TO: **U.S. Sentencing Commission**

RE: **Hearing Feb. 16, 2012**
Options For Federal Sentencing After Booker

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Thank you for inviting me to testify at the "Improving the Advisory Guideline System" roundtable I have carefully considered the thoughtful Prepared Testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security on Oct. 12, 2011, and I offer my opinion on each of the Commission's specific proposals.

Introductory Remarks

First, please allow me to make a few general comments. It seems to me very clear that Congress in 1984 intended the Federal Sentencing Guidelines, as promulgated by the U.S. Sentencing Commission, to be binding on federal judges.[1] Evidence and experience establishes that the Guidelines were largely successful in eliminating unwarranted sentencing disparity based upon factors such as race, gender, ethnicity, judicial philosophy, and geography.[2] Though there is perhaps additional unwarranted

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[1] See 18 U.S.C. section 3553(b)(1) (1984), which makes conformity with the guidelines mandatory unless a departure is warranted, and 18 U.S.C. section 3553(b)(2) (2003), the Feeney Amendment, which prevents judges from departing from the Guidelines for certain offenses. See also Susan R. Klein and Sandra Guerra Thompson, "The DOJ's Attack on Federal Judicial Leniency, The Supreme Court's Response, and the Future of Criminal Sentencing," 44 Tulsa Law Review 519 (2009) (detailing the history of the passage of the Feeney Amendment as part of the larger fight between Congress and the Supreme Court over the judicial role in sentencing).

[2] See Susan R. Klein and Jordan M. Steiker, "The Search for Equality in Criminal Sentencing," 2002 Supreme Court Review 223 (2003); U.S. Sent'g Comm'n Results of Survey of United States District Judges January 2010 Through March 2010 (2010) (finding that 78% of more than 600 federal district judges surveyed agreed "somewhat" or "strongly" that the Guidelines have reduced unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar crimes). But see Office of Defender Services Fact Sheet Responsive to Sentencing Commissioner Patti Saris' Testimony, www.fd.org.

disparity stemming from law enforcement investigative and prosecutorial charging decisions,[3] it was unseemly, to say the least, to have identical defendants receiving widely disparate sentences based upon which judge they drew.

The Commission should be extremely proud of the Guidelines Manual that it produced and its salutary effect on sentencing in the federal system and in the many states that emulate the federal system. Not only has unwarranted disparity been reduced, but a new level of transparency surrounds the sentencing process. The judiciary, Congress, and the public can view what the Commissioners and other district judges around our nation consider the important reasons for increasing or decreasing sentences (like possession of a weapon, injury to a vulnerable victim, organizational role, and family ties). These same constituents can easily discover what district judges find important now that these judges are required to justify each sentence on the record, and Commissioners can get feedback through the Judicial Statements of Reasons. The Commissioners can then utilize this feedback in drafting further amendments to the guidelines. The former black box, where a defendant went in and an inexplicable number came out,[4] has turned into an informative show where the viewer can identify why a particular sentence was selected (based upon offense and offender characteristics and the other factors listed in 3553(a)), and an appellate court can review those stated reasons. Three cheers for the Sentencing Reform Act and the Commission!

As the U.S. Sentencing Commission data reflects, defendants were sentenced within the guideline range (or below the guideline range at the request of the government) in 93.7% of all cases immediately following the Feeney Amendment in 2003. That is astoundingly successful. However, after the Booker decision that figure fell to 85.9% in 2006, and then further to 80.4% in 2010.[5]

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[3] Prosecutorial authority is tempered somewhat by the real offense part of the FSG, which used to permit (but now simply allows) judges to sentence for relevant conduct - what the defendant actually did rather than simply what the prosecutor chose to charge. This process is assisted greatly by the Probation Department, which is tasked in its PSRs with disclosing all criminal conduct engaged in by a defendant regardless of whether it is included in a negotiated plea.

[4] The abolition of parole meant that the sentence the judge gave was the true sentence, rather than a starting point that could be deviated from by a parole commission whose work was not transparent.

[5] Prepared Testimony of Judge Patti B. Saris (hereinafter "Prepared Testimony"), Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives, Oct. 12, 2011, pp. 6, 7, and 20.

My prediction is that the percentage of within guidelines sentences may continue to fall just a bit more before leveling off. Despite the Court's ruling in Booker that the Guidelines are purely advisory, they continue to serve as "mental anchors" in each sentencing decision. This alone gives them great weight, and allows the Sentencing Reform Act to accomplish most of its mission. After all, the vast majority of federal judges were appointed after the Sentencing Reform Act was enacted in 1984, and this is the only sentencing system they know.

I personally agree with many critics that federal sentences are, on the whole, much too high, and we may lack the political will to lower sentences across the board.[6] Sentences are particularly unnecessarily high for controlled substances, fraud, and child pornography offenses, and judges understandably react by sentencing below the recommended guideline range in some cases. Thus, fostering judicial leniency by encouraging variances from the guidelines might be viewed as a net benefit. However, allowing each judge to determine her own sentence unfortunately appears to disproportionately benefit white, college-educated, employed U.S. citizens, and has increased racial disparity in sentencing. Recent Sentencing Commission data establishes that during the Post-PROTECT Act period the difference in sentences between black male offenders and white male offenders decreased to 5.5%, but increased to 15.2% in the post-Booker and a startling 20% in the post-Gall period.[7] On the other hand, it also worth considering that some of this disparity may soon by offset by the Fair Sentencing Act of 2010,[8] and some may simply be a price we have to pay in order to allow the individualized sentencing that wisdom mandates while still conforming to the Supreme Court's interpretation of the jury-trial right contained in the Sixth Amendment. While it may be preferable

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[6] See, e.g., Sara Sun Beale, "Is Corporate Criminal Liability Unique?," 44 Am. Crim. Law Rev. 1505 (2007) (noting that federal fraud sentences are much higher than state sentences for similar misconduct); Frank O. Bowman III and Michael Heise, "Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences," 86 Iowa Law Rev. 1043 (2001) (suggesting that prosecutors believe drug sentences are too high).

[7] Prepared Testimony 54, But see Amy Baron-Evans and Kate Stith, "Booker Rules," Univ. of Penn. Law Rev. (forthcoming) (arguing that the Commission's methodology for determining that racial disparity has increased is flawed, and citing instead to a study by Jeffrey T. Ulmer, Michael R. Light, & John H. Kramer, "Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report," 10 Criminology & Pub. Pol'y 1077 (2011)).

[8] The reduction in crack guidelines took effect on Nov. 1, 2010, so the Commission's Monitoring Dataset for 2011 is not yet available.

that Congress or the Commission make uniform national policy choices regarding whether crack cocaine offenders deserve more prison time than powder cocaine offenders, rather than allowing each of the over 600 federal district court judges to make that decision based upon her own beliefs, it may not be constitutionally permissible. Or it may be constitutionally permissible, but only at great cost in terms of inordinately high sentences. My ultimate recommendation is that we take a "wait and see" approach for at least another year or two. The current Guideline system, even in a post-Booker world, is still immeasurably better than our pre-1984 sentencing lawlessness.[9]

The only certain way to cabin judicial discretion, if this is truly Congress' ultimate goal, is to return to the early nineteenth-century practice of treating as an element, and proving to the jury a beyond a reasonable doubt any fact other than a prior conviction that increases the statutory maximum sentence.[10] A form of this proposal was recently recommended by Judge Sessions,[11] and it has worked well in many states.[12] It has also been suggested that Congress could transform the present advisory guideline system back into a mandatory one by taking the top off of each grid in the sentencing table (and raising all statutory maxima to life) and

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[9] See Marvin E. Frankel's seminal piece "Lawlessness in Sentencing," 41 U.Chicago Law Rev. 1 (1972).

[10] See Nancy J. King and Susan R. Klein, "Essential Elements," 54 Vanderbilt Law Review 1467, 1472 (2001), detailing historical practice of including value of property stolen, injured, burned, or obtained whenever a statute varied the fine or penalty based upon that fact, as cited in United States v. Harris, 122 S.Ct. 2406 (2002). But see Jonathan F. Mitchell, "Apprendi's Domain," 2006 Supreme Court Review 297 (2007) (arguing that the Apprendi Court overlooked the historical practice of allowing judges to find facts that determined degrees of homicide and thus penalties). Alternatively, a defendant can always admit to that element as part of her plea, thus avoiding the jury.

[11] Hon. William K. Sessions III, "At the Crossroads of Three Branches," 26 J.L. & Politics 305 (2011). See also Susan R. Klein testimony before the U.S. Sentencing Commission on Nov. 4, 2004 (recommending that Commissioners eliminate the 43 offense levels and isolate just five or ten of the most common aggravators to send to the jury, and permit judges to make finer gradations by increasing the discretionary range within each offense level from 25 to 40 percent).

[12] Stephanos Bibas & Susan Klein, "The Sixth Amendment and Criminal Sentencing," 30 Cardozo Law Review 775, 797 - 800 (2008), Appendix A (List of states that have been affected by the Blakely decision) and Table II (list of states that responded by Blakely by sending facts to the jury).

employing a series of mandatory minimum sentences.[13] While this may pass constitutional muster, the Supreme Court ruling in Harris v. United States that would allow such a system was a very close 4-1-4 decision.[14] The best course of action at this point, in my opinion, is to do nothing. I do not find the Commission's proposals at all unreasonable, and I sympathize with the desire to make the Guidelines more mandatory and therefore decrease unwarranted disparity. However, I fear that what is in essence the tinkering at the edges proposed by the Commission will either be ruled unconstitutional, or will be judicially interpreted in such a manner that it will have little or no effect. Or worse yet, the Court might view this as another attempt by Congress to unnecessarily cabin judicial discretion, and it might produce more opinions like Booker which will make guideline sentencing even more difficult.

The Commission sent me four questions on Jan. 27, 2012, and five related questions later that day. I have combined those questions and my answers are below.

Question Nos. 1 and 5: Do the USSC proposals comport with the Sixth Amendment, and What are the pros and cons of the USSC proposal?

Proposal No. 1: One Commission proposal is to change the standard of substantive appellate review in three ways: (1) require appellate courts to adopt a presumption of reasonableness for within range sentences; (2) require sentencing courts to provide greater justification for sentences imposed the further that sentence is from the otherwise applicable advisory guidelines sentence; and (3) apply a heightened standard of appellate review for sentences imposed as a result of a "policy disagreement" with the guidelines.

The first part of this proposal would probably be acceptable to the Supreme Court, and may assist uniformity in a very slight degree. The Court in Rita v. United States[15] held that appellate courts can presume a within guideline sentence reasonable if they

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[13] See testimony before the U.S. Sentencing Commission on Nov. 4, 2004, including testimony of Stephanos Bibas, Frank O. Bowman III, Hon. Susan C. Bucklew, James E. Felman, Susan R. Klein, Mark S. Osler, Paul Rosenzweig, Stephen Saltzburg, Hon. Emmett G. Sullivan, Christopher A. Wray, David N. Yellen; Frank O. Bowman III, 16 Fed. Sentencing Reporter 364 (2004). See also Judge Paul Casell in United States v. Croxxsford, 324 F.Supp. 2d 1230, 1254 (D. Utah 2004) (predicting that Congress might replace "the carefully-calibrated Guidelines with a series of flat mandatory minimum sentences").

[14] 536 U.S. 545 (2002).

[15] 551 U.S. 338 (2007).

want to (though they cannot presume a non-guideline sentence unreasonable). On the other hand, however, I fear that the Commission's proposal might ultimately lead to a reexamination and reversal of Rita. That is, there remains the risk that robust reasonableness appellate review of guideline or non-guideline sentences might "over time harden into a common law of sentencing that will create jury trial rights for those facts needed to raise sentences."[16] Suppose an appellate panel reverses as unreasonable a sentence that was above the guideline range (but within the statutory maximum) because the defendant was only 19 at the time of his misconduct. The fact that the defendant must be at least 20 to get an above guideline sentence would then become a sort of common law of reasonableness developed through the judicial process. A jury would have to make this finding before a judge could impose this higher sentence in the future. On the other hand, though substantive review could in theory present such a Sixth Amendment problem, we can rarely if ever identify these substantive violations in current practice. The appellate court provides its forgiving abuse-of-discretion standard of review to all sentencing decisions within or outside the Guidelines, so appellate courts do not isolate a specific fact or judgement that is necessary to justify the imposition of a particularly high or low sentence. But an appellate court could reverse an unreasonably high sentence under the totality of the circumstances without pinpointing exactly what which facts and policies its reversal rested on. If the Commission forces district judges and appellate judges to isolate specific facts or policies underlying sentences, those facts and policies are at risk of becoming jury issues. Any change requiring a presumption runs the slight risk of appellate review turning advisory guidelines into mandatory ones.

An attempt by the Commission to force all appellate courts to presume that sentences are reasonable in cases where there is serious national disagreement among federal judges at all levels as to whether a factor should play a role in sentencing might cause the Court or Congress to react negatively. For example, the Commission was told by Congress in 28 U.S.C. section 994(e)) that family ties and responsibilities are "generally inappropriate" as a ground for recommending a term of imprisonment or the length of a term of imprisonment, and it interprets this provision very stringently. The Commission believes that this directive prevents judges from using this factor to depart downward and impose a shorter sentence as well as preventing them from using this factor in deciding whether to imprison a defendant at all. A particular judge may agree and sentence a defendant (who has strong family ties) within the guideline range for his crime, while a judge sitting in the courtroom next door might disagree and thus regularly decrease sentences based upon strong family ties. One difficult issue here is which is the actual maximum penalty, the lower or the higher one? The fact that some defendants are

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[16] Stephanos Bibas & Susan Klein, "The Sixth Amendment and Criminal Sentencing," 30 Cardozo Law Review 775, 782 (2008).

regularly sentenced to a higher penalty than similarly situated defendants because of lack of family ties may make that factor appear to be a an element or mandatory guideline factor, which should mean under Booker that the issue of whether the defendant had strong family ties should have been sent to a jury for resolution. At the least, even if not a jury issue, such disparate sentencing may cause Congress to take a second look at who should be making these policy choices, lawmakers or judges. Perhaps the safer course of action for prosecutors, defense attorneys, and the Commission is for the Commission to accept judges' findings that family ties are sometimes relevant, at least for downward variances, and take that into account in drafting amendments to the guidelines, rather than fighting them on the issue.

The Commission's second part of its first proposal is to require that district courts provide greater justification for variances the greater the imposed sentence is from the recommended guideline sentence. I question how this would function in practice. Requiring a "compelling" justification by sentencing courts would make the guidelines look mandatory, which would violate the Sixth Amendment. Requiring district judges to list which 3553(a) factor it believes justifies the sentence is certainly acceptable, but for the most part courts already do that. If proposal is for more detailed written statements regarding the sentencer's reasons for variance, that might be acceptable if not too onerous. However, requiring the sentencing court to do anything which makes the Guidelines appear mandatory in any way will not be tolerated by the Court. See Nelson v. United States,[17] reaffirming statements in Rita and Gall that a presumption of reasonableness is improper at the district court level, and Pepper v. United States,[18] emphasizing that a sentencing court may impose a non-guideline sentence based upon disagreement with the Commission's views. The Court has been very clear that the Guidelines are not mandatory, and they therefore cannot be presumed reasonable by the sentencing court. Requiring greater justification for sentences farther from what the Commissioners recommend appears to me to be approaching a presumption that the Commissioner's opinions are reasonable and binding.

The third part of this first proposal, imposing a heightened appellate standard of review for "policy" disagreements, may violate the language in Gall v. United States,[19] which rejected any appellate rule requiring extraordinary circumstances to justify a sentence outside the guideline range, or any formula that uses the

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[17] 555 U.S. 261 (2009) (per curiam).

[18] 131 S.Ct. 1229 (2011).

[19] 552 U.S. 38 (2007).

percentage of departure as the standard for determining the justification for a sentence. Whether it with withstand constitutional scrutiny will depend upon exactly how it would work in practice. The Court in Kimbrough did state that a closer appellate review might be in order when a sentencing judge varies from the Guidelines based solely on the judge's view that the guideline range "fails to properly reflect section 3553(a) considerations' even in a mine-run case."[20] However, there appears to me to be little purpose behind such review. The appellate court cannot reverse a sentence on the grounds that the sentencing judge disagrees with the guidelines, at least not without running the risk of making the guidelines mandatory again and violating the Sixth Amendment. Language in Kimbrough v United States[21] and Pepper v. United States make it very clear that district judges are permitted to disagree with the Commission, so far in every instance where the issue has been raised (crack cocaine v. powder cocaine disparity, and whether post-sentencing rehabilitation is a ground for a below-guideline sentence).

The Commission would also need to define when a disagreement is a "policy" one. For example, after a two-day evidentiary hearing, Judge Pauley (S.D.N.Y.) found that the 500:1 MDMA (Ecstacy)-to-marijuana equivalent was undermined by intervening scientific developments. He explicitly rejected the Commission's finding and instead adopted a marijuana equivalency of 200 grams for MDMA.[22] Is this a policy disagreement subject to heightened scrutiny, or not?

Proposal No. 2: a second Commission proposal is to require that district courts give guidelines "substantial weight." While 18 U.S.C. section 3742(a) and (b) still provide jurisdiction to federal appellate courts to review criminal sentences, the Booker Court excised section 3742(c), that section that mandated appellate reversal for non-conformity with the guidelines. The Supreme Court replaced review for conformity with the guidelines with "reasonableness" review. The Commission proposal to require that district courts give guidelines "substantial weight" is probably going too far toward making them mandatory. Only Justice Alito, in a dissenting opinion in Gall v. United States, opined that district judges could be required to give "significant weight" to the advisory Guidelines.[23]

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[20] Kimbrough, 552 U.S. at 109.

[21] 552 U.S. 85 (2007).

[22] United States v. McCarthy , 2011 WL 1991146 (S.D.N.Y. 5/19/11).

[23] Gall, 552 U.S. at 68 (Alito, J., dissenting).

Proposal No. 3: The Commission recommends that the three-step process described in USSG section 1B1.1 be binding by all sentencing judges. Such a Congressional statute would run into the same problems as any attempt to heighten appellate review or require more justification by district judges for sentences that disagree with Commission policy. That is, such a procedure runs the risk of being declared a violation of the Sixth Amendment when it eventually reaches the Supreme Court.

Question No. 2: How should Congress address the tension between directives to the Commission set forth at 28 U.S.C. sections 991 et. seq. and directives to the district courts at 18 U.S.C. section 3553(a)?

Proposal No. 4: Another USSC proposal is to resolve the "tension" between 18 U.S.C. section 3553(a) and 28 U.S.C. section 991 et. seq. by amending section 3553(a) or striking 28 U.S.C. section 944(e).

18 U.S.C. section 3553(a) directs sentencing courts to consider factors such as "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; " ..."(2) the need for the sentence imposed to ...(D) provide the defendant with needed educational, vocation training, medical care, or other correctional treatment in the most effective manner."

28 U.S.C. section 944(c) directs the Commission to assure that the Federal Sentencing Guidelines reflect the "general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."

These statutes do not necessarily conflict. It could be that the factors listed in 944(e) are not ordinarily relevant in deciding between prison and probation, but may be relevant in selecting the appropriate prison sentence. One way to eliminate the perceived policy disagreement, other than the Commission's proposal to apply heightened appellate review of sentences imposed as a result of a "policy disagreement" with the Commission, is for Congress to become more involved. Congress could try to add the 944(e) directive to 18 U.S.C. section 3553(a), as the Commission has suggested. This may not make much of a difference in sentencing, as a judge would be free to say that employment record is relevant in the case before her. Congress could go further and enact a statute banning district judges from disagreeing with policy choices made by the Commission, and enshrining those policy choices into separate federal statutes. For example Congress could enact a statute providing that a judge may not increase or decrease a guideline sentence based upon a defendant's prior military service or his post-conviction rehabilitative efforts. This policy choice then becomes a mandatory guideline and if it increases a sentence above the otherwise applicable guideline range it must be found by jury beyond a reasonable doubt. Congress might have to

combine such a new statute with topless guidelines in order to be certain that it functioned consistently with the Sixth Amendment. However, such a statute runs the serious risk of a separation of powers attack. Is may not be within Congress' purview to limit what factors are important to district judges at sentencing. Such a bald attempt to reign in judicial discretion might not sit well with the Supreme Court. Congress' history of attempting to further cabin judicial discretion with the Feeney amendment backfired spectacularly, when the Court a few years later in Booker insisted that the guidelines be considered advisory. If Congress again attempts to make the guidelines mandatory, we may end up with a similar result. It might be wiser to compromise, and convince the Commission to amend the guidelines (especially Parts H and K) to take account of what judges are doing nationwide.

Question No. 3: What changes to federal statutes, the FSG, or the FRCP are required to implement the USSC proposals?

Changing the standard of review on appeal should be done statutorily, by amending 18 U.S.C. section 3742(e), which provides for appellate review for conformity with the Guidelines. Much of this statute was held unconstitutional by the Booker Court. Thought the Court replaced review for conformity with the Guidelines with review for "reasonableness," this provision has yet to be amended to conform with the constitution. Congress could simply enshrine "reasonableness" review under an abuse of discretion standard into an amended statute, or it could draft a new statute providing for the heightened review the Commission recommends.

The repeal or amendment of 28 U.S.C. section 994(e) would be an option if the Commission wanted to collect empirical information about how judges actually include family ties and other discouraged factors in sentencing, and eventually use that information to amend the FSG to include these things. The Commission did this very effectively with the crack cocaine guidelines and are now doing the same with pornography sentences. Amending 18 U.S.C. section 2553(a) to exclude certain factors from consideration is also an option, though this one might encounter constitutional problems, especially from the current U.S, Supreme Court.

Question No. 4: To what extent will the USSC proposals promote the statutory purposes of sentencing set forth in the SRA?

If these proposals were upheld by the Court, they would generally promote uniformity in sentencing. However, the proposal regarding the factors in 944(c) would inhibit the growth of sentencing law. It might be better to see what judges do with these factors and how this affects sentencing for a year or two before trying again to disallow them. If the proposal regarding 944(e) and the proposals regarding appellate review and sentencing court justifications are not upheld by the Court, the proposals might result in contributing to law that will be worse, in terms of

fair sentencing, than what we have now.

Question No. 6: How will the USSC proposals affect the plea bargaining process? The trial process?

As I predicted in 2001, the Apprendi line of cases appear on the whole to favor criminal defendants.[24] Defendants have a greater hope of a downward departure now than after the Feeney Amendment, and are under less pressure by prosecutors to sign negotiated guilty pleas (thus the recent increase in defendants pleading straight up to the indictment that players in the field have noticed since the guidelines became advisory). Anything that makes the guidelines more certain will probably increase the number of negotiated guilty pleas, which is helpful to the efficiency of the system as a whole. However, overall I think the effect of the proposal will be negligible. Defendants have overwhelming reasons to plead regardless, such as the acceptance of responsibility reduction, avoidance of consecutive weapons charges and Armed Career Criminal notices.

Any change that involves taking the tops off the guidelines (in essence turning the bottom of each grid into a mandatory minimum) might negatively affect plea bargaining. Defendants facing high mandatory minimum penalties might be inclined to instead roll the dice at trial.

Question No. 7: What other ideas do you have for reforming federal sentencing?

I would like to see a guidelines analogue for substantial assistance under USSG section 5K1.1 (and perhaps for fast track programs). The offering of such motions is wildly disparate among various United States Attorneys Offices. It would be useful to obtain some data on when and why prosecutors offer such discounts, and whether they actually lead to other successful prosecutions of bigger fish. It would also be useful to collect racial data on such discounts - are they being offered more frequently to white defendants? Of course this may be outside the purview of the Commission, but perhaps they could get some data upon request. Perhaps prosecutors can fill out "Statement of Reasons" forms as judges do, upon judicial request after the government makes its substantial assistance request to the judge.

The Commission (and/or Congress) might consider adopting the equivalent of the safety valve for non-drug crimes. This would allow judges to be lenient in a more structured setting.

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[24] Nancy J. King & Susan R. Klein, " Apprendi and Plea Bargaining," 54 Stanford Law Rev. 295, 296 (2001), as cited by Justice Scalia in his majority opinion in Blakely v. Washington, 124 S.Ct. 2531 (2004).