal offenders or particularly dangerous crimes (such as sex offenses).

Another area to explore is whether longer terms of supervised release in situations where criminals have substantial restitution to pay to their victims. There may be cases in which it is appropriate to extend a term of supervised release so that the court can continue to insure that restitution is being paid. Of course, direct judicial ability to enforce a restitution order terminates when supervision terminates.

As part of the ongoing cost containment efforts endorsed by the Judicial Conference,[112] the judiciary has pursued a program that allows judges to bring an early termination to terms of supervised release when offenders have demonstrated that they no longer require supervision.[113] The concept of authorizing expanded supervised release authority to judges does not contradict this policy, but augments it. Instead of terminating all offenders' terms of supervision on an

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[112] *See* JCUS-SEP 04, pp. 6-7.

[113] *See* John Hughes, Memorandum to All Chief Probation Officers: New Criteria for Assessing Early Termination of Supervision (Oct. 30, 2002), available at: http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2002_Memos/New_Criteria_for_Assessing_Early_Termination_of_Supervision.html.

early basis (thereby compromising public safety), and instead of doubling the length of all offenders' terms (unnecessarily driving up costs), the model that the Criminal Law Committee is interested in discussing and evaluating may permit judges to better use their discretion to respond to the specifics of the case.

Supervised release is costly with meaningful budgetary effects. It costs an estimated $3,452 annually to supervise each of the offenders under federal supervision.[114] Expanding supervision terms would therefore likely require increased expenditures for probation officers. Nonetheless, given that it costs $23,205 annually to incarcerate each prisoner in Bureau of Prisons custody,[115] it is possible that this would be taxpayer money well spent, particularly when compared to the cost of prison – and the cost to crime victims if an unsupervised offender commits a new crime.

F. Give Judges Authority to Prevent Profiteering by Criminals

The Criminal Law Committee would like to explore and evaluate ways of giving judges sufficient ability insure that criminals do not profit from their crimes. The current federal law on the subject may be unconstitutional, yet neither the Justice Department nor the Congress has taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes. We believe that corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering.

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[114] *See* John Hughes, Memorandum to All Chief Probation Officers: Cost of Incarceration and Supervision (Apr. 15, 2005), available at: http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2005_Archive/PPS41505.html.

[115] *Id.*

By way of background, the federal criminal code, like the codes of various states, contains a provision concerning forfeiture of profits of crime. This provision, found in 18 U.S.C. § 3681, allows federal prosecutors to seek a special order of forfeiture whenever a violent federal offender will receive proceeds related to the crime. Congress adopted this statute in 1984[116] and modeled it after a New York statute popularly known as the "Son of Sam" law.[117] In 1977, New York passed its law in response to the fact that mass murderer David Berkowitz received a $250,000 book deal for recounting his terrible crimes.

In 1991, the United States Supreme Court found that the New York Son of Sam law violated the First Amendment. In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*,[118] the Court explained that the New York law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[119] The New York statute that was struck down covered reenactments or depictions of crime by way of "a movie, book, magazine article, tape recording, phonograph record, radio, or television presentation, [or] live entertainment of any kind."[120]

The federal statute is widely regarded as almost certainly unconstitutional, as it contains language that is almost identical to the problematic language in the old New York statute. In particular, the federal statute targets for forfeiture depictions of a crime in "a movie, book,

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[116] Pub. L. 98-473, Oct. 12, 1984, 98 Stat. 2175.
[117] N.Y.Exec.Law § 632-a (McKinney 1982 and Supp.1991).
[118] 502 U.S. 105 (1991).
[119] *Id.* at 116.
[120] N.Y. Exec. Law § 632-a(1) (McKinney 1982), *reprinted in* 502 U.S. at 109.

newspaper, magazine, radio or television production, or live entertainment of any kind."[121] Thus, it can easily be argued by criminal defendants that the statute contains the same flaw – the targeting of protected First Amendment activity – that the Supreme Court found unconstitutional in the New York statute. Indeed, the Supreme Court in *Simon & Schuster* cited the federal statute as similar to that of New York's.[122] Moreover, current guidance from the Justice Department to its line prosecutors is that this law cannot be used.[123]

Unfortunately, neither the Department of Justice nor Congress have taken steps to revise the defective federal anti-profiteering statute in the wake of *Simon & Schuster.* Fortunately, there appears to be a relatively straightforward and constitutional solution available to Congress. As the Massachusetts Supreme Court has recognized in analyzing *Simon & Schuster*, nothing in the First Amendment forbids a judge from ordering in an appropriate case, as a condition of a sentence (including supervised release), that the defendant not profit from his crime. As *Commonwealth v. Powers*[124] explains, such conditions can be legitimate exercises of court power to insure rehabilitation of offenders and to prevent an affront to crime victims. These conditions do not tread on First Amendment rights, because they do not forbid a criminal from discussing or writing about a crime. Instead, they simply forbid any form of "profiteering."

It is worth discussing whether judges should have the power to order, in an appropriate case, that a term of supervised release be extended beyond what would otherwise be allowed for the sole purpose of insuring that a criminal not profit from his crime. In a notorious case, upon

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[121] 18 U.S.C. § 3681(a).
[122] *See* 502 U.S. at 115.
[123] *See* DOJ Criminal Resource Manual 1105.
[124] 650 N.E.2d 87 (Mass. 1995).

appropriate findings, a judge might be empowered to impose a term of supervised release of life with the single extended condition that a criminal not profit from his crime. It may also be possible to simply revise the federal anti-profiteering statute so that it complies with the Constitution and broadly forfeits all profits from a crime, not just profits from First Amendment activity. It may also be possible to redraft the federal anti-profiteering law.[125] The Criminal Law Committee would be happy to discuss these areas further.

G. Give Judges Greater Ability to Award Proper Restitution.

Also worth examining is whether judges should be given greater statutory authority to order convicted criminals to pay restitution to their victims. Current federal law authorizes judges to order restitution only in certain narrow categories, such as to compensate for damage to property or medical expenses. These narrow categories have lead to considerable litigation about whether various restitution awards were properly authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that judges should have broad authority to order defendants to make restitution to restore victims to where they would have been had no crime been committed.

The Supreme Court has held that a district court's power to order restitution must be conferred by statute.[126] The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A –

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[125] I have offered my own tentative personal opinions on these subjects in Testimony of Paul G. Cassell Before the U.S. Sentencing Commission Regarding Protecting Crime Victims' Rights in the Sentencing Process (Mar. 15, 2006).

[126] *Hughey v. United States*, 495 U.S. 411, 415-16 (1990); *see also United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998) ("It is well-established that a federal court may not order restitution except when authorized by statute."); *United States v. Helmsley*, 941 F.2d 71, 101 (2d

permit courts to award restitution for several specific kinds of loss, including restitution for loss of property, medical expenses, physical therapy, lost income, funeral expenses, and expenses for participating in all proceedings related to the offense. The statutes contain no general authorization for restitution to crime victims, even where such restitution is indisputably just and proper.

A case I handled last week will illustrate the problem. In *United States v. Gulla*,[127] I sentenced a defendant for the crimes of bank fraud and aggravated identity theft. Ms. Gulla had pled guilty to stealing out of the mail personal information from more than ten victims, and then running up false credit charges of more than $50,000. Government search warrants recovered an expensive Rolex watch and eleven leather jackets purchased by Ms. Gulla. Following the recommendation of the government, I sentenced Ms. Gulla to a term of 57 months in prison. I also ordered her to pay restitution for the direct losses she caused.

But the victim impact statements in the case revealed that they had suffered more than just financially from these crimes. One victim wrote about the considerable time expended on straightening things out:

> I was 71 years of age when two fraudulent checks were written on courtesy checks that were stolen from my mailbox. . . . There is no way to describe the frustration and time involved in contacting the various financial institutions, to determine if there were any other fraudulent charges. We had to stop automatic withdrawals since there were not funds available to cover the checks. We are

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Cir. 1991) ("Federal court have no inherent power to order restitution. Such authority must be conferred by Congress.").

[127] 2:05-CR-634-PGC (D. Utah Mar. 8, 2006).

> grateful that we did not have to cover the checks because this would have been a problem. There was considerable time and frustration involved in getting everything straightened out. I believe that justice should be satisfied and the guilty person be held accountable for breaking the law. Even to this day we worry about someone tampering with our mail. We have investigated a locked mail box and have not made any decision as yet.

Another victim wrote that she spent a great deal of time clean up her credit:

> My husband and I are victims of Ms. Gulla's scam. We had a check stolen from our mailbox, and apparently she forged her name to it, and changed the amount. . . . Since then, it has cost us more than $200 in check fees, fees for setting up a new account, and fees for stopping payment on checks. This does not include my time (about 20 hours, and still counting) to track down outstanding checks, talking to the banks (mine and the one where she tried to cash the check), rearranging automatic deductions, talking to the sheriff and filling out appropriate paperwork.
>
> Now I am not able to put mail out in my mailbox, so I have to make special trip to the post office to mail letters. As of this date, I am still attempting to clear up the affected account.
>
> This has been a great inconvenience for us, and it makes me question my safety in my home, if someone is able to gain access to my personal mail, what is next?

Finally, one last victim wrote about losing time with her children to deal with the crime:

> We felt, and continue to feel, very vulnerable now that something has been stolen out of our mailbox, something that allows someone with dishonest, selfish intentions to access into our personal information. . . .

> [Another way the crime] impacted us was by loss of time. Ms. Gulla's selfish act caused us countless phone calls to the credit card company (and although they've been very helpful, they have not always been very speedy). We have had to spend time filling out forms and sending in paperwork to resolve this situation, which was no fault of our own. It has been extremely frustrating to do all this, especially since we are self-employed and have 3 small children. Any time we have spend on Ms. Gulla's theft is time we are not running our own livelihoods or enjoying our precious children. That has been the biggest loss of all.

In light of these victim statements, it seemed to me (as I said in court) that I should be able to order restitution beyond the direct financial losses of the phony charges run up by the defendant. In particular, I thought it would be fair to order restitution for the lost time the victims suffered in responding to the defendant's crime. Unfortunately, as the government explained at the hearing, current law does not allow this. Restitution is not permitted for consequential losses[128] or other losses too remote from the offense of conviction.[129]

The case law demonstrates that the problem I confronted is not unique. In many circumstances, courts of appeals have overturned restitution awards that district judges thought were appropriate, not because of any unfairness in the award but simply because the current restitution statutes failed to authorize them. Here are few examples:

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[128] *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996).

[129] *See, e.g.*, *United States v. Havens*, 424 F.3d 535 (7th Cir. 2005) (a victim of identify theft "takes the position that she is entitled to reimbursement for all the time she spent in this endeavor [of clearing credit], but in our view that goes too far."); *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989) (victim's attorney's fees too remote); *United States v. Kenney*, 790 F.2d 783, 784 (wages for trial witnesses too remote).

- In *United States v. Reed*,[130] the trial court ordered restitution to victims whose cars were damaged when the defendant, an armed felon, fled from police. The Ninth Circuit reversed the restitution award because the defendant was convicted of being a felon in possession of a firearm and the victims were not victimized by *that* particular offense.

- In *United States v. Romines*,[131] a defendant on supervised release absconded from his residence and employment, driving away on his employer's motorcycle and later cashing an $8,000 check from his employer's bank account. He was caught, and the district court ordered restitution of $8,000 to the employer as part of the sentence for the supervised release violation. The Eleventh Circuit reversed because the government, rather than the employer, was the victim of the defendant's the violation: "The only victim of that crime was the government, whose confidence in [the defendant's] rehabilitation seems to have been misplaced." [132] Accordingly, the Eleventh Circuit overturned the restitution order because "of the absence of textual authority to grant restitution."[133]

- In *United States v. Cutter*,[134] the defendant sold a house to his niece, then filed a fraudulent bankruptcy petition. The defendant was convicted of false statements in the petition. At sentencing, the district court ordered the defendant to pay his niece $21,000 in restitution because of her losses in a fraudulent conveyance action instituted by the bankruptcy trustee. The First Circuit overturned the order

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[130] 80 F.3d 1419, 1421 (9th Cir. 1996).
[131] 204 F.3d 1067 (11th Cir. 2000).
[132] *Id.* at 1069.
[133] *Id.*
[134] 313 F.3d 1 (1st Cir. 2002).

because the niece was not a direct victim of the defendant's criminal action of filing a fraudulent petition before the bankruptcy court.[135]

- In *United States v. Havens*,[136] the defendant pleaded guilty to various offenses relating to identity theft. The victim had earlier pursued a civil action against the defendant, receiving $30,000 in damages, and the district court ordered restitution in that amount. The Seventh Circuit reversed this restitution order, holding that it was unclear which damages and costs qualified as appropriate losses under the Mandatory Victims Rights Act.[137]

- In *United States v. Shepard*,[138] a hospital social worker drained a patient's bank account through fraud. The hospital paid the patient $165,000 to cover the loss. The social worker was later convicted of mail fraud and the district court ordered restitution of the $165,000 to the hospital. But the Seventh Circuit held that the patient was the only direct victim of fraud in the case and reversed the restitution order to the hospital.[139]

- In *United States v. Rodrigues*,[140] a defendant, an officer of a savings and loan, was convicted of numerous charges stemming from phony real estate transactions. The district court found that Mr. Rodrigues usurped the savings and loans' corporate opportunities by substituting himself for the S&L in four real estate deals and ordered him to pay $1.5 million in restitution – his profits in those deals. The Ninth Circuit reversed, holding that since the defendant's profits arose from

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[135] *Id.* at 8-9.
[136] 424 F.3d 535 (7th Cir. 2005).
[137] *Id.* at 538-39.
[138] 269 F.3d 884 (7th Cir. 2001).
[139] *Id.* at 886-87.
[140] 229 F.3d 842 (9th Cir. 2000).

the defendant taking his victim's corporate opportunities, rather than from direct losses by the S&L, restitution was improper. "Although the corporate opportunity doctrine allows recovery for a variety of interests, including mere expectancies, restitution under the VWPA is confined to direct losses."[141]

- In *United States v. Stoddard*,[142] the trial court ordered substantial restitution by the defendant, an official of a savings bank. The defendant misappropriated $30,000 from an escrow account and used the money to fund two real estate purchases. He subsequently netted $116,223 in profits from the real estate transactions. Although the trial court ordered restitution based on these profits to the savings bank, the Ninth Circuit set the order aside because that the restitution statute only allowed restitution for direct losses.

- In *Government of the Virgin Islands v. Davis*,[143] the defendant pleaded guilty to conspiracy to defraud, forgery, and related counts in connection with an attempt to defraud an estate of more than a million dollars in real and personal property. The trial judge ordered restitution that included the attorney's fees spent by the estate to recover its assets, but the Third Circuit reversed: "Although such fees might plausibly be considered part of the estate's losses, expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy), and are, therefore, too far removed from the underlying criminal conduct to form the basis of a restitution order."[144]

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[141] *Id.* at 846.
[142] 150 F.3d 1140, 1147 (9th Cir. 1998).
[143] 43 F.3d 41 (3rd Cir. 1994).
[144] *Id.* at 47.

- In *United States v. Arvanitis,*[145] the trial court awarded attorney's fees in favor of a victim which had spent considerable money investigating the defendants fraud. The Seventh Circuit reversed because the restitution statute for property offenses "limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorneys fees, unavailable."[146]

- In *United States v. Elias*,[147] the defendant forced his employees to clean out a 25,000 gallon tank filled with cyanide sludge, without any treatment facility or disposal area. He was convicted of violating the Resource Conservation and Recovery Act by disposing of hazardous wastes and placing employees in danger of bodily harm. The district court ordered the defendant to pay $ 6.3 million in restitution. The Ninth Circuit overturned the restitution order because the restitution statute only authorizes imposition of restitution for violations of Title 18 and certain other crimes, not environmental crimes.[148]

- In *United States v. Sablan*,[149] the Ninth Circuit reversed a restitution order based on consequential damages, such as expenses arising from meeting with law enforcement officers investigating the crime, because such expenses were not strictly necessary to repair damage caused by defendant's criminal conduct.

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[145] 902 F.2d 489 (7th Cir. 1990).

[146] *Id.* at 496.

[147] 292 F.3d 1003 (9th Cir. 2001).

[148] *Id.* at 1021-22; *see also United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999) (holding that the district court lacked legal authority to order restitution to the IRS for the defendant's tax liability); *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998) (holding that the VWPA does not authorize restitution for Title 26 tax offenses).

[149] 92 F.3d 865, 870 (9th Cir. 1996).

- In *United States v. Blake*,[150] the defendant was convicted of using stolen credit cards and the district court ordered restitution to victims for losses that resulted from their stolen credit cards. The Fourth Circuit reversed a restitution order reluctantly: "Although the result we are compelled to reach represents poor sentencing policy, the statute as interpreted requires the holding that the persons from whom Blake stole the credit cards do not qualify as victims of his offense of conviction, and as such he cannot be ordered to pay restitution to them . . . the factual connection between his conduct and the offense of conviction is legally irrelevant for the purpose of restitution."

- In *United States v. Hays*,[151] the defendant was convicted of possession of stolen mail, specifically three credit cards. The trial court ordered him to pay restitution to the credit card companies of $3,255 for charges to those stolen credit cards. The Eleventh Circuit reversed, because the charges were not caused by the specific conduct that was the basis of the offense of conviction (mail fraud).

The point here is not that any of these restitution awards were correctly or incorrectly made by the trial judges under the current statutory framework. Instead, the point is that a good case can be made that the judges in these cases *should* have had authority to make these awards. After all, at sentencing a trial judge has full and complete information about the nature of the offense, the impact of the crime on the victim, and the defendant's personal and financial circumstances.[152] When a judge has reviewed all of that information and determined that

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[150] 81 F.3d 498, 506 (4th Cir. 1996).

[151] 32 F.3d 171, 173-74 (11th Cir. 1995).

[152] *See* FED. R. CRIM. P. Rule 32(d)(1)(B), (2)(A)(i)-(iii) ("The presentence report must . . . calculate the defendant's offense level and criminal history category; . . . the defendant's history and characteristics, including; any prior criminal record; the defendant's financial condition; any

restitution is appropriate, it is not clear why that order should be subject to further litigation about whether it fits into some narrow statutory category. After all, the core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[153] Indeed, the congressional mandate for restitution is "to restore the victim *to his or her prior state of well-being to the highest degree possible.*"[154] Unfortunately, however, because judges must fit restitution orders within narrow pigeon holes, this congressional purpose may not be fully achieved.

The rights of criminal defendants are also important in the restitution process. Criminal defendants should have a fair opportunity to contest restitution awards and their constitutional rights should be fully protected in determining a restitution award. Within those important constraints, however, there is considerable room for expanding the kinds of restitution that district judges should have discretion to award. It is worth examining further the ways in which judicial power to award fair restitution to crime victims could be properly expanded.[155]

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circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment . . ."); *see also* Rule 32(c)(B) ("If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.").

[153] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).

[154] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (emphasis added) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

[155] I have offered my own tentative personal opinions on these subjects in Testimony of Paul G. Cassell Before the U.S. Sentencing Commission Regarding Protecting Crime Victims' Rights in the Sentencing Process (Mar. 15, 2006).

H. Modify Unjustified Mandatory Minimums.

This Subcommittee should consider repealing irrational mandatory minimum sentences, particularly the "stacking" mandatory minimums found in 18 U.S.C. § 924(c). As I have discussed, the Judicial Conference already opposes mandatory minimum sentences and has urged Congress to "reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act."[156]

Mandatory minimums are problematic for several reasons. As the Sentencing Commission has explained, mandatory minimums may result in the same sentence for widely divergent cases because, unlike the Guidelines, mandatory minimums typically focus only on one indicator of offense seriousness (such as drug quantity) or one indicator of criminal history (such as whether a defendant has a previous conviction).[157] Mandatory minimums can therefore lead to increased disparity in sentence length among similarly situated offenders (or, inversely, very similar sentences for defendants whose actual conduct was dramatically different).[158] And unlike the Guidelines' graduated, proportional increases in sentence length, mandatory minimums tend to result in large jumps in sentence length or "cliffs" based on small differences in offense conduct or a defendant's criminal record.

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[156] *Report of the Proceedings of the Judicial Conference of the United States*, March 13, 1990, published in United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System.*

[157] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991), at 25.

[158] *Id.* at 33.

Senator Orrin Hatch from my home state of Utah has also explained problems with mandatory minimum sentences in light of the fact the sentencing guidelines exist.[159] Perhaps more important, the mandatory minimum sentences conflict with the basic idea behind sentencing guidelines. As Senator Hatch observed:

> The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[160]

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[159] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commisison, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

[160] *Id.* at 194; *accord* Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

Today, I will highlight one particular mandatory minimum that produces embarrassing results – 18 U.S.C. § 924(c). It is hard to explain why a federal judge is required to give a longer sentence to a first offender who carried a gun to several marijuana deals than to a man who deliberately killed an elderly woman by hitting her over the head with a log. I was recently forced to do exactly this.

In *United States v. Angelos*,[161] I had to sentence a twenty-four-year-old first offender who was a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agreed that Mr. Angelos should serve about six-and-a-half years in prison. But there were three additional firearms offenses for which I also had to impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insisted that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urged me to sentence Mr. Angelos to a prison term of no less than 61½ years – six years-and-a-half years for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relied on a statute – 18 U.S.C. § 924(c) – which requires courts to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produced 55 years of additional punishment for carrying a firearm.

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[161] *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006). The *Angelos* case is no longer pending before me.

The sentence created by § 924(c) was simply irrational in the *Angelos* case. Section 924(c) imposed on Mr. Angelos a sentence 55 years or 660 months; that term was consecutive to the minimum 6 and ½ year (or 78-month) Guidelines sentence – a total sentence of 738 months. As a result, Mr. Angelos faced a prison term which more than doubled the sentence of, for example, an aircraft hijacker (293 months),[162] a terrorist who detonates a bomb in a public place (235 months),[163] a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months),[164] a second-degree murderer,[165] or a rapist.[166] The table below sets out these and other examples of shorter sentences for crimes far more serious than Mr. Angelos'.

Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. §2A5.1	Base Offense Level 38	293 Months

[162] U.S.S.G. § 2A5.1 (2003) (base offense level 38). The 2003 Guidelines are used in all calculations in this opinion. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[163] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[164] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[165] U.S.S.G. § 2A1.2 (base offense level 33).

[166] U.S.S.G. § 2A3.1 (base offense level 27).

Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old. in sexual positions U.S.S.G. § 2G2.1(a) &(b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 +2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

The irrationality of Mr. Angelos' sentence is easily demonstrated by comparing it to a sentence that I imposed in a far more serious case on the very same day. Shortly before Mr. Angelos' sentencing, I imposed sentence in *United States v. Visinaiz*, a second-degree murder case.[167] There, a jury convicted Cruz Joaquin Visinaiz of second-degree murder in the death of 68-year-old Clara Jenkins. One evening, while drinking together, the two got into an argument. Ms. Jenkins threw an empty bottle at Mr. Visinaiz, who then proceeded to beat her to death by striking her in the head at least three times with a log. Mr. Visinaiz then hid the body in a crawl space of his home, later dumping the body in a river after weighing it down with cement blocks. Following his conviction for second-degree murder, Mr. Visinaiz came before the court as a first-time offender for sentencing. The Sentencing Guidelines required a sentence for this brutal second-degree murder of between 210 to 262 months.[168] The government called this an "aggravated second-degree murder" and recommended a sentence of 262 months. I followed that recommendation. Yet on the same day, I had to impose a sentence that is several decades longer for a first-time drug dealer who carried a gun to several drug deals!? The victim's family in the *Visinaiz* case – not to mention victims of a vast array of other violent crimes – can be forgiven if they think that the federal criminal justice system minimizes their losses. No doubt § 924(c) is motivated by the best of intentions – to prevent criminal victimization. But the statute pursues that goal in a way that effectively sends a message to victims of actual criminal violence that their suffering is not fully considered by the system.

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[167] *United States v. Visinaiz*, No. 2:03-CR-701-PGC.

[168] U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

The Judicial Conference has long desired to find an approach to sentencing in which this kind of irrational result could be avoided. One possible approach that the Criminal Law Committee will discuss and evaluate is whether to "unstack" the mandatory minimum sentences in § 924(c) so that it becomes a true recidivist statute – that is, the second 924(c) conviction with its 25 year minimum would not be triggered unless the defendant had been convicted for use of a firearm, served time, and then failed to learn his lesson and committed his crime again.

1. Reduce the Crack/Power Cocaine Disparity.

The disparity between sentences for distributing crack cocaine and power cocaine also merits attention. Reducing the disparity would improve the rationality of the current system and, perhaps even more important, reduce both perceived and actual racial disparities in our federal criminal justice system.

Congress passed the Anti-Drug Abuse Act of 1986[169] – the law that established the 100-to-1 ratio of penalties – with a sense of urgency.[170] Responding to ominous claims that crack was

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[169] Pub. L. 99–570, 100 Stat. 3207 (1986).

[170] H.R. 5484, the bill which eventually became the 1986 Act, was amended well over 100 times while under consideration from September 10, 1986 to October 27, 1986. Several members of Congress were critical of the speed with which the bill was developed and considered. *See, e.g.*, 132 CONG. REC. 26,462 (daily ed. Sept. 26, 1986) (Statement Sen. Charles Mathias) ("You cannot quite get a hold of what is going to be in the bill at any given moment."); 132 CONG. REC. 26,434 (daily ed. Sept. 26, 1986) (statement of Sen. Robert Dole) ("I have been reading editorials saying we are rushing a judgment on the drug bill and I think to some extent they are probably correct."); 132 CONG. REC. 22,658 (daily ed. Sept. 10, 1986) (statement of Rep. Trent Lott) ("In our haste to patch together a drug bill – any drug bill – before we adjourn, we have run the risk of ending up with a patch-work quilt . . . that may or may not fit together in a comprehensible whole.").

extremely addictive[171] and was closely associated with violent crime,[172] Congress ratcheted up the ratio from 20-to-1 to 100-to-1. Yet, as the Sentencing Commission later observed, "The legislative history does not provide conclusive evidence of Congress's reason for doing so . . . ."[173]

As the Subcommittee is well aware, under current law, 100 times as much powder cocaine as crack cocaine is needed to trigger the same five-year and ten-year mandatory minimum penalties. Because of this, the sentencing guideline penalties for crack cocaine offenses are 1.3 to 8.3 times longer than powder sentences, depending on the amount of cocaine involved and the specific characteristics of the offender.[174] In 2000, the average prison sentence for trafficking in powder cocaine was 74 months, while the average sentence for trafficking in crack was 117 months.[175] The differential between average sentences has always been significant, but appears to be growing. In 1992, crack offenders served sentences that were 25.3% longer than powder offenders, but by 2000, the differential had increased to 55.8%.[176]

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[171] *See, e.g.*, 132 CONG. REC. 22,667 (daily ed. Sept. 10, 1986) (statement of Rep. James Traficant) ("Crack is reported by many medical experts to be the most addictive narcotic drug known to man."); 132 CONG REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) ("Crack is thought to be even more highly addictive than other forms of cocaine or heroin.").

[172] 132 CONG. REC. 31,329-30 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles) ("Our local police and our sheriffs have found themselves unable to cope with the crime . . . ." caused by crack).

[173] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002).

[174] *See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (2002), available at http://www.usdoj.gov/olp/cocaine.pdf.

[175] *Id.* at 21.

[176] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 35 (May 2002).

Ever since Congress set the 100-to-1 ratio in 1986, controversy has swirled around it. In 1997, members of the judiciary weighed in on the matter. Judge John S. Martin, Jr. and twenty-six other federal judges transmitted a letter to the House and Senate Committees on the Judiciary, arguing that the disparity results in unjust sentences:

> It is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society's interest.[177]

Members of Congress have not been blind to these concerns. Numerous legislative proposals have been suggested. Some of these would have reduced disparity by decreasing the penalties for crack;[178] others would have reduced disparity by raising the penalties for powder cocaine.[179] Other proposals would operate in both directions: not long ago, Senators Sessions and Hatch introduced the Drug Sentencing Reform Act of 2001,[180] which among other things, would have

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[177] *Statement on Powder and Crack Cocaine to the Senate and House Committees on the Judiciary*, 105th Cong. (1997) (letter from Judge John S. Martin, Jr. et al., p. 1).

[178] *See, e.g.*, H.R. 2031, 105th Cong. (1997) introduced by Rep. Charles Rangel; H.R. 939, 106th Cong. (1999) introduced by Rep. Rangel; H.R. 1241, 106th Cong. (1999) introduced by Rep. Maxine Waters; and H.R. 697, 107th Cong. (2001) introduced by Rep. Rangel. See also Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. § 1772 (2000) (proposing a 10-1 ratio by reducing the five-year powder cocaine trigger quantity from 500 grams to 50 grams).

[179] *See, e.g.*, S. 1162, 105th Cong. (1997) introduced by Sen. Wayne Allard; S. 209, 105th Cong. (1997) introduced by Sen. John Breaux; S. 1593, 105th Cong. (1998) introduced by Sen. Allard; H.R. 332, 105th Cong. (1997) introduced by Rep. Gerald Solomon; H.R. 2229, 105th Cong. (1997) introduced by Rep. William Pascrell, Jr.; and H.R. 4026, 107th Cong. (2002) introduced by Rep. Roscoe Bartlett.

[180] S. 1847 (2001). *See* 147 CONG. REC. S13,961-65 (daily ed. Dec. 20, 2001) (statements of Sens. Sessions and Hatch) (discussing the relevant legislative history for the current federal penalty scheme and the proposed changes contained in the bill).

reduced the 100-to-1 drug quantity ratio to 20-to-1 by increasing the statutory mandatory minimum penalties for powder cocaine and decreasing the statutory mandatory minimum penalties for crack cocaine.

But Congress is not the only institution to recognize the problems inherent in a crack-powder disparity. The United States Sentencing Commission – has condemned the crack-powder disparity on three different occasions: in 1995, 1997, and in 2002.

When in 1994 Congress directed the Sentencing Commission to issue a report and recommendations on cocaine and federal sentencing policy,[181] the Commission proposed amendments to the Sentencing Guidelines that would have adjusted the guideline quantity ratio so that the base offense levels would be the same for both powder cocaine and crack cocaine offenses; set the mandatory five-year minimums for both crack and powder cocaine at 500 grams; and eliminated the unique five-year mandatory minimum for simple possession of more than five grams of crack cocaine.[182]

After its 1995 guideline amendments were rejected, the Commission issued a 1997 report to Congress that did not propose amendments but did suggest the thresholds to trigger a five-year mandatory minimum should be raised for crack and reduced for powder cocaine.[183] More

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[181] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 1994).

[182] *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074 (1995). In October 1995, Congress passed and the President signed legislation rejecting these amendments. *See* Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

[183] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (April 1997).

recently, the Commission released another report on cocaine and federal sentencing policy.[184] The Commission has found:

- Current penalties exaggerate the relative harmfulness of crack cocaine;[185]
- Current penalties sweep too broadly and apply most often to lower level offenders;[186]
- Current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality;[187]
- Current penalties' severity mostly impacts minorities.[188]

Accordingly, the Sentencing Commission unanimously and firmly concluded that congressional objectives can be achieved more effectively by decreasing the 100-to-1 drug quantity ratio.[189] Specifically, the Commission has recommended that Congress revise federal cocaine sentencing by: (1) repealing the mandatory minimum for simple possession of crack cocaine and increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten-year threshold quantity to at least 250 grams; (2) encouraging the Commission to establish appropriate sentencing enhancements to the primary trafficking guideline to

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[184] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002).
[185] *Id.* at v.
[186] *Id.* at vi.
[187] *Id.* at vii.
[188] *Id.* at viii.
[189] *Id.*

specifically account for a variety of aggravating factors; and (3) maintaining the current minimum threshold quantities for powder cocaine offenses.[190] If these recommendations were adopted, the Commission estimates that the average sentence for crack offenses would decrease from 118 months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months.[191]

Of particular concern about the current 100-to-1 ratio is problem of perceived and actual ratio disparities. This point has been expressed by a number of commentators.[192] This apparent inequality in the sentencing guidelines produces actual injustice to the crack-cocaine defendant. It "'undermine[s] public confidence in the fairness of our system of justice'" and "'serves as a stimulant to race prejudice.'"[193] At a practical level, the widely perceived unfairness of the dramatic disparity between sentences for crack cocaine and sentences for powder cocaine may make it harder for the government to convict defendants, as juries may be inclined to "nullify" the charges by simply acquitting.[194]

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[190] *Id.*

[191] *Id.* at ix.

[192] For a powerful statement of the argument, *see, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287 (1995).

[193] *See id.* at 1316 (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

[194] *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) ("Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair." (citing Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15)); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997).

While making substantive recommendations about federal sentencing policy is not generally the purview of the Judicial Conference, the Criminal Law Committee is willing to consider and evaluate the Commission's recommendations about reducing the disparity for crack and powder penalties.

J. Community Correction at the End of Sentences.

The Criminal Law Committee would be interested in discussing way to improve the use of community corrections at the end of sentences.

In December 2002, the Bureau of Prisons (BOP) changed its practice on the important subject of community correction. Before that time, dating to approximately 1965, BOP allowed some inmates to serve significant portions of their sentences in Community Corrections Centers (CCC's) or halfway houses and for many years often assigned inmates with short sentences (less than 12 months total) to confinement in CCC's or halfway houses for the entire term. This was based on BOP's view that its facility designation authority under 18 U.S.C. § 3621(b) broadly permitted it to designate some inmates with short sentences directly to a CCC, generally upon the recommendation of a sentencing judge. In appropriate circumstances, it was common for judges to recommend such placements for defendants receiving light-end sentences. The benefits in appropriate cases, such as improved prospects for rehabilitation, better likelihood of satisfying restitution obligations, and continued family contact were clear. A 1992 legal opinion from the Department of Justice's Office of Legal Counsel affirmed BOP's designation authority under § 3621(b).

In December 2002, however, the Deputy Attorney General directed BOP to cease this "unlawful" practice of designating inmates to serve their entire sentences in a CCC. This change was based on a new opinion from new personnel in the Department of Justice's Office of Legal Counsel, reinterpreting § 3621(b) and concluding that this practice was not authorized thereunder. Accordingly, the BOP practice was changed and new regulations were issued limiting placement in a CCC to the last ten percent of a term of imprisonment not to exceed six months, and otherwise, all inmates were required to serve their sentences in BOP facilities.

There are plenty of reasons to be skeptical about this subsequent OLC opinion, which of course stood at odds with another OLC opinion. In particular, the subsequent OLC opinion relied on provisions of the U.S. Sentencing Guidelines to reinterpret the statute and declare illegal a practice widespread over 18 years.[195] OLC's new legal interpretation was based on 18 U.S.C. § 3624(c), which pertains to BOP's obligation to prepare inmates for community re-entry and reads in part:

> (c) Pre-release custody. – The Bureau of Prison shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, *not to exceed six months, of the last 10 percentum of the term to be served* under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this sub-section may be used to place a prisoner in home confinement . . . . (emphasis added).

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[195] *See, e.g.*, *Estes v. Federal Bureau of Prisons*, 273 F. Supp. 2d 1301, 1310 (S.D. Ala. 2003) (Butler, J.); *Iacaboni v. U.S.*, 251 F. Supp. 2d 1015 (D. Mass. 2003) (Ponsor, J.).

Section 3621(b), however, vests BOP with authority to determine the location of an inmate's imprisonment. Thus, by construing § 3624(c) as limiting BOP's designation authority under §3621(b), OLC took the view that for sentences of less than 60 months, the maximum term that may be spent in a CCC is limited to ten percent of the sentence or a maximum term of six months.

This new OLC interpretation was rendered during a time when "light sentences" for white-collar criminals were a focus in the national news. Some commentators had objected to persons serving sentences as long as one or two years without being imprisoned for any part of that time because they had been designated to halfway houses.

Subsequent challenges to BOP's regulations implementing this policy change has led some courts to conclude that it is unauthorized under § 3621(b) and runs afoul of Congress' intent. The First Circuit and the Eighth Circuit found that policy implemented in 2002 to be unlawful and contrary to the plain meaning of § 3621(b) because it failed to recognized BOP's discretion to transfer an inmate to a CCC at any time and that time constraints under § 3624(c) placed no limits on this discretion.[196] In response to such decisions, the BOP proposed new regulations which became effective on February 14, 2005. The 2005 BOP regulations acknowledged its general discretion under § 3621(b) to place an inmate at a CCC at any time but limited any such placement to the lesser of ten percent of the total sentence or six months, unless special statutory circumstances apply.[197] In December 2005, the Third Circuit found these new

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[196] *See Elwwod v. Jeter*, 386 F.3d 842 (8th Cir. 2004); *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004).

[197] *See* 28 C.F.R. §§ 570.20, 570.21.

regulations to be contrary Congress' directives as set out in § 3621(b).[198] In particular, the Third Circuit found that the 2005 BOP regulations fail to allow full consideration of the factors plainly enumerated in § 3621(b), which must be considered in determining an appropriate and suitable place of imprisonment.[199]

Perhaps a statutory change is needed to address the issue of community corrections. If so, the Committee would be interested in discussing whether it would be appropriate to return to the tried and true policy of judges recommendations being considered, along with other factors as provided under § 3621(b)(4)(B), in BOP's determination of an appropriate type of penal or correctional facility, including a CCC, as a place of imprisonment.

K. Restore the Bootcamp Program.

The Criminal Law Committee is interested in discussing whether there could be value in restoring the boot camp program that was terminated by the Federal Bureau of Prisons (BOP) in 2005. The federal boot camp program – sometimes referred to as the Shock Incarceration Program or the Intensive Confinement Center ("ICC") program – was established by Congress with the Crime Control Act of 1990.[200] After the necessary regulations were enacted by the BOP

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[198] *See Woodall v. Federal Bureau of Prisons*, No. 05-3657, 2005 WL 3436626 (3d Cir. Dec. 15, 2005).

[199] *Id.; see also* 18 U.S.C. § 3621(b).

[200] Pub. L. No. 101-647, § 3001, 104 Stat. 4789 (codified at 18 U.S.C. § 4046).

to establish its boot camp program,[201] the Federal Intensive Confinement Center Program began at Lewisburg Prison in January 1991.[202]

The primary goal of shock incarceration programs is to change the offenders' behavior to dissuade their involvement in criminal activity, using highly regimented and disciplined environments to effect a lasting behavioral change on participants. To qualify for participation in the boot camp program, offenders were required to meet six criteria:

- Be serving a sentence of 12 to 30 months;
- Be serving their first period of incarceration or have no lengthy periods of prior incarceration;
- Volunteer for participation in the program;
- Be a minimum security risk;
- Be 35 years old or younger when they enter the program; and
- Lack medical restrictions.[203]

Noting that "ICC programs are exceedingly costly to maintain" and that eliminating the program would save an estimated $1.2 million annually, BOP terminated its boot camp program in January 2005. The penological research on boot camps suggests some successes and some

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[201] At the time of the statute's enactment, "the Bureau of Prisons [did] not have the legal authority necessary to operate a shock incarceration program." H.R. Rep. No. 101-681(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6557, 6558. The BOP subsequently enacted the necessary regulations to implement the boot camp program. *See* Intensive Confinement Center Program, 61 Fed. Reg.18,658 (Apr. 26, 1996); Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53,690 (Oct. 15, 1997) (both codified at 28 C.F.R. §§ 524.30-.33 (2004)).

[202] *See* Jody Klein-Saffran, David A. Chapman, and Janie L. Jeffers, *Boot Camp for Prisoners*, F.B.I. LAW ENFORCEMENT BULLETIN 13, 13 (Oct. 1993).

[203] *Id.*

failures. While such programs appear to effect positive short-term changes in participants,[204] these changes do not always lead to lower recidivism rates.[205] The National Institute of Justice report on the subject concludes that the boot camps which have reduced recidivism offer more treatment services, are longer in duration, and include more post-release supervision.[206]

Boot camp programs may be expensive, but it is not clear that they cost more to operate than BOP prison facilities. The cost of incarcerating a BOP inmate for one year, after all, is $23,205.[207] While boot camps need not comprise a significant portion of BOP facilities, the Criminal Law Committee is interested in discussing whether a boot camp system – perhaps on a modest scale – would allow judges in certain specific cases to impose more effective sentences. There is some reason to believe that boot camps can, for the right offender (particularly a youthful, non-violent offender), make a real difference. Many judges believe that having any option in the system for young offenders could promote rehabilitation, thereby reducing recidivism and preventing revictimization of crime victims.

The Criminal Law Committee is interested in discussing the merits of restoring a boot camp program based on the research findings of the National Institute of Justice, and after studying the issue, hopes to convey its view to BOP. In the mean time, perhaps this

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[204] *See* National Institute of Justice, *Correctional Boot Camps: Lessons from a Decade of Research* ii, available at: http://www.ncjrs.gov/pdffiles1/nij/197018.pdf.

[205] *Id.*

[206] *Id.*

[207] *See* John Hughes, Memorandum to All Chief Probation Officers: Cost of Incarceration and Supervision (Apr. 15, 2005), available at: http://jnet.ao.den/Probation_and_Pretrial_Services/Memos/2005_Archive/PPS41505.html.

Subcommittee might also wish to study the matter, and to consider providing funding to restore the boot camp program for appropriate non-violent offenders.

L. Report from the Sentencing Commission.

The last avenue for exploration may be the most significant – that Congress look to the Sentencing Commission to provide general recommendations on how to improve our federal sentencing system.

Booker has prompted considerable interest in the proper way to structure federal criminal sentences, as this hearing amply demonstrates. In addition, a number of non-governmental groups have been studying the state of federal sentencing in the wake of *Blakely* and *Booker*. One that may merit particular mention is the Sentencing Initiative of the Constitution Project, a bipartisan group of sentencing experts co-chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann. The group includes federal district and appellate judges, among them Justice Samuel A. Alito, Jr., who was an active participant in the group's deliberations until his nomination to the Supreme Court.[208] The Constitution Project has issued a set of principles and accompanying report, The Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report*.[209]

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[208] The other federal judges participating in the Constitution Project Sentencing Initiative are Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit, Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts, and myself.

[209] (available beginning March 16, 2006 at http://www.constitutionproject.org/sentencing/index.cfm?categoryId=7).

The Constitution Project Report is critical of central features of the pre-*Booker* federal sentencing system. The group found that:

> *The federal sentencing guidelines, as applied prior to United States v. Booker, have several serious deficiencies:*
>
> *The guidelines are overly complex. They subdivide offense conduct into too many categories and require too many detailed factual findings.*
>
> *The guidelines are overly rigid. This rigidity results from the combination of a complex set of guidelines rules and significant legal strictures on judicial departures. It is exacerbated by the interaction of the guidelines with mandatory minimum sentences for some offenses.*
>
> *The guidelines place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant's role in the criminal conduct. They also place excessive emphasis on conduct not centrally related to the offense of conviction.*
>
> *The basic design of the guidelines, particularly their complexity and rigidity, has contributed to a growing imbalance among the institutions that create and enforce federal sentencing law and has inhibited the development of a more just, effective, and efficient federal sentencing system.*

These observations are particularly germane to today's hearing for at least two reasons. First, they suggest a need for a searching re-examination of the pre-*Booker* system. Second, they argue against adoption of the "topless guidelines" approach apparently favored by some critics precisely because that approach would reinstitute many of the features of the pre-*Booker* regime that the Constitution Project found to be undesirable. The Constitution Project is currently

working on a set of more particular recommendations for reforming federal sentencing. I understand that these recommendations will issue very shortly.

Other commentators have also recommended reform. For example, Professor Frank Bowman has proposed a significantly simplified federal sentencing system designed to be consistent with the Supreme Court's developing Sixth Amendment jurisprudence while retaining a role for post-conviction judicial fact-finding. This proposal elaborates on a model first suggested by James Felman, one of the witnesses in today's hearing.[210] Professor Bowman's proposal would reduce the number of factual determinations necessary for individual sentencings while incorporating the work done by Congress and the Sentencing Commission over the past two decades in identifying aggravating and mitigating factors relevant to punishment.

Our point is not specifically to endorse any of these particular suggestions, but rather to encourage Congress to consider receiving a far-ranging report from the Sentencing Commission on a whole host of issues. Congress, of course, created the Sentencing Commission as an expert agency precisely to analyze important questions of sentencing policy. The Sentencing Reform Act directs the Commission, among its many other responsibilities, to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional markers that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy."[211]

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[210] *See* James Felman, *How Should Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT. REP. 97 (2004).

[211] *See* 28 U.S.C § 995(a)(20).

The Sentencing Commission is obviously committed to making the Guideline system work as well as possible. Moreover, it is carefully assessing *Booker*'s impact, and it is well-positioned to explore the pros and cons of any proposed post-*Booker* changes. In light of all this, it might be appropriate for the Congress to consider encouraging the Sentencing Commission to undertake a comprehensive review of the current federal sentencing system. Such a review could consider the issues that we raise here and they ways in which the system could be improved. Among the the items that the Sentencing Commission might investigate are such things as:

- Developing a standardized methodology for determining sentences, such as the three-step process currently recommended by the Commission;
- Improving ways in which downward sentences reductions for substantial assistance are handled by judges *and* prosecutors;
- Confirming that a system of "topless" guidelines is not needed after *Booker*;
- Ways in which judges could be empowered to prevent criminals from profiting from their crimes;
- Expanding the power of judges to award full and fair restitution to crime victims and treating victims' fairly throughout the sentencing process;
- Ways of modifying or repealing mandatory minimum sentences;
- Reducing the unsupportable disparities between the penalties for distributing crack cocaine versus powder cocaine;
- Considering whether any of the current Guidelines need to be reconsidered, such as raising firearms penalties or changing immigration penalties;
- Whether the Guidelines should be simplified, as recommended by the Constitution Project.

No doubt there are other subjects that the Sentencing Commission could also be profitably directed to consider. The Criminal Law Committee hopes that this Subcommittee will consider taking full advantage of the considerable expertise of the Sentencing Commission by encouraging it to take a broad assessment of ways in which current federal sentencing practices can be improved.

On behalf of the Judicial Conference, I thank you for the opportunity to testify today, and I look forward to responding to your questions.

Mr. COBLE. Thank you, Your Honor.

Mr. Felman, you are recognized.

TESTIMONY OF JAMES E. FELMAN, PARTNER, KYNES, MARKMAN & FELMAN, P.A.

Mr. FELMAN. Mr. Chairman, Ranking Member Scott and other distinguished Members of this Subcommittee, I am truly honored to have the opportunity to address you today on the important question of whether or not there is a need for immediate legislation to address the *Booker* decision. I believe there is not. I believe the data makes a compelling demonstration that status quo is an overwhelmingly more reasonable explanation than chaos. The bottom line statistic in sentencing is what is the average sentence length? Before *Booker* it was 56 months. After *Booker* it is 58 months. This is not about district judges going wild and giving everybody breaks. The average sentence went up.

While there are a modest number of additional downward variances, we could expect that. This is not the same system we had before. I am surprised by how modest the change is. And to talk only about what is the difference in the percentage of variances before and after *Booker* can be very misleading, because a 2-month variance looks the same as a 20-month variance under that statistic. It is very important to focus on what is the average extent of a departure. The average extent of departures relying on *Booker* authority is identical to the average extent of departures pre-*Booker*, and it is only 12 months. It is a rather modest amount, particularly in comparison to the average substantial assistance departure which is nearly 2½ times that, at 28 months. The reason sentences are outside the range more often is a Government motion, and the extent of the variance, which is such a critical factor, is much greater in a Government motion.

While the data does not show a need for legislation, there is a compelling reason not to make legislation right now, and that is that we are in a period of considerable constitutional uncertainty that will impact whatever legislation options you may wish to consider. The United States Supreme Court, just a few weeks ago, agreed to hear a case that will determine the constitutionality of California's presumptive sentencing laws. It is inevitable that the Court's opinion in that case will help clarify some of the critical uncertainty regarding the developing constitutional doctrines under *Blakely* and *Booker*.

There are two, as I understand it, legislative options that have been discussed. Both of them are quite potentially unconstitutional, and we will know much more about that if we wait and see what the Court says in the *Cunningham v. California* case.

The first of those options that has been discussed by Mr. Mercer today, they describe that as a minimum guideline system. I think that would be a little hard. It is suggested there be a few guidelines or they would not mean much. I would describe it as a mandatory minimum guideline system. It especially turns—and I believe the department has acknowledged in their testimony that the constitutionality of that proposal turns exclusively on the continuing viability of the Court's precedent in *Harris v. United States*. *Harris* is a 414 plurality opinion, and we have two new Justices.

If both of the Justices that are being replaced, that have been replaced, voted to uphold *Harris*, or if either of the new Justices change the vote of the Justices they replaced, *Harris* would fall.

But of particular interest is Justice Breyer's opinion in *Harris*. He issued the concurring opinion that resulted in—that caused that result. Justice Breyer said, "I cannot agree that there is any logical difference between using judicial fact-finding to raise a sentencing maximum," which is the rule of Apprendi, "and using judicial fact-finding to raise a guidelines minimum," which is what the department proposal relies upon. For Justice Breyer, he thinks there is no logical basis for that distinction. However, in *Harris* he said, "Because I do not yet accept the rule of Apprendi," I am not prepared—"I am prepared to go along with those who would permit judicial fact-finding to raise the sentencing floor."

Since Justice Breyer lost the vote in Apprendi, he has lost that same vote in *Ring v. Arizona*. He has lost that vote in *Blakely v. Washington*. He has lost that vote in *Booker v. United States*. He may very well lose that vote in *Cunningham*. What are the odds now that Justice Breyer will still say he cannot yet accept that? If Justice Breyer decides he must now accept the rule of Apprendi, *Harris* falls. It is an incredible gamble to wager on that vote, because if *Harris* falls, it is not just your new mandatory minimum guideline system that falls, it is every single mandatory minimum sentence in the Federal Criminal Code. They would all be unconstitutional because they rely on *Harris*. It's a heck of a gamble to take.

Before I think you could take a gamble like that, there would have to be a compelling demonstration of chaos, a compelling demonstration that we need to act. What is the reason we should not wait a year and find out whether that is a gamble worth taking? I think that the only word I can use to describe the suggestion that we should legislate now on that is "irresponsible."

The second proposal that has been suggested is so-called presumptive guidelines, that is, we could pass a law that would add additional weight to the guidelines. That pushes the constitutional envelope. We know that binding guidelines are unconstitutional. We know that advisory guidelines are not. We do not know whether presumptive guidelines are constitutional. I do not think that that approach can be supported by a cost benefit analysis.

And I see that my time has expired, and so I will stop, but I will be happy to answer any questions that you have. Thank you.

[The prepared statement of Mr. Felman follows:]

PREPARED STATEMENT OF JAMES E. FELMAN

TESTIMONY OF JAMES E. FELMAN, ESQ.
Kynes, Markman & Felman, P.A.
Tampa, Florida

BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY OF THE JUDICIARY COMMITTEE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

March 16, 2006 Oversight Hearing
***United States v. Booker*: One Year Later – Chaos or Status Quo?**

Mr. Chairman and Distinguished Members of the Committee:

I am honored to have this opportunity to appear before you today to express my views regarding the state of federal sentencing law. I am a practicing criminal defense attorney in Tampa, Florida. Throughout my career I have taken a keen interest in federal sentencing law and in the Federal Sentencing Guidelines in particular. Since 1994 I have helped to organize and moderate the Annual National Seminar on the Federal Sentencing Guidelines, which is a joint project of the Federal Bar Association and the United States Sentencing Commission. From 1998 to 2002 I served as Co-Chair of the Practitioners' Advisory Group to the Sentencing Commission. I am the immediate past Co-Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section and a current member of the ABA's *ad hoc* task force on *Blakely* and *Booker*. I am also a member of the Sentencing Initiative of The Constitution Project, a bi-partisan panel of federal and state judges, scholars, and practitioners chaired by former Attorney General Edwin

Meese and former Deputy Attorney General Philip Heymann. Our group also includes Judge Cassell as well as, until very recently, then circuit judge Samuel Alito. My testimony today is strictly in my personal capacity, and the views I express are not necessarily those of any of the above groups or organizations, although I will reference certain policies adopted by the ABA and the Constitution Project group.

My testimony will cover three areas. First, I will discuss the data on post-*Booker* sentencing patterns. I conclude that there remains a large amount of additional information that would be well worth gathering and analyzing before taking any legislative action. Second, I will address whether the data gathered to date support immediate legislative action. I conclude that it does not and that the additional information we lack is worth waiting for. Another reason to be patient is that most of the legislative alternatives to advisory guidelines pose significant constitutional questions. Those questions may at least in part be addressed by the Supreme Court in a case it agreed to hear just last month, *Cunningham v. California*.[1] Third, while I believe it is premature to take action now, I will offer some thoughts regarding various alternatives over the long term: (1) leaving the existing advisory guidelines in place; (2) new legislation designed to give "presumptive" weight to the guidelines; (3) mandatory minimum guidelines; and (4) simplified guidelines.

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[1]No. 05-6551, 2006 WL 386377 (cert. granted, Feb. 21, 2006).

I. Post-*Booker* sentencing data

Thanks to the efforts of the Sentencing Commission, we have a wealth of data regarding both pre- and post-*Booker* sentencing trends.[2] This data reflects modest increases in both average sentence length and in the rate of sentences outside the now advisory guideline range. It also points to the need for the collection and analysis of additional data to get a complete picture of important aspects of post-*Booker* sentencing.

A. The data we have

1. Average sentence length

The bottom line in sentencing statistics is the overall average sentence length. The average sentence before *Booker* was 56 months. The average sentence after *Booker* is 58 months.[3] It would be difficult to make a credible argument in light of that statistic that the post-*Booker* state of affairs is anything other than status quo.

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[2]UNITED STATES SENTENCING COMMISSION, *Report On The Impact of United States v. Booker On Federal Sentencing* (March 2006) ("Booker Report").

[3]The status quo regarding average sentence lengths before and after *Booker* is reflected across the board in all four of the most significant categories of cases: drugs, immigration, firearms, and economic offenses.

2. Percentage of variances

A somewhat less telling statistic is the rate of sentencing outside the ranges dictated by the guidelines or government-sponsored departures. The post-*Booker* rate of sentencing within the guideline range or outside the range at the request of the government is 85.9%. This compares with a rate of 90.6% prior to the Protect Act and 91.9% after the Protect Act. The percentage of upward variances post-*Booker* has *doubled* from 0.8% to 1.6%. There was a roughly 5% increase in defense-sponsored variances when compared to post-Protect Act rates and a 4% increase when compared to pre-Protect Act rates. This hardly indicates sentencing "chaos." Because this means 95% of cases are being handled in the same way as before *Booker*, "status quo" more accurately describes the present situation.

3. Extent of variances

Undue focus on the percentage of variances obscures an equally important consideration – the extent of such variances. Sentences 10% and 100% below the guidelines range look the same when viewed only from the perspective of whether or not they are variances. To understand the significance of variance rates, they must be considered in conjunction with data regarding their extent. As foreshadowed by the bottom line statistic of slightly increased overall sentence lengths, the average extent of variances based on pre- and post-*Booker* sentencing authority is identical. The

average departure based on pre-*Booker* guidelines authority is 12 months. The average variance based on post-*Booker* Section 3553(a) authority is also 12 months.

Those concerned about overall sentencing severity should note that those averages pale in comparison to the average length of departures granted when sponsored by the government. The average downward departure for substantial assistance is 28 months – more than double the average defense-sponsored variance.

4. Appellate review of variances

We do not have data for rates of within-range sentences during the period of relative confusion following the initial enactment of the Guidelines in 1987. Anecdotally, however, I believe there is consensus on the fact that rates of departure dropped dramatically during the initial years of guideline implementation, especially after their constitutionality was upheld in 1989. The major force in pushing departure rates down was the process of appellate review. The circuit courts reversed many more downward departures than they affirmed in those early years, and this led to much higher rates of within-range sentences by the district courts.

A similar phenomenon appears underway now in the immediate post-*Booker* period. The Sentencing Commission's "Selected Appellate Decisions" data[4] reflects

[4]*See* Booker Report, *supra* note 2, at 30, Ex.2.

15 reversals and only 6 affirmances of downward variances.[5] Only one within-guideline range sentence has been reversed. Just as they did in the late 80's, the district courts will likely respond to this appellate trend. District courts are likely to grant even fewer downward variances throughout the near term.[6]

B. The data we need

While the Sentencing Commission has done a tremendous job compiling a vast array of important post-*Booker* data, there is still a great deal we do not know. For example, we do not yet have any data by offense category on *why* district courts are granting variances under their post-*Booker* authority. I have yet to encounter a federal district judge who does not approach his or her job in general and sentencing in particular with anything other than the utmost solemnity. Frivolous people do not get appointed to the federal bench in this country. Any serious study of post-*Booker* sentencing practices and patterns remains incomplete in the absence of data regarding the reasons why these conscientious men and women are sentencing particular types

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[5]Interestingly, this trend does not carry over to appeals of sentences above the guidelines range. The Sentencing Commission cites 14 affirmances and only 2 reversals of above-guideline variances.

[6]Indeed, preliminary data suggest "a possible beginning of an upward trend in the rate of imposition of within-range sentences and a concomitant decrease in the rate of imposition of non-government sponsored, below-range sentences." Booker Report, *supra* note 2, at 59.

of offenses as they are. We need to know the bases for variances by offense category and their relative rates of frequency. And we also need this data cross-referenced by extent of the variance.

The newly-available array of sentencing considerations in Section 3553(a) presents a valuable learning opportunity that should not be squandered. While the guidelines were always intended to evolve based on further knowledge, they lagged behind in some notable respects. For example, the Commission has identified a number of factors that powerfully predict reduced likelihood of recidivism, including age, first offender status, and a stable employment history,[7] factors which are not incorporated in the criminal history computation and are deemed "not ordinarily relevant" under the Guidelines. Post-*Booker*, courts have been able to consider factors like these, thus more effectively meeting the purposes of sentencing.[8] If a large percentage of the variances are for reasons that more effectively assure the

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[7]UNITED STATES SENTENCING COMMISSION, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines,* 11-12, 16 (May 2004) ("Measuring Recidivism"); UNITED STATES SENTENCING COMMISSION, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score,* 8, 13-15 (Jan. 2005).

[8]*E.g.*, *United States v. Ryder*, 414 F.3d 908 (8th Cir. 2005) (elderly, various medical conditions); *United States v. Lata*, 415 F.3d 107, 113 (1st Cir. 2005) (over 60, suffering from cancer).

purposes of sentencing, this suggests a need to capture these considerations more adequately within the guidelines. This, in turn, would lead to greater rates of within-range sentences. Given the talent of our judiciary, sentencing policy should be a dynamic process of learning. Data on the reasons for variances is essential to this process.

We also need more data regarding appeals of variances. As explained above, this will be an important aspect of the development of post-*Booker* sentencing practices. We do not know how many variances have been appealed. We do not know the rates at which variances are being reversed. And we do not know what the final post-appeal variance rates are. Under our current data, downward variances by district courts are shown as sentences outside the guideline range even if they are later reversed on appeal. And, of course, we do not yet know what the impact of such appellate reversals will be over the near and longer term on future variance rates.

II. There is no need for immediate legislation

The post-*Booker* data reflect slight increases in overall average sentence length and rates of variance and no change at all in average extent of variances. There is, accordingly, no state of emergency in federal sentencing to warrant legislative change at this time. Moreover, as the appellate process continues to play out, variance rates will likely remain low. In the meantime, we can continue to collect the critical

additional data regarding reasons for variances needed to flesh out the full post-*Booker* sentencing picture.

In addition to the fact that the existing data does not demonstrate a pressing need *for* immediate legislation, there is a significant reason *not* to enact immediate legislation. The Supreme Court just a few weeks ago granted certiorari to review a new case in the *Blakely/Booker* line – *Cunningham v. California*.

In *Cunningham*, the Court will consider the constitutionality of California's presumptive sentencing laws. The case involves a sexual offense against a child. Under California law, the punishment for the specific offense can be either 6, 9, or 12 years' imprisonment. The middle sentence, however, has presumptive value – the sentencing court must impose a sentence of 9 years unless it finds aggravating or mitigating factors to justify the greater or lesser sentence. These aggravating and mitigating factors are not presented to a jury. In *Cunningham*, the trial court found aggravating factors and imposed a 12-year sentence. The California appellate courts affirmed, relying on an interim decision of the California Supreme Court that its system did not violate *Blakely* because the middle range was merely presumptive and the trial court retained discretion to impose a higher sentence under the advisory aggravating factors.[9] In its review of *Cunningham*, the newly-comprised Supreme

[9]*People v. Black*, 35 Cal.4th 1238 (Cal. 2005).

Court will directly confront the constitutionality of presumptive guidelines coupled with advisory factors found by judges rather than juries. *Cunningham* may also call into play the issue of raising the low end of the applicable sentencing range based on judicial factfinding – an issue open to question in light of the Court's 4-1-4 decision in *Harris v. United States*.[10] As discussed below in Part III, several of the potential avenues of legislation raise significant constitutional issues. *Cunningham* appears virtually certain to have a direct impact on these issues.

Over 98% of sentences result from guilty pleas rather than trials. Accordingly, in the overwhelming majority of federal cases, the sentencing hearing is the only trial court proceeding of significance. The law of sentencing is therefore, in my view, the single most important aspect of federal criminal law. Because we do not face a state of emergency, there is valuable data yet to be collected, and the Supreme Court is poised to decide a case of critical significance, I believe the responsible course at this time is one of patience.

III. What are the other alternatives?

I recognize that the law of federal sentencing is a subject of keen interest to this Committee. I also recognize that the post-*Booker* system of advisory guidelines is not exactly the one Congress enacted but resulted from an unanticipated development in

[10] 536 U.S. 545 (2002).

Sixth Amendment jurisprudence. As we continue to collect important additional data and observe the manner in which the Court will refine the Sixth Amendment lines roughed out in *Blakely* and *Booker*, the Committee will be considering its long-term legislative options. I would like to comment on some of those options.

A. Leave the current system in place

The first and most obvious option is to leave the post-*Booker* system of advisory guidelines in place. This may well be the best option. While the mandatory guidelines reduced disparity to a degree,[11] they were not without their faults. There is widespread consensus that the mandatory guidelines were simply too rigid. Indeed, this is one of the central conclusions reached both by our bi-partisan panel at The Constitution Project[12] and by the ABA.[13] My own experience as a criminal defense

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[11]*See* UNITED STATES SENTENCING COMMISSION, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform,* 32, 48-52, 82, 87, 91-92, 104, 113-19, 122-27, 131-46 (2004) (goal of eliminating unwarranted disparities was not fully achieved; racial disparity increased under guidelines; unwarranted disparities stem from, *inter alia*, prosecutorial practices, relevant conduct rules, drug guidelines, some criminal history rules) ("Fifteen Year Study").

[12]CONSTITUTION PROJECT'S SENTENCING INITIATIVE, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005).

[13]The rigidity of the guidelines is accountable in large part to the 25 percent rule codified in 28 U.S.C. §994(b)(2). The ABA, in approving the Justice Kennedy Commission recommendations in August 2004, recommended "that the Congress [r]epeal the 25 percent rule in 28 U.S.C. §994(b)(2)to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing

attorney matches the consensus viewpoint. As my years of practice go by I am continually reminded of something a senior attorney told me at the outset of my career – "The truth is stranger than fiction."[14] The mix of information presented by offenses and offenders is frequently so rich that it simply cannot all be predicted, written down, and appropriately weighed in advance with unfailing success. Even the best written guidelines, if mandatory, will yield instances of undue uniformity – treating *unlike* offenses and offenders in a like manner. Making the guidelines advisory while permitting consideration of other relevant factors, coupled with appellate review for overall reasonableness, is a targeted solution to the Guidelines' undue rigidity. The present advisory guidelines bear no resemblance to the "unbridled discretion" of the pre-Guidelines era.[15] We have an established structure to provide sentences sufficient but not greater than necessary to achieve just punishment, deterrence, protection of

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guidelines and consider state guideline systems that have proven successful" Recommendation 121A, Annual 2004, p.9, available at http://abanet.org/crimjustice/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

[14]As the Sentencing Commission has long acknowledged, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." *See* U.S.S.G. § 1A1.1, editorial note, Part A(4)(b).

[15]The current system is consistent with the carefully thought out ABA Standards for Criminal Justice: Sentencing (3d ed. 1994). The Standards recognize the importance of guidelines to control and protect against unfettered judicial discretion, but allow consideration of aggravating and mitigating factors in particular cases.

society, and rehabilitation, in consideration of the advisory guidelines and other sentencing factors present in the case. While it is too soon to be certain, the present system may well be one worth keeping.

B. Potential improvements to the current system

This is not to say that the present system cannot be improved upon. There are important changes that would improve the present system without major structural change or constitutional doubt. I offer the following suggestions:

1. Fix the crack/powder ratio

The 100:1 ratio for crack and powder is wrong.[16] It leads to racially disparate results and is inherently unfair. The ratio should be changed without raising the penalties for powder because drug penalties are more than severe enough as they are.[17]

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[16]*See* UNITED STATES SENTENCING COMMISSION, *Cocaine and Federal Sentencing Policy*, Executive Summary at v-viii (May 2002). The ABA has called for the elimination of the crack/powder disparity for more than a decade. *See* Recommendation 129, Annual 1995 (Individual Rights and Responsibilities, Special Committee on the Drug Crisis).

[17]The more than doubling of sentences in drug cases is the major cause of prison population growth and a primary cause of racial disparity in sentencing. Yet, over 50% of drug offenders are in Criminal History Category I, and of all federal offenders, drug offenders are the least likely to recidivate. The drug trafficking guideline in combination with the relevant conduct rule increased "prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." As a result, low-level offenders are punished as harshly as kingpins, and resources may be misdirected from the kingpins and traffickers Congress had in mind in enacting the two-tiered mandatory minimum

2. Reduce the impact of uncharged and acquitted conduct

The relevant conduct provisions of the guidelines are also problematic. They allow sentences to be dramatically impacted by conduct for which the defendant is neither charged nor convicted, and even offenses for which the defendant was found not guilty by a jury. The Sentencing Commission has repeatedly looked at ways to correct this problem, but it has not yet acted on the issue.[18] The Constitution Project group has similarly reached consensus that the existing rules governing relevant conduct require change.[19]

3. Procedural reform

Prior to the guidelines, district courts had discretion to sentence defendants anywhere between any statutory minimum and maximum sentences. Courts were not required to state any reasons for their sentences or make any particular factual findings to support their decisions. Under this discretionary regime, the courts utilized probation officers to conduct presentence investigations regarding the defendant, but

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law. *See* Fifteen Year Report, *supra* note 11, at 47-55, 76, 132, 134; Measuring Recidivism, *supra* note 7, at 13 & Exh. 11.

[18]UNITED STATES SENTENCING COMMISSION, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996); 62 Fed. Reg. 152, 161 (1997); 61 Fed. Reg. 34,465 (1996); 57 Fed. Reg. 62832, 62848 (1992); 58 Fed. Reg. 67522, 67541 (1993).

[19]*See supra* note 12.

these reports were not used to make factual findings regarding disputed matters because no such factual findings were required in the sentencing process.

Under the advisory guidelines, in contrast, narrow sentencing ranges are determined through very specific factual findings regarding the factors enumerated in the guidelines. Given the number and importance of the factual determinations to be made under the guidelines, the rules of procedure should ensure that the process for litigating these factual issues is balanced and designed to produce the most reliable results possible.

The pre-existing practice of presentence investigations conducted by probation officers based on ex parte submissions is inconsistent with the principles underlying an adversarial system of justice and should be revised to account for the new importance of fact finding at sentencing. Indeed, the very concept of a judicial "investigation" of potentially disputed facts is without precedent or analog in American jurisprudence.

There are presently no rules governing the process by which presentence investigations are conducted. In practice in most districts,[20] the parties submit factual

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[20]I understand that there is disparity among the districts in these procedures. In some districts there is virtually "open file" discovery. In my district, the Middle District of Florida, all submissions to the Probation Office are ex parte and will not be shared with opposing parties. These wide variations in practice among the districts are a further reason for the enactment of uniform rules of procedure.

information to the probation officer on an ex parte basis. The probation officers do not share the information submitted to them by one party with the other party. Indeed, probation officers are authorized to promise confidentiality to sources of information and to present information without revealing its source. Even in the absence of a probation officer's grant of confidentiality to information sources, presentence investigation reports do not typically cite or reference the sources of information upon which their proposed factual findings are based.

Dueling ex parte submissions, followed by reports without citations, do not approach the level of reliability in the factfinding process that would result from the ordinary adversarial process. There do not appear to be any countervailing considerations to suggest that an adversarial process would be unduly burdensome or unworkable in the litigation of sentencing facts, so long as provision is made for the protection of sensitive information upon good cause shown.

An adversarial process in litigating sentencing facts could be accomplished by amending Rule 32 of the Federal Rules of Criminal Procedure to require that any party wishing to provide information regarding a sentencing proceeding to the probation officer preparing the presentence investigation report must, absent good cause shown, provide that information to the other party.

Specifically, a new subsection (c)(3) should be added:

> **(3) Limitations on ex parte submissions**. Any party wishing to submit information to the probation officer in connection with a presentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer.

This Rule would substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer. A "good cause" exception is made where information, if revealed to other parties, may compromise an ongoing investigation or result in physical or other harm to a confidential source, the defendant, or others. Existing rules limiting ex parte communications should suffice to limit submissions of information directly to the Court without serving opposing parties.

It may also be necessary to repeal or amend subsection (d)(3)(B) of Rule 32, which directs probation officers to exclude from the presentence investigation report "any sources of information obtained upon a promise of confidentiality." Probation officers should not be empowered to promise confidentiality to sources of information to be used to sentence defendants in the absence of good cause.

4. Add a defense ex officio to the Sentencing Commission

Federal sentencing policy is in large measure shaped by the Sentencing Commission. In addition to its seven voting members, the Sentencing Commission

has *two* Department of Justice *ex officio* members – one slot for the Chair of the Parole Commission and a second for the Attorney General or his designee. The defense bar, the other critical player in the sentencing process, has *no* voice or presence on the Sentencing Commission. Parole has been abolished for more than twenty years. There is no longer a need for the Parole Commission to have an *ex officio* seat on the Sentencing Commission. That position should be converted to a defense representative position.[21]

C. Other potential changes to the current system that are not necessary

1. The standard of appellate review

It has been suggested by some that the "reasonableness" standard of appellate review should be changed, perhaps even by a return to the pre-*Booker* standard of de novo review. There are two compelling reasons not to do this. First, it would be unconstitutional. The remedial majority in *Booker* found it necessary to excise de novo review from the statute in order for the guidelines to be sufficiently advisory to pass constitutional muster. *See Booker*, 543 U.S. at 259, 261. Second, it represents poor sentencing policy. A de novo standard of review announces that the opportunity

[21]I would also favor repeal of the limitation on the number of Judges who may serve on the Sentencing Commission. There is no limit on the number of barbers or truck drivers who may be sentencing commissioners. There is no valid reason to limit the number of Judges who may serve. The ABA has also made this recommendation. *See* Recommendation 121A, Annual 2004, *supra*, note 13.

to actually see and hear the individual human being to be sentenced is of absolutely no value to our system of justice. I urge the Congress not to subscribe to this view. Tightening the standard of review to some intermediate point between "reasonableness" and de novo would only push the constitutional envelope, and no case can be made at this point that there is anything wrong with the present standard.[22]

2. Substantial assistance departures without a government motion

Shortly after *Booker*, some expressed a concern that district courts would grant downward departures for substantial assistance in the absence of a government motion with undue frequency. I do not believe that concern has come to pass. The Sentencing Commission has collected data on 65,766 cases sentenced after *Booker*. The government filed substantial assistance motions in 9,399 of these cases. In 258 cases, district courts considered substantial assistance where the Sentencing Commission could not determine whether or not the government had filed a motion. In only 28 of these 258 cases were departures reportedly granted based solely on unrecognized substantial assistance.

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[22]The ABA in August 2004, prior to the *Booker* decision, recommended that Congress "[r]einstate the abuse of discretion standard of appellate review of sentencing departures, in deference to the district court's knowledge of the offender and in the interests of judicial economy." Whether a "reasonableness" or abuse of discretion standard is used, the unique role played and information possessed by a sentencing judge should be recognized. *See* Recommendation 121A, Annual 2004, *supra*, note 13.

I have a number of thoughts about this data. The first is how small the numbers are. The 258 cases represents .4% of total cases and 2.7% of the number of cases in which the government filed the motion. These numbers are remarkably small in comparison to the overall number of cases and the number of cases where the government agreed the defendant was entitled to the departure. And evidently the extent of these departures were very modest – an average of only 13 months compared with the average government-sponsored departure of 28 months.

Second, the circumstances of these cases should be examined closely. It seems unlikely that a district court would grant a substantial assistance downward departure to a defendant who did not earn it. There are many other ways under the present system to justify a downward departure or variance. The Sentencing Commission noted that in roughly half of the 258 cases, it could not determine whether the government did in fact move for or agree to the departure. This is not always easy to determine.[23] After careful review of these cases, the number of substantial assistance departures granted without government approval may turn out to be even lower than the minuscule .4% now in question.

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[23] *Cf.* UNITED STATES SENTENCING COMMISSION, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, 60 (October 2003) (conservative estimate was that 40% of downward departures reported to Congress as judicial departures were initiated or acquiesced in by the government).

Third, the data does not indicate whether the government elected to appeal any of those cases or, if an appeal was taken, its outcome. After a Westlaw search, I found only one case in which the government appealed a sentence below the guidelines range based on cooperation without a government motion. It was reversed.[24] I have seen no other appellate decision on this issue.

Finally, just because a judge rewarded a defendant for substantial assistance without a government motion does not mean the defendant did not deserve it. Unfortunately, prosecutors will at times simply refuse to reward defendants with motions to recognize their assistance. In addition to examining why the district courts granted these departures, it may be of equal or greater importance to learn why the government refused to file the motion in these cases. In any event, I hardly think this data suggests a need for corrective legislation.

D. "Presumptive" guidelines

As set forth above, the present system of advisory guidelines may prove to be the best long-term option. Another possibility discussed by some is legislation to give greater or "presumptive" weight to the guidelines. This is not an advisable course of action at this time because the costs of such an approach greatly outweigh its benefits. The benefits to this approach are slim in my view because the guidelines are already

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[24] *United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005).

treated as nearly presumptive by most district courts. Although they may not constitutionally be able to say so, nearly every district judge starts with the assumption that he or she will impose a guidelines sentence unless there is a good reason not to do so.[25] This is the functional equivalent of a presumption. A new law labeling the guidelines "presumptive" would not change the results in many cases.

On the other side of the equation, the costs of this approach are considerable. The day after such legislation is enacted, every federal sentence imposed in this country will be in constitutional doubt. Putting additional weight on the guidelines – factors used to increase sentencing ranges in the absence of jury findings – raises a significant constitutional question under *Booker*. We know that "advisory" guidelines are constitutional. We know that "binding" guidelines are not.[26] We do not know

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[25]The reason for this is twofold. The first is habit – federal judges have been sentencing under the guidelines for nearly two decades. They are comfortable and familiar with them. The second is practical. The guidelines are specific, whereas the remainder of the 3553(a) factors are general. The comments of the district court quoted in a recent en banc opinion of the First Circuit are likely typical of the vast majority of the district courts: "I need to start someplace, and [the guidelines are] where I'm going to start." *United States v. Jimenez-Beltre*, ___ F.3d ___, 2006 WL 562154 (1st Cir. Mar. 9, 2006).

[26]The legislative history of the Sentencing Reform Act describes the original guidelines as "presumptive." As summarized by the Sentencing Commission, the standard set forth in the now-excised section 3553(b)(1) (requiring a sentence within the range unless a ground for departure existed) was adopted during the legislative process to ensure that the guidelines were "presumptive" rather than "advisory" as they had originally been conceived. *See Fifteen Year Report*, *supra* note 11, at 7. The

whether "presumptive" guidelines are constitutional or not, but we know that virtually every defendant will object on the ground that they are not and appeal until the question is answered by the Supreme Court. If such a law were struck down, many or all of the defendants sentenced during the interim would need to be re-sentenced. We are still in the process of this same work in the wake of *Blakely* and *Booker*. Adding yet another round of this on top of the present process would be truly unfortunate. Moreover, as discussed above, this issue may well shortly be resolved by the Supreme Court in its consideration of *Cunningham*.

It has been suggested by some that "presumptive" guidelines would be constitutional because some,[27] but not all,[28] circuit courts have held that within-range sentences will be presumed reasonable on appellate review. Putting to one side that an appellate presumption of reasonableness may itself be unconstitutional, this is a

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availability of departure in this "presumptive" system did not avoid the constitutional issue. *Booker*, 543 U.S. at 234.

[27] *See, e.g., United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 707 (6th Cir. 2006); *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

[28] *See, e.g., United States v. Jimenez-Beltre*, ___ F.3d ___, 2006 WL 562154 (1st Cir. Mar. 9, 2006); *United States v. Cooper*, 437 F.3d 324, 327-28 (3d Cir. 2006); *United States v. Talley*, 431 F.3d 784, 786-87 (11th Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005).

comparison of apples and oranges. A presumption of reasonableness on appellate review presents a wholly different constitutional question from giving the guidelines presumptive weight in the first instance at the district court level.

The term "presumptive" is also vague. Even if a new law making the guidelines "presumptive" were upheld, the Court would surely provide its gloss on what construction of that term led to its passing constitutional muster. Any district court using a more restrictive definition of the term would have to redo its interim sentences.

Accordingly, a cost/benefit analysis weighs decisively against enactment of "presumptive" guidelines at this time. This conclusion is reinforced by the fact that the constitutionality of California's presumptive guidelines is now before the Court in *Cunningham*. In light of the importance of the issue, the fact that the guidelines enjoy a limited presumption in practice already, and the tremendous potential costs outlined above, there is no compelling reason not to at least await the Court's ruling in *Cunningham* before taking legislative action to add weight to the advisory guidelines.

E. mandatory minimum guidelines

In addition to "presumptive" guidelines, some have suggested restoring the binding nature of the low ends of guideline ranges as a potential long-term legislative

approach. This "mandatory minimum" approach is an even worse and more constitutionally tenuous idea than "presumptive" guideline legislation.

First, any effort to put binding weight on the low end of ranges determined by judicial factfinding will squarely present the constitutional question of whether the plurality opinion in *Harris v. United States*[29] has continuing viability. In *Harris*, Justice Breyer concurred in the Court's opinion to allow mandatory minimum sentences to be imposed on the basis of judicial factfinding. He did so, however, even though he expressly disagreed that there was any logical difference between using judicial factfinding to raise a sentencing ceiling – clearly unlawful under *Appendi v. New Jersey*[30] – and allowing judicial factfinding to raise a sentencing floor – the issue in *Harris*. For Justice Breyer, the same rule must apply to both circumstances. Justice Breyer concurred in allowing judicial factfinding to raise the sentencing floor in *Harris* only because he had dissented in *Apprendi* and did not "yet accept its rule."[31] In the years since Justice Breyer lost the vote in *Apprendi*, he has again lost the same

[29]536 U.S. 545 (2002).

[30]530 U.S. 466 (2000).

[31]536 U.S. at 569.

vote in *Ring v. Arizona,*[32] *Blakely v. Washington*,[33] and *United States v. Booker*.[34] He could well lose the vote again in *Cunningham* by the time legislation enacting mandatory minimum guidelines reaches the Court. Under the circumstances, it hardly seems responsible legislative policy to bet the constitutional ranch on the proposition that Justice Breyer – having lost the same vote at least four times – would continue not to "accept" the rule of *Apprendi*. And, of course, the Congress would not be wagering only its new mandatory minimum guidelines legislation on this constitutional gamble regarding the continuing viability of *Harris*. If the rule of *Harris* falls, every mandatory minimum sentence in the federal criminal code that relies on judicial factfinding would fall along with it.

Second, mandatory minimum guidelines are such poor policy that they have been rejected by every concerned body to have considered them, including the Judicial Conference, the Federal Judges Association, the American Bar Association, as well as our Constitution Project panel, to name only a few.[35] Mandatory minimum

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[32]536 U.S. 584 (2002).

[33]542 U.S. 296 (2004).

[34]543 U.S. 220 (2005).

[35]*See, e.g.*, Letters to House Judiciary Committee from the Judicial Conference, the Sentencing Commission, Edwin Meese and Phillip Heyman for the Constitution Project, the ABA, the Federal Defenders, Professor Bowman, and others, available at http://www.nacdl.org/Federal Sentencing.

guidelines would establish as policy that we are essentially unconcerned about unduly severe sentences so long as there are no unduly lenient sentences. Such a policy flies in the face of established sentencing principles, such as the need to avoid unwarranted disparity, the need for sufficient flexibility to avoid unwarranted uniformity, and the "parsimony principle" embodied in Section 3553(a).

F. Simplified guidelines

If the Congress is truly dissatisfied with the post-*Booker* advisory guidelines after all of the necessary data is in, there is one clear alternative approach that would simultaneously serve the purposes of the Sentencing Reform Act and be free from all constitutional doubt. This approach, which I have previously described in some detail,[36] has been endorsed by the ABA.[37] It is also under careful review by The Constitution Project, which I anticipate will be issuing a report with detailed legislative recommendations within the coming weeks.

I refer to this approach as "simplified" guidelines. It involves selecting a handful of core culpability considerations in each offense type and submitting them

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[36]James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 97 Fed. Sent. R. 97 (Dec. 2004). Professor Bowman has added additional helpful thoughts regarding this potential approach. *See* Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149 (2005).

[37]Recommendation 301, Midyear 2005 (Criminal Justice Section).

to the jury or stipulating to them through guilty plea. For example, in drug cases the jury might consider the defendant's role and the weight of the drugs involved in the offense. In fraud cases the jury might consider the loss caused by the offense, just as the jury determines damages in every civil case. The result of these additional jury findings or plea stipulations would be a sentencing range that would ordinarily be binding on the district court. The number of sentencing ranges could be dramatically reduced – from 43 offense levels to as few as, for example, 10 levels:

1	0-1 years
2	0-3 years
3	1-4 years
4	2-5 years
5	4-9 years
6	8-13 years
7	12-17 years
8	16-21 years
9	20-25 years
10	25 years - life

This proposal is content-neutral on severity. Additional factors such as those in the present guidelines manual and Section 3553(a) could be considered by the sentencing court in imposing sentence within the range established by the jury's verdict or the defendant's stipulation. A court could depart downward from that range only if it found a mitigating circumstance of a kind or to a degree not included in the factors determined by the jury or the within-range advisory considerations.

Obviously there would be room for reasonable differences of opinion in drafting the details of this approach. But if the Congress is dissatisfied with advisory guidelines, the only clearly constitutional way to return to binding guidelines is to put the fact questions that determine the binding guideline range to the jury.

Conclusion

I appreciate this opportunity to assist the Subcommittee on these important issues. I will be pleased to answer any questions the Subcommittee might have at the hearing or, if necessary, in a subsequent written submission.

Mr. COBLE. Thank you, Mr. Felman, and thank each of you for complying with the time limit. We also impose the 5-minute time limit against ourselves, so if you all could keep your answers as tersely as possible.

Mr. Mercer, having reviewed the Sentencing Commission's statistics, and having discussed or listened to prosecutors in the field, walk us through very briefly what happened post—*Booker*.

Mr. MERCER. As I indicated in my opening statement, we're seeing significant increases in disparity within judicial districts, and also on an inter-circuit and intra-circuit basis. I think numbers here are somewhat helpful. Let me talk for a minute about the Southern District of New York. In 2003, the non-substantial assistance downward departure rate was 8.3, and that was fairly constant after *Blakely* and pre-*Booker* in 2004, 8.1 and 8.9 percent. It is now up to 23.6 percent.

In the Western District of Louisiana, pre, in 2003, the rate was 2.3 percent for non-substantial assistance downward departures. It was 1.8 and 1.0 percent in 2004, pre-and post-*Blakely*. And then it's up to 14.2 percent now. So we have seen a very significant increase in the number of cases in which courts are imposing below guideline range sentences.

We also know from the Sentencing Commission data set—and this comports with what we've seen in the field—that of those defendants who are getting non-substantial downward departures and non-governmental-sponsored departures, 40 percent of those, one-third of that cohort of cases, about 2,700 of them, involve departures of 40 percent or more. So you've heard a couple witnesses talk about how that only means 12 months, but if we play that out in a real case, maybe a fraud case with a loss of, say, $250,000, where the guideline range is 12 to 18 months. In a case where you've got a downward departure, typically on a factor that was disfavored or unmentioned in the guidelines manual, and something that we would not have seen after the PROTECT Act, relied upon to lower a sentence, so now we may see a sentence down to zero months with one of those defendants, the other one getting 18, and a significant disparity if you've got the same fraud and the same criminal history for this defendant, and a sentence of zero months for this defendant. That is the sort of unwanted disparity that the Sentencing Reform Act was designed to get rid of.

Mr. COBLE. Thank you, Mr. Mercer.

Judge Hinojosa, why, if you know, why are judges handing down more below-range sentences for the crimes of sexual abuse of a minor, sexual contact of a minor, or trafficking in child pornography, sexual exploitation of a minor, and furthermore, the below-range sentences increased for all major drugs, meth, heroin, marijuana, powder cocaine? Can you explain why?

Judge HINOJOSA. Well, it's difficult to explain, Chairman Coble, but I will say that one thing we have found in the sex offenses is that it appears to be at the level where there is no prior criminal history, and that is where you see the highest percent of post-*Booker* below-range sentences, and that seems to be a common factor with regards to those.

Mr. COBLE. Your Honor, that probably, and cooperating with the State or Federal Government in developing a case?

Judge HINOJOSA. No. When we say the below-range, that includes basically judicially-initiated below-range sentences. The Government-sponsored ranges are kept separate.

Mr. COBLE. I got you.

Judge HINOJOSA. And so it would not include that. We do not see that with regards to rape cases. Those have actually, as far as the below-range sentences, gone down from the post-PROTECT Act. That is the one area where they have gone down. That is one of the explanations. Judge Cassell mentioned others.

With regards to the drug cases, again, basically the same thing, first-time offenders.

Mr. COBLE. Thank you, Your Honor.

Judge HINOJOSA. And/or low criminal history categories. There are some of these drugs that are higher than others with regard to the below-range sentences.

Mr. COBLE. Let me go—thank you, Judge.

Let me to Judge Cassell before my red light illuminates. Judge, do you expect the rate of below-range sentences to continue to increase over time?

Judge CASSELL. No——

Mr. COBLE. Your mike's not hot, Judge.

Judge CASSELL. All right. I expect—in my testimony, I've actually got data on that, and if you look at what's happened January, February, March of this year, each month there has been an increase in the number of sentences within the guideline range, and so I would expect that to increase over time. We need to remember, *Booker* came down about a year ago, and the Courts of Appeals hadn't told us in the District Courts exactly what to do. They've now told us in a number of circuits that we should be giving very serious attention to the Sentencing Guidelines, and so over time, we're seeing that trend with more and more guideline compliance.

Mr. COBLE. Thank you, Your Honor.

The distinguished gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Mercer, if you had two people in court pleading guilty the same day, one's a 19-year-old high school senior having consensual sex with a 15-year-old, more than 4 years difference in age, consensual sex, pleads guilty to it. At the same a 50-year-old pleads guilty to having sex with a 12-year old. They're prosecuted under the same code section. Should they get the same sentence?

Mr. MERCER. Well, of course, we'd look at the criminal history in that case, Your Honor—excuse me—Congressman, but we—I think you're right in saying that the guideline calculation would be different in all likelihood, probably be a coercion enticement case for the 50-year-old. It depends on the facts. But I think you're right, the sentence would probably be different in that case, and that would be reflected——

Mr. SCOTT. If there were a downward departure for the 19-year-old compared to the 50-year-old, would that be bad?

Mr. MERCER. Well, typically, we would look for that variance to be within the guideline range.

Mr. SCOTT. So you would expect both of them to be sentenced within the guideline?

Mr. MERCER. Absolutely. In fact, the example——

Mr. SCOTT. The 19-year-old high school student having consensual sex with a 15-year-old high school student within the same guideline as a 50-year-old having sex with a 12-year-old, ought to be sentenced within the same guideline?

Mr. MERCER. Let me—if I may back up just to talk about—we do a fair number of those cases in my district because of our jurisdiction in Indian country offenses. And we would look to whether the State law would even allow us to bring that case, depending upon the age of the victim and the age of the offender, but we've got a real——

Mr. SCOTT. This is Federal law. We passed it. It's illegal for a 19-year-old to have consensual sex with a 15-year-old. Should they get the same sentence as the—do you see much difference? I mean, maybe you don't see a difference. I see a difference.

Mr. MERCER. I think the thing that we see in the legislative history is that the Congress is concerned about protecting the 15 and 14-year-old girl, and so we would expect that sentence to be within the range, and that's typically what we see victims wanting.

Mr. SCOTT. Thank you. You would expect the same guideline sentences for the two?

Mr. MERCER. Well, there might be an upward departure, Your Honor, if the court didn't find the range to be adequate for the older defendant.

Mr. SCOTT. And if the range is right for the 50-year-old having sex with the 12-year-old, that it's appropriate for the 19 and 15-year-old to be in the same range?

Mr. MERCER. Well, I think there would be specific offense characteristics that would change the sentencing calculation.

Mr. SCOTT. If you have four people in court, one with 490 grams of powder, one with 4.8 grams of crack, one with 5.01 grams of crack, and one sharing one gram of crack with a friend, but the guy he got it from was dealing 10 pounds, so he's part of a 10-pound conspiracy, who ought to get the most time?

Mr. MERCER. I have to admit you lost me in the hypothetical. What are the——

Mr. SCOTT. You get 490 grams of powder; he can get probation. 4.8 grams of crack; he can get probation. 5.01 grams of crack; he's stuck with a 5-year mandatory minimum. And a friend sharing a gram of crack with his buddy, but it's part of a 10-pound conspiracy, is probably locked up for life. Does any of that make sense?

Mr. MERCER. Well, I think what the Congress has tried to do in this area is make sure that the punishment reflects the fact that we're really concerned about what's happening in the community, and we think that the mandatory minimums in this area have really helped establish and protect the public, so——

Mr. SCOTT. That would make sense to you?

Mr. MERCER. Well, I think the——

Mr. SCOTT. If the 4.8 grams of crack walks out on probation, and the 5.01 grams of crack gets stuck with a 5-year mandatory minimum, makes sense to you?

Mr. MERCER. We think the system will allow enough—with those sort of sentencing ranges, we think that we've been able to induce cooperation in many cases, and by doing so, work up the chain and make cases that help protect the public, and so we believe that

those sentencing ranges have helped advance the purposes of punishment.

Mr. SCOTT. All this disparity that you've been complaining about, how much of it is due to the prosecutor having the discretion, as opposed to the judge exercising common sense?

Mr. MERCER. The Government really does take issue with what Judge Cassell has set forth in terms of substantial assistance. Let's talk about that for a minute. The Commission, and I think the Congress, has recognized that the Government needs to be able to find cooperators, and typically, those are people who were engaged in criminal activity. And by finding cooperators that can help us make cases, we're able to better protect the public and bring people to justice.

So unlike many of the factors that we talk about in our testimony, substantial assistance is a favored practice. It's something where we're trying to induce cooperation and make cases. Things in 5(h) and 5(k) are typically—those departure factors are typically disfavored or prohibited factors. So substantial assistance is designed to serve a larger goal, and therefore, any disparity that's created there is designed to help protect the public, and we believe that that, in large part, explains why the Commission allows us to make those motions to reduce——

Mr. SCOTT. And you haven't asked us for these draconian sentences for white-collar crimes, where you can really go in and get some cooperation. You just say, you know, a little bit of lightweight fraud, you can get 30 years to serve unless you cooperate. You haven't——

Mr. MERCER. I think, Congressman Scott, that Mr. Felman would say that he thinks that the Economic Crime Package in 2001 has created very substantial sentences in the economic crime area, and that, in fact, we depend very much on the cooperation in corporate fraud cases in order to identify those who were able to put those cases together for us——

Mr. SCOTT. If I could ask one question, kind of follow in on the same area? On this cooperation, this is based on a Government motion. Apparently some judges have noticed cooperation that the prosecutor hasn't made a motion for. What's wrong with the judge noticing two people equally cooperation, one got a motion and the other one didn't, being sentenced the same, if you had the same amount of cooperation?

Mr. MERCER. Well, I think both the historical notes in the Commission's work in the guidelines, and the—I don't know about the legislative history, but certainly, the whole concept here was to say the Government's in the best position to note who was cooperating. And to the extent that courts are then making determinations to reduce sentences, even though the Government says that cooperation either didn't exist or didn't constitute substantial assistance to what we were doing in that case or another case, it's going to undercut the Government's ability to get substantial assistance if defendants think the court's likely to cut our sentence even in the event the Government doesn't believe we've rendered cooperative—valuable cooperation.

Mr. SCOTT. So it's okay if the judge notices, as a finding of fact, that the cooperation of two individuals was identical, but the Gov-

ernment only made a motion in one of them, that they should get vastly different sentences because in one case you had a motion, the other case you didn't, although as a finding of fact, the judge found that they had cooperated equally, they should get vastly, wildly divergent sentences?

Mr. MERCER. It might have an effect on the within-range calculation, but the whole point, I think, of the Commission saying in 5(k)1.1 that the determination of the Government was central to the motion is because the Government's in the best position to determine whether its case or another case was advanced through that cooperation. So, yes, we believe it would be very problematic if that were to change. I think the Commission's already addressed that in its proposal.

And, frankly, the fact that we have somewhere between 280 or 290 instances where sentences were reduced below the lower end of the guideline range when the Government didn't believe cooperation was rendered, is a real serious issue for us, and one we've been worried about from the time that the *Booker* decision came down. So we're very concerned about that.

Mr. FEENEY [presiding]. Thank you, and, Congressman Scott, unless there's a mad rush by our colleagues to get here and participate, I think you'll have time for another round. So I want to thank all the witnesses for being here.

Judge Hinojosa, I wanted to, you know, use—Congressman Scott's entitled to create his own hypothesis, and I won't change it for him. I'll leave it to him. But, number one, isn't—aren't there separate offenses for coercive and—coercive sex versus consensual sex? Aren't they separate offenses under the Federal code?

Judge HINOJOSA. I know that we break them by guidelines, and I'm sure they are connected to the Federal code, and we call them criminal sexual abuse, and under 2(a)3.1 that would be rape, and we have criminal sexual abuse of a minor, which is statutory rape, which would be 2(a)3.2. And then we have abusive sexual conduct, which is inappropriate sexual contact, which is 2(a)3.4. And then we go to the sexual exploitation.

But I believe because of the age, although I am not totally sure, that he has used of 19 and 50, I don't think that there is a separate criminal code section for those because——

Mr. FEENEY. Well, the——

Judge HINOJOSA [continuing]. This is somebody who is of majority age with someone who is a minor. Some of the State statutes—and I'm not—will make a variance based on the difference in the age as to how they classify it. I'm not sure that the criminal code——

Mr. FEENEY. But within the guidelines——

Judge HINOJOSA. I'd be guessing if I said that.

Mr. FEENEY. Within the guidelines that the Commission has established, though, there is a great deal of discretion that judges have within the guidelines themselves for most offenses. Is that right?

Judge HINOJOSA. Well, that's true. It is also true, Congressman Feeney, that 60 percent of the cases are sentenced within the minimum range.

Mr. FEENEY. Right.

Judge HINOJOSA. Within the minimum——

Mr. FEENEY. One of the red herrings in this argument is it would take——

Judge HINOJOSA. Within the minimum amount of the guidelines.

Mr. FEENEY. One of the red——

Judge HINOJOSA. There is a wide range within the guideline that——

Mr. FEENEY. Yeah, one of the red herrings in the argument is that we're taking all discretion away from judges in sentencing, and, in fact, that's not what the guidelines do. They allow a great deal of discretion within the guidelines, and in exceptional circumstances, we allow departures. But they were designed to be explicitly in the '84 legislation exceptional circumstances.

Judge HINOJOSA. And I——

Mr. FEENEY. You know, if——

Judge HINOJOSA. This would be my suspicion as a judge. I think a judge would treat both of those cases differently, whether it's within the guideline range or through a departure upward or downward.

Mr. FEENEY. Mr. Mercer, one of the things that Mr. Felman said confused me a little bit. Maybe you could clarify. As I understood Mr. Felman's testimony, he said that the Supreme Court has ruled that advisory guidelines are constitutional, but that the guidelines on mandatory—binding guidelines are unconstitutional, I think was the language he used. In fact, seven of the nine Justices in *Booker* said that the guidelines, by and large, were very much constitutional, even if binding. Isn't that right? We had a bifurcated decision in *Booker*. We had a couple Justices that said when you add on—after the jury decision on guilt, when you add on time served with the jury participating, that denies right to a trial by jury. But the majority of the Court, a distinct majority, did not declare the binding guidelines unconstitutional. Is that right?

Mr. MERCER. Well, in the remedial opinion that we are now working under every day, there are two very significant things that happened. One, the Court said that the guidelines as written could no longer function as a mandatory system, and that's Mr. Felman's point in terms of rendering it as an advisory system. The second thing that it did in order to achieve that remedy was to strike the *de novo* standard of review, which was, arguably, the most significant component of the PROTECT Act of 2003. And so——

Mr. FEENEY. But there's not a majority on the Court today that would rule the guidelines themselves unconstitutional.

Mr. MERCER. Well, I think—in fact, I think the opinions—and this goes back even to what the Court said about *Blakely*—talked about the salutary effort and effect of having Sentencing Guidelines and the fact that they're a very positive thing in terms of trying to calibrate sentences and advance the purposes of punishment. But that remedial opinion made the system advisory as opposed to mandatory, which we view as a really significant problem and one that needs to be remedied by the Congress.

Mr. FEENEY. One of the points that Judge Cassell makes is that the average sentencing has gone up, but a couple points about that I'd like you to address. Number one, we have increased minimum mandatories in the past few years for a number of offenses, and

that's reflected in the average statistics. Number two, the average doesn't tell us anything about uniformity. In trying to treat Black defendants the same as White defendants, this disparity has been greatly enhanced by *Booker*, the geographic disparity and some of the other differences, for example. So while the average may have gone up, the uniformity is the problem that Congress was, by and large, trying to get to.

And then, finally, Judge Cassell says that we've got really too few cases, if you look at just the sexual offenses, to be worried about some mass pattern. But, in fact, it's not just the sexual offense cases, which I have a particular interest in, but the departure on theft and fraud has increased from 7.3 percent to a post-PROTECT standard of 14.2 percent post-*Booker*. Drug trafficking has gone from departures of 6 percent to almost 13 percent, firearms from about 9 percent to over 15 percent.

So, in fact, almost every major set of Federal offenses has seen a significant increase in downward departures since the *Booker* decision. Do you want to comment on how the average statistic may be accurate but misleading in terms of what Congress was trying to accomplish with these guidelines?

Mr. MERCER. Yes, I appreciate that, Congressman Feeney, because this is a crucial thing and something that the department's very interested in trying to work with the Committee on talking about case examples. Judge Cassell has taken issue with some of our cases. We're happy to show a number of others because we've taken appeals now in about 122 cases where we think the departures are dramatic and there shouldn't be any way that they could be viewed as reasonable sentences.

But I share your concern about the trends and the fact that there is very significant disparity, no matter how you measure it. Let's just work some of the numbers.

The First Circuit, Massachusetts right now, their downward departure rate, non-governmental-sponsored, is 33.6 percent. So one in three cases, you're going to have a below-the-range guideline system, even though the Government has not made a motion. In Maine, it's 5.5 percent. So the chance that someone is going to get a below-the-guideline range sentence in Maine is dramatically lower than it is within that same circuit just up the road in Massachusetts. The same thing with Rhode Island, a State that before *Blakely* came down had been at 3.3 and 2.1 percent, is now at 22.9 percent. And if we break that into categories—and I think Judge Cassell was trying to focus on a very narrow category. I can't remember if he was talking about the number of sentences in the sexual abuse of minor category, but certainly the child pornography category is a growing category. We had about a thousand convictions in that category in 2005. And if we look at those numbers, the numbers tell a very significant story. Before the PROTECT Act, 25 percent of the cases results in below-guideline-range sentences. After the PROTECT Act, that was down to 16.9. Now it's up to a number that exceeds where it was before the PROTECT Act was passed. It's at 26.3 percent. So more than one in four child pornography possession cases result in sentences that are below the guideline range. And, in fact, 6.6 percent of those defendants aren't

going to prison at this point, which I think is very interesting given what the Congress did in 2003.

Trafficking in child pornography, obviously a guideline that is much more significant in terms of those purposes of punishment, the rate is way up. It's up—was it 13.7 before the PROTECT Act? Now it's at 19.1 percent of the people are getting sentences below the guideline range based upon this new Commission data.

So we can go through every category. We can talk about first offenders. We can talk about career offenders. We can talk about the economic crimes. Every trend line is in the wrong direction, and it's going to have a big effect, as I said, when you take a defendant in Maine and a defendant in Massachusetts convicted of the same crime, whether it's fraud or child pornography, the probabilities, given these statistics, would suggest that they're going to be treated differently in terms of whether the sentence is within the range or below the range.

Mr. FEENEY. Thank you. My time has expired.

Mr. Delahunt, you are recognized.

Mr. DELAHUNT. I thank the Chairman, and I happen to come from Massachusetts.

Mr. MERCER. I know.

Mr. DELAHUNT. So I have a particular interest in the statistics that you're using here, Mr. Mercer.

First let me say that I'm very familiar with the Massachusetts Federal District Court, and I hold each and every one of those justices in high regard. I've had different experiences with each of them during 22 years as a prosecutor. Some of them were former prosecutors. In fact, one of them worked for me. And I guess let me just conclude by saying I really have the utmost confidence in their decisions.

I've heard a lot of statistics here today, but I don't necessarily accept the fact that the statistics that you cite fairly represent the decisions of these individual justices. And I'd submit to the Chair that what we should do is have a judge or two and maybe the United States Attorney from the Massachusetts district come and let's have a good, hard look at the reality of what's happening in Massachusetts. I think it would be important, and I think it would be very revealing. I'm always proud to point out that Massachusetts is probably one of the safest States in the country in terms of incidence of violence, homicides, et cetera.

The 25-percent figure that is utilized by Mr. Mercer I would suggest relies on a product of—a methodology that isn't—doesn't really reflect the reality, because when the district court judges reported their data to the Commission, the Commission reviewed the data and interpreted the entries. In most cases, I presume they were doing it without the benefit of sentencing transcripts or decisions, because those forms had not been, my understanding is, electronically attached.

I thought what's particular interest to me was that the statistics from the Commonwealth of Massachusetts Probation Department are different from the Commission's statistics based on the exact same form, Judge Hinojosa. And, additionally, from a very cursory review of the data, I noted a number of sentences included in the

category of judge-initiated that were, in fact, agreed to by the Government.

So I have some serious concerns about the validity of the data as it applies to the District of Massachusetts, but I think this raises a very important question because we sit here and accept this data, and I'm sure that the data is not miscalculated intentionally, but I'd like to hear from those that supplied the data, and I'm going to request the Chair if you would consider having representatives of the Massachusetts Federal Court and possibly a representative of the U.S. Attorney's Office come down so that we can really interact together and see whether the data would lead to the same conclusions that Mr. Mercer has. I don't know whether they would come, but I think we should at least extend that invitation, because it could very well be, Mr. Chairman, that as we see in the Commission's number could be reflective of the U.S. Attorney's practices.

Judge HINOJOSA. Do you have a question of the Commission on that, Congressman?

Mr. DELAHUNT. No, I don't. No. I'm just up here kind of letting the pain out there a little bit. But we have some time left, Judge Hinojosa. I'd be interested in your response.

Judge HINOJOSA. I would be glad to say something about it.

Mr. DELAHUNT. Well, you know, maybe we can do—maybe we can have you back if the Chair honors my request about having—let's make it a case study, because conclusions have been reached relative to Massachusetts that I believe are not valid in terms of the reality of what's going on on the ground. Now, we can have stats going up and down, and bars and graphs, and we can all do it. But I'd really like to hear from those that participate, you know, the judges that are—as Judge Cassell knows, I'm sure, the judges that are here and from the U.S. Attorney to see whether there is this great disparity. Let's get to what the reality is.

You know, the Commission claims that the Government sponsors below-range departures nationally at a rate of 24 percent. And yet in Massachusetts it's 12 percent. You know, are the courts, are the judges trying to, you know, make it up a little bit because of the practices of the U.S. Attorney? I don't know, but I'd like to hear before—as Mr. Felman indicated, before we leap off into the abyss, it's incumbent upon us to really take all of these stats, take a good look at them, rip them apart, open them up so that we can educate ourselves.

And I note my time is out, so I will just turn off my mike, Mr. Chairman.

Mr. COBLE [presiding]. I thank you.

Mr. DELAHUNT. But I would really genuinely hope that you would consider my request.

Mr. COBLE. We'll certainly discuss that, Mr. Delahunt.

Mr. DELAHUNT. Thank you.

Mr. COBLE. And, gentlemen, I think this issue is significant enough to warrant a second panel or second line of questioning, and I believe time will permit that to occur.

I thank the delegate from Massachusetts Mr. Delahunt. Many of my friends in the rural South believe that Massachusetts is a hot-

bed for danger, so I am going to pass it on to them that it is better than they think it is.

Mr. DELAHUNT. Mr. Chairman, I will tell you, if we have a hearing, we ought to come to Boston.

Mr. COBLE. Let's go to Cape Cod.

Mr. DELAHUNT. And we will go to Cape Cod, maybe even Nantucket. But I can assure you, I think that Massachusetts—I think Boston, in fact, has the lowest homicide rate of any major urban center in the country right now.

Mr. COBLE. Cape Cod and Nantucket are sounding increasingly appealing.

Mr. DELAHUNT. In fact, we could schedule it sometime in June. You could bring your tennis racket.

Mr. COBLE. I am going to cut his mike off in a minute. [Laughter.]

Only kidding, of course.

Mr. Felman, I did not intend to ignore you last time. Let me ask you this: I believe you recommend leaving the reasonableness standard in place, do you not?

Mr. FELMAN. I do.

Mr. COBLE. Are you concerned in any way—and maybe you're not—that the circuit courts have adopted varying definitions or standards for reasonableness?

Mr. FELMAN. I think they're still working that out. There is not a wide disparity between them, but there is—I mean, this is a new standard of review for this type of review. There have always been reviews for reasonableness in terms of extent of departure, so it's not an unheard of standard of review. But in terms of reviewing sentences for overall reasonableness, they are still working that out. And that takes time.

The part that bothered me the most about changing it is that what was suggested is that we ought to change it to a *de novo* standard of appellate review. I got to tell you, you know, that sends the signal to me that what that means is that in sentencing, as a matter of policy, the ability to actually see the human being who is going to be punished, the ability to actually observe that person is of absolutely no value to our system of justice. That is what a *de novo* standard of review says. It is worthless to be able to look the person in the eye who is going to be sentenced. I find that view abhorrent, and I would urge this Congress not to take that view.

Mr. COBLE. I thank you for that, sir.

Judge Hinojosa, you appeared that you were anxious to insert your oars into Mr. Delahunt's waters, and I am going to give you a chance to do that if you wanted to add to what he——

Judge HINOJOSA. Well, I will start off by saying that Massachusetts is the only other State I have ever lived in besides the State of Texas, and that was when I was in law school. So I have great respect for the State, loved my time there, and would love to get back there. And I have great respect for the judges of the District Court of Massachusetts, some of whom are my very good friends.

What I wanted to clarify is that the Booker Report itself indicates that we do caution the reading of some of these statistics because of the fact of the way the information is sent to the Commission. The Congress wisely decided in the Sentencing Reform Act of

1984 that there should be an independent agency that would collect this information in one place and put it together as opposed to have 94 district courts with quite a few divisions having this slotted individually and then there would be no control about this information.

So our statistics are based on the information that we receive, and the PROTECT Act required that five documents be sent to us. There is a high compliance rate with regards to the sending of the documents. However, with regards to the statement of reasons, especially post-*Booker*, there was a period of time where different forms were being used and sent to the Commission, and we indicate that in the report. And we caution with regards to some of these statistics about that. We have said that in the report, and we say it publicly when we use these statistics.

In fact, there have been times where we get more than five different statement of reasons forms, some of which in no way indicate whether the Government agreed to certain things or not. And so, therefore, we base this information on the way it is sent to us, and it is checked and looked at, and we put it out based on that, but we always indicate what the caveats are.

We commend and thank the Congress for putting into the PATRIOT Act the requirement that all of the district courts in the United States use the same statement of reason form so that we have uniform reporting, a form that will be adopted and passed by the Judicial Conference and approved by the Commission. And so, therefore, it's important that we receive this information uniformly.

Sometimes we do get contacted by courts, and they are sending information in different ways, which it's hard to capture. And so, therefore, if anything, what this particular situation points out is the importance of having these documents sent in the same fashion from all of the district courts that we can compare apples and apples and not apples and oranges, and that it is important to have it come to one independent agency within the judiciary that then puts out the information so there can be informed decisions made.

Mr. COBLE. Thank you, Your Honor. My time is about to expire.

The Chair recognizes the distinguished gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Judge Hinojosa, did I understand your testimony to be that if you saw a 19-year-old having sex with a 15-year-old, that that would—and another case where a 50-year-old was having sex with a 12-year-old, that common sense would require you to treat them differently?

Judge HINOJOSA. Well, certainly within the guideline range, I would suspect that I would treat them differently. I've never had such a case. And you say if I saw it. I don't know that I would see it personally, but you mean in the courtroom, I am sure, Congressman Scott. But, yes, I——

Mr. SCOTT. I mean, are those different—those essentially are different crimes?

Judge HINOJOSA. As we see in the commission of any type of crime, there are differences with regards to the way individuals—and I will say there is discretion within a guideline system, even

the mandatory system, within the ranges and, therefore, also with departures.

Mr. SCOTT. Judge Cassell, do you see an essential difference between two criminals, one a 19-year-old having consensual sex with a 15-year-old and a 50-year-old having sex with a 12-year-old? I mean, Mr. Mercer didn't notice much difference.

Judge CASSELL. It would seem, having sentenced sexual abuse cases, those two cases seem to me to be dramatically different.

Mr. SCOTT. Thank you.

If you were to notice, Judge Cassell, that an aggressive prosecutor were to overcharge consistently, would you expect downward departures more in that jurisdiction than in a case where a prosecutor did not aggressively overcharge?

Judge CASSELL. I would. The system tries to bring warranted uniformity. We've heard a lot about unwarranted disparity, but there are situations where judges need to make adjustments to what other actors are doing in the system. And we have heard from Mr. Mercer that my statistics are unfair. I'm still wondering why folks in Idaho are so much more willing to cooperate than folks are in Utah. I think that there are a lot of people in Utah that would be happy to cooperate with the Government. Maybe they should just bring down some of the prosecutors from Idaho, and we can get a little more uniformity between those two jurisdictions.

Mr. SCOTT. Thank you.

Mr. Mercer, of the 69,000 sentences issued last year, could you remind me how many you appealed?

Mr. MERCER. In the post-*Booker* period, we have taken appeals in, I think, about 125 *Booker*——

Mr. SCOTT. Out of 69,000.

Mr. MERCER. Yes.

Mr. SCOTT. And the standard is reasonableness?

Mr. MERCER. It is.

Mr. SCOTT. How many of those 122 out of 69,000 that you selected as unreasonable were found by the appellate court to, in fact, be unreasonable?

Mr. MERCER. At this point we don't have a large body of case law from the circuits on the reasonableness question. I have not gone back to say—make a determination about how many of those cases have resulted in published opinions, but I guess I'd be surprised if it's more than 15 at this point. I talk about a couple in my full statement. I talk about the Menyweather case, which is a Ninth Circuit case. It involves a fraud of around $400,000 where the defendant only served 40 days—the term of the judgment is 40 days on consecutive weekends in a jail like——

Mr. SCOTT. Wait a minute. We're talking about trying to fix a system that some people believe in chaos. You looked at—your department looked at 69,000 cases, picked out the most egregious 122 as being unreasonable, and won some and you lost some on those 122. Is that right?

Mr. MERCER. Well, the point I'm trying to make is we only have a very small percentage of——

Mr. SCOTT. Well, how many have you won and how many have you lost so far?

Mr. MERCER. I can't—I can certainly supply that as supplemental information to the Committee, but——

Mr. SCOTT. But it's fair to say that you won some and lost some.

Mr. MERCER. That's correct.

Mr. SCOTT. And this is out of—122 out of the worst of the 69,000. I would assume that your 122 would be the worst, egregious cases of judicial mistake.

Mr. MERCER. Well, the cohort starts with the 8,200 cases in the post-*Booker* period where there were sentences below the guideline range. Obviously, we aren't going to contest sentences within the guideline range, and we don't have any basis to challenge those. We believe that a sentence within the guideline range is presumptively reasonable.

Mr. SCOTT. Well but——

Mr. MERCER. The problem here—may I just quickly? The problem here is 8,200 cases, although we certainly are going to, as we are contesting in the district court whether a sentence below the guideline range is reasonable, for us to appeal, say, a thousand of those cases would have a dramatic effect on our ability to process all the other criminal cases that we need to do. Unlike defendants who have a constitutional right to get a lawyer and, if they can't afford it, have the Government pay for that lawyer, the United States Attorney's Offices have to figure out a way to prosecute appeals at the same time as meeting its obligation to prosecute all the other defendants that need to be prosecuted for subsequent crimes. So we are trying, in working with the Solicitor General, to take appeals, but there isn't any way that we can take 8,200 appeals.

Mr. SCOTT. That's right, and you picked out the worst 122 and couldn't even win a lot of those. The downward departures are, in fact, part of the process, and some downward departures are, in fact, looking at all the facts and circumstances reasonable. And when you get up with a—when you get on the appellate court with a downward departure and they say, well, that downward departure, taking everything into consideration, was reasonable. I mean, it's part of the process. So just because you have a downward departure does not mean it's unreasonable, and particularly when you look at a 50-year-old and a 12-year-old having sex, having a downward departure for the 19- and 15-year-old, the people on your left and right might think a difference was reasonable. And if you went up to the appellate court, I suspect that the court would find a difference in sentencing those two defendants reasonable.

And so just because you have a downward departure doesn't mean it's unreasonable, and the fact that out of 69,000 cases, and you only picked out 122, and you couldn't even win those, suggests to me that the system is working pretty well.

I yield back.

Mr. COBLE. I thank the gentleman.

The Chair recognizes the distinguished gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Well, Mr. Scott can be very persuasive unless you pick apart his major and minor premises.

Mr. Mercer, one of the reasons that you've only appealed 122 cases is the reasonableness standard is very deferential, is it not?

Mr. MERCER. Yes. In fact, the Ninth Circuit has equated the reasonableness review to an abuse-of-discretion review, which is exactly what the Congress tried to eliminate through the PROTECT Act, because it's very difficult for the Government to challenge on an abuse-of-discretion standard departures that result in sentences that we don't believe advance the purposes of punishment. And if I may, I'll just quickly talk about——

Mr. FEENEY. Well, let me—I think you've made the point. One of the reasons you're not appealing is because appellate judges, when asked to review whether a lower-court judge was reasonable, give a lot of deference. And that's one of the reasons why a lot of appeals may not be fruitful; whereas, had the law Congress passed been followed, which is basically to say what we've all known since 1984, that departures are in some cases reasonable, as Mr. Scott pointed out, but that they should be granted only under, in quotes, "rare circumstances," end of quotes. That's the law. Unfortunately, we've got some circuits that in some instances are giving downward departures 33 percent of the time. They look at Congress's law as a suggestion, and a judge may follow our suggestion or not as he or she pleases. And that's the problem we have with uniformity, which leads to disparities in geography, in—according to race, and according to a number of other—.

Now, one of the things I was interested in is that Judge Cassell suggested one of the problems we have with lack of uniformity is on the prosecutorial end, and he implies or stated that it would be overcharging by the prosecutor that would account for a lot of the disparity.

How does a prosecutor obtain a high conviction rate if he is overcharging for offenses? I mean, if you charge people for things they're not guilty of, I'd be interested in knowing how you get a conviction. It's a neat trick if you can do it, I guess.

Mr. MERCER. I guess I want to talk about the department's charging policy because we believe we've made very important steps in this Administration in this area.

Attorney General Ashcroft issued a memo in 2003, known as "the Ashcroft memo," that says, among other things, the Government must charge the most serious, readily provable offense. That's the standard.

So if we've got a bank larceny charge that somehow would minimize the conduct—let me use an example where we could charge something as a misdemeanor and charge something as a felony. That policy requires that we charge the case that's most serious, readily provable, and if that's the felony charge, then that's the case that we charge. We don't overcharge. We charge the criminal conduct that we believe is most serious and readily provable.

So that's the standard. We apply that standard across the country. When we're evaluated, we're measured on whether we're, in fact, meeting that standard. So that's been the policy since 2003.

Mr. FEENEY. Mr. Felman, maybe I'll ask you, because I think we have perhaps some, you know, fundamental differences of philosophy. You know, as old as the rule of law—I mean, Cicero, when he wrote his great his law books, indicated when it came to crimi-

nal sentencing, he said, "Let the punishment suit the offense." And I think the implication there is that similar defendants in similar positions ought to be treated similarly. And I think a lot of us believe that's part of what the rule of law means.

I believe that article I establishes Congress's exclusive right to determine what a Federal crime is. We define what Federal offenses are. We can add them or subtract them from the law books. And I think inherent in Congress's sole and exclusive plenary power, is, if we want, to micromanage what the sentencing ought to be. If we wanted to establish a fine down to the penny or a prison sentence down to the last second, while it may not be wise—and Congress does a lot of unwise things—I think we've got that implied right under our article I power to define what a Federal offense is. Do you agree with that or not?

Mr. FELMAN. I do, but I think that it's easy to get overly concerned with making sure that like offenses are treated in a similar manner. And I think that—I think everyone understands that it's also very important to make sure that unlike offenses are treated differently. And I think that's one of the real problems here.

It's pretty easy to compare statutes and say anybody who violates this statute should be punished, you know, if you commit crime X you should receive sentence Y. That's pretty easy for you guys to do from Washington.

Mr. FEENEY. Right.

Mr. FELMAN. What makes it hard for us is that life is just so rich in its detail, and the truth is just stranger than fiction.

Mr. FEENEY. Well, you and I agree, not all wisdom resides in Congress, so trust me. But whether or not we have the power to do something and whether we're exercising that power wisely are two different questions. I'm glad that you agree with me that we've got the inherent and implied power to micromanage sentencing if we desire, as unwise as that may be.

Finally, Justice Breyer in the *Booker* decision said that the ball's in Congress's court. I mean, he believed that there was some sorting out that had to be done legislatively. If you don't think we need to take any additional action, why is it that you disagree with Justice Breyer in the *Booker* decision?

Mr. FELMAN. Well, I don't know that I said I disagreed with his decision. I think when I was referring to Justice Breyer earlier, I was talking about his concurring opinion in the *Harris* case and the fact that I think there's a very real possibility that he will now be forced to accept the votes of his colleagues that, when it comes to raising a sentencing ceiling—or floor—that that may not be done by judicial fact-finding, that that has to be put to the jury. And that's where I think it's really quite clear in *Booker* that there were five Justices who agree that if you are going to try to raise a sentencing maximum based on judicial fact-finding, that is unconstitutional. And I just respectfully would disagree with your earlier description of the case. I think that's what the merits majority opinion is about, and there's five Justices who signed it.

Mr. FEENEY. Well, but remember, *Booker* was a bifurcated decision, and on the issue of the guidelines themselves—not the enhanced sentencing, the guidelines themselves—seven of the nine Justices indicated they thought the guidelines were constitutional.

When they tried to figure out a remedy they could all agree on, they basically said, well, we've got to make them advisory and start from scratch. But seven of nine believed the guidelines are constitutional as of *Booker*. I've read the decision. I'll have to go back and read it, but it was pretty clear to me.

Mr. FELMAN. We'll just have to agree to disagree on that.

Mr. COBLE. The gentleman's time has expired. If the gentleman—we are going to keep the record open for 7 days so we can continue the dialogue.

The Chair recognizes the distinguished gentleman from Maryland—from Massachusetts. I stand corrected.

Mr. DELAHUNT. It begins with an M, Mr. Chairman.

You know, I heard my friend from Florida quote—I think it was Cicero, updated by Feeney. [Laughter.]

About let punishment, you know, fit the crime. And, clearly, I believe that, you know, there has to be a sense of fairness in terms of the application of a sanction under our criminal justice system. But I would put forth that that's only one component in the equation of what our criminal justice system is about, because fundamentally the criminal justice system is our effort to secure public safety and public order.

You know, I would just refer to the hypothetical that was mentioned by Bobby Scott about the victim in a rape case being 14 and her boyfriend being 16 and the stranger, the sexual predator being 42 with a vicious rape. I mean, you know, to say that the punishment should be the same in both of those cases just simply, I would suggest, doesn't make any sense, because a downward departure, you know, for that 16 or 17-year-old might be predicated on the fact that we don't want to introduce that particular defendant to a situation where he will become a real dangerous threat to society at 20 or 21 or 25. I mean, so it is, it's very much a system that needs to have the ability to look in a comprehensive way as to a particular case.

But having said all that, you know, we're talking about variances in terms of sentences. What I think is interesting as well is the variance in substantial assistance motions offered by the Government among circuits. There's a 4 percent in one circuit and a 36 percent in another circuit. That tells me—and I think it was Judge Cassell that alluded to this—to try to lay this all on the courts, the judges, the judiciary, I don't think really is fair, because the prosecutor here plays a significant role. You know, in New York, you know, maybe there's an extraordinary reliance on the use of informants, and we're talking statistics. But for those that have been prosecutors, in the—you know, again, in the real world, so to speak, you're sitting down with, you know, an unsavory character with an extensive criminal background, and you're trying to secure cooperation, you know, maybe that's a practice that exists in one district that doesn't exist in another district, the reliance on informants.

That's why, when I made the request to take a look at Massachusetts, I think it's important to implicate the Department of Justice in this process, not just simply rely on the data supplied by the Sentencing Commission. And I understand and I do appreciate the

explanation by Judge Hinojosa, and it does make sense. I think we're working our way through this.

But while there might be a charging philosophy, is there a philosophy or a policy in the Department of Justice that is consistent in terms of substantial assistance motions being filed? Because, clearly, there is a significant departure, 4 percent and 36 percent.

Now, maybe there is, but it comes out in a way statistically that when you examine it, you're taken aback. I'm sure there's a good explanation, but I'm just putting for an opinion. I'd be interested to hear from Judge Cassell and Mr. Mercer about how complex this is, and it just isn't simply a black-and-white and dry formula. There's much more to it.

Mr. COBLE. The gentleman's time has expired, but you gentlemen may respond.

Judge CASSELL. Well, the Sentencing Commission investigated this, Congressman Delahunt, and they found no rhyme or reason to the geographical disparities in what the Justice Department was doing. They said, well, let's try to control for this. Is this the more serious cases or drug cases? They put in controls for all of that, and they ran a multiple regression equation, and they couldn't come up with any explanation.

They also found that there were racial differences in the way that cases were being handled, and this is what disturbs me. This information was given to the Justice Department 8 years ago, that their practices were having racial disparities, and they have done nothing to fix it. And yet Monday afternoon, the Sentencing Commission for the first time says, well, we've run into some data here that may be suggesting a problem, and the Justice Department runs over and says something needs to be done right away.

Why haven't they in 8 years gotten their house in order and eliminated these kinds of dramatic disparities from district to district that are done in secret, without any opportunity for appellate review, without any kind of a transcript or other record? That's the question that we have in the judiciary.

Mr. MERCER. Well, I guess—I think I want to discuss the process that is set forth in the department policy because I think it might be useful, and——

Mr. COBLE. Mr. Mercer, as quickly as you can, because there's going to be a vote imminent.

Mr. MERCER. Okay. Disparity, given what we have said as part of this testimony, is a significant issue for us, whether we're talking about a non-substantial assistance departure, as is the focus of this testimony, or whether we're talking about any disparity that is introduced through substantial assistance.

It's important, I think, that the Committee know that when the Government makes a substantial assistance motion, it can't grant that motion on its own. It's got to be granted by the court. The court then makes a determination——

Mr. DELAHUNT. Let's really be honest here. When the Government comes before a Federal district court judge and puts forth a request for substantial assistance and a downward, I would think in most cases that it's almost an automatic departure. So I don't think, with all due respect, Mr. Mercer, you can lay that one on the courts. That's the responsibility of the Department of Justice.

Mr. MERCER. I am just laying out the way this process works, because——

Mr. DELAHUNT. I'm familiar with how the process works.

Mr. MERCER. And it is certainly a concern to us that, to the extent that that motion results in a departure of, say, 60 percent or 70 percent or 80 percent, there are going to be very significant disparities introduced into the system, but in terms of the way those motions are processed, typically offices have committees where they're making determinations not just on the line but in terms of whether, in fact, the defendant has rendered substantial assistance. And I think some of the differences in the averages in, say, Utah versus Idaho, I'm going to go back and take a look at that. I think it may have a lot to do with things like in Utah there's a substantial number of firearms prosecutions. In firearms prosecutions around the country, you're going to see a lot fewer substantial assistance motions than you are in drug cases, typically based upon the type of conduct we see. So there——

Mr. DELAHUNT. Okay. And I do respect your response. But the point is, if we're looking at this simply in a statistical fashion, as you would have this Committee do in terms of the judiciary, there is in all likelihood a rational explanation. And that's why, Mr. Chairman, I think it's important, let's take the Massachusetts case—okay?—and those statistics and have a full hearing so that we can explore the reasoning and the realities behind the stats. Fair enough, Mr. Mercer?

Mr. MERCER. I think—we're interested in analyzing these statistics in general because disparity is something that this system is designed to——

Mr. DELAHUNT. Whether it's the responsibility of the Government or whether it's the responsibility of the court.

Mr. MERCER. Unwarranted disparity is a problem, and I said earlier——

Mr. DELAHUNT. I don't think anybody—anybody—on this panel or on the panel that you're sitting on—would countenance unwarranted disparities, but the real question is: Is the disparity rational and reasonable and does it enhance public safety in the long term in a holistic, comprehensive way?

Mr. MERCER. And as I noted when this question came up within Congressman Scott asked it, the distinction between a substantial assistance motion under 5(k)1.1 and the vast majority of the provisions in 5(h) or 5(k) of the Sentencing Guidelines are that most of those provisions in 5(h) and 5(k) were deemed to be factors that were only going to be used in exceptional cases or extraordinary circumstances. They're disfavored factors—things like age, things like whether the person has made great community service over a number of years. Those are all factors that are disfavored and only to be applied in exceptional cases.

Substantial assistance, the Commission has designed a system in which we have the authority to try to induce that cooperation in order to make other cases, and so they're on a different playing field, and that's got to weigh into the question of whether the disparity is warranted or unwarranted.

Mr. COBLE. I thank the gentleman.

We've been joined by the distinguished lady from Texas, Ms. Jackson Lee, but Mr. Scott wanted to make a comment initially.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, the gentleman from Florida isn't with us, but he suggested that departures ought to be rare. My view is I don't know how often they ought to be, but you ought to have a departure when it makes common sense. That might be rare; that might be often. But whenever it makes common sense, you ought to have a departure. And there's nothing in these statistics we've seen so far that shows that anything unreasonable is going on. The department has picked out 122 of the most—apparently most egregious cases, and many of those have found—notwithstanding the fact that there are only 122 out of 69,000 have been found still to be reasonable.

Furthermore, if you look—if you're going to have any consistency in charging—in sentencing, you've got to have consistency in charging, and when the department has articulated today that they have a new way of charging, they're going to charge the highest provable case, not the one that will produce the most rational outcome, but the highest sentence for the same action, you would expect more downward departures, down to things that make common sense.

So, Mr. Chairman, as I indicated, I don't—the suggestion that we're in chaos I think has just been not—hasn't been found.

Mr. COBLE. I thank the gentleman.

Gentlemen, I realize you all have been with us since 10:30 this morning, but I feel obliged to recognize Ms. Jackson Lee. And, Ms. Jackson Lee, if you could keep it fairly terse, I know these folks would appreciate it. But we're delighted to have you with us.

Ms. JACKSON LEE. I will be a little bit colorful, Mr. Chairman. Let me thank you very much for giving me the opportunity. I want the gentlemen to know that the importance of this hearing is such that even with a hobbled foot and in another hearing two buildings away, I hobbled as fast as I could in order to be able to query you. So let me thank you for your patience, but my hobbled foot is hurting trying to get over here to be able to question you because this is for me an extremely important issue. And it's particularly important because I live in a State that, although this is a Federal jurisdictional question—and I will lead toward my question. I live in Texas, and so I bear the brunt of extreme decisions, sentencing decisions statewide, under the State system. And, of course, as you well know, we have a parole system, probation system under the State system.

I also live in a State where, many of you may know, the infamous Tulia case—Tulia case in the State of Texas, and I pronounce it differently each time. But in any event, that dealt with the incarceration, innocent incarceration of individuals who were the victims of a conspiracy by, unfortunately a law enforcement officer, who then blanketed and painted the entire town with charges of drug violations and ultimately these individuals were incarcerated. This case is well proven. This is not hearsay because ultimately the rogue officer was found out under oath and indicated that he made up these stories.

These are the extremes, but they're very real. They break people's lives. And so let me just probe where we are.

I was going to say—beyond my hobbled foot, I was going to use the terminology "Halleluia for *Booker*," because I think it gives us a moment of pause. And, Mr. Hinojosa, I want to—as you have taken the lead of this Sentencing Commission that I've worked with since coming to Congress almost about a decade ago—and I respect what you do. And, in fact, you were some of our strongest allies so many years ago to raise the question of giving more flexibility or giving the Sentencing Commission back its job.

So let me just try to ask a pointed question, and if you can not take my role and be expansive, you be concise, is the idea of the Sentencing Commission, do you feel, broken with *Booker*? Are you able to go along with business? And do you feel that it's given you some parameters in which to operate on to be as fair as you possibly can be under the very heavy responsibility that you have?

Judge HINOJOSA. Well, actually, being your fellow Texan, I'm glad that you did manage to hobble here.

Ms. JACKSON LEE. For you.

Judge HINOJOSA. Thank you very much.

The Commission has been extremely busy post-*Booker* and has continued to act in the fashion that it has always acted, whether it's in promulgating amendments or responding to congressional directives or responding to emergency amendment requests. And certainly with regards to data collection, we have turned it into real time so that we can put out the information as quickly as possible so that informed decisions can be made. So from that standpoint, I think the *Booker* decision itself predicted that the Commission would continue to exist and continue to operate in the same legislative statutory fashion that it had before. And so, therefore, we have.

We have been in a situation where we have to develop more resources with regards to the post-*Booker* period and trying to determine how to proceed, both from training as well as data collection as well as there was a period of time where we were affected because post-Blakeley and pre-*Booker* it was an uncertain period and we were unable to proceed with too much amendment with regards to guidelines that needed to be looked at, including the immigration guidelines, which you would be familiar with.

Ms. JACKSON LEE. Very much so.

Judge HINOJOSA. Coming from the State of Texas.

Ms. JACKSON LEE. Let me—time is of the essence. Let me just raise these questions, Mr. Hinojosa, Mr. Mercer, and then both Mr. Cassell and Mr. Felman—Mr. Cassell—Judge Cassell, in fact, you are in the midst of, obviously, rendering sentencing.

Mr. Mercer, you said there is a problem in that we have actually determined that sentencing has gone up. Since I happen to be the author of the good time early release bill on the Federal system because I believe we have languishing in the Nation's prisons individuals, nonviolent, over 45 years old, and wasting more time than not, that came about—came about through mandatory sentencing and no parole.

My question to you is: What is the problem when we found that sentencing has actually gone up? Judge Cassell—let me just finish. Judge Cassell, we want the courts to have jurisdiction. Sometimes—not jurisdiction. Discretion. Sometimes I'm completely in

dismay at the decision that may be made, because I've been character witnesses, my community comes to me, I'm arguing for leniency, and, of course, the mandatory comes in. How has *Booker* impacted you? And if you said it earlier, I apologize. I missed it. And, Mr. Felman, who deals with this on a daily basis, your thoughts on how we can make *Booker* the guidepost for bringing some rationale to this idea of mandatory sentencing, which really is not a key component of rehabilitation which I think we'd like to do with, particularly, nonviolent crime and make it work as opposed to now suggesting that we need to pull back either legislatively and otherwise.

Mr. Mercer, why is it a problem?

Mr. MERCER. It's a problem, Congresswoman, because, first and foremost, we have seen a real significant increase in disparity among similarly situated offenders, and——

Ms. JACKSON LEE. That's discretion. That's the court's discretion.

Mr. MERCER. Well——

Ms. JACKSON LEE. That's looking at the facts. That's looking at the individual situation. That's what we have Federal judges for, well trained in the law. Yes, Mr. Mercer?

Mr. MERCER. And the guidelines, as they were promulgated back in the late eighties, and as they've been applied, and certainly applied in the post-PROTECT Act era, the notion of fairness is to say if a person has committed a crime in jurisdiction A and another person has committed the same crime in jurisdiction B—let's use as an example a fraud case of $250,000. Neither of them have any criminal history whatsoever, and so maybe the guideline range is 12 to 18 or 15 to 21 months, and there isn't anything remarkable about them other than maybe they both have been very active members in their communities. If judge A says, you know, this person really should deserve less of a sentence, first-time offender, really done a lot of great things in the community, straight probation, and if judge B says, you know, I really worry about fraud crimes because I think it really is corrosive when——

Ms. JACKSON LEE. If judge B says, what, you don't—you don't deserve probation and you get a sentence?

Mr. MERCER. Judge B says I'm putting you at the top end of the guideline range, 21 months, 15 months, you've got completely comparable conduct, completely comparable criminal histories, and you've got very different outcomes, and this——

Ms. JACKSON LEE. Well, Mr. Mercer, I like your merciful approach. You're being merciful. You're concerned about the fact that the gentleman and lady getting the higher end. Let me ask Judge Cassell, what about that? What about the individual given probation and the other judge giving 21 months? How can we fix that? That's what seems to be Mr. Mercer's problem. He wants fairness. He wants to make sure they both get probation. How do we work on that issue? [Laughter.]

Judge CASSELL. Well, judges agree with those principles. We certainly want fairness in sentencing. But let's look at what's happened since *Booker*. We heard just a second ago from Mr. Mercer there's been a, quote, real significant increase in departures. What the data shows is that 93 percent of the cases are being resolved the same way today as they were before *Booker*. So we're talking

about 7 percent of the cases around the country. What happens in those 7 percent of the cases? Men and women who work very hard on the Federal bench to reach fair decisions in these cases have found some unusual factor that is not accounted for in the guidelines or the departure provisions that they believe requires some modest adjustment in the sentence. And I say "modest"—again, let's talk statistics.

The average adjustment is 12 months in prison, an adjustment down to reflect the circumstances of the case, and I should mention that there are some Federal judges that have gone up a little bit more because they've found cases that are more aggravated.

I would suggest that what that is causing is not unwarranted disparity, but it's eliminating unwarranted uniformity. Under the old rule, we had situations where two cases, even though they were dramatically different, sometimes had to be sentenced in the same way, and the new, more discretionary system has given judges the opportunity to be judges and to render justice in those cases.

Ms. JACKSON LEE. Mr. Felman? Thank you very much, Judge. Thank you, Mr. Chairman and Ranking Member.

Mr. FELMAN. No doubt *Booker* from my perspective is an improvement to the prior guidelines system. I think there was a consistent, widespread consensus that the previous guideline system was simply too rigid. I am honored to be a part of a bipartisan group that the Constitution Project has put together. It's chaired by former Attorney General Ed Meese and former Deputy Attorney General Philip Heymann. It includes Judge Cassell. Until his appointment to the United States Supreme Court, it included Samuel Alito.

We reached consensus on the point that the guidelines and their binding fashion were simply too rigid. *Booker* represents a dramatic improvement although albeit a somewhat modest one in light of the fairly modest changes in departures.

There are still improvements that could be made, and I have four to recommend——

Ms. JACKSON LEE. And we can do this legislatively, are you suggesting?

Mr. FELMAN. Yes.

Ms. JACKSON LEE. If you can give them quickly, I'd appreciate it.

Mr. FELMAN. Number one, fix the crack:powder ratio. It's wrong. Number two——

Judge CASSELL. We agree with that, by the way.

Ms. JACKSON LEE. And I agree with that, absolutely.

Mr. FELMAN. Number two, there needs to be a look at the relevant conduct issue where people are sentenced for behavior they were not charged or convicted for and, indeed, might even have been acquitted for.

Number three, there is a need for procedural reform in the system. Not many people understand this, but the Federal Rules of Criminal Procedure have never been revised to take into account the ways in which sentencing procedures happen. Pre-sentence investigation reports drive the facts at sentencing hearings. They are conducted by each of the parties submitting *ex parte* submissions to the court. I am not entitled to receive the factual information the

Government presents to the court and upon which pre-sentence investigation reports are written. That's wrong and it could be fixed.

Number four, we believe that the Sentencing Commission could benefit from the addition of an *ex officio* member that represents the interests of the defense bar. Presently, the Department of Justice has two *ex officios*: one of them the chairman of the Parole Commission—Parole has been abolished for more than 20 years. They don't need that spot anymore, and the interests of the defense bar should be represented as an *ex officio* member of the Sentencing Commission.

Thank you.

Ms. JACKSON LEE. Thank you very much to the witnesses.

Mr. Chairman, Mr. Ranking Member, let me thank you very much. I think our work is before us, and I think we need to act. I yield back.

Mr. COBLE. I say to the distinguished lady from Texas, you've been plagued by a hobbled foot, Ms. Jackson Lee. I've been plagued by a hobbled back, so after the March work period, I hope you and I come back sound of body.

Gentlemen, I thank you all for your—Bobby, anything else?

Mr. SCOTT. Mr. Chairman, I'd like unanimous consent to enter in the record a statement from Carol Striker, Professor at Harvard, in reference to the importance of having judges on the Sentencing Commission.

Mr. COBLE. Without objection, it will be received.

[The prepared statement of Ms. Steiker follows:]

Mr. COBLE. And, furthermore, without objection, all Members' opening statements will be made a part of the record.

[The prepared statement of Ms. Jackson Lee follows in the Appendix]

Mr. COBLE. I thank the witnesses for your durability—I know you all have been here a long time—and for your testimony. We very much appreciate your contribution.

In order to ensure a full record and adequate consideration of this important issue—and it is indeed an important issue—the record will remain open for additional submissions for 7 days. Also, any written questions that a Member wants to submit should be submitted within that same 7-day period.

This concludes the oversight hearing on "*United States v. Booker:* One Year Later—Chaos or Status Quo?" Thank you again. This Subcommittee stands adjourned.

[Whereupon, at 2:06 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND CHAIRMAN, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Good morning. I want to welcome everyone to this very important oversight hearing before the Subcommittee on Crime, Terrorism and Homeland Security to examine the impact the Supreme Court's decision in *United States v. Booker* has had on the federal sentencing system.

I want to commend the United States Sentencing Commission for its very thorough and comprehensive "Report on the Impact of United States v. Booker on Federal Sentencing." This report is detailed and thorough, and raises many significant issues.

There is no question that the Booker decision has had a dramatic impact on Federal sentencing. Unfortunately, the Supreme Court's decision to strike down the mandatory guidelines and replace them with an advisory system has jeopardized the fundamental principles underlying the Sentencing Reform Act of 1984. It is important to remember that the Sentencing Reform Act of 1984 was a bi-partisan measure designed "to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct."

The Sentencing Commission Report documents in considerable detail how federal judges have responded to the Booker decision. The data speaks for itself and it speaks loud and clear.

Most significantly, the data demonstrates that the judiciary has undone, or circumvented, the basic sentencing reform measures passed overwhelmingly by the House and the Senate as part of the PROTECT Act of 2003. Those reforms were critical and the data shows that they were working—the incidents of judicial downward departures declined. Unfortunately, the data shows that once freed from the mandatory guideline system, judges have now returned to sentencing practices, and handed out unwarranted and unjustified downward departures for sex offenders, child pornographers, pedophiles, drug traffickers and career criminal offenders.

While it is true that there has been no decline in average sentences, that fact is simply misleading. First, it does not account for the fact that Congress has passed legislation to increase sentences in several areas; and it does not account for the fact that the Sentencing Commission has raised guideline ranges in many crime categories. Significantly, that fact does not explain why there has been a dramatic increase in downward departures for sex offenders who prey on our children, child pornographers, and drug traffickers.

The Sentencing Commission's Report shows that in the last year there has been a *six hundred percent* increase in below guideline sentences for defendants convicted of sexual abuse of a minor, a *four hundred and fifty percent* increase in below guidelines sentences for sexual exploitation of a minor, and a *fifty percent* increase in below guidelines sentences for defendants convicted of sexual contact of a minor, trafficking in child pornography and possession of child pornography.

The Commission's report also reveals increases in below guidelines sentences for drug traffickers and repeat offenders, and that district judges have increasingly awarded substantial assistance departures for cooperation without the filing of a government motion. The Subcommittee intends to study these issues carefully and to examine legislative solutions to the problems identified in the Sentencing Commission's Report. In order to return to the basic principles of the Sentencing reform Act of 1984, Congress must address the issue.

We look forward to hearing from our distinguished panel of witnesses. I am particularly interested in hearing your proposed solutions to the issues I have outlined

today. The Committee will continue to monitor these issues in the coming months. I now yield to the ranking Member of this Subcommittee, the gentleman from Virginia, Mr. Bobby Scott.

THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Mr. Chairman. I am pleased to join you for this hearing on federal sentencing since the *Booker/Fanfan* Supreme Court decision. The title of the hearing is "*U.S. v. Booker:* One Year Later—Chaos or Status Quo?" When we look at the question posed by the title, it is clear from the recent Sentencing Commission report on sentencing during this period that the answer to the question is "status quo". There is nothing to suggest chaos. Given the fact that the *Booker* decision eliminated the mandatory application of the guidelines and required the courts to consider a broad array of factors, including the guidelines, it is amazing that there is not a much more pronounced difference in sentencing when compared to pre-*Booker* sentencing. Indeed, expecting sentencing to be the same despite the changes required by *Booker* would suggest that judges were expected to ignore the decision and go on applying the guidelines as if they were still mandated. Yet, with over 69,000 cases in 94 districts, during a time of implementing a new sentencing regimen, judges sentenced within the guidelines range in over 85% of the sentences that did not involve a government motion.

With any data base this large, you can find whatever you are looking for. So, those looking for anecdotal evidence that there are more unjustified downward departures can point to the fact that the percentage of prosecutor and judge initiated downward departures were slightly up during this post Booker period. And they can look until they find a category of cases that happens to show a greater rate of downward departures and say that is the evidence they were looking for. But to conclude that such departures are unjustified or unacceptable, one would have to ignore or minimize the fact that average sentences increased during the period and that upward departures doubled. Also, such a conclusion would have to ignore the fact that there were less than 200 appeals among the 69,000 sentences, a fraction of a percent.

Whether it is post-*Booker* or pre-*Booker,* you can't look at sentences based on the name of the crime and expect to come up with an intelligent analysis of the sentences. A sentence usually involves the input and impact of a federal prosecutor, a probation officer, defense attorney, possibly a victim and a judge. Their impact is marginalized or nullified when the data is analyzed simply on the basis of the name of the crime, as some have done since the Commission's report.

While it is good that we have given ourselves at least a year before we began to evaluate the impact of *Booker/Fanfan* on sentencing, given the continuing impact that practice, experience, feedback, and appeals are having on focusing sentencing decisions, it would still be premature to take any legislative action based on this first year of data. The impact of appeals should, especially be awaited. There have been several circuit court appeals decided, but we have not had another Supreme Court decision on the post *Booker* context. There is a case in which the Supreme Court has accepted cert, *Cunningham v. U.S*, which is due to be decided during the next term and would address some of the post *Booker* issues, including the constitutionality of certain approaches. So, any legislative action prior that decision would clearly be premature.

Moreover, when we look at the data regarding the circuit appeals what we see is a that the circuits are more prone to affirm within guideline and above guideline sentences than they are below guideline sentences. Of the appeal decision issued for cases since *Booker,* all but one sentence within the guidelines have been confirmed. And, of 21 appeals of downward departures, 15 have been reversed and only 6 affirmed. At the same time, 14 appeals of above guideline sentences have been affirmed while only 2 have been reversed. And the circuits all agree that even after *Booker* they still lack jurisdiction to review a court's denial of a motion for downward departure.

So, Mr. Chairman, I believe the sentencing data clearly reflects that there is no chaos in the federal sentencing that we need to fix at this time as a result of *Booker/Fanfan.* However, there are some things that existed before *Booker* that adversely affect sentencing, in my view, and need to be addressed. Among them are mandatory minimum sentencing, the 100-to-1 sentencing disparity between crack and powder cocaine and the astounding disparity in substantial assistance treat-

ment given offenders in the different circuits. We will hear more about the details of these problems from our witnesses.

So, Mr. Chirman, I look forward to the testimony of our experts on the issue of sentencing and look forward to working with you to properly address the problems and advice they bring to our attention. Thank you.

PREPARED STATEMENT OF THE HONORABLE TOM FEENEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Good Morning. I'd like to start out by welcoming everyone to the Subcommittee hearing on this vitally important issue. We are here today to discuss the effects that the Supreme Court's decision in *United States v. Booker* has had on the sentencing of federal criminal defendants. Approximately one year ago, the Supreme Court's decision in *Booker* declared that the Sentencing Guidelines promulgated by the United States Sentencing Commission were no longer mandatory requirements, but rather advisory in nature.

Though this decision created immediate concerns over equity and fairness in sentencing, Members of Congress agreed to wait until they had more information available to thoroughly evaluate the consequences of *Booker*. Chairman Coble himself was advised by the late Chief Justice Rehnquist to hold Congressional action until enough time had passed to gauge the effects of the ruling. Now that a year has gone by, the Sentencing Commission has released a report just this week detailing how *Booker* has influenced the federal sentencing system.

Before I address the contents of the Sentencing Commission's report, I would like to praise the Commission for its hard work in this bipartisan effort to compile data and analysis on the issue. The Commission's report is very detailed and thorough, and it shows that the *Booker* decision has had a dramatic impact on the way that judges sentence defendants. What troubles me the most is that the Commission's report indicates that protections for America's children are being undone by judicial discretion.

On April 30, 2003, I was proud to stand with President Bush in the Rose Garden as he signed into law the PROTECT Act to help defend our children from sexual predators while strengthening law enforcement's ability to keep these criminals off the street. A key component of this bill was the Feeney Amendment which I authored, to ensure that those who commit sexual crimes against our nation's children will receive the full punishment of the law. The Commission's report reveals that that some judges are working to undermine this tough legislation.

According to the report, in the last year there has been a six-fold increase in below guideline range sentences for defendants convicted of sexual abuse of a minor, a five-fold increase in below guideline range sentences for defendants convicted of sexual exploitation of a child, and a fifty percent increase in below guideline range sentences for defendants convicted of sexual contact of a minor, trafficking in child pornography, and possession of child pornography. The sexual exploitation of children is one of the most vicious crimes conceivable, a violation of mankind's most basic duty to protect the innocent. We can not tolerate the deliberate evasion of public laws by those in our courtrooms, and American families and our children deserve protection from predators and abusers.

After *Booker,* judges are no longer held accountable for ensuring that defendants convicted of heinous crimes receive the punishments they deserve. Last year in Vermont, a judge initially sentenced a defendant who had admitted to sexually abusing a young girl over a four year period to only sixty days in prison. In the middle district of Florida, a judge gave a 52% reduction from the guideline sentence to a defendant who had distributed child pornography, fled when released on bond, and had an armed standoff with police.

The creation of the Sentencing Commission and the Sentencing Guidelines was accomplished to prevent the exercise of unreviewable, arbitrary power in the hands of judges. When the Supreme Court's decision in *Booker* granted this kind of authority to judges, the results speak for themselves. Sentences after Booker have exhibited a marked tendency to increase downward departures from the Guidelines. In addition to the erosion of protection for child victims of sexual abuse, the Commission's report shows that there was an increase in below range sentences for drug offenses, including those for powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine. This failure to shield our children from predators and from drug offenders is a breakdown in the system that we must find intolerable and unacceptable.

The findings of the Sentencing Commission indicate that *Booker* has endangered the principles of predictability, uniformity, and toughness in federal sentencing. In the coming months, the Subcommittee plans to study this issue in depth, and we will consider legislative solutions to the problems exposed by the Commission's report. I look forward to hearing from our distinguished panel today.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:
2435 Rayburn House Office Building
Washington, DC 20515
(202) 225-3816

DISTRICT OFFICE:
1919 SMITH STREET, SUITE 1180
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING
HOUSTON, TX 77002
(713) 655-0050

ACRES HOME OFFICE:
6719 WEST MONTGOMERY, SUITE 204
HOUSTON, TX 77019
(713) 691-4882

HEIGHTS OFFICE:
420 WEST 19TH STREET
HOUSTON, TX 77008
(713) 861-4070

Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEES:
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CO-CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OVERSIGHT HEARING ON "UNITED STATES V. BOOKER: ONE YEAR LATER—CHAOS OR STATUS QUO?"

MARCH 16, 2006

Mr. Chairman, I applaud the Sentencing Commission for undertaking such a rigorous statistical analysis of the data available. Although there are still many unanswered questions, it is certainly interesting to note that there was a significant impact on judicial decisions as a result of Booker, different from the situation before the PROTECT Act and after the PROTECT act.

It is also clear that, although this report is definitive on certain questions, it is far from conclusive on the underlying issues, and there is a need for further study and analysis. I look forward to the testimony today, as well as the questions, to clarify and further explain the results, and determine future action.

It is promising that the Sentencing Commission asserts that sentences have remained relatively stable over the last few years. In addition, of the 69,000 sentences analyzed in this study, it appears that less than 200, a fraction of a percent, have been appealed.

Similarly, the study shows that when sentences within the range of the guidelines are combined with government sponsored and below range sentences, the conformance rate of sentencing with the guidelines is 85.9%. This remained stable throughout the year after Booker.

Although the severity of imposed sentences has not changed significantly, there was an increase in the average sentence length after the Booker decision. As a result of Booker, the rate of sentences above those recommended by the Sentencing Guidelines doubled.

Principally, analysis of the post-Booker data indicates that Black offenders are associated with sentences that are 4.9 percent higher than white offenders. Such an association was not found in the post-PROTECT act period but did appear in 4 of 7 time periods analyzed from 1999 through the post-Booker period.

I have concerns with this and other indications. It appears that sentence lengths have increased on average since the Booker decision, even when controlling for a number of other factors, such as the category and severity of the crime.

My greatest concern, however, is any occurrence of disparity in sentencing that unfairly imposes longer-than-average sentences on individuals

I want to emphasize, specifically, an issue that is in dire need of Congressional investigation: the discrimination and underlying prejudice that plagues any discussion of mandatory minimum sentences, and the harm—intended or unintended—that these policies have on minorities and women. There are additional problems to carrying out sentencing guidelines, and addressing compliance with sentencing standards only begins to reveal the crisis.

Time and again, studies and data emerge showing that certain populations of people in this country are over-experiencing our criminal justice system. African Americans comprise 12 percent of the United States population, 15 percent of drug users, and 17

percent of cocaine users. Yet, 33 percent of all Federal drug convictions and 57 percent of Federal cocaine convictions.

And we are all familiar at this point with the shocking statistic from the September 2002 issue of the journal Racial Issues in Higher Education that, at that time, there were more African American males in prison than in college. I am afraid that little has changed, and I encourage my fellow committee members to give this matter further consideration.

Consequently, I believe that the ability and willingness of judges to go outside of the sentencing guidelines is of great to concern, whether the primary concern is consistency in sentencing practices or in human and civil rights.

Thank you Mr. Chairman, and I thank the witnesses for taking the time to discuss this issue with us today.

SUPPLEMENTAL TESTIMONY OF JAMES E. FELMAN, ESQ., KYNES, MARKMAN & FELDMAN, P.A., TAMPA, FLORIDA

SUPPLEMENTAL TESTIMONY OF JAMES E. FELMAN, ESQ.
Kynes, Markman & Felman, P.A.
Tampa, Florida

BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY OF THE JUDICIARY COMMITTEE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

March 16, 1006 Oversight Hearing
***United States v. Booker:* One Year Later – Chaos or Status Quo**

Mr. Chairman and the Distinguished Members of the Committee:

I wish to thank the members of the Committee for allowing me to testify at the March 16, 2006, hearing. The following submission is intended to supplement my testimony.

I. Rates of downward departure

In my written testimony at page 4, I indicated that the post-Protect Act rate of sentencing within or outside the guidelines range at the request of the government was 91.9%. The data in my written testimony was based on the Sentencing Commission's 277-page "Booker Report,"[1] released the same day I submitted my written testimony. The 91.9% figure was based on Appendix E-1 of the Report. The Sentencing Commission has since updated that figure to 93.7%.[2]

I would also observe that the Commission's data through all three time periods covered by its Report understates the rate of government-sponsored sentences below the otherwise applicable guideline range in several ways. First, prosecutors in some districts rely heavily on post-sentence

[1] UNITED STATES SENTENCING COMMISSION, *Report on the Impact of* United States v. Booker *on Federal Sentencing* (March 2006) ("Booker Report").

[2] *See* UNITED STATES SENTENCING COMMISSION, "Explanation of Revisions to Version Released March 13, 2006," *available at* http://www.ussc.gov/booker_report/BookerRptErrata.pdf. ("Explanation of Revisions").

Rule 35(b) motions to reward cooperation.[3] Second, the government uses charge bargains as both a substantial assistance reward and as a form of an early disposition program.[4] No information regarding either of these categories of "hidden departures" is mentioned in the Sentencing Commission's Report.

Third, as Judge Hinojosa testified, the Commission received more than five different Statement of Reasons forms, some of which did not indicate whether the government agreed to the sentence imposed. It appears some districts only began using forms that indicate whether the government agreed to or did not oppose a below-guideline sentence toward the very end of the post-*Booker* coding period, while other districts never used such forms during the post-*Booker* period..[5]

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[3]UNITED STATES SENTENCING COMMISSION, *Downward Departures from the Federal Sentencing Guidelines* 68-69 (October 2003) ("Downward Departures").

[4]*Id.* at 69.

[5]Judge Hinojosa's written testimony states that 20,000 of the post-Booker cases were reported on a "variety of forms" other than forms "issued in December 2003 or thereafter." *See* Testimony of Ricardo H. Hinojosa at 4. No particular form was required until the Patriot Act became law on March 9, 2006. *See* Pub. L. No. 109-177.

One form provides only two choices for a sentence outside the guideline range – a substantial assistance motion filed by the government, or other "specific reason(s)." If the government moved for a downward departure other than for substantial assistance, or agreed to or did not oppose a defense motion for downward departure, and the court did not state what the government's position was (that question not having been asked by the form), the Commission recorded the sentence as one not supported by the government. I understand this form was still being used by some districts during the post-*Booker* coding period.

Another form was approved by the Judicial Conference in December 2003 and distributed to the district courts on February 11, 2004, although it was not adopted by every district. This form for the first time listed grounds for departure other than substantial assistance, and contained boxes to check indicating that the government (1) moved for a departure other than under 5K1.1, (2) entered into a plea agreement for such a departure, (3) agreed in a plea agreement not to oppose a defense motion for departure, or (4) did not object to a defense motion for departure.

Next, a Supplemental Statement of Reasons form was approved in August 2004 in response

Furthermore, it is my understanding that if the court did use such a form and checked the box indicating that the government did not object to a defense motion for downward departure, the Commission attributes the sentence to the court rather than to the government. When the government does not object, many courts understand this to mean that the government implicitly approves of the departure.[6] If the Commission is reporting these departures as ones the government did not support, that would understate the actual number of departures the government at least implicitly supported.

Even taking the data as reported by the Sentencing Commission, the increased rate of departures does not justify legislation in light of the following evidence:

- Average sentence length has increased from 56 months pre-Protect Act to 57 months post-Protect Act to 58 months post-*Booker*.[7]

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to *Blakely*. It contained boxes indicating whether the court applied the guidelines in full, applied the guidelines in part, imposed a discretionary sentence, or took "some other action." We do not know how many districts used this form, for what period of time, or whether any district that used it also used a form indicating whether the government moved for, agreed not to oppose, or did not object to a sentence below the otherwise applicable guideline range.

In June 2005, the Judicial Conference approved yet another form, which listed reasons for sentences outside the guideline range as required by *Booker*, and contained boxes permitting the judge to indicate the government's agreement or lack of objection. It is my understanding that no district adopted this form until the late Fall of 2005, just before the post-*Booker* period ended. According to the Booker Report, only 2/3 of districts are using this form today, and "to varying degrees." Booker Report, *supra* note 1, at v.

[6]*See* Downward Departures, *supra* note 3, at 60 (number of government initiated departures "may not reflect fully the extent to which the government acquiesces to downward departures granted by sentencing courts"); *United States v. Lazenby*, __ F.3d __, 2006 WL 569284 (8th Cir. 2006) (Loken, J.) (prosecutor stated at sentencing that the defendant was similarly situated to a co-defendant who received a much lower sentence and that the court could reduce her sentence based on her residence in a halfway house for which the Bureau of Prisons would give her no credit, but maintained that she "was not authorized" to support a variance).

[7]Booker Report, *supra* note 1, at 71, Table 3.

- "[L]arge reductions below the minimum of the within-range sentence . . have decreased in the post-*Booker* time period. Overall, the courts are imposing below-range sentences more often but are not differing from the guideline sentence by a greater extent today compared to the two previous time periods."[8]

- Courts are sentencing people to prison at a higher rate than before. Courts reduced sentences from a term of imprisonment to probation at a rate of only 10.3% post-*Booker*, while the rate was 14.5% pre-Protect Act and 13.3% post-Protect Act.[9]

- At the conclusion of the post-*Booker* period, the rate of judicial below-guideline sentences was less, and the rate of within-guideline sentences more, than immediately following *Booker*.[10]

II. Sex offenses

Following release of the Booker Report, Chairman Sensenbrenner voiced strong concerns about sentencing patterns for certain sex crimes. The Chairman also went further to suggest that these concerns regarding sex crimes were significant enough that Congress should restrict judges' discretion for all offenses, not just sex offenses.[11] But sex offenses are such a minuscule percentage of the federal caseload that they cannot form a basis for any conclusions about overall sentencing trends, and should not serve as the basis for legislation regarding all federal cases.

Sex crimes comprise a mere 2% of all cases sentenced post-*Booker*.[12] There were a total of 304 cases involving sexual abuse, sexual abuse of a minor and abusive sexual contact – roughly one-

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[8] *Id.* at 63.

[9] *Id.*

[10] *Id.* at 60, Fig. 4.

[11] U.S. House of Representatives Committee on the Judiciary, F. James Sensenbrenner, Jr., Chairman, *News Advisory* (March 14, 2006) ("News Advisory").

[12] Booker Report, *supra* note 1, at 119, Table 16 (1308 of 65,368 cases).

half of one percent of the 65,368 post-*Booker* cases.[13] And of those 304 cases, 88.4% were sentenced within or above the guideline range or received government sponsored downward departures.[14] This exceeds the overall within or above-guideline rate of 87.5%. Of the 144 sexual abuse cases sentenced, 90.9% received sentences within or above the guidelines or benefitted from government sponsored downward departures and only 9% or a mere 13 defendants received a below-guideline sentence.[15] Those 13 defendants make up only .019% of all post-*Booker* cases. Of the 130 cases involving sexual abuse of a minor, 87.7% of defendants received within or above guideline sentences or received government sponsored downward departures.[16] Only 16 defendants received below guideline sentences.[17]

Average sentence lengths in all but one category of sex crime have increased substantially from pre-*Booker* sentences. The sentences for criminal sexual abuse increased from 144 post-Protect Act to 158 months post-*Booker*, or nearly 10%. The sentences for exploitation of a minor (production of pornography) increased 30% from 162 to 209 months.[18]

The Chairman cited a six-fold increase in below-range sentences for defendants convicted of sexual abuse of a minor.[19] The significance of this statistic shrivels in light of the fact that the

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[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.* at 118, Table 15.

[19]News Advisory, *supra* note 11.

increase is based on the difference between 2 below-guideline sentences post-Protect Act and 16 below-guideline cases post-*Booker*.[20] The Chairman similarly pointed to a five-fold increase in below-range sentences for defendants convicted of sexual exploitation of a child.[21] This increase is based on the difference between 2 below-guideline sentences post-PROTECT Act and 10 below-guideline cases post-*Booker*.[22] In light of the more than 65,000 cases sentenced since *Booker*, I would urge the Congress not to base wholesale changes in federal sentencing policy on 26 cases.

Aside from the minuscule number of cases at issue, the disparity inherent in the structure of the sex offense guidelines may provide some clues about certain kinds of below-guideline sentencing statistics. Native Americans comprise only 1.5% of the U.S. population, yet they were subject to more than half the sexual abuse convictions in federal court in 2001 through 2003.[23] Post-*Booker*, they make up 62.1% of federal offenders convicted of criminal sexual abuse, 39.5% of federal offenders convicted of sexual abuse of a minor, and 80% of federal offenders convicted of abusive sexual contact.[24] This is not because Native Americans commit these offenses more often than those of other races, but because offenders of other races are prosecuted for the same conduct

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[20]Booker Report, *supra* note 1, at 119, Table 16. The spread is eight-fold. The difference in numbers may reflect the fact that the original version of the Booker Report contained some errors in Table 16. *See* Explanation of Revisions, *supra* note 2.

[21]News Advisory, *supra* note 11.

[22]Booker Report, *supra* note 1, at 119, Table 16.

[23]*Report of the Native American Advisory Group* 21 (Nov. 4, 2003), http://www.ussc.gov/NAAG/NativeAmer.pdf. ("NAAG Report"); UNITED STATES SENTENCING COMMISSION, *2002 Sourcebook of Federal Sentencing Statistics* at 14, Table 4 ("2002 Sourcebook"); *2003 Sourcebook of Federal Sentencing Statistics* at 16, Table 4 ("2003 Sourcebook").

[24]Booker Report, *supra* note 1, at E-11, Appendix E-10.

in state court. Although their crimes are the same, similarly situated defendants who are white, black or Hispanic, receive shorter sentences simply by virtue of the fact that they are not subject to federal prosecution. In November 2003, the Sentencing Commission's Ad Hoc Advisory Group on Native American Sentencing Issues ("Advisory Group") reported that federal sentences in 2001 and 2002 were more severe than state sentences for sexual abuse offenses, and that the perception that Native Americans receive harsher sentences for sexual abuse offenses than non-Native Americans was accurate.[25]

Notwithstanding these findings, penalties for sex offenses were then substantially increased by new mandatory minimums and direct guideline amendments in the PROTECT Act of 2003 and another round of amendments in 2004. Between 2002 and 2004, even without those increases reflected in the data, average sentence lengths for all sexual abuse offenses nearly doubled (from 58 to 95.2 months) and mean sentence lengths nearly tripled (from 28 to 78 months).[26] These increases mean that the disparity between sentences imposed on Native Americans in federal court and sentences imposed on similarly situated offenders of other races convicted of the same conduct in state court has widened since the Advisory Group issued its report.

Cases involving non-Native Americans may also present circumstances where rigid adherence to the guideline range may result in unwarranted and unintended severity. This point is illustrated in *United States v. Bailey*, 369 F. Supp. 2d 1090 (D. Neb. 2005), in which the district court (Kopf, J.) departed from a guideline range sentence of 21 to 27 months to probation in a child

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[25]NAAG Report, *supra* note 23, at 21-23.

[26]*Compare* 2002 Sourcebook at 29, *supra* note 23, at Table13 *with* UNITED STATES SENTENCING COMMISSION, *Selected 2004 Sourcebook Tables* at Table 13, at http://www.ussc.gov/ANNRPT/2004/ selected_2004.pdf.

pornography case. Bailey pled guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The government agreed the case was "unique" because the images were not consciously downloaded by Bailey but by the operating system, he viewed the images via the Internet only briefly, and he had no intention of retaining them. Bailey was examined by a psychologist who determined that he was not a danger to society. The probation officer who drafted the Pre-Sentence Investigation Report agreed that he was not a typical child pornography offender and his circumstances may warrant a sentence different from the calculated guideline.[27]

Prior to his arrest, Bailey had custody of his daughter, who periodically visited her mother. The daughter had returned home from these visits with bruises starting at age 4 and there was evidence that she was molested on more than one occasion by her mother's boyfriend. The matter was referred to police but charges were not brought. Bailey lost custody of his daughter to her mother upon his arrest. She was 9 years old. Social services investigating the household reported a high level of domestic violence between the mother and her boyfriend. They also found that another friend of the mother's frequently sexually molested the daughter while babysitting for her.[28] The district court carefully documented the emotional and physical trauma the daughter had endured. The judge examined the exhaustive social service process that led the state to return her to her father, even though he was charged with a child pornography offense, and noted his efforts at counseling and rehabilitation as well as his daughter's need to be in the stable, loving and safe

[27] *Bailey*, 369 F. Supp. 2d at 1093-94.

[28] *Id.* at 1097-98.

home that he and his wife provided her. Bailey, he found, was critical to his daughter's recovery from Post-Traumatic Stress Disorder.[29]

The guidelines range called for Bailey to serve 21 to 27 months in prison. The judge departed 8 levels to probation and imposed fines, lengthy probation, one year of home confinement with electronic monitoring, counseling and treatment.[30] The government did not appeal.[31]

III. Cooperation reductions without government motion

The topic of sentencing below the guidelines range based on cooperation without a government motion was discussed at the hearing. There is a great deal we do not yet know about this issue. The Commission's Report indicates that there have been 258 cases post-*Booker* that were treated as variances based on cooperation without a government motion.[32] The Report explains, however, that in 114 of these 258 cases, the Commission does not know whether the government filed a substantial assistance motion, and therefore "some of these cases might involve government-sponsored reductions."[33] Further, of these 258 cases, cooperation was the sole basis for the variance in only 28 cases. This means that in the other 230 cases, the courts may have imposed the same sentence pre-*Booker* without mentioning cooperation as a consideration. As a result, we do not

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[29] *Id.* at 1099.

[30] *Id.* at 1103.

[31] District of Nebraska B Docket Report, United States v. Bailey, No. 4:02-cr-03040, at https://ecf.ned.uscourts.gov/cgi-bin/dktRpt.pl?435200417296289-L_923_0-1 (last visited March 29, 2006).

[32] Booker Report, *supra* note 1, at 113.

[33] *Id.* at 114.

know how much of the reported effect of *Booker* is a change in description rather than a change in practice.

Focusing on the remaining 28 cases in which cooperation was the sole basis for the departure, we do not know how many of them might actually involve government motions. Moreover, even if all of these cases were without government motion, 28 cases in the year after *Booker* roughly corresponds with the 29 such cases in the 13-month post-Protect Act period and the 17 such cases in the 7-month pre-Protect Act period.[34] What appears to be a slight increase may well be a stable trend.

It would also be helpful in evaluating this issue to know the number of these cases appealed by the government. As discussed in my written testimony, I was able to find only one case in which the government appealed a below-guidelines sentence based on cooperation without a government motion, and the sentence in that case was reversed.[35] It seems likely that the government would have appealed any cases in which it believed the district court had acted unreasonably.

We also do not know anything about the facts of these cases. The pre-*Booker* caselaw reveals numerous examples of the government declining to file a substantial assistance motion where a motion would appear to have been justified and appropriate.[36] Examination of the facts of the

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[34]Booker Report, *supra* note 1, at 115 Table 14.

[35]*See United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005).

[36]*United States v. Lazenby*, 2006 WL 569284, at *2, *5 (8th Cir. Mar. 10, 2006) (defendant "cooperated with the government and stood ready to testify against other conspirators" at trial and at the sentencing of another coconspirator; she was "the first of her co-defendants to plead guilty " and "her pledge of full cooperation played a role in the rapid guilty pleas entered by her conspirators, and in [the other conspirator] dropping objections to the offense as described in her PSR"); *In re Sealed Case*, 244 F.3d 961, 963 (D.C. Cir. 2001) (defendant's cooperation resulted in "superseding drug indictments against several individuals who thereafter pled guilty"); *United States v. Anzalone*, 148 F.3d 940, 941 (8th Cir. 1998) (government admitted defendant had substantially

below-guideline cooperation cases could well show that the government's decision to withhold a motion was not justified and that the court's decision to sentence below the guidelines range was appropriate and furthered the interests of justice.[37]

Additionally, it would be worth examining by district data regarding below-range sentences based on cooperation without a government motion. As reflected in the Commission's Report, the rate at which the government sponsors below-guidelines range sentences varies widely by district.[38] The government's "irregular and inconsistent policies among the various districts" regarding substantial assistance motions results in widely divergent percentages of cases in which the government makes such motions, varying from less than 5% to more than 40%, depending on the district.[39] There is not even agreement among the districts about what constitutes "substantial

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assisted in investigation and prosecution of members of cocaine distribution conspiracy); *United States v. Wilder*, 15 F.3d 1292, 1295 n.7 (5th Cir. 1994) (defendant testified before multiple grand juries, his cooperation led to several guilty pleas, and his cooperation was expected to result in additional future indictments); *United States v. De la Fuente*, 8 F.3d 1333, 1339-40 (9th Cir. 1993) (defendant cooperated in drug prosecution of family member); *United States v. Knights*, 968 F.2d 1483, 1484-85 (2d Cir. 1992) (defendant testified at trial against co-defendant); *United States v. Drown*, 942 F.2d 55, 57 (1st Cir. 1991) (defendant's cooperation led to the apprehension of two "significant cocaine trafficking targets," he testified at trial against one of the apprehended cocaine traffickers, and he provided information regarding another cocaine trafficking organization); *United States v. Garcia*, 926 F.2d 125, 126-27 (2d Cir. 1991) (defendant's early plea and offer to testify "br[oke] the log jam in a multi-defendant case," resulting in guilty pleas by co-defendants).

[37]I have been able to locate one post-*Booker* case where a district court took into consideration the defendant's cooperation without a government motion. In that case, the defendant provided information after he was sentenced which led to multiple indictments, including two for murder. *United States v. Murray*, 2005 WL 1200185, *2-3, *5 (S.D.N.Y. May 20, 2005) (granting resentencing after remand in light of *Booker*). The court found the defendant's cooperation was "significant" and "goes to the heart of the characteristics of this Defendant and provides support for his genuine contrition." *Id.* at 5.

[38]Booker Report, *supra* note 1, at 93-104.

[39]*See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing*

assistance."[40] Some of the cases in which courts imposed below-range sentences based on cooperation may well be the result of such regional anomalies.

IV. The "reasonableness" appellate standard

In his testimony before the Subcommittee on March 16, 2006, Department of Justice representative William W. Mercer stated that the government had filed approximately 122 appeals of below guideline sentences post-*Booker*, many of which were still pending, and indicated that the "reasonableness" standard of review was so unfavorable to the government that it was not worth the resources to file more appeals. Again, I disagree.

Of the 23 government appeals of below-guideline sentences listed in the Commission's Report, the government prevailed in fifteen, which were reversed as unreasonable. Two more were remanded for further hearing and explanation in the district court.[41] Only six were affirmed as reasonable. This government win rate of 73.9% hardly indicates a standard of review unfavorable to the government. In the eight years for which there is data before *Booker*, the government prevailed on appeal of downward departures at a lower rate in some years (ranging from 28-73%), a higher rate in others (ranging from 76-87%), and a lower rate overall at 71.8%.[42]

Reform, 103-04 (2004) ("Fifteen Year Study").

[40] Linda Drazga Maxfield & John H. Kramer. *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy & Practice*, 8-9, 26, *available at* http://www.ussc.gov/publicat.5kreport.pdf ("Substantial Assistance"); *see also* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 U.C.L.A. L. Rev. 105, 125 (1994).

[41] Booker Report, *supra* note 1, at 30, Ex. 2.

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Year	#Issues	#Reversed	#Affirmed	Govt Win %
1996	53	41	12	77
1997	23	20	3	87
1998	41	26	15	63

"Reasonableness" review appropriately respects the district courts' expertise and vantage point in sentencing, but it is not a "rubber stamp."[43] As the Commission's review of the appellate caselaw makes clear, every circuit has held that the district court must begin by calculating the guideline range, the correctness of which is reviewed *de novo*; that findings of fact, as always, are reviewed for clear error; that the district court must carefully articulate its reasons for the sentence; and that the more the sentence differs from the guideline range, the more compelling must be the justification.[44]

There is further evidence that the government is not suffering under the reasonableness standard of review. In stark contrast to the government's high 73.9% success rate in appealing sentences below the guideline range is the low rate of 12.5% at which defendants prevail on appeals

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1999	25	7	18	28
2000	15	13	2	87
2001	25	19	6	76
2002	32	27	5	84
2003	63	46	17	73
Totals	277	199	78	71.8

The Sentencing Commission produced tables on government appeals with affirmance rates beginning in the 1996 Sourcebook and continuing through the 2003 Sourcebook, the last one published. Because these tables count the number of issues rather than cases, the government's success rate is based on the numbers of issues involving downward departures. These were government appeals of downward departures in §4A1.3 (over-representative criminal history), §5K2.0 (departures), §5K2.10 (victim's conduct), §5K2.11 (lesser harms), §5K2.12 (coercion and duress), §5K2.13 (diminished capacity), §5H1.4 (physical condition), §5H1.6 (family ties and responsibilities), §5H1.10 (race, sex, national origin, creed, socio-economic status) and §5H1.12 (lack of guidance as youth).

[43]*United States v. Moreland*, 437 F.3d 424, 433-34 (4th Cir. 2006) ("Although this standard clearly requires a degree of deference to the sentencing decisions of the district court, 'reasonableness' is not a code word for 'rubber stamp.' Our task is 'a complex and nuanced' one, requiring us to consider the extent to which the sentence imposed by the district court comports with the various, and sometimes competing, goals of § 3553(a).").

[44]Booker Report, *supra* note 1, at 24-30.

of sentences above the guideline range, all the more striking because the rate of sentences above the range has doubled after *Booker*.[45] In the single case in which a court of appeals reversed a within-guideline sentence, the Eighth Circuit did not find that the 87-month guideline sentence was unreasonable. The circuit court instead held that the district court did not adequately consider a number of relevant factors, and therefore remanded for consideration of those factors.[46] In the same case, the court reversed a 12-month below-guideline sentence of a similarly situated co-conspirator as being unreasonably low because, although her post-offense rehabilitation was "dramatic," a 12-month sentence did not reflect the seriousness of the offense and created unwarranted disparity compared with higher sentences imposed on less culpable members of the same conspiracy.[47] This case demonstrates that the reasonableness standard is working.

Finally, the spate of below-guideline reversals under the reasonableness standard has no doubt contributed to the lower rate of below-guideline sentences at the end of the post-*Booker* period than immediately after *Booker*.[48] While a stricter standard of review is likely to be unconstitutional and would denigrate the societal value of face-to-face sentencing, there is no evidence that a heightened standard, even if upheld, would cause a lower rate of sentences below the guideline range than the reasonableness standard does. While the government sometimes claims that the abuse of discretion standard established in *Koon v. United States*, 518 U.S. 81 (1996), caused an increase in downward departures, the Sentencing Commission finds that *Koon* had little effect on the downward

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[45]*Id.* at 30, Ex. 2; *id.* at vii.

[46]*United States v. Lazenby*, __ F.3d __, 2006 WL 569284 (8th Cir. 2006) (Loken, J.).

[47]*Id.* at **3-4.

[48]Booker Report, *supra* note 1, at 60, Fig. 4.

departure rate, and that though the government rarely appealed departures after *Koon*, it was highly successful when it did.[49] Nor did the Commission find any clear effect on the rate of downward departures as a result of the Protect Act's *de novo* standard of review, since departures were already declining before it was enacted.[50]

V. Race and sentence length

The Executive Summary to the Commission's Report states that sentences for Black offenders were 4.9% longer than those for Whites and that sentences for "other races," predominantly Native Americans, were 10.8% longer.[51] In the body of the Report, Judge Hinojosa's testimony, and the Commission's Fifteen Year Study, the Commission makes clear that this association between race and sentence length does not result from judicial racial bias, and that the primary causes of racial disparity in federal sentencing are built into certain sentencing rules, as well as the unreviewable exercise of prosecutorial discretion. Because the Commission's multivariate analysis controlled for those rules and prosecutorial decisions,[52] the data set forth in the Report does not reflect the primary causes of racial disparity.

The sentencing disparity between White and minority offenders was small in the pre-Guideline era, but widened considerably in the Guidelines era. For example, by 1994, the number of months of imprisonment for Black offenders was nearly double that for Whites, and has narrowed

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[49] *Id.* at 49-50 & n.257 (citing Mark T. Bailey, *Feeney's Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 Iowa L. Rev. 269, 296-97 (2004) (government rarely appealed departures after *Koon*, and was highly successful when it did, and *Koon* had little effect on departure rates)).

[50] *Id.* at 52-54.

[51] *Id.*, Executive Summary at viii.

[52] *Id.* at B-22-39.

only slightly since then.[53] According to the Commission, most of the disparity is due to differences in the seriousness of the offense and criminal history, and little if any is due to discrimination by judges.[54] A statistically significant amount of the racial sentencing gap, however, is due to the following guidelines, statutes and practices, which are not necessary to achieve legitimate sentencing purposes:[55]

- Crack/powder ratio "The harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine," and "[h]igh penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers."[56]

- Career Offender Guideline The career offender guideline dramatically overstates the risk of recidivism for offenders classified as career offenders based on prior drug trafficking offenses. Further, lengthy incapacitation of low-level drug sellers under the career offender guideline "prevents little, if any, drug selling; the crime is simply committed by someone else."[57] Because these offenders are disproportionately Black, the career offender guideline has a disparate racial impact not justified by sentencing purposes.[58] Nonetheless, the Commission, without explanation, limited the extent of a departure for criminal history score overstating the risk of recidivism of a career offender to one level.[59]

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[53]Fifteen Year Study, *supra* note 39, at 115-16 & Fig. 4.2, 120-27.

[54]*Id.* at 117.

[55]*Id.* at 127, 113, 131, 134.

[56]*Id.* at 131-32.

[57]*Id.* at 133-34.

[58]*Id.* at 133-34.

[59]U.S.S.G., App. C, amend. 651 (2004).

- Criminal History Rules The use of non-moving traffic violations in the criminal history score may adversely impact minorities without advancing a purpose of sentencing.[60]

- Mandatory Minimum Laws, Drug Guidelines, Relevant Conduct Rules Mandatory minimums have a disparate racial impact, create more disparity than downward departures, are costly, and have little effect on crime control.[61] The "drug trafficking guideline," modeled on the mandatory minimum drug statute but broader, "in combination with the relevant conduct rule" increases "prison terms . . . in many cases above the level required by the literal terms of the mandatory minimum statutes."[62]

- Uneven charging practices The government uses statutory penalty enhancements based on prior offenses, 924(c) enhancements, and mandatory minimums "unevenly." While *not* using these enhancements "can lead to *more* proportionate sentencing" that better serves the purposes of sentencing in particular cases, the government's "charging decisions disproportionately disadvantage minorities."[63]

- Substantial Assistance Motions In a study published in 1998, the Commission found that "factors that were associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity." Legally irrelevant factors including race, gender, ethnicity and citizenship are "statistically significant in explaining §5K1.1 departures," while legally relevant

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[60]Fifteen Year Study, *supra* note 39, at 134.

[61]*See Id.* at 21-22, 48; CONSTITUTION PROJECT'S SENTENCING INITIATIVE, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); AMERICAN BAR ASSOCIATION, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); UNITED STATES SENTENCING COMMISSION, *Cocaine and Federal Sentencing Policy* (May 2002); FEDERAL JUDICIAL CENTER, *The Consequences of Mandatory Prison Terms* (1994); UNITED STATES SENTENCING COMMISSION, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); FEDERAL JUDICIAL CENTER, *The Consequences of Mandatory Prison Terms* (1994); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

[62]Fifteen Year Study, *supra* note 39, at 48-49.

[63]*Id.* at 89-91.

> factors such as the type or benefit of cooperation, defendant culpability and offense type "generally were found to be inadequate in explaining §5K1.1 departures." The unreviewability of prosecutors' reasons for making substantial motions is "exactly [what] led to charges of unwarranted disparity and passage of the SRA."[64]

After *Booker*, the courts have ameliorated the irrationality of some of these rules to some extent.[65]

With respect to the possibility of judicial bias, the Commission has found that offense-to-offense and year-to-year fluctuations in racial effects on sentence length should not be assumed to reflect stereotyping or discrimination.[66] Here, there was a statistically significant difference between black and white offenders' sentences in drug cases post-Protect Act, but no significantly significant difference in drug cases post-*Booker*.[67] Because drug cases comprise the largest proportion of the federal docket,[68] the situation apparently has improved post-*Booker*. Further, the Commission's demographic analysis did not measure the effect of certain factors, such as the nature of criminal history and the bail determination, which can affect sentence length for reasons not due to racial bias.[69] "If it were possible to include these unmeasured factors in the models, the statistical significance and impact of these demographic variables would likely change."[70]

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[64]Substantial Assistance, *supra* note 40, at 20-21.

[65]*E.g.*, Booker Report, *supra* note 1, at x, 136-140 (courts imposed more below-guideline sentences for career offenders and these were primarily drug cases); 126-131 (rate of below-guideline sentences in crack cases increased but sentence length remained the same); 79 (problems with criminal history rules one of most frequently cited reasons for below-guideline sentence).

[66]Fifteen Year Study, *supra* note 39, at 125; Booker Report, *supra* note 1, at 108.

[67]Booker Report, *supra* note 1, at 108.

[68]Fifteen Year Study, *supra* note 39, at 47.

[69]Booker Report, *supra* note 1, at 105 & nn.317-18.

[70]*Id.* at 106; Testimony of Ricardo H. Hinojosa at 14-15 & nn.41-42.

In sum, the "evidence shows that if unfairness continues in the federal sentencing process, it is more an 'institutionalized unfairness' built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. ... Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[71]

VI. Increased judicial discretion achieves public purposes

In response to questions at the hearing regarding the disparity created by the government's disparate use of substantial assistance motions, the Department of Justice representative responded that such disparity helps protect the public, while consideration of statutory factors that are prohibited or discouraged by the Guidelines do not. I must take issue with both parts of the Department's answer.

First, when the government fails to reward cooperation fairly and equitably, it harms the public by discouraging others from assisting law enforcement. Second, as one would expect, the purposes of sentencing identified by Congress – just punishment, deterrence, incapacitation and rehabilitation – are public purposes.[72] While Congress directed the Sentencing Commission to assure that the purposes of sentencing were effectively met and to minimize prison overcrowding,[73] the Commission has acknowledged that those goals have not been fully implemented.[74] As a result,

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[71]Fifteen Year Study, *supra* note 39, at 135.

[72]18 U.S.C. § 3553(a)(2).

[73]28 U.S.C. §§ 991(b)(1), (2); 994(g).

[74]Fifteen Year Study, *supra* note 39, at 77-78, 139-140, 143.

before *Booker*, the courts were required to impose sentences in some cases that were unjust and wasteful. With the federal prison population now at 190,000 at a cost to the taxpayers of over $4 billion per year, and the Bureau of Prisons at 40% overcapacity, the modest increase in judicial discretion to correct for the inefficiencies of the guidelines should be viewed as a positive change.

One of the reasons that mandatory guidelines sometimes failed to promote public purposes is that the Commission prohibited or deemed "not ordinarily relevant" many facts that can be directly relevant to those purposes.[75] For example, the Commission has only recently performed studies revealing that the following factors, although either prohibited or deemed "not ordinarily relevant" under the guidelines, reduce the risk of recidivism and the need for deterrence and incapacitation:

- Recidivism rates decline steadily with age.
- Lower rates of recidivism are associated with stable employment, educational level, family ties, and abstinence from drug use.
- A lower risk of recidivism is associated with first offender status, *i.e.*, no prior contact with the criminal justice system.
- Drug trafficking offenders have the lowest rates of recidivism.

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[75]The Commission deemed "not ordinarily relevant": age; education and vocational skills; mental and emotional conditions; physical condition; employment record; family ties and responsibilities unless the defendant was "irreplaceable;" public service, charitable and military contributions. U.S.S.G. §§5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, 5H1.11. The Commission prohibited consideration of a single aberrant act if the defendant had any "significant prior criminal behavior" even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum; lack of guidance as a youth or disadvantaged background; drug or alcohol dependence, gambling addiction; personal financial difficulties, economic pressures upon a trade or business; post-sentencing rehabilitative efforts no matter how exceptional; diminished capacity if the offense involved a threat of violence, or where diminished capacity was caused by voluntary use of drugs or other intoxicants. U.S.S.G. §§ 5H1.4, 5H1.12, 5K2.12, 5K2.13, 5K2.19, 5K2.20(c).

- The career offender guideline vastly overstates the risk of recidivism when the predicates are drug offenses.
- Certain minor offenses included in the criminal history score, such as non-moving traffic violations, do not clearly promote sentencing purposes.
- Programs to reduce drug use and provide education would have a high cost-benefit value.[76]

After *Booker*, the most frequent reasons for below-guideline sentences are the overstatement of the seriousness of risk of recidivism by the defendant's criminal history score, the defendant's family ties and circumstances, and purposes of sentencing that would better be achieved by a below-guideline sentence.[77] The courts have more frequently imposed below-guideline sentences for first offenders and career offenders, primarily in drug cases.[78] Courts rely on age and poor health more frequently than in the past, because elderly or ill defendants present a low risk of recidivism and it

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[76]UNITED STATES SENTENCING COMMISSION, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, 9, 12-13, 15-16 (May 2004)("Measuring Recidivism"); Fifteen Year Study, *supra* note 39, at 133-34.

[77]Booker Report, *supra* note 1, at 79. *See, e.g., United States v. Gorsuch*, 404 F.3d 543 (1st Cir. 2005) ("serious mental illness, maternal responsibilities, and lack of a criminal record [are] more relevant than under the pre-*Booker* regime of mandatory guidelines"); *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005) (defendant was caretaker for brain damaged son though there were alternative means of care); *United States v. Haidley*, 400 F.3d 642, 645 (8th Cir. Mar. 16, 2005) (defendant used embezzled money for her child's high medical expenses, and had two young children at home); *United States v. Williams*, 432 F.3d 621 (6th Cir. 2005) (departure in felon in possession case was appropriate where defendant's prior felony was 15 years old, no new offenses in interim); *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. May 6, 2005) (defendant was neglected and abandoned by his addicted mother, his only male role models were drug dealers, he re-established ties with his children and lived drug free for a year after the offense).

[78]Booker Report, *supra* note 1, at 132-140. *See, e.g., United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006) (decision to vary in career offender case based on small amounts of drugs and lack of violence in past and current offenses was reasonable, but unreasonable in extent); *United States v. Hued*, 338 F. Supp. 2d 453 (S.D.N.Y. 2004) (first offender guilty of storing heroin, not involved in planning criminal conduct, and involved for limited duration which was marked deviation from otherwise law-abiding life).

is so costly to house them.[79] While courts almost never considered employment record, education, or rehabilitative or treatment needs because of the restrictions imposed by the guidelines, they are considering those issues now to the extent they promote public purposes.[80]

The Commission has also found that sentences for many drug offenders are greater than necessary to achieve legitimate sentencing purposes, result in unwarranted uniformity among offenders of widely divergent levels of culpability, are the major cause of prison population growth, and are a primary cause of racial disparity.[81] In a study published in 1994, the Department of Justice concluded that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system. Though these offenders "are much less likely than high-level defendants to re-offend" and "a short prison sentence is just as likely to deter them from future offending as a long prison sentence," they "still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme." The Department recommended that the resources expended on these low-level drug offenders "could be used more efficiently to promote other criminal justice needs."[82]

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[79]*See, e.g., United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005) (advanced age and serious medical problems indicated no risk of recidivism and burden on prison system); *United States v. Lata*, 415 F.3d 107, 113 (1st Cir. 2005) (though age and infirmity were discouraged bases for departure, they may be considered under 3553(a), especially where they diminish the risk of re-offense).

[80]Booker Report, *supra* note 1, at 80-83; *compare* 2003 Sourcebook, *supra* note 23, at Table 25A. *See, e.g., United States v. Spigner*, 416 F.3d 708 (8th Cir. 2005) (sentence below guideline range would be appropriate to provide treatment of severe kidney failure in most effective manner).

[81]Fifteen Year Study, *supra* note 39, at 47-55, 76, 132, 134. The Commission attributes 75% of the more than doubling of drug sentences to the mandatory minimum laws, and 25% to its own independent actions. *Id.* at 102, 138-39.

[82]United States Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary 2-5 (February 4, 1994)("DOJ Drug Offender

In the post-*Booker* period, approximately 26% of all drug offenders had no prior contact with the criminal justice system whatsoever,[83] and drug trafficking offenders comprised 38% of all first offenders.[84] Of all first offender cases in which courts sentenced below the range, 36% were drug cases, and of all first offender cases in which the government sponsored a below-guideline sentence, 54% were drug cases.[85] While this did not reduce the average length of drug trafficking sentences overall,[86] it does appear that public purposes were better served and resources saved in these cases.

VII. Mandatory guidelines are not responsible for reduced crime rates

For many of the reasons just stated and others, I must also take issue with the Department of Justice's claim that mandatory guideline sentences are responsible for reducing the crime rate overall and the rate of violent crime in particular. To begin with, because the incarceration rate includes all offenses, but the crime rate measures only property and violent crime and not drug offenses, comparing the crime rate to the incarceration rate makes it appear as if increased incarceration has led to a greater reduction in crime than it actually has.[87] The drop in the crime rate

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Analysis").

[83]*See* Booker Report, *supra* note 1, at E-18 (6112 drug offenders were first offenders); D-6 (approximately 23,000 drug offenders).

[84]*Id.* at 134.

[85]*Id.* at E-18 (866 of 2378 total, 2012 of 3682 total).

[86]*Id.* at 130, D-18.

[87]The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 2 (2005) ("Incarceration and Crime"); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1332-33 (May 2005); Henry Ruth & Kevin Reitz, *The Challenge of Crime: Rethinking Our Response* 5, 15-18 (2003).

is due to declines in violent and property offenses, which are prosecuted primarily by the states.[88] Further, three-quarters of the decline in violent crime in the 1990s was due to factors other than incarceration, such as economic trends and employment rates.[89]

According to a study cited by the Department of Justice, only 14.8% of federal inmates in 1997 were convicted of a violent offense, while 62.6% were convicted of a drug offense, 14.8% of a public-order offense, and 6.8% of a property offense.[90] Federal drug offenders are primarily low-level couriers or street dealers (59-66% for cocaine base and powder offenders in 2000), had no weapon involvement (85.2% in 2003), and are in Criminal History Category I (55.1% in 2003).[91]

As the Commission and the Department of Justice have found, drug crime is driven by demand, and low-level dealers and couriers are easily replaced.[92] Thus, even while the federal prison population has increased from 24,000 to 190,000 in the guideline era, drug use rates have remained substantial and even increased over the past few years.[93] The answer, according to the Sentencing Commission and other reputable researchers, is drug treatment, education, and intervention in at-risk families, not more federal incarceration.[94]

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[88]Incarceration and Crime, *supra* note 87, at 6-7.

[89]*Id.* at 4.

[90]*See* Bureau of Justice Statistics, *Correctional Populations of the United States, 1997*, Table 4.3 (Nov. 2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf.

[91]Incarceration and Crime, *supra* note 87, at 6-7; 2003 Sourcebook, *supra* note 23, at Tables 37, 39.

[92]Fifteen Year Study, *supra* note 39, at 134; DOJ Drug Offender Analysis, *supra* note 82.

[93]Incarceration and Crime, *supra* note 87, at 6-7.

[94]Measuring Recidivism, *supra* note 76, at 15-16; Incarceration and Crime, *supra* note 87, at 8, and Rand Corporation studies cited therein finding that if a small portion of the budget

VIII. Regional disparity

According to the Commission Report, the same regional differences in sentencing practices that existed prior to *Booker* continue to exist after *Booker*.[95] At 23.7%, the rate of government-sponsored below-range sentences is double that of all other below-range sentences, and this accounts for the widest variation among districts.[96] As before *Booker*, the most significant cause of *unwarranted* regional disparity is the government's own policies and practices.[97]

Mr. Mercer called it "troubling" that different districts within the same circuit have different rates of within-guideline sentences. These differences long preceded the past twelve months. As the Commission noted in its Fifteen Year Study, differences among districts within the circuits were always more pronounced than differences among the circuits. Besides differences in judicial departure rates, "composition of the caseload and the role of government-sponsored departures were shown to be important determinants of interdistrict variations."[98] To suggest that differences among districts shows anything about the effect of *Booker* is therefore potentially misleading.

The Sentencing Commission has not reported whether inter-district disparity has increased or decreased after *Booker*, but it does report that the spread between the districts with the lowest and highest government-sponsored rates is much greater than that between the districts with the lowest

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currently dedicated to incarceration were dedicated to treatment, education and families, it would reduce drug consumption by many tons and save billions of taxpayer dollars.

[95]Booker Report, *supra* note 1, at viii.

[96]*Id.* at 90-91, 92, Figs. 10 & 11.

[97]Fifteen Year Study, *supra* note 39, at 102, 141; *see also id.* at 89-92, 103-107, 112.

[98]*Id.* at 85.

and highest judicial rates.[99] The difference for judicial below-guideline sentences may actually have decreased after *Booker* if the data overstates the rate of judicial below-guideline sentences for the District of Massachusetts. Professor Frank Bowman has studied the data and concluded that any increase in regional disparity is statistically insignificant, and further, that *Booker* appears to have caused less inter-district disparity than did the Protect Act.[100]

Further, claims of inter-district disparity are meaningless without the data to "fully compare the offenders and the offenses for which they are convicted."[101] The Commission defines "unwarranted disparity" as "different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing," and recognizes that there is no unwarranted disparity "when sentencing decisions are based only on offense and offender characteristics related to the seriousness of the offense, the offender's risk of recidivism, or some other legitimate purpose of sentencing."[102] However, the Commission acknowledges that it lacks "good data on all legally relevant considerations that might help explain differences in sentences," and that the "lack of data is especially severe regarding circumstances that might justify departure from the guidelines," because it does not collect data on offense and offender characteristics that may justify a sentence outside

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[99]Booker Report, *supra* note 1, at 90-91, Figs. 10 & 11

[100]Frank O. Bowman III, *The Year of Jubilee...or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, at **37-44, forthcoming in 43 Houston L. Rev. __ (2006), available at http://ssrn.com/abstract=882507. Professor Bowman does not distinguish between judicial and government-sponsored variation.

[101]General Accounting Office, *Federal Drug Offenses, Departures from Sentencing Guidelines and Mandatory Minimums*, Fiscal Years 1999-2001 at 1 (October 2003).

[102]Fifteen Year Study, *supra* note 39, at 80, 113 (emphasis in original).

the guideline range unless a departure was actually granted.[103] Thus, if a defendant in District A receives a below-guideline sentence for extraordinary family circumstances, the Commission records the reason, then reports it as "non-compliant." If a similarly situated defendant in District B receives a guideline sentence, the Commission collects no information about her extraordinary family circumstances and reports the sentence as "compliant." Despite the labels, the Commission's data does not tell us whether the defendant in District A received unwarranted leniency or the defendant in District B received unwarranted severity.

IX. The *Booker* Opinion

During the hearing Mr. Feeney and I could not agree on the number of Supreme Court Justices who believe binding guidelines are unconstitutional. I expressed the view that at least five Justices had held mandatory guidelines unconstitutional in *Booker*. Mr. Feeney expressed the view that seven Justices believed binding guidelines were constitutionally permissible. Given that there are only nine Justices, the only way I can reconcile our difference is if there was some confusion regarding the identity of the fact-finder.

My statement was premised on the assumption that the facts used to determine the binding guideline range were to be found by a judge rather than a jury. It is clear from *Booker* that Justices Stevens, Souter, Scalia, Thomas and Ginsburg believe the Sixth Amendment prohibits increasing a mandatory guidelines range based on judicial fact-finding. Only four justices (Breyer, Rehnquist, O'Connor, and Kennedy, two of whom are no longer on the Court) expressed the view that mandatory guidelines are constitutional even if the facts are not submitted to a jury.

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[103] *Id.* at 119.

On the other hand, if Mr. Feeney was thinking of binding guidelines driven by *jury* fact-finding, then I believe he has undercounted the number of Justices on the *Booker* Court who would uphold binding guidelines. Indeed, all nine justices in *Booker* would find mandatory guidelines constitutional if the facts used to increase the guideline range were admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt. In the event I am incorrect about the reason for the disagreement between Mr. Feeney and me , I would certainly welcome the opportunity to address the basis for Mr. Feeney's position if he is willing to identify the seven Justices to which he refers and the opinions from which he infers their willingness to uphold binding guidelines driven by judicial fact-finding.

X. Conclusion

I again thank the Subcommittee for the opportunity to address these important issues. I hope this supplemental submission is of assistance in the Subcommittee's work, and I would be pleased to answer any additional questions the Subcommittee might have.

Sincerely,

James E. Felman

PREPARED STATEMENT OF CAROL S. STEIKER, PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

March 14, 2006

The Honorable Howard Coble
Chair
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security
US House of Representatives
Washington, D.C. 20515

Dear Chairman and Subcommittee Members:

I submit the attached statement in the hope that it will be of use in your consideration of appropriate responses to the Supreme Court's recent decisions regarding the constitutional status of the Federal Sentencing Guidelines. My statement deals with a discrete but extremely important feature of the current federal sentencing scheme: the composition of the Federal Sentencing Commission. Congress' decision three years ago to amend the Sentencing Reform Act by stripping the judiciary of mandatory representation on the Sentencing Commission is extremely problematic, both for prudential and constitutional reasons. I urge you to reconsider this aspect of the Feeney Amendment for the reasons that follow in my statement.

My interest and expertise in this matter stems from a twenty-year legal career focused almost exclusively on issues of criminal justice: fourteen years as a scholar of the American criminal justice system on the faculty of Harvard Law School, four years as a staff attorney representing indigent defendants in the District of Columbia courts, and two years as a judicial law clerk on the Federal Court of Appeals for the District of Columbia Circuit and the United States Supreme Court. I include a copy of my curriculum vitae with my statement.

If there is any further information or assistance that I can provide, I can be contacted by telephone at (617) 496-5457 or by e-mail at steiker@law.harvard.edu.

Respectfully submitted,
Carol Steiker
Professor of Law

PREPARED STATEMENT OF STATEMENT OF CAROL S. STEIKER, PROFESSOR OF LAW, HARVARD LAW SCHOOL, TO THE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY, OF THE HOUSE JUDICIARY COMMITTEE, REGARDING MARCH 16, 2006, HEARINGS ON APPROPRIATE RESPONSES TO THE SUPREME COURT'S RULINGS ON THE FEDERAL SENTENCING GUIDELINES

PRUDENTIAL AND CONSTITUTIONAL REASONS TO CORRECT THE PROTECT ACT'S ELIMINATION OF MANDATORY JUDICIAL REPRESENTATION ON THE FEDERAL SENTENCING COMMISSION

I. Requiring Judicial Involvement on the Commission Serves Important Goals

Title IV of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children ("PROTECT") Act, (the "Feeney Amendment,") altered federal sentencing law by changing the composition of United States Sentencing Commission.[1] The Feeney Amendment eliminated the prior mandatory involvement of at minimum three federal judges on the Commission; on the contrary, the Feeney Amendment required that *not more than* three members be judges.[2] In implementing such a drastic change, Congress provided no notice, opportunity for discussion, or solicitation of contrary views.[3] In doing so, it overlooked the important benefits of requiring judicial membership on the Commission and instituted a Commission that violates the separation of powers.

A. Judges are uniquely qualified to serve on the Sentencing Commission

The United States Sentencing Commission has two purposes: to "establish sentencing policies and practices for the Federal criminal system,"[4] and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing. . . ."[5] In order to accomplish these goals, it is vital that the Federal Sentencing Commission have first-hand knowledge of variations in offenders and offenses, the way in which sentences are applied, and the considerations that go into sentence determination. Judges - more than any other group - understand the particulars involved in sentencing. They learn the details of each crime and each defendant; they hear arguments from both the prosecution and the defense; they receive input from parole officers and family members - both of defendants and victims; they see and respond to changes

[1] See PROTECT Act, Pub. L. No. 108–21 § 401.
[2] Pub. L. No. 108–21 § 401(n)(1).
[3] See, e.g. 149 Cong. Rec. S5137–01, 5145 (daily ed. Apr. 10, 2003) (statement by Sen. Leahy) (stating, "the Feeney amendment. . .was added to the bill on the House floor after only 20 minutes of debate.").
[4] 28 U.S.C.A. § 991(b)(1).
[5] 28 U.S.C.A. § 991(b)(2).

over time in crime commission and enforcement. Judges have the everyday, ground level, case-by-case view of sentences in action. In fact, this first-hand knowledge of the law's interaction with real parties and facts is why Congress placed the Federal Sentencing Commission in the Judicial Branch of the government.[6] In upholding the constitutionality of the original Sentencing Reform Act in *Mistretta v. United States*, the Court stressed that "judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business - that of passing sentence on every criminal defendant."[7] It would defy the Court's understanding of the nature of the Commission and defeat the Commission's very purpose to take away the expertise that Congress initially built into its structure.

Unlike prosecutors, defense attorneys, or legislators, judges are also uniquely positioned to provide a long-term view of sentencing. An appointment to the federal judiciary is for life, and a judge may spend years on the bench before sitting on the Commission. Prosecutors and defense attorneys rarely spend as much time in their respective capacities. This is true of the current Commission membership.[8]

Judges are also less susceptible to political pressure and sudden shifts in popular opinion than are prosecutors.[9] A sudden rise in crime will not prompt a Commissioner-judge to take extreme but perhaps unwise measures in order to satisfy immediate demands for harsher punishment. Additionally, unlike prosecutors or defense attorneys, judges do not spend their careers either trying to convict defendants or trying to acquit them. Rather, they are able to focus on the criminal justice system as a whole: with the benefit of all relevant arguments, they are more likely to be able to take a balanced view.[10] Of course, prosecutors and defense attorneys have experience in the criminal justice system too, but the nature of the adversary system demands that they advocate zealously for their perspective, making it difficult for them to be as open to competing values.

Moreover, judges will tend to be highly qualified even without significant experience on the bench. That they have passed the uniquely rigorous selection process applied to federal judges indicates a Congressional belief in their qualifications to determine and apply the law, including appropriate sentences.

Finally, the guidelines promulgated by the Commission are not applied by prosecutors, defense attorneys, or legislators; they are applied by judges. Judges thus have the most clear-eyed view of how adversaries on both sides might seek to exploit "loopholes" in the guidelines. They also have a unique perspective on how judges will respond to guidelines once promulgated. Judges can most effectively advise the Commission on how to make their policy goals apply in practice. That other judges will consider guidelines promulgated with substantial judicial input more credible further proves the value of having more, not fewer, judges.

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[6] See Mistretta v. United States, 488 U.S. 361, 396 (1989) ("Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise."). See also S. Rep. No. 98–225, at 159 (1983) (Senate Report on the Sentencing Reform Act) ("Placement of the commission in the judicial branch is based upon the committee's strong feeling that even under this legislation, sentencing should remain primarily a judicial function.").

[7] *Mistretta*, 488 U.S. at 407.

[8] The Commission Chair - Judge Ricardo H. Hinojosa - has served as a federal judge for 23 years. Judge Ruben Castillo has spent 12 years as a federal judge, in addition to four years as an Assistant United States Attorney. Chief Judge William K. Sessions has served on the federal bench for 11 years, in addition to 4 years as a public defender. In contrast, Vice Chair John R. Steer has no direct experience in the criminal justice system. Commissioners Beryl A. Howell and Michael E. Horowitz served as Assistant United States Attorneys for 6 years and 8 years respectively, and neither holds that position currently.

[9] See, e.g., a statement by the President of the American Bar Association: "By overriding the Sentencing Commission and legislatively rewriting the Guidelines, the Feeney Amendment threatens the legitimacy of the Commission. The Commission was created by Congress to ensure that important decisions about federal sentencing were made intelligently, dispassionately, and, so far as possible, uninfluenced by transient political considerations." Letter from Alfred P. Carlton, Jr., President of the American Bar Association to Senator Orrin G. Hatch, (Apr. 1, 2003), available at http:// www.nacdl.org/departures. See also Paul J. Hofer & Mark H. Allenbaugh, *The Reason behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 28 (2003). "[M]any guideline amendments are not initiated by the Commission based on research identifying flaws in the existing rules. The Guidelines are often amended because Congress directs the Commission to increase sentences for a particular type of crime, often a crime that has received media attention. For example, in 2000, Congress directed the Commission to increase penalties for trafficking in the 'club drug' MDMA, commonly known as 'ecstasy.' The Commission responded with an amendment doubling, and in some cases tripling, penalties."

[10] See, e.g., Statement of Senator Leahy: "Judges are extremely valuable members of the Commission. They bring years of highly relevant experience, not to mention reasoned judgment, to the table." 149 Cong. Rec. S5137–01, 5146 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy).

B. Requiring judicial membership on the Commission insulates judicial members from Executive Branch pressure

Even though the Commission can benefit from judicial members' expertise whether or not their participation is required, a guarantee that some members of the Commission will be from the judiciary helps ensure that judicial members will be insulated from Executive Branch pressure in their decision-making. Judicial members on the Commission serve under the awareness that the President is under no obligation to replace them with other judicial members. They also know that the Attorney General or his representative, as an *ex officio* member of the Commission, will be aware to every last particular of the nature of their participation on the Commission. Therefore, without a legislative requirement that judges will be part of the Commission, judicial members may feel compelled either to comply with or be more accommodating to the demands or desires of the executive so as to preserve the possibility that there will be continued judicial representation on the Commission after their terms have been served. There is thus always the danger that judicial members on the Commission will act in response to fear of executive retaliation rather than from considered judicial expertise, depriving the Commission of the benefits of judicial participation in the first place. Requiring that judges be a part of the Commission allows judicial members to provide their expertise with the reassurance that continued judicial participation will not be subject to the demands or whims of the chief executive.[11]

C. Judicial participation is necessary to avoid self-dealing by the Executive Branch

Without a requirement of judicial membership on the Commission, the Executive Branch could potentially have full control of the Commission. Because the Executive Branch already holds a significant amount of power in sentencing decisions, a lack of judicial membership concentrates too much power in that branch and creates a situation where the only effective discretion in the sentencing process is the discretion of the executive. The executive would be able to determine, through the Sentencing Commission, the appropriate level of punishment for any given offense, enhancing and perhaps even perverting the power it already holds to prosecute those offenses. Without judicial involvement, the executive could engage in a form of "self-dealing" and use its control of the Sentencing Commission to benefit itself and make certain kinds of prosecution easier. For example, the Commission could enhance sentences attached to specific lesser crimes that are easier to prosecute to provide the executive with larger bargaining chips in pursuing more serious crimes that are more difficult to prosecute. The concentration of power in one branch in sentencing raises serious concerns that could be alleviated by a judicial "check" in the form of judicial participation on the Commission.

D. Judicial membership is necessary to avoid the appearance of unfairness

Even if judicial members of the Commission do not in fact feel pressure to conform to the desires of the Executive Branch, and even if a Commission fully controlled by the Executive Branch does not engage in self-dealing, judicial membership on the Commission is necessary to avoid the *appearance* of improper influence and unfairness. Though judicial members may try to make their decisions free from Executive Branch influence, they may be perceived by the public as compromised by the undue influence of the executive through its appointment powers - decisions, especially unpopular ones, that may have been motivated by independent concerns will be questioned and potentially undermined by the fact that judicial membership on the Commission is not guaranteed and subject to the desires of the executive. Similarly, if the Executive Branch takes full control of the Commission, it will potentially undermine public confidence in the justness and fairness of the sentencing process and the federal criminal justice system. Our adversary system is premised on the idea of zealous partisanship by adversaries, presided over neutrally by judges, and ultimately resolved through sentencing after conviction by those same neutral judges.μ If one of the adversary parties in the system, the Executive Branch, is given complete control over all decisions made by the Commission, it can create the perception that the executive is both prosecuting and sentencing at the same

[11] The Supreme Court has long recognized the constitutional significance of the chilling effect of fear of retaliation in the First Amendment context. See, e.g., Buckley v. Valeo, 424 U.S. 1, 68 (1976) ("It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation.").

time. Regardless of the actual fairness and justness of prosecutions by the executive, the legitimacy of its decisions will have been compromised by its complete and potentially corrupting control of the sentencing process. Thus, a guarantee of judicial membership on the Commission can help uphold in the eyes of the public and of defendants both the legitimacy of the Commission's decisions and of the Executive Branch's powers.[12]

II. Failure to Mandate Judicial Involvement Violates Separation of Powers Doctrine

In addition to raising important prudential concerns about fairness within the adversarial system, the elimination of required judicial participation on the Sentencing Commission raises fundamental questions about the very constitutionality of such an organization. As the Supreme Court has held, "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."[13] By vesting sentencing decisions primarily in the Executive Branch, the Feeney Amendment's change in the necessary composition of the commission violates the separation of powers doctrine in two significant ways. It unites the power to prosecute, a purely executive function, with the power to sentence, a judicial function; additionally, the allocation of traditionally judicial responsibilities to the Executive Branch encroaches upon judicial authority while aggrandizing executive oversight.

A Sentencing Commission with no judicial involvement falls exclusively within the purview of the Executive Branch as a matter of functional reality. With no mandated judicial involvement on the Commission, all sentencing decisions will in some way be connected to the executive branch.[14] This degree of executive power mirrors presidential oversight of "independent agencies," which fall within the scope of the Executive Branch.[15] In independent agencies, the President retains appointment power, at minimum, of the chief administrator; the agency then formulates rules and performs other functions.[16] Likewise, a Sentencing Commission without mandatory judicial membership will contain only Presidential appointees who may act devoid of any input from judicial actors, despite their unique experience and expertise on the issue and the long history of judicial control of the sentencing rules and processes. As one court has held, "[t]his concentration of sentencing power in the Executive Branch is unprecedented."[17]

By functionally embedding the Sentencing Commission within the Executive Branch, the Feeney Amendment unconstitutionally united the prosecutorial and sentencing powers within one governmental sector. In *Mistretta*, the Supreme Court upheld the then-required appointment of at minimum three judges to the Sentencing Commission. Rather than finding a separation of powers violation due to judicial involvement, the Court instead speculated that Executive responsibility for "promulgating sentencing guidelines" might "unconstitutionally. . .unite[] the power to prosecute and the power to sentence within one Branch."[18] Mandated judicial involvement was therefore central to the Court's upholding of the prior structure of the Sentencing Commission. In criminal cases, the prosecutor is an executive actor. The judiciary is prohibited from encroaching on the executive's wide discretion in bringing charges and trying cases, except in rare cases like overt race discrimination in jury selection.[19] Likewise, the Executive Branch must refrain from infringement on the judiciary's role as the neutral sentencer. Placing the development of sentencing standards within the purview of the executive gives this branch both wide discretion in bringing charges, along with the ability to impact sentencing by

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[12] The importance of the appearance of the independence of the judiciary in its adjudicative role is a longstanding concern. See, e.g., Hobson v. Hansen, 265 F. Supp. 902, 931 (D.D.C. 1967) ("The need to preserve judicial integrity is more than just a matter of judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied.").

[13] Mistretta v. United States, 488 U.S. 361, 380 (1989).

[14] See United States v. Detwiler, 338 F. Supp.2d 1166, 1174 (D. Or. 2004).

[15] Freytag v. Commissioner, 501 U.S. 868 (1991) (Scalia, J., concurring in part and concurring in the judgment).

[16] FMC v. S.C. State Ports Auth., 535 U.S. 743, 773 (2002); Panama Co. v. Ryan, 293 U.S. 388, 428 (1935).

[17] *Detwiler*, 338 F. Supp.2d at 1175.

[18] *Mistretta*, 488 U.S. at 391 n.17; see also *Detwiler*, 388 F. Supp.2d at 1175.

[19] See United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) (Separation of powers mandates that judicial independence from executive affairs and executive independence from judicial affairs).

promulgating rules that favor its own prosecutorial interests.[20] This is exactly the type of unified action against which the *Mistretta* court cautioned. "To permit the same body to serve as prosecutor, an advocate for the sovereign, and also determine the penalty for the offense, is contrary to fundamental notions of liberty and justice."[21]

Not only does the Separation of Powers doctrine preclude the unification of sentencing and prosecuting powers within one branch; it also expressly prohibits any form of "encroachment or aggrandizement of one branch at the expense of the other."[22] The placement of the Sentencing Commission entirely within the scope of the executive does just this. Previously, the Supreme Court has struck down laws that give one branch powers appropriately diffused among three branches, laws that undermine the authority and independence of another branch of law, and laws that reassign power vested in one branch to another branch.[23] Though some blending of the branches' functions is appropriate, this is true only when the overlap poses "no danger to either aggrandizement or encroachment."[24] However, when this blending prevents one branch from exercising its constitutionally assigned tasks, the Founders' fear of the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" is realized.[25] In identifying unacceptable infringement, the Court looks to the "practical consequences" of a challenged plan within the context of traditional Article III principles.[26]

Sentencing has long been designated as a "primarily judicial function."[27] By effectively relocating the Sentencing Commission within the Executive Branch, the Feeney Amendment both interferes with the judiciary's traditional sentencing role and allows the executive to assume a function that has long been entrusted to the judiciary. The Sentencing Commission determines the appropriate range of punishments for particular offenses. Without the required application of judicial expertise to this decision-making process, the executive will have increased its ability to determine sentences, particularly when combined with its plea bargaining power and its ability to decide what charges to bring. It will simultaneously have limited or eliminated the judiciary's ability to individually tailor sentences. Such a merging of responsibilities impermissibly concentrates what has long been a diffused sentencing power among the three branches and unquestionably aggrandizes the executive's power. The "practical consequence" of not mandating judicial involvement on the Sentencing Commission is to aggrandize the executive's power and to encroach upon the judiciary's function as the neutral arbiter.[28]

Likewise, by not mandating judicial involvement on the Commission, the Feeney Amendment risks intimidating any judicial members who are lucky enough to secure an appointment to the commission, chilling their promotion of independent ideas. With no judicial positions guaranteed, a judge may be subject to removal by the executive and replaced by a non-judicial member. Under such circumstances, any judicial members who are appointed to the Commission may feel pressure to act in adherence to executive policy desires, as a failure to adhere may imperil judicial representation on the Commission in the future. This potential for intimidation undermines the necessary elicitation of judicial expertise in the Commission's deliberations and encroaches on the independence of the judiciary branch.[29] In creating

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[20] See Jamie Escuder, *Congressional Lack of Discretion: Why the Feeney Amendment is Unwise (and Perhaps Unconstitutional)*, 16 Fed. Sent. R. 276, 276–277 (2004) ("[B]y edging judges out of the sentencing process, the Feeney Amendment removes a critical check on the Executive's ability to design a sentencing structure that is biased in its favor.").

[21] *Detwiler*, 388 F. Supp.2d at 1175.

[22] Buckley v. Valeo, 424 U.S. 1, 122 (1983); INS v. Chadha, 462 U.S. 919, 951 (1983).

[23] See *Mistretta*, 488 U.S. at 382; see e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (Congress cannot control enactment of legislation by retaining the removal power); *Chadha*, 462 U.S. at 951 (Congress cannot control the mechanism in which laws are executed).

[24] *Mistretta*, 488 U.S. at 382; Morrison v. Olson, 487 U.S. 654 (1988) (judicial appointment of independent counsel does not aggrandize its functions); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (the executive agency may exercise jurisdiction over state-law counterclaims).

[25] *Chadha*, 462 U.S. at 951; see also Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

[26] *Commodity Futures Trading Comm'n*, 478 U.S. at 857.

[27] *Mistretta*, 488 U.S. at 382 ("For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases."); *Detwiler*, 388 F. Supp.2d at 1170 (the judiciary has historically determined "what sentence is appropriate to what criminal conduct under what circumstances.").

[28] *Mistretta*, 488 U.S. at 392.

[29] See Bowsher v. Synar, 478 U.S. 714, 725 (1986) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive

Continued

the original Sentencing Commission, Congress clearly recognized that "any suggestion that the Executive Branch should be responsible for promulgating the guidelines would present troubling constitutional problems. . ." and would "fundamentally alter the relationship of Congress to the Judiciary with respect to sentencing policy and its implementation."[30] By not mandating judicial involvement with the Sentencing Commission, those prescient congressional fears will be realized.

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influence, direct or indirect, of either of the others, has often been stressed is hardly open to serious question.").

[30] H.R. REP. 98–1017, at 94–95 (Sept. 13, 1984).

RESPONSES TO QUESTIONS FOR THE RECORD FROM WILLIAM E. MOSCHELLA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 19, 2006

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions posed to William Mercer, United States Attorney for the District of Montana and Principal Associate Deputy Attorney General, following Mr. Mercer's appearance before the Subcommittee on March 16, 2006 on "*United States v. Booker*: One Year Later – Chaos or Status Quo?"

Thank you for the opportunity to supplement Mr. Mercer's testimony. We hope that this information is helpful to you. The Office of Management and Budget has advised that there is no objection to the presentation of these responses from the standpoint of the Administration's program. If we may be of additional assistance, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Bobby Scott
Ranking Minority Member

Questions for the Record from the Honorable Bobby Scott
"*United States v. Booker*: One Year Later—Chaos or Status Quo?"
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
March 16, 2006

Questions for William W. Mercer

1. According to your testimony, the Department of Justice has taken 122 appeals of sentencing-related issues during the period following the *Booker* decision. You attributed this number to two factors: (1) the *Booker* decision's adoption of a reasonableness, as opposed to *de novo*, standard of review; and (2) that the Justice Department lacks the resources to file more sentencing appeals without withdrawing resources from the prosecution of new cases.

A. Provide the case names, docket numbers, and districts of the 122 cases to which you referred in your testimony.

As best as we can determine, as of May 1, 2006, the Solicitor General has authorized 156 appeals challenging sentences imposed since *Booker* on the ground that the sentence was unreasonable. A list of those appeals is attached as Exhibit A.

B. Provide documentation of all post-*Booker* requests for approval of sentencing appeals that were denied by the Solicitor General's Office including the contemporaneous documentation of the reasons for such denial.

As a matter of longstanding policy, the Department of Justice does not disclose memoranda to the Solicitor General making recommendations on whether to appeal. Such documents constitute protected attorney-client, attorney work product, and pre-decisional memoranda, the disclosure of which would chill the performance of the Department's functions. An intrusion into the Department's highly privileged deliberations would interfere with the Solicitor General's ability to receive candid, complete, and balanced advice and would undermine the Solicitor General's ability to protect the litigation interests of the United States. This point has particular force in the exercise of appellate prosecutorial discretion in criminal cases, a core executive function.

C. Provide copies of any formal or informal policies, guidelines and memoranda used by the Department (including the Solicitor General's Office) to determine the appropriateness of a sentencing-related appeal. Please describe any changes in the procedures for reviewing and approving such appeals following the *Booker* decision.

Government appeals of sentences are governed by Section 2.170(B) of the United States Attorneys' Manual (USAM). A copy of that provision of the USAM is attached as Exhibit B. In addition, then-Deputy Attorney General Comey issued a memo in January 2005 regarding post-*Booker* practice. In it, he addressed the importance of Government appeals of unreasonable sentences. The individual appeal recommendations, which discuss the appropriateness of seeking appellate review in specific cases, are protected by the deliberative process privilege. There have been no changes in the procedures for reviewing and approving such appeals since *Booker*.

D. Provide the number of attorneys who currently write criminal appeals (1) in each district and (2) at Main Justice and the Solicitor General's Office.

The Office of the Solicitor General currently has a small team of attorneys, consisting of three Assistants to the Solicitor General and one Deputy Solicitor General, preparing sentencing recommendations to the Solicitor General in order to foster expertise, efficiency, and uniformity in the evaluation of sentencing appeals.

We cannot quantify the number of attorneys who write sentencing appeals either in Main Justice or in the United States Attorneys' Offices. Although there are 27 attorneys in the Criminal Division's Appellate Section, these are not the only attorneys at Main Justice who are available to draft sentencing appeals. Trial attorneys also draft such appeals, as do appellate attorneys in the other litigating Divisions. For example, the Tax Division's Criminal Appeals and Tax Enforcement section has six attorneys who work on appeals, including the Chief and Assistant Chief. The Environment and Natural Resources Division (ENRD) Appellate Section currently has 29 attorneys. Of those, approximately three to four attorneys work on criminal appeals, but not full time throughout the year. We estimate that post-*Booker*, ENRD Appellate has devoted the equivalent of one full-time employee to criminal appeals. About one half of this time includes work on Government appeals of criminal sentences. At this time, nine of the twelve Civil Rights Division Appellate lawyers have criminal appeals assigned to them. All four reviewers in that section are working on criminal appeals. The Antitrust Division's Appellate Section has 11 attorneys, all of whom work on criminal appeals.

Each of the 93 United States Attorneys has discretion to staff his or her office according to the needs of the office. As such, a few of the larger United States Attorney's Offices have appellate units where attorneys spend all or substantially all of their time on appellate work. Many offices, however, require the Assistant United States Attorney who tried a particular case to also write and argue the appellate brief. The magnitude of the appellate caseload managed by U.S.

Attorneys' Offices is best understood through public source information. The Sentencing Commission tracks appeals of sentences. In Fiscal Year 2003, defendants and the United States took 3,121 appeals of sentences imposed by district courts. United States Sentencing Commission, *2003 Sourcebook of Federal Statistics* (Table 55), pp. 111-13. In another 1,262 appeals, defendants challenged the sentence in addition to the conviction. *Id.* The Sentencing Commission recently published its *2004 Sourcebook of Federal Statistics* and its *2005 Sourcebook of Federal Statistics*. On the issue of the number of sentencing appeals taken by either the Government or defendants, the fiscal year 2004 data are comparable to those from fiscal year 2003. However, the Sentencing Commission reported a substantial increase in the number of appeals for Fiscal Year 2005. In Fiscal Year 2005, defendants and the United States took 6,208 appeals of sentences imposed by district courts. United States Sentencing Commission, *2005 Sourcebook of Federal Statistics* (Table 55) (www.ussc.gov.ANNRPT/2005/Table55.pdf).

2. Provide the number of cases in which a sentence was reduced based on a Rule 35 motion and the average extent of such sentence reductions, by district and by fiscal year, from October 1, 2002 through January 11, 2006.

The Department does not have a centralized data base with information responsive to this question. The United States Sentencing Commission does compile such data. In a letter to Congressman Scott, dated April 25, 2006, the Commission provided data on Rule 35 sentence reductions, by district and fiscal year, for fiscal years 2003 to 2005. The data included the extent of such sentence reductions. We have no data to make an independent assessment of the accuracy and completeness of the Commission's report.

3. Provide the number of cases, by district and fiscal year, in which the government entered into a charge bargain as a reward for substantial assistance or as a form of Early Disposition Program from October 1, 2002 through January 11, 2006.

The Government does not typically enter into charge bargains as a reward for substantial assistance. Instead, substantial assistance is typically rewarded through a motion to reduce the sentence pursuant to United States Sentencing Guideline 5K1.1. The Department does not maintain data on charge bargains designed to reward substantial assistance that would be responsive to this aspect of the question.

The table below summarizes the number of cases, by district and fiscal year, in which the Government entered into a charge bargain under an approved early disposition program. The fiscal year runs from October 1 through September 30, so the data from fiscal year 2003 covers the period from October 1, 2002 to September 30, 2003. Data for fiscal year 2006 will be

available after September 30, 2006.

Number of Cases Resolved by Charge Bargain

District	FY 2003	FY 2004	FY 2005*
AZ	300	392	477
CA/C	194	588	348
CA/N	73	59	61
CA/S	2,218	2,094	974
FL/S	--	273	450
GA/N	--	100	90
NM	--	--	8
NY/E	400	150	207
OR	222	153	130
WA/W**	40	65	45
TOTAL	3,447	3,974	2,790

* The numbers for FY 2005 may slightly understate the number of cases because the districts extracted the information during the month of September, but not as of September 30, 2005.

** The numbers for WA/W also include offenders who were prosecuted under a downward departure program, rather than a charge bargaining program.

The number for FL/S in FY 2005 includes some offenders who were prosecuted in the last two months of FY 2004 and were not counted that year.

Programs without numbers indicate that the program was not yet authorized/implemented or that offenders were not prosecuted under a charge bargaining program that fiscal year.

4. Identify the cases, by name and docket number, which the Department of Justice contends demonstrate a need for legislation at this time.

In addition to the cases noted in Mr. Mercer's written statement, a number of other cases demonstrate the need for legislation. Although this list does not exhaust the examples of troubling analysis and bad outcomes in cases as a result of *Booker*, the following cases provide a useful sample:

United States v. Michael J. Bradford, D.C. Docket No. 4:04-CR-339 (E.D. Missouri); 2006 WL 1277104 (8th Cir. 2006);

United States v. Jeffrey Shafer, D.C. Docket No. 8:03-CR-424 (D. Nebraska); 438 F.3d 1225 (8th Cir. 2006);

United States v. Sam Saenz, 428 F.3d 1159 (8th Cir. 2005);

United States v. Mario Bueno, 443 F.3d 1017 (8th Cir. 2006);

United States v. Gordon Givens, D.C. Docket No. 8:04-CR-478 (D. Nebraska); 443 F.3d 642 (8th Cir. 2006);

United States v. Michael A. Crisp, D.C. Docket No. CR-04-BE-0403 (N.D. Alabama); Court of Appeals Docket No. 05-12304-GG;

United States v. Frank Huang, 2006 WL 1345541 (9th Cir. 2006)(unpublished); D.C. Docket No. CR-04-01298-R (C.D. California);

United States v. Thomas Whitehead, D.C. Docket No. CR 03-53-CAS (C.D. California);

United States v. Krishnaswami Sriram, D.C. Docket No. 00 CR 894-1 (N.D. Illinois);

United States v. Darryl Wallace, D.C. Docket No. 04-CR-999 (N.D. Illinois);

United States v. Lynn Lazenby, D.C. Docket No. 04-87-4 MWB (N.D. Iowa); 439 F.3d 928 (8th Cir. 2006);

United States v. David Duhon, D.C. Docket No. 04-60007 (W.D. Louisiana); 440 F.3d 711 (5th Cir. 2006);

United States v. Michael D'Amico, D.C. Docket No. 02-10283 (D. Massachusetts);

United States v. Corey Smith, D.C. Docket No. 04-10111 (D. Massachusetts); 445 F.3d 1 (1st Cir. 2006);

United States v. William Thurston, D.C. Docket No. 98-10026 (D. Massachusetts); 358 F.3d 51 (1st Cir. 2004);
United States v. Jose Medina, D.C. Docket No. 04-0419 (D. Maryland);

United States v. Fadya Husein, D.C. Docket No. 04-80750 (E.D. Michigan);

United States v. Chastity Hawkins, D.C. Docket No. 03-1636; 03-1637 (E.D. New York); 119 Fed. Appx. 318 (2d Cir. 2004);

United States v. Sanford Freeman, D.C. Docket No. 02 CR 441 (S.D. New York);

United States v. Anthony C. Atkinson, D.C. Docket Nos. CR-04-01581 and CR-04-01067 (C.D. California); 2006 WL 1307869 (9th Cir. 2006);

United States v. Malcolm E. McVay, D.C. Docket No. 03-00195-CR-C-S (N.D. Alabama); 2006 WL 1193212 (11th Cir. 2006); and related Health South cases (*United States v. Michael Martin*, D.C. Docket No. 03-00191-CR-C-S (N.D. Alabama); 135 Fed. Appx. 411 (11th Cir. 2005) (04-13458); 05-16645 (new 11th Circuit Docket); *United States v. Kenneth Livesay*, D.C. Docket No. 03-00182-CR-C-S (N.D. Alabama); 146 Fed. Appx. 403 (11th Cir. 2005)(04-13453); 06-11303 (new 11th Circuit Docket);

United States v. Michael Camiscione, D.C. Docket No. 5:04-CR-594n (N.D. Ohio);

United States v. S. DiAmbrosio, D.C. Docket No. 04-66 (E.D. Pennsylvania);

United States v. Lakiha Spicer, D.C. Docket No. 04-320 (E.D. Pennsylvania);

United States v. Darrell Prows, D.C. Docket No. 2:04-CR-102 BSJ (D. Utah), Court of Appeals Docket No. 05-4164;

United States v. Idana Williams, D.C. Docket No. 2:04-CR-104 (E.D. Virginia); Court of Appeals Docket Nos. 05-4685; 05-4758;

United States v. Synina Clark, D.C. Docket No. 1:04-CR-401 (E.D. Virginia); 434 F.3d 684 (4th Cir. 2006);

United States v. Kevin Halsema, D.C. Docket No. 04-00027-CR 1-SPM-AK (N.D. Florida); 2006 WL 1229005 (11th Cir. 2006).

In addition to the foregoing cases, there a number of other issues as a result of *Booker* that are problematic. For example, some circuits have found that a sentence within the applicable

guideline range is entitled to a rebuttable presumption of reasonableness. *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2005); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); and *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005). However, other courts have rejected the same test. *United States v. Jimenez-Beltre*, 440 F.3d 514, (1st Cir. 2006) (*en banc*); *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006) ("a mandatory rebuttable presumption . . . is much more than a mere consult for advice, and the Guidelines are to be no more than that."). Such divergent views are certain to cause disparate treatment. When one court interprets *Booker* to mean that advisory guidelines are to be consulted merely for advice, and another says "[b]ecause the Guidelines are fashioned taking the other § 3553(a) factors into account and are the product of years of careful study, the guidelines sentencing range, though advisory, is presumed reasonable," (*United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006)), intercircuit and intracircuit disparities are guaranteed.

This problem is compounded when one considers that the goal of minimizing unwarranted disparity, the primary goal of the Sentencing Reform Act of 1984 and set forth in 18 U.S.C. § 3553(a)(6), appears to be viable in some circuits but not others. *Compare United States v. Bradford*, 2006 WL 1277104 (8th Cir. 2006) (In the 8th Circuit, the district courts are governed by the court of appeals' view that "[W]e are still operating within the framework of an advisory guideline scheme designed to reduce unwarranted sentencing disparities among similar defendants. It is not reasonable to expect that other similarly situated defendants are receiving similar [to what Bradford received] extraordinary reductions."); and *United States v. Marcial-Santiago*, 2006 WL 1215444 (9th Cir. 2006) (holding that "the need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing sentence.").

Appendix A

GOVERNMENT APPEALS – REVIEW OF SENTENCES FOR "REASONABLENESS"

	Case Name	District Court Number	District
1	United States v. Vernon Shelton	No. 6:04-CR-72	M.D. Fla.
2	United States v. Mark Edwards Myers	No. 3:04-CR-147	S.D. Iowa
3	United States v. Sabrina Cage	No. 03-766	D. N.M.
4	United States v. Gordon Givens	No. 8:04-CR-478	D. Neb.
5	United States v. Marcus Raqual Williams	No. 6:04-cr-70	M.D. Fla.
6	United States v. Jeffrey Allen McDonald	No. 04-146	S.D. Iowa
7	United States v. Kendrix Feemster	No. 4:04-CR-508	E.D. Mo.
8	United States v. Manuel E. Gatewood	No. 04-4028-010	W.D. Mo.
9	United States v. Clinton McGhee	No. 8:04CR436	D. Neb.
10	United States v. Jonathan P. Johnson	No. 3:04-545	D. S.C.
11	United States v. Michael A. Crisp	No. CR-04-BE-0403	N.D. Ala.
12	United States v. Charles A. Green	No. L-03-0305	D. Md.
13	United States v. Jeffrey Shafer	No. 8:03-CR-424	D. Neb.
14	United States v. Michael Eugene Hillyer	No. 2:04-CR-18	E.D. N.C.
15	United States v. Synina Lavel Clark	No. 1:04cr401	E.D. Va.
16	United States v. Charles R. Vawter	No. CR-04-BE-0057	N.D. Ala.
17	United States v. Lynn Lazenby	No. 04-87-4MWB	N.D. Iowa
18	United States v. David Vincent Duhon	No. CR-04-60007-01	W.D. La.
19	United States v. Garrett LaFrance	No. 02-81048	E.D. Mich.
20	United States v. Richard Rowan II	No. 04-60010	W.D. La.
21	United States v. Lance Pisman	No. 04-10028	C.D. Ill.
22	United States v. Esteban Rivera	No. 03-4024-02-CR	W.D. Mo.
23	United States v. Mario Claiborne	No. 4:04-CR-423	E.D. Mo.
24	United States v. Bobby Williams	No. 5:04-CR-93-2	E.D. N.C.
25	United States v. Dorothy Flowers	No. CR 00-539-GMK	D. Or.

	Case Name	District Court Number	District
26	United States v. John B. Baker	No. 04-10053	C.D. Ill.
27	United States v. William J. Davis	No. CR-3-99-110	S.D. Ohio
28	United States v. Brian A. Moreland	No. 2:04-00142	S.D. W. Va.
29	United States v. Mark Burgess	No. 4:03-CR- 00397	E.D. Mo.
30	United States v. Quiana Hampton	No. 05-4224	D. S.C.
31	United States v. Jack LeRoy Goody	No. 03-150	S.D. Iowa
32	United States v. Vincent Eura	No. 3:04CR00151	E.D. Va.
33	United States v. Derrick Kimbrough	No. 2:04CR001185-002	E.D. Va.
34	United States v. Robert Gus Desselle	No. 01-172-D	M.D. La.
35	United States v. Corey Smith	No. 04-10111	D. Mass.
36	United States v. Brian M. Gall	No. 4-04-CR-116	S.D. Iowa
37	United States v. Markham J. Guidry	No. 03-60009	W.D. La.
38	United States v. Sheldon Lynn Bryant	No. 04-4037-01	W.D. Mo.
39	United States v. Eric Jones	No. 04-CR-6123	W.D. N.Y.
40	United States v. Anthony C. Atkinson	No. CR 04-1067	C.D. Cal.
41	United States v. Katherine O'Meara	No. C3-04-105	D. N.D.
42	United States v. Gregory A. Krutsinger	No. C3-04-25	D. N.D.
43	United States v. John A. Fuson	No. 3:03-CR-716	N.D. Ohio
44	United States v. Frank Fu Jen Huang	No. CR 04-1298-R	C.D. Cal.
45	United States v. Nathaniel Ford	No. 03-089	E.D. N.Y.
46	United States v. A. Galicia-Cardenas	No. 05-CR-18	E.D. Wis.
47	United States v. Faridah Ali	No. 04-320	E.D. Pa.
48	United States v. Lakiha Spicer	No. 04-320	E.D. Pa.
49	United States v. Mark A. Medearis	No. 04-05031-CR	W.D. Mo.
50	United States v. Angela Montgomery	No. 2:04-CR-00307	N.D. Ala.

	Case Name	District Court Number	District
51	United States v. Ahmed Ressam	No. CR99-66JCC	W.D. Wash.
52	United States v. Hyung Pil Baek	No. 03-233	E.D. Pa.
53	United States v. Darrell Dean Prows	No. 2:04-CR-102BSJ	D. Utah
54	United States v. Thomas Whitehead	No. CR 03-53-CAS	C.D. Cal.
55	United States v. Aaron Eric Williams	No. 6:04-cr-111-Orl-31JGG	M.D. Fla.
56	United States v. Joseph Konner	No. 3:04-CR-187	D. Conn.
57	United States v. Demond W. Williams	No. CR-04-0154-VRW	N.D. Cal.
58	United States v. Michael D'Amico	No. 02-10283	D. Mass.
59	United States v. S. DiAmbrosio	No. 04-66	E.D. Pa.
60	United States v. Dwayne Dollson	No. 04-CR-402-1	E.D. Pa.
61	United States v. Idana Williams	No. 2:04-CR-104-4	E.D. Va.
62	United States v. James M. Funk	No. 3:02-CR-708	N.D. Ohio
63	United States v. Krishnaswami Sriram	No. 00 CR 894-1	N.D. Ill.
64	United States v. Auzio Hewlett	No. 03-CR-023	E.D. Wis.
65	United States v. James W. Rogers	No. 03-40333-01	W.D. Mo.
66	United States v. Kevin Halsema	No. 1:04CR27-001	N.D. Fla.
67	United States v. Juan Castillo	No. 03 Cr. 835	S.D. N.Y.
68	United States v. Shawn Lewis	No. 05-55	D. R.I.
69	United States v. Sambath Pho	No. 05-46	D. R.I.
70	United States v. Joshua Perry	No. 04-89	D. R.I.
71	United States v. Mark Allen Lee	No. 1:05-CR-33	E.D. Mo.
72	United States v. Santos Portillo	No. CR-02-26	S.D. Iowa
73	United States v. Zebedee Hall	No. 05-1251	D. Colo.
74	United States v. Quang V. Nguyen	No. 1:04CR279	E.D. Va.
75	United States v. Marlon J. Bradford	No. 4:04-cr-339	E.D. Mo.

	Case Name	District Court Number	District
76	United States v. Chastity Hawkins	No. 02 Cr. 563	E.D. N.Y.
77	United States v. Darryl Wallace	No. 04-CR999	N.D. Ill.
78	United States v. Brian Williams	No. 05 Cr 407	S.D. N.Y.
79	United States v. Sultan & Asif Khan	No. CR 02-951	C.D. Cal.
80	United States v. Robert E. Maloney	No. 04-492	D. Minn.
81	United States v. Miguel Rayo-Navarro	No. 3:04-CR-00118	M.D. Tenn.
82	United States v. Monty Hundley et al. (James Cutler)	No. 02-Cr. 441	S.D. N.Y.
83	United States v. Monty Hundley et al. (Sanford Freeman)	No. 02 Cr. 441	S.D. N.Y.
84	United States v. Hammad Abdur-Raheem	No. 1:03CR296	E.D. Va.
85	United States v. Terron Brown	No CR-03-289	D. Neb.
86	United States v. Herbert Vance Goldsmith	No. H-04-268	S.D. Tex.
87	United States v. Henry Mathis	No. 1:04-CR-36	M.D. Ga.
88	United States v. Carlos Vazquez	No. 6:04-cr-212-Orl-31	M.D. Fla.
89	United States v. Samuel Collington	No. 5:04CR587	N.D. Ohio
90	United States v. Roderick Henry	No. 00-CR-80128	E.D. Mich.
91	United States v. Tauheedah Richardson	No. 4:02CR60-7	E.D. N.C.
92	United States v. Noe Arevalo-Juarez	No. CR-4-5-60	S.D. Ga.
93	United States v. Ramon Reyes-Sanchez	No. 04-CR-45	E.D. Wis.
94	United States v. Antonio Zermeno	No. 04-311	S.D. Iowa
95	United States v. Charles Polito	No. 03-207	M.D. La.
96	United States v. John W. Jointer	No. 05-79-CR-01	S.D. Ind.
97	United States v. Donna Peterson	No. 05-4005	N.D. Iowa
98	United States v. Max F. Gray	No. 6:04-cr-182	M.D. Fla.
99	United States v. Ronald N. Charron	No. 05-66-S	D. R.I.
100	United States v. Carlos Romero-Candelaria	No. 5:05-CR-63	E.D. N.C.

	Case Name	District Court Number	District
101	United States v. Enrique Perez-Pena	No. 4:05-CR-19	E.D. N.C.
102	United States v. Jose Medina	No. 04-0419	D. Md.
103	United States v. Robert Collier	No. 4:05-CR-313	E.D. Mo.
104	United States v. Russell J. Hodge	No. 03-4105	N.D. Iowa
105	United States v. Michael Ricks	No. 00-24	E.D. Pa.
106	United States v. Marc Ricks	No. 00-024	E.D. Pa.
107	United States v. Jonathan Cecconi	No. 05-63	D. R.I.
108	United States v. Jayne Ngatia	No. 03 CR 1004-1	N.D. Ill.
109	United States v. William Thurston	No. 98-10026	D. Mass.
110	United States v. Matthew Morledge	No. CR 04-60, CR 05-35	D. Mont.
111	United States v. Antron Russell	No. 03-94	D. R.I.
112	United States v. Dwayne Sheckles	No. 05-13-CR-01	S.D. Ind.
113	United States v. Jeremiah Prather	No. 1:03-CR-736-02	N.D. Ga.
114	United States v. Donald Benjamin	No. 97-CR-133	W.D. N.Y.
115	United States v. Neal Benjamin	No. 97-CR-133	W.D. N.Y.
116	United States v. Fadya Husein	No. 04-80750	E.D. Mich.
117	United States v. Michael Camiscione	No. 5:04-CR-594	N.D. Ohio
118	United States v. Jose Brito	No. 00-635	E.D. Pa.
119	United States v. Ruth Kane	No. 4:03-CR-232	E.D. Mo.
120	United States v. Terrance Beal	No. 1-05-CR-86	E.D. Mo.
121	United States v. Samuel Shuler	No. 05 Cr. 454	S.D. N.Y.
122	United States v. Mark Smith	No. 1:03-CR-0126	S.D. Ohio
123	United States v. Michael Martin	No. CR-03-C-0191-S	N.D. Ala.
124	United States v. Anthony Wills	No. 02-CR-483	N.D. N.Y.
125	United States v. Robert Sutherlin	No. 02-95-2	E.D. Ky.

	Case Name	District Court Number	District
126	United States v. Kenneth W. Curry	No. 2:05 CR3	E.D. Va.
127	United States v. Steven Spears	No. 05-4008	N.D. Iowa
128	United States v. Tyrone Judon	No. 05-3006	N.D. Iowa
129	United States v. Gladger Ross	No. 05-3006	N.D. Iowa
130	United States v. Orville Mullings	No. 6:05-cr-60	M.D. Fla.
131	United States v. Jack Alex Baker	No. 3:04-CR-98	E.D. Tenn.
132	United States v. Bruce Perrin	No. 05-16	M.D. La.
133	United States v. Carol Dominguez	No. 04-CR-397	N.D. N.Y.
134	United States v. Norman Borho, Jr.	No. 3:05-CR-68	W.D. Ky.
135	United States v. Kuldip Singh Chaggar	No. CR04-445C	W.D. Wash.
136	United States v. Anthony Lewis	No. 04-430	D.D.C.
137	United States v. Mark Repking	No. 05-CR-30128	S.D. Ill.
138	United States v. Kelvin Lamont Williams	No. 04-378	D. S.C.
139	United States v. Guadalupe Garcia-Lara	No. 04-40152-01-RDR	D. Kan.
140	United States v. William A. Fink	No. 1:05-CR-422	N.D. Ohio
141	United States v. Kenneth K. Livesay	No. CR-03-C-0182-S	N.D. Ala.
142	United States v. Brett Gouvion	No. 04-20071	D. Kan.
143	United States v. Jesus Jimenez-Gutierrez	No. 03-6016-01-CR	W.D. Mo.
144	United States v. Gary Roberson	No. 03-CR 855-4	N.D. Ill.
145	United States v. John Canova	No. 3:01-CR-264	D. Conn.
146	United States v. Marcus Franklin	No. 02-CR-90037	E.D. Mich.
147	United States v. Jamaal Clarke	No. 02-CR-90037	E.D. Mich.
148	United States v. Robert Wachowiak, Jr.	No. 05-CR-22	E.D. Wis.
149	United States v. Cassandra Plaza	No. 4:04-CR-311	S.D. Iowa
150	United States v. Stefan Goff	No. 05-541	D. N.J.
151	United States v. James A. Rattoballi	No. 05-1562	S.D. N.Y.

152	United States v. Jacquemain	No. 03-80863	E. D. Mich.
153	United States v. Maceo Simmons	No. 3:04-cr-00132	S.D. Miss.
154	United States v. Said Karim.Hayez	Nos. 05-4273, 05-4407	E.D. N.C.
155	United States v. John and Willie Ann Madison	Nos. 05-5622, 05-5625	W.D. Tenn.
156	United States v. Max C. Tanner	No. 02-10661, 03-1002	D. Nevada

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEYS' MANUAL
TITLE 9 - CRIMINAL DIVISION
CHAPTER 9-2.000 AUTHORITY OF THE UNITED STATES ATTORNEY IN CRIMINAL DIVISION MATTERS/PRIOR APPROVALS
January 2000

9-2.170 Decision to Appeal and to File Petitions in Appellate Courts

A. Approval Requirements. 28 C.F.R. § 0.20(b) provides that the Solicitor General has the authority to "[d]etermine whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs)." The following actions must be approved:

1. Any appeal of a decision adverse to the government, including an appeal of an order releasing a charged or convicted defendant or a request to seek a stay of a decision adverse to the government.
2. A petition for rehearing that suggests rehearing en banc--and any rare appeal in which the government wishes to suggest that it be heard initially en banc. See Fed.R.App.P. 35(c). Although a petition for panel rehearing does not require the approval of the Solicitor General, one should not be filed until the Solicitor General has been given the opportunity to decide whether the case merits en banc review.
3. A petition for mandamus or other extraordinary relief.
4. In a government appeal, a request that the case be assigned to a different district court judge on remand.
5. A request for recusal of a court of appeals judge.
6. A petition for certiorari. (NOTE: 28 C.F.R. § 0.20(a) provides that the Solicitor General shall supervise all Supreme Court cases, "including appeals, petitions for and in opposition to certiorari, briefs and arguments, and settlement thereof." Accordingly, in criminal cases, only the Solicitor General petitions for certiorari or responds to petitions for certiorari).

B. Reporting Requirements. United States Attorneys' Offices (USAOs) should report all adverse, appealable district court decisions to the Appellate Section (including adverse 28 U.S.C. § 2255 habeas rulings, coram nobis rulings, and forfeiture rulings). USAOs need only report adverse district court Sentencing Guidelines decisions if they wish to obtain authorization to appeal that decision. Other adverse sentencing decisions should be reported.

USAOs should report every published court of appeals' decision that is adverse to the government in any respect. They should report any unpublished court of appeals' decision that affirms a district court decision that the government appealed. They should report any unpublished court of appeals' decision that they believe merits rehearing en banc or certiorari.

Before confessing error in a court of appeals, USAOs should consult with the Appellate Section. USAOs should also consult with the Appellate Section before

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taking a position that may be inconsistent with the government's position in another case.

USAOs should report every adverse decision as soon as possible, especially adverse court of appeals' decisions, since the government generally has 14 days to approve, draft, and file a rehearing petition if no extension is obtained.

C. Timing of Appeals and Rehearing Petitions. The government has 30 days from the date of judgment or 10 days from the filing of any defendant's notice of appeal to file a notice of appeal. See Federal Rule of Appellate Procedure 4. A timely filed motion for reconsideration (that is, one filed within 30 days after judgment) extends the time for filing a notice of appeal until 30 days after the denial of the motion. The time for filing a notice of appeal is otherwise not subject to extension and is jurisdictional. For a Notice of Appeal form, see the Criminal Resource Manual at 22.

The government has 60 days to file a notice of appeal from an adverse § 2255 habeas or in rem forfeiture decision.

A protective notice of appeal should not be filed without notifying the Appellate Section. If a protective notice of appeal is filed and a briefing schedule is issued before authorization to appeal is obtained, notify the Appellate Section of the briefing schedule as soon as possible. In cases involving Sentencing Guidelines appeals, notify the Appellate Section before filing any document other than a protective notice of appeal, so that approval of the Solicitor General may be obtained.

Federal Rule of Appellate Procedure 40 requires a party to file a petition for rehearing within 14 days of the court of appeals' judgment. In those instances in which the Appellate Section has not been advised of an adverse court of appeals' decision in a timely fashion, USAOs should protect the time to petition for rehearing by filing a motion requesting an extension of 30 days to petition for rehearing. Even when the Appellate Section has been timely advised of an adverse court of appeals' decision, the Appellate Section may ask the USAO to seek a 30-day extension of time within which to petition for rehearing in order to allow the Solicitor General time to review the case. Most circuits will grant the government a 30-day extension of time to file a petition for rehearing. For a form Petition for Rehearing Extension, see the Criminal Resource Manual at 23.

Motions for extensions of time to file a rehearing petition must be received by the court on or before the date the rehearing petition is due. Similarly, rehearing petitions must be received on or before the date they are due. Mailing by the due date is insufficient to constitute timely filing.

The government has 90 days from the date of the court of appeals' decision or an order denying a timely petition for rehearing to file a petition for a writ of certiorari.

D. Obtaining Authorization to Appeal and Petition for Rehearing. To obtain authorization to appeal, the United States Attorney should send the following materials to the Appellate Section:

- A memorandum setting forth reasons for the appeal;

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- The order or opinion of the district court;
- Related motions or memoranda and relevant transcripts if available; and
- In sentencing appeals, the presentence report and the judgment and commitment order.

To obtain authorization to file a petition for rehearing with suggestion for rehearing en banc, the United States Attorney should send the following materials to the Appellate Section:

- The opinion of the court of appeals;
- The briefs filed by both parties in the court of appeals; and
- A memorandum setting forth reasons justifying the filing of a petition for rehearing with suggestion for rehearing en banc.

Materials should be sent to the following addresses:

By mail:	By overnight courier:
Appellate Section Criminal Division P.O. Box 899 Ben Franklin Station Washington, D.C. 20044	Appellate Section Criminal Division Room 2266, Main Justice Bldg. 10th St. & Pennsylvania Ave., N.W. Washington, D.C. 20530

D. Standards for Authorization. United States Attorneys' Offices are encouraged to consult with the Appellate Section if they have any question as to whether a case is appropriate for appeal or rehearing.

E. The Authorization Process. After receiving the United States Attorney's request for authorization to seek further review, an Appellate Section attorney writes a memorandum containing a recommendation to the Solicitor General. If the Appellate Section agrees with the United States Attorney, then the United States Attorney's and the Appellate Section's recommendations are forwarded to the Solicitor General.

If the Appellate Section disagrees with the United States Attorney, a Deputy Assistant Attorney General in the Criminal Division reviews the Appellate Section's and United States Attorney's recommendations before they are sent to the Solicitor General.

Whenever further review is sought, an Assistant to the Solicitor General reviews the United States Attorney's and Appellate Section's recommendations and writes a memorandum containing the Assistant's recommendation to the Solicitor General. The Deputy Solicitor General then reviews all of the recommendations and writes another memorandum to the Solicitor General (except for sentencing guidelines cases, which go directly to the Solicitor General after review by an assistant). The Solicitor General personally determines whether to authorize every appeal and petition for rehearing with suggestion for rehearing en banc.

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See the Criminal Resource Manual at 21 for Appellate Section Contacts.

Appeals are also discussed in USAM Title 2.

U.S. Attys'. Man. **9-2.170**
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Appendix C

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 28, 2005

TO: All Federal Prosecutors

FROM: James B. Comey
Deputy Attorney General

SUBJECT: Department Policies and Procedures Concerning Sentencing

I. INTRODUCTION

The past few months have been a time of change and uncertainty in federal sentencing. Federal prosecutors have had to adapt to a shifting landscape, which you have done with characteristic professionalism and dedication. I thank you and commend you for your flexibility, your creativity and your good humor in these difficult circumstances. The challenges continue. Although the Supreme Court's ruling in *United States* v. *Booker* answered some of the questions raised in *Blakely* v. *Washington*, the sentencing system will continue to be a source of debate and litigation. Throughout, we must remain focused on our principles and our mission, which are clear and enduring.

First, we must do everything in our power to ensure that sentences carry out the fundamental purposes of sentencing. Those purposes, as articulated by Congress in the Sentencing Reform Act, are to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford deterrence, to protect the public, and to offer opportunities for rehabilitation to the defendant.

Second, we must take all steps necessary to ensure adherence to the Sentencing Guidelines. One of the fundamental imperatives of the federal sentencing system is to avoid unwarranted disparity among similarly situated defendants. The Guidelines have helped to ensure consistent, fair, determinate and proportional punishment. They have also contributed to historic declines in crime. We must do our part to ensure that the Guidelines continue to set the standard for federal sentencing.

II. DEPARTMENT POLICIES AND PROCEDURES CONCERNING SENTENCING

Sentencing is a shared responsibility of the three branches of the federal government. The role of the Executive Branch is to enforce the law by bringing appropriate charges and advocating the consistent application of the Sentencing Guidelines and mandatory minimums, which reflect the judgments Congress has made about appropriate sentences for federal crimes. The following guidance is intended to help you faithfully execute that role in the wake of *Booker*.

A. *Consistency in charging, pleas, and sentencing*

Federal prosecutors must consult the Sentencing Guidelines at the charging stage, just as federal judges must consult the Guidelines at sentencing. In order to do our part in avoiding unwarranted disparities, federal prosecutors must continue to charge and pursue the most serious readily provable offenses. As set forth in Attorney General Ashcroft's Memorandum on Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003), the "most serious" readily provable offenses are those that would generate the most substantial sentence pursuant to: (1) the Guidelines; (2) one or more applicable mandatory minimums; and/or (3) a consecutive sentence required by statute. One of the fundamental principles underlying the Guidelines is that punishment should be based on the real offense conduct of the defendant. To ensure that sentences reflect real offense conduct, prosecutors must present to the district court all readily provable facts relevant to sentencing.

B. *Compliance with the Sentencing Guidelines*

Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases. Under the Guidelines, departures are reserved for rare cases involving circumstances that were not contemplated by the Sentencing Commission. Accordingly, federal prosecutors must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate Guidelines range or to refrain from objecting to a defendant's request for such a sentence.

C. *Appeals of unreasonable sentences*

Federal prosecutors must preserve the ability of the United States to appeal "unreasonable" sentences. The Solicitor General will ensure that the Department takes consistent and judicious positions in pursuing sentencing appeals. Accordingly, in any case in which the sentence imposed is below what the United States believes is the appropriate Sentencing Guidelines range (except uncontested departures pursuant to the Guidelines, with supervisory approval), federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best position possible on appeal. If a sentence not only is below the Guidelines range, but also, in the judgment of the United States Attorney or component head, fails to reflect the

purposes of sentencing, then the prosecutor should seek approval from the Solicitor General to file an appeal.

D. *Reporting of adverse sentencing decisions*

Although the Department has not proposed or endorsed any particular action by Congress or the Sentencing Commission in the wake of *Booker*, we must continuously assess the impact of the Supreme Court's rulings based on accurate, real-time information on sentencing, in order to play an appropriate and effective role in the public debate. The existing requirements for reporting adverse decisions set forth in the U.S. Attorney's Manual remain in effect. In addition, the Executive Office for United States Attorneys is distributing instructions for reporting (1) sentences outside the appropriate Sentencing Guidelines range, and (2) cases in which the district court failed to calculate a Guideline range before imposing an unreasonable sentence. This reporting requirement applies to all United States Attorney's Offices and litigating divisions.

III. CONCLUSION

I know how hard you work and what credit that work brings to this great institution and this country. Our job is to bring justice to criminals and for their victims. Your ability and dedication will get the job done in these challenging times.

BOOKER SENTENCING REPORT FORM

_____ District of _____

This form should be used if the court (a) imposes a sentence outside the appropriate Sentencing Guidelines range (unless the departure was requested by the government, for example, a 5K1.1 motion), (b) if the court refuses to calculate a range, or (c) if a 5K1.1 or a 5K3.1 motion is made but the court sentences below the government's recommended range.

This form replaces the "Blakely Sentencing Report Form," but does not replace the "Standard Form for Reporting Adverse District Court Sentencing Guidelines Decisions." If that form is required (*see* USAM §9-2.170(B)), it should be completed and submitted separately.

1. Defendant (Last, first)		6. Applicable guidelines range (in months)	
2. AUSA		7. Actual sentence imposed (in months)	
3. LIONS Number or USAO Number		8. Did the court refuse to (a) determine a guidelines range or (b) apply an enhancement warranted under the facts as found by the court ?	____ Yes ____ No
4. Court Number		9. Sentencing Date	
5. Primary Offense Of Conviction (indicate only one)	__ Drugs __ Guns/violent crime __ Economic Crime __ Child porn/ Exploitation __ Immigration __ Other (explain) _____ _____	10. Was the actual sentence above or below the guidelines range?	___ Above ___ Below

11. If a mandatory minimum statute applies, indicate what the minimum was: _____
Did the mandatory minimum require a sentence higher than the guideline range? ___Yes ___No

12. Please provide a brief explanation of the court's rationale for sentencing outside the range and any additional explanation which will assist in understanding the significance of the case:
_____
_____
_____
_____
_____
_____

RESPONSES TO QUESTIONS FOR THE RECORD FROM JUDITH W. SHEON, STAFF DIRECTOR, U.S. SENTENCING COMMISSION, WASHINGTON, DC

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

April 25, 2006

Honorable Robert C. Scott
Ranking Member
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives
B-336 Rayburn House Office Building
Washington, D.C. 20515

Re: Responses to Questions for the Record from United States v. Booker: One Year Later – Chaos or Status Quo?

Dear Representative Scott:

On behalf of the United States Sentencing Commission I am responding to your Questions for the Record from the March 16, 2006 oversight hearing entitled United States v. Booker: One Year Later - Chaos or Status Quo. The Commission would like to thank you, Chairman Coble, and the rest of the Subcommittee for holding the hearing and providing the Commission with the opportunity to provide further information for the record.

Most of the questions for the record submitted to the Commission concern the use of the statement of reasons form in collecting information from the sentencing courts. Therefore, before answering your specific questions, it would be helpful to explain more fully the recent history of the statement of reasons form and how changes to the form are intended to comply with the law and also facilitate the Commission's data collection and analysis efforts.

After passage of the PROTECT Act in 2003, the Commission worked with the Judicial Conference of the United States on a new statement of reasons form that would reflect whether or not the government sponsored a sentence outside the guideline range (the "post-PROTECT 3-page form").[1] This form includes two check-boxes to indicate

[1] A copy of this form is attached as Exh. A.

the government's position at sentencing with respect to departures.[2] The first box indicates that a "plea agreement [] states that the government will not oppose a defense departure motion." The second box indicates the government did not object to a motion for a departure but that departure was not made as part of a plea agreement. District court judges were encouraged to use this form by the Judicial Conference but were not required to do so.

After the *Booker* decision, the Commission again worked with the Judicial Conference to revise the statement of reasons form in such a way that it included information on sentences outside the guideline range that did not rely on departures (the "post-*Booker* 4-page form").[3] This post-*Booker* 4-page form, therefore, includes the departure boxes set forth in the post-PROTECT Act 3-page form plus two additional boxes to indicate the government's position regarding outside-the-range sentences pursuant to a court's *Booker* authority.[4] This form became effective in June 2005 and, again, district courts were encouraged but not required to use it.

As more and more courts begin to use the new form, however, the Commission is better able to collect, analyze and report data about national sentencing practices. The Commission believes that proper use of a standard form as now statutorily required by the USA PATRIOT Improvement and Reauthorization Act of 2005 will significantly increase the Commission's ability to capture and analyze data accurately and efficiently. The Commission is working with the Judicial Conference to assist the judiciary to comply with the new statutory requirements regarding the use of a standard statement of reasons form.

During the hearing Judge Hinojosa indicated that "there have been times where [the Commission] get[s] more than five different statement of reasons forms, some of which in no way indicate whether the Government agreed to certain things or not." *See* Draft Tr. at 60. In fact, since *Booker*, the Commission has received a multitude of "statement of reasons" forms. For example, in one district for the time period April through October 2005, the Commission received nine different statement of reasons forms. Of those nine forms, only two were of the type that had boxes to indicate whether the government sponsored an outside-the-range sentence or objected to such a sentence, and of those two forms, only one form indicated the government's position at sentencing.

These differences in reporting are precisely the reason why the Commission carefully reviews every sentence and issues caveats about what the data do and do not indicate. The Commission is pleased to report, however, that this same district that submitted nine different statement of reasons forms in the first three quarters following

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[2] The post-PROTECT Act 3-page form includes other check-boxes for indicating the government's position with regard to sentencing including a box for departures pursuant to U.S.S.G. §5K3.1 (early disposition program motions).

[3] A copy of this form is attached as Exh. B.

[4] As with the post-PROTECT Act 3-page form, this form also includes other check boxes for indicating the government's position with regard to sentencing including a box for departures pursuant to U.S.S.G. §5K3.1 (early disposition program motions).

Booker has been using the post-*Booker* 4-page form since November 2005 in the majority of cases. As a result, the Commission has seen an increase in the accuracy of the data the Commission is able to report on this district, particularly with respect to attribution of sentences outside the guideline range.

Prior to the *Booker* decision, the *type* of statement of reasons form used by the courts was not a data collection issue for the Commission. The PROTECT Act only required that the courts submit "the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range)". *See* 28 U.S.C. § 994(w)(1)(West 2006). After *Booker* rendered the guidelines advisory and the Judicial Conference began reviewing the statement of reasons form and the information included on it, the Commission determined that ascertaining what types of statement of reasons forms were being used – and, more specifically what type of information was being included on them -- might be helpful in informing the sentencing policy debate.

In May 2005, the Commission began coding for the type of statement of reasons form used by the courts in each case. This means that the Commission began coding for this variable on cases sentenced in or after late-February 2005.[5] The Commission receives about 5,800 cases a month from the courts, so there are over 10,000 cases in the Commission's post-*Booker* datafile for which it does not have information on the type of statement of reasons form used.

With that background, I will now turn to your specific questions.

1. **According to Judge Hinojosa's testimony at the hearing on March 16, following the Booker decision, the Sentencing Commission received five different Statement of Reasons forms, some of which did not indicate in any way whether or not the government agreed to a sentence below the guideline range.**

A. **In how many of the 65,368 cases did the court *not* use the form which contained boxes indicating (A) specific reasons for a sentence below the guideline range other than a government motion for substantial assistance under 5K1.1, and (B) whether the government (1) moved for a sentence below the guideline range for a reason other than substantial assistance under 5K1.1, (2) entered into a plea agreement for such a sentence, (3) agreed in a plea agreement not to oppose a defense motion for such a sentence, or (4) did not object to a defense motion for such a sentence?**

[5] The PROTECT Act requires the chief judge of each court to submit the statement of reasons and other sentencing documentation to the Commission within 30 days of entry of judgment. 28 U.S.C. § 994(w)(1). Given mail and other delivery issues, cases coded and analyzed in May 2005 would have been sentenced in or after late-February 2005. The lag time between case coding and sentencing diminished during the year following *Booker* as more and more courts joined the Commission's online document submission system.

Answer: Of the 65,368 cases referenced in the Commission's Final *Booker* Report, information about the use of particular statement of reasons form is as follows:

1. 30,252 (46.3%) used the post-PROTECT Act 3-page form.
2. 14,706 (22.5%) used the post-*Booker* 4-page form.
3. 9,477 (14.5%) used another type of form, usually a district-modified form or pre-PROTECT Act form.
4. 873 (1.3%) had no statement of reasons form.
5. 10,060 (15.4%) were missing information in our datafile about the type of statement of reasons form used.[6]

Therefore, the Commission's post-*Booker* datafile contains 54,435 cases for which it received a statement of reasons form and had information coded on the type of form used. Of those 54,435 cases, 17.4% of them did not use a form with check-boxes to denote the government's position regarding a below-range sentence.

B. In how many of the post-*Booker* cases reported as non-government sponsored below-guideline sentences did the court *not* use the form described in Question 1A?

Answer: The Commission's datafile contains a total of 8,189 non-government sponsored, below-range sentences. Of those cases:

1. 1,710 (20.9%) used a statement of reasons form *other* than the post-PROTECT Act 3-page form or the post-*Booker* 4-page form. These forms usually are pre-PROTECT Act statement of reasons forms or district-modified forms.
2. 5,599 (68.4%) used either the post-PROTECT Act 3-page form or the post-*Booker* 4-page form.
3. 846 (10.3 %) were missing information on the type of form used.[7]
4. 34 (less than .1%) had no statement of reasons form.

Therefore, the Commission's datafile contains 7,309 non-government sponsored, below-range sentences for which the Commission received a statement of reasons form and had information on the type of form used. Of those 7,309 cases, 23.4% of them did not use a standard form with check-boxes to indicate the government's position regarding a below-range sentence.

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[6] As indicated above, the Commission did not begin coding for the type of statement of reasons form used until May 2005. As a result, there are over 10,000 cases in the Commission's post-*Booker* overall datafile for which it does not have coded information on the type of statement of reasons form used by the courts.

[7] As indicated above, the Commission did not begin coding for the type of statement of reasons form used until May 2005. As a result, there are over 10,000 cases in the Commission's post *Booker* overall datafile, of which these 846 cases are a part, for which it does not have coded information on the type of statement of reasons form used by the courts.

C. In how many of the 258 cases reported as ones in which the court considered cooperation without a government motion in the post-*Booker* period did the court *not* use a form described in Question 1A?

Answer: The Commission's datafile contains 258 cases designated as "cooperation without motion." Of those 258 cases:

1. 54 cases (20.9%) used a statement of reasons form *other* than the post-PROTECT Act 3-page form or the post-*Booker* 4-page form. These forms usually are pre-PROTECT Act statement of reasons forms or district-modified forms.
2. 180 cases (69.8%) used the post-PROTECT Act 3-page form or the post-*Booker* 4-page form.
3. 24 cases (9.3%) were missing information on the type of statement of reasons form used.[8]

Therefore, the Commission's datafile contains 234 "cooperation without motion" cases for which the Commission received a statement of reasons form and had information on the type of form used. Of those 234 cases, 23.1% of them did not use one of the forms with check-boxes to indicate the government's position regarding a below-range sentence.

As indicated in Judge Hinojosa's written statement for the hearing, of the 258 cases in the post-*Booker* datafile, there were 28 cases in which the only reason cited for the below-range sentence was substantial assistance or cooperation with the government. *See* Written Statement at 10. Of these 28 cases:

1. 17 cases (60.7%) used the post-PROTECT Act 3-page form.
2. 2 cases (7.1%) used the post-*Booker* 4-page form.
3. 6 cases (21.5%) used another type of form, either a district-modified form or pre-PROTECT Act form.
4. 3 cases (10.7%) were missing information on the type of statement of reasons form used.[9]

D. When the court did use a form described in Question 1A and checked a box indicating that the government <u>did not object</u> to a defense motion for a sentence below the guideline range for a reason other than substantial assistance under 5K1.1, did the Commission report the sentence as

[8] As indicated above, the Commission did not begin coding for the type of statement of reasons form used until May 2005. As a result, there are over 10,000 cases in the Commission's post-*Booker* overall datafile, of which these 24 cases are a part, for which it does not have coded information on the type of statement of reasons form used by the courts.

[9] As indicated above, the Commission did not begin coding for the type of statement of reasons form used until May 2005. As a result, there are over 10,000 cases in the Commission's post-*Booker* overall datafile, of which these 3 cases are a part, for which it does not have coded information on the type of statement of reasons form used by the courts.

government-sponsored or non-government sponsored in its Booker Report?

Answer: As outlined above, the post-PROTECT Act 3-page form includes two check-boxes to indicate the government's position at sentencing with respect to departures, either as part of a plea agreement or as a motion not pursuant to a plea agreement.[10] The post-*Booker* 4-page form includes these departure boxes plus two additional boxes to indicate the government's position regarding outside-the-range sentences pursuant to a court's *Booker* authority.[11] The Commission categorizes as government-sponsored all cases in which the court has checked "government did not object" pursuant to a plea agreement.

If, however, the court has checked "defense motion for departure to which the government did not object" or "defense motion for a sentence outside of the advisory guideline range to which the government did not object," the statement of reasons form is reviewed in its entirety to ascertain attribution.

For purposes of this question, there are 810 post-*Booker* cases in which the court checked "defense motion for departure to which the government did not object," and 151 cases in which the court checked "defense motion for a sentence outside of the advisory guideline range to which the government did not object." After the Commission conducted a further review of the entire statement of reasons form completed by the courts, these 961 cases, although the court indicated the sentences were below-range, broke down as follows:

1. 338 cases (35.2%) were either within the applicable guideline range, above the applicable guideline range, or were assigned to one of the government–sponsored categories based on the reasons given for the departure or variance.
2. The remaining 623 cases (64.8%) were reported in one of the non-government sponsored, below-range categories.

This analysis demonstrates the care that must be taken in ascribing too much meaning to a particular variable when trying to ascertain sentencing nuances. As illustrated by the review undertaken to respond to this question, courts' use of the government sponsorship boxes – when available – is neither consistent nor always accurate. For example, relying solely on this series of boxes to categorize a sentence as "government sponsored" or "non-government sponsored" would result in mis-categorization to a similar degree as would categorizing all U.S.S.G. §5K1.1 or fast-track departures as defendant- or court-initiated simply because the defendant did not object to

[10] The post-PROTECT Act 3-page form includes other check-boxes for indicating the government's position with regard to sentencing including a box for departures pursuant to U.S.S.G. §5K3.1 (early disposition program motions).
[11] This form also includes other check-boxes for indicating the government's position with regard to sentencing including a box for departures pursuant to U.S.S.G. §5K3.1 (early disposition program motions).

the motion. This analysis, therefore, illustrates the critical need on the part of the Commission to continue its work with the judiciary to ensure that courts understand how to use the statement of reasons consistently and uniformly.

E. In those districts that used a form described in Question 1A for some or all of the post-*Booker* period, did the courts at times not check any box indicating the government's position on a below guideline sentence? If so, in approximately how many cases? Did the Commission report those sentences as government-sponsored or non-government-sponsored in its Booker Report?

Answer: There are many instances when the courts have used the post-PROTECT Act 3-page form or post-*Booker* 4-page form for a below-range sentence and not indicated the government's position with regard to the below-range sentence. The Commission's datafile contains 15,692 cases that had below-range sentences – both non-government and government sponsored – for which the Commission has coded information for the type of statement of reasons form used and determined that the court used either the post-PROTECT Act 3-page form or post-*Booker* 4-page form. Of this group, 5,419 cases (34.5%) did not check any of the check-boxes to indicate the government's position with regard to the sentence. Of those 5,419 cases, the Commission categorized them as follows:

1. 1,753 cases (32.4%) were reported in one of the government sponsored categories due to the reasons provided by the court for the sentence imposed.
2. 3,666 cases (67.6%) were reported in one of the non-government sponsored categories due to the reasons provided by the court for the sentence imposed.

As with the analysis conducted to respond to Question 1D, this analysis indicates the need not only to have the judiciary use one standard form but to complete it uniformly. The reliability and accuracy of any analyses conducted by the Commission directly correlates to the quality of the information collected. The Commission hopes that full use of a standard form in a uniform manner will provide the courts a more accurate method of reporting sentencing outcomes. This will increase efficiency and accuracy in the Commission's data collection and analysis efforts.

2. The Commission in its 2003 Downward Departure Report stated that it hoped to be able to collect data on the use of Rule 35 motions going forward. Has the Commission collected that data in the intervening period? If so, please provide the number of cases in which a sentence was reduced based on a Rule 35 motion and the average extent of such sentence reductions, by district and fiscal year.

Answer: After passage of the PROTECT Act in 2003, the Commission issued a joint letter with the Criminal Law Committee to the courts informing them of the sentencing documentation required to be sent to the Commission. This letter indicated that

documentation related to Rule 35 re-sentencings was to be included in the courts' submissions to the Commission. Since that time, the Commission has worked to obtain information on these types of sentencing; however, it remains an area where our documentation is not complete. As a result, caution should be exercised in ascribing too much meaning to the relatively small numbers of cases available for analysis in response to this question. The Commission will continue to work with the judiciary in obtaining information on these types of sentencings.

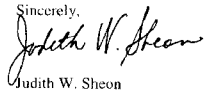
The Commission's fiscal year 2003 datafile contains 382 re-sentencings pursuant to Fed. R. Crim. P. 35(b). The average sentence in those cases was 63.0 months. The average percentage of sentence reduction from the original sentence was 44.6% percent, and the average degree of sentence reduction was 51.0 months. District-specific information is provided on the attached sheets at Exh. C.

The Commission's fiscal year 2004 datafile contains 184 re-sentencings pursuant to Fed. R. Crim. P. 35(b). The average sentence in those cases was 62.5 months. The average percentage of sentence reduction from the original sentence was 50.0%, and the average degree of sentence reduction was 63.0 months. District-specific information is provided on the attached sheets at Exh. D.

The Commission's fiscal year 2005 datafile contains 818 re-sentencings pursuant to Fed. R. Crim. P. 35(b). The average sentence in those cases was 60.0 months. The average percentage of sentence reduction from the original sentence was 50.0%, and the average degree of sentence reduction was 62.9 months. District-specific information is provided on the attached sheets at Exh. E.

If you have any questions about this material, please do not hesitate to contact Lisa Rich at 202.502.4519.

Sincerely,



Judith W. Sheon
Staff Director

cc: Honorable Howard Coble

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Attachment (Page 1) — Statement of Reasons

Exhibit A

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.**

OR

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES:** (Use Page 3, if necessary.)

☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level or specific offense characteristics):

☐ **Chapter Three of the U.S.S.G. Manual** adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

☐ **Chapter Four** of the **U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $ _____ to $ _____

☐ Fine waived or below the guideline range because of inability to pay.

☐ **THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.**

OR

☐ **THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS:** (Use Page 3, if necessary.)

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

RESTITUTION DETERMINATIONS

Total Amount of Restitution: $ _____

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

DEPARTURE (Check all that apply)

☐ The sentence departs below the guideline range for the following reasons; or
☐ The sentence departs above the guideline range for the following reasons:

Pursuant to a Plea Agreement

☐ based on 5K1.1 motion of the government based on the defendant's substantial assistance;
☐ based on a government motion pursuant to an early disposition program;
☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);
☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or
☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason

Pursuant to a Motion Not Addressed in a Plea Agreement

☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;
☐ pursuant to a government motion based on the below reason for departure; or
☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or
☐ pursuant to a defense motion based on the below reason for departure to which the government has objected

☐ Other than plea agreement or motion by the parties based on the below reason for departure.

Reason(s) for Departure

☐ 4A1.3 Criminal History Adequacy (explain)
☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):
☐ 5K2.1 Death
☐ 5K2.2 Physical Injury
☐ 5K2.3 Extreme Psychological Injury
☐ 5K2.4 Abduction or Unlawful Restraint
☐ 5K2.5 Property Damage or Loss
☐ 5K2.6 Weapons and Dangerous Instruments
☐ 5K2.7 Disruption of Government Function
☐ 5K2.8 Extreme Conduct
☐ 5K2.9 Criminal Purpose
☐ 5K2.10 Victim's Conduct
☐ 5K2.11 Lesser Harm
☐ 5K2.12 Coercion and Duress
☐ 5K2.13 Diminished Capacity
☐ 5K2.14 Public Welfare
☐ 5K2.16 Voluntary Disclosure of Offense
☐ 5K2.17 High-Capacity Semiautomatic Firearm
☐ 5K2.18 Violent Street Gang
☐ 5K2.20 Aberrant Behavior
☐ 5K2.21 Dismissed and Uncharged Conduct
☐ 5K2.22 Age or Health of Sex Offenders
☐ 5K2.23 Discharged Terms of Imprisonment
☐ 5K3.1 Early Disposition, "fast-track" Program

☐ Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11)(explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES
(If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS
(If necessary.)

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT
(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE
(If necessary.)

Defendant's Soc. Sec. No.:
Defendant's Date of Birth:

Defendant's Residence Address:

Defendant's Mailing Address:

Date of Imposition of Judgment

Signature of Judge

Name and Title of Judge

Date Signed

AO 245B (Rev. 06/05) Criminal Judgment
Attachment (Page 1) — Statement of Reasons

Exhibit B

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The court adopts the presentence investigation report without change.**

B ☐ **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 ☐ Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level, or specific offense characteristics):

2 ☐ Chapter Three of the U.S.S.G. Manual determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 ☐ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A ☐ No count of conviction carries a mandatory minimum sentence.

B ☐ Mandatory minimum sentence imposed.

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case
☐ substantial assistance (18 U.S.C. § 3553(e))
☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $ _____ to $ _____
☐ Fine waived or below the guideline range because of inability to pay.

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A ☐ **The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.**

B ☐ **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** (Use page 4 if necessary.)

C ☐ **The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.** (Also complete Section V.)

D ☐ **The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)**

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs (Check only one.):**
☐ below the advisory guideline range
☐ above the advisory guideline range

B **Departure based on (Check all that apply.):**

1 **Plea Agreement (Check all that apply and check reason(s) below.):**
☐ 5K1.1 plea agreement based on the defendant's substantial assistance
☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
☐ binding plea agreement for departure accepted by the court
☐ plea agreement for departure, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):**
☐ 5K1.1 government motion based on the defendant's substantial assistance
☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
☐ government motion for departure
☐ defense motion for departure to which the government did not object
☐ defense motion for departure to which the government objected

3 **Other**
☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure (Check all that apply other than 5K1.1 or 5K3.1.)**

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.11	Lesser Harm
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.12	Coercion and Duress
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.13	Diminished Capacity
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.14	Public Welfare
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.5	Employment Record	☐	5K2.6	Weapon or Dangerous Weapon	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.18	Violent Street Gang
☐	5H1.11	Military Record, Charitable Service, Good Works	☐	5K2.8	Extreme Conduct	☐	5K2.20	Aberrant Behavior
			☐	5K2.9	Criminal Purpose	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5K2.0	Aggravating or Mitigating Circumstances	☐	5K2.10	Victim's Conduct	☐	5K2.22	Age or Health of Sex Offenders
						☐	5K2.23	Discharged Terms of Imprisonment

D **Explain the facts justifying the departure. (Use page 4 if necessary.)**

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM
(Check all that apply.)

A The sentence imposed is (Check only one.):
- ☐ below the advisory guideline range
- ☐ above the advisory guideline range

B Sentence imposed pursuant to (Check all that apply.):

1 Plea Agreement (Check all that apply and check reason(s) below.):
- ☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court
- ☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
- ☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):**
- ☐ government motion for a sentence outside of the advisory guideline system
- ☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object
- ☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**
- ☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)
- ☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- ☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

D Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary.)

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure)

VII COURT DETERMINATIONS OF RESTITUTION

A ☐ Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one.):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

Defendant's Residence Address: _____

Defendant's Mailing Address: _____

Date of Imposition of Judgment

_____

Signature of Judge

Name and Title of Judge

Date Signed _____

For Rule 35 (B) Resentencings in 2003 Exhibit C

	n	sentto-t0	mnthsd-epart	pctdep-art
TOTAL	382	63.0	51.0	44.6
Dist of Columbia	1	69.0	51.0	42.5
Maine	1	125.0	63.0	33.5
Mass.	2	72.0	63.5	48.2
New Hampshire	1	18.0	42.0	70.0
Puerto Rico	2	131.0	84.0	30.2
Rhode Island	0	.	.	.
Conn.	0	.	.	.
New York East	1	86.0	1.0	1.1
New York North	1	54.0	67.0	55.4
New York South	0	.	.	.
New York West	6	51.5	75.0	59.8
Vermont	0	.	.	.
Delaware	0	.	.	.
New Jersey	2	48.5	28.0	37.6
Penn. East	0	.	.	.
Penn. Mid	1	120.0	60.0	33.3
Penn. West	5	29.0	84.0	61.7
Virgin Islands	0	.	.	.
Maryland	0	.	.	.
NC East	17	90.0	43.0	33.3
NC Mid	3	131.0	79.0	37.6
NC West	4	121.5	124.0	58.8
South Carolina	6	64.5	84.0	48.5
Virginia East	29	66.0	52.0	48.9
Virginia West	4	73.5	77.5	52.3
WV North	3	61.0	47.0	35.8
WV South	5	49.0	51.0	42.1
Louisian East	0	.	.	.
Louisian Middle	0	.	.	.
Louisian West	3	120.0	172.0	58.9
Miss. North	1	32.0	25.0	43.9
Miss. South	1	84.0	67.0	44.4
Texas East	10	76.0	45.5	34.5
Texas North	2	137.0	39.0	17.3
Texas South	6	67.5	47.5	52.4
Texas West	3	15.0	12.0	44.4
Kentucky East	2	24.0	68.0	73.9
Kentucky West	0	.	.	.
Michigan East	0	.	.	.

(Continued)

For Rule 35 (B) Resentencings in 2003.

	n	sentto-t0	mnthsd-epart	pctdep-art
Michigan West	6	58.5	17.5	25.7
Ohio North	3	110.0	103.0	50.4
Ohio South	1	18.0	9.0	33.3
Tenn. East	7	33.0	19.0	33.3
Tenn. Mid	2	75.0	68.0	48.0
Tenn. West	3	75.0	50.0	34.0
Illinois Cent	6	91.5	44.5	35.1
Illinois North	4	67.0	21.0	33.6
Illinois South	50	80.0	42.5	33.3
Indiana North	6	55.5	47.7	47.7
Indiana South	1	51.0	69.0	57.5
Wisconsn East	6	145.5	88.0	42.4
Wisconsn West	9	87.0	20.0	21.4
Arkansas East	2	35.0	85.0	70.8
Arkansas West	1	135.0	100.0	42.6
Iowa North	7	46.0	60.0	64.3
Iowa South	2	64.0	57.0	47.1
Minnesota	0	.	.	.
Missouri East	2	43.0	71.0	61.9
Missouri West	2	39.0	31.5	43.9
Nebraska	32	48.0	80.5	58.0
North Dakota	0	.	.	.
South Dakota	2	32.5	39.5	55.8
Alaska	0	.	.	.
Arizona	2	58.5	36.5	39.6
Californ Cent	0	.	.	.
Californ East	3	8.0	22.0	73.3
Californ North	1	2.0	55.0	96.5
Californ South	6	39.5	45.0	49.9
Guam	0	.	.	.
Hawaii	0	.	.	.
Idaho	2	28.5	27.5	36.7
Montana	5	108.0	80.0	43.5
Nevada	0	.	.	.
N Marian Island	0	.	.	.
Oregon	2	51.5	43.5	43.4
Wash. East	0	.	.	.
Wash. West	0	.	.	.
Colorado	2	81.0	81.5	42.6
Kansas	2	55.5	80.0	62.0

(Continued)

For Rule 35 (B) Resentencings in 2003.

	n	sentto-to	mnthsd-cpart	pctdep-art
New Mexico	1	17.6	102.4	85.4
Oklahoma East	1	60.0	40.0	40.0
Oklahoma North	0	.	.	.
Oklahoma West	0	.	.	.
Utah	0	.	.	.
Wyoming	5	57.0	78.0	51.1
Alabama Mid	0	.	.	.
Alabama North	2	60.0	76.5	75.0
Alabama South	0	.	.	.
Florida Mid	32	66.5	53.5	44.4
Florida North	11	90.0	103.0	47.4
Florida South	11	56.0	38.0	44.0
Georgia Mid	9	76.0	39.0	29.6
Georgia North	6	109.0	65.5	58.4
Georgia South	3	108.0	17.5	50.0

For Rule 35 (B) Resentencings in 2004.

Exhibit D

	n	sentto-t0	mnthsd-epart	pctdep-art
TOTAL	184	62.5	63.0	50.0
Dist of Columbia	0	.	.	.
Maine	1	102.0	49.0	32.5
Mass.	2	70.0	67.5	48.6
New Hampshire	0	.	.	.
Puerto Rico	2	43.0	220.5	85.3
Rhode Island	0	.	.	.
Conn.	0	.	.	.
New York East	1	0.0	70.0	100.0
New York North	0	.	.	.
New York South	1	28.0	29.0	50.9
New York West	0	.	.	.
Vermont	0	.	.	.
Delaware	0	.	.	.
New Jersey	1	66.0	122.0	64.9
Penn. East	0	.	.	.
Penn. Mid	3	62.0	58.0	48.3
Penn. West	2	19.5	59.0	69.7
Virgin Islands	0	.	.	.
Maryland	1	151.0	111.0	42.4
NC East	10	72.0	113.0	59.9
NC Mid	2	112.5	75.0	40.0
NC West	1	180.0	144.0	44.4
South Carolina	6	85.5	106.0	54.8
Virginia East	12	61.5	70.5	50.0
Virginia West	13	120.0	150.0	66.7
WV North	1	27.0	10.0	27.0
WV South	5	39.0	13.0	33.3
Louisian East	0	.	.	.
Louisian Middle	0	.	.	.
Louisian West	1	60.0	40.0	40.0
Miss. North	0	.	.	.
Miss. South	1	87.0	33.0	27.5
Texas East	5	80.0	45.0	33.9
Texas North	0	.	.	.
Texas South	10	60.5	29.0	38.9
Texas West	0	.	.	.
Kentucky East	0	.	.	.
Kentucky West	1	37.0	9.0	19.6
Michigan East	1	108.0	154.0	58.8

(Continued)

For Rule 35 (B) Resentencings in 2004.

	n	sentto-t0	mnthsd-epart	pctdep-art
Michigan West	1	10.0	14.0	58.3
Ohio North	0	.	.	.
Ohio South	19	48.5	81.5	65.5
Tenn. East	2	66.0	84.5	55.2
Tenn. Mid	0	.	.	.
Tenn. West	2	81.0	57.5	40.7
Illinois Cent	3	96.0	35.0	20.0
Illinois North	0	.	.	.
Illinois South	4	112.5	34.0	28.1
Indiana North	1	168.0	192.0	53.3
Indiana South	0	.	.	.
Wisconsn East	4	47.0	41.5	37.1
Wisconsn West	1	145.0	103.0	41.5
Arkansas East	0	.	.	.
Arkansas West	0	.	.	.
Iowa North	5	76.0	61.0	36.3
Iowa South	0	.	.	.
Minnesota	0	.	.	.
Missouri East	0	.	.	.
Missouri West	0	.	.	.
Nebraska	24	50.0	68.0	58.3
North Dakota	0	.	.	.
South Dakota	2	58.0	62.0	51.7
Alaska	0	.	.	.
Arizona	0	.	.	.
Californ Cent	0	.	.	.
Californ East	1	90.0	.	.
Californ North	0	.	.	.
Californ South	1	63.0	57.0	47.5
Guam	0	.	.	.
Hawaii	0	.	.	.
Idaho	0	.	.	.
Montana	2	56.5	38.5	43.1
Nevada	0	.	.	.
N Marian Island	0	.	.	.
Oregon	0	.	.	.
Wash. East	0	.	.	.
Wash. West	0	.	.	.
Colorado	1	131.0	131.0	50.0
Kansas	1	39.0	39.0	50.0

(Continued)

For Rule 35 (B) Resentencings in 2004.

	n	sentto-t0	mnthsd-epart	pctdep-art
New Mexico	0	.	.	.
Oklahoma East	0	.	.	.
Oklahoma North	0	.	.	.
Oklahoma West	0	.	.	.
Utah	0	.	.	.
Wyoming	6	48.5	57.0	51.5
Alabama Mid	0	.	.	.
Alabama North	0	.	.	.
Alabama South	0	.	.	.
Florida Mid	8	96.0	69.5	35.6
Florida North	1	144.0	.	.
Florida South	17	45.0	35.3	47.2
Georgia Mid	3	30.0	21.0	41.2
Georgia North	1	98.0	22.0	18.3
Georgia South	0	.	.	.

For Rule 35 (B) Resentencings in 2005 Exhibit E

	n	sentto-to	mnthsd-epart	pctdep-art
TOTAL	818	60.0	62.9	50.0
Dist of Columbia	1	54.0	208.0	79.4
Maine	2	67.0	87.0	56.8
Mass.	4	166.0	24.0	21.1
New Hampshire	2	0.0	37.5	100.0
Puerto Rico	6	59.0	140.0	55.2
Rhode Island	0	.	.	.
Conn.	1	94.0	94.0	50.0
New York East	2	27.9	167.1	91.5
New York North	2	93.0	43.0	35.5
New York South	2	76.5	103.0	68.2
New York West	6	50.0	76.5	53.7
Vermont	1	84.0	178.0	67.9
Delaware	0	.	.	.
New Jersey	2	28.0	60.0	51.8
Penn. East	10	59.0	77.0	51.7
Penn. Mid	1	72.0	18.0	20.0
Penn. West	12	54.0	79.6	62.6
Virgin Islands	0	.	.	.
Maryland	2	57.5	62.5	52.1
NC East	30	84.0	81.0	50.4
NC Mid	0	.	.	.
NC West	3	36.0	66.0	70.0
South Carolina	19	70.0	68.0	52.4
Virginia East	43	72.0	63.0	50.3
Virginia West	11	42.0	76.0	56.1
WV North	5	30.0	26.0	34.8
WV South	13	60.0	60.0	47.1
Louisian East	0	.	.	.
Louisian Middle	0	.	.	.
Louisian West	2	100.0	91.0	42.9
Miss. North	1	80.0	43.0	35.0
Miss. South	2	78.0	59.5	43.8
Texas East	11	70.0	47.0	50.0
Texas North	0	.	.	.
Texas South	37	42.0	35.0	41.7
Texas West	3	81.0	62.0	46.8
Kentucky East	5	30.0	83.0	88.1
Kentucky West	3	30.0	90.0	75.0
Michigan East	5	72.0	48.0	40.0

(Continued)

For Rule 35 (B) Resentencings in 2005.

	n	sentto-t0	mnthsd-epart	pctdep-art
Michigan West	18	62.0	42.5	42.3
Ohio North	2	60.0	83.0	58.0
Ohio South	5	24.0	34.0	82.4
Tenn. East	7	70.0	62.0	45.0
Tenn. Mid	0	.	.	.
Tenn. West	4	70.0	64.8	47.5
Illinois Cent	10	127.5	62.0	40.5
Illinois North	5	116.0	118.0	50.2
Illinois South	24	59.0	38.0	33.5
Indiana North	6	77.0	55.0	47.1
Indiana South	2	72.0	49.5	41.4
Wisconsn East	30	65.5	55.0	41.3
Wisconsn West	12	81.5	12.0	14.7
Arkansas East	0	.	.	.
Arkansas West	0	.	.	.
Iowa North	11	76.0	38.0	34.3
Iowa South	0	.	.	.
Minnesota	6	59.8	46.0	46.2
Missouri East	4	39.0	45.0	45.3
Missouri West	3	60.0	120.0	68.1
Nebraska	232	54.0	77.0	60.0
North Dakota	0	.	.	.
South Dakota	9	42.0	38.0	42.1
Alaska	0	.	.	.
Arizona	2	80.5	47.5	26.9
Californ Cent	0	.	.	.
Californ East	0	.	.	.
Californ North	0	.	.	.
Californ South	2	27.0	199.5	71.9
Guam	0	.	.	.
Hawaii	0	.	.	.
Idaho	1	67.0	3.0	4.3
Montana	2	104.5	39.5	28.5
Nevada	0	.	.	.
N Marian Island	0	.	.	.
Oregon	4	73.5	86.5	57.7
Wash. East	1	0.0	135.0	100.0
Wash. West	0	.	.	.
Colorado	1	75.0	17.0	18.5
Kansas	6	73.0	74.5	46.2

(Continued)

For Rule 35 (B) Resentencings in 2005.

	n	sentto-to	mnthsd-epart	pctdep-art
New Mexico	0	.	.	.
Oklahoma East	0	.	.	.
Oklahoma North	0	.	.	.
Oklahoma West	2	141.5	83.5	39.1
Utah	0	.	.	.
Wyoming	4	63.0	24.0	27.4
Alabama Mid	3	78.0	107.0	63.7
Alabama North	0	.	.	.
Alabama South	5	30.0	10.0	41.7
Florida Mid	38	70.0	60.0	46.6
Florida North	19	67.0	90.0	50.0
Florida South	79	51.0	48.0	47.9
Georgia Mid	2	54.0	61.5	57.1
Georgia North	7	46.0	14.0	25.0
Georgia South	1	140.0	48.0	25.5

LETTER TO THE HONORABLE HOWARD COBLE, RE: REVISED TESTIMONY FOR THE RECORD FROM JUDITH W. SHEON, STAFF DIRECTOR, U.S. SENTENCING COMMISSION, WASHINGTON, DC

April 24, 2006

Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
207 Cannon House Office Building
Washington, D.C. 20015

Re: Revised Testimony for March 16, 2006 Oversight Hearing, United States v. Booker: One Year Later-Chaos or Status Quo?

Dear Representative Coble:

On March 13, 2006, the Sentencing Commission released its report on the impact of *United States v. Booker* on Federal sentencing. This report endeavors to provide sentencing data in a format relevant and meaningful to post-*Booker* analysis and therefore reports data outside of the Commission's customary fiscal year reporting practices. In the process of finalizing the report for printing, three programming errors were identified that required correction of certain data. Correcting the data also required revising the Commission's March 16, 2006 written testimony, a copy of which is provided for inclusion in the final legislative record of this proceeding.

With regard to the programming errors in the report, as described in footnote 242 of the March 13 *Booker* report, the post-PROTECT Act time period used for purposes of the report is the period from May 1, 2003 (the date after the enactment of the PROTECT Act) through June 24, 2004 (the day of issuance of the *Blakely* decision by the Supreme Court). Accordingly, the post-PROTECT Act datafile consists of an aggregation of portions of the Commission's fiscal year 2003 and fiscal year 2004 datafiles, consisting of the 81,206 offenders sentenced from May 1, 2003, through June 24, 2004. In aggregating the relevant portions of the fiscal year 2003 and fiscal year 2004 datafiles, a programming error inadvertently omitted the cases sentenced within the applicable sentencing guideline range and cases sentenced above the applicable guideline range in the relevant portion of the fiscal year 2003 datafile. As a result, for the post-PROTECT Act time period, the preliminary report understated the percent of cases sentenced within and above the applicable guideline sentencing range, and overstated the percentage of

cases sentenced below the applicable guideline sentencing range. *See, e.g.*, Tables 16, 20, Appendix E-1.

In addition, when conducting guideline-specific analyses, cases typically are sorted based on the *Guidelines Manual* used at sentencing. Accordingly, the analysis of theft/fraud offenses sentenced under §2B1.1 for the pre-PROTECT Act time period (cases sentenced from October 1, 2002, through April 30, 2003) was intended to be limited to cases sentenced under a *Guidelines Manual* (or Supplement) issued November 1, 2001, or later. A programming error, however, inadvertently included cases sentenced during the pre-PROTECT Act time period using guidelines manuals issued prior to November 1, 2001. As a result, the preliminary report did not properly limit the theft/fraud cases to be analyzed for the pre-PROTECT Act time period. *See* Appendix E-1. Similarly, in order to fully capture cases sentenced for crack cocaine offenses, cases sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) and §2D1.2 (Drug Offenses Occurring Near Protected Locations or involving Underage or Pregnant Individuals) were combined for purposes of this report. For the pre-PROTECT Act time period, however, a programming error inadvertently omitted cases sentenced under §2D1.2. *See, e.g.*, Tables 20, 21, Appendix E-1.

Finally, sentences typically are capped at 470 months and life sentences are assigned a value of 470 months when computing average sentence lengths. For the pre-PROTECT Act and post-PROTECT Act time periods, a programming error inadvertently failed to assign these values. As a result, the average sentences in the career offender analyses for these time periods were overstated. *See* Table 28.

These errors, in addition to certain transcription and technical typographical errors, have been corrected in the Commission's Final Report on the Impact of *United States v. Booker* on Federal Sentencing. The Final Report is available on our website, www.ussc.gov, and a printed version of the Final Report has been delivered to all House Judiciary Committee members and staff.

If you have any questions about the revised testimony or the Final Report, please do not hesitate to contact Lisa Rich in the Office of Legislative and Intergovernmental Affairs at 202.502.4519.

Sincerely,

Judith W. Sheon
Staff Director

Attach.

cc: Honorable Bobby Scott
Ranking Member

SUPPLEMENTAL INFORMATION FOR THE RECORD FROM THE HONORABLE PAUL G. CASSELL, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
112 Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Honorable Donetta W. Ambrose
Honorable Lance M. Africk
Honorable Julie E. Carnes
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable José A. Fusté
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable Nora M. Manella
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable William J. Riley
Honorable Thomas J. Rueter
Honorable Reggie B. Walton

Honorable Paul Cassell, Chair

March 23, 2006

TELEPHONE
(801) 524-3005

FACSIMILE
(801) 526-1185

Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism
and Homeland Security
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Coble:

I am writing to provide additional information to the Committee in connection with the hearing you held on Thursday, March 16, 2006, on the subject of criminal sentencing.

Information from Massachusetts Judges

During the hearing, members of the Subcommittee expressed considerable interest in how criminal sentencings are proceeding in the District of Massachusetts. I have received a letter from Chief Judge Mark Wolf explaining facts regarding that district that may be of interest. I respectfully request that you include this letter and its enclosures in the hearing record.

The Justice Departments Examples of "Problems" Under *Booker*

In the written testimony submitted by William W. Mercer, the Department of Justice cites six cases to represent "the problems in sentencing post-*Booker*."[1] As I noted in my own oral testimony, four of these six cases were decided before *U.S. v. Booker*,[2] and two of these cases are still being reviewed on appeal.[3] Each of the six cases cited by the Department involved a unique set of facts that were carefully assessed by the sentencing judge. Although reasonable minds may differ about whether these judges got it right when they sentenced these defendants to these particular punishments, an examination of published opinions shows that the sentencing judges considered significant sentencing factors beyond those cited in the Department's written testimony.

United States v. Menyweather

In *United States v. Menyweather*,[4] the defendant pleaded guilty to one count of mail fraud and admitted to making between $350,000 and $500,000 in unauthorized purchases on her government credit cards. The guidelines sentencing range for this offense was 21-27 months, but the district judge made an eight-level downward departure, and imposed a shorter term of incarceration. The Department's testimony indicates that the court "imposed a sentence of 40 days in jail-like facility on consecutive weekends."[5] That description, however, is not wholly accurate: the court not only sentenced Dorothy Menyweather to five years of probation (40 days of which had to be served in a jail-type institution on consecutive weekends) but also ordered her to pay $435,918 in restitution, and ordered her to serve 3,000 hours of community service. The district court characterized this probation as very "strenuous."[6] Menyweather was also prohibited from seeking a loan or credit without the prior approval of the probation office. This sentence was imposed well before *Booker*.

In this complex case, the government has appealed this sentence four times, three of which have resulted in substantive opinions. The first time, the Ninth Circuit remanded back to the district court to allow that court to provide detailed reasons for "the direction and the degree of the departure."[7] The second time, noting that government had not received adequate notice of the district court's consideration of "post-conviction rehabilitation" (a basis the district court later

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[1] Statement of William W. Mercer, United States Attorney for the District of Montana and Principal Associate Deputy Attorney General, United States Department of Justice, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, United States House of Representatives, concerning "Federal Sentencing after United States v. *Booker*" presented on March 16, 2006, at 18.
[2] United States v. Menyweather; United States v. Leyva-Franco; United States v. Rivas-Gonzales; United States v. Edwards.
[3] United States v. Menyweather; United States v. Medearis.
[4] *See* United States v. Menyweather, 36 Fed. Appx. 262 (9th Cir. 2002) (Menyweather I); United States v. Menyweather, 69 Fed. Appx. 874 (9th Cir. 2003) (Menyweather II); United States v. Menyweather, 431 F.3d 692 (9th Cir. 2005) (Menyweather III).
[5] Mercer, *supra* note _Ref130745590\h1 at 19.
[6] Menyweather III, at 702.
[7] Menyweather I, at 263.

abandoned), and noting that the extent of the departure was still unexplained, the Court of Appeals vacated the sentence and remanded again.[8] The district court adopted expanded findings of fact and conclusions of law, imposing the same sentence, and the government appealed the third time. While this third appeal was pending, the *Booker* decision was decided, rendering the guidelines advisory.

In this third appeal – *Menyweather III* – the Ninth Circuit Court of Appeals arrived at three interrelated conclusions: (1) Given that the district court sentenced Menyweather under the assumption that the Guidelines were mandatory, the district court did not abuse its discretion by downwardly departing from the Guidelines; (2) even if the district court had exceeded the departure authority available under the pre-*Booker* Guidelines, any error was harmless in view of the sentencing factors listed in 18 U.S.C. § 3553(a) (which the district court can now consider after *Booker*); and (3) the resulting sentence was reasonable.[9]

The Ninth Circuit's standard of review was equivalent to abuse of discretion,[10] and the circuit found that the district court's findings of fact supported a mitigated sentence. The district court had awarded an eight-level downward departure for a number of reasons, including Menyweather's diminished capacity (a forensic psychologist had testified at the sentencing hearing that she suffered from severe symptoms of post-traumatic stress after being abandoned by her parents and after experiencing the murder of her fiancé),[11] Menyweather's role as single parent and breadwinner for her eleven-year-old daughter,[12] Menyweather's crime did not require lengthy incarceration to protect the public,[13] and a sentence of probation would better allow Menyweather to pay restitution to her victims.[14]

Reasonable people can differ on whether this was the right punishment for Dorothy Menyweather. Indeed, Circuit Judge Andrew Kleinfeld wrote a strong dissent.[15] Dissatisfied with the sentence, the government has taken the appropriate step: appealing the decision for a fourth time, seeking *en banc* review of the matter.

United States v. Leyva-Franco

Another pre-*Booker* case from the Ninth Circuit (also appealed three times by the government), *United States v. Leyva-Franco* involved a four-level downward departure for "aberrant

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[8] *See* Menyweather II, at 875.
[9] *See* Menyweather III, at 694.
[10] *Id.* at 697 (identifying "abuse of discretion" as the appropriate standard of review in evaluating reasonableness).
[11] *See id.* at 698-99 (describing psychological testimony).
[12] *See id.* at 700 (describing the district court's finding that Menyweather's relationship with her daughter, and the care she provides, are unusual as compared with the situation of other single parents).
[13] *See id.* at 702.
[14] *See id.*
[15] *Id.*at 704 (Kleinfeld, J., dissenting).

conduct" granted by the district court.[16] A defendant is eligible for an aberrant conduct departure when his crime was extraordinary and involved a single criminal occurrence or transaction that (1) was committed without significant planning, (2) was of limited duration, and (3) represents a marked deviation by the defendant from an otherwise law-abiding life. When Oscar Guadalupe Leyva-Franco pleaded guilty to importing five or more kilograms of cocaine from Mexico, the prosecution claimed that Leyva-Franco had admitted to a customs inspector that he had crossed the border with cocaine several times in the week before his arrest. Leyva-Franco, however, denied making such a statement. Although the presentence report indicated that this controverted fact was an issue, it did not make a recommendation on resolving the matter. At the sentencing hearing, while the district court indicated that it had considered the issue, it did not specifically resolve the issue. The district court sentenced Mr. Leyva-Franco to forty-eight months in prison and sixty months of supervised release.

The government appealed, and the Ninth Circuit reversed and remanded the case for resolution of the disputed issue about Leyva-Franco's statement to the customs inspector. On remand, the district court found Leyva-Franco committed a single criminal transaction and imposed the same four-level departure for aberrant behavior. The government appealed again, and *in Leyva-Franco II*,[17] the Ninth Circuit concluded that the district court had failed to resolve the threshold question of whether Leyva-Franco's aberrant conduct had indeed been "extraordinary." The sentence was vacated and the case was remanded again. The district court then analyzed the issue and concluded both that Leyva-Franco's conduct was extraordinary and that a downward departure for aberrant behavior was warranted. It then imposed the same four-level departure in the wake of the *Booker* decision.

On appeal, the Ninth Circuit held that the sentence was reasonable.[18] It did so because, based upon the facts of the case, the district court determined that Leyva-Franco's conduct was indeed extraordinary: a single criminal occurrence, committed without significant planning, of limited duration, and one that was a marked deviation from Leyva-Franco's otherwise law-abiding life.[19]

United States v. Rivas-Gonzalez

In *United States v. Rivas-Gonzalez*,[20] another pre-*Booker* case from the Ninth Circuit cited by the government, the government actually prevailed on appeal. Although the written testimony of the Department suggests that the district court awarded an eight-level departure solely on the basis of cultural assimilation,[21] there were additional important reasons for the court's departure (notably,

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[16] 311 F.3d 1194 (9th Cir. 2002).
[17] 89 Fed. Appx. 50 (9th Cir. 2004).
[18] 2006 WL 64422 (9th Cir. 2006).
[19] *See id.*
[20] 384 F.3d 1034 (9th Cir. 2004).
[21] *See* Mercer, *supra* note _Ref130745590\h1 at 23 ("The district court made an 8-level departure based upon the cultural assimilation of Rivas-Gonzalez.").

extraordinary family ties)[22] — indeed, the district judge said that this was "the most extraordinary of these illegal alien cases that [the sentencing judge] has seen in seven years on the bench"[23] and that Ernesto Rivas-Gonzalez was "the kind of person we want to have living in this country," "a good citizen," and a man with connections to his community that surpass most of those who live here by birth.[24] The Ninth Circuit Court of Appeals, however, rejected the departure awarded on the basis of cultural assimilation. The appellate court agreed that – because Rivas-Gonzalez's social, economic, and cultural ties to the United States were formed after he illegally re-entered the country – the downward departure for cultural assimilation was incorrect.[25] The case was then remanded for resentencing.

On remand, the district court imposed the same six-month sentence as before, but based its departure from the Guideline range on the factors in 18 U.S.C. § 3553(a) rather than any specific factors mentioned in the Guidelines. The court also noted that Rivas-Gonzalez had been deported during the pendency of the appeal, meaning that any resentencing was an empty gesture:

> Although the government appealed the original sentence, it has no interest in seeing the Defendant re-sentenced. As the government stated in its most recent submission to the court,
>
> > [T]he Department of Justice believes that any costs incurred by the government to re-sentence the defendant would be money ill-spent. There is no urgency to re-sentence him. In fact, if he does not return to the United States, he need not be re-sentenced. . . . Therefore, the United States does not believe that re-sentencing the defendant at this time is necessary or the most beneficial use of limited resources.[26]

United States v. Edwards

In *United States v. Edwards*,[27] yet another pre-*Booker* case appealed to the Ninth Circuit, the district court did not apply the sentencing enhancements recommended in the presentence report because it believed it was precluded from finding sentence-enhancing facts because of the Ninth Circuit's *Blakely*-related case, *United States v. Ameline*.[28] Because the district court did not apply a

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[22] 384 F.3d 1034, 1041 ("[T]he district court did not explicitly differentiate between cultural assimilation and family ties when it articulated its reasons for departing … [but] explained why, in its view, the case stood 'outside the heartland' of cases governed by the Sentencing Guidelines.").
[23] *Id.* at 1041.
[24] *Id.* at 1042.
[25] *Id.* at 1045.
[26] Order, *United States v. Rivas-Gonzalez*, Case No. CR 02-11-BU-DWM (Feb. 24, 2006) at 6-7.
[27] 2005 U.S. App. LEXIS 28908.
[28] 376 F.3d 967 (9th Cir. 2004).

ten-level upward adjustment for loss amount or a two-level upward increase for more than minimal planning, it sentenced Duncan William Edwards to seven months of house arrest, *followed by* five years probation (not five years probation, *including* seven months of home detention, as characterized by the Department in its written testimony).[29] The government appealed this sentence, and although the Ninth Circuit Court of Appeals declined to hold that the sentence was unreasonable,[30] it did remand the case to the district court so that the district court could determine whether it would have imposed a different sentence had it understood that the sentencing guidelines were advisory.[31] The Ninth Circuit suggested that "[t]he sentence imposed after the *Ameline* remand may well be different from the sentence imposed, and the government will be free to argue at that point, if it so desires, that the remaining sentence is unreasonably low."[32]

The district court imposed the same non-custodial sentence on remand. The government has appealed,[33] which means that the sentence is not yet final.

United States v. Montgomery

In *United States v. Montgomery*,[34] the district court sentenced Angela Montgomery to eight months of imprisonment for bank fraud (as well as five years of supervised release), but the government appealed her sentence as unreasonable.[35] While in the government's testimony, it characterizes the district court's listing of the statutory sentencing factors as "a perfunctory and boilerplate recitation,"[36] the Eleventh Circuit Court of Appeals described the district court's identification of the procedure it followed and the reasons it gave for the sentence it imposed as precisely what is needed to facilitate meaningful appellate review,[37] as required by law.[38]

The court of appeals held that Montgomery's sentence was reasonable.[39] In making this determination, the Eleventh Circuit looked at more than the fact that she "was a first offender and that the trial court believed she would not commit a new crime"[40] – as the Department's testimony tersely describes it. Rather, the Eleventh Circuit considered the 18 U.S.C. § 3553 sentencing factors imposed by Congress, including:

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[29] Compare *Edwards* at *1 ("The court sentenced the defendant to seven months house arrest followed by five years probation") with Mercer, *supra* note _Ref130745590\h1 at 26 ("[T]he court sentenced Edwards to probation for five years, including seven months of home detention with electronic monitoring.").
[30] *Id.* at *3.
[31] *Id.* at *2.
[32] *Id.* at *3.
[33] *United States v. Edwards*, No. 06-30163 (9th Cir.).
[34] 2006 U.S. App. LEXIS 2891 (per curiam).
[35] *Id.* at *1.
[36] Mercer, *supra* note _Ref130745590\h1 at 27.
[37] *Montgomery*, at *4.
[38] *See* 18 U.S.C. § 3553(c)(2).
[39] *Montgomery*, at *6.
[40] Mercer, *supra* note _Ref130745590\h1 at 28.

1. The seriousness of the offense
2. Just punishment
3. Adequate deterrence
4. The criminal history and personal characteristics of Montgomery: "This crime was Montgomery's first and only offense . . . . Based on her lack of a criminal history, Montgomery is unlikely to commit further crimes in the future such that she would need a lengthy period of incarceration to protect the public."[41]
5. The need to provide restitution to Montgomery's victims: "Restitution was an important component in providing punishment for the offense, and the district court recognized this in ordering Montgomery to pay a large amount of restitution and sentencing her to the maximum five years of supervised release in order to make restitution payments."[42]
6. The need to provide the Montgomery with medical care for her mental illness: "Montgomery had a history of mental illness, which the district court took into account in fashioning its sentence."[43]

While reasonable minds may differ as to whether eight months imprisonment and five years of supervised release was the right sentence for Angela Montgomery, it seems important to understand that she was a non-violent offender with a history of mental illness, given a shorter sentence so as to provide greater restitution to the crime victim. Perhaps it is because of these facts that the the government has chosen not to appeal this case.

United States v. Medearis

In *United States v. Medearis*,[44] the district court sentenced Mark Medearis (a drug user in possession of a short-barreled shotgun and a stolen firearm) to five years of probation instead of to the 46-57 month prison term recommended by the sentencing guidelines. The district court so sentenced Medearis after considering the relevant 18 U.S.C. § 3553 sentencing factors, including the need for deterrence, Medearis' criminal history and personal characteristics, extraordinary community and family support, his credible religious conversion, and the lack of a need to protect the public.

The sentencing judge had the opportunity to interact with Medearis and to assess his claims of religious conversion. The sentencing judge also had the opportunity to speak with the 15-20 members of Medearis' church who appeared on his behalf at sentencing, and with the 15-20 members of Medearis' family who were there, as well. The government has just appealed the sentence to the Eight Circuit, so if the government's assessment of this case is correct, then the

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[41] *Montgomery*, at *6, *7.
[42] *Id.* at *6-*7.
[43] *Id.* at *7.
[44] No. 04-05031-CR-SW-ODS (W.D. Missouri, 2006).

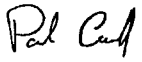
sentence will presumably be reversed. At this point, however, the sentence that will finally be imposed has yet to be determined.

Conclusion

In the government's written testimony, it is said that "[t]here are hundreds and hundreds more examples of judges reducing sentences below the guidelines … including drug trafficking cases, sex abuse cases, and even terrorism cases."[45] But if the six cases cited by the government are in any way representative of these others, they suggest that the courts of appeals, rather than hastily enacted legislation, are the appropriate mechanism to establish a meaningful jurisprudence of reasonableness.

I would be happy to provide any additional information that might be of assistance to the Subcommittee and look forward, on behalf of the Judicial Conference, to working with the Subcommittee to insure that the federal sentencing system continues to be fair to all concerned.

Sincerely,



Paul Cassell, Chair

Enclosures

cc: Honorable Bobby Scott
Ranking Democrat

[45] Mercer, *supra* note _Ref130745590\h1, at 28.

LETTER TO THE HONORABLE PAUL G. CASSELL AND "REPORT ON POST-BOOKER SENTENCING IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS," FROM THE HONORABLE MARK L. WOLF, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

United States District Court
Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

March 22, 2006

Honorable Paul G. Cassell
Chair, Judicial Conference
Criminal Law Committee
United States District Court
350 South Main Street
Salt Lake City, UT 84101

Dear Judge Cassell:

Because the recent sentencing practices of the judges in the United States District Court for the District of Massachusetts were discussed at the March 16, 2006 hearing of the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, you have asked me to provide you with some pertinent information. I am pleased to do so in this letter and in the attached report which amplifies it.

I understand that the United States Sentencing Commission's reported statistics indicate that judges in the District of Massachusetts have relied on the discretion afforded by the Supreme Court's decision in United States v. Booker to impose sentences below the guideline range in almost 26% of all case. However, we believe that the figures for Massachusetts are not accurate because of the manner in which the bases for our decisions were initially recorded and because of the way the Commission interpreted some of our reports. As the Sentencing Commission has written, "caution should be exercised in drawing conclusions from the post-Booker data collected and analyzed thus far."[1] We are now using the new Judgment and Commitment form, which should more accurately capture what is actually occurring in the District of Massachusetts and elsewhere.

The length of the sentences being imposed in the District of Massachusetts can be determined accurately. We are advised by our

[1] United States Sentencing Commission, Report on the Impact of United States V. Booker on Federal Sentencing, at vi (March 2006)(the "Booker Report").

Probation Department that the length of sentences imposed in this District has not changed after Booker.[2] This is consistent with the national experience.[3]

The Department of Justice illustrated its argument for legislation further limiting judicial discretion by pointing out that while judges in the District of Massachusetts have reportedly relied on Booker to sentence almost 26% of defendants below the guideline range, judges in the neighboring Northern District of New York have done so only about 9% of the time.[4] However, the Sentencing Commission's statistics indicate that in both districts, sentences within the guideline range are imposed in about 53% of the cases.[5] In the Northern District of New York the government sponsors departures in about 32% of the cases, while in Massachusetts it does so only in about 12% of them[6] - approximately half the national average rate of about 24%.[7]

These comparative figures are a reminder that any just system of sentencing will necessarily involve the exercise of some discretion. The risk of unwarranted disparity may be increased by decisions of prosecutors and reduced in response by decisions of district judges, who in contrast to prosecutors are neutral and exercise their discretion in an open manner, subject to appellate review. In essence, it appears that prosecutors in the District of Massachusetts are requesting departures or variances to promote just sentences far less often than their colleagues across the United States. As the attached report illustrates, in some of the cases in which the government does not sponsor a departure or variance a sentence in the guideline range plainly would not be just. Thus, the aberrant practices of prosecutors in the District

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[2]Massachusetts statistics reported by the Department of Probation, D. Mass.

[3]Booker Report at vii. ("The severity of sentences imposed has not changed substantially across time. The average sentence length after Booker has increased.")

[4]Federal Sentencing After United States v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (2006) (statement of William W. Mercer, United States Attorney, District of Montana and Associate Deputy Attorney General at 5).

[5]Booker Report at Appendix D-19.

[6]Id.

[7]Id. at Appendix D-10.

of Massachusetts may explain and justify any higher than average rate of judicially initiated departures or variances resulting in sentences below the guideline range.

However, we agree with the General Accounting Office that one cannot properly evaluate interdistrict disparity unless one also has data to "fully compare the offenders and the offenses for which they are convicted."[8] Without such data it is impossible to reach any reliable judgments on whether similarly situated offenders are being sentenced differently in the District of Massachusetts and elsewhere, including the Northern District of New York. Developing such data may be a challenging task, but it is necessary if statistics are going to be used in making legislative judgments which will profoundly effect the public, defendants, victims, and confidence in the administration of justice.

As you testified, when the Courts of Appeals, and perhaps the Supreme Court, clarify the applicable law, any unreasonable disparities in sentences imposed after Booker should diminish.[9] In this evolutionary process, we will all gain insights from experience that should inform the decision as to whether further legislation is appropriate and, if so, what it should provide.

We understand and share the interest of Congress and the Department of Justice in the matter of federal sentencing law. As you explained in your testimony, the federal judiciary looks forward to being part of the colloquy concerning both the relative roles of the Legislative, Executive, and Judicial branches in this important area and the substance of federal sentencing law in the future.

Thank you for the opportunity to submit this information about the District of Massachusetts for inclusion in the record with your testimony.

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[8] United States General Accounting Office, Federal Drug Offenses Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001 at 1, see also pp. 19-22 (October 2003).

[9] It was only two weeks ago that the case law in the First Circuit had ripened sufficiently to permit the Court of Appeals to issue a definitive decision "en banc to provide stable guidance in this Circuit for the determination and review of post-Booker sentences." United States v. Jiminez-Beltre, ___ F.3d ___, 2006 WL 562154 *1 (1st Cir. (Mass.) March 9, 2006).

With best wishes,

Sincerely yours,

Mark L. Wolf
Chief Judge

REPORT ON POST-BOOKER SENTENCING
IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

March 22, 2006

We have reviewed the statistics for the District of Massachusetts in the U.S. Sentencing Commission's Report on the Impact of United States v. Booker on Federal Sentencing (March 2006) (the "Booker Report"). We wish to address five general points:

First, Commission statistics concerning "Booker variances" for the most part reflect the period before the formal adoption of the new Judgment and Commitment form. As such, they are not accurate for a number of reasons described below.

Second, sentencing lengths in this district have not changed post Booker, and are comparable to the national averages.

Third, the grounds on which Massachusetts judges are relying for Booker variances are consistent with those used by other judges around the country. We suggest that the content of the "Booker variances," not just the fact of variances, must be analyzed to determine whether they reflect real problems with certain Guidelines.[1]

Fourth, to the extent that there are issues raised by the data, they will be addressed through the courts of appeals. It is clear that there has not been a return to the pre-Guidelines era. The Guidelines are being followed in the majority of cases. Where district courts diverge from the Guidelines, they have spelled out their reasons with care, and have been subject to appeal. The post Booker period both within our district and across the country has produced more careful sentencing procedures and more thoughtful sentencing decisions than ever before. The guidance we are just beginning to receive from the courts of appeals will assure that this is increasingly true. See, e.g., United States v. Jiminez-Beltre, __ F.3d __, 2006 WL 562154 (1st Cir. (Mass.) March 9, 2006).

Fifth, to the extent the statistics are accurate, they raise other issues, namely disparity in the rates of substantial assistance motions brought by the government, in the rates of government-sponsored sentences, in government appeal rates, and differences in the case load of the various districts around the country. Similarly

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[1] As the Commission noted in its August 2003 Departure Report, p. ii, http://www.ussc.gov/departrpt03/departrpt03.pdf, : "Departure decisions also provide the Commission with important feedback from courts regarding the operation of the guidelines and improve its ability to make ongoing refinements to the sentencing guidelines. Frequent or increasing use of departures for a particular offense, for example, might indicate that the guideline for that offense does not adequately take into account a particular recurring circumstance."

situated offenders may be treated differently across the country because prosecutors differ in their approaches on issues including which cases to bring in federal court rather than state courts, when to offer cooperation departures, when to appeal.

On the question of statistics:

a. **There are serious conceptual problems in the field which have not yet been resolved.** What is a Booker departure? For example, is a departure because a case presents a set of facts that are outside the heartland of the Guidelines a traditional departure ground pre- Booker, or will it now be considered a new Booker variance?

b. **There are problems in the way the District of Massachusetts characterized its sentences in the Judgment and Commitment orders.** For example, at the beginning of this period some judges erroneously labeled all their sentences "Booker" sentences even when they were not. This District quickly implemented the new J & C form because of our concerns with the reporting problems. Nothing in the old J & C form would have required a court to identify the issues that now appear to be salient in the Commission's reports.

c. **There are problems in the way the Commission interpreted District of Massachusetts data.** Commission "coders" reviewed the old J & C forms and interpreted the entries. In some instances, they were doing so without sentencing transcripts in which judges would explain their reasons or even written decisions, because those materials had not been electronically attached. We had been on the Electronic Filing System for approximately a year, but we did not learn about these problems until the fall of 2005. We have since corrected them. Still, we do not believe that the Commission "re-coded" the earlier data.[2]

d. **When the Commission coders could not determine what the basis for the sentence was -- for example, because all the papers had not been**

[2] Data from the period of time when we were not recording our sentencing accurately is over-represented in the 2006 table. The table reflects 56,086 cases sentenced after Booker which the Commission had time to receive, code and "edit" before December 21, 2005. We understand the Commission indicated that that process took two weeks to months. That means that the 2006 table is, to a considerable extent, based on data before we introduced the new J & C in November 2005.

attached -- they merely added that data to the "Booker" category. In fact, the category "can't tell" was inappropriately folded into the Booker departure column for the report on individual districts.

e. **Since the forms did not have a space for "government sponsored" departures, the data understates the numbers of sentences those in which the government in fact agreed to the ultimate sentence.** For example, our data suggests that in eighteen instances in which defendants were charged with illegal reentry after deportation, the government agreed to a lesser sentence in exchange for a quick plea and no PSR, in thirteen cases without a formal plea agreement. In addition, there are ten instances in which the government filed a post-sentencing motion under Rule 35 to reduce the sentence because of cooperation, although it is not clear how these adjustments were recorded.[3]

f. Some of these problems have already been ameliorated with the new and more detailed J & C form; some will have to await the development of the case law. The Commission has acknowledged that there was a lack of uniformity in the reporting of sentencing information, that the categories which the Commissions' report reflects were not captured on the forms filled out by courts. Booker Report, Executive Summary, pp. v., vi.

On the issue of sentencing patterns, the data suggests the following:

a. Sentencing lengths have not changed post Booker in this District and are comparable to the national average sentence.

b. The grounds for departures or variances are consistent with like cases around the country. Indeed, rather than showing problems with judges sentencing post-Booker, they show substantive issues with Guideline sentencing -- criminal history issues, crediting time spent in ICE detention, concern about disparity between codefendants, which should be addressed.

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[3] While the Commission noted that in 2003 they had begun to determine the proportion of non-substantial assistance departures that were sponsored by the government, since the J & C had no such category, it is not clear how the Commission would have known that the government did not oppose the ultimate sentence where there was no PSR, no plea agreement, and no transcript attached to the judgment.

The following are some examples of sentences resulting from Booker variances that demonstrate why an advisory guideline system is critical.

Case 1: An individual charged with illegal reentry after deportation. The government requested a guideline sentence of ten months, with a split sentence, including five months in home detention. The defendant had already served seven months in the custody of Immigration Customs Enforcement. If he received a sentence of time served, the likelihood is that he would be detained for another two months, before deportation, totaling nine months in custody, only one month short of the guideline sentence. Moreover, one aspect of the guideline sentence requested by the government could not be implemented: the defendant had no home in which to be detained. In addition, the defendant had a three-month-old son who needed surgery in his home country and the defendant would need to work in his home country to pay for it. The Court sentenced him to time served. The government did not appeal.

Case 2: Defendant was charged with bank robbery. As a career offender his guideline range was 151-188 months in prison. If he were not a career offender, the range would be 77-96 months. While the Guidelines concluded that "lack of guidance as a youth" was a prohibited ground for departure, the Court noted the following: The defendant's mother was 14 when he was born and she was drug addicted. She and her boyfriend gave the defendant heroin starting when he was 11. The defendant committed some of the crimes that form his criminal history to help his mother who was dying from AIDS and provide her boyfriend with drugs. All of his prior offenses were non-violent. The defendant committed the bank robbery and was arrested, shortly after, inside a train station counting his wad of cash, $620. He had never done state prison time, nor had he ever had drug treatment. The Court also noted that there were innumerable drug addicts with similar records prosecuted in state court, facing substantially lower sentences. The Court departed downward in part based on the fact that his criminal history overstated his culpability, and in part on a variety

of § 3553(a) factors, and imposed an 86 month sentence. The government did not appeal.

Case 3: Defendants were charged with distribution of pseudoephedrine. The acknowledged mastermind of the pseudoephedrine operation, who had funded and advised the defendants and defendants across the country in setting up drug factories, had been held responsible in another state for a substantially smaller amount of drug quantity than the defendants and received a substantially lower sentence than the sentence the defendants were facing. The Court noted: "Ironically, in this case, the Guidelines concerns about 'unwarranted disparity among defendants with similar records who have been found guilty of similar conduct,' 18 U.S.C. § 3553(a)(6), call for an out-of-Guidelines adjustment. Ordinarily, the Guidelines do not permit me to make adjustments as between co-defendants in a single case, much less between defendants in separate indictments. See United States v. Kneeland, 148 F.3d 6, 16 (1st Cir.1998). However, in the instant case, there is something troubling about the extent to which differences in sentencing were driven not by differences in the crime, but by the happenstance of the way the government indicted, the jurisdictions of indictment, and who ran to cooperate first. Because of Abu-Lawi's prominence [Abu-Lawi was the mastermind], and the timing of his cooperation, the government had virtually all it needed before it got to Jaber [who had also offered to cooperate]. Some adjustment is essential to reduce unwarranted disparity in the case at bar." U.S. v. Jaber, 362 F. Supp. 2d 365, 380 (D. Mass. 2005). The government did not appeal.

To the extent the data show any change post-Booker, and to the extent accurate information can be gleaned from the data at all, an important source of disparity may be prosecution based. For example, the data suggests that the District of Massachusetts United States Attorney's office has a much more limited approach to substantial assistance departures than offices around the country, i.e. granting it to fewer defendants than do other offices. (For example, the Northern District of New York is at

32% substantial assistance departures, and the District of Massachusetts is at 12%, according to the most recent statistics.) [4]

Moreover, real differences between jurisdictions can only be evaluated by understanding differences in case load. The caseload from circuit to circuit and district to district varies enormously. If judges in X district go outside the guidelines 40% of the time and in Y district only 20%, that does not mean, as it might superficially appear, that the X judges are departing in cases where the Y district judges would not. It may mean the X district judges are seeing different kinds of cases. [5]

Our Probation Department advises us that in Massachusetts, sixty percent of our case load consists of street crime including drugs (43%), weapons (7.3%), robbery, larceny, gambling, assault, escape, homicide, burglary. The figure could well be higher if you add in cases which may be street offenses charged as racketeering (1.7%), obstruction of justice/perjury (3.0%), perhaps money laundering (1.4%). 17.2% of the cases in the District of Massachusetts are for fraud, 6.5% for immigration, and 1.7% for tax offenses.[6] We do not have comparable statistics for other districts, which makes meaningful comparisons be possible.

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[4] Frank Bowman notes that the institution most responsible for sentences outside the Guidelines post-Booker is the government, not only formally, through substantial assistance departures and "fast track" programs, but also through plea agreements (so called "government sponsored" departures.) . Bowman, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker* 43 Houston L. Rev. __ (2006),

[5] This is precisely what the UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL DRUG OFFENSES DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 at 1, see also pp. 19-22 (October 2003) noted in its Departure Report, namely that one could not evaluate interdistrict disparity unless one also had data to "fully compare the offenders and the offenses for which they were convicted."

[6] Indeed, in Frank Bowman's recent article, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker* 43 Houston L. Rev. _ 41 (2006), he notes that developments "within the pre-*Booker* mandatory guidelines system apparently caused *greater* increases in regional sentencing disparity than the *Booker* decision transforming the character of the Guidelines from mandatory to advisory." (Italics supplied.)

REVISED TESTIMONY OF THE HONORABLE RICARDO H. HINOJOSA, U.S. DISTRICT JUDGE AND CHAIRMAN, U.S. SENTENCING COMMISSION

PREPARED STATEMENT
Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

March 16, 2006

Chairman Coble, Ranking Member Scott, and distinguished Members of the Subcommittee, thank you for the invitation to testify today on behalf of the United States Sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker*[1] on federal sentencing.

I appeared before this Committee just a few weeks after the *Booker* decision in February 2005, and stated that the *Booker* decision was the most significant case affecting the federal sentencing guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta*.[2] My testimony this morning will focus on the Commission's activities since the *Booker* decision, particularly our work that culminated in our recently released report on the impact of *Booker*. The Commission remains uniquely positioned to assist all three branches of government in ensuring the continued security of the public while providing fair and just sentences. To fulfill this role, the Commission undertook a detailed review of post-*Booker* sentencing to help inform the ongoing debate about the future of federal sentencing policy. While the full impact of the *Booker* decision still cannot be ascertained from only one year's worth of data, the decision does appear to have had some initial impact on national sentencing practices.

Before I report some of the highlights of our *Booker* Report, I would like to reiterate certain principles I outlined to the Subcommittee last February that the Commission firmly believes still hold true. After *Booker* the Federal Sentencing Guidelines remain an important and essential consideration in the imposition of federal sentences. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing" subject to review by the courts of appeal for "unreasonableness."[3]

Many courts have adopted, as the Commission teaches, a three-step approach to determining federal sentences under the framework set forth by *Booker*.[4] First, pursuant to 18 U.S.C. § 3553(a)(4), a sentencing court must determine and calculate the applicable guideline sentencing range, since sentencing courts cannot consider the sentencing

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[1] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005).
[2] *Mistretta v. United States*, 488 U.S. 361 (1989).
[3] *United States v. Booker*, 543 U.S., 124 S. Ct. at 767.
[4] *See, e.g., United States v. Haack*, 403 F.3d 997 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005); *United States v. Christenson*, 403 F.3d 1006 (8th Cir. 2005); *see also* Proposed Rules Change to Fed. R. Crim. P. 11 (Pleas)(proposing to amend Rule 11(M) to correspond to the three-step approach to sentencing).

guideline range as required by *Booker* if one has not been determined. Second, the court the court should consider any traditional departure factor that may be applicable under the sentencing guidelines, since 18 U.S.C. § 3553(a)(5), which contemplates consideration of policy statements issued by the Commission, including departure authority remains intact after *Booker*.[5] Third, after consideration of the applicable guideline sentencing range and guideline departure factors, the court should consider the other applicable sentencing factors set forth under 18 U.S.C. § 3553(a) and if the court determines that a guidelines sentence (including any applicable departures) does not meet the purposes of sentencing, it may impose a non-guidelines sentence pursuant to *Booker*.

Although the *Booker* decision makes clear that sentencing courts must consider the guidelines, it does not make clear how much weight sentencing courts should accord the guidelines. The Commission firmly believes that sentencing courts should give substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose, and that *Booker* should be read as requiring such weight. During the process of developing the initial set of guidelines and refining them throughout the ensuing years, the Commission has considered the very factors listed at section 3553(a) that were cited with approval in *Booker*. Congress in fact mandated that the Commission consider all the factors set forth in 3553(a)(2) when promulgating the guidelines,[6] and they are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a).[7]

In addition, Congress through its actions has indicated its belief that the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guideline and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and over 680 amendments, many of which where promulgated in response to congressional directives, have withstood congressional scrutiny. Such congressional approval can only be interpreted as a sign that Congress believes the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. In short, sentencing courts should give substantial weight to the Federal Sentencing Guidelines as they are the product of years of careful study[8] and represent the integration of multiple sentencing factors.[9]

I. Ongoing Commission Activities

Notably, the *Booker* decision left intact all of the Sentencing Commission's statutory obligations under the Sentencing Reform Act. The Court stated, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the

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[5] *See United States v. Hughes*, __ F.3d __ 2005 WL 147059 (4th Cir. Jan. 24, 2005) at *3.
[6] *See* 28 U.S.C. § 994(a)(2).
[7] *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).
[8] *United States v. Claiborne*, __ F.3d __, 2006 WL 452899 (8th Cir., Feb. 27, 2006).
[9] *Jimenez-Beltre*, __ F.3d __, 2006 WL 562154.

Guidelines accordingly,"[10] and the Commission has set an aggressive agenda in each of these areas.

In October 2005, the Commission promulgated two emergency amendments. The first addressed intellectual property offenses as directed by Congress in the Family Entertainment and Copyright Act of 2005. The second amendment increased penalties for obstruction of justice offenses involving domestic or international terrorism as directed by the Intelligence Reform Act of 2004. The Commission also made changes during the 2004-2005 amendment cycle to the antitrust and identity theft guidelines.

On January 27, 2006, the Commission published a notice for comment in the *Federal Register* covering fourteen substantive areas of criminal law including, immigration, steroids, intellectual property, and terrorism offenses. To better inform our decision making process, we held two regional hearings on immigration and conducted a public meeting addressing the issue of attorney-client waiver in the Chapter Eight organizational guidelines. We expect to submit amendments covering several of these areas to Congress on May 1, 2006.

The Commission also has increased its training and outreach efforts since *Booker*. In calendar year 2005, commissioners and Commission staff held training programs in all twelve judicial circuits and 61 districts, which resulted in the training of over 9,700 judges, clerks, staff attorneys, probation officers, prosecutors, and defense attorneys.

The Commission also has focused on its statutory duties with regard to data collection, analysis, and reporting. Under the Sentencing Reform Act, the Commission is statutorily charged with being the clearinghouse of federal sentencing statistics,[11] including the systematic collection and dissemination of information about sentences actually imposed.[12] Immediately after the Supreme Court's decision in *Blakely*,[13] which brought uncertainty to the federal sentencing system, the Sentencing Commission sought to refine its data collection and analysis to provide the criminal justice community with "real time" data on sentencing trends. The Commission's data collection was designed for annual reporting, not "real-time" reporting, and moving to real-time data collection continues to require significant resources.

After *Booker*, the Commission categorized sentences into eleven categories[14] designed to capture the nuances taking place in sentencing that previously had not existed. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limits, and unclear or incomplete documentation submitted to the Commission makes it even more difficult to characterize individual cases as falling into these categories. The Commission relies on documentation

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[10] *Booker* 543 U.S. at 264.
[11] 28 U.S.C. § 994(a)(12).
[12] 28 U.S.C. § 994(a)(14-16).
[13] *Blakely v. Washington*, 542 U.S. 296 (2004).
[14] For a complete description of the eleven categories developed by the Commission after *Booker*, *see* p. D-4 of the *Booker* Report, available at www.ussc.gov.

statutorily required to be sent by the courts under 28 U.S.C. § 994(w)(1): the indictment, written plea (if any), presentence report, judgment and commitment order, and statement of reasons form as the basis of its data files.[15] If the documentation is not complete or is filed untimely, our data files cannot account accurately for what is taking place at sentencing.

The Statement of Reasons is the form adopted by the Judicial Conference of the United States to report the sentencing court's reasons for imposing a particular sentence as statutorily required under 18 U.S.C. § 3553(c).[16] Unfortunately, individual courts are not bound to use the particular adopted form, and over the years the Commission has received many variations. After *Booker* it became evident that the pre-*Booker* form – in all its variations -- was not sufficient to capture sentencing practices in an advisory guidelines system. The Commission worked with the Criminal Law Committee of the Judicial Conference to revise the Statement of Reasons form so that it could capture all the nuanced aspects of sentencing in a post-*Booker* world. That document is relatively new, and as to be expected, the Commission has had some difficulty capturing some of the nuanced sentencing taking place prior to adoption of the form. This difficulty will continue until the form is used uniformly. For example, of the more than 65,000 cases reviewed by the Commission for its *Booker* report, approximately 45,000 of those cases used Statement of Reasons forms issued in December 2003 or thereafter, including the Statement of Reasons form issued in June 2005 in response to *Booker*. Of the remaining 20,000 cases, a variety of forms are being used.

The Commission applauds the advisory committee for the Federal Rules of Criminal Procedure on its efforts to impose uniformity with respect to use of the statement of reasons form.[17] Congress also has taken steps to address this documentation issue through the PATRIOT Act,[18] and the Commission looks forward to working with the Judicial Conference to devise one form to be used uniformly by all courts. More uniform completion of sentencing documentation will ensure that the Commission can continue to inform Congress, the Judiciary, the Executive branch, and the federal criminal justice community about emerging sentencing trends and practices.

II. The Booker Report

The Commission's emphasis on real-time data collection and analysis has enabled it to complete a comprehensive report on the impact of *Booker* in relatively short order. In August 2005, the Commission announced its decision to issue a report to examine

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[15] *See* 28 U.S.C. § 994(w)(1) requiring the chief judge of each court to submit this documentation to the Commission within 30 days of sentencing.

[16] The PROTECT Act amended 18 U.S.C. § 3553(c) to require courts, "at the time of sentencing" to state the reasons for imposing an outside-the-range sentence "with specificity on the written order of judgment and commitment." 18 U.S.C. § 3553(c)(2) (2005).

[17] *See* Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States).

[18] *See*, Sec. 735 of H. Rep. 109-174, Pt I (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission").

whether any initial *Booker* impact could be determined and, if so, to determine the magnitude of such impact. The Commission sought to answer questions in three areas:

(1) Guideline Compliance: Has *Booker* affected the rates of imposition of sentence within and outside the applicable guideline range and, if so, how has it affected sentence type and length, including the extent of departure or variance from the guideline range?

(2) Historical Trends: Has *Booker* affected federal sentencing compared to sentencing practices occurring prior to the decision?

(3) Reasons for Sentences Imposed: In what circumstances do judges find sentences outside the guideline system more appropriate than a guideline sentence? In other words, for what reasons do judges impose non-guidelines sentences and have those reasons changed after *Booker*?

The Commission also sought to examine the appellate courts' responses to *Booker*, particularly whether they were developing case law on what constitutes a "reasonable" sentence.[19]

In compiling this "*Booker* report," the Commission reviewed three relevant time periods to ascertain historical sentencing practices and compare them with post-*Booker* practices:[20] (1) the pre-PROTECT Act period, which covers cases sentenced from October 1, 2002 to April 30, 2003, the date of the PROTECT Act's enactment;[21] (2) the post-PROTECT Act period, which covers cases sentenced between May 1, 2003 and June 24, 2004, the date of the *Blakely* decision; and (3) the post-*Booker* period, which covers cases sentenced between January 12, 2005 and January 11, 2006.

The Commission looked at national sentencing practices as well as sentencing practices for the four major offense types that comprise over 70 percent of the federal caseload: theft/fraud, drug trafficking, firearms, and immigration offenses.[22] The

[19] *See Jimenez-Beltre*, __ F.3d__, 2006 WL 652154 (1st Cir., Mar. 9, 2006)(en banc)("We have heard this case *en banc* to provide stable guidance in this circuit for the determination and review of post-*Booker* sentences.").

[20] The Commission customarily reports data by fiscal year, which runs October 1 through September 30. The Commission concluded, however, that use of the fiscal year data for its *Booker* report would not lend itself to meaningful analysis.

[21] The Commission chose this seven-month period as representative of pre-PROTECT Act sentencing practices because it was during Fiscal Year 2003 that the Commission refined its methodologies for distinguishing government-sponsored from other downward departures. In its 2003 Departures Report, the Commission estimated the rate of government-sponsored departures for fiscal years prior to 2003. As such, for purposes of the *Booker* report, the Commission chose to report what it felt was the most reliable data available for capturing "pre-PROTECT Act" sentencing practices. *See Booker* Report at 53 n.265 (explaining methodology for determining pre-PROTECT Act period). For purposes of this testimony, other fiscal year estimates will be reported based on information prepared for the 2003 Departures Report, available at www.ussc.gov.

[22] Immigration offenses are broken into two categories: "alien smuggling offenses" sentenced pursuant to USSG §2L1.1 and "unlawful entry offenses" sentenced pursuant to USSG §2L1.2.

Commission also reviewed certain specific classes of offenders and offenses to ascertain post-*Booker* and historical sentencing practices. Because of the limitations set out above about the uniformity of sentencing documentation, some caution should be exercised in drawing certain conclusions from the post-*Booker* data,[23] but some observations can be made.

A. Guideline Conformance

One measurement of *Booker*'s impact on federal sentencing is the rate of sentences imposed in conformance with the guidelines. As indicated in *Booker*, courts must still "consider the Guidelines' sentencing range established for . . . the applicable category of offense committed by the applicable category of defender."[24] This means that the courts must continue to determine and calculate the applicable guideline range, consult the guidelines, and take them into consideration at the time of sentencing, an approach approved by a number of appellate courts.[25]

The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines after *Booker*. The national average for within-range sentences after *Booker* is 62.2 percent. By comparison, in fiscal year 2001 the within-range rate was 64.0 percent and in fiscal year 2002, it was 65.0 percent. In the pre-PROTECT Act period it was 68.3 percent, and post-PROTECT Act, the rate was 71.7 percent.

National data show that when within-range sentences and government-sponsored,[26] below-range sentences are combined, sentencing in conformance with the guidelines is 85.9 percent. This "conformance rate" remained stable throughout the year that followed *Booker*.

The post-*Booker* national conformance rate is comparable to historical sentencing trends, although the degree of comparability depends on the historical period being used for comparison. For example, based on the Commission's estimates of the rates of government-sponsored downward departures prior to 2003 combined with the rates of within-range sentences, the national conformance rate in fiscal year 2001 was 88.4 percent and in fiscal year 2002, it was 88.9 percent. In the pre-PROTECT Act period, the within-range and government-sponsored, below-range conformance rate was 90.6 percent and during the post-PROTECT Act period, it was 93.7 percent.[27]

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[23] For a discussion of the cautions associated with the *Booker* Report's data, *see Booker* Report at v-vi.
[24] *Booker*, 543 U.S. at 259.
[25] *See, e.g.*, *United States v. Vaughn*, 430 F.3d 518 (2nd Cir. 2005); *United States v. White*, 405 F.3d 208, 218 (4th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Stone*, 432 F.3d 651 (6th Cir. 2005); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041 (7th Cir. 2005); *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005); *United States v. Cantrell*, 433 F.3d 1269 (9th Cir. 2006).
[26] Government-sponsored, below-range sentences include sentences outside the range that were made for reasons such as "pursuant to plea," "deportation," and "savings to the government." *See also* discussion on page 20 of the *Booker* Report for more circuit decisions approving this approach to sentencing.
[27] For an illustration of this conformance rate over time, see Figure 3 of the *Booker* Report at 56.

During this Post-*Booker* period, 55 percent of the 94 districts (52) have compliance rates above the national average of 62.2 percent. Government-sponsored, below-range sentences still account for the highest percentage of below range sentences post-*Booker*, and these types of sentences have increased slightly since *Booker* was decided to 23.7 percent. This compares to a rate of 22.3 percent pre-PROTECT Act and 22.0 percent post-PROTECT Act. By way of comparison, the Commission estimates that the rate of government-sponsored, below range sentences in fiscal year 2001 was 24.4 percent and 23.9 percent in fiscal year 2002.[28]

In 34 districts that have a within-range compliance rate lower than the post-*Booker* national average, the reason is directly attributable to a higher percentage of government-sponsored below range sentences.

Commission data also indicate that the pattern of sentencing within-the-range has not changed after *Booker*. Approximately 60 percent of within-range sentences still are imposed at the bottom of the applicable guideline range.

The Commission conducted similar analyses for the four major offense types.[29] In post-*Booker* theft/fraud cases, the conformance rate is 83.0 percent, compared to 93.4 percent pre-PROTECT Act, and 94.0 percent post-PROTECT Act.

For post-*Booker* drug trafficking offenses, the guidelines conformance rate is 86.5 percent compared to 92.6 percent pre-PROTECT Act, and 95.1 percent post-PROTECT Act. The conformance rate for Post-*Booker* firearms offenses is 82.5 percent compared to 88.8 percent pre-PROTECT Act, and 92.3 percent post-PROTECT Act.

Alien-smuggling offenses sentenced after *Booker* demonstrate a conformance rate of 88.5 percent. This rate compares to 86.4 percent pre-PROTECT Act and 92.8 percent post-PROTECT Act. The post-*Booker* compliance rate for unlawful entry offenses is 89.5 percent compared to 88.0 percent pre-PROTECT Act and 93.3 percent post-PROTECT Act.

B. Sentence Length and Type

During the time periods reviewed by the Commission, the severity of sentences did not change. The average sentence length after *Booker* has increased nationally, including in the four major offense types with the exception of unlawful re-entry offenses.

Nationally, sentences in the pre-PROTECT Act period averaged 56 months. During the PROTECT Act period, sentences averaged 57 months. Post-*Booker*, the

[28] This could be viewed as a continuation in the trend toward more government-sponsored below-range sentences. *See* 2003 Departures Report at 31, 67 (discussing trend in increased rates of below-range sentences granted pursuant to USSG §5K1.1 from 1991 through 2001) available at www.ussc.gov.
[29] For reference to the national conformance rates for the four major offense types across time reported in this testimony, *see Booker* Report at E-1.

national average sentence is 58 months. Theft/fraud sentences also have risen throughout these periods averaging 16, 20, and 23 months respectively. Average sentences for drug offenses have risen from 80 months, to 83 months, to 85 months post *Booker*. Average sentences for firearms offenses have held steady at 60, 61, and 60 months. Similarly, average sentences for alien smuggling offenses have held steady at 16, 17, and 17 months post-*Booker*. Only sentences for unlawful re-entry have fallen post-*Booker*. Sentences in these cases averaged 29 months pre-PROTECT Act, 29 months post-PROTECT Act, and 27 months post-*Booker*.

Related to sentence length is the rate of imposition of sentences of imprisonment. According to Commission data, this rate has not decreased since *Booker*. Courts continue to sentence defendants to a term of imprisonment at a rate consistent with trends during the previous time periods examined. Courts also continue to sentence at the bottom of the applicable guideline range in nearly 60 percent of all cases sentenced within the guideline range.

C. Non-Government-Sponsored Outside-the-Range Sentences

The Commission did detect an increase in non-government sponsored, below-range sentences following *Booker*. These are sentences that are below the applicable guideline range and the court has: 1) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission[30] ("departures"); 2) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission, and additionally mentions *Booker* or cites to 18 U.S.C. § 3553(a) ("departure + Booker")[31]; 3) cited only *Booker* or 18 U.S.C. § 3553(a) ("variance")[32]; or 4) not indicated a reason that falls into the previous three categories.[33]

Based on the Commission's best attempts to categorize sentences after *Booker*, the Commission has determined that nationally about 12.5 percent of cases have non-government sponsored, below-range sentences attributable either to guideline departures or *Booker*. By comparison, the non-government sponsored, below-range sentence rate estimated by the Commission for fiscal year 2001 was 11.1 percent and in fiscal year 2002, it was 10.3 percent. During the pre-PROTECT period the rate was 8.6 percent and during the post-PROTECT Act period the rate was 5.5 percent.

Despite this increase in below range sentences from previous time periods, the degree to which sentences are below the range is somewhat smaller than what it was previously. During the post-*Booker* period, the median reduction being granted – either through departures or under *Booker* – is 34.2 percent below the minimum of the range. In fact, since *Booker*, courts have granted sentences 9 percent or less below the minimum of the range more frequently than they did before the decision. By comparison, during

[30] *See Booker* Report at D-4 n.2 for a complete description of this category.
[31] *See Id.* at D-4 n.3.
[32] *See Id.* at D-4 n.4.
[33] *See Id.* at D-4 n.5.

the pre-PROTECT Act period the median reduction was 40.0 percent, and in the post-PROTECT Act period it was 35.1 percent.[34]

Moreover, the rate of imposition of above-range sentences after *Booker* has doubled to 1.6 percent. During fiscal year 2001, it was at 0.6 percent and in fiscal year 2002, it was 0.8 percent. It remained at 0.8 percent throughout the pre- and post-PROTECT Act period. A multivariate analysis undertaken for this report confirmed that the likelihood of receiving an above-range sentence is higher post-*Booker* than pre-*Booker*.

The Commission looked at non-government sponsored, below-range sentences for the four major offense types. For theft/fraud cases, the post-*Booker* non-government sponsored, below-range sentence imposition rate (combining guideline downward departures and sentences based on *Booker*) is 14.2 percent. This compares to a non-government sponsored, below-range sentence imposition rate of 5.8 percent pre-PROTECT Act, and 5.1 percent post-PROTECT Act.

A review of drug trafficking cases demonstrates a non-government sponsored, below-range sentence imposition rate of 12.8 percent after *Booker*. This compares to 7.3 percent pre-PROTECT Act and 4.7 percent post-PROTECT Act.

The non-government sponsored, below-range sentence imposition rate for post-*Booker* firearms cases is 15.2 percent compared to 10.2 percent pre-PROTECT Act and 6.5 percent post-PROTECT Act.

Alien smuggling cases sentenced post-*Booker* demonstrate a non-government sponsored, below-range sentence imposition rate of 9.1 percent compared to 13.1 percent pre-PROTECT Act and 6.6 percent post-PROTECT Act. Unlawful entry cases demonstrate a non-government sponsored, below-range sentence imposition rate 9.5 percent compared to 11.6 percent pre-PROTECT Act and 6.4 percent post-PROTECT Act.

The Commission undertook a review of the reasons courts were giving for the sentences they impose. The Commission's data indicate that even post-*Booker* courts rely predominantly on traditional guidelines departure reasons for imposing an outside-the-range sentence. For guidelines downward departures, courts cite criminal history, general mitigating circumstances, family ties, and aberrant behavior most often to explain a below-range sentence.

For cases in which a court relies solely on *Booker* to sentence below the range, the sentence is most often accompanied by a general citation to the *Booker* decision or factors under 18 U.S.C. § 3553(a) but also may include a citation to traditional guidelines departure reasons. Making up a significant portion of the Commission's "otherwise below the range" category, however, are those cases in which insufficient information in

[34] *See Booker* Report at 66 (chart explaining median decreases across time for all guidelines and four major offense types).

the documentation made it impossible for the Commission to ascertain what happened at sentencing. The Commission believes that more uniform sentencing documentation will help ensure the Commission's ability to capture what is taking place in courts after *Booker*.

The Commission also undertook a series of multivariate analyses as part of its review of post-*Booker* sentencing. Multivariate analyses are included to assess whether any changes in national sentencing trends are significant after controlling for a number of relevant factors. This is one statistical method employed to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The Commission undertook this type of analysis to determine what factors may be statistically significant in post-*Booker* sentencing compared with other time periods.

D. Specific Offense and Offender Issues

The Commission undertook several analyses focused on specific sentencing issues and offender groups that are of perennial interest to the federal criminal justice community, or for which the issue of a *Booker* effect naturally arises. Specifically, the Commission examined sentencing practices regarding the use of cooperation without a government motion as a reason for the imposition of a non-government-sponsored, below-range sentence, sex offenders, crack cocaine offenders, first offenders, career offenders, and the rate of imposition of below-range sentences based on early disposition programs or other "fast track" mechanisms.

1. Cooperation Reduction without a Government Motion

The Department of Justice, in particular, has voiced concern that courts would use *Booker* authority to grant sentence reductions for defendant's cooperation absent a government motion, as outlined in 18 U.S.C. § 3553(e).[35] The Commission reviewed its data to ascertain whether these cases were occurring. The Commission's analysis suggests that these cases do occur post-*Booker*, as they did before *Booker*. The Commission cautions, however, that this data should be considered with the caveat that in many cases, the statement of reasons form may indicate that the court sentenced below the range for cooperation but does not indicate whether or not the government made a motion for substantial assistance. As such, the Commission's data may overstate the frequency with which this type of sentence is occurring.

Commission data indicate that post-*Booker* there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with the government was the only reason cited. In the remaining 230 cases, it was one of a combination of reasons for the below-range sentence. By

[35] *See* Hearing on: "Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines, before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives (Feb. 10, 2005) (Written Statement of Assistant Attorney General Christopher A. Wray at 15), available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf.

comparison, there were 17 total cases in the pre-PROTECT Act period and 29 total cases in the post-PROTECT Act period.

The Commission compared the extent of reductions below the applicable guideline range in cases where it could determine the government moved for a substantial assistance reduction and cases where there was no motion or the documentation was unclear. In cases with a government motion, the median percent decrease below the applicable range was 50 percent (or 28 months) below the minimum sentence. In cases where there was no motion, or the documentation was not clear, the median percent decrease was 35.1 percent (or 13 months).

2. Sex Offenses

A major impetus for enactment of the PROTECT Act was congressional concern that the rate of downward departures was too great to control and deter crime, particularly sex offenses against children. Since 2003, a number of legislative changes and guideline amendments have increased punishment for these offenses. In order to ascertain sentencing practices post-*Booker*, the Commission divided sex offenses into two categories: 1) criminal sexual abuse offenses, including rape, statutory rape, and inappropriate sexual contact,[36] and 2) sexual exploitation offenses, including crimes related to the production, trafficking, and possession of child pornography.[37]

The Commission notes that with respect to the analysis undertaken for this class of offenses, conclusions are cautionary. Sex offense cases make up a small portion of the national sentencing caseload, and such a small number of cases potentially distorts both the percentages and averages reported. For example, during the pre-PROTECT Act period, the total number of sex offense cases included in the two categories outlined above was 563 cases. During the post-PROTECT Act period the number was 1,206 cases. Post-*Booker* the number of cases was 1,330. Also, the recent changes in the law have resulted in substantial increases in sentences and the full impact of these changes may still be working through the system.

With these caveats, the Commission's data suggest that the average sentence length for cases sentenced pursuant to the criminal sexual abuse guidelines have remained fairly constant. Imposition of below-range sentences declined for overall criminal sexual abuse cases during the post-PROTECT Act period but increased slightly after *Booker*. The rates of imposition of below range sentences for abusive sexual contact cases and sexual abuse of a minor decreased in the post-PROTECT Act period, but increased during the post-*Booker* period. The majority of below-range sentences involving criminal sexual abuse are imposed on offenders with little or no criminal history. The rate of above-range sentences increased after *Booker* for criminal sexual

[36] The criminal sexual abuse category includes offenses sentenced under USSG §§2A3.1 (Rape), 2A3.2 (Statutory Rape), 2A3.4 (Abusive Sexual Contact).
[37] This category of cases includes offenses sentenced under the section G guidelines covering sexual exploitation of a minor, including USSG §§2G2.1 (Production), 2G2.2 (Trafficking), 2G2.4 (Possession).

abuse and abusive sexual contact offenses, but that rate declined for offenses involving sexual abuse of a minor.

Sexual exploitation offenses, like criminal sexual abuse offenses, comprise a small number of federal cases. These cases follow the national trend of increased sentence lengths. In each of the three major classes of offenses – production, trafficking, and possession, sentence lengths have increased. For production offenses, average sentences have increased from 146 to 209 months over the three time periods. Average sentences for trafficking increased from 65 to 92 months over the same time periods, and average sentences for possession increased from 25 to 42 months.

The Commission's data suggest that the rates of below-range sentences in sexual exploitation offenses have increased following *Booker*. For production offenses, the rate of below-range sentences went from 3.8 percent pre-PROTECT Act to 1.8 percent post-PROTECT Act to 11.3 percent post-*Booker*. Similarly, rate of below-range sentences for trafficking offenses increased from 13.7 percent pre-PROTECT Act to 12.2 percent post-PROTECT Act to 19.1 percent post-*Booker*. The rate of below-range sentences for possession offenses also have increased since *Booker*. In the pre-PROTECT Act period the rate was 25 percent. During the post-PROTECT Act period the rate decreased to 12.3 percent but has increased post-*Booker* to 26.3 percent. The rate of imposition of above-range sentences has increased post-*Booker* for possession offenses, but has decreased over time for cases involving production or trafficking in child pornography.

3. Crack Cocaine Offenses

Some have speculated whether courts would use their *Booker* authority to express disapproval of the penalty structure Congress created to address crack and powder cocaine offenses, and the federal sentencing guidelines implementation of that penalty structure. Commission data do not indicate that this is occurring frequently after *Booker*. It does not appear that courts are using *Booker* or other 18 U.S.C. § 3553(a) factors to vary from the penalty structure on a frequent basis. The Commission reviewed 610 crack cocaine cases in which there was a non-government sponsored below-range sentence. In only 35 of those cases did the court indicate specific discontent with the 100-to-1 penalty structure for crack and powder offenses. Commission data indicate that the overwhelming majority of courts are not explicitly citing the crack/powder cocaine disparity as a reason to impose below-range sentences.

Sentencing practices regarding crack offenses generally have followed the same patterns exhibited nationally and within the other major drug types: powder cocaine, heroin, marijuana, and methamphetamine. Following *Booker*, 84.8 percent of crack cases were sentenced in conformance with the guidelines, including government-sponsored below-range sentences. This is comparable to the national sentencing rate of 85.9 percent. Sentence length for crack offenses also has remained fairly stable across time with post-*Booker* sentences averaging 124 months compared to 123 months pre-PROTECT Act and 127 months post-PROTECT Act.

To date, no circuit court has concluded that a policy disagreement with the crack and powder cocaine sentencing ratio is a proper basis for imposing a non-guideline sentence. The First Circuit reviewed a case in which the district court employed a 20-to-1 crack/powder ration, instead of the congressionally mandated 100-to-1 ratio.[38] The First Circuit reversed the decision noting that a district court's general disagreement with broad-based policies enunciated by Congress or the Commission, cannot serve the basis for sentencing outside the applicable guidelines range. The Fourth Circuit also came to a similar conclusion stating that "[i]n arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity that totally is at odds with the will of Congress."[39]

4. First Offenders

First offenders are defined as those with no prior contact with the criminal justice system whatsoever. The Commission's analysis suggests that the rate of imposition of below-range sentences for first offenders increased after *Booker*. During the pre-PROTECT Act period, first offenders received non-government sponsored, below-range sentences in 9.8 percent of cases. During the post-PROTECT Act period that rate was 6.1 percent. After *Booker*, the rate of non-government sponsored, below-range sentences is 15.2 percent. But the rate of above-range sentences for first offenders also has

[38] *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006). The First Circuit has agreed to hear this case *en banc*.
[39] *United States v. Eura*, No. 05-4437, 2006 WL 440099 (4th Cir., Feb. 24, 2006).

increased after *Booker* from .7 percent pre-PROTECT Act to 1.2 percent post-*Booker*. Even though first-time offenders are more likely to receive sentences either above or below the guideline range post-*Booker*, the proportion of them receiving imposition of prison time has remained constant. Moreover, the average sentencing length for this class offenders has remained constant: 37 months pre-PROTECT Act period, 39 months post-PROTECT Act period, and 39 months post-*Booker*.

5. Career Offenders[40]

The rate of below-range sentences for career offenders increased after *Booker*, the majority of these sentences being given in drug-trafficking cases. During the pre-PROTECT Act period, the rate of imposition of non-government sponsored, below-range sentences was 10 percent. That rate decreased to 7.3 percent during the post-PROTECT Act period and has increased to 21.5 percent post-*Booker*. Sentence length for career offenders has decreased after *Booker*, which continues a trend that began before *Booker*. The average sentence for career offenders during the pre-PROTECT Act period was 190 months. That average decreased to 189 months during the post-PROTECT Act period and decreased again to 180 months post-*Booker*.

6. Early Disposition Programs

Early disposition or "fast track" programs have existed in some form for a number of years, primarily in the border districts to assist in the burgeoning caseload faced by U.S. Attorneys' offices and the courts. In 2003, as part of the PROTECT Act, Congress formalized these programs by requiring the Attorney General to authorize their existence. Congress also directed the Commission to promulgate a policy statement authorizing a sentence reduction up to four levels if the government filed a motion for such departure pursuant to an early disposition program.

Currently, the Department of Justice has authorized early disposition programs in 16 districts. Some commentators, including the Commission in its 2003 Departures Report, have speculated whether courts that do not have an authorized early disposition program would use their *Booker* authority to grant below-range sentences on par with those that would be given in an early disposition program district. The Commission's data do not reflect that these concerns generally have been realized. In districts without early disposition programs, the data do not reflect widespread use of *Booker* to grant below-range sentences in immigration cases similar to those available in approved early disposition program districts.

The Commission has not identified any reported cases in which circuit courts have upheld sentences below the guidelines range in non-Early Disposition Programs districts, because the district court cited the resulting disparity between districts that qualify for early disposition program departures and those that do not qualify. Two circuits have rejected the defendant's argument that the sentence was unreasonable because the district judge failed to consider the unwarranted disparities in sentencing

[40] The Commission used the guideline definition of career offender for this analysis. *See* USSG §4B1.1.

created by the existence of early disposition programs in other jurisdictions. These circuits explained that the policymaking branches of government can determine that certain disparities are warranted and thus courts need not avoid the disparity created by these programs.

E. Regional and Demographic Differences in Sentencing Practices

The Commission also undertook a review of what impact *Booker* may be having on regional and demographic sentencing practices. Commission data indicate that the regional disparity that existed prior to *Booker* continues to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, however, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*, both because of an increase in government-sponsored below range sentences and non-government-sponsored, below-range sentences.

The Commission undertook a series of multivariate analyses to ascertain what factors are statistically significant in sentencing post-*Booker* as compared with sentencing in the pre-PROTECT and post-PROTECT Act periods. The conclusions from these analyses are cautionary because although they control for a number of factors associated with sentencing, there exist factors that cannot be measured. Unmeasured factors in the analyses conducted may include, for example, violent criminal history[41] or the bail decision.[42] If these "unmeasured factors" were able to be included in the models, significance of demographic factors might change.

A detailed multivariate analysis conducted on post-*Booker* data demonstrates that male offenders continue to be associated with higher sentences than female offenders. This association was evident every year from 1999 through the post-*Booker* period.

Another multivariate analysis suggests that following *Booker*, black offenders are associated with sentences that are 4.9 percent higher than white offenders. Although this factor did not exist in the post-PROTECT Act period, it did appear in fiscal years 1999, 2000, and 2001.[43]

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[41] The presence of violent criminal history may lead the court to sentence higher in the prescribed range. The Commission's datafile does not have information on the type of criminal history behavior. In 2002, the Commission created a datafile which took a 25 percent random sample of cases sentenced in Fiscal Year 2000. This datafile looked more closely at offender's criminal conduct, including detailed information on the type of criminal history the offender had. Using this data (the Intensive Study Sample 2000, or ISS2000), it was found that 24.4 percent of white offenders had violent criminal history events, as compared to 43.7 percent of black offenders, 18.9 percent of Hispanic offenders, and 23.7 percent of "other" offenders.

[42] Offenders who are not given the opportunity to post bail, or may not be able to afford bail, are detained for the entire period before their sentencing. Thus, if an offender's final sentencing range is 6-12 months, and the offender serves 10 months in prison before the final adjudication of the sentence, the court could sentence the offender to "time served," and the sentence would be 10 months. An offender who was out on bail during this process may get a 6-month sentence for the same behavior, which the court may have wanted to impose on the first offender if the bail circumstances were similar.

[43] *See* Figure 13 of the *Booker* Report at 109.

Another multivariate analysis suggests that following *Booker*, "other" race offenders – primarily Native Americans – are associated with sentences 10.8 percent higher than white offenders. This association also was found in fiscal year 2002.[44]

F. Appellate Review

No discussion about the impact of *Booker* on federal sentencing would be complete without examining the post-*Booker* appellate court decisions interpreting and applying *Booker*. Like the data on sentencing practices, the appellate law surrounding *Booker* continues to evolve. It took the appellate courts several months to wade through the procedural issues associated with *Booker* so it has only been within the last few months that the courts have begun in earnest to develop a post-*Booker* body of case law that gives some guidance about what constitutes an "unreasonable" sentence.

As the Supreme Court specifically stated in *Booker*, district courts must continue to determine and calculate the applicable guidelines range. In doing so, the courts have concluded that determination and calculation of the applicable guideline range continues to include judicial factfinding by the court to resolve disputed issues. Circuits that have ruled on this also have concluded that the resolution of disputed sentencing issues may be done using a preponderance of the evidence burden of proof.[45] The appellate courts also have upheld the post-*Booker* use of hearsay evidence and acquitted conduct when fashioning a sentence in the advisory guidelines scheme.

Courts have concluded that once a guideline range is determined and calculated, it must be considered by the sentencing court. This consideration is part of the sentencing courts overall consideration of the sentencing factors that must be considered in imposing a sentence.[46] The record on appeal must include sufficient evidence to demonstrate affirmatively the court's consideration of these factors, including the applicable guideline sentence.

1. Reasonableness Review

In *Booker*, the Supreme Court instructed the appellate courts to "review sentencing decisions for unreasonableness."[47] The reasonableness standard of review is not particularly clear-cut, having been inferred by Justice Breyer from "statutory language, the structure of the [Sentencing Reform Act], and the 'sound administration of

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[44] *Id.*
[45] *See Booker* Report at 22 *citing United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Ledesma*, No. 05-1563, 2005 WL 3477715 (3d Cir. Dec. 20, 2005) (unpub.); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006); *United States v. Tynes*, No. 05-13035, 2005 WL 3536189 (11th Cir. Dec. 28, 2005) (unpub).
[46] *See* 18 U.S.C. § 3553(a) listing the seven factors to be considered when imposing sentence.
[47] *Booker*, 543 U.S. at 264.

justice'."[48] The appellate courts, therefore, have been somewhat cautious in developing guidance on a reasonable sentence.

Six circuits – the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth – have held that a sentence within the applicable guideline range is presumptively reasonable. These circuits declined to find a within-range sentence to be *per se* or conclusively reasonable because, in the view of some, to do so would be "inconsistent with the Supreme Court's decision in *Booker*, as such a standard would effectively re-institute mandatory adherence to the Guidelines."[49] This does not mean that a sentence outside the applicable guideline range is presumptively unreasonable, nor does it mean that a guidelines sentence is reasonable in the absence of evidence that a district court followed its statutory mandate to impose a sentence after having considered the applicable sentencing factors under 18 U.S.C. § 3553(a)(2). So far, only one appellate court – the Eighth Circuit -- has found a within-guideline range sentence to be unreasonable.

With respect to guideline departures, the circuit courts agree that after *Booker* they still lack jurisdiction to review a court's denial of a motion for downward departure, if it is clear that the court properly understood the authority to depart and chose not to exercise it.

2. Jurisdiction

Separate and apart from the reasonableness analysis, circuit courts also are examining issues of jurisdiction. Congress provided for limited appellate review of sentences under the Sentencing Reform Act. Prior to *Booker*, neither the government nor the defendant had the right to appeal a sentence properly calculated within the applicable guideline range.[50] *Booker* did not excise this jurisdictional limit on appellate review and some have posited that the appellate courts do not have jurisdiction to hear a post-*Booker* appeal of a within-range guideline sentence. To date, that conclusion has not found support in reported appellate cases. Three circuits – the First, Eighth and Eleventh – have specifically rejected this argument.

As a final note on appellate review, the circuit courts have reasoned that *Booker* does not apply to mandatory minimum sentences, which are driven by statutes, not by the sentencing guidelines. Similarly, the post-*Booker* appellate courts have agreed that the fact of a prior conviction is not a fact that a jury must find beyond a reasonable doubt. Courts, therefore, that have considered the Armed Career Criminal Act have agreed that *Booker* does not have an impact, although they do differ on the extent of the exception.

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[48] *Booker*, 543 U.S. at 260-61, *citing Pierce v. Underwood*, 487 U.S. 552, 559-60.

[49] *See Booker* Report at 26 (citing *United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005) citing *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). *See also United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005); *Mykytiuk*, 415 F.3d at 607;*Talley*, 431 F.3d at 786)).

[50] See 18 U.S.C. § 3742(a).

III. Conclusion

The *Booker* decision has had an impact on federal sentencing. The magnitude of the impact depends on to which historical period one compares post-*Booker* sentencing practices. The Commission's review of historical sentencing practices does not indicate whether the post-PROTECT Act trend toward increased conformance with the guidelines system would have continued without *Booker*. Nor does it indicate that, absent the PROTECT Act, the rate of conformance with the guidelines would have decreased.

The Commission commends the Congress and the Department of Justice for the period of time they have allowed post-*Booker* sentencing to occur before considering what, if any, legislative action should be taken in response to the decision.

After a year of collecting data, monitoring appellate court decisions, and having issued its *Booker* report, the Commission believes that it is time for serious consideration of a legislative response to *Booker*. As anticipated by the decision itself:

> Ours of course is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution that Congress judges best for the federal system of justice.[51]

The Commission strongly believes that any legislation considered should preserve the core principles of the bipartisan Sentencing Reform Act of 1984 in a constitutionally sound fashion. The Commission believes that, at the very least, a legislative response to *Booker* should include the following four adjustments, all of which can be made within the Sentencing Reform Act.

First, a legislative response should include codification of the three-step process for imposing a sentence. As outlined above, this approach ensures that the federal sentencing guidelines are afforded the appropriate consideration, determination and ultimately, the proper weight to which they are due under *Booker*. The sentencing guidelines embody all of the applicable sentencing factors for a given offense and offender. The Commission believes that the three-step approach to sentencing is consistent with the *Booker* remedy.

Second, the Commission believes that any legislative response to *Booker* should address the appellate review process and standard.

Third, as the Commission has noted throughout this testimony, timely and uniform use of sentencing documentation is imperative to the Commission's ability to accurately ascertain and report about national sentencing practices. Any legislative response should include the continued importance of proper and uniform sentencing documentation being sent to the Commission.

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[51] *Booker*, 543 U.S. at 265.

Fourth, the Commission believes that a legislative response should clarify that a sentence reduction for cooperation or substantial assistance is impermissible absent a motion from the government.

The Commission is considering holding its own *Booker* hearings.

The Commission stands ready to work with Congress, the Judiciary, the Executive branch, and all other interested parties in refining the federal sentencing system so that it preserves the core principles of the bipartisan Sentencing Reform Act in a constitutionally sound manner that would lessen the possibility of further litigation of the system itself. Such an approach would be the best for the federal criminal justice system.

Mr. Chairman, Ranking Member Scott, and Members of the Committee, thank you for holding this very important hearing. I will be glad to answer any questions you may have.