Transcript of Proceedings

U.S. Sentencing Commission Public Hearing
February 15, 2005

PROCEEDINGS

CHAIR HINOJOSA: I will go ahead and call the public hearing of the United States Sentencing Commission to order.

Before we start, on behalf of the Commission, I do want to thank all the members of the different panels who have taken the time and made the effort to come and share their thoughts with the United States Sentencing Commission. Professor Berman in his blog has described this as a stellar cast, leaving out the fact that he is one of the members of the cast. But I think it is an apt description, including himself.

I also want to give a brief statement with regards to what the Commission has been up to since our last public meeting on January 26th. Since then, the Commission, through the chair, has testified before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. Many of you may have already seen the testimony from the standpoint of our website and/or other sources, including the blog, but I would like to give a brief outline as to what the testimony on behalf of the Commission was.

The Commission did indicate that obviously the opinion continues the role of the Commission and that the Commission remains in place and continues and maintains its responsibilities under all the statutory requirements of the Sentencing Reform Act; that the opinion basically only deals with excising two portions of the Sentencing Reform Act – one dealing with regards to the mandatory nature of the guidelines, and the other one with regards to appellate review of sentencing within the Act.

The other point that was made on behalf of the Commission was that it is the Commission's strong belief that the opinion and the Sentencing Reform Act clearly state that the guidelines have to be considered and, as the opinion says, consulted and used in reaching a determination with regards to a sentence.

What that means as far as the way the Commission reads the act is that that requires – in order to consult and consider the guidelines and take them into account with regards to imposing a sentence, in order to do that, a sentencing court would actually have to make the determinations under the guidelines, because how can you consult the guidelines if you have not made the determinations?

The statute also requires that the sentencing court consider the policy statements within the guidelines, which obviously include the departure statements in the guidelines. And, therefore, it is the Commission's position that a sentencing court should consider the guideline range and make the findings with regards to the guideline range, consider the policy statements, including the departure statements within the guidelines, and then consider the factors in the Sentencing Reform Act as a whole, and then impose a sentence.

The Commission also feels strongly that there should be substantial weight given to the sentencing guidelines in imposing a sentence. The reason for that, as far as the Commission is concerned, is quite simple. The statute itself requires the Commission to have considered the factors in the Sentencing Reform Act in initially promulgating the guidelines as well as in the amendments to the guidelines. The promulgation and the amendment of the guidelines also has required by statute the approval of the United States Congress because anything that the Commission does gets sent to Congress and, unless they vote not to approve it, becomes law.

Obviously, Congress wrote and voted on and passed the Sentencing Reform Act, so one would assume that in approving the guidelines they have considered the factors within their own act and allowing them to stand.

The Commission also is aware and has put out the notice that the act remains intact with regards to the reporting requirements that have to be made to the United States Sentencing Commission. In that regard, we have worked closely with the Criminal Law Committee of the Judicial Conference of the United States with regards to continuing to inform the courts of the necessity under the Act to continue to send five documents by the chief judge of each district within 30 days of the entry of judgment, that being the judgment and commitment order, the statement of reasons, the presentence report, the indictment or charging instrument, and also the plea bargain agreement, if there is one.

We have, as I indicated, received a lot of cooperation from the Criminal Law Committee with regards to continuing to get this word out.

Also, during the testimony before the House Subcommittee, the Commission did inform the subcommittee about the statistics that we had been able to determine and assess at that particular point. As I indicated there, and I will indicate again today, we have to look at these with great caution. We have to realize they are very preliminary and at a very early stage. We also have to realize that they do not necessarily represent the entire country.

At this point, we have made some more recent calculations with regards to the cases that have come in. We have been able to go through approximately 1,118 cases. How does this compare to the total that one would expect in a particular year? It is the usual average, as it has been recently, that we have about 65,000 to 70,000 sentencings per year, so this is a very small number, not necessarily representative of the entire country, and it is within a very short period after January the 12th. So that may in itself indicate something with regards to what has been coming in.

Out of those 1,118 cases, the Commission was unable to determine in 94 cases the information to be able to slot them into the calculations because of some missing information.

Some of these 94 cases, which does represent 8.4 percent of the total cases, may be because they are misdemeanor cases where no presentence report was prepared. They may be cases where the sentence is time served, sometimes in the immigration field and there was no presentence report prepared. And then there may be just some other cases that, for whatever reason, we have been unable to get all the documentation necessary, and we will try to keep on top of those situations and try to get that corrected as much as we can with the cases that we receive that we are unable to count.

That leaves 1,024 cases that we were able to make determinations on. Of those 1,024 cases, 629, or about 61.4 percent, were sentenced within the guideline range calculations. That compares to about – the range has been usually in the last three fiscal years that we have prepared as far as data publication, those ranges have usually been about 64 to 65 percent, within the guideline range calculation. Of these 1,024 cases, 24 have been above the guideline range calculations, which is about 2.4 percent. The traditional number has usually been about 0.7 percent.

Of those above the guideline range, the upward departure, where an upward departure was indicated on the statement of reasons, is about 1.3 percent of the cases, and the upward departure where there is no indication in the statement of reasons is about 1.1 percent.

Those cases sentenced below the guideline range calculations are 371, which is about 36.2 percent. The traditional number has been about one-third below the guideline range in the last three fiscal years that we have published data on.

Of those 371 cases, about two-thirds of those, 246, are what we call government-sponsored departures. And they represent 24.0 percent of the cases. Government-sponsored means as follows: 5K1.1 motions for substantial assistance; those are 169 cases; they represent 45.5 percent of the departure cases and 16.5 percent of the total cases. 5K3.1 departures, which is known as fast track and/or early disposition, those are 65 cases, and they represent 17.5 percent of the departures and 6.3 percent of the cases. Departures pursuant to a plea bargain agreement between the government and the defendant represent 12 cases, which is about 3.2 percent of the departures and about 1.2 percent of the total number of cases.

Other departures that cannot be identified as government-sponsored are 125 cases, which is about 12.2 percent of the total cases. Downward departures which are indicated on a statement of reasons, 55 cases, which is about 5.4 percent, and downward departures that are not indicated in the statement of reasons is 70 cases, which is about 6.8 percent of the cases.

Where does this leave us as to sentences that are being handed down within the guideline range and the policy statements? One would say that the Booker departures can be as low – within this group, with all the cautionary statements I have made about this, can be as low as 7.9 percent and possibly as high as 14.6 percent. The reason I say "possibly as high" is because we are making the calculations within the upward departures that are indicated in the statement of reasons because many of those may actually indicate guideline departures, whether it's criminal history or any other applicable guideline departure. What we do know is that 7.9 percent of the cases we have no indication as to what the – there was no departure reason indicated in the statement of reasons and, therefore, one would have to consider those as strictly Booker variances from the guidelines because we have no way to determine this, and that is part of the message, to make sure that the courts continue to get us the information and they state in the statement of reasons what the reason was for a departure within the guideline system and/or a variance from the guideline sentence.

And so basically that is the report that we have prepared, the more recent report with regards to the cases and the statistics. It is cautionary on the Commission's part, and I indicated that we are making some further refinement as to whether the Booker variances are either 7.9 percent or a somewhat higher number than that. But we know for sure it is not higher than 14.6 percent, and probably less than 14.6 percent, after we check as to what the reasons were checked for the box for the departure in the statement of reasons.

That concludes my more than five-minute allotted time for my report, and at this point I would ask the first panel to come forward. The first panel consists of two judges. We have the Honorable Thomas F. Hogan, who is the chief judge of the District of the District of Columbia. He is a United States district judge whom I am quite familiar with since we both attended baby judges school together. He actually took the bench in 1982, and I took the bench shortly thereafter, in 1983, and it is nice to see him. And in addition to being the chief judge of the District of the District of Columbia, he is also a member of the Executive Committee of the Judicial Conference of the United States.

We also have with us the Honorable Lawrence Piersol, who is the chief United States district judge for the District of South Dakota. He is also the chair of the Federal Judges Association, which is an organization comprised of federal judges from across the country that stands up and speaks up on behalf of the judiciary. It is an independent group, and he obviously plays a very important role within the Judges Association as the chair of that organization. And he does give of his time to do that.

So at this point I would call on Judge Hogan first.

JUDGE HOGAN: All right. Thank you, Mr. Chairman, members of the Commission, for inviting us to testify today about the impact on the judiciary of the Supreme Court's decision in United States v. Booker.

Unfortunately, my remarks this afternoon have to be somewhat limited necessarily because the United States Judicial Conference, of which I'm a member, has not yet taken an official position on sentencing in the wake of the Booker decision. So I speak today as an individual United States district court judge and not on behalf of the official position of the federal judiciary, although I am a member of the Executive Committee of the Judicial Conference.

I wanted the chance and I appreciate the chance of talking to you all because the Judicial Conference is the principal policymaking body of the United States court system and, as such, speaks for the entire federal judiciary pursuant to 28 U.S.C. § 1331.

The Conference meets twice a year and has not yet had an opportunity to consider and approve a position, but I can assure you it is well aware of the significance of the Booker decision and is considering its potential impact upon us and the entire federal judiciary.

Our governance is such that, under our procedures, the matters that come before the Judicial Conference are first considered by an appropriate committee prior to the Conference. Consistent with this practice, the Judicial Conference Criminal Law Committee that has jurisdiction over this issue under the chairmanship of Judge Sim Lake has taken the lead and is now hard at work developing policy recommendations for the Conference's consideration. That committee will coordinate with the Rules Committee and has been and is holding, I believe, meetings yesterday and today, some in a joint session with the Sentencing Commission, to discuss the Booker and Fanfan decisions. I understand that the chair of the Rules Committee, Judge David Levy, is also participating in this special meeting.

We know the Criminal Law Committee is developing empirical data and has asked for substantial staff work. They will review that, and then we anticipate that they will make recommendations which will then be considered very shortly by the Judicial Conference. We have our semi-annual meeting on March 15th, in a month, and at that conference we will take up – the Judicial Conference will consider recommendations from the Criminal Law Committee and hopefully adopt a policy and position as to the impact on the judiciary of the Booker decision.

It is obvious that it is going to have impact on our workload. It will have an impact on our budget. The Administrative Office of the United States Courts is monitoring these factors. I have met with them. If necessary, they may have to submit a supplemental appropriation request. But right now it is too early to measure accurately the impact of the decisions upon our work. The courts of appeals are just beginning to render decisions interpreting the Supreme Court decisions. The district judges are just beginning to sentence or resentence defendants. There is going to be an impact on our budget, but we cannot quantify it at this time. It is too early. But throughout this all, the Administrative Office, the Criminal Law Committee, and other committees of the Judicial Conference have all been instructed to closely monitor any developments and then we will make appropriate recommendations to our Conference when needed, and we will act upon them.

The judiciary, I know, is committed to reaching out and working cooperatively with the Department of Justice, with the Sentencing Commission, and with Congress as we move forward in this aftermath of the Booker decision. On a personal basis, I can say, from my experience as chief judge at our court of 15 active judges and some senior judges with our criminal docket, that the brief experience we have had post-Booker has been as the chairman has reported, I think, generally the experience across the country. Judges are paying close attention to the guidelines and following the guidelines as presumptively valid, and I believe that is hopefully the experience we will see across the country and that we will have some time, a year or more, to develop empirical data to see what changes, if any, are needed. That is a personal position, not the official position of the Conference at this time.

Thank you all very much for the chance to be here, and I will be happy to answer questions at any time.

CHAIR HINOJOSA: Judge Hogan, thank you very much, and you have made your baby judges class very proud.

Judge Piersol?

JUDGE PIERSOL: Thank you, Mr. Chairman and members of the Commission. Thank you for allowing me the opportunity to appear before you again, this time not on Native American matters. As the chair indicated, I am the chief judge of the District of South Dakota and also the president of the Federal Judges Association, which about two-thirds of the Article III judges are members of.

Subsequent to the Booker decision, the Federal Judges Association board of directors unanimously adopted a resolution which is as follows:

"The board of directors of the Federal Judges Association has resolved that the position of the FJA should be to ask Congress to allow the present situation time to work, and only if it does not ultimately work to the satisfaction of Congress, should Congress then proceed, in consultation with the courts, academics, the Justice Department, the United States Sentencing Commission, and other interested parties, to fashion some changes."

I would like to address you now from my personal point of view. Unlike some other judges, I haven't written any post-Booker decisions because I haven't had any unusual sentencings since Booker. I have sentenced 17 people since Booker and six more tomorrow. All the sentencings were within the advisory guideline range, with one having been a downward departure because of diminished capacity. The 18th sentencing I put off until tomorrow because I gave notice of an intent to depart upward. It doesn't mean that it will, but it's a high probability.

Now, as I said, none of these were so unusual as to warrant a variance. A variance is the term that I use to describe a sentencing that is outside the advisory guidelines as well as outside the departures available under the guidelines.

I believe that Booker provides a nearly perfect system. Advisory guidelines are helpful to judges and to the parties. They provide a thorough review of many but not all considerations, an indication of what is generally being done in other cases, and an indication of congressional intent. There is now an ability on the part of sentencing judges to sentence outside the guidelines and its departures. Given the clear expression of congressional intent through the guidelines, it would seem that a sentence outside the guidelines and its departures, a sentence that I call a variance, would seldom occur. When a variance is appropriate, however, it is terribly important, in my opinion. It allows justice to be done where otherwise it would not be done. A variance would be those instances where an unjust sentence would result from an advisory guideline sentence. The variance should not be for a reason that Congress has clearly indicated should not be a sentencing factor. An example that has been discussed is socioeconomic status. Judge Cassell, who will speak to you later, has demonstrated in pages 13 to 17 of his second U.S. v. Wilson opinion, dated February 2nd, that there is adequate congressional intent indicating that socioeconomic status one way or the other cannot be a sentencing factor, even though it is doubtful to me that it was really a factor in the Wisconsin decision that was being discussed.

Now, as did the chair and Commissioner Steer, I attended the House Judiciary Subcommittee on Crime hearing chaired by Representative Coble last Thursday – a good hearing, I thought, parenthetically. Just as the Senate Judiciary Committee hearing last summer concerning Blakely, which we all also attended, the members of Congress were trying hard to determine what they should and shouldn't do, both short as well as long term. They asked good questions. And from this, I urge the Sentencing Commission to take an active role. You have much to offer and can make a difference. First of all, you must gather accurate information of what the courts as a whole are doing in sentencing after Booker rather than having a few unusual results color the debate about what, if anything, should be done after Booker – in other words, what the outliers control. The Supplemental Statement of Reasons form that was used with judgments after Blakely does not accurately reflect what we should now record from a criminal judgment.

Parenthetically, I want to add that I talked to Chairman Lake, Sim Lake at noontime and found out that the forms are being changed to accurately reflect what we need now post-Booker as opposed to post-Blakely. At a minimum – and I was telling him what I thought we should have, and he said, "I agree with you right along the line," because they had already passed it and I didn't know it.

We should know whether the sentence was within the advisory guidelines, whether the sentence was a departure upward or downward within the advisory guidelines, and if not, we should know that the sentence was a variance from the advisory guidelines and its departures.

I understand it is going to be called a non-guideline sentence as opposed to a variance, but, anyway, that is what Judge Lake told me.

I urge the Sentencing Commission to play an active role in the post-Booker debate. I urge the Commission to take the position that the "Bowman fix" is no fix at all. I think it is somewhere between a flat tire and a blowout, and that is no criticism of Professor Bowman because in his testimony both before the Senate this summer as well as before the House last week, he was not urging his fix, and now he is not urging it because Booker changed that. At any rate, the fix has been something that was put up only as an idea for a temporary fix, but one that some members of Congress were enamored of. The Bowman fix would be at least, I think, declared unconstitutional in some circuits, so we would now have a year or two where federal sentencing law would be in an upheaval while that issue was being initially resolved. And I just say initially resolved, because that would be a question of what happened to the Harris decision and so on and then ultimately the Supreme Court would have to answer that question. And I say initially, because if the Bowman fix or something like it went in and was determined constitutional in some circuits, then we'd have the resulting resentencings and the post-conviction proceedings and so on that would go well beyond a year or two.

I urge that the Commission assist in brokering a compromise if it is the will of Congress to change federal sentencing law either sooner or later.

I don't think you can find a judge who has done any significant amount of sentencing who does not have an instance where justice was not served by mandatory guidelines. I usually sentence 150 to 180 people a year, and usually the mandatory guidelines work just fine. But that is not good enough. I maintain that the varying degrees of restiveness among trial judges comes from those instances where the mandatory guidelines did not do justice. We could debate what justice is and how we know if the federal courts are doing their ultimate duty – that is, delivering justice to the people. We know that we are humans and that we have an ethical sense that can warn us in those hopefully rare instances when our laws and our institutions have failed to deliver justice.

One little additional insert. Let us not forget the public. What lay person sitting in a courtroom listening to some arcane guidelines arguments is really going to believe justice was being done? In these times of examination, simplification should be considered. I realize it is difficult, but it should be.

Let me give you an example of why the system we now have is a real improvement. Several years ago, I sentenced a man in a $1.3 million investment fraud case with a lot of small victims. Some victims had forgiven him; some had not. The defendant had one previous conviction for tax evasion resulting in three criminal history points, a Category II. He was not in good health but not bad enough to warrant a downward departure. He was 59 years old. A sentence of a little over 20 years as mandated by the guidelines amounted to a life sentence of incarceration. If he had been 30 years old, it would not have been a life sentence. Older persons should not get a get-out-of-jail-free pass, but some consideration should have been able to be given. It was not available. I don't know what would be done now if I had the opportunity, but I give that example.

I don't believe any statutory or guideline changes are necessary at this time. The Second and Fourth Circuits have already entered helpful opinions on the procedures to be used post-Booker, the Hughes and the Crosby decisions, Mr. Chairman, referenced to in testimony last week. Other circuits will surely do the same. The Fourth Circuit indicated it would "affirm the sentence imposed as long as it is within the statutorily prescribed range...and is reasonable...." The Eighth Circuit has also spoken on reasonableness in a recent opinion. The courts regularly deal with applying the concept of reasonableness and need no legislation nor regulation to perform that task. *De novo* review could be reinstated by Congress, but it is no better of an idea now than it was when it was initially put in. Reasonableness is an appropriate standard of appellate review, and it should be a standard applied to each sentence, no matter whether it is an advisory guidelines sentence, a guidelines departure, or a variance from the advisory guidelines. A reasonableness review would, for example, find a sentence based upon a sentencing factor which Congress had indicated should not be a sentencing factor, such as race or socioeconomic status, to be an unreasonable sentence.

In conclusion, which isn't written, especially because of my involvement with the Federal Judges Association, I do get an opportunity to informally learn the views of many federal judges, especially what is bothering them. I think there was much pent-up frustration over the mandatory guidelines in those few instances where they didn't work. I think also a view that advisory guide – I think there is also generally a view that advisory guidelines would be helpful. Now that they are advisory, we must exercise judicial restraint, particularly during this time of some uncertainty about what Booker has brought. In court decisions, the uncertainty from Booker will soon evaporate. The Sentencing Commission and the judiciary must be able to forcefully urge Congress that the system we have, once the dust has settled, is ideal. It does not need overhaul. It only needs the continuing attention of this Commission.

Thank you.

CHAIR HINOJOSA: Thank you, Judge Piersol.

Are there questions or comments from any of the Commissioners?

VICE CHAIR SESSIONS: I would ask – Judge Piersol has made an observation that we as the Sentencing Commission should take an active role in the debate, and I guess my question is on behalf of all of the judges of the United States and your role with the Federal Judges Association: what are the judges looking to us for? Any kind of guidance in any particular way? What would they want from the Sentencing Commission?

JUDGE PIERSOL: Well, I can't answer for all judges on that, but from my own point of view, again, I think that, frankly, the Federal Judges Association has become an advocate in these sentencing issues because we think it's necessary. The Judicial Conference, which ultimately speaks for the judiciary, when some things come up quickly, can't, due to the committee process and all of that, sometimes respond as promptly as might be necessary. And so the Sentencing Commission, you're the ones that have the statistics; you're the ones that have the expertise; you're the ones that have the staff. And you are supposed to be, at least whenever it serves Congress's ends, an arm of the judiciary rather than an arm of Congress. So we would look to you to be the advocates for the judiciary for what should appropriately be done in interfacing with Congress.

Now, what should you do with regard to the judiciary itself? I don't know other than be our advocate and continue to provide changes to the guidelines as necessary, you know, provide them to Congress as well as provide them to us, because you're the proper body to do it, not Congress. They don't have the staff; they don't have the expertise. They just come in and pick particular areas, and I think that Congress can be more easily driven than can the Commission, because they don't have the staff; they don't have the expertise that you do.

COMMISSIONER REILLY: Chief Judge Piersol, you mentioned simplification as being an issue as well. Any particular areas with regard to the guidelines that judges have indicated to you that they would like to see us try to simplify?

JUDGE PIERSOL: I couldn't say one area that judges, you know, have come to me. What I hear was, I think, generally frustration for those limited number of instances where, for whatever reason, a case – a judge felt a sentence that he or she had to enter wasn't fair. But I haven't heard on any particular area.

I think one of the areas that's most difficult – and it's also the most difficult to simplify – probably is the fraud area. You know, fraud has so many faces that it is very difficult. It seems to me that what you have now in the guidelines might be too much dollar-driven with regard to the fraud as opposed to the other moral implications that come out of some fraud causes. You know, sometimes it might not be a particularly high amount, but it might be especially egregious. Now, I know you try and capture that with regard to its relationship, enhancements and so on. But – and the other part of it is sometimes if I'm sentencing on a fraud case, you've got a bunch of people sitting out there that lost $5,000 or $10,000 or their child's college fund – I have had those. And you're sitting there and you're going through those things. I try and make a recapitulation that makes sense to them, but, nonetheless, you might spend half a day and it sounds like you're speaking Greek up there to these people that are victims. And I do try and put a face on it at the end of it.

So just from my own point of view, fraud might be the hardest to simplify, but at the same time it may be one of the more necessary ones.

VICE CHAIR STEER: Chief Judge Piersol, I'd like to ask you to flesh out the concept of reasonableness as you see it a little more, if you could. I take it that you think it might have a procedural aspect as well as a substantive aspect. Let me take the case that you gave as an example of a variance.

I take it that, if in a case like that, you had simply gone to the final result that you thought appropriate, whether it was with reference to actuarial tables or whatever, and not gone through the process of applying the guidelines, looking to see whether there was an appropriate policy statement for departure, but that instead had simply based your sentence on what you thought was actuarially appropriate, that an appellate court might look at that process and find that to be unreasonable?

JUDGE PIERSOL: I think that the best one could hope for if you did that would be a reversal of resentencing, because I think the Second and Fourth Circuits have indicated appropriately what you should do, just as the chair indicated, and that is, you go through and you determine the guideline range to begin with, you look at appropriate departures to see – if the guideline range itself you feel won't capture what you think should be done in that case, then you go and analyze the departures upward and downward, and then, only then, you look outside to see if there was some non-prohibited or even discouraged – you'd look at the departures and then the areas that are discouraged but not prohibited before you would go beyond that into variances. And if you hadn't gone through that process, I think that it is likely that you're going to have an inaccurate record and, at the least, you would get a reversal sent back for appropriate consideration.

I think the Second and Fourth Circuits have outlined a good procedure.

CHAIR HINOJOSA: Does anybody else have any other questions?

[No response.]

CHAIR HINOJOSA: Thank you all very much. We do appreciate you taking your time. We understand how busy both of you are, and we appreciate what you all do for the judiciary.

JUDGE PIERSOL: I'm sorry I talked too long.

CHAIR HINOJOSA: You didn't.

If the next panel would come on up? The next panel is also composed of individuals who are members of the federal judiciary. We have the Honorable Paul G. Cassell, who is a United States district judge in the District of Utah, who has been on the bench since the year 2002. We have the Honorable Richard G. Kopf, United States district judge in the District of Nebraska, who has been on the bench since 1992. And we have the Honorable Lynn S. Adelman, who has been on the bench since 1997, and he serves as a United States district judge in the Eastern District of Wisconsin.

Each one of these judges has written an opinion post-Booker on some of the issues that we have discussed and have already heard discussed and we'll continue to discuss. And we'll start with Judge Cassell since you were first off the bat with an opinion.

JUDGE CASSELL: I had a little more sleep today. My staff and I spent quite a while getting that together, and we have some useful things for folks in it.

I am pleased to be invited to talk about the impact of Booker in federal sentencing. My view, as you know from the Wilson opinion, is that we ought to be changing our practices very little in the wake of Booker. After Booker, of course, judges are required to consider the guidelines in an advisory capacity, and I think that since the touchstone remains achieving congressional purposes in sentencing, we ought to give those guidelines heavy weight, and vary or impose a non-guideline sentence only in unusual cases for persuasively demonstrated reasons.

If there are any significant changes needed in the guidelines, I think that might be in the area of the new Crime Victim Rights Act, and I wanted to mention just a few things about that.

I've got some prepared testimony that breaks into four parts, and let me just try to briefly summarize each of those parts.

In the first part, I try to explain my view that the guidelines are entitled to heavy weight and that we should vary from those guidelines only in unusual cases for clearly identified and persuasive reasons. Congress has spent many years – it had to create the Commission, appoint its members; it had to approve the guidelines, or at least allow them to go into effect. As you well know, in many cases, Congress has directed changes in the guidelines or suggested changes to the Commission. And as a result of that, I think we're quite clear that the guidelines embody what the congressional view is for appropriate sentences in this country.

And as a result I think the guideline sentence will usually be the appropriate sentence to impose.

In part two, I try to critique the view expressed by several district courts that the guidelines should just be considered as one factor among many other factors. I don't think that's the proper way to approach these issues. The problem is, when you start handling things in those ways, you begin to look at factors that I think Congress would view as inappropriate. For example, some courts have looked at socioeconomic status of a defendant in imposing sentence despite a clear congressional command that both rich and poor are to be treated equally in criminal justice sentences. Also, that approach will inevitably lead to unwarranted sentencing disparity since judges will inevitably weigh those factors differently when they have similarly situated defendants in front of them.

In the third part of my testimony, I try to offer seven specific suggestions to the Commission for improving the guidelines. First, I think the Commission might consider reemphasizing that certain factors are forbidden considerations – for example, race, sex – and I think socioeconomic status ought to be included among those.

Second, I think the Commission ought to provide greater explanation for its policy statements on offender characteristics and departures. I was trying to do some research on an offender characteristic, lack of youthful guidance, and the best I could find was an excellent law review article by Commissioner Steer and former Commissioner Wilkins that explained what was going on there, but a judge shouldn't have to go look for law review articles to determine what the reasoning was behind those policy statements. That ought to be clearly articulated in the commentary.

Third, I think the Commission ought to list as a forbidden factor cooperation with the federal government as the basis for varying or departing downward, absent a government motion. Judges are poorly situated to evaluate those kinds of things, and only if there's a governmental motion ought that issue to be on the table.

Fourth, I think the Commission should clarify that a preponderance of the evidence standard is the appropriate standard for sentences. That was the Commission's view before, and there's no reason to change now that the guidelines are purely advisory, but fortunately, the Commission's view is expressed in a commentary by the [inaudible] policy statement or guideline, and I think that ought to be raised to greater prominence.

Fifth, while we're talking about policy statements, I think the Commission ought to change all of its policy statements to guidelines. Why do we have policy statements? I guess it was to indicate some greater degree of discretion, but now that the entire guideline apparatus is advisory, I think the label on everything ought to be changed to guidelines.

Sixth, I think the Commission should come up with some terminology for describing sentences that fall outside of the guideline. My recommendation, as I was pleased to see the chairman and Commissioner Steer talking about variances, I think that's a good term. I know that others have talked about a nonguideline

sentence. The problem from a purely stylistic point of view, as somebody who's written a number of pages on these issues, is there's no verb in a nonguideline sentence. Variance allows the quick and easy form of vary, but the ultimate terminology here is not important.

What may be important is my seventh, that the Commission ought to require courts as a procedural matter to first look to departures, and only if the departure methodology does not produce an appropriate sentence ought courts consider variances or nonguideline sentences.

In part four, I turn to recent crime victims legislation, the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act. I mention the lengthy title because Scott Campbell is the lead person identified and Collene Campbell, I believe, will be on the next panel for the Commission, Scott Campbell's mother. As you know from looking at that Act, it may require a number of changes in the way we do federal criminal justice proceedings. I think it has a particular impact for the sentencing guidelines.

The procedural provisions that are in there right now allow parties to dispute sentencing factors. In the wake of the new Act, I think it's quite clear that victims could also dispute factors since they have the right to be reasonably heard at sentencing proceedings, and I believe the Commission's procedural provisions ought to be changed to reflect that.

In conclusion, I think it's important that we exercise the opportunity as the judiciary to responsibly handle the new freedom that we've been given, that that freedom is used not to thwart congressional objectives but to implement them discriminatingly in particular cases. That will be ultimately, I think, the best solution with everyone involved in criminal justice proceedings. And I urge the Commission to do whatever it can to encourage judges to follow the guidelines.

CHAIR HINOJOSA: Thank you, Judge Cassell.

We'll turn to Judge Adelman.

JUDGE ADELMAN: Thank you, Mr. Chairman, and members of the Commission. I agree with a lot that everybody said. I guess I want to start out by expressing that I agree with Judge Piersol who said that the Booker decision really, whether by intent or accident, it really creates the potential for a tremendously improved federal sentencing practice. I mean I really think that Booker is, in a sense, a great opportunity for judges, for the Commission, for everybody to really work out a sentencing system that pretty much everybody agrees is fair and just.

I have prepared some written testimony. I don't want to go through all of it, but some of it I do. I guess they're reasons for the assertion I just made.

First, Booker restores federal judges to a meaningful role in the sentencing process, and that's tremendously important. Secondly, it makes clear that fairness in sentencing requires considerations of many factors, not just reduction of disparities. That's not to say that reducing disparities is not important, it is. There are many other things that are important also.

I think that a lot of the flaws in our present system flow from the mistaken view that the main problem in sentencing is judges, and that the solution to the problem is to remove judges from the decisionmaking process as much as possible. I just think that's completely wrong. Based on my experience, which I agree isn't as long as many people here, but federal judges I think are very conscientious and very

thoughtful, some you might even characterize as being wise, and how the notion is that somehow it's important to prevent them from exercising the qualities that got them put on the bench just seems to me kind of misguided.

And I think even without the constraints on judicial discretion that remain in place after Booker, judges would not abuse the authority that Booker confers on them. But even if they were inclined to, which I see no evidence of at all – and I think some of the statistics that the chairman went through illustrated that. Although I would emphasize that I don't think the most meaningful statistic is how many guideline or nonguideline sentences there were. I think what's really meaningful is, in either case, how good an explanation did the judge give when he gave a sentence that was either in guideline or nonguideline. This is not just a numbers game and if you're within this, then you're okay. There might be sentences within the guidelines that aren't okay. There might be something wrong with the guidelines application to that particular sentence.

The question really is the reasoning and the "why." That's everything, the process. See, I'm getting a little ahead of myself, but I really think that Booker creates the opportunity for a real dialog between judges, between judges and the Commission. I mean, I think the role of the Commission in this new era is going to be a little different, but it's going to be probably more important, I think.

But anyway, there are constraints on discretion after Booker, and they ensure that the post-Booker regime will not be a return to the pre-guideline world where a judge's discretion was total. That's never going to happen and for good reason.

First of all, judges have operated under the guidelines for a very long time, and to a considerable extent have internalized guideline thinking. Judges are not going to give up this way of thinking just because the guidelines are advisory, and I think that's already clear. The judges have been essentially socialized into thinking in guideline terms, and that's not going to change.

Secondly, Booker directs judges to consider the guidelines, and judges most assuredly are going to follow that.

Third, the fact that sentences are reviewable for reasonableness, and if the history of departures is any guide where courts of appeals have been very, very tough on sustaining departures and have looked at district court departures very carefully, the fact that sentences are reviewable for reasonableness will cause judges to think carefully about the sentences they impose, and to explain in detail any sentence that they believe that the government or the defendant is going to seriously question.

As I stated in Ranum, an advisory guideline regime is going to make sentencing more difficult for judges. Lawyers will be able to present a broader range of arguments; judges will be forced to think about them. That's what judges should do. That's why they're judges. Judges will still be able to use the guidelines as a point of reference, but their sentences will be their own. The result will be that sentencing will be less mechanical, and the process and the outcomes – and I think they're probably both important, the sentencing process and the outcomes – will more closely comport with the public's intuitive understanding of what a just sentencing is. I think that point was made by one of the speakers earlier. There's a certain sort of a cathartic, if you will, quality in sentencing that's ritualistic, a symbolic quality, and the public comes to expect certain things, and I think now that will be more likely to happen.

I think Booker also promotes greater fairness by directing courts to consider a broad range of relevant factors other than disparity. I think that the focus on disparity has been excessive and has made our system

less just. Even under the old guideline regime there's lots of disparities, all kinds, some created by the guidelines, fact bargaining, charge bargaining, ways by which lawyers try to work around the guidelines, variations between districts and the number of substantial assistance motions, the use of fast-track programs in some districts and not others. There's lots and lots of disparities of many different kinds. And, sure, we should try to get at them, no doubt about it, but that can't be the sole focus.

Booker enables judges to treat people being sentenced as they should be treated, as individuals, and to craft sentences that are appropriate to them. Insofar as is possible, a sentencing system should not force judges to impose sentences that they don't believe in. It might be said that Booker constitutes a recognition of the irreducible need for individualized judgment and humanity in sentencing.

A little bit about the guidelines. Booker said that the federal sentencing guidelines violated the Sixth Amendment, and I think that some of the suggestions that are made that we should do as little as possible or that the guidelines are still really, really [inaudible] by really heavy weight, that's unlawful. The Supreme Court said that was unlawful. It's a new system now. It's not just the old system with some different terminology. And I think that a system that was too much like the old system runs the risk of violating both the merits majority of Booker and it also runs the risks of violating the remedial majority in Booker.

Let's talk a little bit about this issue of the proper weight to be accorded the guidelines. Based on the statutory scheme that remains after Booker's excision of 3553(b), I think the guidelines should be given the same weight as the other factors set forth in 3553(a), and I might add that the Second Circuit in Crosby and the Ninth Circuit in Ameline, although neither of them cited Ranum, both essentially took that position. I've got Ameline here; I can quote it.

3553 cites seven factors, and it says that the court shall consider these factors, and those factors include the guideline range, the policy statements, but there's nothing in that statute, as modified by Booker, that says any one factor as a general principle is entitled to more weight than others. Now, it might be in a specific case. The guidelines might decide a specific case, and probably they will in most cases, but as a general rule I don't think there's anything in 3553 or in Booker that says that they're entitled to greater weight.

First, when it directed sentencing courts to consider the guidelines but allowed them to "tailor the sentence in light of other statutory concerns," Booker recognized that the guidelines do not take into consideration all of the 3553(a) factors. If the court believed that the guidelines took all of those factors into account, it would not have used this language. Secondly, as I discussed in Ranum, the guidelines do not take into consideration all of the 3553(a) factors, and in fact, advise courts not to consider them. For example, 3553(a) directs courts to consider "the history and characteristics of a defendant." Now, how you can square that with statements in the guidelines that you're not allowed to look at history, or age, or education, or mental condition, or drug or alcohol dependence, or employment, or family ties or responsibilities, or civic and military ties? It seems to me that no matter how you kind of try to fudge that, 3553(a) says something different.

There's a lot of support for what I am saying. This is not just something that I've made up. I'm reading Booker, I'm reading 3553(a). Go back to Daniel Freed who wrote a law review article back in 1992, "Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers," 101 Yale Law Journal, 1681. He states, the "5H policy statements...are inconsistent with 3553(a) and 3661 of title 18," which require the judge to consider without limitation information on the offender's background and character, and that "in the end the Commission chose to acknowledge the relevance only of a person's criminal characteristics." So I disagree with Judge Cassell strongly on that issue.

And even if the Commission did take some of these factors into account, the argument that the courts should accord the guidelines heavier weight than other 3553(a) factors does not withstand scrutiny. As stated, 3553(a) contains no suggestion that any factor be accorded more weight than any other. Moreover, 3553(a) states that "in determining the particular sentence to be imposed," courts "shall consider" the factors listed in the statute. The use of the word "shall" requires courts to consider these factors, and I think it also prohibits them from turning that responsibility, that is, the responsibility to consider those factors, over to some other entity. Other parts of 3553(a) reinforce the conclusion that the sentencing judge, not any other person or entity, including this Commission, is responsible for weighing the statutory factors. Under the statute, it is the judge who has to consider the nature and circumstances of the offense. It's the judge who has to consider the history and characteristics of the defendant. It's the judge who has to determine the particular sentence to be imposed and to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing.

Thus, whether or not this Commission considered certain factors in crafting the guidelines, to comply with Booker and with 3553(a), the judge has to independently consider them. Similarly, whether or not Congress, through its inaction, expressed a view that the Commission performed well – and it's very hard, as all of you know, to infer something from non-action by Congress – but even assuming that by inaction, Congress incorporated the purposes of sentencing into the guidelines, the clear statutory command of 3553(a) is that the court has to consider all those factors.

I don't think that there's any way to get around that, nor should we get around it. This is as it should be. 3553(a) creates a process by which individual judges sentence individual defendants. The statute further requires judges to consider a number of factors specific to the defendant who is before them. The Sentencing Commission can do many, many good things, but it cannot perform that function. This is so because the Commission has no knowledge of the individual being sentenced, or of the particulars of the offense that he committed. The Commission "operates from an *ex ante* system-wide perspective; it has created guidelines by examining sentencing outcomes in the aggregate," but it has not directly considered any of the individual human beings who have violated federal law.

Finally, I believe the guidelines will continue to play an important role in sentencing, although it's a slightly different one. Courts will consider the guidelines in all cases, and have to, and should, and they will impose guideline sentences in many, probably most cases, and even when a court sentences outside the guidelines, the guidelines will be of tremendous value in determining the specific sentence to impose. This is because the judge can use the guideline terminology as a way of translating findings under 3553(a) into a specific numerical sentence. I think this is exactly what Justice Breyer had in mind when he instructed judges to consider the guidelines but tailor their sentences in light of the other factors set forth in 3553(a).

Just a few more points. I'll skip some other of these points I've made.

I just want to note, it hasn't been noted much – I think that in Crosby there was a mention of it – but it hasn't been noted much, that there's an existing body of law that really can guide both the district courts and the appellate courts in carrying out their post-Booker duties, and that is the law that relates to sentencing after revocation of probation and supervised release. That is what we've long used advisory guidelines, and appellate courts have reviewed such sentences to determine whether they were plainly unreasonable. There's a whole body of law as to how that works, and it seems to me it's imminently transferable, because now all guidelines are advisory and all review is for reasonableness. So I don't think we're going into such a tremendously uncharted territory. I think there's lots of law and lots of guidance that we can all rely on.

I'm going to skip over some. With respect to what action is required, I agree with, I think, just about everybody who has spoken up here, that the Congress and this Commission should really take a cautious approach. Let this system play itself out, and I really think that it has the potential for really working well.

I think that one of the things this Commission can do, it can collect all the data on when judges are not giving guideline sentences and what are the factors, and judges have to write down why, and then the Commission can sort of reflect and criticize those particular sentences, and disseminate information to other judges about what's going on.

By the same token, this Commission isn't perfect, and many of the guidelines are also potentially subject to criticism, and when courts are going to give a sentence that's a nonguideline sentence or they're going to say "I don't think that the guidelines reflect what should happen in this particular case," and hopefully it will be a broader statement, then courts can discuss where they think there is some error in the guidelines. So it will be a two-way, back and forth process, a true dialog where you're not just sort of free form, you have the guidelines and you have this Commission. You have a sort of a stable center point, but you also have the judges now with a little greater freedom to talk more honestly.

And then you have the Commission. If a judge or judges are making decisions that seem to be – I'm not really talking about criticizing – just by collecting data, I think, this Commission will be able to evaluate and make public, let the public evaluate whether the nonguideline sentences, when they're given, whether they're for good reason, whether they make sense. And if they do, then maybe this Commission should rethink some of the guidelines. Nothing is locked in stone, and that's where I think the beauty of Booker is.

The Commission is a judicial branch agency, and I guess I would like there to be a true partnership between this Commission and the judges, and we would help each other; nobody would dictate to each other. It would be a mutual process. As I said, the Commission would analyze nonguideline sentences and disseminate them and participate with judges.

There's been a lot of talk for many years about the creation of a common law of sentencing, and I think now we have the ability to do that. We can create a true common law of sentencing where the judges and the Commission both participate. And for their part there's a huge responsibility on judges. Judges have to write thoughtful decisions. They have to explain their sentences. Whether or not they're outside the advisory guidelines, any time I have a sentence that raises an issue I write on it because I think it's terribly important. This will assist the Commission in understanding what judges are doing, and it will also make it clear to legislators and others that judges are not exercising discretion arbitrarily.

I think courts, under the guidelines, created somewhat of a disappointing legacy. They didn't really share their experience, they didn't really – and I think the courts of appeals were at fault in this, too. There was really no dialog. It was, "Here's the guidelines, and it's really hard to depart, and if you depart a little bit too much, then you'll get knocked down by the court of appeals." That was not a good system. I mean, with all due respect, and I think everybody who was a judge on this Commission knows it was not a good system.

Now we can really take the best of that system but also the flexibility that the new system provides. I am very, very hopeful. I think that everybody should kind of, "Let's see how this works." Nobody should get too active. I think there's a good chance if all of us, that is, the Commission, the judges, and other interested parties, kind of take this position as many players have. Congress won't want to do anything either for a while. Maybe we'll have enough time to let things work out in a very positive way.

I talked too long, but thank you very much.

CHAIR HINOJOSA: Thank you, Judge Adelman.

Judge Kopf, I guess I was very interested in your opinion. With all my years on the bench I've never actually seen somebody offer to buy a beer for someone if they got reversed.

[Laughter.]

CHAIR HINOJOSA: That definitely ensured that I read the entire opinion.

[Laughter.]

CHAIR HINOJOSA: And it's your turn at bat here.

JUDGE KOPF: I should mostly court affirmance, Your Honor, unless you think I paid too little attention or too much attention to issues of personal characteristics such as viewer depression.

I won't read my testimony. It's limited to one page, and if you think it worthwhile, take a gander at it. Otherwise –

CHAIR HINOJOSA: You can summarize it if you like or if you want to –

JUDGE KOPF: I think it's short enough that I'll just leave it as it is. Thank you for the invitation.

CHAIR HINOJOSA: Thank you, sir.

Are there any questions?

COMMISSIONER RHODES: I have one for Judge Cassell.

CHAIR HINOJOSA: Sure.

COMMISSIONER RHODES: We've heard from Judge Adelman. We've heard from others today, and over the past few weeks, that it might be best to do nothing. Let's give it a year. Let's collect all the data. I've been trying to get a sense of exactly where you stand on that because you've put forth some very interesting proposals, you know, some what I call sort of light-handed legislative proposals, some things that could be done that could, for want of a better word, sort of feed the beast of those in Congress who are anxious to do something to respond back to the Supreme Court.

What exactly are your views about whether or not the Sentencing Commission, whether you describe it as an active role, saying do nothing, or an urging do nothing and let us just collect data in an active way, versus some others who say just play a broker role, and try and help facilitate communications between the Department of Justice and the Judicial Branch and members of Congress, and actually coming forward and supporting a proposal, a light-handed legislative proposal that would certainly, of course, maintain advisory guidelines but with some incentives for judges to follow those guidelines and consider them when they're sentencing?

JUDGE CASSELL: First, let me say I'm not sure I would agree with the feeding the beast. I just think Congress is a wonderful, thoughtful body that has worked very hard to develop these guidelines over many years. But the question, then, is what are we going to do over the next year? Some said do nothing. I

think that would be the wrong thing to do. There are specific areas where the Commission could act and should act immediately to address questions that have come up. Judge Adelman and I disagree on whether socioeconomic status ought to be a factor that should be –

JUDGE ADELMAN: I don't – you've misrepresented my opinion, Judge Cassell.

CHAIR HINOJOSA: Judge Adelman, we'll just let Judge Cassell finish and then we'll get to you. We'll have plenty of time here. I don't limit myself to the exact time, and so Judge Cassell, and then we'll get to Judge Adelman.

JUDGE CASSELL: I think we disagree on whether that ought to be a factor at sentencing. It's listed in the opinion and I think that's inappropriate. I think if the Commission agrees with that, one of the things the Commission could do is list that as a factor that ought not to be considered in sentencing.

Another example, I know the Justice Department's testimony last week was very concerned about what to do with substantial assistance motions because now there's always the possibility that some defendant will say, "Well, it's the soft-hearted judge up there. I'll give the Department a little bit and then hope I can sweet talk the judge into getting a good break at sentencing." I think that's a very difficult situation to leave the Department in, and I'd like to be able to say that I'm just as good as Department prosecutors in assessing cooperation. I don't think I am. I don't think I can with a straight face make that sort of a claim.

Again, the Commission could and should act now to say that without a governmental motion there's no reason for the court to even consider governmental cooperation.

Another area where there ought to be immediate action is this new crime victims legislation. I think it's quite clear that the Commission's current procedures are not in compliance with congressional command. In my view, victims are entitled to dispute sentencing factors even though the Commission's procedural provisions limit that right exclusively to parties. So again, there's something that needs immediate action.

Now, how far to go, how light-handed should the touch be and so forth? I mean, obviously, that's a judgment call. But in my view, doing nothing would be a mistake. I don't think we should sit here and let another year of sentences go by and then realize, "Gee, there were some things we could have done a year ago." I've tried to lay out some specific things.

I guess I would just say that judges are looking for help from the Commission on the procedural side of things. Maybe Judge Adelman and I and others disagree about what the substantive outcomes ought to be, but the Commission could say, "Look, here are the procedures you ought to go through, figure out the guidelines, look at departures, look at variances," so on and so forth, and in that sense, the Commission could be very useful.

CHAIR HINOJOSA: Judge Adelman, did you want to say something?

JUDGE ADELMAN: No, I apologize for interrupting. I shouldn't have. I just think –

CHAIR HINOJOSA: I didn't mean to cut you off either.

JUDGE ADELMAN: No, no, that's fine. You were totally right. I just think that my decision in Ranum, which Judge Cassell wrote an opinion critical of, Ranum, that was not really about socioeconomic factors and whether or not you believe that shouldn't be a factor. The guidelines are advisory in any case, so

if you take into consideration in some unreasonable way or improperly, it's going to be unreasonable and you're going to get reversed. So I just think the focus on that particular issue is not really what we ought to be talking about.

CHAIR HINOJOSA: Let me go ahead and ask this question, which is a variance to the question of Judge Cassell, but directed at you, Judge Adelman.

Let's say you're a member of Congress and you heard someone say, "3553(a) factors, they all have the same weight, and that's the way it's written." And you're in Congress and you say, "But, no, that's not the way it was written. 3553(b)(1) made them mandatory, so when we wrote 3553(a), by writing (b)(1) also, we obviously meant to give them substantial weight or more weight than the other factors. And that is no longer the case because Booker says (b)(1) is no longer in existence, it is now advisory."

And if you're a member of Congress and you come to you, and you've heard your thoughts and your sincere thoughts, and well-thought-out thoughts in the way you view 3553(a), and you say, "I as a member of Congress would like to word this in such a way that it becomes clear to you and everybody else that we do mean this to have more weight."

What could be done from your standpoint that would be the least offensive, from the way you view things, as to what Congress could do to make that point clear if they so desired to, if that would be possible?

JUDGE ADELMAN: It's hard for me to say what a congressman – I ran for Congress a couple times unsuccessfully, so I wouldn't really –

[Laughter.]

JUDGE ADELMAN: I'm not the best – but I really don't – first of all, I think it would be very hard–

CHAIR HINOJOSA: I've run for office unsuccessfully also, and I like this job a lot better.

[Laughter.]

JUDGE ADELMAN: Me, too. We both did okay.

I think that it would be very hard for Congress, assuming they wanted to. My own gut feeling is if things work out pretty well and no judges are giving sentences that cannot be justified, or there are very few, my guess is Congress is not going to do anything. Congress responds to problems. They've got lots of problems facing them now, tons of problems. And if it looks like the post-Booker world is working okay and there's no gross kind of problems, I think Congress is going to be happy, frankly.

And I think that if they did try to write a law that said the guidelines are entitled to 'X' amount of weight but not 'Y' amount of weight, they've got a huge problem with negotiating the Booker merits majority. So I think probably if we do our jobs, Congress probably will let us.

CHAIR HINOJOSA: Judge Kopf, you had your hand up. I didn't mean to interrupt you.

JUDGE KOPF: No. Thank you, Judge.

In response to a question, the thing that concerns me are the unintended consequences. Once this snowball starts rolling down the hill, to use a bad metaphor, I don't know – perhaps your political skills are much better than mine.

CHAIR HINOJOSA: I lost the election.

[Laughter.]

JUDGE KOPF: I worry where it might end up, and that's my primary concern. In a perfect world, I would agree, Judge, with your suggestion, that it would have a fairly easy fix, put a weight statement in the statute, a standard of review in the statute perhaps. But once you start down that line, one wonders whether that's all that's going to happen, and that would be my concern.

I share both Judge Adelman's and, I think, Judge Cassell's view that we have the makings of a system that whether the previous system was bad or not, you're going to have much greater adherence from many more judges with a system that is advisory, if for no other reason, ego sorts of things. And to the extent that we can have a pretty close photograph, the old system compared to the new system, and we buy greater acceptance by some segment of the judiciary, that's a real valuable thing. I think that's worth spending some time seeing if you can buy that sort of acceptance without worrying about the unintended consequences.

CHAIR HINOJOSA: Commissioner Sessions?

VICE CHAIR SESSIONS: Paul, just a couple of questions to follow up, and then I'd like to ask for comments from others. But you suggested that we should become active, proactive, essentially at this point. And I think I read this correctly, that we should restrict in some ways the information that judges can rely upon in imposing sentence because either we're not qualified or less qualified than, say, the Justice Department, but also that politically that might be a wise step at this particular point. My question is how do we do that? Do we do it by way of a policy determination of the Sentencing Commission, and if so, would judges listen to that? Would they apply that to a nonguideline range of sentence, or would they say the Sentencing Commission only deals with the guidelines?

And then if we did that, my next question is, "Would that meet constitutional muster?" That is, would we have judges say to us, "Your restriction of the kinds of information that you can consider makes these a mandatory system de facto, and as a result, violate Booker?"

JUDGE CASSELL: It's an interesting question because of this; what are you supposed to do? Do you take the guidelines and then put them in bold type or something so that everybody understands that they're to be taken quite seriously?

Although I think there are a couple of things you could do practically. One is you could elevate certain factors to a forbidden list, and maybe indeed put it in bold type. Part of what you need to do though, I think, is also explain the reasoning behind these things. Judge Adelman and I probably agree on 95 percent of the factors that one ought to look at, but we disagree on a few of them. When I was trying to figure out why did I disagree with him on one point or another, I ended up searching in law review articles and things like that. I ought to be able to look at the Commission's commentary and see the Commission believes this factor ought not to be considered or ought to give a little weight for these reasons. It ought to be laid out so that then judges can look at that and agree with it.

Now, does that end up violating Booker? Well, at the end of the day, I think whatever you tell us is going to be advisory, so I don't think it violates Booker in any way. So maybe you would say, "Well, is it worth spending a lot of time and energy, if at the end of the day what you say is advisory?" I think it is. I think judges are going to pay considerable attention to what the Commission has to say over the next year or so.

CHAIR HINOJOSA: Commissioner Castillo.

VICE CHAIR CASTILLO: So that there's no misunderstanding, Judge Cassell, your action items, you're proposing these as guideline changes that we should consider?

JUDGE CASSELL: Yes. I think they ought to go into the guidelines, and then when we pick up the manual to try to figure out what we are considering by way of advice, then some of these things would be part of that consideration process.

VICE CHAIR CASTILLO: The other thing I wanted to say, just so you all understand what we're struggling with – and I'm glad all judges have been consistent about this – this distinction between judges that are currently sentencing within the guidelines, albeit with departures or without, versus the variance or the nonguideline sentences; this is such a critical distinction for us to capture because Judge Adelman talks about Congress evaluating if things are working out pretty well. Well, what people are going to evaluate are the statistics, and we can only give as good as we get, and unfortunately, even just hearing the preliminary report, there are a lot of cases that we just can't discern what is going on. I think unless judges drive this point home as to what exactly is being done, a lot of data is going to be misunderstood and could drive legislation that is ill-advised. That's my concern as one commissioner, and I think it's shared by a lot of others.

JUDGE CASSELL: I think that's one concern I have. Judge Adelman recommends not using the departure methodology. I think in the long run that may end up undercutting the position that people like Judge Adelman are advocating, because then Congress will see a big number of sentences that look like judges ignoring the guidelines, when in fact, as the data that was presented a moment ago suggests, many of those will be faithful application of the guideline process.

VICE CHAIR CASTILLO: Completely agree.

CHAIR HINOJOSA: Commissioner Steer gets the last question.

VICE CHAIR STEER: Judge Cassell, I agree with many of your suggestions, have a hesitancy about one, and that is your suggestion that we make all of the policy statements guidelines, in effect. My hesitancy is that, given that a ground of appeal still remains the incorrect application of the guidelines and that we don't yet have case law saying that a within-guideline sentence in any situation could be unreasonable, wouldn't converting policy statements on departures such as, say, family circumstances, set up a situation where a judge who failed to depart for a set of family circumstances that might, had the judge departed, be held to be a reasonable sentence, wouldn't that create a whole new set of legal problems?

JUDGE CASSELL: I don't think so because we are in a strange world right now where we have – we're supposed to consider advisory guidelines, and then we have policy statements, and then we have the 3553(a) and (b) factors, I guess. It just seems to me that if people are talking about simplifying the guideline structure, one way of doing that is to collapse everything into a single set of rules. Now, would that create the greater possibility for appeal? I don't know. Obviously, we don't have a lot of case law on what reasonableness means yet, the standard for appellate review.

But I guess when I wrote that provision I was thinking about this. I was working on my opinion, trying to figure out what the difference is between a policy statement and a guideline, and you chase the little rabbits through the case law out there and you're not sure. And I'm just thinking, at the end of the day, is it really worth having a distinction, or wouldn't it be simpler, particularly if we're trying to think about ways to bold type the guidelines and suggest to judges that they pay serious attention to all of these, would one way of doing that be to simply say, "Look, everything in here is a guideline." That's where I am.

CHAIR HINOJOSA: Commissioner Horowitz is going to make me a public liar because he gets the last question.

COMMISSIONER HOROWITZ: I'll ask a lead-in to the next panel.

Judge Cassell, in his testimony and presentation, talked about the Victims' Rights Act and changing the procedures to allow victim participation. I was wondering if either Judge Kopf or Judge Adelman have any thoughts on that, with regard to participation by victims at sentencings, and also the possibility that having another party at this sentencing proceeding provides a further check on what I know many have been concerned about, which is fact bargaining between the prosecutor and the defense lawyer, if you have any thoughts on that before we hear from some interested other parties on this?

JUDGE KOPF: Just very briefly. I have some thoughts on it, but I'm not going to tell you.

[Laughter.]

JUDGE KOPF: And the reason, I really think that the more uncertainty, anything you do to change the status quo, as screwed up as it is, you're going to inject such uncertainty into this system that it really can create enormous unintended consequences, and I would urge you simply to do nothing. And sometime in the future, if you really care what some guy out in the hinterlands thinks about this, I'd be happy to give you my ideas.

JUDGE ADELMAN: I want to agree with Judge Kopf. I think that this new system is – I have a lot of faith in judges, as I said, and I think they're going to work this system out in a very positive way that virtually everybody is going to praise. So I think that we should let that process happen, and then once things settle down a bit, then if there's fine tuning or changes, go ahead and make them.

CHAIR HINOJOSA: Thank you all very much. I do appreciate your time.

Judge Adelman, having just testified last week, I have to say that I did find it was not like my courtroom where I could interrupt and say anything I wanted, and I found my courtroom a much more pleasant experience when I got back to it.

Thank you all very much.

We're ready for our next panel. Our next panel consists of two individuals that represent what our entitled advocacy groups. We have Mary Price, who is with the Families Against Mandatory Minimums, and faithfully attends all Sentencing Commission meetings. And we have Ms. Collene Campbell, who is with the Memory of Victims Everywhere. And I will go ahead and call on Ms. Price first.

MS. PRICE: Thank you for seeking our views at this very important time.

Over the years, Families Against Mandatory Minimums has advocated sentencing reforms to ameliorate the harshest impact and aspects of guideline and statutory sentencing.

We steadfastly have opposed mandatory minimum sentences, and we've been strong and remain strong supporters of guided judicial discretion. We believe the sentencing guidelines can cabin judicial decisions, while also providing judges the flexibility that they need to give true effect to the circumstances of offense and defendant that can't be captured in a mechanistic grid-based system.

Though we've been highly critical over the years of some of the terrible inequities and failures of sentencing guideline systems, we've lately fallen out of the habit of bringing to you sort of sweeping proposals for change. This is understandable. FAMM is cognizant of the possibilities, the political lay of the land, the balance of power, and the line that you walk.

As you pointed out recently in the report, the creation and amendment of guidelines fully informed by Commission expertise and the product of genuine collaboration among the branches is giving way of necessity, overridden or ignored in policymaking through the enactment of mandatory minimums or specific directives to the Commission.

This state of affairs reached perhaps an extreme in 2003, when Congress took on the task of directly amending the guidelines. So the PROTECT Act perhaps foreshadowed the next big thing. In quick succession we had Blakely, and then Booker and Fanfan, and those decisions have forever altered our understanding of the rules of sentencing.

We do agree with many others here today and before us, that there is no need to rush in to fix federal sentencing. While the current advisory guideline system is not ideal, it's eminently workable in this interim period. As you undertake the job of recommending to Congress what sentencing ought to look like, you can do so secure in the competence of the courts to impose and to review sentences.

Today we invite you to use your unique perspective to help Congress take advantage of the immense opportunity the Supreme Court has given you. The Blakely and Booker opinions launched what you recently and rather eloquently described as a national conversation about sentencings. Your voice has to be heard prominently in that discussion. This is not a time to tinker around the edges of reform. It's not a time to rush in to adopt measures designed to just meet, or worse, to avoid constitutional requirements. Instead, we urge you to embrace the opportunity to help Congress critically examine federal sentencing.

You're in the best position to do this, to challenge unwarranted or unjust assumptions underlying the guidelines, to take a lesson from the failures and the inequities of the system, to rethink long-held assumptions about the core purposes of sentencing, and attend to the oft-expressed criticisms of guideline sentencing. We ask that you think very big and to reach back to core principles and foundations of justice.

Chief among the philosophical underpinnings is the principle of parsimony. Cesare Becaria articulated the concept that punishment should never be greater than necessary, and his thinking has influenced the founding fathers of our nation and is enshrined in our own sentencing statute.

So were you to start to construct a sentencing system from the ground up, knowing what you know, with the experience that you have, what would you keep and what would you discard? What aspects of guidelines would you alter? For example, what kinds of differences in offense, offender, and context are worth accounting for, or better giving judges the opportunity to account for? What kinds of disparity are accepted under the guidelines, and are they actually acceptable? What are the measures of culpability and are

they reliable? How much play is there in the joints of sentencing and how much should there be? And what use will we have any more for mandatory minimum sentences?

The guidelines were devised, in part, out of congressional concerns with unfettered judicial discretion, and while the guidelines appear to have reduced some forms of disparity, they contribute to the institutionalization of others. Perhaps chief among them is race-based disparity. The gap in average sentences between White and minority defendants was relatively small, and Whites dominated the federal criminal population prior to the adoption of the guidelines. Today minorities dominate the criminal docket, and the gap in average sentences between African-American and some other groups, which began to grow at the time that the guidelines were implemented, is significant.

The Commission concludes that the sentencing rules themselves explain the disparities, in particular, the cocaine sentencing rules contribute significantly to the widening gap in sentences between Black and other defendants. The Commission has repeatedly called for the revision of the crack cocaine sentencing structure, and for good reason. The Commission should include in any proposal to Congress a proposal to revise sentencing and have a renewed call to restructure cocaine sentencing.

And while we're on the subject of mandatory sentencing, it's a perfect time to urge Congress to do away with those as well. Today we have two irreconcilable systems living together, on the one hand mandatory minimum sentences, on the other, advisory guidelines. Congress is likely to institute a system that will be more enforceable than the current advisory system, as much as some of us would like to maybe see it go forward. Enforceable guidelines can make mandatory minimums redundant.

Mandatory minimum sentences, as you have pointed out, distort the operation of the guidelines, because they install an artificial but practically impermeable floor beneath sentences. This unhappy marriage has prohibited the guidelines from operating as they were intended, driven sentences higher than necessary, and provided unnatural power over sentencing at the front end to prosecutors who can control what amounts to strict liability sentencing, ameliorated practically only by the ability to determine who will receive substantial assistance departures. Now when Congress is poised to revisit sentencing, it's a perfect time to remind lawmakers of the sound reasons for your longstanding opposition.

While mandatory minimum laws have set the stage for sentencing and justice, the Commission has contributed to the overall unfairness of sentencing in other kinds of sentencing by placing undue emphasis on single factors such as amount or quantity. This practice has, for example, exacerbated and perpetuated the impact of five- and ten-year mandatory minimums. Those terms, originally designed by Congress for the most serious and culpable offenders, are today merely the starting point or the jumping off points for much higher sentences. Those are driven by relentless increases in offense levels, based on incremental increases in quantity or amount.

No single incremental factor should play such an overwhelming role in sentencing. Mandatory minimums and guideline sentences need not be inextricably linked, particularly if the Commission can limit the impact of one-dimensional sentencing. So while revisiting the decision to sentence in one-dimensional ways, the Commission might encourage a broad view of the benefits of multi-dimensional sentencing. We're convinced this system that better accounts for such things as defendant's background beyond the mechanistic toting up of criminal history and characteristics of the offense can better lead to reliable sentencing outcomes.

Consider recommending the sentencing be structured to better account for important characteristics that measure culpability, whether currently forbidden or not. Imagine a system that actually can account for drug addiction – which is really a very important factor in a lot of drug cases – poverty, or family

circumstances, or history of abuse, role in the offense, and other things that might be considered a measure of culpability or a mitigation or an aggravation.

Federal sentences, of course, are longer than necessary. The guidelines have contributed to what many, most famously, Justice Anthony Kennedy, have criticized as unduly severe sentencing. Between 1984 and 2002 the mean federal sentence increased from 24 months to 55.4 months.

Similarly, incarceration is overused in our criminal justice system. The Commission should encourage Congress to take a close look at using alternatives to incarceration, especially for non-violent first-time offenders who pose no threat to public safety. A number of states have experimented with just such regimes.

The Commission should challenge underlying assumptions. Following the very short debate over the passage of the Feeney Amendment to the PROTECT Act, we became increasingly disturbed about the assumptions underlying what are acceptable bases for disparity. It became apparent that, among those factors that lead to disparity, the system can live with, or does live with now, are included those that facilitate the prosecution of others, or to ease the prosecutorial caseload. Whatever one thinks about the extent of or justification for judge-based disparity in sentencing, important differences in sentences for similarly situated defendants also exist for the sole purpose of making cases or easing caseloads.

Much has been written about the problems in this regard with respect to substantial assistance departures. But the relatively new fast-track system is also presenting new forms of disparity, and as Judge Kaplan recently wrote, if the overall goal here – he was talking about the new fast-track system and the difference in sentences depending on where one is apprehended, that being the main factor, of course. He wrote, "If the overall goal here is equal treatment for equal conduct, then there is at least a question whether administrative convenience or a reluctance to invest the resources required to prosecute all of these cases in the normal fashion warrants such wholesale disregard of the principle of uniformity."

So as we explore building a new sentencing system, it's going to be critical to encourage Congress to examine the underlying assumptions that guide when sentence length can be shortened, and what are and are not acceptable grounds and limits for disparity.

The Commission demonstrated in the 15-year study that "punishment became not only more certain but also more severe," and it laid a lot of responsibility for that on the door of the Sentencing Commission. The result has been an unprecedented growth in number of people serving time in federal prison.

The Justice Department has recently and repeatedly pointed out in testimony here and before the Congress that increased incarceration has led to the lowest crime rate in decades. Assistant Attorney General Christopher Wray, announced the day of Booker's release, that, "[t]he Sentencing Guidelines have helped reduce crime by ensuring that criminal sentences take violent offenders off the streets, impose just punishment, and deter others from committing crimes."

Despite the appeal of such a compelling and straightforward explanation, the facts demonstrate, if not otherwise, at least that the contribution to lower crime rates is not nearly so direct. The argument is flawed in important respects. The correlation is imperfect, the relationship anything but direct, and the claim ignores the impact of a variety of factors that combine to contribute to the decline in the crime rate.

The crime rate measures violent and property offenses that are reported to the police. It does not measure drug crimes. Drug offenders have contributed most significantly, however, to the increase in the

incarceration rate in state and federal prisons and jails. The failure to account for drug crime in the crime rate thus obscures the overall crime picture, making it look as if there's less crime overall, and making it appear that increased incarceration has led to a lower incidence in crime.

Moreover, one would expect that if the general statement were always true, that locking up all criminals reduces the crime rate, then the specific should follow directly: locking up more drug offenders thus lowers the drug crime rate. While drug incarceration has driven the overall incarceration rates, drug use and drug crime continue to rise, however, in part because drug markets are inherently demand-driven.

Moreover, experience at the state level doesn't support the claim that correlation is consistent with causation. The Sentencing Project examined crime and incarceration rates in the state – not the federal level – for the years 1991 to 1998. They found that states with the largest increases in incarceration experienced on average smaller declines in crime than other states.

I don't mean to say that incarceration has no impact on crime. It certainly does. It's probably among a number of factors. It's bound to do so. But studies and research demonstrate that there are a variety of factors that contribute to our increasing security. They include a growing economy, an aging population, increased and more effective law enforcement, community and problem-oriented policing, and the greater possibility of apprehension. So we urge extreme caution in using crime statistics to justify the burgeoning prison population or harsh sentencing laws.

Because I speak for FAMM, and one of our jobs is to bring you the human faces of sentencing, I want to tell you one story before I close. FAMM member Chrissy Taylor was a drug user when she was sentenced to nearly 20 years in prison. Her guideline sentence was driven by the quantity of precursor chemicals her boyfriend convinced her to purchase on his behalf. Chrissy never manufactured methamphetamine and believed what her boyfriend told her, that it was legal to buy the precursor chemicals. She went to trial and she was convicted. Her offense was nonviolent. She had priors, one for shoplifting, another for some drug possession. She was not a kingpin, and yet she received a greater than kingpin length sentence. She was 19 years old at the time.

Chrissy left prison last week. She called us. She told us when she got out of the prison that the experience has institutionalized her in ways that she didn't expect, and it will take years for her to overcome. She said something happens to a person when they reach the ten-year mark in prison; something in them begins to die. And she said, a lot of women felt the same way, that the ten-year anniversary in prison was a turning point for them. After that milestone, she said, the years became unbearably long.

Chrissy's sentence represents a lot of what's been wrong with guideline sentencing today. It was driven by quantity, unmitigated by the fact of her addiction or the low level of involvement, and all together too long to be other than mindlessly punitive. It's a sentence that neither protected the public or, after a certain period of time, did anything for her.

So we call on you from FAMM to please really fix sentencing, and it's important to do so. Thanks.

CHAIR HINOJOSA: Ms. Campbell?

MS. CAMPBELL: Thank you.

Mr. Chairman and Honorable Commissioners, I come to you from the real world that nobody wants to be in, but on behalf of thousands of crime victims I represent, we thank you for allowing me to be here today.

This isn't about me or the people that are victims. This is trying to stop other people from wearing the same shoes that we have to.

There's no one that wants to be educated in the justice system like my family has been forced to do. Our first life-changing tragedy was caused by the lack of mandatory sentencing. As you are well aware, leniency afforded to evil and violent criminals frequently causes enormous loss and suffering to good people.

Statistics are not kept on the "oops" factor of releasing dangerous criminals. However, those mistakes are forever deeply engraved in the hearts and the lives of the subsequent victims.

I have the greatest respect and place tremendous importance on your recommendations, and because I know firsthand the great need for improvement, I felt I must be here today, and that wasn't easy for me. Yesterday at this time, I was in the California Superior Court listening to another stressful bail motion in the 17-year-old murder case of my brother, auto-racing legend, Mickey Thompson and his wife, Trudy. Last evening, following the painful day in court, I climbed on a plane and flew all night to be here with you.

My knowledge and experience of the justice system is not one to be envied. I've been in the system for 23 straight years without a break. Our only son was murdered in 1982. He was robbed, strangled, and thrown from an airplane into the Pacific Ocean. His body was never recovered. Like thousands of other victims, our son, Scotty, was murdered by a dangerous felon who was released early. At that time there was no mandatory sentencing guidelines. Had there been, our son would be alive today, and believe me, that's not easy for this old bag to swallow.

Prior to killing our son, his murderer received four indeterminate life sentences, but instead of spending his life behind bars, he was released within four years, giving him the opportunity to do more violence and to destroy families.

We are among the many who have suffered devastating results from crime due to a system that placed emphasis on returning dangerous criminals back into society instead of protecting innocent men, women, and children. In doing this, our government failed to carry out its most important mandate, that of public safety.

Please don't allow these types of horrible mistakes and poor judgment to be repeated by continuing the misplaced focus on leniency for violent criminals. Renew the commitment to protect America's law-abiding families. Make certain strong mandatory sentencing guidelines are in place and not ignored.

In every case, I would wish the decisionmakers would internalize their decisionmaking process by asking themselves, "Would I feel comfortable allowing this inmate to spend an unsupervised evening with my mother, my daughter, or my son?" If the answer is no, then please don't allow that criminal to return to society and be with another person's family.

It's interesting to note that every ten weeks as many people are murdered in America as were killed in all three 9/11 terrorist attacks, every ten weeks. We all despair tremendously over our military deaths in Iraq – it's horrible – but we want the world to be peaceful and free. Along with their families, our courageous servicemen and women are making huge sacrifices to eliminate evil to keep us safe. Since 9/11 there have been 1,110 Americans killed in action and 65 more killed in Afghanistan. That's a total of 1,185 of our

highly-valued American military killed in our fight to stop terrorism and bringing peace to the world and our country.

But let's not forget the Americans at home. What's going on here in our country? During that same period of time since 9/11 there have been more than 55,000 Americans murdered right here in our own homeland. That, commissioners, is 50 times more than in the war zone. Every day, every week, every month, every year, 50 times more Americans have been murdered right here in our own nation than have been killed in action in Iraq and Afghanistan.

I'm not just talking about crime. I'm talking about murder, loved ones dead, never to come back to their mom and dad, or their sister, or their brother. They have been killed. They're lifeless, and they're gone forever.

We need to once and for all set the balance true. It is a necessity to send strong and clear messages that the lives and well-being of honest, law-abiding Americans are more important than gambling on those who have shown they cannot be trusted in a free society, those who have forfeited their rights to freedom, those who have caused great pain and misery to good people. They are the dangerous and the violent among us.

We must make certain that fair and reasonable, but realistic and tough, sentencing guidelines are in place and followed. We have an obligation to be very positive that our standards are not weak, nor should we be given – or should those standards of weakness be given to anyone with a propensity for violence.

We need to protect honest citizens and must recognize that we have a huge battle in the fight against crime right here in our own country.

Federal judges have once again gained vast sentencing power. And it would be helpful to this Commission's work to recall the reasons for mandatory sentencing guidelines in the past. It was a judiciary that was unaccountable and out of step with the American people. They had embraced the false promises that everyone is good and can, in fact, be rehabilitated. However, virtually every institution and the American people lost confidence in the court's ability to protect us, the honest people. And make no mistakes, protecting the people is the court's highest responsibility, and it's just.

Let me tell you, when your child is laying dead, murdered by a violent, evil killer, lip service does not heal the problem. We know that protection of the citizens has not been the top priority. It simply hasn't been happening. It took an act of Congress to help correct this free fall of chaos and to begin to see that top priority should and must be, first and foremost, to protect the good people before the bad.

This Commission must build into its sentencing policies and procedures a requirement that judges are obligated to give the victim a right to be heard, and must take into consideration and understand the impact of the crime along with the views of the victim, prior to making any sentencing decisions. I wish I had the time to tell you the real world out there where victims can't be heard and they're excluded from the courtroom, and the things that happen in that courtroom that victims could help with.

Judge Cassell proposed that the Commission amend its procedures to ensure that victims can be heard in sentencing proceedings at a time when their statements can make a difference to guideline calculations. I strongly endorse his proposal and am confident that most victims advocates would do so as well. And like he said, certainly you are aware this is now mandated by Congress in 18 U.S.C. § 3771, which is the new Crime Victims' Rights Act.

It is vitally important for the survival of our republic that all laws truly work to protect the innocent and to punish the guilty, and remember, there is no better indication of future behavior than a person's past behavior. Romans 13, Verse 1 and 4 in essence says, "Those who are in authority are ordained by God, for they are his ministers to reward those who do good and execute judgment on those who do evil."

I will close with the truly well-respected phrase: "Evil triumphs when good people do nothing." Please do the right thing so mothers, sisters, and brothers like me will no longer have to come before bodies such as this and request true American justice. Please do not hesitate to ask me questions. I'm such a mess that probably most people would hesitate, but thank you for letting me be here.

CHAIR HINOJOSA: Thank you both very much.

Are there any questions for either Ms. Price or Ms. Campbell?

COMMISSIONER REILLY: Mr. Chairman?

CHAIR HINOJOSA: Yes. Commissioner Reilly.

COMMISSIONER REILLY: I just want to say I've had the distinction of serving with Ms. Campbell. She's recently been appointed by the President to the National Institute of Corrections Advisory Board. Her story is one that obviously we all have great compassion and empathy for. And I know how hard it was for you to be here today, Collene, so thank you for sharing your thoughts with us.

MS. CAMPBELL: Thank you.

CHAIR HINOJOSA: Commissioner Steer?

VICE CHAIR STEER: Ms. Campbell, I would also like to thank you for sharing your experience with us, as painful as it is to relive it, and for taking the time and trouble to come all this way.

I wonder if you or your organization have given thought to what information you believe should be shared with the victim, in order for you to be effective in making a presentation to the court? I know you want an opportunity to be heard, and that procedurally may be easier to accomplish than – I don't know, I hadn't given thought to whether, for example, the presentence report is a document that you feel victims should have access to or have some input into its preparation.

MS. CAMPBELL: I'll try to make this as short an answer as I can. I believe it's critical. There are a lot of different types of victims, families that are close, like I'm sure that your families are, families that love their children, they know what's happened. When they're kept out of the courtroom or something, they don't know what's going on in the courtroom. Unfortunately, there is a lot of untruth told inside of the courtroom, and when you're outside you're not able to do anything about that.

But when you – I think it's important that your prepared statement is very accurate, that the prosecutor has an opportunity to make certain that you're not stepping over the line. I am not sure – during my son's murder trial, I was kept out during three trials, not allowed to be heard, and there was a lot of inaccuracies in there. The last day, the last moment, they let me come in when the defendant was testifying. I caught him in a huge lie and was able to send it up to the district attorney who went ahead and found that lie to be untrue, and he was convicted because he was able to do that.

So should victims be in the courtroom, should they have that opportunity? I think that that's a very interesting question because if you're talking about a family that isn't honest, that they're into bad things, they probably shouldn't be in the court. It would just generate more lies. But for good people – and that again isn't fair to some – but for good, honest people that could give some information to the judge that they may not have, I think that's very important, and I think probably a prepared report that's looked at by a prosecutor would be very important to do that.

It's not, "Yes, our heart's torn out, yes, our Christmases are never the same." It's, "Can you give some information that might help that judge do the sentencing." A judge knows. They don't need to hear all of that stuff again.

And so it's very hard, and what we did in California – I also sit on the Post Commission – we put together a video to help train victims how to work better with law enforcement in the court, how to have information, and also how to prepare a report to the judge if they're allowed to be heard.

I think that victims need to have some type of education on how to deal with the system, and it needs to be in several different languages. In California, we have it in five different languages, and it's very hard.

My father was a policeman, and one day all of a sudden, I'm faced with my son's disappearance and not knowing where he went or what happened to him. And I had to learn a lot, and hopefully that I can share that with any of you that want the information. It's not a nice story. And then while we're in that trial, eight-year trial, my brother and his wife were also murdered and we're still on that trial. And they were my only son, my only siblings.

So unfortunately, I've got a lot of information in this old head, and I represent, I think, and have bios on, more victims than anybody in the nation, as far as breaking the information down, what happened. And I'm not talking about parents of murdered children, or somebody like that; they certainly have more. But we work with Force 100 on what happened in the courtroom, and there's a tremendous amount of information that we need to get out. Nobody has any idea.

CHAIR HINOJOSA: Thank you both.

Does anybody else have any other questions?

[No response.]

CHAIR HINOJOSA: Thank you all both very much. I will say that for anybody who's on the bench, when you sentence an individual you certainly have to consider the defendant in that particular situation, that individual defendant, but we all also consider the public and the public interest in the particular case, although the public may not be present. And you both represent two of the issues that face everyone who does this, and face the Commission when it determines what the guideline range should be, and that is whether it's too much of a sentence or too little of a sentence, and I think those are issues that the Commission faces when it writes the guidelines, and those are issues that every judge, in determining a sentence, also goes through in each case.

So we appreciate your taking the time to come share your views.

MS. CAMPBELL: Thank you.

CHAIR HINOJOSA: Thank you all very much.

We'll go on to the next panel. The next panel is from academia, which, therefore, means smarter than the rest of us.

[Laughter.]

CHAIR HINOJOSA: We have Professor Paul Rosenzweig, who is a senior legal research fellow with the Heritage Foundation and is an adjunct professor at George Mason University School of Law. We also have Professor Douglas A. Berman, who is a professor at the Michael E. Moritz College of Law, The Ohio State University, whose biggest concern is when the University of Texas Longhorns come to play them in football sometime in September of this year. He is also famous for his blog, which I have dubbed "the blob," as it keeps getting bigger and bigger.

Professor Rosenzweig?

PROF. ROSENZWEIG: Thank you, Mr. Chairman.

CHAIR HINOJOSA: I will start with my right.

PROF. ROSENZWEIG: Okay. Well, thank you very much, Mr. Chairman. Thank you very much for inviting me. I was here last November and confidently offered a number of predictions about the likely result in the Supreme Court, almost none of which proved to be true, proving that I –

CHAIR HINOJOSA: You were like everybody else.

PROF. ROSENZWEIG: Yes, proving that I take no caution at all from that experience, I will offer some more.

It is, however, a cautionary note, which is that honestly nobody who was here in November and, frankly no observer of sentencing law and procedure prior to the Supreme Court's decision could possibly have predicted what result we got.

CHAIR HINOJOSA: I know some people who did.

PROF. ROSENZWEIG: Really? That's very impressive. It does, however, suggest a real note of caution, which is that we should be – though I will say some predictions here and some thoughts, we should be exceedingly humble in our self-congratulations and perhaps move somewhat slowly. I am not one to think that there is a need for any immediate set of reactions. I think that there may well prove to be some as time goes on, but since I have had a bad track record, I'm not going to rush blindly forward again.

I will offer one prediction, though, which is another aspect of caution, and it's one that hasn't – it's a viewpoint that hasn't been offered here today, which is – and I realize full well that the main thrust of today's hearing is what should we do to live with Booker, and that's right and true because Booker is immediately in front of us.

I honestly don't think that Booker will last. I don't think that five years from now the sentencing regime that we are now trying to build will be the sentencing regime in the federal system. Either Congress will change it because it doesn't like it, or of equal possibility, it will collapse of its own weight because it is

– and I say this with all respect to the Supreme Court and the jurists who have crafted the decision. It is incoherent and self-contradictory. We have a system that is now based upon, I think everybody would acknowledge, a transparent fiction that had Congress had the choice, this Congress had the choice, they would have asked for advisory guidelines; that notwithstanding the rejection of those in the '80s and the Feeney amendment and other congressional [inaudible], this Commission is more than familiar with in the last few years, no legal structure that is based upon a fiction can last too terribly long, I think.

The other one is the inherent contradiction between the merits opinion and the remedial opinion. And, after all, we now have a system in which the right to a jury trial that lies at the core of the constitutional rules that we are constructing has produced a system in which there is more or less unfettered judicial discretion, and the jury has almost no role at all. And those two things to me seem to suggest that in the long run Booker will come back upon itself.

The other reason I am skeptical of its long-term vitality is because the provision for reasonableness review will either prove to be nothing at all, in which case we will have a de facto every decision is reasonable, and judges will routinely affirm on some abuse of discretion standard that is a review standard in theory and not in practice, or will actually have some real bite and the courts of appeals will wind up instituting reasonableness reviews that have some real structure and meaning. But if they actually have some real structure and meaning and become legally constraining on district court judges, then they will become, in effect, mandatory rules respecting the discretion of judges and will run right back into the Blakely/Booker core remedial problem.

Now, maybe I'm wrong. Maybe a system that has these kinds of cognitive dissonances in it can be sustained over a long arc of time, over 15, 20 years. But I'm really very skeptical. And what that actually means for me is to commend to you briefly the project I commended to you back in November, which is the guidelines need simplification as well. And that's independent of Booker. We can have a simplified guideline system that goes on top of the advisory guidelines and that is available, if we wind up going back to a system of jury fact finding and sentencing.

Right now the structure of the guidelines is far too convoluted, far too complex for it to be readily transformed into a jury sentencing system, and it remains, frankly, far too complex to really allow district court judges to, you know, operate with the new discretion that they have. It's very proscriptive in its ways and engenders some of the thoughts that judges like Judge Adelman have about the necessity for going beyond. If they were simpler, they'd be more appealing, even in an advisory system.

I know that that is a big task and you've got lots of other things to talk about, including how to deal with Booker directly. But I don't want Booker – if I could urge upon you a course of conduct, I wouldn't want Booker to occupy the entire field of this Commission's attention going forward.

Turning briefly to Booker, I think you've got a lot, a huge number of issues that are out there. My general sense is that this Commission is best engaged in answering as decisively as possible the procedural questions because those are ones where, to be sure, you can't actually direct people explicitly, but an optimum set of procedures that would in this Commission's judgment act – you know, be reasonable procedures and meet the reasonableness test to the extent the courts apply reasonableness to procedural process rather than substantive results would be, I think, very good. I certainly think that for this Commission, for example, to offer the policy judgment that judges need to continue to calculate the guidelines, as you have in construing this, and to make that part of it is a great contribution, and I would urge more of that.

On the substantive side, I think your question, Judge Sessions, is absolutely right. You're not going to be able to constrain district court judges. If you could, it would, again, run right back into the Booker/Blakely remedial problem. But you have, I think, a great deal of moral authority. I heard Judge Hinojosa at the ABA earlier, and he talked about the unique place of this Commission at the intersection of all three branches – executive, legislative, and judicial. And that gives you really, I think, a great opportunity to define the reasonableness, at least the broad outer parameters. And to the extent that you continue to do so, I would urge you to continue to do so.

I've offered some more particularized answers to some of the more specific questions that you've asked in my testimony. I won't bore you by repeating them here. But I think that, by and large, Booker should be seen as less a change agent – or as minimal a change agent as possible going forward, and that that's a formula for success. If it becomes a license for wildly disparate sentencing, wildly disparate procedures in different circuits, wildly disparate substantive sentencing treatments – one area I predict that this may very well happen, for example, is in the crack/powder area. If it becomes a license for that, that politically I think will engender a counterrevolution far more rapidly than is warranted. And so I would urge the Commission to try and guide the judiciary away from that.

I'll conclude there.

CHAIR HINOJOSA: Thank you, sir.

Professor Berman?

PROF. BERMAN: Well, I liked Paul starting "deja vu all over again" because Yogi Berra did set the tone for my opportunity to both thank you again for a chance to come back and really to reiterate some of the principles that I spoke to in November but now reshape them in light of how Booker has reshaped our collective universe.

I want to focus particularly on some principles. I think the remarkable remedy – and "remarkable" is a word that I think fits because people who have different views of whether that's a good or bad reality, but it was a remarkable remedy. It does provide us, all the same, with a remarkable opportunity to return to first principles, but to do so with the collective wisdom that 20 years of guideline sentencing in the federal system have brought upon us. Though there's dozens of principles we might focus on, I'm going to put them into three categories. I did in my testimony, and I just want to echo some of those points, what I'm sort of dividing into institutional principles, substantive principles, and procedural principles, which I believe should guide the work of this Commission in the weeks and months ahead.

On the institutional front, I start with a point echoed by many before, the Commission's leadership. Justice Breyer properly, and perhaps not accidentally, given his prior status on this Commission, emphasized twice in the Booker opinion the unique importance of the Commission, your critical role, your unique responsibility. It reinforces the idea that this Commission is the only institution which, by virtue of its information and insight, can take a truly comprehensive and balanced view of the entire federal sentencing landscape. It is for that reason that this Commission should continue to take a highly visible role as a vocal advocate for sound federal sentencing reforms. I want to compliment you for the job you've done, releasing the 15-year report, providing as much public data as possible during this period of incredible transition. I want to encourage you to continue to do that, continue to speak about your role as leaders going forward about the importance of a data-driven approach to federal sentencing. And as I'll outline in a few minutes, I particularly want to encourage you to produce for at least the next year quarterly reports to Congress about

post-Booker sentencing developments, which include specific recommendations concerning potential short-term and long-term legislative responses to Booker.

I'll get back to that in a minute, but other institutional principles, broad and transparent collaboration with all the institutions and actors in the federal system and, again, to compliment you on putting this hearing together, state actors as well. We've heard a lot of talk, and rightly so, that many states operate under advisory guideline systems, and I think they have an awful lot to teach us. I look forward to hearing what they have to say tomorrow. I encourage this Commission to continue to aspire to be a true hub of sentencing information and knowledge by encouraging various entities – public policy groups, federal agencies, state sentencing commissions and the like – to share and allow for public dissemination, perhaps on your website, the data that's being collected and analyzed concerning not just the operation of the federal sentencing system, but also a number of state systems that can be valuable models and visions of contrast in a host of things.

Finally, institutionally, judicial involvement, a point that obviously the judges on this Commission understand full well that I think this Commission doesn't need to be instructed on, but that it's important for you to highlight to all the others acting within the system. Federal judges, I think as we've seen already today, care passionately about these issues and having them involved in the policymaking process is critically important, and yet a role that they are not always familiar or comfortable with. That's why calling them to testify, encouraging them to take a proactive role in this process is a role that this Commission can play, and to highlight to others involved that the voice of the judiciary is not only one to be sought out, but heeded in many respects.

Turning to substantive principles, I want to emphasize the importance of dividing up the federal sentencing universe and particularly that this Commission focus upon violent and repeat offenders. In the wake of Blakely and now also in the wake of Booker, the U.S. Department of Justice has in a variety of sorts of ways suggested that the toughest federal sentences should be directed toward violent and repeat offenders. And I thought Attorney General Gonzales's comments during his confirmation hearing that prison is best suited "for people who commit violent crimes and are career criminals," and also that he 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." In his words, "It is part of a compassionate society to give someone another chance."

Unfortunately, some of the statistics bear out that the federal system has not always done a great job of focusing its prison resources on violent and repeat offenders. I don't want to debate the particulars of any of the statistics right now. My goal, rather, is to spotlight that I think there is broad agreement that the federal sentencing system should be particularly concerned with violent and repeat offenders, and to suggest that post-Booker analyses and reforms should be especially attentive to the distinction between first-time, non-violent offenders and repeat, violent offenders.

Other critical substantive principles, mandatory sentencing laws. You all have said, over and over again, how in crude ways they disserve the goals embraced by Congress in the Sentencing Reform Act. Just continuing to reiterate that message as various proposals move around I think is very important.

Offender circumstances. One of the reasons why mandatory sentencing laws are criticized and have been found to be often ineffective and unjust is because by describing a sentence based on only one aspect of an offense, they often mandate identical sentences for defendants who are substantially different. Unfortunately, the guidelines have been criticized for sometimes likewise placing undue emphasis on precise quantity of harm, allowing that to drive the sentence, and giving insufficient attention to offender circumstances.

It's not surprising, then, that in a survey of Article III judges that this Commission conducted quite recently, a significant percentage of judges suggested that more emphasis be given to a broad array of mitigating offender circumstances, and a majority of respondents stated that age, mental condition, and family ties and responsibilities should play a greater role in federal sentencing.

What we have now after Booker is a remedy that obviously enables judges to give greater consideration to these offender circumstances, and the fact that the survey showed they want to is a sign that it's going to come into play whether they intend it to or not. That's one of many reasons why this Commission should especially focus through its data collection and analysis on whether and how offender circumstances can and should be sensibly incorporated into federal guideline sentencing.

I think one of the concerns and a viable concern is that offender circumstances can produce disparity, but only by ignoring or not effectively channeling the consideration of offender circumstances is that a serious problem.

This then relates to the last key substantive principle, a balanced pursuit of uniformity. Achieving sentencing uniformity was an important goal of the Sentencing Reform Act, but not the only goal. And the emphasis in Booker on 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed reducing disparities as only one of a number of goals. Your own 15-year report highlights the challenges of chasing down disparity because of geographic variation, because of presentencing disparities. The simple story is that absolute sentencing uniformity is not an achievable goal, and it should not be doggedly pursued without recognizing that a just sentencing system needs to strive to achieve a host of other important values.

This then leads to some procedural principles. There's an incredible link between procedure and substance that I think has gone lost or forgotten in our effort to reform federal sentencing laws. Assistant Attorney General Christopher Wray rightly stressed in his testimony to the House subcommittee last week that "to have consistent sentences, it is essential that sentencing hearings have consistent form and substance." I think this Commission should make procedures – and we've heard this from a number of witnesses – a key consideration because among the variation we may see in the wake of Booker may actually turn on different applications of sentencing procedure rather than different substantive judgments, and among the procedural focus points going forward, I think, concerns about fair notice. There have been consistent complaints that oftentimes defendants do not get the notice they need before entering pleas about the facts and factors that come into guideline calculations, exploring ways to increase notice effectively, transparency in the decisions that are made presentencing. I think some procedural reforms could achieve goals that way.

The burden of proof issue, one that's very challenging but one that I think is incredibly important. As you may realize, a number of defense attorneys are already arguing that a beyond a reasonable doubt standard, not a preponderance of the evidence standard, should be applicable in the wake of Booker. I must say that I see some merit to the contention that the Due Process Clause should be understood to require that all facts which can lead to enhanced sentences be proved beyond a reasonable doubt. After all, as the Supreme Court stressed in In re Winship, this heightened proof standard provides "concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law."

Put simply, preponderance of the evidence is a civil standard. We learn it as a civil standard in law school. My students have always been distrustful of me when I teach them [inaudible] and explain to them that in the criminal system, even after you're acquitted by a beyond a reasonable doubt standard, that consideration, those facts can still come to bear at sentencing.

Importantly, the Sentencing Reform Act doesn't speak to burdens of proof at all. The commentary as a part of guideline 6A1.3 does say that the Commission believes the use of the preponderance standard is appropriate to meet due process requirements and policy concerns. But that policy statement, I believe, hasn't been seriously reexamined since Jones, Apprendi, Blakely, and Booker have reshaped our understanding of the significance of procedure and the constitutional rules that attend to them.

I encourage this Commission to give steady attention and serious consideration to these burden of proof issues, to monitor how lower courts are addressing these matters, and to think through whether new policy guidance is appropriate in light of these issues, not just the legal jurisprudence but also broader public policy issues.

That then leads to the data points. Unfortunately, headline-making cases always have unique purchase in the development of sentencing laws and policies, and there is, I think, a particular concern that anecdotal accounts of particular cases may unduly impact and shape public debates over the future of the federal sentencing system. That makes your challenges especially significant and especially important that you help inform all key policymakers to stay focused on the cumulative data rather than be looking at anecdotes. There will always be outlier cases. In a system that processes 60,000 cases, I would be concerned if there weren't the occasional ugly case. Among the things to recognize, of course, is an ugly case at the district court level may not stay an ugly case. Appellate review oftentimes will fix that, and I'm particularly concerned, in light of the Feeney amendment, that there is a tendency to focus on ugly cases without having them be appealed and go through the processes that exist to correct those uglinesses that inevitably are going to happen in a system that is so huge.

Importantly, the challenges for this Commission are not only in collecting and disseminating data, but describing effectively and accurately this variance, non-guidelines sentencing idea, important to get nomenclature down, important, I think as well, as we focus on variances and departures, that we look at the magnitude as well as the number of variances. Small variances are not as disconcerting as very large ones. One of the things that I've noticed in just looking at anecdotal reports – that's all I can see from the newspapers – is even in some of these variance cases, we have defense attorneys arguing for probation, the guidelines providing for maybe five years, and the judges still giving two or three years, still giving a prison sentence, still not being unduly lenient, all things considered, but it may still go down as a variance. And without effective coding and analysis of the amount of the variance and its nature, there will be a misimpression of what judges are doing out there.

Similarly, I think breaking down, as I suggested, the statistics between first-time non-violent offenders and repeat violent offenders, I think breaking down drug cases versus sexual offenses versus fraud cases, I think distinguishing men and women in this coding, something that you all do and do very well in your big reports, but don't always get out there as effectively in the public policy conversation, is a very important thing to do as you put this data together.

The last point I just want to reiterate is the sort of go-slow attitude is not only important, I think, as a policy matter but as a pure litigation matter. The circuits are proving to us yet again how complicated life becomes when you change an intricate, detailed system. And I think any significant change – rapid, slow, whatever you want to say they are – are going to have enormous transition costs, years and years of litigation to work out. One of the things that you all can do effectively is start mapping out a plan for incremental changes, helping Congress see that maybe amendments are going to be a more efficient way to make some of the changes that are [inaudible] necessary than broad legislation.

I haven't even had a chance to look at all the sort of Feeney aftermath, but one of the things that I've noticed is that legislation itself has had questions surrounding it in litigation terms that can sometimes undermine the goals, even if it's brilliant legislation, if there are constitutional challenges, I heard the prediction that some circuits would find the Bowman fix unconstitutional. That is scary enough to encourage away from it, whatever you think its policy merits are, because it is inevitably the reality of how these things play out on the ground. And in a system that's designed to achieve uniformity, anytime you get circuit splits, you need to serve the goals of the system no matter how good the laws are written. And so for that reason as well, beyond the policy merits, the litigation realities encourage me to encourage you to leave well enough alone for now and to map out a strategy for slow, incremental changes for whatever problems get identified going forward.

Thank you very much.

CHAIR HINOJOSA: Thank you both.

Any questions?

[No response.]

CHAIR HINOJOSA: We've got to have questions.

COMMISSIONER RHODES: All right. I have a question. Encouraging that policymakers do not consider the outlier cases and instead take those cases to the appellate review process for correction, what is your analysis of the reasonableness standard actually providing a remedy for those outlier cases, you know, considering the various different circuits that have their own characteristics?

PROF. BERMAN: I really like the idea – and it's my old boss, Judge Newman, who sort of seemed to set this tone – that reasonableness will particularly govern the sort of outlier process, that I really think what we should be aspiring to do and what Booker may at least provide a really nice setting for, is that we ensure not just sort of a fair process but a deliberative process. And the real risk of the outlier cases, the real challenges, are going to be when judges sort of wave their hand at the guidelines and say, "Well, I kind of have an idea," or among other things, I'm a little concerned about this in Crosby, as a matter of fact. "I don't need to figure out the loss because, you know, that's complicated and, you know, I'll just say I wouldn't have given a sentence over ten years anyway." And so I think really sort of encouraging and regulating a process, and encouraging among other things the Department of Justice to appeal those cases where the process looked hinky, and making sure that it's deliberative along the way is one of the ways to sort of maximize the chance that the outliers at the end of the day really aren't outliers, that they are the product of true deliberation, because I think if there has been a deliberative process, the risk that the outliers should be looked at askance is much less. And so, I mean – and my instinct is that a procedural regulation – and again, this Commission can do a great job of encouraging a certain set of procedures and reform – you know, defining the terms, all of that can be very, very effective. I think that minimizes the risk that the outliers produce real concerns.

PROF. ROSENZWEIG: I guess I'm a little less sanguine than Doug. I think that reasonableness review with some help from this Commission and the circuits will pretty quickly define procedural requirements that everybody will have to follow. And that's mostly because judges don't care – I mean, they care about what procedures they have to follow, but all they really want is the formula to follow. You know, if you've ever been at a plea colloquy – right? – they want to make sure that they know what has to be on the checklist, and if the court of appeals tells them to put something new on the checklist, they'll put it on, and they're happy to do that.

I'm a little less optimistic about the likelihood that in the end the substantive reasonableness review will prove constraining. I am hopeful, I think, that if people adopt guidelines as presumptively reasonable, that will encourage that, for example. I think that if my reading of 3742(a) as to not allow appeals for sentences within the guidelines is an accurate reading, which I think it is, that will encourage it.

But I think that there is a great deal of sense within which district judges, some district judges will find themselves trending towards the outliers. I've even had one district judge tell me that, you know, he's looking forward to it. I don't know if he was joking or not, but, you know, ideas – we were talking earlier, for example, about whether or not judges in defining – in sentencing can consider the factors that the guidelines purport to exclude – age, race, socioeconomic. And it's quite clear to me that many judges think that those are relevant factors that bear upon their reasonableness. It's also quite clear to me that different judges, you know, look at them in absolutely different directions. Some see poverty as a justification for a lower sentence. Some actually see high socioeconomic status as a reason not to impose sentence because, of course, they're being punished substantially by the loss of a license or something like that as well.

Unless and until the courts of appeals impose some uniformity on the degree – whether or not that's okay in the first instance, and if it is, the degree to which it is acceptable, the reasonableness may not have as much success in constraining the outliers. I mean, it's all going to come down, if you will, to the standard of review and what people think it means, and where we're playing, we don't know that yet.

CHAIR HINOJOSA: Commissioner Castillo?

VICE CHAIR CASTILLO: Do you have any expert opinion on this? What do you think of Judge Cassell's recommended action items?

PROF. BERMAN: They all look sensible to me. I haven't had a chance to go through each individual one. I think the 5K1.1 issue sort of came to my attention for two reasons. One, I think the government has a real reason to be concerned about still having the kind of cooperation leverage that it feels it needs in order to create effective dealing. At the same time, I also think having them as sole gatekeepers is itself disconcerting at times, especially in light of the purposes of punishment and the Act's specification of the different goals that the sentencing system is seeking to achieve.

There may be instances – and this is something that, again, your own work as the Commission has highlighted – where a person can't give substantial assistance, no matter how much they'd like. They can give assistance. It just doesn't turn out to be substantial. Or as much of a concern perhaps is the quite variable standards that different U.S. Attorneys' offices are using to define what gets a 5K motion and what doesn't.

And so I like the idea of figuring out effective ways to ensure that there is an opportunity for substantial assistance to both be rewarded appropriately and for the government to have the leverage that it necessarily needs in order to get effective cooperation. I think that needs to be balanced. Really what it is – and I would say vis-a-vis all of Judge Cassell's proposals – is, you know, a healthy balance. And I think the preponderance standard, the other point that I noticed, concerns me. It doesn't feel to me like a healthy balance. I'm not sure that beyond a reasonable doubt is a healthy balance either for every single kind of factor. I've seen some very interesting work already done on the fraud loss issues that beyond a reasonable doubt actually is a problematic standard because anybody with a good forensic accountant can raise a reasonable doubt.

What that highlights to me, though, is there's important nuance in all of these matters, that maybe in fraud cases a certain degree of loss, you know, needs to be clear and convincing. You know, what's wonderful about being lawyers is we can come up with a bunch of different standards, and I won't reveal which judge told me on burden of proof, "Well, they're all the same, anyway, what's the big deal?"

[Laughter.]

PROF. BERMAN: But I do think it –

CHAIR HINOJOSA: What was your answer to that question? What is the big deal?

PROF. BERMAN: Well, I think it makes a statement, right? I mean symbolically – right? – to say that people can go to jail for longer periods of time just because we're more convinced than not. And after a jury has said we're not convinced beyond a reasonable doubt, again, I'm embarrassed to teach that to my students, quite honestly, you know, when they say to me, "So how does that make sense?" I said, "Well..."

CHAIR HINOJOSA: Does it bother you that a judge could do that under the old system without – and apparently under the system where we had no guidelines, all members of the Supreme Court seemed to say that would be fine.

PROF. BERMAN: One of the things, I think, is a key difference, is in those settings judges had an opportunity to add on top of that consideration judgments, so that judges had an opportunity to, in a sense, calibrate the scale. Well, that evidence is a little bit fishy and so, you know, not so sure. Again, the case that brings that to my mind is the case out of the Fourth Circuit, Hammoud, where based on what seemed like pretty questionable evidence of terrorist ties, the person had to go – and, again, this is the key point – had to go from a sentence of five years to 155 years. And, you know, if he's a terrorist, I'd want him to go away for 155 years. If he's not a terrorist – you know, part of, again, what's important about burden of proof issues is if the goods are there, the person is still going to get convicted, still going to be sent away, still going to be an opportunity. And I would wonder in that sort of case if a judge had the discretion to come somewhere in between, to say, you know, I think the evidence is not convincing, but I have concerns, I don't think five years is enough, I think 155 years is too long. What makes it different is that the preponderance standard in a discretionary system – now technically we have that again – gives the judge more authority to sort of weigh effectively.

CHAIR HINOJOSA: But you don't think under a mandatory system of the guidelines the judge didn't have that discretion to begin with?

PROF. BERMAN: What is disconcerting to me is the judge would have to paper over that discretion, right? So the judge would have to say, "Well, I'm not convinced by a preponderance," even if maybe he or she was. Right? That's the concern I have, that in a standard system that's put that way to a judge, if a judge wants to exercise discretion on that variable, his or her choice is not to actually honestly say, "Here's what I think the proof bears out, here's what I'm going to do." It would be, rather, to sort of look for gaps in the system. I know Professor Bowman has sort of spoken to this as well. Certainly they had discretion. What's disconcerting to me, especially as an ivory tower academic, is that that discretion would have to get buried into a statement about proof standards rather than brought to the surface in a way that, again, now it can be and this, you know, in some sense relates to some of the points that Judge Adelman is making.

I wouldn't like a judge now to say, "Well, I know it's a five-point enhancement for, you know, brandishing a gun, but, ah, you know, I don't think that was really proven to me" – when, in fact, what the

judge is saying is, "I think there was a gun, I just think in this case the purposes of punishment justify some other sort of consideration." And so, again, it's a view of making sure the statements match with the judicial perspective because – you know, really it's the cynic in me – that perspective is going to come to bear anyway. That's going to come to influence the judge, consciously or subconsciously, no matter what the legal rules are, better it be in an environment in which the judge can talk about that and express it freely rather than have to sort of subsume that into a non-written record or into a judgment that doesn't really reflect what's going on.

PROF. ROSENZWEIG: I actually think I disagree with Doug on this point, and it's because of the exact opposite effect, which is that if it were – well, substantively if there is a burden of proof that is beyond a reasonable doubt in an advisory system, the judge is going to bury that as well if he wants to – if he feels he needs to to enhance the punishment at issue.

In my view, actually, given a truly advisory system, the burden of proof is kind of irrelevant because the judge can expressly take into account, you know, whatever the weight is. I mean, that's the commonality in the civil system. "Here, I'll let it in for what it's worth, right?" And it may very well be that in the Hammoud case, we let it in for what it's worth, and we find it somewhat persuasive so that we think that it – you know, that there's some chance that he's a terrorist, and that motivates us to go from five to ten to 15 as opposed to 155. And I don't want a judge either falsely declaring that it's beyond a reasonable doubt and jumping up to 155.

So it actually strikes me, first, that maintaining the burden of proof at the lowest standard affords the judge the greatest discretion within the – to account for the weight he's giving the evidence in an advisory system.

The other thing that I really would caution about is the perception, which is if Booker becomes a reason for judges at the appellate level to impose higher standards of proof, that's – it strikes me as something that the legislature believes is generically within its province, and for describing these things, and I think that if we see – if it is construed – reasonableness is construed as making it harder in many ways, that's the type of thing that will engender a counterrevolutionary reaction, Thermidor, if you will.

I think that it is far better generically to assume that Booker changes as little as possible, doesn't change procedures. I mean, another question that it raises, for example, is whether or not the present fact-finding methodology of *ex parte* contact between the probation office and the prosecution probation office and the defense bar is reasonable.

Now, you know, sitting outside in my academic chair, I think there is a lot to be questioned about that system. It lacks all kind of adversarial components that we think are fostering truth finding. But if the judiciary or this Commission were to urge the judiciary to seek the reasonableness standard as a reason to change those settled expectations, that's precisely the type of kind of – you know, evulsive reaction, you know, major change that will engender a very strong counter-reaction, I think. It seems to me that Booker doesn't change that much about procedure or shouldn't be viewed as changing that much about procedure, both because it substantively leaves the judges with the greatest number of tools and because politically – and I shouldn't say that here, but politically that's the wise thing to do.

VICE CHAIR SESSIONS: I'd like to sort of focus on what we should do at this particular point, at this juncture of history. You talked about process, focusing on process. But you've also been talking a little bit about substantive issues. And the question is: what does the Commission do at this particular point? Do we allow these substantive issues to be fleshed out in Congress? Do we allow the courts to proceed without

any kind of direction from the Sentencing Commission? Or do we take a proactive stand and address some of the questions which have been raised today?

PROF. ROSENZWEIG: I think that this Commission has two goals to fulfill. The first is that, to the extent it identifies clear need for statutory revisions, inconsistencies either in the statute or the procedural rules, it's in a better position than anybody else to call those authoritatively to the attention of the legislature.

VICE CHAIR SESSIONS: Procedural statutes as opposed to substantive changes?

PROF. ROSENZWEIG: Generically, yes, procedural statutes. So that's kind of what I perceive as your role vis-a-vis the legislature. Your role, I think, vis-a-vis your colleagues on the bench, the judiciary, is unfortunately one only of moral suasion. I don't think you have any ability to order judges to stay within the guidelines, and indeed, as you pointed out, if you ordered them to and it were effective, that would violate Booker and Blakely.

I think, however, that at this juncture district judges are essentially in real time defining their roles, and a large part of what they're defining is the nature of their relationship to the legislative branch. And perhaps it's a little impolitic to say so, but I would counsel you to counsel them towards humility.

I fully accept judges as –

VICE CHAIR SESSIONS: Is that inconsistent with life tenure?

[Laughter.]

PROF. BERMAN: Well, judges –

[Simultaneous conversation.]

PROF. ROSENZWEIG: And that means, you know, urging them to be cautious in variances, urging them to give strong consideration – I mean, I think that the idea that they are just one factor ignores the context in which they were written with 3553(b) and their mandatory nature. You know, it will be the outliers that catch people's attention, unfortunately, notwithstanding the need for data. And at this juncture, you can't tell people, tell the judges what to do. You just can't. But you can urge upon them – I mean, it's no secret, because I've read it in the paper, that immediately after Booker, all the district judges kind of got together on the Internet and started trying to talk to each other about how to react to this. And I think that that's the right thing to do. And you are, in effect, kind of the capstone of that discussion that I hope will bring forward, you know, a sense of, you know, take the guidelines as a generic reflection because we've worked hard at trying to find what the right balance is. If you have a good reason, put it on paper so that people will know about it. Don't hide behind standards of proof. Put it on paper, and if it survives appeal, good for you. That's great. That's how the system will work. But don't kind of treat with disdain the product of our work and, because Congress has approved all of it, inferentially, you know, the work that the elected representatives of the United States have adopted.

PROF. BERMAN: Let me just sort of –

CHAIR HINOJOSA: I do want to just thank him on behalf of the press who might be here for the fact that Professor Rosenzweig gets his news from the print media rather than from the blogs.

[Laughter.]

PROF. BERMAN: Playing my role, which reinforces my sense that what I think being active – and why I'm encouraging quarterly reports with data and, again, quarterly may not fit your schedule but regular, to frame the conversation because in so many ways, especially at a time of so much uncertainty, how this gets talked through in lots of ways defines how people look at this universe and how it's going to be sort of comprehended in a sense. And already it seems like – and I certainly agree with Judge Cassell's point here – that, you know, encouraging going through the departure steps, defining a distinction between departure sentences, so-called guideline sentences, and variances versus non-guideline – I mean, that's a very important item to get out the data, to get people talking about it, to be working through.

Similarly, you know, Frank Bowman again, it became the Bowman fix not because it was, you know, any super original idea but because he got out there and framed the conversation, defined the terms of it. Good, bad, or indifferent, it's another piece of evidence that whoever is out there articulating the way these issues should be looked at sets the terms of debate in ways that can be effective or ineffective. And, again, I believe this Commission is going to do not only as good a job but a much better job than many other possible actors or institutions in defining those items. And that's why I think sort of regular production – and it may just be nothing more than what's done for this hearing, you know, topics of discussion, defining the issues in ways so that the public conversation can move forward, I would say that's both substance and procedure.

And so, again, I've sort of emphasized the distinction between violent and non-violent offenders, first and repeat offenders as being important because, you know, there's that Mark Twain quote which I love so much, "There's lies, damn lies, and statistics." You know, even a focus on data can be reshaped in a lot of different ways, and there will be lots and lots of different folks who will have lots and lots of different reasons to want to define the terms of a debate. And, again, I would trust you and encourage you to be active in at least getting the conversation moving in the sets of directions that you recognize as healthy to move in.

CHAIR HINOJOSA: Well, we want to thank you all very much, and I want to thank all the participants. I will say that today's hearing has been a big success.

[off topic]

CHAIR HINOJOSA: Thank you all very much, and we will see you all tomorrow morning.

[Whereupon, at 4:40 p.m., the meeting was adjourned.]

Transcript of Proceedings

U.S. Sentencing Commission Public Hearing
February 16, 2005

PROCEEDINGS

CHAIR HINOJOSA: We are going to go ahead and call the public meeting to order of the United States Sentencing Commission with regard to issues that have arisen since the Supreme Court decisions on Booker and FanFan.

Again, on behalf of the Commission, I would like to thank all the participants in these hearings. Yesterday's hearing was extremely helpful to the Commission, and we appreciate very much the time that each one of you has taken from your busy work and the other things that you need to do, to be here and share your thoughts on these issues. We appreciate your expertise and your willingness to come and share it with us.

This morning, our first panel is basically a look at state guideline systems. We have Kim S. Hunt, who is the director of the District of Columbia Sentencing Commission; Daniel F. Wilhelm, who is the director of the State Sentencing and Corrections Program at the Vera Institute of Justice; Mark Bergstrom, who is the executive director of the Pennsylvania Commission on Sentencing; and Lyle Yurko, who actually was kind enough yesterday to agree to step in for Richard Kern, who is the director of the Virginia Criminal Sentencing Commission and was called to testify before their state legislature today. Lyle is a member of the North Carolina Sentencing Commission. So at this point, we will go ahead and start with Kim Hunt.

DR. HUNT: Thank you, Mr. Chairman and members of the Commission. I appreciate the opportunity to testify. I'd like to do two things today. I'm the director of the nation's newest sentencing commission. It is an advisory guidelines system. So I'd like to spend a little time describing that system and especially the reasons we made the decisions we made. And secondly, I'd just like to offer a few observations about conditions under which we think successful advisory guidelines systems may operate.

So as I mentioned, we have an advisory guidelines system, in effect since June 2004, for felony cases in the District of Columbia Superior Court. It's too early to assess the effectiveness of that system – we've been in operation about six months – but there are encouraging signs and a lot of support from the various parties. In fact, let me mention I think we will assess in a preliminary way our successes in our November 30, 2005, annual report, so probably in about six months we will have a better sense of how things are going.

The first topic I hoped to speak about was the rationale for the system that we selected and a little bit about it. We spent many months considering various structured sentencing systems that had been in effect in various states. Our findings concerning those various systems are contained in our 2002 annual report, which is available on our web site. We concluded, for four reasons, that advisory guidelines made sense for the District of Columbia.

The first of those reasons was that advisory guidelines can achieve high compliance. The second reason was that advisory guidelines are less rigid than the mandatory schemes we studied, and allow judges more room to structure a sentence to fit the varying circumstances of individual cases. And that was important to us.

Third, advisory guidelines make it easier for the commission to adjust sentencing ranges in the future – and remember, we are calling this a pilot guidelines system; we expect to make some revisions along the way. It also allows us to account for important sentencing factors as needed and to address unanticipated consequences.

Last, and importantly, the commission believed unanimity was important within our commission and that was necessary to ensure the acceptance of our system; and the selection of the advisory guidelines enabled us to reach unanimity.

So let me just briefly describe, and I won't go into great detail about what our system looks like, except to say it's a relatively simple system. There are 12 offense groups and five criminal history categories. The driving force behind our guidelines system, its purpose, is to bring greater fairness to felony sentencing in the District of Columbia, and we believe we can do that with advisory guidelines.

We studied sentences during the period 1996 to 2003, and we saw a good deal of variation in sentences and variation that couldn't be accounted for by legal factors. We concluded that at least some of that variation was solely due to differences in judicial philosophy. So we developed a guidelines system with that in mind, to reduce unwarranted disparity, without trying to either create longer times served or shorter times served on existing sentences, but rather to bring in the edges toward the middle of historical sentencing patterns.

As a result, we collected the data and we crafted guidelines looking at each cell among these 12 offense groups and five criminal history categories and looking for the middle 50 percent of sentences, taking the top 25 percent of sentences and the bottom 25 percent of sentences and creating the ranges around that middle 50 percent. The important sense there was we were looking for where most of the typical cases resided within our system.

We expected departures. We continue to expect departures because we believe there are exceptional circumstances and particular cases that don't reflect that middle 50 percent of sentences and the typical cases that reside there. And so rather than trying to eliminate all of those departures, we crafted a fairly short system of what we considered to be exceptional circumstances – aggravating and mitigating circumstances. We also have an open-ended category, but we ask judges to consider something of equal gravity to the ones that we do mention, about ten types of circumstances in both the aggravating and mitigating areas.

With that, we will study. We hope to have and are beginning to see some thoughtful responses as to why they departed in particular cases. We don't have a lot of departures yet. And we will use that information as we go forward in this pilot system to reconsider what we've done and perhaps make adjustments as needed.

So that is a brief description of the system. I will be happy to answer questions about that, if you have any particulars. I know time is limited, so I'd like to just move to speaking briefly about the prospects for success in an advisory system.

I noted earlier that we studied state sentencing structures. In fact, all the other panelists that are here with me today helped us in this process of studying other sentencing systems, and we concluded that advisory guidelines can work, and do work, in various places around the country. I think many people will be surprised to hear that, that advisory guidelines can succeed. They lack a formal enforcement mechanism, which some people believe is necessary to ensure compliance. However, if you look at the compliance rates around the country, I think what you'll find is the compliance varies from jurisdiction to jurisdiction, and there is no demonstrable pattern of higher compliance in presumptive systems than there is in voluntary systems.

Now obviously, a state-by-state assessment is hard to do. The rules in effect in each state are different, the structures or their guidelines are different, the width of the ranges would surely affect

compliance somewhat. I guess the point I'd like to leave you with about that, though, is that, given the various structures in place around the country, in voluntary systems where there's no formal mechanism for requiring people to stay within those rules, people nonetheless largely stay within those rules. And they do so for a variety of reasons that I'd like to mention briefly.

I'm going to also mention another factor that we believe – let me mention four factors, in fact, that I think are important to the success of these kinds of systems. One is transparency – I'd like to describe that briefly; data, information and analysis; effective dialogue; and clear goals and feedback are the range piece.

With regard to transparency, there are examples of sentencing systems in the states that are relatively transparent. I think, in fact, the Pennsylvania system is probably the most transparent system in the country in which each judge's compliance rate is reported. It stands to reason that judges would be more inclined to comply with voluntary guidelines if compliance rates are transparent and readily available, and that when they don't comply, they will provide a useful reason for understanding what was unique about that case that led them outside the guideline range.

The second point had to do with data analysis and information gathering, and I don't really have to tell the United States Sentencing Commission or its staff about that. You do a lot of that and have done for many years. What I would mention is what we found when we were constructing our guidelines was that that data analysis, coupled with dialogue among the various parties interested in sentencing policy, provided very effective feedback, and I think you will find that to be the case also.

Obviously, in an advisory guidelines system, it is likely that some offense groups will have different compliance rates than other offense groups. In the process of going through that analysis, you learn a good deal. Creating focus groups or other mechanisms to get regular feedback about the reasons for those areas is going to, I think, be very useful for you.

I would just conclude by mentioning that I think it's going to be very interesting to see how appellate review of sentences occurs under this new reasonableness standard that's been created. To my knowledge, none of the advisory guidelines systems currently have appellate review. Maybe other participants will talk a little more about that. But that is, I think, one area where the states can learn from the federal experience as that moves forward and you begin to analyze that.

Thank you very much. I'll be happy to answer your questions.

CHAIR HINOJOSA: Thank you, Dr. Hunt. We will go on with the next group of speakers and then we'll open it up for questioning. That has been the procedure we have followed, and I should have stated that at the start.

For the remaining group of speakers, I will note that Professor Doug Berman of blog fame has walked in. Maybe I should give you Miranda warnings, but I don't have time for that.

Mr. Wilhelm.

MR. WILHELM: Thank you, Mr. Chairman, members of the Commission. My name is Daniel Wilhelm, and I direct the State Sentencing and Corrections Program at the Vera Institute of Justice in New York. I wanted to thank you for the opportunity to participate in this conversation this morning and to share some of the lessons that we've picked up from states around the country as the Commission considers policy responses to Booker.

Unlike the commissions that are represented here, Vera's role is a bit different in that we don't work within just one specific jurisdiction. We're a not-for-profit organization that works in a nonpartisan way around the country, and the five years that this program has been in existence – Vera's been around for more than 40 years – we've worked with officials from more than half the states in a variety of sentencing and incarceration policy issues. That's given us kind of a unique vantage point to view what's going on around the country, and to assess the construction and operation of guideline structures in many different jurisdictions.

Before I offer some observations about both advisory and mandatory guidelines systems, and I'm going to focus most of my comments on the advisory systems that exist, I first want to commend the Commission for taking the time to examine what the states are doing. In our travels around the United States, we often see that the federal and state criminal justice systems operate in parallel but often in an ignorant parallel of what's going on in each other's shops. And this is really unfortunate in many ways because the states have been, I think as the creators of federalism intended, the states have really been laboratories of policy innovation around sentencing reform. And so the lack of a robust federal-state dialogue, I think, has really kind of constrained the conversation in ways that it need not be. So I commend the Commission for opening up that discussion in a bit more purposeful fashion.

What's interesting to note is that the aims and many of the methods that are being employed in the states are familiar to federal practitioners because they are many of the same goals that undergirded the creation of the federal sentencing guidelines years ago. To provide some kind of systemic context, it's interesting to note that since the late 1970s, approximately 20 states have adopted sentencing guidelines and nearly all of them retain them in some form today. Some of these systems are presumptive in nature and would be familiar to federal actors who practiced in the pre-Booker federal system. Others are advisory in nature, and bear a more striking resemblance to the way the federal system looks after Booker.

But what's interesting is that, as I said, some common missions inform these in concert with the missions that inform the federal system, such as a desire to eliminate unwarranted disparities, to promote proportionality among sentences. And states have tacked on another important function, which is to better manage and control resources expended on prisons and correctional structures. This historically has not been as much of a concern in the federal system, but for states, which in the aggregate incarcerate more than 1.2 million of the 1.3 million prisoners in this country and spend $40 billion a year on prisons, it's become an issue of increasing concern and urgency.

So given those factors, how should a federal inquiry assess advisory and mandatory guidelines systems? Looking at the advisory systems generally and looking with some specificity at the system that the Supreme Court created in Booker, it's worth noting that the system created in Booker is a fully functioning system. By that I mean that the Court's conversion of a mandatory system into a voluntary one does not somehow render the new voluntary system incomplete. I think there has been in some quarters a tendency or propensity to think about the lack of a mandatory feature as creating an incomplete system, but, with the states as a guide, that by no means has to be the case. Reasonable minds can disagree about the propriety of voluntary versus presumptive systems, but it's clear that many policymakers and jurisdictions prefer the former. They prefer voluntary systems. Some ten states have affirmatively chosen to adopt voluntary guidelines structures and two others are currently in the process of creating them.

It's also worth stressing that even though Booker and Blakely leave many important questions unanswered, which will play out in the federal system and perhaps also in some of the states – not the least of which, what the appellate standard of reasonable means and how it will be interpreted – the Court's guidelines structure that was created is more or less ready to wear, although some further alteration may be required to

make it fit comfortably. Congress may object to the method by which it was created, it may object to the content of what was created, but it doesn't mean that the system is non-operational.

So that is a precursor to the notion that early calls for immediate legislative response may be unwarranted by practical need, in that the system that was created subject to further modification is workable. Political imperatives, however – and politics is never absent from these sorts of sentencing and criminal justice decisions – may compel a different result.

So from what we've seen using the states as a guide, rash action may be unfortunate and it may be unnecessary, so I would urge Congress to take the time to study this system that's been created. The best way to do that, obviously, is by drawing on the historical strengths of the United States Sentencing Commission, allowing the Commission to continue its mandate of study and assessment, which you already have embraced in the post-Booker era, to determine how federal courts are applying this new rule.

Given that the temptation of action by Congress will be omnipresent, it's still instructive to see what state advisory guidelines systems can offer the Commission as you counsel Congress on its policy options. As I stated a moment ago, depending on how one defines advisory guidelines, about ten states have created such systems that are in place today. The basic definition of these, as you know, at least as they have traditionally applied in the states, is that they do not require a judge to impose a recommended sentence and they generally do not provide for appellate review.

Within that broad rubric, however, there are really pretty significant variations among the ways the states structure the traditional use of these guidelines and the way the judges interact with these guidelines. And it's these structures that, in my opinion, can really determine the success and the acceptability of an advisory or a voluntary system, using the terms "advisory" and "voluntary" interchangeably.

States can measure success in a variety of different ways, depending on what it is that they want to get out of their systems. I mean, for a state where resource control is very important, the ability of their guidelines to predict who's going to prison, and predict what their bed needs are going to be, is going to be quite important. But there are others of the more kind of altruistic goals, such as those related to fairness and decreasing unwarranted disparities, which are also quite relevant across all the systems we've talked about. And often, in many states these are statutorily mandated or stated purposes for the creation of the systems in the first place.

So if officials are successful in creating sentences that meet these goals, compliance is a valid measure by which to assess the success of systems. It's interesting to note, as Dr. Hunt had mentioned, that a number of voluntary guidelines states have markedly high compliance rates. It's unfortunate that Dr. Kern from Virginia couldn't be here today, because Virginia has really emerged, I think, in the national conversation as the state system perhaps most analogous to the way that the post-Booker federal system looks now. Virginia, as you may know, reports that judges imposed guidelines-recommended sentences some 80 percent of the time. Departures are evenly split upwards and downwards, ten percent each, beyond the initial 80 percent.

Now, it's important to know that Virginia also shares one important feature with the new federal system, namely, that judges are required in Virginia by statute to consider the guidelines recommendation applicable in each case. Moreover, in Virginia, judges are statutorily required to complete a guidelines form that contains written explanations for any departures. Given the high rate of compliance in that state, it may be reasonable to conclude that the process of considering applicable guidelines and formulating a written explanation for departures helps build awareness.

It may be reasonable to conclude that the process of considering applicable guidelines and formulating a written explanation for departures helps build awareness of what the guidelines require and may help inculcate a sense of fealty to the application of the guidelines in most circumstances.

It is important to note a couple of things about Virginia, though. Judges continue to be very actively involved in the – we're actively involved in the creation and continue to be very actively involved in the maintenance of guideline structures of the state. And, also, the guidelines themselves are based on an historical study of actual sentences served by defendants. And so there is a basis and a belief in the kind of propriety and probity of the underlying guideline system that exists in Virginia that doubtless helps promote compliance. Something has been made of the fact that in Virginia the legislature selects judges, and so perhaps judges are fearful to not comply with guidelines. There is obviously intuitive appeal to that argument, but there is very little evidence, at least the anecdotal evidence that we have been able to collect and assess, that suggests that very few judges are actually not returned to the bench and that judge-specific data, although it has been occasionally released in the past in Virginia, is not regularly made available either to the legislature or to the public.

Compliance is high in other states that have less-rigorous requirements, such as in Utah and Maryland, and in those states there are some sorts of systems in place procedurally that require judges to take certain steps in regard to the guidelines. It is fair to say that in some states, where there are virtually no requirements put on judges, compliance has been poor. Missouri, for example, basically, doesn't require judges to do it – recently, required judges to do nothing with its guideline structure. It existed kind of on paper, and maybe in cyber-space and, as a result, according to one of the justices of the Missouri Supreme Court, compliance was less than half. Recommended guideline sentences were applied in less than half of the cases.

So it is difficult to draw definitive conclusions from these experiences, but several points do emerge.

First, it appears that some rigor in the form of procedural requirements that judges must follow may help promote compliance with advisory guidelines. Here, with the Court's decision that directs federal judges to consider the federal guidelines in an advisory context, that may provide some of the impetus for a high compliance rate in the federal system.

Second, it's worth noting that in none of the states that we have discussed is appellate review available. And as Dr. Hunt suggested, there seems to be some sort of normative character that, over time, the existence of guidelines, even if they're advisory in nature, judges tend to use them and apply them, given perhaps some encouragement to do so in the form of procedural requirements. So, as Dr. Hunt said, with the creation of perhaps a more rigorous appellate review standard on the federal level, that may lead to even greater compliance.

Third, what Virginia and the states at this table represent, I think, is the example that a well-informed, data-rich Sentencing Commission that is actively involved in the policy formulation and advising process is essential to the creation of sentencing policy that is not only substantively desirable, but politically legitimate and politically feasible. And so based on what we've seen in the better state examples, this really represents a golden opportunity for the U.S. Sentencing Commission to embrace that role and actively study the data that it's collecting now, and to use that as the basis for forceful policy recommendations to Congress and to use that, then, also, as an opportunity to build political support and constituencies for those recommendations.

I will just briefly mention mandatory guidelines, and it may be premature to consider them, given the state of affairs this morning, but maybe the Congress compels a return to mandatory sentencing guidelines.

And if that is the case, it should just generally be remembered that states, also, may have something to offer here. States have taken a variety of approaches with regard to presumptive guidelines, and it's interesting to note that in none of the states has judicial discretion been constrained in the way that the pre-Booker federal guidelines and mandatory minimums operating in concert have constrained the discretion of federal judges.

It must be noted that there is a big difference, however, between federal and state structures, and that this big difference may limit the ultimate applicability of state models to federal presumptive guidelines, and that is the role that criminal codes play in the different systems. The federal criminal code is a less precise instrument than the codes found in many states.

The reason the federal system was so deeply implicated by Blakely and Booker is the heavy lifting assigned to the federal sentencing guidelines in fleshing out the severity of an offense and the culpability of a defendant. In the states, most of these tasks are taken up through the provisions of more detailed or finely grained criminal codes and differently graded offenses, which are appropriately considered and included in charging decisions.

So, if the need arises to consider presumptive options, it may be appropriate for the Commission and the Congress to think about whether the aspirations and goals that supported the creation of federal sentencing guidelines in the first place can be met within the context of the current federal criminal code. Maybe the consideration of this larger, and admittedly much more difficult, political and substantive issue, whether the federal criminal code needs to be reformed, has to be answered to the predicate before formulating presumptive policy responses.

If code reform is not feasible, possible, or desirable, the experiences of presumptive states may be less directly applicable, but, still, the principles of fairness and justice that the state systems and the federal system hold in common still suggest that the states have something to offer. So thank you very much, and I look forward to answering any questions you may have.

CHAIR HINOJOSA: Thank you very much.

Mr. Bergstrom?

MR. BERGSTROM: Good morning, Mr. Chairman and members of the United States Sentencing Commission.

I am Mark Bergstrom, executive director of the Pennsylvania Commission on Sentencing. Thank you for this opportunity to comment as you assess the impact of the United States Supreme Court decision in U.S. v. Booker on sentencing issues. I hope that some of the experiences with sentencing guidelines in Pennsylvania during the past 25 years may be of assistance in this effort.

Sentencing guidelines are inherently linked to the sentencing structure and practices of the jurisdiction in which they are developed. For this reason, I doubt that Pennsylvania sentencing guidelines would be effective if transplanted to the District of Columbia or to North Carolina or to the federal courts. So my purpose here today is not to recommend adoption of any specific aspects of Pennsylvania sentencing guidelines for incorporation into the federal system, but rather to highlight some of the characteristics of structured sentencing that have proven effective and useful in Pennsylvania.

Pennsylvania has both sentencing guidelines and discretionary parole release authority. When imposing an incarceration sentence, courts are required to impose both a minimum and a maximum sentence,

with the minimum sentence guided by the sentencing guidelines and any applicable mandatory minimum sentences, and the maximum at least double the min with no longer than a statutory maximum sentence.

The minimum sentence serves as administrative notice of the earliest date a person is eligible for parole. There is no good time or earned time for state offenders in Pennsylvania. Therefore, an inmate must serve the entire minimum sentence before being eligible for parole. And since there is no right to parole in Pennsylvania, our appellate courts have long held that the maximum sentence imposed by the court is the actual sentence. A defendant may not serve more than the maximum sentence, either in prison alone or through a combination of prison and parole.

Pennsylvania sentencing structure has arguably survived Apprendi challenges because the grading of the offense, which dictates the statutory maximum, is based on proof beyond a reasonable doubt of the elements of the crime. The court may not impose a maximum sentence longer than the statutory maximum based on the grading of that offense.

Pennsylvania sentencing guidelines have arguably survived Blakely challenges because they provide recommendations only relating to the minimum sentence and provide no recommendations regarding the maximum sentence. If you have an interest in reviewing issues of federal sentencing structure beyond guidelines, I commend to you a forthcoming article in the Emory Law Review by Professor Steve Johnson, who is a member of the Commission and a professor of law at Villanova University.

Moving on to guidelines, specifically, Pennsylvania's first sentencing guidelines were adopted in 1982. They were promulgated in order to structure the trial court's exercise of its sentencing power and to address disparate sentencing. Legislative history also indicates that the guidelines were enacted to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict unfettered discretion given to sentencing judges.

Pennsylvania sentencing guidelines structure both the dispositional and durational decisions of the sentencing court. Since the guidelines address sentencing for misdemeanors and felonies, the dispositional recommendations consider the full range of options, including probation, county intermediate punishment, county incarceration, commonly known as jails, which can be used up to five years, a maximum of five years, state intermediate punishments, state incarceration, state boot camps.

Since the early 1990s, the guidelines have provided tradeoffs between the use of incarceration and community-based intermediate punishment options, with great emphasis on the use of clinically prescribed drug and alcohol treatment in lieu of or in addition to incarceration.

Pennsylvania sentencing guidelines have often been characterized as advisory due to the relatively weak – I think Mr. Wilhelm described it as procedural review – of our guidelines for most of its history, particularly in review of durational departures from our guidelines. However, in recent years, the Pennsylvania Superior Court has exhibited an increase in the reach of appellate review sentencing discretion, a move towards more presumptive guidelines.

Since this Commission has expressed an interest in receiving comments regarding state appellate review and presumptiveness of state guidelines, I will focus on this issue. It may be helpful to relate some of the comments from a recent superior court opinion in Pennsylvania that addressed the fairly recent changes in appellate review of the guidelines. In Commonwealth v. Walls, the court stated, "Thus, it would be helpful at this point to dispel a misconception in the law. It is perceived by many that the extension of discretion to the

sentencing court has resulted in a situation where the sentencing court is free to impose any sentence within the limits allowed by law, as long as it states its reasons for doing so upon the record."

The corollary to this premise suggests that as long as the court states a reason for departing from the guidelines on the record, the superior court is duty-bound to affirm, regardless of whether or not reasons stated are viewed as reasonable or as justifying the departure. This is simply not so.

The court went on to discuss its role to review sentences in a more detached manner, so to ensure not only a fair and impartial sentence under the circumstances, but also to protect against grossly disparate treatment of like offenders throughout the commonwealth. The court relied on the statutory provisions related to appellate review of the guidelines, which defines when a sentence is unreasonable. In determining whether a sentence is unreasonable, the appellate court shall have regard for the nature and circumstances of the offense and the history and characteristics of the defendant, the opportunity of the sentencing court to observe the defendant, including any presentence investigation, the findings upon which the sentence was based, and the guidelines promulgated by the Commission.

The court suggested that sentencing guidelines accomplished the goals of consistency and rationality in sentencing by providing a norm for comparison. The standard range of punishment for the panoply of crimes found in the crimes code and providing a scale of progressively greater punishment as the gravity of the offenses increase. By logical extension, the provisions of a norm require an assumption of a type of conduct that typically satisfies the elements of the crime and correlates the norm to that conduct.

The provision of a norm also strongly implies that deviations from the norm should be correlated with facts about the crime that also deviate from the norm for the offense or facts relating to the offender's character and criminal history that deviates from the norm and must be regarded as not within the guidelines contemplation.

Given this predicate, simply indicating that an offense is a serious, heinous, or grave offense, misplaces the proper focus. The focus should not be upon the seriousness, heinousness, or egregiousness of the offense, generally speaking, but rather upon how the present case deviates from what might be regarded as a typical or normal case of the offense under consideration.

If the sentencing court, under the guise of exercising its discretion, imposes a sentence that deviates significantly from the guideline recommendations without a demonstration that the case under consideration is compellingly different from the typical case of the same offense or without pointing to some other sentencing factors that are germane to the case before the court, including the character of the defendant or the defendant's criminal history, then the court is not, in reality, merely exercising its sentencing discretion. Rather, the court is, in effect, rejecting the assessment of the Sentencing Commission as to what constitutes just punishment for a typical commission of a crime in question.

The cases of Gause and Eby indicate that the sentencing court is not free to reject the assessment of just punishment contained in the sentencing guidelines and interpose its own sense of just punishment. Of course, the rationale for this position should be obvious. If a sentencing court were able to easily sentence outside of the sentencing guidelines, the goals of treating like offenders in a like fashion would be frustrated, and we would be de facto in a sentencing environment that existed prior to the passage of the guidelines.

Regardless of the level of appellate review, the guidelines in Pennsylvania have been found to be effective in both shifting dispositional choices and changing the duration of sentences. Evaluations done by the Commission following the changes in the 1994 and 1997 guidelines found this to be so. When the

Commission attempted to shift offenders from state prison down to county jail, or from county jail to state prison, or from incarceration out to community-based alternatives, we found those changes in the guidelines that promoted that action actually bore fruit. We saw significant changes in sentencing behaviors. We also saw that related to the length of sentence, although we did notice there is an upper cap to that. The Commission, in both those sets of guidelines, increased penalties for violent serious offenders.

In the '94 guidelines, we did see a corresponding shift in sentences imposed for violent offenders. In the '97 guidelines, it appeared that we sort of hit the cap, that we increased, to a degree, and the shift by the courts was less severe or less significant.

The reason for the compliance with the guidelines may be because, in practice, the sentencing guidelines in Pennsylvania are seen as a common starting point for sentencing. Judges with adequate reasons for departure are able to depart, but in the vast majority of cases, the guidelines appear reasonable to all parties. This is, in part, due because the guidelines were first based on descriptive information, the practices already in place by courts, and then modified by more prescriptive issues raised by the General Assembly or the executive branch in increasing penalties or decreasing penalties.

So that is a quick rundown of the sentencing guidelines in Pennsylvania. Thank you for this opportunity, and I look forward to any of your questions.

CHAIR HINOJOSA: Thank you very much.

Mr. Yurko?

MR. YURKO: Thank you. As a ten-year member of the North Carolina Sentencing Commission, I am honored to share our experiences as they relate to Booker with this Commission. First, most of you know me as a ten-year veteran of the Practitioners Advisory Group, and I enthusiastically endorsed the articulate and comprehensive written testimony of the Practitioners Group presented in this hearing. Their position to give the new advisory guideline system an opportunity to work echoes a letter I sent to the North Carolina Congressional Delegation on January 27th of this year, and that delegation includes Representative Coble, and I included that in the record.

I truly believe that a new advisory system fashioned by Justice Breyer preserves this Commission's dedicated 17-year odyssey toward the creation of just and fair sentencing reform. This new system, I believe, if allowed to flourish, will promote uniformity, while at the same time diminishing the occasional irrational results required by any mandatory guideline system.

Now, to North Carolina. By the early 1990s, prison overcrowding had spawned a federal court takeover of our prison system. We were paroling some inmates by fax before they arrived, and felons served only 14 percent of their stated sentence. When Michael Jordan's father was killed by two career criminals, the legislature and public required action.

In 1994, our legislature, with bipartisan support, enacted sort of a hybrid mandatory discretionary structured sentencing system. It's offense and conviction-based with a grid containing 56 cells. Inside each cell is a presumptive, mitigated, and aggravated range. There are statutory aggravating and mitigating factors determined by the court using a preponderance standard. The vertical axis is based on offense and conviction, graduated on the basis of degree of harm, with violent conduct at the high end and property offenses at the low end. The horizontal axis is based on criminal history.

In about one-third of the cells, the court has absolute discretion to select an active or alternative punishment. In the other two-thirds, prison must be selected. In any given year, 35 percent of all defendants receive active sentences, while 65 percent receive alternative punishments, including house arrest, day reporting centers, intensive supervision, and split sentences.

Of the average 30,000 sentences imposed each year, 80 percent are in cells with judicial discretion for this active/alternative choice. It's about 80 percent. Judges impose aggravated sentences in less than seven percent of all cases. The system's ten-year review established that prison was being used for violent and repeat offenders. Inmates' time served doubled, but overcrowding was eliminated because the structure gave the legislature, long-term, well-based, predictable resource numbers creating physically sound management tools.

I believe that North Carolina has created one of the best punishment systems in the nation, and many experts agree. We have repeatedly earned awards for our work, including the prestigious Excellence in Government Work from the Kennedy School and Ford Foundation. Because two-thirds of our cells require active incarceration, our court of appeals ruled last summer that our system was subject to Blakely. We worked very hard this fall to address the Blakely issues. Our Commission has 28 members and only two defense lawyers and only four judges. The remaining commissioners are prosecutors, law enforcement officers and members of the public. After careful debate, we decided to comply with Blakely and not to dodge it. We debated a Bowman-type fix, and it was soundly rejected. We fashioned a system that is a hybrid between the Breyer-Felman-type approaches. We preserved discretion and provided for jury fact-finding for aggravating factors. We believe, with only seven percent of our cases in the aggravated sentencing range, the increased jury determinations will be manageable. This new legislation will be acted on by the legislature this term and passage is quite probable. Our Blakely compliance was passed by the Commission unanimously.

I hope the patience recommended by all of the speakers so far in this hearing is the response chosen by the U.S. Congress. If, however, Booker is politically unfeasible, I would ask this Commission to carefully examine the Felman proposal and would be happy to share the details and progress of our North Carolina experience any time in the future.

CHAIR HINOJOSA: Mr. Yurko, thank you very much for your part advocacy, part information statement this morning. We appreciate your stepping in at the last minute here.

It is now open for questions on the part of the Commission.

Commissioner Horowitz?

COMMISSIONER HOROWITZ: Let me ask a question, following up on some testimony we heard yesterday about the Victims' Rights Act that Congress passed and some discussion we had yesterday about whether victims should have an opportunity to speak regarding guideline calculations. I was wondering if any of the states you are familiar – your own states or any other states that you are familiar with in the guideline systems – allow victims to comment on guidelines calculations or the facts that might support a guidelines sentence?

MR. BERGSTROM: In Pennsylvania, our Commission does not have a victim representative. Of course, all of our deliberations are open to the public, and we encourage comments from victims. So, in the framing of guidelines, in effect, the district attorney, the prosecutor position, I believe, views that office and that representative on the Commission as the representative of victim's issues and works very closely with

victims to represent those views in the structure of the guidelines. At the individual case disposition, there is a victim impact statement, of course, available and victim comment during sentencing, but I don't know that there is – so courts take that into account. It can certainly be used as a mitigated or aggravated factor in sentencing, but I don't believe we see it beyond that.

MR. YURKO: We have a victim's representative on the Commission as well, and it is required by statute. We have a notification provision, where the victim must be notified of the hearing and a mandatory victim impact statement. As far as actual participation in guideline calculations, it's left up to the discretion of the individual prosecutor.

MR. WILHELM: As a general proposition, what we have seen mirrors what these two comments, that several of the commissions reserve a spot for victims' rights advocates on the commission, so that input is incorporated into the structure of the guidelines that are created in some states. And then in addition, other jurisdictions also provide for victim impact statements.

MR. KERN: Same answer. While we don't have a formal representative on the Commission on victims' rights, one of the citizen members is quite active in making it run smoothly.

COMMISSIONER HOROWITZ: Just to follow up on the comment about the victim's impact statement, how is that prepared? Is that prepared by, we, obviously, have probation officers in the federal system who prepare our reports. Is that – who is responsible in your state systems?

MR. BERGSTROM: In Pennsylvania, we have, at the state level, an Office of Victims Advocate, an independent gubernatorial-appointed position. That office has, in effect, two divisions – one division located in the Department of Corrections, the other with the Board of Probation and Parole. And then at the county level, each county has an office within the District Attorney's Office of the Office of Victims – I'm sorry – a victim witness coordinator. And in both of those cases, both the state level and the county level, those staff persons reach out to victims, work with them to develop any testimony that they would give, but also a victim impact system.

MR. YURKO: And we have a victims' coordinator in each DA's office as well.

CHAIR HINOJOSA: Commissioner Steer?

VICE CHAIR STEER: As one who has regularly attended the National Association of State Sentencing Commission meetings, although I, unfortunately, had to miss last year's, I am delighted to have you as part of our process. I think, and I've thought for some time, that there is much to be learned from the various state experiences.

My question that I would ask of those of you who particularly have studied the state systems and with regard to compliance rates is, to what extent do you think the availability of parole or the lack of parole, and the availability of motions to reconsider the sentence after the fact or the lack thereof might affect compliance rates? Let me tell you, specifically, what I am thinking. Maryland has a high compliance rate, but they so frequently grant motions to reconsider that I am wondering whether the nominal compliance rate means very much.

Your observations, if you have any on that?

MR. BERGSTROM: Commissioner, I think – we have parole in Pennsylvania, and I think one of the struggles is making sure that, to the same degree that we want sentencing to be transparent, I think we need to have parole transparent, that the decisionmaking, maybe the starting point is presumptive for release at the minimum in Pennsylvania, and, to some degree, using the lack of a release as bad time as an alternative to good time, which we don't have in Pennsylvania, that there be clear factors and reasons why someone is rejected for parole. And I think, absent a very transparent, structured process for parole, it undermines anything you do at the sentencing end.

One of the things that we have been concerned about in Pennsylvania is that we did go through a period of time where parole rates were reduced substantially because of some high-profile cases, and we have seen the reaction to sentencing by judges, where judges may depart from our guidelines, anticipating the parole board not paroling a high-profile or violent case, et cetera.

So I think because parole cannot occur in Pennsylvania until the minimum has been served, I think, with presumptive parole or more presumptive parole, I think courts tend to, I don't think there is kind of factor of parole decisionmaking at sentencing. I think, absent that more presumptive parole, I think you get into game playing, you get into issues, and it is a concern.

MR. KERN: Just with regard to reconsideration, before I came to the District of Columbia, I worked with a study commission in Maryland for a couple of years, and I think you are quite right in the sense that reconsideration, in Maryland, is probably the most liberal in the country, in terms of the length of time cases can be reconsidered, and I don't know at what rate they actually are reconsidered, and you may know better than I.

In my experience in Maryland, judges did not use reconsideration to appear to comply with the guidelines and then later to change their sentence in a way that departed from the guidelines. That certainly could be studied, and the Maryland Sentencing Commission I think could tell you the answer to that, and I would be happy to connect you up with those folks.

MR. WILHELM: As a general proposition, you have identified something that is important. Any lack of transparency, as has been mentioned earlier in this hearing, really I think undermines public confidence in the operation of the system. And so, to the extent that any system is relying on something like a compliance rate to justify its existence, if you dig into it a little bit, and there is nothing there, you would really put the entire legitimacy of the system at risk.

And so that is, also, coupled, I think, with the observation that there are different ways to measure compliance, and states do it in very different ways. Talking about Maryland, Maryland redefines how it views, I guess, its dispositions to drug treatment as being compliant with guidelines regulations; whereas, other states would not do that. And so compliance, I think, is a general, useful tool, but I think it's one that needs to be examined as to its true value. I think it's good to keep that in mind because, if you don't, you risk losing public confidence in the operation of the system.

MR. YURKO: I think one of the highlights of our system is we abolished parole in 1994. The guidelines determine the minimum sentence. The maximum is 20 percent greater by statute, and there is an earned time credit for good behavior in prison, and that is the only way you can get down from the maximum. There is no motion to reconsider. In fact, even in late substantial assistance, after sentencing substantial assistance cases, there is no way to reduce the sentence unless you jury-rig up some sort of *habeas*, and that is done in rare cases.

CHAIR HINOJOSA: We have time for one more question.

Commissioner Howell?

COMMISSIONER HOWELL: Mr. Yurko, you just brought up the point that I wanted to talk about. We heard testimony yesterday criticizing our current guideline system for having too many prohibited considerations from the sentencing judge, while we have also heard testimony suggesting that we should add to those prohibited considerations to have the sentencing judge not consider cooperation with the government or substantial assistance unless there is a government motion.

And I was just interested, and this is one of the issues that I think a lot of people are struggling with under an advisory system and what happens to the 5K1.1 substantial assistance motions by the government and whether courts can consider that, with our, without a government motion, despite the statute. So I was very interested in hearing how, in the advisory systems that you have, whether you deal with substantial assistance evaluations by the government by prohibiting consideration of substantial assistance unless there is a government motion or whether you have some kind of analog to 5K1.1 and exactly how you deal with that issue.

MR. YURKO: For drug-trafficking cases, we have mandatory minimums, and it requires a substantial assistance finding, but the motion can be made by either side, and that seems to work fairly well in North Carolina. I will say that I probably handled a thousand federal cases, and I would say a third of my clients tried to offer substantial assistance and, in the majority of times, the prosecution has filed a motion. There are some instances where the client will provide some very valuable information and, for whatever reason, I never like to call anybody lazy – I sometimes call a few law enforcement officers energy-challenged – a very substantial proffer will wind up sitting in somebody's drawer. And I think in that instance, when a defendant offers truthful, honest, substantial information, it ought to figure in the sentencing calculus, and it hasn't been able to be figured in the sentencing calculus under the mandatory system.

So I would strongly urge that you not monkey with the system and prohibit a substantial assistance determination solely on government motion.

CHAIR HINOJOSA: If anybody attended – did you want to say something?

MR. BERGSTROM: No.

MR. KERN: Are you sure?

MR. BERGSTROM: Okay. Quickly.

[Laughter.]

MR. BERGSTROM: In Pennsylvania, we have relatively wide guidelines. We allow any number of reasons. We don't provide a list of reasons for departure. And I think we can sort of get away with that because of the structure of our system, the min-max and so forth. In a federal system, where you have more determinate sentencing, I can see how it's a larger issue, and that's, I think, an important characteristic of what you're doing with that, whether you do, in fact, have to provide specific reasons and how those are proven in trial or at sentencing. And I think we skip that and, as a result, we have a pretty broad list of mitigating or aggravating reasons.

MR. KERN: I would just add one thing. One of our mitigating factors in our departure list is similar to substantial assistance, but, again, those would be viewed as the exceptional cases. We made a conscious choice to try and keep it simple and have relatively few boxes in our grids, also, wide ranges that would allow judges, we think, in most cases to consider a wide variety of legitimate factors and still find a sentence within those boxes and not depart unless it was truly an exceptional case.

MR. WILHELM: I think that that is an approach echoed elsewhere, where, in the construction of the initial guidelines system, there is enough latitude accorded to the court, so the court can take a variety of factors into consideration in imposing the final sentence.

CHAIR HINOJOSA: For those of you who were here yesterday, you're going to leave these hearings with the impression that, when I say, "One last question," I obviously don't mean it –

[Laughter.]

CHAIR HINOJOSA: – because Commissioner Rhodes will now have the last.

COMMISSIONER RHODES: Thank you.

I would like to get your thoughts on applying an advisory system to the federal system and specifically focusing on the much broader geographical area that the federal system necessarily encompasses and the regional diversity that we have within our country and different legal diversity in different cultures. I know, Mr. Bergstrom, you commented on the fact that a system arises from the legal culture and wouldn't necessarily – the Pennsylvania system wouldn't necessarily apply in Washington, D.C.

So I am interested in knowing do you see that advisory guidelines could apply to the federal system and, if so, would they need additional reinforcement or strengthening in some way to make them more rigorous? Bearing in mind that one of the original purposes of the guidelines and their mandatory nature was to eliminate regional disparity?

MR. BERGSTROM: I will jump right in on that one because Pennsylvania has been described by some as I guess Pittsburgh and Philadelphia divided by Alabama or something like that.

[Laughter.]

MR. BERGSTROM: And so I think, in most states, you will find a lot of diversity, a lot of differences. We have very rural counties, and we have very urban counties. In fact, one of the reasons Pennsylvania adopted the approach it did 25 years ago, relatively wide guidelines, relatively low appellate review – wide ranges, I'm sorry – relatively low appellate review and the other things, was because we were hearing those kind of arguments about how there are differences out there. But keep in mind that our guidelines have, in effect, two steps, and the first step is dispositional.

And when we're controlling or we're setting up guidelines to look at both misdemeanors and felonies, it is a big step to make recommendations for nonincarceration when the trend may have been for incarceration. And then when you go to the second step of duration, we have seen how we have changes.

Now, there might be a different level of change that we see exhibited in Philadelphia versus in Elk County, but, nonetheless, I think guidelines can help to establish a norm, a statewide norm, and sometimes

when there is a lot of diversity, you need a little bit wider range to capture that norm, but I think it does have a bearing of cutting out the outliers on either end, and that's I think what our guidelines purport to do.

MR. YURKO: Our North Carolina experience has really been revealing. Before the guidelines, as you may know, in the southern states, property crimes are seen as being more severe than in the other parts of the country. And because of the nature of what we were trying to do, reserve prison for violent offenders and for repeat offenders, we have totally changed the culture in just a period of ten years.

So, again, I think that the advisory system created by Justice Breyer will be a good experiment, and I think the Commission needs to monitor to see if regional differences are as pronounced under the advisory system as evidently they were under the mandatory system.

MR. KERN: If I understood you correctly, you said your statute requires you to eliminate disparity, and you asked for an opinion. So I'll give you my opinion. I think that's an extremely ambitious task to eliminate disparity and that, in the act of attempting to eliminate one form of disparity, you might introduce another form of disparity. We consciously chose to attempt to reduce disparity, recognizing that there will remain some disparity within our system with these wide guidelines, but that we do expect to reduce it.

So you do have a challenging task there, and you're certainly right that the geographical differences – if I were attempting to do that, I think what I would try was to keep it simple, simplify some elements, broaden ranges so that you have an opportunity to reduce this disparity, and I think you'd accomplish that task.

MR. WILHELM: Just if I may, it is a challenge, and I think flexibility can assist you in responding to that challenge, but it also raises the other important point of, in talking about an advisory guideline system and can it work, I mean, the system itself is a mechanism and kind of devoid of content, for the most part. And so, really, the question then becomes, "Can this guideline system work?" and part of answering that question, I think, is do federal judges trust in or believe that the current system has legitimacy?

And I think part of what has allowed advisory systems to flourish in Virginia and the District of Columbia, and other places is that judges think that the underlying system of sentencing is just, and they think the sentence is largely because they are based on historical actual sentencing practices, and time served patterns reflect reality and reflect, for the most part, the heartland of just sentences for offenses.

And so I think one of the obviously difficult, but bigger challenges and issues that the Commission needs to address is, is the state of federal sentencing at a place where judges will actually embrace it or does it need to be adjusted and moved to a place where judges will feel more comfortable that it accurately reflects just sentencing practice.

CHAIR HINOJOSA: Thank you all very much.

Mr. Bergstrom, your description of the state of Pennsylvania reminds me that you all should think in a bigger fashion like my home state, Texas, which one of my favorite t-shirts reads, "Texas is bigger than France."

[Laughter.]

CHAIR HINOJOSA: Thank you all very much.

If the next group would please come up.

[Pause.]

CHAIR HINOJOSA: The next group are individuals who have studied the issue and/or also worked with groups who have studied and worked on the issue. The first one is Bruce Fein, who is from Bruce Fein & Associates and the Lichfield Group; Professor Stephen A. Saltzburg, who is a professor at George Washington University School of Law and also has worked very closely with the ABA Criminal Justice Section on the issue; and Daniel P. Collins, who is a partner with Munger, Tolles & Olson and has prior experience in the Justice Department.

I realize Mr. Fein may have a time problem, and I have not done a good job of keeping us on time here, so we will start with you, sir.

MR. FEIN: Thank you, Mr. Chairman and members of the Sentencing Commission.

I would like to begin by underscoring what I think is the need to establish a benchmark of what the purpose of criminal sentencing is before you can, then, examine particular elements of guidelines as either praise worthy or contraindicated.

I don't think that uniformity, by itself, is the goal of criminal sentencing. You could have uniformity by having all crimes punished the same, have no discretion at all. And to fixate on just an attempt to get uniformity, I think, distracts attention from the larger issue that wasn't raised in particular by Booker, but, obviously, moves behind all questions relating to sentencing is, "What are we searching for in imposing a sentence on someone who has been convicted of a crime?"

And I have suggested that it is deterrence. We all want to reduce the incidence of crime in society. Deterrence can be special deterrence, which means the individual has committed the crime, is incarcerated, and he can't commit new crimes while he's in prison, and then there's general deterrence, how much does the example of incarceration by one inmate deter others who might be contemplating a comparable crime? I think that the guidelines and sentencing procedure would be enhanced by requiring or tailoring the guidelines to the judge's explanation as to how the sentence, given the particular nature and circumstance of the offense and the character of the offender, would seek to deter or would have the effect of deterring crimes, and maybe because the individual is likely a recidivist, he's a career criminal, so to speak, and maybe because it's thought that the case is high profile, and to have a stiff sentence would carry very great weight in communicating to society the severity that is likely to be visited upon someone who commits a new crime.

But that seems to me the appropriate way to tie guidelines into a sensible objective of criminal sentencing in advance, to focus on the guidelines, and I know that one of the questions that the Commission is interested in as to how much you can induce judges to stay within recommended ranges. And if it's 80 percent or 90 percent, that seems to be accepted as a great achievement, but it may or may not be. The highest achievement is to reduce the incidence of crime. For whatever reasons, and I am sure there are multiple, crime rates have tumbled in the last 20 or 30 years. There seems to be some correspondence between mandatory nature of the sentencing, "three strikes, you're out" laws, mandatory federal sentencing guidelines or otherwise, that correlated with reduced crime.

That does not mean that mandatory sentences or limiting judicial discretion is the sole reason or even a majority of the explanation. We still recognize that criminology is a very primitive science, but it does seem to me that we need to continue to think about the federal sentencing guidelines, as they are now, in the wake

of Booker, voluntary as to how that they can be incorporated into having sentences more appropriately and effectively produce deterrence, which I think is the objective of the sentencing system. I, myself, do not think that we ought to give great weight on that score to things like rehabilitation or retribution. They seem, to me, very marginal to the goal of our criminal justice system.

I would like, then, to address, in particular, some of the questions that you had raised for all of the panelists in trying to decipher what does Booker mean now with regard to the sentencing and how will it affect, if Congress leaves the Booker decision undisturbed, the practice of sentencing in the federal system compared to what was in place prior to Booker.

It seems to me that, under Booker, it would be unconstitutional to adopt a system of guidelines where if you were within the range that was recommended, it was automatically deemed "reasonable for purposes of appellate review." That seems, to me, simply a different and more clever way of saying the guidelines are, in fact, law in the sense that they come with a legal premium and fortification if you're within the guidelines whenever you're subject to appellate review.

Now, I agree it is rather puzzling as to what Justice Breyer intended the reasonableness review standard to be, if it's not simply was it reasonable within the guidelines, because he does not identify the particular factors outside the guidelines that a judge ought or should or might consider, and whether there is any particular rationale or reasoning you have to apply in employing those guidelines or those elements in issuing a sentence.

That is why, in my judgment, perhaps the safest course is to require the judges, in each individual case, to explain how the sentence is serving an overall purpose of the criminal sentencing, as historically understood, deterrence, rehabilitation, retribution or otherwise, as a basis for explaining providing a reasonableness test for an appellate court to review.

I do not think that Booker prohibits a judge or prohibits this Commission from advising that a judge ought to consult a particular topic or ought to refuse to consult it. They just can't be binding on the judge. And so I don't think that substantial assistance, fast track, acceptance of responsibility are elements that a judge may not examine in deciding a sentence after Booker. He's not bound to consider those as circumstances that might justify his thumb pushing any sentencing down, but he may, independently, decide that's the case.

One of the, I think, misfortunes of the decision in Booker is that it, in my judgment, may create pressure on the judges to be disingenuous as to why they are sentencing. If the guidelines are not mandatory, but you are supposed to examine them, does a judge who feels that the guidelines really are appropriate say, "I am deciding what the guidelines would recommend, but I am really doing that by my independent judgment and not because I looked at the guidelines?"

And I think it places the judges in this very awkward position, if they believe that the guidelines are very sound, to say, "But I really didn't follow them because I was required to." And if sentencing remains what it was prior to Booker, it suggests the decision was meaningless, which obviously is not the intent of the first majority who held their constitutional right to jury trial was violated under the mandatory federal sentencing guidelines. I am not exactly sure how, unless Justice Breyer writes an addendum to his opinion, how you approach that particular problem.

Congress, obviously, can move and try to clarify some of these ambiguities. I don't know how fast the typically lit or glacially moving Congress can address the issues. The judges have the defendants coming before them now, and so waiting doesn't seem, to me, an acceptable alternative.

I think that when you look at the various state guidelines, voluntary or mandatory, and the other panelists who dealt with them earlier are experts in their fields, it does seem to me it's very difficult to reliably extrapolate from the state system how voluntary guidelines at the federal system would work because of the unique nature defining what is compliant, what is not, how closely there was an effort to correlate the guidelines to what actually was occurring before.

I noticed, in Maryland, where the compliance rate is 39 percent, which seems remarkably low compared to the other states that are typically at 60, 70, sometimes as high as 90, then, the large percentage of the deviations were in the drug cases. And it may well be that in one particular kind of crime that is especially prominent in the docket, there seems to be a misalignment between community expectations and what the experts were writing is as to what they thought was the proper sentence.

All I'm saying is that I would be very reluctant to think that we could, with a high level of confidence, extrapolate from the varied state experience what, in fact, would happen under the federal guidelines.

I, also, think that the sentencing would be improved if this Commission or another entity served as a database to try to follow up on what was the future career of those who are sentenced. Did they turn to career criminals? Were they recidivists or not? And using that database to try to discover what seems to be a better correlation between a sentence and deterring future crime.

Again, I go back in saying that's the overarching mission here. The Sentencing Commission should be very proud if it played a role in reducing the incidence of crime, which I think most people would say is more important than just being uniform in whatever particular sentence is issued. We understand some tension between an equal protection theory – all persons who commit the same crime, under the same circumstances, ought to be the same. Well, people aren't the same, and circumstances are never identical, and the idea of deterrence seems to me more important than making sure that every sentence, in every case, looks to be uniform, even if the individual sentence goes out a couple of times.

Thank you.

CHAIR HINOJOSA: Thank you. We, actually, have worked quite a bit on recidivism, and we have a lot of that information available on our website. We just had a presentation prior to the last meeting to the Commission on the work that is being done on that.

I will state that in the federal system it is a little different because of the fact that approximately one-third of our defendants in the federal system are noncitizens of the United States, so it becomes difficult to track recidivism with regards to that percentage, which is a high percentage of the defendants in the federal criminal system.

MR. FEIN: Is that because most are deported soon after the sentences are served?

CHAIR HINOJOSA: That's mostly the case with regards to the noncitizens and either because they were here illegally to begin with and/or they lose their right to be here because of the conviction that was part of the federal violation.

I am not here to testify, but I, obviously, went in and made some statements.

[Laughter.]

CHAIR HINOJOSA: Professor Saltzburg?

PROF. SALTZBURG: Mr. Chairman, members of the Commission, you have my written statement. I don't intend to read it, and I don't intend to go over it point-by-point because you can read it a lot faster than I can talk it, and I can maybe help you get back on schedule.

I have only two points I want to make, and then I'd much rather answer questions later, if you have them, because I think maybe I'd say something that was useful.

As you know, I wear two hats today. I am here officially to represent the American Bar Association, which on Monday adopted a resolution recommending that advisory guidelines be given 12 months to work, that in that period that you provide Congress with data about how they're working, and that Congress have hearings to consider whether they're working and what the alternatives are.

If, at the end of the 12-month period they are not working, we recommended a, for lack of a better term, a "Blakelyization," where either the Commission or Congress would fix factors that would actually be presented to a jury more simplified than the current guidelines are. It's a version of what a member of our working group, in the ABA, Jim Felman has talked to the Commission about before – no surprises there.

What I am impressed by, and perhaps there are two things that impress me the most right now, when we had the hearings before Booker was decided, no one, none of us academics, none of the commissioners foresaw that there were going to be two 5-to-4 holdings of the Court and we would be in the situation that we're in.

When the decision came down, I think a lot of us responded with shock. We read it and said, "Gee whiz, no one expected it. What are we going to do?" And as we've had time to talk through it, I regard this – this second point – as a real opportunity, I think, to make this guideline system work even better than it has in the past. And in thinking about this, I know that Judge Paul Cassell testified yesterday here, and he mentioned that he and I had talked about one of the issues that was asked about earlier. I think Commissioner Howell asked about the substantial assistance issue.

And what I learned – this was talking with Judge Cassell was – that reasonable people, I think, agree on a whole lot of things about how an advisory system won't work. Judge Cassell e-mailed me yesterday, and I skimmed it, and I was flying back from the ABA meeting. I didn't have a chance to read it carefully, but speaking for myself and not the ABA, I agree with the bulk of what he had to say.

I think that there is a lot of agreement that if the guideline system, advisory system is going to work, that it's very important the judges comply with the statute that remains in place, which is they have to do a guideline calculation. They have to figure what a guideline sentence would be and then if they are going to vary.

One of the most important things I think for the Commission is going to be how you present the data as to what is a departure that would have been permissible prior to Booker and what's a variance now from the guideline system. If a judge, under the guidelines that existed, would have been permitted to depart for a recognized reason, that's a guideline sentence. It may be a departure under the guidelines. But if a judge

says, "I've done the calculation. There's no departure recognized. I'm going to vary this sentence and issue a nonguideline sentence," that ought to be, I think, captured differently in the data so that we all are talking about the same things.

And I think Judge Cassell really felt strongly about that, too; that if we mixed them up, we're going to have perhaps an impression that there are more departures under advisory than there really are compared to what happened pre-Booker.

And I think that there are some things – you asked a bunch of questions – one of the most important things, I think, is we have to address, I mean, you have to address, and the system has to address legitimate concerns with the Department of Justice about I think substantial assistance being one, third-level reduction for acceptance of responsibility, another.

My own view, again, speaking for myself, is that judges ought to honor the judgment that was made, which is that prosecutors ought to be responsible for making the substantial assistance motion and that judges ought not to do it on their own. If that is not a policy statement or if that's not something that comes through loud and clear to judges, I fear that what will happen is that Congress will step in. I don't think it's necessary for Congress to step in.

This is the opportunity here. My sense is that, from talking to judges, and there were two judges in our working group – federal judges – in talking to others who weren't in our group, talking to people in the Department, talking to people on the defense side, there's a lot of agreement on what could work in an advisory system that would prevent too much disparity, but perhaps provide a little more leeway for judges to consider those facts and circumstances, which, in any guideline system, no matter how good it is, I'm never going to catch all.

And I think the last I'll say is one of the other factors that I believe will be most important to the Congress, assuming it gives you time, and the public is not just the number of variances or the percentage of variances, it's the extent of the variances; that there will be, from talking to staffers on the Hill, there is a widespread, I think, acceptance of the fact that small variances, from a guideline sentence, taking into account individual differences, may very well be much more tolerable than judges who basically choose to fight the guidelines and that, I think, is going to be the issue. Are judges going to do what the statute requires, do what 3553(c) requires? If they decide they are going issue a sentence that varies, are they going to do it honestly, state their reasons, particularly why the purposes of sentencing are better served with a nonguideline sentence, and permit appellate review? If they do it honestly, and we have appellate review, I think this system can work. And as Judge Cassell said to me – I don't think he would mind my saying this – he said, "You know, there's a chance that we can have almost a perfect system if everything came into line." That was really encouraging.

Now, there is also a chance that the system, you know, will go awry. It depends a lot I think on what kind of fealty judges give to the guidelines and what "reasonableness" means. I don't know whether the Commission is going to step into the discussion about reasonableness and say, "We're going to help define it," or step back and say, "Just leave it to the appellate courts." That's an interesting and difficult question, I think, and people smarter than I, as they testify here, probably can give you guidance on that. I find it still puzzling.

And I would be happy later to answer questions.

CHAIR HINOJOSA: Professor Saltzburg, I don't know why I would stop with Mr. Fein here, and make a comment after each member of this panel. But this Commission agrees very strongly with you, and we have tried to make the point that it is important to distinguish between departures within the Guidelines Manual and variances outside of the guidelines. We have done that in testimony before Congress and in every forum that we've had an opportunity to do this, and it is important for us for the data collection to be able to do that, and to continue to have judges make that distinction. It's required, in our view, by the statute itself, because it requires the [inaudible], to go ahead and consider the guidelines as well as the policy statements, which includes the departures. Mr. Collins, I hope you give me an opportunity to say something after you finish.

[Laughter.]

CHAIR HINOJOSA: Go ahead, sir.

MR. COLLINS: Judge Hinojosa and members of the Commission, I am pleased to be here this morning. I had the privilege of testifying last week on a panel with the chairman of this Commission, Judge Hinojosa, before a subcommittee of the House Judiciary Committee. I won't repeat everything here that I said there, but I can reprise the substance of the recommendation that I made there.

I think that the invalidation of the mandatory nature of the guidelines that occurred in Booker is from the point of view of federal sentencing policy something of an accident. It was nothing about the substantive value judgments or commitments that are reflected in the Sentencing Reform Act or in the work that this Commission and the Congress have done since the initial enactment of that Act that brought about the result in Booker. It really was an issue of the mechanics of how the guidelines worked in terms of the jury trial requirement of the Sixth Amendment. Therefore, Booker does not provide an occasion for a wholesale revision of the value commitments of federal sentencing policy as previously reflected in the Guidelines Manual, in the statutes enacted by Congress.

Since I personally believe that that system was an effective one, was successful by almost every measure, including – and I agree with Mr. Fein that the key measure is, "Did it help reduce crime?" – and I understand there can be debate about that – but I think that the guidelines were highly influential despite the fact that the federal system only accounts for a certain percentage. They were influential in starting a movement towards determinate sentencing at the state level, and I think cumulatively that has contributed to the drop in the crime rate.

Therefore, my recommendation to Congress is that it act to restore the system most nearly as it was before Booker with the least changes possible. The easiest way to do that is what has been popularly called "the Bowman fix" although that's perhaps unfair since Professor Bowman has abandoned his child and now recommends against the adoption of that proposal, but that is, essentially in light of the fact that Harris protects the bottom of a mandatory guideline, that all that is needed to do is to raise the top of every guideline range to the statutory maximum, and that will make the system compliant with Booker and all of the Apprendi jurisprudence as it exists today. That does require congressional action because of the 25 percent limitation in existing law on the width of guideline ranges, so the Commission cannot expand ranges to accomplish the same result. Would also require an act of Congress to restore the appellate review sections that were excised by the Supreme Court's decision in Booker, and I believe that that should be done as well.

The fact, though, that I think that the ultimate solution to the problem should come from Congress does not mean that this Commission does not have some important work to do. It is the job of this Commission to enforce the Sentencing Reform Act and the relevant statutes. With the law that it has today, I

don't think that you have the privilege of waiting for Congress maybe to do something. You need to determine what are the appropriate steps for this Commission to take in implementing the law as it exists today as we sit here today.

In that regard, I think there are a number of recommendations that I have suggested in my testimony you may wish to consider. The first of those – and this is drawing upon the Commission's continued authority to issue policy statements, which is not affected by Booker – is the suggestion that you consider issuing a policy statement that would provide some guidance on the reasonableness inquiry that is left for the courts in wake of Booker. I think one could have a debate over the extent to which policy statements of the Commission will have some binding or normative force in the courts. I could probably brief that either way. I think that's not something you need to be concerned about. Even if it is not strictly normative or binding, it may be useful for the Commission to do that. After all, you are still charged by statute as the entity that is to set federal sentencing policy under the implementation of the Sentencing Reform Act and for the courts, and not the courts as a whole to make those policy choices.

In defining the concept of reasonableness, I think there are perhaps five things that the Commission could consider doing in that regard. First is to state explicitly what Judge Hinojosa indicated in his testimony to the House last week, which is that the Commission believes that the guidelines should be given substantial weight in making the determination of an appropriate sentence under 3553(a).

Second, I think the Commission could say that a sentence within the range is conclusively deemed to be reasonable, and here I differ with Mr. Fein. I think that the creation of a safe harbor that a sentence within the range is reasonable without more, is not in any sense a requirement to stay in the safe harbor, because sentences outside that safe harbor will also be reasonable, and therefore, I don't think it backs into the Booker problem in the same way that it would if the Commission tried to establish firm lines beyond which courts could not go. Then I do think, as Justice Breyer's dissent from Justice Stevens's Apprendi analysis indicates, that you could back into a Booker problem in that way.

I also think that the fact that the Court left unsevered the threshold requirements for filing an appeal means that sentences that are within the range, in the absence of some other factor, are not appealable. You must show that there is an error of law or that there was an error in the calculation of the guidelines, and those may still result in appeals on the theory that the judge who went through the appropriate guideline calculation might have chosen a different sentence had the range actually been calculated appropriately and in a different way and with a lesser range. So those would still, I think, be appealable. But you must fit within one of the four categories that is specified within the statute, and if you're within the range and you don't have an error in the calculation of the guidelines, an error of law, it's not appealable, and therefore, I think that the judgment that within-the-range sentences are conclusively reasonable is consonant with the judgment that's reflected on the face of the remaining statute.

It's hard to identify any other potential safe harbors. I mean, one that comes to mind is where the unadjusted range embraces the statutory maximum. There is clearly not going to be any conceivable Apprendi problem in that situation. Presumably a sentence that is within that range is reasonable, and a sentence that is outside that range can be presumptively unreasonable.

A number of witnesses before the Commission have emphasized the importance of reaffirming the fact that, under the statute, certain factors are absolutely prohibited in all cases, and that that needs to be reiterated, and that other factors are discouraged. Again, the unexcised portions of the statute retain the language that allows appellate courts to vacate sentences that are based on impermissible factors.

The Commission could also consider, in articulating the concept of reasonableness, imposing a requirement that there be an articulation, a specific articulation of grounds for going outside of the guidelines range, either in a departure or in a variance, as the new terminology is being used. That, I also think, is consonant with the statute, which in its existing form still requires an explicit articulation for sentences that are outside the range and allows appellate courts to vacate sentences that are outside the range and without adequate explanation.

In terms of things the Commission might do other than defining the concept of reasonableness, I think it would be worthwhile to make clear that the prior notice requirements for going outside the range, either through a departure or a variance, are that that requirement is valuable, should be reiterated and reaffirmed, that that applies either to departures or to variances. Courts should give prior notice to the parties that such a course is being contemplated.

There are also a lot of puzzles that come out of Booker, but to me one of the most perplexing is what to do with 3553(b)(2). The Court was quite specific in severing only (b)(1), and indeed it reproduces the text of the severed provision in an appendix. It cannot have failed to notice that there is another provision, (b)(2), which looks in many respects like (b)(1) but with some critical differences. This was one of the key provisions added by the PROTECT Act, and it creates a different regime of departure authority in the context of certain offenses against children and sex crimes.

And it creates an uneven regulation of departures. It regulates departures downward much more severely than it does departures upward. I think there is a substantial case to be made that the severability analysis of Justice Breyer's opinion does not apply to (b)(2) and would not justify the wholesale severance of (b)(2). It might, in fact, be that the appropriate severance is to sever the limitations on upward departure authority because given the disparity that appears on the face of the statute, that appears I think most clearly to be what Congress would have wanted under (b)(2), if it knew that it could not do what it did in (b)(2).

And then there's a question whether the Commission could do anything, or should do anything, to support or reflect that judgment and try and salvage (b)(2) from a potential invalidation. And one thing that the Commission could consider, although I think it raises some difficult legal issues, is whether the Commission could either by amending the guidelines or through a policy statement, remove whatever restrictions exist in the Guidelines Manual to the fullest extent the statute would allow on upward departures so as to minimize the Apprendi problems that might exist with respect to (b)(2).

I would be happy to answer any questions the Commission may have.

CHAIR HINOJOSA: Who's got the first question? Commissioner Castillo?

VICE CHAIR CASTILLO: I want to thank Mr. Saltzburg for the ABA's position, which I think is a very reasonable position, and I was heartened by it. I frankly think, I'm hopeful that Congress would give us a little bit more time than the 12 months because there is this fleshing-out period of trying to get all of my colleagues to understand the need, the critical need for accurate information, and to not skip to the last and penultimate part of what they believe a reasonable sentence would be, but to make the sentencing guideline calculation as you espouse and others have espoused, which I think is critical. I think the Crosby decision out of the Second Circuit helps us a great deal, but I'm thinking that in the end it might take 18 months for us to have a crystal clear or at least more precise vision as to what is to occur. So I do want to say that.

I also have a question for you, Mr. Fein. You espouse in your written testimony the need to write opinions, and really to focus on deterrence. While I'm in Chicago and maybe things are not that hectic, I'm

just worried that all of my colleagues, especially those along the Mexican border are just not going to be able to write opinions in every single sentencing case as much as I –

CHAIR HINOJOSA: Not if they have to be up here.

[Laughter.]

VICE CHAIR CASTILLO: What do we do about that?

MR. FEIN: Well, I think it's better that – I think anyone who's been in the business of judging and writing in general knows how sharper, or think how much more sharp their thinking is when you've got to put something down on paper. And sentencing is a critical, critical element of our whole objective of prosecutions in trying to reduce the incidence of crime. I think by requiring opinions, not just "I've decided 'X' and don't ask me whatever reasoning is behind it," we end up even with a greater labor, even if it delays other cases, a far more overall effective system.

I have encountered too many occasions where judges, they deliver opinions orally, and they're not just marginally, in my judgment, maybe if you're on losing side, wrong. But sometimes even when I've won, I think this just isn't a judge who has thought carefully about the case. You're inclined to be that way with overwhelming documents, but when it becomes a sentencing, and individual liberty and the safety of the community in light of deterrence, I just think that's too important. And I think it's too easy to get away from thinking about deterrence and just say, "Well, if I'm in the guidelines and it's uniform, that's the end of my thought process." That's the beginning of the thought process, not the end. I just think that's critical.

If there's a criticism I have of the current federal judicial system at present, it's because too few opinions are written, not too many. And that betrays a lack of attentiveness to detail and facts all the time. I understand you have caseload problems, you know, go get more judges, but everybody has to toil, and that's one of the prices of public service.

CHAIR HINOJOSA: Commissioner Sessions.

VICE CHAIR SESSIONS: I would like to ask Mr. Collins a question. Perhaps it begins with a statement. I'll try not to make this a statement as opposed to a question, but you've suggested that what was generally referred to as "the Bowman fix" as the appropriate resolution.

CHAIR HINOJOSA: Apparently, it's now "the Collins fix."

[Laughter.]

VICE CHAIR SESSIONS: Congratulations, and hopefully you won't change your view along the way.

We've had a number of witnesses testify about concerns about that particular resolution. The first concern, you can only address this issue once. And my first question is: are you suggesting that this fix would be the permanent resolution?

The second is that there are obvious questions about its constitutionality, especially in light of the Crosby decision from the Second Circuit, and that you could very well, by suggesting this particular

resolution at this stage, create a situation of confusion over a period of one to two years as courts try to flesh out whether it's constitutional or not. And I would like to ask you to address that.

And then third, you also suggested that perhaps there are things we could do as a Commission at this point to try to guide judges not to go off the reservation, as it were, and is that not to some extent inconsistent with your approach that a Bowman kind of fix would be the appropriate resolution as opposed to a presumptive advisory system which I think you're also suggesting, by addressing questions about acceptance of responsibility, the third point, cooperation, et cetera?

MR. COLLINS: I think that so long as Harris is on the books, and it is still on the books, there is not much doubt that the Bowman fix is constitutional. Under Rodriguez de Quijas v. Shearson/American Express, the lower courts may not overrule or disregard a controlling Supreme Court precedent even if they believe that the current court might disavow it or that there are grounds for doubting it in later decisions. I don't think that there is much doubt that Harris is controlling on the question whether or not the setting of the bottom of the guidelines as a mandatory, effectively a mandatory minimum sentence, is consistent with Apprendi. I think that Harris settles that question. The Supreme Court may revisit Harris.

And in my testimony to the House last week I suggested to them that they may wish to consider that possibility up front. One of the things that I think is most distressing about Booker is that we have essentially had thrust upon us a system that no one really chose other than the remedial majority of the court, and Congress may wish to address proactively how it would want the issue of severability to be decided in the event that the Court were to abandon Harris. I understand that there's concern about that, that if Justice Breyer, given what he said in his concurrence in Harris, were ultimately to reach a conclusion similar to what Justice Kennedy did in Ring, which is to say that I don't agree with Apprendi, but I now think that internal consistency within it requires that I abandon my position in Harris.

I understand that and that's what has been, I think, the source of the concern, but I don't think there is any basis for the lower courts to create any confusion in the meantime. I think that they are bound by Harris and should obey Harris until the Court decides to do otherwise. And I think that Congress should consider writing in a severability provision that essentially indicates that if this is invalid, this is what should take its place.

VICE CHAIR SESSIONS: So the Bowman or the Collins fix you think is the ultimate solution?

MR. COLLINS: I think it is. If we are going to be left with Apprendi, and Apprendi itself is 5-4. We don't know whether or not – I mean we've worried about whether Harris will survive; we're not quite sure perhaps whether Apprendi will survive. But I do think it would be a long-term fix. I think there is enough empirical data in the 15 years under the guidelines to realize that the loss of the cap at the top of the range is probably not sufficiently great a concern to warrant a more wholesale fix. I think it's the only way you can restore the system to operating basically the way it was before, with the least disruption possible and the least expenditure of unnecessary resources.

VICE CHAIR SESSIONS: Can I just quickly follow up with Professor Saltzburg? Do you see concerns about whether district court judges or court of appeals judges will come up with inconsistent conclusions on a Bowman or a Collins kind of fix? In which case, what happens to the justice system at that juncture?

PROF. SALTZBURG: Well, Judge Sessions, I'm glad you asked because although the ABA has not explicitly said this, implicitly twice in the last two years, both in August when it approved Justice Kennedy

Commission recommendations, and then on Monday when the vote was unanimous, basically the recommendation the ABA made implicitly rejected this approach, and it did so for a couple reasons.

The main one, I think, is the concern about whether Harris will be good law. We just don't think it's wise policy to adopt a fix that will, I think, have the following effect. I agree with Mr. Collins that lower courts will be bound by Harris. But we have to recall then – the Department of Justice made this point very well in what I thought was a very good brief to the Supreme Court in Booker. It said you four times upheld the federal sentencing guidelines. Every single court of appeals has upheld them. The Supreme Court said: So what? We haven't addressed this question exactly and we're striking this down.

What will happen is every single defendant who has a lawyer who's not incompetent will argue that the system is unconstitutional if this fix is imposed even if the court of appeals – what the courts of appeals will probably do is say: we are bound by Harris, but we recognize Harris may no longer be good law. And there will be a *cert*. petition filed on behalf of every single defendant until the Supreme Court grants review.

If we could all take a step back and just look at what would happen if the Collins fix, now we're calling it, were adopted. What it is, is it makes the sentencing – the guidelines mandatory. In fact, all it is is a cosmetic change which basically says everything that the 5-4 majority that said this violates Apprendi, everything they said is still there. And Justice Breyer's position in Harris was he didn't agree with Apprendi; he didn't think Apprendi applied to sentencing. Now that it does and he's lost that battle, I think there's a very good chance that his vote would be to say that that's not constitutional.

But I don't think anybody would think it would be a good thing two years from now to have another decision striking down the guidelines. When there's an alternative, that's the issue that can work. If there was nothing that could work, and we might say, "Well, you know, we would have to be desperate to try for something," but this advisory system I think can work.

The third part of your question was, "Are there things you can do that will keep judges on the reservation?" Unfortunately, I think the answer is no, not completely. This is the worry, I think, that everyone has whether you are Republican or Democrat, conservative. Everybody's worry is that judges, particularly those judges who have been on the bench before – that were on the bench before the guidelines came into effect, who have sort of roiled against them and sort of waited for an opportunity to impose a nonguideline sentence, that somebody will go and basically fight the guidelines. That's the best way I can put it, impose a sentence that is right in the face of the guidelines.

My hope is that the courts of appeals will fix that quickly because it's very important that if sentences that are way off get a lot of publicity – and they will. The sentences that fall within the guidelines will get none. It will be the erratic sentences, they'll get publicity, and we know from the past that Congress will feel a need to act, and I hope that we can stop that. Eventually the system, whether you call it substantial weight, as Judge Cassell said, whether you call it presumptive, as some people use, I think the right approach – and I don't know there's any way around it – is there has to be some kind of substantial weight given to the guideline determination, just has to be in this system.

I think judges will do it. I think 99 percent of the judges in this country will do that. It's the one percent that we can't control. I don't think you can issue a policy statement – I mean it would have to read, "Judges, just be reasonable," which the Supreme Court has already said that.

[Laughter.]

PROF. SALTZBURG: And I don't think you'll be able to do more.

CHAIR HINOJOSA: Professor Saltzburg, on behalf of those of us who were on the bench before the guidelines, actually there was a number of judges who didn't have guidelines, who felt it was a very good system that came into place for the obvious reasons of trying not to impose sentences that were either disparate or not consistent with regards to – and so I do think that it is not viewed by judges who were on the bench beforehand as something that is long awaited.

I guess my question is – and I'm certainly not here to endorse the Collins fix, nor do I even know that I'm a fan of it, but doesn't it lead to some kind of distant viewpoint of the Supreme Court if we take very 5-4 decision and say, "Well, we can't take any action in this particular situation because that particular decision is 5-4," whether it's Booker, FanFan, Harris, Apprendi. In arguing against the Bowman/Collins fix, should we leave that aside and just argue it on the merits as opposed to what the Supreme Court may do with a prior 5-4 decision? Do we run the risk then of being placed in a situation where whenever we face an issue and that there was a 5-4 decision of the Supreme Court that we're relying on, that therefore that type of decision takes a different type of precedence as opposed to a 6-3 decision, for example?

PROF. SALTZBURG: Judge, it's a tough question, a good question. My answer is this. I don't think that every 5-4 decision that's rendered requires the Commission or any agency of Government to sit there saying, "Gee, what might the next decision be? We can't act."

But when we look to what the Court said in this 5-4 decision and what it said in Blakely, which is what triggered this, it is that judicial fact-finding that increases sentences is troublesome to five people on the Court. The Collins fix, the reason I said it's cosmetic, it's still judicial fact-finding that's increasing sentences, and I think this is a chance because of that, just a very basic policy. If the Court revisits it, it will say that that's what we condemned. And so it's not just that it's 5-4, it's the reasoning behind it.

There is an alternative, but it's an alternative, as I say, that the ABA has urged be considered. If we get to the point where we say advisory guidelines won't work, and on the merits the alternative is to set forth those facts which we really think should increase sentences and have juries find them. I mean, that is what the Supreme Court's majority prefers to the extent we could find the majority. We have the remedial majority and we have the Blakely majority, and the Blakely majority prefers jury fact-finding to judge fact-finding. And so there is an alternative there.

The ABA's position remains that advisory guidelines can work, that with the right appellate review and – it was interesting, I hope you'll, as the Commission has its hearings, I hope you'll press harder on the issue of how appellate review [inaudible] worked in various states, because there's one citation I saw in one of the bits of testimony to an article that's forthcoming that Kevin Reitz is doing for Columbia. I have not seen the article. The citation suggests that appellate review doesn't work, and while we – I don't claim to be an expert on this – the Minnesota prosecutors and judges claim that the common law of sentencing developed by their Supreme Court has worked very well. And in Ohio, my impression is that the Ohio Supreme Court has made their presumptive sentencing approach really very effective and has engaged in a dialog with their trial courts that has been very instructive.

Those two jurisdictions I think are at least worth looking at, as the Commission thinks about how appellate review might actually play out in the federal system.

MR. FEIN: Mr. Chairman, if I could add a footnote. Number one, I think that the so-called Bowman fix exults form over substance, as I think Professor Saltzburg pointed out, if you look at the reasoning behind

Blakely and the worry that the Court had that you didn't have the reliability of fact-finding, you didn't have the citizen protection from an overzealous judge in the sentencing process when you permitted the fact finding by judges after a verdict to be decisive in what the sentence was. And in my judgment, that kind of fix ultimately would collapse because it simply is contrary to the whole purpose that led the Court to its conclusions in Blakely and in Booker.

It also seems to me that it is appropriate in certain circumstances to examine whether a precedent is 5-4, not because it's any less binding than 6-3; it's the holding of the Court. But when you look in this case at what I would consider not the full mandatory nature of the guidelines pre-Booker, but attempts to give the guidelines some extra legal authority or support by saying if you're in the guidelines you get rewarded for these reasons. It's a safe harbor, and you're automatically presumed X, Y, and Z.

That's when you have to worry about are you going to peel off that fifth vote and say, "No, you're violating what's really the substance of the majority holding on jury trial." When you are creating an overwhelming incentive, a legal incentive for a judge to stay within the guidelines, even though you may call them voluntary, that again you're having form triumph over substance, and that is appropriate to look at in Booker because what pushed Justice Ginsburg to flip from her allegiance on liability on the jury trial to Justice Breyer on remedy would be critical in my judgment in trying to fashion –

CHAIR HINOJOSA: You have any idea what did push her?

[Laughter.]

MR. FEIN: I haven't consulted the oracles at Delphi yet.

CHAIR HINOJOSA: Okay, go ahead.

COMMISSIONER HOWELL: I just want to ask one really quick question, and that's about the data collection and analysis by the Sentencing Commission, because those witnesses yesterday that we've heard, the witnesses we've heard today, and you all, who are urging the Sentencing Commission and urging Congress to hold off for a year or so to let the Sentencing Commission collect data, analyze it, and look at what has been happening under this advisory system that we have been handed to help Congress make an evaluation as to what if anything they should do.

It's a very time-intensive, resource-intensive effort to look at data and then, as you could tell from the chairman's review of the most recent post-Booker data yesterday, we have to be very careful and cautious in how we analyze it and lay it out.

It seems that you also had some good ideas about some of the things that might be helpful for us in parsing through that data, including not just looking at the percentage and numbers of variances in the post-Booker data, but, in fact, the amount of the variance, you know, sort of the number of months that the variances were made, and that that might be probative.

I've also thought that perhaps it might be interesting to see the types of cases where there were variances that might be instructive, that it's in – you know, because it may be that some of the guidelines may be viewed as too high in multiple districts and that's why there are some variances in certain types of cases.

Would you agree that some – and could you tell me if there are other – or tell the Commission if there are other kinds of data that we should be parsing from the data we're collecting and analyzing that you think would be helpful, as we look and see how well the advisory guidelines are working?

PROF. SALTZBURG: I don't envy the task of – I've always been impressed with the data collection and the analysis that this Commission does. It's extraordinary. And I know Commissioner Steer was there at the beginning, and I think he deserves some credit for the really rigorous, thorough, and I'd say, nonpartisan way this data gets collected, got a lot of pride in that. I don't think anybody in Congress, even those who aren't the biggest fans of the Commission, ever question the accuracy of the data. I think it's important that that be maintained.

Several things matter. I think the number of variances, that is, nonguideline sentences, the extent of the variances, and comparing those in which types of cases can be instructive, I think it's going to be important for you to look at whether the judge varied *sua sponte* or whether there was a motion made. And I think – and this is probably somewhat more controversial – I think probably you want to track variances by judge to some extent, because what you may find is that there is a bell-shaped curve with the vast majority of judges very rarely varying, and then at the end some never, and some – you may find that there are five percent variances, that the five percent are accounted for by three percent of the federal judges, and that also is something I think to be taken into account.

I think that you'll want to be tracking what the appellate courts do with respect to variances. Basically – and if they find unreasonable variances, whether they impose their own sentence or simply remand for resentencing.

One of the reasons, I think, for gathering data – and this is something I know that you all have thought about more than I – if Congress were to lift, as the ABA recommended last year, if they were to lift the 25-percent rule so you weren't bound by that, it would be possible for you to adopt Mr. Collins's approach, and actually if you thought that was the right answer, you could do it. It wouldn't take Congress to do it, I believe.

The other alternative, however, is you could look at the state systems, as the ABA urged last year, and conclude that sentencing ranges that were somewhat broader, such as Jim Felman talked about when he made his presentation to you, might make sense, and it may very well be that, with slightly broader sentencing ranges, you would have almost no variances. That's one of the other issues, which is if there are variances is it because of the tightness of your ranges? And I think that that's something that also, in terms of long-range policy, would be an interesting thing for you to consider.

So that if – I think we're probably agreed the 25-percent rule should be lifted, but we agree for different reasons – it would free this Commission up to actually do what it was intended to do, which is to be that expert body that would decide and guide judges in sentencing, and to use that expertise. The ABA's view has been that Congress should leave more to this Commission and not do it all by legislation so that the expertise you have can actually come into play.

But it's probably best – I say that for the long term, because dealing with the advisory system in the short run is challenge enough. But as the data comes in, it very well may inform what the future looks like and ought to look like.

CHAIR HINOJOSA: Commissioner Horowitz has the last question unless another commissioner proves me to be a –

[Laughter.]

MR. COLLINS: I just had one comment on data collection.

CHAIR HINOJOSA: I'm sorry.

MR. COLLINS: I agree with Professor Saltzburg that the Commission's data collection is really outstanding and I think has been a valuable service to the public. I think there were two areas where if you were looking for ways to improve it that you might want to consider. First, there still is a problem with substantial noncompliance by a small number of districts that simply refuse to send in the data to the Commission. I don't know exactly what the Commission can do about that or what Congress can do about it, but it is a problem that shows up every year in the footnotes in the Annual Report.

The second area – and I think this is an area that becomes more critical after Booker than it even was before – is getting a better understanding of the grounds for departures or now departures and variances. I think one of the things that emerges from the debate over the PROTECT Act is that the one weakness in the Commission's data collection was probably Tables 24 and 25 of the Annual Report, which has grounds for downward and upward departure, because it became apparent, for example, that those tables did not capture the fast-track phenomenon because it was getting miscoded or misreported, and so that was one of the areas where there clearly was a gap.

And I understand that the Commission is aware of that problem, but they need to get a better handle on the grounds for departures or variance will become more critical after Booker, not less so.

CHAIR HINOJOSA: Commissioner Horowitz has the last question until the next commissioner proves me a liar again.

[Laughter.]

COMMISSIONER HOROWITZ: Just following up on what Professor Saltzburg said and the data collection issue. You mentioned both in your comments, your statement and now about the extent of departure or variance being an important factor. This one question I had for the panelists is how do you measure that? What is a large, medium, small variance, given the guideline ranges cover such a wide range of sentences?

Then you also just mentioned that, and others have mentioned this also, the notion that the vast majority of judges stay within the guidelines, but a small percentage of judges are the ones who create the large percentage or may well cause the large percentage of variances, and how – should we go about measuring that, and if so, how?

MR. FEIN: I think that it is important to highlight individual judges whose sentencing may seem aberrational with regard to the majority. There has been a lot of clamor suggesting that undermines judicial independence and that putting the sunshine on judges is bad because the public may become aroused and dislike them, and write editorials that are nasty, and Congress may get up in arms. But the whole purpose of the life tenure is to have that protection against that kind of public sentiment in a counterproductive way influencing a judge's decision. Many of the decisions that judges make here are based upon statutes, and Congress has a right to know whether it may need to change a statute because it's not being administered in a way they think is appropriate and faithful.

And I know that there was, in the aftermath of the PROTECT Act, many voices raised that this was an attack on the independence of the judiciary, which, it seems to me, is totally ill-conceived. And by focusing, if there seems to be a recurring problem amongst a handful of judges, on their particular sentencing, we may be able to understand better how the flaw can be overcome. But it may well be also a system where judicial independence makes, you know, a corrective action impossible without encroaching on the Article III protection that we wanted.

With regard to deciding, you know, what's a substantial variation as opposed to a minor one, I mean, I'm not sure whether there's any Euclidian formula. It's a sense that six months, or 18 months, or two years to most people wouldn't seem – the bandwidth is already a year, substantial, five years, maybe it is. I think it's more important to draw a line than exactly where the line is drawn. But I agree with Professor Saltzburg that there ought to be some way of distinguishing between the variances instead of treating them all in one homogenized whole.

PROF. SALTZBURG: It's a really good question, and I'm trying to think about this. Since you asked it, I had a little time to ponder. There are two ways that most of us go about doing it, and I think probably both ways ought to be considered. One way is you look at what the guidelines call for, and then you look at the sentence, and you identify in months the actual disparity or the actual difference. And so we'd know we'd have – you'd be able to say that variances of one month, two months, and so on, there are this many. And the other way would be to look at the percentage of the sentence. And I think perhaps you need to do both because if a sentence is six months and the judge departs by two, calling that just a two-month variance might understate the significance of the change. And because we don't – because it's too early to know exactly how this advisory system will work, again, easy for me to say, I don't have to do those calculations. But my instincts would be you'd want to try the numbers both ways.

I think it's possible, by the way, without engaging in *ad hominem* attacks on judges, to gather this data. I didn't mean to suggest that we ought to have a "Most Wanted List" of judges out there who – because there is going to be a dialogue ongoing about what it is an advisory system should look like. But if, in fact, you can point to 'X' number of judges account for a huge number of departures, that's something I think appellate courts ought to be aware of, as well when they engage in reasonableness review. They don't need to know – they know the names, for the most part.

I remember, on a different subject, an appellate judge told me once that in his circuit that 95 percent of the sanctions imposed upon lawyers were imposed by five percent of the judges. And he said his court was fully aware of who they were and took that into account when they engaged in review. And I suspect that something like that will take place in sentencing. As for Mr. Collins's point, the one thing that is sort of unforgivable, knowing that the judges in some of the districts are really overworked, I mean, the sentencing burden is enormous, the data has to be provided. It's really important. And I think that the Judicial Conference needs to take a more – perhaps a more active role in encouraging that, and in pointing out that the absence of data and the failure – nothing inflames the Congress more than when judges in their views flout the requirements. And it's not enough of an excuse to say, "We're busy." I think it's just vital that judges understand that you're going to get a negative congressional reaction if Congress thinks they're not complying. And compliance means providing the data. And maybe you do this already now in light of the response of Mr. Collins. Maybe the Commission has already provided guidance to judges on the fast track in those jurisdictions, that if this is a fast-track departure, say that, identify it as such. You know, we can label it so that we can have more accurate data.

It may be that if there are certain patterns that you see, a shorthand for the judge, it might very well save time and enable them to give you the data that you're required by law to accumulate.

MR. COLLINS: The Commission's statistical report already has in it one measurement that tries to assess the extent of departure as a percentage. I think you may want to consider whether or not in this – if the advisory system continues, some more, a little bit refined or reticulated assessment of range or scope of the extent of departures is warranted. And it may be that it would be too cumbersome to do for every offense, but you may find as you look at the data, that there are some that have a greater standard deviation than others, and you may want to do something in that regard.

With the chairman's indulgence, I would like to just add – I didn't have a chance to respond to some of the points that were made on Harris before, and if I could briefly make a few points.

CHAIR HINOJOSA: You can because I plan to say something, too, at the end.

[Laughter.]

MR. COLLINS: I think that – certainly I would hope that the Congress would not engage in a self-fulfilling prophecy where, out of fear or concern that Harris may not survive, it essentially declares it to be dead. It is not dead. It is still on the books. I think it is – Justice Kennedy's opinion distinguishing Apprendi is well reasoned. I think there is a difference between setting the maximum to a range and setting a minimum within that range.

I also think that to the extent that there is criticism of the Bowman fix as being form over substance, that's rather – I think it proves too much because, frankly, the Booker solution is form over substance, because the Booker solution is to eliminate the very right that the Court recognized in Justice Stevens's opinion.

The problem that created Booker is the fact that the defendant has a right to a maximum – a right to a maximum sentence below the statutory maximum, and the Court's remedy for that problem is to eliminate the right, so that now you can go to the maximum under your discretion. That is form over substance. So I think it proves a little bit too much to say that the elimination of the Apprendi problem that is inherent in the Bowman fix is somehow inconsistent with the Court's rationale. And as Justice Scalia pointed out in his opinion in Blakely, it is not necessarily the case that the remedies that a legislature may adopt to comply with Apprendi will necessarily be defendant-favorable. That is not the Court's role or mission, to try and push the system in one way or the other in terms of substantive value choices. Those are ultimately for the Congress in the first instance, and I think for the Commission in implementing the directives of Congress in the second instance.

CHAIR HINOJOSA: I'll now close – I've been on the district court bench I guess for almost 22 years – with a statement adding to what Professor Saltzburg said about the appellate court judges know the names. And I do have to say that the district court judges know the names of the appellate court judges.

[Laughter.]

CHAIR HINOJOSA: We'll go ahead and take a short, three-minute break. That I'm sure of. And we'll go on with the next panel. Thank you all very much.

[Recess.]

CHAIR HINOJOSA: Our next group presenting views on the subject are members of the defense bar: Amy Baron-Evans, who is the co-chair of the Practitioners Advisory Group, and she is an attorney in Boston, which is a great place –

[off topic]

CHAIR HINOJOSA: Carmen Hernandez – second vice president of the National Association of Criminal Defense Lawyers. That is one of the hats she wears. And Jon M. Sands, Federal Public Defender for the District of Arizona, who is also the chair of the Federal Defender Guideline Committee. We look forward to hearing from them, and we will start with Ms. Baron-Evans.

MS. BARON-EVANS: Why did everyone leave?

CHAIR HINOJOSA: They are coming right back.

MS. BARON-EVANS: Good morning, Judge and members of the Commission. Thank you very much for inviting me to speak on behalf of the Practitioners Advisory Group.

We strongly recommend that the Commission not support any legislation or promulgate any rules at this time that would make the guidelines even a little bit more mandatory. I thought that Professor Saltzburg put it well when he said that any defendant with a competent lawyer will be challenging that system with labels – labels of presumptive weight or even substantial weight, I think, as a return to effectively a mandatory system.

If you look at Justice Breyer's language pretty closely, it looks like he went just as far as he could go up to the line where he couldn't say any more. He said judges are not bound by the guidelines, but they must consult them and take them into account. And I think that's as far as he can go, and really as far as the Congress and the Commission can safely go right now.

At the same time, I'm not sure there's that much to worry about because if you go through the analysis, I think it's pretty obvious that the guidelines are going to have to be given primary respect in the analysis, because the analysis has to start with the guidelines and it refers back to the guidelines at each step along the way. The court first has to find the facts and calculate the range, and everybody, to look at this, says that in order to consult the guidelines, they have to – judges, of course, have to find the facts and figure out what the guideline range is. The next step is obviously departures. And to do that, the courts are going to have to look at the policy statements on departure, which also depends on what the guideline range is, how – you know, whether the departure is reasonable.

Next, the court is going to have to consider whether the sentence produced by the Guidelines Manual is sufficient but not greater than necessary to reflect the seriousness of the offense, promote respect for the law, achieve just punishment, achieve deterrence, and [inaudible]. At that point, the court has to consider some facts in addition to the guidelines and the policy statements that have gotten less consideration up to this point, and that's the defendant's history and characteristics, the available types of sentences, and the need to avoid unwarranted disparities and the need to provide restitution. Restitution has always been considered.

If there is a reason for a sentence different from the one produced by the Guidelines Manual, the reason, we think, will have to be explained in relation to the guidelines. The court will have to, as usual, state in open court the reasons for the particular sentence and state the specific reasons on the judgment and commitment if the sentence is outside the guideline range.

So at each step along the way, just as a matter of logic and habit, I think that the court is going to consider the guidelines and articulate the sentence with reference to the guidelines. This is an analysis that we think by its nature respects the guidelines' central role. If the Commission starts receiving information indicating that judges have invented some other kind of analysis and aren't applying the framework in this way, you could communicate, we think, to the judges at that point what the proper analysis is. But I think, again, that you are going to have to need – you would need to be cautious about putting labels on the weight, the specific weight to be given the guidelines.

One thing the Commission could do right now – and it sounds like you're already doing it – is to tell the district judges that if there's a reason for a sentence outside the guidelines range that qualifies as a departure and a reason under some other factor under 3553(a), they should call it a departure. It seems to me that that will give you the best picture in your data of what judges are really doing. It would be a shame if a judge called what was really a departure a 3553(a) factor, and all of a sudden what was really a guideline sentence counted as a non-guideline sentence. So we don't see any problem in telling judges to do it that way as a matter of data collection.

Prohibited factors, we disagree with Judge Cassell that the Commission should promulgate guidelines that tell the courts not to consider things like race and gender or substantial assistance without a government motion just because that's what the guidelines already say. As to substantial assistance motions in particular, the guidelines require a motion from the government before the guideline can be applied. Whether the government makes the motion is entirely in its control, not the court's. At least in my experience, courts don't want to get involved in figuring out whether assistance was substantial. They rely on the government to do that, and we don't see a reason that that would not continue. But, again, if the Commission receives information that that is happening, maybe you could somehow reemphasize the government motion requirement.

I believe Mr. Collins suggested that certain factors could be – certain other factors could be put completely off limits. If the Commission did that, the statute would, of course, trump the guideline if you promulgated a guideline prohibiting certain factors, which I don't think you're suggesting. I think someone suggested that Congress prohibit factors more broadly.

I think if Congress did that, that would be unconstitutional. The guidelines are advisory only because there are other things besides the guidelines that the courts have to consider. If you chop away everything else that the courts have to consider, that leaves the guidelines, and the guidelines are effectively mandatory. So you couldn't, for example, have Congress enact a law that says the guidelines already reflect all the purposes of sentencing or the guidelines – or courts cannot consider the history and characteristics of the defendant, or making all of the discouraged factors prohibited. I don't think Congress could do that without returning to mandatory guidelines.

As to appellate review, we don't think that either the Commission or Congress should get involved in appellate review. I agree it's not a model of priority. But there are three things that you can pick out of Justice Breyer's opinion.

First is that section 3553(a) factors will guide the appellate courts in determining whether a sentence is reasonable. Second, Justice Breyer said, "The Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under §3553(a))." This has to mean that even if the sentence was in the range, it has to be reviewed for unreasonableness. I think someone else suggested that sentences within the range that are correctly calculated can never be unreasonable as to length, and I think that's wrong. That's the

way the Second Circuit interpreted it in Crosby, that a sentence within or outside the guidelines range, regardless of length, can be unreasonable in length, potentially.

At the same time, I don't think that sentences within the range, a correctly calculated range, are ever going to be reversed as a practical matter, as long as the court considers the 3553(a) factors.

The third thing the Court said was in regard to the *de novo* standard. I think there's been some suggestion that the *de novo* standard might be reinstituted. The Court could have struck down only 18 U.S.C. 3553(b), but it also struck down 18 U.S.C. 3742(e), including explicitly the *de novo* standard of review. I think we have to assume that it struck the *de novo* review standard because *de novo* review of sentences outside the guideline range certainly suggests that sentences within the guideline range are mandatory or close enough to mandatory to require jury fact finding.

In closing, I just want to say that there really is no crisis at this moment or anything that can be credibly painted as a crisis. The PAG recommends that the Commission make sure the courts are accurately reporting what they're doing, collect the data, study what it means, and not propose legislation or promulgate guidelines in the meantime.

I think the Supreme Court was very careful in the language it used to describe the new sentencing procedures and appellate review, and any law or rule that would make the guidelines even a little bit more mandatory would be risky at the moment.

We agree with others that believe the Bowman fix or the Collins fix is on even shakier ground after Booker. It looks like the only options for the long-term then are either advisory guidelines, as now, or what people are now calling the simplified Blakelyized guidelines that Jim Felman first proposed. And I just want to note that there was some question whether those simplified guidelines would have to be codified by Congress or if they could be promulgated by the Commission, and there's a direct answer to that question in the Justice Stevens's majority, which says the Commission can promulgate even facts that are found by a jury.

We hope that the Commission will take this opportunity to study the Booker regime in action and work on simplifying and improving the guidelines based on what courts are actually doing and why they're doing it.

Thank you.

CHAIR HINOJOSA: Thank you.

Ms. Hernandez?

MS. HERNANDEZ: Good afternoon, Judge and Commissioners. Thank you once again for inviting me. I usually don't read, but I want to say some things very carefully and so, therefore, the only way to control myself is to –

[off topic]

MS. HERNANDEZ: Thank you once again for inviting me to testify before the Commission and for holding another hearing to consider the divergent views of so many thoughtful people. And I really think that's important. I'm saying that very seriously. I think both last – the November hearings and this hearing

you have brought together a whole lot of different voices that you haven't always listened to or heard from, and I think it's very helpful both to those of us who follow your work and to the Congress. I already diverted from my –

[Laughter.]

CHAIR HINOJOSA: The biggest laughter is coming from the blog.

MS. HERNANDEZ: Justice often looks so much different from where you're sitting, so I will try to speak on terms that we can all agree to. I admit that we will never agree on what constitutes just punishment. I fervently believe that we imprison too many people for periods of time and under circumstances that, in my opinion, are at times too harsh and at times even barbaric.

Obviously, some in the Congress and the Department of Justice and perhaps even on the bench think otherwise. Perhaps even some of our citizens also think that lengthy prison sentences are the right and just thing to do with those who violate our laws. So instead of getting into an argument over whether the increasingly harsh sentences have, in fact, reduced crime, and just so I'm not misunderstood, I don't think they have. I think there are studies that show that the drug sentences, for example, really is – there was a RAND report some years ago that talked about wasting taxpayer money on harsh drug – or long drug sentences for a certain type of drug defendant.

I would like to say that we should be able to agree on the goal of making each person in America safe in their person and home.

You didn't expect that from me, did you?

But if that is a common goal, I think we also need to agree on three things: one, we must accomplish these goals in a way that honors our bedrock constitutional principles; two, we must find a better way to ensure that we're only imprisoning those actually guilty of the magnitude of the crime for which the law imposes such severe sentences; and, three, we must find a different way to achieve the goal of protecting the public.

I've just returned from a meeting of the National Association of Criminal Defense Lawyers in New Orleans where we hosted a delegation of criminal defense lawyers and a professor from Beijing, China. Three things struck me from that trip as we escorted the delegation to observe hearings in federal court, discussed our laws with them, and torts and prisons and juvenile facilities.

First, it is how necessary it is for us to address the root cause of crime. Lack of education, drug addiction, untreated mental health problems, poverty – we need to address these, both at the front end to prevent crime, and at the back end to limit recidivism.

During a visit to the prison in New Orleans Parish, the warden gave us a tour of the facility and explained three programs that she seemed quite proud of, where prisoners were put through boot camp, counseling, and provided educational opportunities. Shockingly, the warden told us that she graduates more young men with GED diplomas than any high school in the entire state of Louisiana. And I think that's an indictment of our system. And I think we should have and the Commission should be a leading voice in recommending to Congress that we add additional alternatives to imprisonment instead of reducing them. I understand the Bureau of Prisons is going to reduce boot camp at the moment.

The second point that I took away from that meeting with the Beijing lawyers was that the men in the prison that we observed – the warden took us through this tour – were sad, defeated men. Many must have been just teenagers. Most were Black and other minorities. They were all someone's son, brother, husband, father. We need to do something about the disparate rate at which we imprison Black and Latino men.

The Chinese lawyers were an inspiring group of men and women, hungry for information about our system of law. They know more of our history and our heroes than most of us. They're looking to emulate the best legal practices in the world. They're fairly young. They have this unique opportunity after the Cultural Revolution to reinstitute a legal system.

It must be what our founders must have been like as they drafted the Constitution and the Bill of Rights. It is heady and inspiring to be around them.

On their last evening in town, the law professor asked me whether our system worked. He said, "Not in theory," he asked, "but in practice." He said it in English, which is more than I can say for my command of the Chinese language.

I hesitated. The NACDL is supporting indigent defense litigation throughout the country to fix situations where defendants first meet their attorneys on the day of trial, and where some attorneys meet with clients for an average of 15 minutes before advising them to plead guilty or go to trial for serious felonies. And the ABA has just published a scathing report on the state of indigent defense. We regularly release innocent persons convicted to death, often because of perjured testimony by government lab technicians, or other shortcomings in the system.

In the federal system, where we pride ourselves on the quality of our justice, we're struggling with whether it is necessary to provide basic due process rights to someone before we can imprison them in a cell for their rest of their natural lives – not for killing another person, but for distributing marijuana, or even for high-stakes thievery.

The third point that the visit with the Chinese lawyers brought home to me was how easily we allow our constitutional protections to be unrealized.

With that as background – and thank you for your indulgence – I will try to answer only a few of the questions you posed. Others have fully addressed them, and I have nothing materially to add to their statements.

Number one – and I was struck by the testimony of Judge Kopf yesterday, whose opinions I have been reading for many years. After the 1995 crack report, he held the crack guidelines unconstitutional as applied in a particular case, in a very thoughtful case. He is a Reagan appointee, a Republican.

CHAIR HINOJOSA: You say that with disdain.

MS. HERNANDEZ: No, I say that –

[Laughter.]

MS. HERNANDEZ: No, I say that to show you that –

CHAIR HINOJOSA: And since they are so different, I do want to know if you asked the Chinese anything about their system. But go on.

MS. HERNANDEZ: Their system is not as good as ours –

CHAIR HINOJOSA: I didn't mean to add any more time to this.

MS. HERNANDEZ: I believe you don't need to make any changes to assure that the Booker remedy is implemented. The lower federal courts are taking care of implementing the Booker decision, and I think Judge Kopf's admonition that any changes you make, particularly in rushed fashion, just create confusion is wise.

I also think there is no need to clarify through legislation or through a guideline what weight courts should give to the guidelines. The courts of appeals will soon have resolved that issue as a matter of statutory construction on a *de novo* standard of review. The wisdom of the many district court judges who are writing on this topic will certainly inform those decisions, and I am not sure, frankly, that the Commission's – this isn't like an administrative act issue where the Commission's learned view on how courts should apply 3553(a) is going to carry weight, I don't believe.

Indeed, with all due respect to Judge Cassell, who has once again, I believe, served a very necessary and important function by explaining his views and providing a jumping-off point for discussion, giving strong weight to the guidelines is not appropriate, and runs the risk that Justice Scalia warned of in his dissent in Booker and in his majority opinion in Blakely.

Justice Scalia, another Republican appointee, who can at times be uncannily accurate in his understanding of how things really work, warned, "As I have suggested earlier, any system which held it per se unreasonable (and hence reversible) for a sentencing judge to reject the guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional." How strongly does one have to follow the guidelines before that line is crossed once again is unclear, but I think if that's how courts are directed to apply the guidelines, you're going to be running afoul of the very strange, tenuous opinion that Booker is.

To understand why this is so, one must understand that the remedial majority's opinion really rests on the slim read of Williams v. New York and even the – of Williams v. New York for the proposition that the court has never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Williams upheld the imposition of a death sentence by the judge, based on information contained in the presentence report prepared by a probation officer. The jury, which had found the defendant guilty of first-degree murder, had unanimously recommended a sentence of life imprisonment.

In the post-Booker world, however, it's important to understand that although Williams affirmed the imposition of a sentence based on non-trial information, in Gardner v. Florida, a 1977 case, the Supreme Court expressly distinguished Williams on the basis that the defendant had not challenged the accuracy of information relied upon by the sentencing court. So you already have an opinion that is expressly and explicitly distinguished by the Supreme Court, on the basis that the reason it's okay for a judge to impose a discretionary sentence based on a probation officer's report is that the accuracy of the information was not challenged. I think you know where that's going.

Accordingly, Williams and the notion that discretion in the hands of a judge can avoid violations of the Sixth Amendment goes only so far. We know that the procedure in Williams has also been held unconstitutional in Ring. No longer can a district court judge impose a death sentence.

While Williams did not address the standard for accurate information in sentencing, U.S. v. Tucker, a 1972 case, held that a defendant has a due process right not to be sentenced on the basis of materially false or inaccurate information. So you have Williams and two strikes at this point, in my opinion.

Tucker said a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited, either as to the kind of information he may consider or the source from which it may come. But these general propositions do not decide the case before us, for we deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded, at least in part, upon misinformation of constitutional magnitude.

Is hearsay unreliable? Of course it is. Is co-conspirator testimony suspect? Yes. That's why we instruct juries to consider such testimony with caution and great care, because such witnesses may have reason to make up stories or exaggerate what others did or may be prejudiced against a defendant. Similarly, a cautionary instruction regarding the testimony of drug users is given to juries. You should expect that continued use of such unreliable information as the basis for a guideline calculation will be challenged, both on Sixth Amendment confrontation grounds and on Fifth Amendment due process grounds. And I don't say that as a challenge. As Professor Saltzburg told us, criminal defense attorneys fully representing their clients will be challenging the standard of proof used at sentencing, particularly if the guidelines continue to be adhered to, and the closer they become mandatory, the more you're going to get these challenges. And I think you can't control the lower federal courts or the Supreme Court.

If we can learn anything from the Apprendi line of cases, it is that the court is prepared to reexamine its precedents to preserve constitutional rights in light of new circumstances, and it said so explicitly in the merits majority in Booker. "As it thus became clear that sentencing was no longer taking place in the tradition that Justice Breyer invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in Jones and developed in Apprendi and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."

While the use of a beyond a reasonable doubt standard is intended to reduce or eliminate factual errors, the Sentencing Reform Act is silent on what standard to use. The guidelines require only that information used to calculate a range have "sufficient indicia of reliability." In a law review article written by then-Sentencing Commission chair, Chief Judge – Circuit Judge William Wilkins – he wasn't the chief judge at the time – and then-USSC counsel John Steer about the compromises made, they explained that the Commission adopted a preponderance standard on the basis of the authority of McMillan v. Pennsylvania, a case that has had its validity challenged, most recently in Harris v. U.S., and we've all discussed Harris earlier. But Harris is the result of a very fractured court. I won't belabor the point because I think the previous panel discussed it. But it isn't merely that it was a fractured court. It isn't merely that it was a 4-1-4 plurality, but that Justice Breyer himself said it was illogical for him to do what he was doing, but because he disbelieves Apprendi, he went ahead and did it. And I must say that two of the members of the Court that

were in the majority, Justice O'Connor and Justice Rehnquist, I think have clearly expressed their desire to leave the bench. And as you know, this is not a liberal issue. You know, this Apprendi line of cases is led by Scalia and Thomas. So unless there's going to be a new litmus test for the Republican appointees, I think Harris may be in trouble for those additional reasons.

I want to say that I think there is no quick fix in light of the constitutional cases and in light of the policy decisions that I think what DOJ wants. In the end I believe that the only system that will work and will withstand constitutional scrutiny is one that provides greater procedural protections in the form of jury fact finding. I know that the Department of Justice would like to avoid jury fact finding of all the sentencing enhancers. And I know that the judiciary doesn't particularly want to be just imposing sentences with all facts resolved. But I think that's the only system that will withstand constitutional scrutiny, and it may require, probably does require a simplified guideline system. So I would recommend to the Commission that between now and whatever time you have, you do work on that remedy.

In the meantime, I think the Commission should start to collect accurate information, not merely of the fact of departures, or what I like to refer to as just-punishment sentences – those would be the Booker sentences – but the reasons why the district judge felt compelled by the mandate in 3553(a) to sentence as he or she did. I don't believe we should or will be allowed to return to the system of completely discretionary sentencing that was in effect before the Sentencing Reform Act passed. But I think we should know from what happened with the PROTECT Act that numbers alone don't tell the story.

We knew – I think everyone who was familiar with the guidelines knew that the departure rates in immigration cases explained – was telling us that there was a problem in immigration cases, so that if you start to find a lot of departures in an area of the law, I think we should give a little more credence to sort of the integrity of the judiciary to do what the law requires. And so if you're getting a lot of departures, it's because there's something wrong in that area of the law.

I think a very difficult issue – and I know the Commission has tried over and over again to address it – is the crack cocaine guidelines. You have statutory mandatory minimums at a very low floor, so you're not going to have too many very low sentences. But in an area where the Commission itself has more than once stated that that statute or that ratio is wrong and where you've got such a disparate impact on minority population and where a lot of the defendants being sentenced in places like D.C. are low-level, street-level dealers, judges are going to be faced with a very, very difficult task when they have a defendant appear before them in a crack case where they are looking at a huge sentence.

I have been to panel presentations in the D.C. Circuit where judges are expressing a real concern for that issue, and I think it's an issue that Congress needs to address; the Commission needs to address; the Department of Justice needs to address. And I understand it's a very controversial issue and there are lots of reasons why we are where we are on there, but it's just a problem that's in the wings.

I will try to be – I just have a few more points. I do agree with Judge Cassell that I think the Commission needs to explain why it's taken some – why it precluded lack of meaningful guidance as a downward departure. It's a policy decision the Commission made, but you need to explain why you did it, so that a judge coming along can say, "Oh, that's why they did it," and can agree or disagree, and can explain why they are agreeing or disagreeing.

I have often spoken about the brief and casual sentencing hearing, and my comments about the problems with Williams talk about that. Judge Posner in the Seventh Circuit, again, not a liberal, has a very eloquent statement in a case called U.S. v. Rodriguez, where a defendant got life without parole in a

marijuana case, where the proof at trial was ounces of marijuana, and where there were two Allen charges because a jury would not convict, where the jury acquitted of all substantive counts, convicted of a conspiracy count, and based on the quantity of evidence – quantity of information produced at sentencing of a historical nature, the defendant was sentenced to life without parole because he had two prior drug offenses. And he talks about – and that case, by the way, was cited by the majority opinion in – the merits opinion in Booker.

I think I'll leave it at that. I just want to tell you the defense bar is not necessarily happy with Booker. It's not like we're – but I appear here on behalf of the NACDL. We just adopted a resolution in which we said Congress should do nothing, let Booker play out, consider the sentencing system, and try to come up with a proposal that meets our constitutional requirements. And we're taking that stance, as I say, not because anybody's particularly happy. I mean, your statistics are reflecting that sentences are going up and that downward departures are fewer than before. We're taking that position, I think responsibly, because there's no alternative at this moment and it's a workable alternative.

And, lastly, I want to take some credit, because the last time I was here, I told you there were three short-term proposals that were possible; one was advisory guidelines; two was a sentence pursuant to 3553(a); and three was Blakely. So I think on the first two, I'm as close as anybody got to what –

CHAIR HINOJOSA: Maybe you talked so long last time, we didn't really – weren't able to figure out –

[Laughter.]

MS. HERNANDEZ: Well, I have the testimony here if you'd like to see it.

CHAIR HINOJOSA: I take it you're done now?

MS. HERNANDEZ: Yes, sir.

CHAIR HINOJOSA: Okay. Thank you, Ms. Hernandez.

Mr. Sands?

MR. SANDS: Judge, I'm sure you watched the Westminster Dog Show last night where the –

CHAIR HINOJOSA: No, but a German short-haired pointer won.

MR. SANDS: I know. It was unreasonable that it should win over your Labs.

CHAIR HINOJOSA: No question about it. I thought that myself.

MR. SANDS: Nonetheless, I was struck by the groups that they were organized in, and the panels that you've set us in, and I think that you have the working group here. I will leave the designations to the other groups.

CHAIR HINOJOSA: I think the Lab losing is what happens when you have a jury deciding things.

[Laughter.]

CHAIR HINOJOSA: And that was a joke, okay? Go ahead.

MR. SANDS: One of the earliest forms of poetry was discovered in ancient Greece, along with the Delphic guidelines. There was a snatch saying the hedgehog sees one big thing, but a fox sees many little things. Over the past two days, many have talked about the huge picture, changes that should be done. I'm here for the federal defenders to talk fox-like about a few things that the Commission can do in the short term, especially from the fox's perspective, since there are the baying of the hounds from other areas. These things, these steps are procedural steps. They will have the effect of bolstering the guidelines, making judges more comfortable in using the guidelines, and using the Commission's suasion, power of logic, and reason to ensure that the judges impose fair and just sentences that happen to coincide with the guidelines. These steps will also frame the debate. First, the Commission through policy statements can urge early discovery of facts. This is done in many districts. This is done in fast-track systems. Indeed, it is a requirement of fast-track systems. And it was done by the government during the summer of Blakely, in which the government, when they were indicting on elements, were giving – or sentencing factors, were giving the discovery. The purpose of discovery is so each side knows what he is facing when they come in front of the court. The government will agree that a sentence should not be a surprise. Courts would agree that a person standing in front of them should know what he is facing. This will allow more confidence in pleas and in the guidelines.

Second is notice, notice of enhancers, notice of mitigators. Both sides would agree that allowing the other side to know that you're asking for a reduction for minimal role, or that you're asking for an adjustment for role in the offense, or for use of a minor, would be fair. Once again, it narrows the issues, and it allows the courts to make decisions within the guideline arena. So you are, in a way, allowing the court, in using advisory guidelines, to play on your field in a fair manner. Once again, it goes to notice.

Third – and this is probably the most difficult and controversial – is revisiting relevant conduct. We have in the past questioned relevant conduct, and I know that many have wondered whether this has been the Achilles' heel of the guidelines. It is a keystone, as one of you has written about, and is still an important factor.

There has been criticism of the preponderance standard of evidence. The Commission could consider as a policy statement using a continuum, where a preponderance standard, when the adjustments are within a few levels, a clear and convincing standard of – as the Ninth Circuit has found, four levels or more, or even a reasonable doubt when there's a cross-reference to a different offense. This goes once again to addressing the concerns of many on the bench, and from the defense bar, and some from academe, that relevant conduct shouldn't be an expansive concept that a person pleads to a small amount of drugs or is charged with a small amount, but his or her sentence is huge through a standard that is quite minimal. This would show that the Commission is addressing the concerns and it is workable. The Third Circuit, the Ninth Circuit, even the Second Circuit had developed a judicial test as something that the Commission should look at.

Fourth is judicial notice when there is, dare I say it, a departure or a variance from a guideline range. Once again, as a previous panelist has stated, many of the parties know what's happening is good policy and will give confidence.

Fifth, is to change or to alter the presentence report. Form follows function. The presentence report lists the guidelines, the departures in the guideline-speak, the 5K, the 5H – and then a section on variants or sentencing factors under 3553. This will allow the court to proceed in an orderly manner. It will by its very nature for the court to consider, seriously consider with the utmost of respect the guidelines, and allow the court to identify what is a 5K, what is a 5H. It is a way of structuring the outcome and will allow the statements for the sentence to be there. This is a form that the District of Arizona is going to be implementing

in the next several weeks because the probation office met with the judges and came up with this after their reading of Booker.

These procedural steps that can be done quickly would have – would force judges to give meaning to what Booker said, which is to consider, to weigh, to give respect to the guidelines. It would also advance the goals of 3553, which is to eliminate unwanted disparity, to promote fairness, to deal with proportionality, and to factor in the deterrence and rehabilitation. You can build on the respect that the guidelines have garnered for 15 years. You can make the system all that it should be, and it is an important step.

Finally, we have heard a lot here about other systems, the topless or Bowman or Collins guidelines, legislative changes. I'm reminded –

[off topic]

MR. SANDS: I'm reminded of Humpty Dumpty who, when they asked him what the meaning of a word was, gave a contrary definition. And Alice questioned him, and Humpty Dumpty humphed and said, "Well, what's important is who's in control of the words." Well, that's the wrong approach when dealing with reasonableness and mandatory guidelines. We need to read Booker carefully and seriously and see what the Supreme Court is saying, which is that judicial fact finding by any means is unconstitutional, and we know what happened to Humpty Dumpty.

Thank you.

CHAIR HINOJOSA: I guess I'll start with the first question, and it's to Mr. Sands. When you talk about notice, you don't read Booker to have done away with the rules that presently require notice on the part of district courts with regards to enhancements that are not identified in the presentence report already. One can certainly argue that that notice requirement is already there.

MR. SANDS: Yes, and what I'm –

CHAIR HINOJOSA: And that would include any kind of factors that the court is considering certainly within the guidelines and/or departures within the guidelines.

MR. SANDS: Yes, and what I am saying, though, is that the Commission can give a renewed emphasis to the duty of the court to give judicial notice that if it's going to vary the sentence or depart. But part and parcel with discovery, the Commission can say it favors discovery, and that discovery advances the goals of the guidelines, because in many districts that is not the case.

CHAIR HINOJOSA: But wouldn't that run afoul of the discovery rules that are presently in the Federal Rules of Criminal Procedure? I mean, isn't that the vehicle that should be changed with regards to discovery, rather than a policy statement in the guidelines?

MR. SANDS: No, because the Commission has policy statements on plea bargaining and plea agreements. And what the Commission says carries great weight. The Commission can be ahead of the curve, can frame the debate, that if you are going to have a guideline system and if the government wants a guideline sentence, then discovery is in its interest. It does so in fast track. It can do so in other cases, especially in drug cases where relevant conduct is the most troublesome.

CHAIR HINOJOSA: Commissioner Sessions?

VICE CHAIR SESSIONS: I'd like to address, in a sense, the recommendation that you made to us that we do nothing. I have no doubt that you are fully aware that there is a national debate over sentencing policy. The debate clearly has been raised in Congress. There's all kinds of possibilities of solutions. This body has an expertise in sentencing and hopefully a sensitivity to all of the issues that are before Congress, concerns of the Department of Justice, concerns of the defense bar as well.

Are you really, in light of today's world, suggesting that we sit on our hands while all of this debate goes on within the larger community, and decisions could be made in the larger community for which we have had little or no input?

MS. BARON-EVANS: I guess I should clarify, Judge. What I'm saying is if you have a choice to collect the data and study what it means now – which at least my reading of Booker seems to give us that. I mean, you know, before it was decided, everybody thought, "Oh, it's going to be either all jury fact finding or no guidance whatsoever." And neither of those are going to fly, either politically or for whatever reason. But this is a sort of – this is a solution. It isn't terrible. It's got some guidance built into it. So I think it's, you know, something you could live with.

I think that as far as I know – there may be others – the actual real contenders – the real contender, the only real contender being proposed by – well, I suppose it's not the DOJ just yet, but by Mr. Collins – is the Bowman fix. I think the Bowman fix has got real problems that we have all talked about at length, and that those problems have gotten even worse. That gets it down to two solutions, as far as I know, for a long-term system, and it's either advisory guidelines with guidance built in, like the Booker remedy or similar to it, or the Felman fix, where some factors would be charged and proved to a jury, and the others would be left to the judge.

What I am saying is, right now if the Commission supports legislation, or proposes legislation, or issues guidelines that make the guidelines mandatory, it seems to me, (a) it's not necessary because the judges are going to follow them in the vast majority of cases, and (b) that it's really constitutionally risky, that people are going to challenge it. If you put labels on like, you know, "presumptively unreasonable outside the range," or "*de novo* review of sentences outside the range," that it's going to cause problems.

I hope the Commission joins in the debate and collects data so that you can contribute that to the debate. I'm just saying we advise not to rush into anything that could cause more problems.

CHAIR HINOJOSA: As individuals who are involved at the national level in the defense bar, as each one of you is, do you have any concern or any views on the fact that some courts across the country, sentencing courts might say that the guidelines are entitled to heavy weight, and you should depart from them and/or vary from them in very, very rare circumstances. Others might say they're just a factor like everything else and we can just consider them. Are you concerned that some appellate courts, some circuits might say, "A sentence within the guidelines we will take to be reasonable for the following reasons: the Commission has already considered these. Congress has let them become approved, and therefore they knew the Sentencing Reform Act, and they've considered these factors already." And other actors might take the viewpoint, "No, we don't necessarily think that just because it's a sentence within the guidelines it's reasonable, and it isn't entitled to any kind of viewpoint that there would be any presumption to it."

Does that, as someone who is involved at the national level, lead to any concern, and if it does, what do you think should be done to lessen any concern if there is any concern? Anybody who wants to answer this question?

MS. HERNANDEZ: Judge, I don't think the circuit courts are as far, at such polar ends as the district courts.

CHAIR HINOJOSA: We haven't heard from most of them, but let's say that were to happen, would that be of concern to any of you?

MR. SANDS: It is a working out of the common law of sentencing that Stith and Cabranes wrote about in Fear of Judging some time ago. It is also an opportunity for the Supreme Court to deal with what's reasonableness. Another way –

CHAIR HINOJOSA: Would it concern you that this might take a while? I mean and that we might go through this period of differences by circuits for a period of time till if and when the Supreme Court decided that they wanted to hear a case?

MR. SANDS: It is a situation in which defense counsel will be dealing with individual clients. I don't think this Commission can unilaterally impose what is reasonable, what is not reasonable –

CHAIR HINOJOSA: I'm not saying the Commission. I'm just saying what if any action anyone should take, whether it's Congress or anybody else?

MR. SANDS: Then you're running into that uncertainty that Professor Saltzburg warned against. What would be best is for the Commission to work on the guidelines on some of the steps I mentioned, to allow courts to have the confidence in the guidelines that they've had in the past and that they do now, and they will in the future to follow it. There will be some outlying judges that sentence one way or another, but most judges will follow the guidelines, and it's incumbent upon the Commission to explain what it is doing, I think, to a better extent than it has in the past, and that will engender more confidence.

CHAIR HINOJOSA: And you quote Professor Saltzburg in, I gather, the ABA recommendation.

MR. SANDS: Yes.

CHAIR HINOJOSA: And so the question is, in order for this recommendation to be able to work and be a proper experiment, does there need to be any action taken by anyone, whether Congress or the Commission or anyone else, to make sure that all the sentencing courts, in making these determinations, are considering the guidelines and then the policy statements including departure and then varying, if that's what they're going to do. Or should we just let it happen, and then at the end of 12 months or six months or 18 months or whatever, we will be comparing some courts having done it a certain way, some sentencing courts, and other sentencing courts having done it another way, and would we at that stage be in a good situation to compare that period of time with what might have been happening before Booker?

MR. SANDS: Yes.

MS. BARON-EVANS: Judge, I think you could send – well, similar to the letter that you sent out with the Criminal Law Committee to all judges, explaining in terms – not so much in terms of this is how you must proceed, but this is what we want to know, and you know, like Jon said, form follows function or function follows form, whatever, if judges would need to explain why they were imposing sentence either within the guideline range – well, I guess they wouldn't really have to explain that – for a departure reason or for another reason under 3553(a), it seems that that would sort of get – if it isn't obvious already that that's what you have to do, that that would indicate how they should proceed.

MR. SANDS: Judge, this is an opportunity in Chapter Two in the drug conversion thing with the weights just to do a new chart with how you would do the weights of facts you're finding. Imagine what your working groups could do on that.

MS. HERNANDEZ: I think it's a concern that is probably overblown. I'm fairly certain that the circuit courts are going to be addressing, and the cases are going up every day. They're going to have to address what 3553(a) is and what it requires. I don't see how – I think it's fairly clear that the guidelines must be – I mean consider means you have to look at them, and I don't think it means that you can say, "Oh, there they are. I considered them." I mean I think the courts – it's fairly clear that that's how the courts are going to come out. Now, whether they say heavy weight or less weight or some weight or only weight when the Commission explained itself, perhaps.

I do think the one thing you can do and should do, as I said – two things. I'll take the blogger; Professor Berman suggested to you that you put out reports every three months. He may have had some self-interest in that proposal, but I think it's – I mean we know from the PROTECT Act that there was a lot of misinformation floating around, and so I think that's one thing the Commission absolutely positively must do is publish, as I say, not just – and I think this is very important – not just that there were ten departures up or down, but why the Court decided what it did. Because if you continue to be a viable entity, which I believe you are, you're still directed to look at how courts are sentencing for what it tells you about whether the guidelines are accurate or not. So you still ought to be saying, "Why are the courts departing or not imposing upward adjustments, or finding the circumstances of the defendant led the court to sentence in this way or the other way?" I also absolutely think that given 3661 you have to explain why you have prohibited any factor that is not, per se, unconstitutional. I mean, I don't think you have to explain why you've prohibited race as a basis for a departure, but why have you prohibited the things you have? I'm not challenging that you should have or might have or could have made that policy decision. What Judge Cassell said was very good on that point. We shouldn't have to – I mean it should be pretty clear in the Guidelines Manual why a particular departure ground is prohibited all together, and you shouldn't have to be searching for law review articles to tell you why it is or it isn't.

The lack of youthful guidance, I can't imagine why you would want to eliminate that, but I also – in a given case your reason for eliminating that may not hold, and so if a court under its discretionary authority says, "Well, if the Commission decided to eliminate that for this ground, but that's not the reason or that's not what's present in my case," then it's a reasonable sentence and I think you're going to get more compliance with a guideline sentence if there is logic and reason stated for why the Commission has done what it's done.

Can I say one thing about substantial assistance, which I know is a big concern to the government? I think one of the problems with substantial assistance, which I think the government could help, and frankly, I believe that it's fairly possible that the courts are going to continue to require a government motion for substantial assistance. I know the courts will be – there will be different decisions, but I think it's fairly possible they'll require it.

I think part of the problem with substantial assistance –

CHAIR HINOJOSA: Does it bother you at all that some courts might say you don't need one and some courts will?

MS. HERNANDEZ: No, because I think it will all play out. I think the courts of appeals – I think that's what courts are for, frankly, to resolve these kind of disputes.

CHAIR HINOJOSA: But does it bother you that then some courts of appeals might have a different standard for – depending on the circuit. I mean does that in any way [inaudible] any concern on any of the parts of – as I asked that question before you went off on factors that should be or not considered, that's the question here. Are any of you bothered by the fact that we might end up with circuits interpreting what weight and/or how to proceed with the –

MR. SANDS: We have that now, Judge, with the Ninth Circuit and the Fifth Circuit on relevant conduct, things like –

MS. HERNANDEZ: We have it on fast-track. I mean we haven't –

MR. SANDS: It has a way of working out.

CHAIR HINOJOSA: Commissioner Steer is going to save us all here. Commissioner Steer has a question.

VICE CHAIR STEER: Actually, I have more of a comment than a question. My question is very simple. Mr. Sands, would you get us a copy of the Arizona form [inaudible]?

MR. SANDS: Yes.

VICE CHAIR STEER: As soon as possible.

MR. SANDS: Maggie Jensen, who was here, will give it to you.

VICE CHAIR STEER: Just a couple of comments, observations. Ms. Hernandez, I agree with you that we should more fully explain our reasons for policy decisions than the Commission may have done in the past, but with all due respect, the lack of explanation for lack of youthful guidance, you know, it's not hard to find. You can just go and read a case, United States v. Floyd, and it's clear that the Commission responded to that case.

As the two of you are representatives of the defense bar, the three of you, I hope that, frankly, there are challenges early on made to court decisions, such as those of Judge Cassell, that say that there must be substantial weight given to the guidelines because I'm pretty darn confident that you're wrong in your analysis, and I think I would like to get that settled as quickly as possible. I don't think that that is a constitutional problem at all *vis-a-vis* Booker, but since we disagree about that, you know, I say, let's get the courts to address that as quickly as possible so that we can be clear going forward, and I think it will help us get the system straightened out.

MS. BARON-EVANS: I actually, Commissioner Steer, agree with you that it's not probably unconstitutional for a judge to look at it that way, but I think it would be unconstitutional for a legislature to – for Congress to enact a statute that said essentially the same thing.

VICE CHAIR STEER: And the distinction being? That a circuit or the Supreme Court can consider it that way and state so, but the Congress cannot?

MS. BARON-EVANS: The statute would have to say you must give strong weight to the guidelines. I think that's the word or something similar, strong weight, presumptive weight, whatever it would be. That would mean that every court in the nation would have to follow that. If Judge Cassell, for his reasons which

he lays out, and I may disagree or agree with any of them, wants to follow that in his courtroom for those reasons, that's his discretionary – that's part of his –

CHAIR HINOJOSA: Well, let's say the Supreme Court – if the Supreme Court says it can they say it?

MS. BARON-EVANS: If the Supreme Court says?

CHAIR HINOJOSA: That you should give substantial weight or heavy weight –

MS. BARON-EVANS: Sure. I don't think they're going to say that. I think they could have said that and they didn't.

MR. SANDS: They said "consider."

CHAIR HINOJOSA: But let's say when this case finally gets up there, at some point somebody's going to review Judge Cassell and Judge Adelman and any other sentencing court that just said something, and it just seems odd to me to make the comment that a court can do something and that that's okay, but that Congress cannot do exactly the same thing. It seems strange.

VICE CHAIR SESSIONS: Why isn't this as applied? In Judge Cassell's courtroom they're a mandatory system under what you're just saying, so therefore as applied, I would think logically your position would be the guidelines are unconstitutional as he applies them.

MS. BARON-EVANS: Judge Cassell himself left the guidelines system and sentenced outside the guidelines for something that is sort of indistinguishable from disadvantaged background in the Croxford case. He said, "Now that the guidelines are advisory I can consider things that aren't ordinarily relevant under the guidelines or that the guidelines make irrelevant, and I'm going to consider that this defendant was sexually abused as a child."

So I think that Judge Cassell is going to encounter times when he's not going to follow the guidelines for some reason that's present in the case and that, you know, makes – it means that the goals of sentencing are better achieved some other way.

You know, he says in general, "I think the guidelines capture the purposes of sentencing," but that doesn't mean that even he is never going to sentence outside the guidelines; he obviously is. If Congress said, "You have to give the guidelines strong weight in every case," I think that that's too mandatory. It's not reasoned. It's a flat requirement.

CHAIR HINOJOSA: We have time for two last questions here. Commissioner Horowitz and then Commissioner Rhodes.

COMMISSIONER HOROWITZ: Let me ask you, given – I think, based on your testimony, that each of you want to see the advisory system not only remain short term but longer term. If that's the case, we've had a lot of discussion in the last day or so of our hearings about what the dangers are to the continued viability of that system, whether because of the issues that it causes the system or whether it would cause Congress to act and change the system.

Let me ask each of you, what do you perceive to be the greatest threat to the continued viability of an advisory system, and should we do anything to try and deal with that danger, or should we do nothing?

MR. SANDS: I believe the greatest danger is to piecemeal it, so you may have the Department of Justice or other players coming in and cabining off huge sections that would limit the true advisory nature. Going to have an advisory system, let it work.

Some of us though favor a Felman approach which would be a "Blakelyization" with a simplified guideline – but if we live in an advisory world that could be worse.

MS. HERNANDEZ: I think the greatest danger probably is a case that hits the newspapers and that appears to be a real deviation from what Congress believes is the appropriate sentence of a given case, which is why I think the Commission has such a burden in trying to explain, because, frankly, I don't think the overwhelming majority of judges are that off from what society believes is the appropriate sentence in any case. And I think that's what we found time and again, every time you've looked at these cases that appear at first blush to say a judge is way out there, sentencing too low, there are good reasons why that judge found that to be the case.

So I do think the Commission has to be in front of these, has to require the information to be produced to you so that you can summarize it, so that that's not out there.

I also think that with the government there will be – the Department of Justice, how much pressure the Department of Justice places on the Congress, and I think the biggest danger is in the substantial assistance area for the reasons that they at least believe they need such a tight hold on substantial assistance.

I think – and I started to say this earlier – I think the Department of Justice can help in two ways in substantial assistance, if they were a little more public in explaining what they want from a defendant. I mean, you know, each assistant U.S. attorney is different. Each office is slightly different, but a lot of times in substantial assistance cases it's a blind promise to provide a substantial assistance motion and no one really knows what the government is seeking in that particular case. If they were to spell out a little more in a plea agreement what they want, what you'll get, I think that would help. I think judges would be more willing to not go off and grant substantial assistance departures, if a motion is not filed by the government.

I also think that they have misread the substantial assistance statute in 5K1. It talks about the investigation or prosecution of another person, and you rarely get a substantial assistance motion unless there's an actual prosecution, not merely an investigation.

And I also think the Department of Justice needs to address issues – and I know it cuts both ways – but in places like D.C. where often a defendant stops cooperating because they're in fear of their life, you know? Somebody gets killed. There has to be a compromise in that area.

COMMISSIONER HOROWITZ: How about for the Commission? The focus was anything for the Commission to do as opposed to Department of Justice?

MS. HERNANDEZ: Reporting.

MS. BARON-EVANS: I agree that the biggest danger to letting this play out – and I should also say, you know, I'm not crazy about judges who are sentencing above the guidelines because they think they can now. I mean, that's not good for defendants, certainly. And I don't know if that's really happening or what

the meaning of the data is. But the biggest danger, of course, is not that. The biggest danger is if the data shows the judges are going down at some significant rate more than they did before, and you want to do know what do you do, or how do you prevent that?

COMMISSIONER HOROWITZ: Right, any suggestions?

MS. BARON-EVANS: Well, my only suggestion that is really safe right now is a letter about how they should –

COMMISSIONER HOROWITZ: Stay within the guidelines?

[Laughter.]

MS. BARON-EVANS: The guidelines are mandatory. Just say it by letter and it won't be a problem.

MR. SANDS: I think the Commission needs to continue its work, and the more it convinces and shows that the guidelines are worthy of being followed, they will be. There are problems that need to be addressed, immigration.

CHAIR HINOJOSA: Do we really need one more question?

MS. BARON-EVANS: I would just add that I think the form itself, the forms themselves that collect the data can sort of dictate the weight, if you will, or at least the guidelines' place in the analysis.

CHAIR HINOJOSA: Thank you all very much.

We are down to our last witness. The most patient person in the entire room is next, Mr. Robert McCampbell, who is a United States Attorney for the Western District of Oklahoma. He is the chair of the Attorney General Advisory Subcommittee on Sentencing with the U.S. Department of Justice, obviously. Mr. McCampbell.

MR. McCAMPBELL: Thank you. I do appreciate the opportunity to be here today.

When Booker first came out it appeared to be confusing. You have Justice Stevens in his majority opinion, says that the guidelines are unconstitutional, and then Justice Breyer turns around in his majority opinion that says, "Well, we have to consult them anyway."

When I read those two opinions back to back, I have to say I was reminded of the old country-western song, "How Can I Miss You If You Won't Go Away?"

[Laughter.]

MR. McCAMPBELL: Having had an opportunity to read Booker and consider it, it's apparent that the guidelines, although not as mandatory as they were before Booker, indeed have not gone away.

I have submitted written testimony for you. That testimony, much of it comes from Chris Wray's testimony before the House of Representatives last week. I've added sections to that to make it additionally responsive to some of the specific questions this Commission has posed for these hearings.

I will not go through that testimony and read it. You will see in there there are certain problems which have arisen from Booker. Some procedural problems could be ameliorated by having courts using common procedures as they go through sentencing decisions. There are other problems inherent in any advisory guideline scheme, and addressing those issues will require congressional intervention.

What I would like to do with my time today is just spend a few minutes talking about some of the particular issues that have come up over the last couple of days. One of the questions, what does it mean to consider the guidelines? What that means is to consider the actual range for the defendant before the court. Section 3553(a)(4) provides that the range has to be calculated. Rule 32 makes that provision, and nothing in Booker undermines that.

As a matter of fact, when you look at Justice Breyer's majority opinion, his language, when he says, "Consider the guidelines," what he says is, "Consider the guidelines range." And as the chairman pointed out yesterday, in considering the guidelines range, you have to know what it is. There has to be a three-step analysis:

First, consider what the guidelines range is;

Second, consider whether there are valid reasons to depart under the guidelines;

Third, and only third, the court needs to consider whether, under Booker, it should use its discretion to have a variance from the guidelines.

In considering the variance, the purposes of sentencing in section 3553 need to be considered. They do not, and should not be, independently reevaluated, all of them being equal, by the sentencing judge. And the reason for that is this Commission has already taken all of those factors into account in formulating the guidelines.

If you look at 28 U.S.C. § 991(b) and § 994(n), this Commission was specifically charged, in formulating the guidelines, with taking into account those other factors, and so it is appropriate that the guidelines be given substantial weight in making sentencing decisions.

Standard of review will be a very serious decision and a serious issue for all of us. The review for unreasonableness has to have some meaning, and the further away from the guidelines a sentence is, the more serious that review has to be. Doug Berman, who testified yesterday, wrote an interesting article in Notre Dame Law Review in 2000, and he makes that point. Listen to what Doug says. "[O]f critical importance, the larger the departure, the better must be the justification. Such an approach certainly seems to resonate with 3742, which instructs appellate courts to review departures to determine if the sentence outside the guidelines 'is unreasonable.'"

Well, he's got it right. There does need to be more search and review the further a sentence gets away from the guidelines.

With respect to sentences within the range, I think they are presumptively reasonable, and I would certainly agree with Paul Rosenzweig and Dan Collins that section 3742(a), which was not excised in Booker, and 3742(b), those sections do not create a right of appeal for sentences within the range, and that applies to the government and defendants both.

In reacting to Booker, unnecessary delay does not serve us well. I am not suggesting there should be a rush to judgment. All of us, we need to take the time to get it right, but we should not unnecessarily delay.

There's been a lot of dislocation in federal sentencing dating back not to January 12th, but to June 24th. As Commissioner Sessions points out, the debate in the larger community is going on right now. And as I've outlined in my written testimony, there are inherent problems in an advisory guideline scheme, and those problems are not going to change over time. If you think back to the hearings you had in November, what was really striking about those hearings is the number of witnesses from a lot of different viewpoints all agreeing that advisory guidelines are not workable in the federal system.

I'd like to spend a minute on 5K1.1 departures. It's a very serious consideration for the government, and there's really two problems that Booker has created with respect to substantial assistance departures.

One is, before Booker, in order to have a substantial assistance departure, you had to have all three actors in the system all working together. You have to have the defendant, the prosecutor, and the court all in agreement if a defendant is going to get downward departure for substantial assistance.

Post-Booker, it's possible that a defendant could get a downward variance for cooperation without the government's acquiescence, and that critically changes the dynamic of that relationship. As a prosecutor, what I want to be able to say to a defendant is, if you want a downward departure motion, I am going to have to make it. And if you're untruthful, I'm not going to make the motion, and that's critical leverage. Now, that leverage is taken away because the government doesn't have to necessarily be in on the calculation.

The second problem created is that there are other alternatives for defendants. A defendant naturally wants a more lenient sentence. Before Booker, about the only way to get there was to make a substantial assistance agreement. After Booker, there's now other alternatives for a defendant to get a more lenient sentence, and so the incentives to make substantial assistance agreements are reduced.

There's been some discussion this morning, a whole new topic, on the issue of gathering statistics and whether we should be gathering, or try to find those judges who are disproportionately sentencing outside the guidelines. I think trying to tie that to the name of the judge is distracting and unnecessary. We will be collecting data within the Department of Justice, who circulated a form for AUSAs to use. The form does not include a way to report the name of the judge, and I don't think that's important.

Gathering the statistics, that's one of the pieces of information we'll want to consider that will be interesting. The individual name of the judge won't help all of us in this room make the policy decisions we need to make.

To conclude my prepared remarks, let me say I really appreciate the Commission rolling up its sleeves and taking these issues on, hearing from a lot of different people. It's important work. I appreciate your doing that.

Lastly, I'd like to say that whatever system we have or whatever system we may have, all of us at the Department of Justice, we're ready to work, and we're ready to work as lawyers and litigants, courts, Congress, and this Commission to make that system of justice the best system it can possibly be.

Thank you and glad to take any questions.

CHAIR HINOJOSA: Thank you, Mr. McCampell.

Who has got the first question? And it cannot be the Department itself.

[Laughter.]

CHAIR HINOJOSA: And I guess this is an unfair question to you because you're not actually in the Department. If it's something you cannot answer, that would be fine.

Do you anticipate that the Department will be coming up with any specific suggestion, whether it's on 5K or any other of these concerns that you have expressed? I know you're not in the Department, exactly.

MR. McCAMPBELL: Yes, I do anticipate that. I am certainly working closely with people at the Department, and we are considering our options. It's still premature to say exactly what that might be or exactly what form that will take, but not a secret, this is of great concern to us, and we are thinking about it and thinking about it every day, particularly after we've gotten through the first couple of weeks post-Booker. All of us, like me, who are thinking about real cases and real courtrooms, were more focused on what's going to happen with this defendant in this courtroom tomorrow than some of the longer-term implications. But we are turning to those, and I do anticipate the Department will want to weigh in.

CHAIR HINOJOSA: This, also, may be an unfair question, but do you anticipate and/or is the Department taking the position on any appeals that are being taken in briefing that if it is a sentence within the guidelines, where there is no claim that there is an error in law, that you will be making the argument in the circuit courts that that is not, under the law, an appealable case?

MR. McCAMPBELL: I certainly believe that is the law, and I believe that is the way section 3742 reads, even post-Booker. I am unaware of a case on appeal where that issue has arisen, and I am reluctant to say, on some future case, what the Solicitor General's Office, what position they will take.

CHAIR HINOJOSA: Commissioner Horowitz?

COMMISSIONER HOROWITZ: In terms of experience, and I imagine it's obviously too early to give any definitive views, but I'm wondering if there are any experiences, for example, with fast track programs or 5Ks, with cooperation, where you've experienced any systemic problems to date already in the month since the decision that the Department is having to think about and deal with?

I could foresee, for example, in fast-track border districts where the number of defendants willing to jump into a fast track program might have been affected by the notion the guidelines are voluntary and have other ways of getting out from under the guideline ranges and the immigration guideline. I am just wondering if there's been any reaction yet, any sense of that yet.

MR. McCAMPBELL: With respect to fast track and the border districts, there hasn't been a noticeable effect thus far. The people I've talked to all say, "Too soon to tell," not a material impact that we noticed thus far.

With respect to plea agreements and acceptance of responsibility points, there have been anecdotal situations arising already, where some defendants are saying, particularly the third point for early acceptance of responsibility, that third point is viewed by some defendants and defense lawyers as less important than it used to be. And that third point is important to us, of course, for managing workload and managing resources.

The same is true with 5K1.1, already anecdotal situations arising, particularly in white-collar cases, where white-collar defendants are thinking, "Maybe there's another opportunity for a lenient sentence besides striking a substantial assistance agreement." And substantial assistance, it can be hard. It's a tough road to take sometimes.

CHAIR HINOJOSA: On the extra point, the Department is taking the position, I gather, that if you do not make the motion for the extra point and the judge grants that, that that is a sentence outside of the guideline range.

MR. McCAMPBELL: Absolutely, because the third point requires the government's motion. The question is, is the judge, in its Booker discretion, going to essentially give you that?

CHAIR HINOJOSA: But that would be a variance from the guidelines.

MR. McCAMPBELL: It would be a variance, absolutely.

CHAIR HINOJOSA: Just one other question. Judge Cassell, as you heard yesterday and probably saw his testimony, lays out a whole series of thoughts and ideas about what steps we can take as a Commission. One of the areas he touches on is the Victims' Rights Act and what we should consider doing. I was wondering if the Department had any thoughts at this point on what the appropriate steps are to implement the Victims' Rights Act with regard to sentencing procedures.

MR. McCAMPBELL: I'm afraid you've exceeded me. I mean, I know we're all aware of the Victims' Rights Act, and it's important that they have all of those rights. And I'm sorry, I just didn't –

CHAIR HINOJOSA: That's okay. I was curious, given Judge Cassell's comments.

Commissioner Reilly?

COMMISSIONER REILLY: Mr. McCampbell, we have repeatedly heard that we should move cautiously, I guess, in terms of recommending a quick fix to obviously what is a great opportunity to do a great deal of revising, if you will, of the guideline system, however it comes down.

I suppose that, as I have sat and listened to a couple of days of the hearings, that one of the things we, at least those of us who had the chance to serve in legislative bodies realize, is that sometimes a lack of response will get you something you really don't want in terms of what can be cooked up by legislative bodies. I think that's obviously of concern to the Department, as well as to the Commission.

I guess, what I am suggesting is: do we have the luxury of, as it's been advocated here, waiting, without the Department either reacting dramatically to recommending anything, but having the chance to wait for whatever the period is, 12 months, as some have suggested, so that we can accumulate what's going on out there post-Booker and then make some wise decisions, in collaboration, if you will, with the judges, whether it's a standard form that we know we need and so on and all of this, but really working urgently with them to try to come up with what could be a collaborative effort that might bring about a cooling down of the waters even between the legislative branch and the judicial branch, which has been going on for as long as I've been around.

And it seems that this is the great opportunity we have, as a Commission working with the Department and trying to bring about a greater compromise with the Hill.

So, I guess, one of my questions is: do we really have the luxury and is everybody willing to wait and take their time to try to develop and get the facts that we need in order to, whatever we do, make the right decisions because everybody keeps saying, you know, we all know that have been around, that Congress can come back and do whatever they want whenever they want.

But the point is, if you come up with a system that obviously is compatible with just about everybody – it's not going to be with everybody, but with the majority – that we might be able to fix a lot of the ills that a lot of people have been complaining about for a long time.

MR. McCAMPBELL: I don't think we have the luxury to wait. Problems have already arisen post-Booker. There are certain problems with advisory guidelines that are always going to exist. Waiting will not make any of those problems go away.

We're not writing on a clean slate. Since Blakely, all of us have been seriously reexamining where sentencing law and policy is in the United States. So it's not like we've just started to think about it. And the rest of the world, the public, the world at-large, Congress, will not necessarily wait on us. The House of Representatives had a hearing last week on this issue.

And so, like you, I would view it as an opportunity to take part in this debate and try to shape the debate going forward to reach the policy that is best for the United States.

MR. FEIN: In that process, you can actually be considering or thinking about relatively concentrated changes to the advisory system to make it more palatable to all sides, including the Department, or you could be thinking about the global changes at this particular point. Without getting into attorney-client privilege and internal debates among members of the Department, are you looking at major changes to the guideline structure or system or are you looking at temporary, small solutions to make, at least at this particular point, the advisory system more palatable?

MR. McCAMPBELL: We haven't reached a decision on that. There are a lot of options on the table. There are a lot of voices within the Department, a lot of people that need to be consulted, want to be consulted, and it's just too soon for us to chart out a course in one particular direction. As I mentioned, it is something we are very concerned about and something we're working on every day.

CHAIR HINOJOSA: Thank you very much, Mr. McCampbell. You have been the most patient witness. We have received your testimony, and you were most gracious in being brief in your description of it. We will read it and pay close attention to it.

MR. McCAMPBELL: Thank you.

[Whereupon, at 1:33 p.m., the proceedings were adjourned.]