

DR. KING: Thank you. Thank you, Judge Hinojosa, and thank you, Commissioners, for inviting me here today. I appreciate the opportunity to be able to share what I hope will be the next version of Federal Sentencing Reform with you, and my thoughts on the aftermath of Blakely.

In the short time I have here I'd like to suggest that rigid regulation of judicial discretion in sentencing enforced by appellate review, may actually carry the risk of creating new opportunities for disparity, and a simpler system not only reduces this risk, but would also comply with the Constitution, should Booker and Fanfan be affirmed.

I'm going to skip through some of my remarks in the hope that you'll have a chance to read them, but let me summarize by saying that review by appeal of sentencing regulation, which has been considered so central to the guideline system, has been undermined by four things: fact bargaining, unreviewable departures and adjustments, Blakely, of course, and also appeal waiver.

Let me skip quickly over the first three because others have talked about them, and focus on appeal waiver because it's not something that anyone really has studied in detail, and Michael O'Neill and I are involved in a project that is attempting to get some statistics on how often and in what ways appeal waivers are being used in the federal courts today.

The first three factors I think are undermining the ability of appellate review to create uniformity in sentencing, fact bargaining, unreviewable departures and adjustments, and Blakely, let me turn to those quickly.

Fact bargaining, as you know is controversial. Not everyone knows exactly how much is going on, but in our interviews of attorneys we find repeated reports that this is happening.

Unreviewable departures, what I mean by that are adjustments in sentencing ranges that cannot be reviewed by the courts, and so when these can't be reviewed, obviously, that contributes to departures and disparities in sentencing.

Third, Blakely, of course, has restricted what sorts of findings can be reviewed on appeal in terms of maximums in the ranges, and it also has made it less possible for Courts of Appeals to review disparity that comes from charge bargaining, because of course, before Blakely, relevant conduct adjustments could be reviewed by the Courts of Appeals; after Blakely, not so much. So that relevant conduct mechanism that has been part of the sentencing guidelines is much more difficult to enforce these days if Blakely applies to the guidelines.

Turning to appeal waivers, let me run through some of our preliminary findings, although these are very, very, very preliminary, based only on interviews, and we are in the process of coding, with the cooperation of the Commission--and I appreciate that--the plea agreements that we have sampled.

The primary reason for adopting appeal waivers was to reduce the flood of criminal appeals that followed the adoption of the guidelines. Judging from the very limited data and interviews we've looked at so far, they've worked. The total number of appeals had continued to decline, but the rate of appeals peaked and then started to drop in the mid 1990s. We believe that the rate also declined among guilty plea cases settled by agreement, and maybe more precipitously--and we hope to evaluate that--using the Commission's data.

What about the predicted negative effects? Predictions that all defendants would be powerless to avoid or bargain over waivers in their agreements are demonstrably untrue, according to our interviews so far. In some districts defenders and prosecutors are reporting no sentencing discounts for appellate waivers. In other districts they're getting significant returns for appellate waivers. Explained one defender, "Our position is we're only going to sign one if we get a significant concession." The list

of concessions that have been reported include: agreement that an enhancement doesn't apply, charge bargain that will eliminate a consecutive sentence, agreement not to enhance with a prior, stipulation to no relevant conduct or low relevant conduct, 5(k)s, and so forth.

So we have the prospect of appeal creating another bargaining point for sentencing settlements which, when exchanged for sentencing discounts, creates more disparity in the system. Favorable stipulations reportedly increased after appellate waivers, including backing off of some probation officers in reviewing those once appellate waivers were signed.

Our interviews turned up another interesting pattern of disparity, and that is between repeat players, and private attorneys. Repeat players, defenders offices are able to negotiate these waivers in return for sentencing discounts in ways that private attorneys reportedly are not.

Also there are confirming reports that serious error in the sentencing system, violations of the sentencing law, statute and guidelines, are going unreviewed and unremedied because of appeal waivers. Almost every defense attorney had some story of error that was barred from review because of an appeal waiver, including Apprendi claims. And in the future, Blakely claims.

So that leaves the last prediction about appeal waivers, which is probably the most interesting thing for the Commission, and that is its risk, its potential for distorting the appellate review of sentencing law. All bargaining skews appellate lawmaking, because rules that are waived away and bargains aren't reviewed and developed on appeal. And we'll know much more once we complete our analysis of sentencing bargainings, but it looks like waiver may distort appellate review of sentencing in a couple of ways.

First, it's going to vary from jurisdiction to jurisdiction. Some jurisdictions that are using them intently aren't part of the appellate lawmaking that we have today because their sentence bargains, at least the portions of convictions that are settled by negotiation, aren't getting reviewed at all. They're disappearing. They're vanishing. The reentry cases and drug smuggling cases, particularly in fast-track jurisdictions, are likely to be under the radar. So are multiple defendant cases where cooperation is routine.

So appeal waivers also limit the types of issues that can make their way to appellate review, particularly in districts where asymmetric waivers are used, defendant waives but not the prosecution. That means that if a significant portion of cases in a district are waiving only defense side appeals, you get more prosecutor appeals, and again, this is something we could look at with the data.

Given the reported increased use of stipulations, fact bargaining, departure authority, appeal waivers, all of which tend to bar the review of noncompliant sentences, it's likely that there is quite a bit of noncompliance going on in the country with sentencing law. It is costly to regulate judicial discretion through appellate review. The more there is to appeal, the pricier it becomes. The pricier it becomes, the more it will be bargained away. And the more parties bargain over sentencing, the more likely it is that no Court of Appeals will ever review their agreements to see if they have a basis in law or comply with reality.

This bleak outlook for enforcing sentencing law through appellate review suggests that we may have less to lose than we think by giving judges a little bit more discretion.

I would like to suggest as a possible alternative to some of the proposals that have been proposed, that the Congress and Commission consider giving the parties fewer facts to bargain over, and the judges more law to apply. Forget temporary fixes. They have a curious way of lasting longer than anybody expected.

Start over. Seek out the best practices in the states. Scrap the complicated point system. Scrap grouping. Scrap cross-referencing. Keep some mandatory ranges, but much broader and much fewer. Assign a broad presumptive range to each offense group or group of offenses with a ceiling that is significantly less than the statutory maximum. Adopt a small number, two or three, of additional aggravated ranges for each crime available only upon proof of aggravating facts charged in the indictment and admitted as part of the guilty plea or proven to a jury. The highest of the aggravated ranges should have the statutory max as a ceiling. A mitigated range to go a ceiling lower than that of the presumptive range could be available. Create simple advisory guidelines for the judges to consult when sentencing within these broader ranges. Spell out the legal principles behind the sentencing system so they can apply them. Scrap departures. They do more harm than good by breeding disparity and bargaining.

Keep the processes that require the preparation of presentence reports requiring judges to spell out their reasons, and give the parties an opportunity to contest. Limit aggravating factors that would trigger a higher range to those facts that would be most easily tried together in one trial with the elements of the offense, extent of injury, age of victim, for example, in assault and robbery cases.

The mandatory ranges, although fewer in number, would create in affect graded offenses, so it makes sense to use those facts that are most often used in criminal codes around the country to distinguish between the bad and the worse, distinctions that are easily understood by potential criminals and jurors alike.

Other aggravating factors that are now part of the guidelines, relevant conduct, obstruction of justice, role in the offense, can be used by the judges within the broader ranges. They need not be charged in the indictment, made part of the plea or trial, nor would they be subject to bargaining.

Last but not least, please keep collecting data on everything so you can see if the new system works as expected.

Structured sentencing's not a lost cause, but too much structure may actually backfire in the quest for equality. It's possible to find a better balance and comply with the Constitution at the same time.

Thank you.

JUDGE HINOJOSA: Thank you, Professor King.

Professor Klein? And what we did yesterday is we had everybody finish and then we opened up for questions.

MS. KLEIN: Thank you.

I am going to assume for purposes of my testimony today that Booker and Fanfan are going to be confirmed, and moreover, that the fact-finding provision of the Federal Sentencing Guidelines is severable. If you want more on why I think that, you can look at an article Nancy and I wrote called "Beyond Blakely," that I think I've included when I sent in my testimony.

So starting from that premise, I'm going to do two things with the short time I have. I'm going to speak in opposition to the proposal by Frank Bowman to lift the top off the guidelines, and the proposal by Kate Stith to turn the guidelines into voluntary measures rather than mandatory measures. And then I'm going to offer how I think the Commission could best "Blakelyize" the guidelines in a way that would conform to the Court's Sixth Amendment requirement, but still be something feasible, still be something that can be done. My fix is going to be similar to what Nancy said, although it won't include any kind of advisory guidelines, and I would not eliminate departures.

Let me start with voluntary guidelines. Kate Stith from Yale, in her book, Fear of Judging, suggested voluntary guidelines. Recently, Bill Stuntz from Harvard has suggested voluntary guidelines. I think this would be a mistake. I don't think one could fill the purposes underlying the Federal Sentencing Reform Act of 1984 with voluntary guidelines. My first reason, I guess, for not wanting to go there is it ain't going to happen. Right? Congress has shown much inclination to contract judicial discretion, and has shown zero inclination to expanding it. And the Feeney Amendment I think is proof enough of whether Congress is going to go there.

But the more important point I think is that we won't get uniformity with anything other than mandatory guidelines. Everybody in this room can tell probably a horror story from pre-1987 of two identical offenders who did exactly the same thing in exactly the same manner, and one got probation and one got 20 years. That's something we can't allow to continue. And I think the only way we can quash that is to have an ex ante system of deciding what facts are important, what facts about the offender are important and what facts about the offense are important, and imposing those on the judiciary, whether the judiciary likes it or not.

Voluntary guidelines just aren't going to do it. That was really brought home to me in a couple of presentations I gave for the Federal Judicial Center. I think one judge stood up and said, "Well, we can make the guidelines voluntary, and people would pretty much give the same sentence." And quite a number of judges stood up after that and said, "Well, wait a minute. I'm giving the same sentence now because I have to," or "I'm in a jurisdiction where there's a moratorium on sentencing," or, you know, "My appellate court has said Blakely doesn't apply to the guidelines, but if I had free reign, I would decrease sentences, or I would sentence as I see fit. I'm a federal judge. I was appointed because I have good judgment, and I want to exercise my good judgment in the individual case before me."

I think that's a natural way for a judge to feel, and I'm not saying there's anything wrong with that, but that's not going to get uniform national sentencing, and so I think going to a voluntary system is just not going to be helpful.

Let me turn to the next proposal, which is the Bowman fix. Really I'm going to talk about two proposals. They're almost identical. Judge Cassell has suggested that Congress implement mandatory minimums. Professor Bowman has suggested we leave the guidelines as they are, but the floor of every guideline range acts as the mandatory minimum. We take the top off the guidelines, and therefore, everything goes up to the statutory maximum.

Basically, this suffers from the same problem as advisory guidelines. A lot of judges are going to sentence at the minimum because they feel sentences are too draconian, too harsh. But you're going to get judges who are going to say, "I'm going to sentence to the statutory maximum." And what are you going to do about that? You're going to have outlier judges and no uniformity.

Now, one potential solution for this is appellate review but I don't think there's any standard or method of appellate review that's going to work with either pure voluntary guidelines, or having the guidelines above the mandatory minimum act as advisory guidelines. If you allow the appellate court to review sentences for conformity with the guidelines, which is what we do now, you have turned those guidelines into the force of law under U.S. Court precedent, and we're back to Blakely. So if we truly try to enforce them, they are again elements, if we have some kind of appellate review that's, say, abuse of discretion, where we don't really enforce the guidelines.

Then again, when is there an abuse of discretion? As long as you're within the minimum and the maximum, and you're not sentencing based on race or some invidious classification, it seems to me the

appellate review would be nothing more than a rubber stamp.

So I guess I disagree with Nancy. I think there's still sufficient appellate review, even with appeal waivers, that we do get some benefit from that, and I don't think we're going to get that with either voluntary guidelines or the Bowman Proposal.

The other slight wrinkle with the Bowman Proposal is the stability of Harris, a four-one-four plurality opinion, where the Court held that mandatory minimums are not subject to the Apprendi elements rule. I'm not so sure that that case is going to remain good law. And the fifth vote for the plurality was Justice Breyer, and in my opinion, he voted the way he did in Harris because he knew that where mandatory minimums go, so go the Federal Sentencing Guidelines. And we all know the guidelines are his baby, and he crafted them.

If it's too late, and if the guidelines go down in flames after Booker and Fanfan, why save mandatory minimums? I think we might see a five-four decision in the other direction. And Justice Kennedy was also in the majority in Harris, and he opined in front of the ABA that mandatory minimums are the worst thing in the world. And who knows whether he might change his vote?

So having shot down those proposals, let me offer my own proposal. But before I do that, let me advise against the temptation to just invert the guidelines, where everything is a statutory maximum and all aggravators become mitigators. I think that would be a mistake for two reasons. First, I think there's a semantical problem. Can there really be a statute saying 20 years unless you don't injure someone, and then 15 unless you don't have racial animus, and then 10 unless you don't use a gun, and then 5. I mean that's just a crazy way to write a statute. It will read like it's an attempt to evade something, and that's really exactly what it is.

And I think the Court warned us in Apprendi, in Footnote 16, that were a legislature to do that, the Court would react. And I think that's the reason why I haven't seen a single legislature at the state or federal level react to Apprendi by trying to play with the substance of crimes.

So what should we do? Well, we should just simplify the guidelines. If you go through your own data, you'll find the few that are used most often, like drug quantity. Well, we already sent that to the jury after Apprendi, hasn't been a problem.

Loss in theft, money laundering and fraud cases. Well, civil juries determine amount of loss all the time. Why can't criminal juries determine the amount of loss? Why is that such a problem? For finer gradations, you know, role in the offense, position of trust, that kind of thing, you could give judges more play within each range, right? Instead of 25 percent between the top and the bottom, let's go to 50 percent or 60 percent. and just allow judges to use their discretion to sentence within that range.

Like Nancy, I would get rid of cross-referencing. Relevant conduct, I don't think it makes any difference if Booker and Fanfan come down the way I anticipate. It doesn't make any difference whether you keep relevant conduct or not. What would formerly be relevant conduct would now be different offenses, and under Rule 8 of the Federal Rules of Criminal Procedure, those would be joined in the same indictment anyway. So on a practical level, relevant conduct will be a new offense, whether you call it that or not.

So I think you can save the guidelines if you just make them simple enough to use such that juries can make the actual findings that the Court insists they make.

Thank you.

JUDGE HINOJOSA: Thank you. Professor Klein.

Professor Berman, you know, there is a time limit, but every minute that you talk we're all safe

from the blog, so you can take as much time as you want.

[Laughter.]

MR. BERMAN: That is certainly true, and so I am happy to be blog free and have a chance to talk in something other than my pajamas about the future of the federal sentencing system.

[Laughter.]

JUDGE HINOJOSA: That's how we read you, in our pajamas.

[Laughter.]

MR. BERMAN: I'm flattered, and I'm sure the audience is enjoying the mental image as we speak.

[Laughter.]

MR. BERMAN: In any event, Judge Hinojosa, Members of the Commission, I thank you very much for this invitation to come and share my views about the federal sentencing system in the wake of the Supreme Court's decision in Blakely, and the anticipated rulings in Booker and Fanfan, and part of the joy of putting together this website, I am infamous perhaps for, is that I have received literally hundreds of articles and briefs, thousands of e-mails about Blakely issues and developments. And what this correspondence has led me to conclude is that nobody has, myself included, a truly complete understanding of what is really happening in the wake of Blakely, while at the same time I believe everyone has a skewed perspective about what should be happening in the wake of Blakely, and thus, as this Commission contemplates its role in the weeks and months ahead, and particularly as you think about how to best interact with Congress in advising Congress how to respond to the expected rulings in Booker and Fanfan, I particularly want to spotlight what I would call the importance of perspective, the importance of data, and the importance of leaving well enough alone. Let me explain.

Indisputably Blakely has created a tremendous amount of uncertainty and confusion concerning the law and procedures of federal sentencing. But I still believe the nature and extent of the harm resulting from Blakely's impact is quite uncertain. There are those who surely feel quite burdened by Blakely, federal prosecutors, judges, court personnel, I suspect, particularly are feeling the aftershocks of the Blakely earthquake, but I surmise that there are many others involved in it, impacted by the federal system for whom the effects of Blakely seem quite manageable, perhaps quite beneficial.

In addition, I think many views about Blakely are colored by views about the federal system and its pros and cons before Blakely. To put this point more colorfully, I have come to think of Blakely like the elephant in the parable of the blind man and the elephant. It seems as though everyone has a different, and I feel, incomplete view of Blakely and its aftermath, depending on personal position, personal perspective, professional position and so forth. And I think this Commission should particularly be attuned to the fact that we're all partially blind, and that our vantage points may color the way we look at both the past, present and future of federal sentencing.

I mean to stress these realities, not to impugn anybody's view, not to suggest that not everyone is trying to be fully cautious and careful in their expression of their perspective, but I think an attentiveness to perspective should inform this Commission's work in two important ways. First, it suggests that you do your very best to get as much input and advice from all of the stakeholders in the federal sentencing system as possible.

These hearings are a fantastic example of that, but I think more would be appropriate, perhaps even holding hearings in other parts of the country. As you all know very well from your data, and even from yesterday's panels, judges have very different perspectives, depending on what jurisdiction they're

in, the nature of their caseload. "Blakelyizing" the guidelines will probably look very different in New York or in a border district than it might in other parts of the country, and having a chance to hear from judges, prosecutors, defense attorneys, victims, defendants, nationwide, I think would greatly inform your ability to make sound judgments going forward.

In addition, insights about perspective I think gives you a unique and critical role as we move forward. The Commission, I believe, is the only body that has the information and the ability to have a comprehensive and balanced view of the entire federal sentencing landscape in the wake of Blakely. Representative of the Justice Department, from the defense bar, they necessarily have a partisan view of both the pre Blakely and post Blakely state of federal sentencing. Individual judges are obviously not partisan, but they can't take the kind of bird's eye view that this Commission can take. Because of your unique perspective advantages, I suggest you take a leading and quite public role in the ongoing dialogue about Blakely and its aftermath. In particular, I want to encourage you to focus on greater public dissemination and promotion of the sentencing data that you collect and can analyze, and quite vocal advocacy of a cautious and data-driven approach to any and all federal sentencing reform efforts.

Let me expand on those two points briefly. Since Blakely was decided in June 2004, the federal courts have essentially been engaged in a remarkable five-month experiment with an uncertain new world of federal sentencing. I believe, Commissioner Steer, you suggested the idea of a pilot program to check out what's going on. We've had a pilot program going on for five months now. And in two circuits in particular, the Seventh Circuit and the Ninth Circuit, this experiment has required sentencing courts to accommodate the apparent demands of Blakely within the existing federal guidelines structure. In addition, even in other circuits, we see courts and litigants devising a wide array of what might be called Blakely coping mechanisms.

There are reports of established special plea and trial procedures, courts announcing alternative sentences, experimenting with sentencing juries. That recently concluded Enron Nigerian barge case is a good example of a judge in a circuit that isn't supposed to be applying Blakely, that is apparently accommodating Blakely's demands.

I have received anecdotal reports that a number of courts are able to cope quite well with Blakely, that Blakelyizing the guidelines even with the existing structure is manageable. I've also heard many others say it's absolutely inconceivable to imagine taking Blakely and applying it on the current structure.

In short, there's a basis for believing we can deal with Blakely with the current structure and a basis for thinking there's no chance, that Blakely has plunged the federal criminal justice system into a state of crisis. Well, I think the only thing that's certain is we're not certain.

We have anecdotes, we have suggestions, we have reports. What I think we likely have, or at least I hope that the Commission has, is now five months of data concerning how courts are coping, and I think by my count it should be a lot of data. I think as many as 30,000 federal sentences should have been imposed nationwide in the five months since Blakely was decided, and roughly 7,000 sentences should have been imposed in the Seventh and Ninth Circuits alone. Now press reports and a lot of other evidence suggest that many of these sentencings may have been put on hold, but I haven't seen any data, any reasonable estimate of how many sentences have gone forward, how many have been postponed awaiting Booker and Fanfan, and I think that's a critical piece of information.

Whether and exactly how the federal criminal justice system is currently functioning, or perhaps not functioning, especially in the Seventh and Ninth Circuits, I think is an extraordinarily important

consideration as Congress and this Commission and others contemplate future changes to federal sentencing law and practices. If the extant data suggest that federal sentencing have been subject to only limited Blakely disruptions---and that certainly seems possible, given the fact that the data suggests there's a significant percentage of cases that don't involve Blakely factors, that the majority of cases are pled out, and that the pleas may include stipulations to the Blakely factors that are there--the need for a quick fix becomes far less urgent if the current system is handling things okay. Of course, if there is massive disruption, if there is enormous dysfunctionality in the current system, then obviously the need for a quick fix is more urgent, and we should feel it's more urgent to move more quickly.

In addition, it's of course more important not just simply to look at are the cases moving through the system, but to look at the results in light of the goals articulated in the Sentencing Reform Act. The ultimate concern needs to be whether and how the purposes of punishment, specified in 3553(a)(3), are significantly undermined during this period uncertainty, or perhaps even being better served. In short, I think it would be enormously valuable for the Commission, as soon as possible, to assemble and make publicly available any and all information and data analysis concerning the post Blakely realities of federal sentencing. This data could be assembled in a formal report to Congress or more informally through a series of research memoranda, focusing on the experiences in the Seventh and Ninth Circuits I think would be particularly informative, although it would be, of course, extraordinarily beneficial to know what's going on nationwide. Obviously, producing a significant report in a very short timeframe would prove challenging, but the Commission could produce and publish its data and analyses in stages.

I should note the Minnesota Sentencing Commission, under an order by its governor, was able to put out a short-term report about Blakely only six weeks after the Blakely decision came out, a long-term report eight weeks later. They're two big reports ahead of you. Now, I know you have a big report coming our very soon, and I want to laud at least the rumor I heard yesterday, that the fifteen-year report would be coming out soon. I assume that's mostly pre Blakely data, but that would be incredibly beneficial as well, as we contemplate the future of federal sentencing. At least I've heard some hints that it will suggest that not everything is perfect. And if that's true, then we probably should try to correct at this unique moment those things that can and should be corrected going forward that have nothing to do with Blakely.

I stress these points because I'm particularly concerned that in the absence of accurate and timely data about what's going on now, Congress and other policymakers may be forced to rely on suppositions, on anecdotal accounts of the operation of the federal sentencing system. I don't need to tell this Commission that, sadly, the passage of the PROTECT Act seemed to reflect suppositions in anecdote form more than comprehensive and timely data about what really was needed in the reform of the federal sentencing system, and therefore, this is a plea to encourage this Commission to produce, assemble whatever data that they have right now. Obviously, it sounds like the Fifteen-year report is coming soon. That's terrific. I compliment you on that work as well.

I want to close by also highlighting what I would call the importance of leaving well enough alone. I think it has been very wise for Congress and this Commission not to make any significant changes to the federal sentencing system while we await a decision in Booker and Fanfan. I want to also suggest that significant major structural changes to the Federal Sentencing Guidelines may not be wise after Booker and Fanfan, no matter what the decision holds.

And here I want to compliment Commissioners Steer and Sessions for what I thought were very wise words they shared with the Judiciary Committee back in July, and I will quote from their

testimony. "If Congress determines that legislation is appropriate, it should be the goal of any legislation to address problem areas as definitively as possible without burdening the system with a host of new issues that have to be litigated."

I couldn't agree more with this sentiment, and I think it should lead this Commission to start with a strong presumption against any dramatic or major structural changes to the Federal Sentencing Guidelines no matter what the Court holds in Booker and Fanfan.

There are two key legal considerations and one policy consideration that drive that. First, I think the constitutional landscape will remain uncertain for quite some time unless the Supreme Court reaches out in Booker and Fanfan to decide a lot of issues that are not formally in front of them. Obviously, you've heard about the legitimacy of Harris being questioned a little. I think Almendarez-Torres, the prior conviction exception, is suspect, at least if you count heads on the Supreme Court. There are all of these subsidiary issues that necessarily relate to devising a sound, complete system that will be unresolved.

I also think--and this is an important point I don't think anyone else hospital raised--that Williams v. New York may not be as sound a precedent in the wake of Blakely as we might be inclined to assume. And so I don't really think it's feasible, and I certainly do not think it would be wise, to legislate any major structural changes to the federal sentencing system in light of so much constitutional uncertainty.

Relatedly, I think there will be a host of complicated, challenging, and probably right now unforeseen transition issues that would accompany any major structural change to the Federal Sentencing Guidelines. I think especially if it were to include some sort of sunset provision--I've seen that sort of proposed a lot--the risk of confusion, uncertainty, strategic litigation, strategic poor litigation, is just not only likely, but inevitable, and unless there is a desire to invite lots and lots of litigation, I think a go-slow-and-incremental approach, one that is cautious, data-driven, and that has this Commission speaking to Congress directly about the headaches they might create if they were to do anything in a rash and hurried way.

Another bit of data that I think you could bring to Congress on this front is data you may have about the wake of the PROTECT Act. My sense is there's been lots and lots of litigation about that, and that the courts have spent time worrying about the intricacies of the PROTECT Act's constitutional validity and legal meaning, and on the assumption that we don't think it's in anybody's best interest to be spending time, to have prosecutors spending their times litigating past cases rather than chasing down the new cases, I hope Congress would be impressed by a collection of data that highlights that it may be more trouble than it's worth to make structural changes now that will only lead to a lot of litigation and perhaps even the kind of court backlash that we saw through Judge Panner in the Detwiler decision that I'm sure you're aware of, through other rulings that may reflect not so much a perfect legal analysis, but the sense the that judiciary is under attack.

Let me conclude by saying that I am very hopeful the Supreme Court in Booker and Fanfan will clarify its ruling in Blakely enough that we can move forward in an effective way.

I have written an article recently that I've attached to my testimony that contends that Blakely should be understood to only apply to facts that relate to offense conduct, and that the jury trial right only extends to those facts relating to offense conduct and not relating to offender characteristics. More broadly, I want to make a pitch to encourage this Commission to think about dividing the world in terms of an offense/offender distinction. I think it's a distinction that provides a very useful guidepost

for considering a range of other issues of sentencing policy and practice.

I could talk more about that. It's a bit premature before Booker and Fanfan come along. But I thank you very much for this opportunity to testify, and I appreciate a chance to answer any questions that you may have.

JUDGE HINOJOSA: Thank you, Professor Berman.

Mr. Rosenzweig?

MR. ROSENZWEIG: It's clear why everybody turns to Professor Berman's blog for the latest and best analysis. I want to thank the Commission very much for inviting me to speak. I want to thank you for putting me on the academics panel, but I confess that my--

JUDGE HINOJOSA: We did put you to the right.

[Laughter.]

MR. ROSENZWEIG: I thank you for that as well. I will confess, however, that my views are, at least in the short term, going to be a lot more practical, and I think that there are some pitfalls in some of the approaches that have been suggested.

In the long term, there is clearly much that I agree with amongst the colleagues that I've heard and some of the testimony from yesterday. But I think from a practical point of view, I would make five points.

The first is that I am not convinced that if Booker and Fanfan resolve the issues as we think they will, that the effects will be so readily compensatable. I'm sure that procedurally the courts will manage. They will find ways to adopt Blakely waivers, enhanced extended plea colloquies, whatever. And that will happen. But what is buried behind that is a failure to recognize or perhaps an implicit acceptance of the view that those changes will necessarily affect the ultimate result, that is, the sentence to which a defendant will be sentenced. And by imposing greater procedural obstacles, greater costs to the trial right, the inevitable result, if this is a market of any form at all, is going to be a diminution in the sentences that criminal defendants will receive.

Now, many people think that that's a good thing, that criminal sentences are currently too harsh, too severe. I tend to think that in many instances it's not, but leaving aside my views on it, I am 100 percent convinced of one thing, that is, that the congressional reaction will not be a favorable one; that is, the majority view in Congress right now is not one that will accept readily a systematic diminution in criminal sentencing.

And so if we take a long-term perspective and say we're going to fix the guidelines completely to accommodate Blakely, which I support as a long-term goal, as something that I think we should do in the long term, but don't do anything in the interim, the interim reaction of Congress will be swift, severe, and negative, and even more severe than, you know, people like me might support. I mean, it will be horrific, I predict.

I think that what is required--and in this I guess I disagree with Professor King--is an interim solution, an interim solution that brings us as close as we can to status quo ante. I believe that you can make it a validly and explicitly interim, that we can put a two-year kicker on it, a sunset rule. Congress enacts those in much legislation, and that compels a reconsideration at a later date when this Commission, working with Congress and with the data that has been gathered, has a time and an ability to construct a response that is thoughtful, that accommodates the Sixth Amendment concerns that we anticipate will come out of Booker and Fanfan. But to say that between now and the time that this Commission or Congress produces such a complete renovation of the Sentencing Guidelines to

accommodate the new constitutional reality we should do nothing is to assuredly invite mandatory minimums or more--or just as likely, I would think, jury sentencing and the elimination of judges altogether. Those are both proposals that are outstanding amongst the Members of Congress who believe in a deterrence model of sentencing, and I think that they will find majoritarian favor.

So my strong recommendation to the Commission is that its strong recommendation, since much of the proposals--many of these interim fixes will require legislation, my recommendation to you is that your recommendation to Congress should be for some short-term interim fix where everybody checks their beliefs at the door about, you know, the fundamental values, yea or nay, with respect to our current level of criminal sentencing, and we just go back as close as we can to the pre-Blakely rules with a firm absolute deadline. That would be my first and second kind of practical recommendation to you, because if you don't do that, then by June of next year I predict that this discussion about what the ultimate optimum sentencing regime should be will be moot.

So turning from that to what I think the optimum sentencing regime should be, because I do want to look a little more long term, I agree completely with Professors King and Klein with respect to advisory guidelines. They are politically unsalable, and I think after Blakely they're constitutionally unsalable. If advisory guidelines are to have any bite at all, any effect in constraining as a matter of law judicial sentencing, then they will run afoul of Blakely. If the judge has to find some fact by some standard in some way that allows him to fit within these advisory guidelines, the Blakely rules will, in my judgment, ultimately be determined to render those inoperable.

If, however, they have no legal bite at all, if they have no de jure constraining effect, then, first off, I think they won't be appealable because I agree that there will be either no appellate review or an abuse of discretion review that is default for almost automatic affirmance. And, more importantly, if they have no bite at all, no constraining effect at all, then we will have gone back to the pre-1987 regime of basically indeterminate sentencing, where the judicial discretion is constrained as a matter of law only by the wisdom of the jurists that we appoint, which, you know, I think is generally quite high, and they will by and large get it right. But that is a system that we have as a society rejected because of the disparities that existed before 1987.

I think that an advisory system is simply a code for indeterminate sentencing, plain and simple. And so I don't think that that's the long-term way to go. The long-term way to go, the one that my colleagues on the panel have, I think, identified is an attempt to simplify the guidelines, Blakelyize them, make them fit. I mean, one can imagine a system in which the base offenses in the federal system are parceled out amongst various categories: crimes against people, crimes against property, you know, that sort of thing, regulatory harms without effect. One can imagine within those classes, in those broad categories, classes of offenses so that crimes against the person--you know, murder is a Class A, rape and robbery are Class B, that sort of thing. That would be a difficult task. I know it's one that the Commission approached in the 1990s and then withdraw from because of a difficulty, and in part because the cornucopia of federal laws suggests that not all laws are going to be readily fit into these categories. But I think the truth is that the dominant ones that are the meat and potatoes of 95 percent of criminal sentencing today will fit in these categories. What dominates are our federal docket, drugs, white-collar crime, and that's about it. You know, 7 percent of crimes are drunk driving, according to your latest statistics. So we'll create a little separate category for that.

But, you know, those kinds of things need to be done. Then you need to also parse out scienter elements that go on top of this, because we all know that some crimes are done, you know, willfully, that is, with intent to violate law, or knowingly, negligently, strict liability. Then you parse out basic offense characteristics based upon the gravity of the harm, the type of victim, and maybe abuse of trust.

With respect to gravity of harm, I think that those are things that the jury can understand. They do currently in the drug area. I think the fraud, monetary fraud would be more

difficult even though they do it in the civil arena, because of the higher burden of proof that will attend jury proof in a white-collar complex fraud kind of case. But I think that with a simplified set of categories, you know, small, medium, large, and really obscenely large fraud, you know, you can give the jury some guidance to fit within those and they can make those determinations.

So that is a task that I think is suitable for this Commission's long-term effort. I think it's one that's accomplishable. I think, candidly, it will take you two years. This is not something that you can do overnight or even in the next six months. And that's part of why I think an interim solution of some form that returns to the status quo ante is the best option right now for the next few years.

I thank the Commission for your attention, and I'm sure you have questions for everybody on the panel. I look forward to answering them.

JUDGE HINOJOSA: Thank you, sir.

Questions? Commissioner O'Neill.

COMMISSIONER O'NEILL: I guess the first question that I have is really we have sort of two proposals on the table, and I think Professor Saltzburg sort of laid it out pretty well the other day, and he said, look, either Blakelyize the guidelines--and obviously there's a lot of disagreement about how one goes about Blakelyizing--or we've got a situation in which we can adopt the proposal that's been on the table. I hesitate to use Frank Bowman's name in vain yet again, so I apologize to him in advance, but to have some sort of a Bowman proposal, the Bowman proposal that people have talked about.

Here's my question to you right now. Obviously, the Department is very committed to upholding the principles of sentencing reform articulated in the 1984 Sentencing Reform Act. In your opinion, do you believe that the principle of reducing disparity will be achieved by the Bowman proposals that have been placed on the table? And if not, why not?

MR. ROSENZWEIG: I believe that the Bowman proposal will achieve about a 95-percent return to the pre-Blakely extent to which the guidelines have eliminated disparity. And I build in the current guidelines because we do know that the current set of guidelines do not themselves do a perfect job of eliminating disparity because of all the fact bargaining and charge bargaining things. But I believe the Bowman proposal will achieve about 95 percent of that status quo ante because I'm convinced by experience and by the data that you've collected that almost all the sentences fall very near the bottom of most guideline ranges. And there will be outliers that will not become de jure possible, but I think that those would be relatively few.

I think as a long-term solution the Bowman proposal is unstable. I think that because I share the concern of the members of the other people on the panel that within about two years it is likely that Harris will go by the wayside. And if Harris goes by the wayside with respect to statutory minima, then the same Blakely argument about guidelines will apply to the guideline's minima as statutory minima. So I would think short-term that, long-term try and do something different.

MS. KLEIN: I guess if I can speak next, I disagree. I think maybe in the very short term, measured by months, you get similar sentences to what we have now. Even in the very short term, that's not going to be true in certain districts. In the Fourth Circuit you're going to get the sentences that you would have gotten under the guidelines. In the Ninth Circuit you're going to get six months. You're going to get the minimum.

And I've had, you know, judges in San Francisco tell me that. They don't want to sentence the way the guidelines tell them to sentence. They want to take into account factors that they think are important and that they're not going to pay attention to the guidelines if they don't have to. And that's just going to get worse over time as judges get used to the fact that the guidelines are no longer mandatory.

MR. BERMAN: I also want to focus on the reality of what short term means. I don't

think--I know there's some suggestion that it could be applied automatically, but I think at least some courts would find ex post facto problems with immediately applying a top-off approach, that that changed the range of punishments in ways that would mean we could only apply the Bowman fix to crimes committed--and, again, it's not crimes sentenced--

COMMISSIONER O'NEILL: I want to leave aside those concerns and the constitutional question for a moment and just focus on this question of disparity, because that has obviously been one of the principal points the Department has been concerned about. And I guess one of the things that I want to try to get at is your best advice as to whether or not the so-called Bowman fix will actually wind up producing disparity--

MR. BERMAN: Over the long term is actually--

COMMISSIONER O'NEILL: Over the long term, exactly.

MR. BERMAN: Right, and I would say only if judges never use the authority you're giving them. That's sort of the funny thing. It creates consistency only if judges don't do what the Bowman fix is designed to give them authority to do. And I think the defender panel sort of highlighted that this sort of weird, convoluted fix on a fix on a fix that works only if nobody pays attention to what it really says and everybody just sort of pays attention to what practically happens. And, again, at the end of the day I'd say first let's figure out really what does practically happen, and we don't know in a world with topless guidelines how all the actors will really respond to that, practically speaking. And it just isn't a system that anybody would have enacted initially, and so I continue to sort of try to keep it simple and say even if it might work, short, long, whatever term, if it's not something that, you know, passes the "that makes a lot of sense" from the outsider observer perspective, I'm inclined not to be in favor of it and be concerned that only us inside the system can even see how it makes sense.

COMMISSIONER O'NEILL: But, again, the concern, regardless of Harris, regardless of all those things, is that the question I'm really trying to focus on, I guess, is the question about disparity and whether or not it's going to lead to greater disparity, because obviously one of the principles that everyone is concerned about is making sure that we maintain the principles of the Sentencing Reform Act. And at least some have suggested that this is the best way of preserving the status quo ante, that everybody recognizes it's not perfect elimination of all untoward disparity but did a reasonably good job. And so the question that at least I'm trying to focus on is whether or not you believe that Bowman is likely to achieve that, whether short term or long term.

MS. KING: Is it my turn? I think my answer to that would be probably not, that the disparity would increase. And I don't think it would increase exactly for the reasons that Professor Klein mentioned with judges going down, because my understanding of the Bowman proposal is that down is locked in, it's only up.

And I think you have to look at bargaining behavior and see what is happening in these plea agreements, and that's something that we'll find out more about.

But if indeed the offers are able to go up and the stipulations to caps and to ranges and to individual specific sentences go up, and as we found out, the ability of individual prosecutors' offices and defenders' offices to negotiate within the guidelines and around the guidelines is drastically different around the country. What you're going to end up through bargaining is more disparity when you have that.

COMMISSIONER STEER: If I could just follow up on that point, why do you think that would change? We've had a system in which bargains had been settled at the bottom of the range for all these years. Why do you think that all of sudden simply because there's a potential for going higher, you know, would your answer be the same if the range were increased to the 50 percent that--

MS. KING: I thought the question was will this reduced disparity--I think that it has the potential for having the same amount and possibly more, if prosecutors have more room to move in

the initial offers.

Now, it's possible that it won't, you know, that people will agree on the same absolute number. But since the options are different, you can start higher and come down.

JUDGE HINOJOSA: And we realize that this is really a difficult question because presently we have a range and the statistics do show judges stay at the bottom of the range, and then there's some number that go to the middle and then very few that go to the top. So we presently have a range, and the range is going to get much bigger.

MS. KING: Right.

JUDGE HINOJOSA: And so it's a very hard question because it's hard for us to really come up with an answer about something in the future, and it is a difficult question.

MR. ROSENZWEIG: I think Professor King is right that, you know, by taking the top off completely, you are placing a slightly better card in the prosecutor's arsenal, so that that will make it probably somewhat preferentially less favorable to defendants.

I think, though, that one of the points I didn't make earlier that I'd like to be sure to include is part of the answer to your question, Professor O'Neill, is compared to what, because the disparity that will--that may come from the Bowman proposal or any other status quo ante proposal needs to be compared to whatever it is that will exist the day after Booker and Fanfan come down, and as Professor Klein suggest, strike the fact enhancement aspects of the guidelines altogether. And I think that regime is going to be rife with lots of rent-seeking and lots of disparity across judges, across prosecutors.

So the option of not putting something in to cabin disparity, not putting in something that cabins disparity has to be compared with what the amount of disparity you think will exist without it, and I think that will be very high.

MR. BERMAN: Can I make just one point on this? I think it's a terrific but challenging question. I think part of it depends on which kind of disparity we're most concerned with. I think we could be confident that there will be some outlier disparity for some percentage of cases. That might only be 2 percent. It might be 5 percent. It could be as much as 20 percent when you take the tops off, where the judges will go as high as they can, or at least very, very high.

And so part of what concerns me, if you look at the cumulative statistics, well, look, 80 percent of the cases are still roughly within the range, okay. But the 20 percent of outliers are now more severe punishments, and especially against the backdrop of the Sentencing Reform Act's statement that punishments should be no greater than necessary to achieve the purposes of punishment. You might say that that's a kind of disparity, that kind of outlier, extremely severe disparity, that should concern us as much if not more than, you know, where the other 80 cases sort of skew together. And so my concern is not just the possibility of disparity but the type of disparity that that fix could create.

JUDGE HINOJOSA: Commissioner Horowitz?

COMMISSIONER HOROWITZ: Just focusing on the proposal to eliminate the tops of the guidelines, the so-called Bowman fix, to the extent each of you or any of you have thought of the issue, the appellate review standard that would apply in those circumstances, what would you think, suggest is either appropriate or constitutional in terms of an appellate review standard for judges who went above the minimum number in the guidelines. And would the same standard apply to a judge who downwardly departed in a Bowman-fix world?

MS. KING: I don't think the same standard would apply because Blakely doesn't--so far I don't think applies to downward mitigating facts.

COMMISSIONER HOROWITZ: And I'm not asking this sort of constitutionally, but in terms of a recommendation to us or in a system that removes or tries to prevent unwarranted disparity, which is what we've been focusing on.

MS. KLEIN: I don't think you can do it through appeal if what you're appealing is the failure to, say, use the guidelines as advice. Since the guy had a gun, it really should have gone up two levels, and the judge didn't do that, can you appeal that? I don't see how, you know, in a world where the guidelines are really advisory--if appellate courts start enforcing these advisory guidelines which were crafted by the Commission and approved by Congress, those are laws which are being enforced, which then violates Blakely.

Now, theoretically, you could have the judges get together and create advisory guidelines, and I think it's a really interesting constitutional question. Could that be enforced through appeal? If they were really created by the judiciary, would that run afoul of Blakely? I don't know the answer to that. But I think as long as the advisory guidelines are crafted by this body, I don't think they can be meaningfully appealed.

MR. BERMAN: I think a lot would depend on how Booker and Fanfan explicate the limits of Blakely. So I would imagine a system of appellate review that tries to be spoken in much more legalistic terms than factual terms, and, you know, this sort of idea of a fact law distinction. If the appellate review standard said to the judges review for abuse of discretion concerning whether this punishment was sufficient but not greater than necessary to achieve the purposes of punishment and spoke of it in very sort of law-ish terms, I think you might be able to skate around what Blakely limits, because I don't think that, at least as written yet, Blakely requires that sort of issues of law have to go to a jury, even if there are issues of law that could enhance sentences, although, again, this is such constitutionally uncertain ground, the only thing I can say confidently is there would be lots of litigation and we'd probably get circuit splits. And, you know, which kind of standard we ought to be sort of pushing forward, should try to be as constitutionally sound as possible. But part of my own advice is let's take the hand we're dealt rather than sort of reshuffled at a time when the court has left us with so much uncertainty of the reshuffling.

COMMISSIONER HOROWITZ: And would you in a topless guidelines world, thinking about a standard of review for a within-guideline sentence, would you think that the Commission would have--or Congress or whoever wrote the standard of review would have two different standards essentially, a within-guideline standard and a downward departure standard?

MR. BERMAN: Unless you can convince Congress to switch the PROTECT Act, right? And I understand the Bowman proposal, at least it's still stuck by the PROTECT Act's rules about review of downward departures. And, of course, you guys could make a recommendation to Congress to do a broad switch of that, but I haven't gotten a sense, and maybe Paul knows better than I what's going on on the Hill, that they're inclined to move that around at this stage as well.

COMMISSIONER HOROWITZ: Professor Rosenzweig?

MR. ROSENZWEIG: I would, I think, agree with Professor Berman that if you go for the topless guidelines, you're going to probably want to keep--or Congress is probably going to want you to recommend to keep the same standard for review of downward departures below whatever the guideline minimum becomes as it is right now. The problem of appellate review for, you know, the excessive upward bound is very intractable for the reasons that we've discussed, and I'm not sure that I see a way to get around it. I mean, that's one of the reasons why I'm not sure I think that the Bowman proposal is a long-term appropriate, stable one. I wish for a return to a regime of reasonably determinative sentencing with reasonable ranges on both ends that protects against both excessively severe judges and excessively lenient judicial sentencing. I think that's the ultimate goal that all of us share.

JUDGE HINOJOSA: Commissioner Rhodes?

MS. KING: I'm sorry. Can I just say one more thing on the appellate review in response to your question? As long as you have abuse of discretion or some level of review that

doesn't turn on the presence or absence of facts, you can construct some sort of appellate review. But it's not going to be effective, unless it is, of course. You can still condition maximum grades on prior offenses as long as Almendarez-Torres. So it's not necessary to take the top completely off. You can still grade it by prior history if you choose until Almendarez-Torres falls.

COMMISSIONER RHODES: I'd like to follow up on Commissioner O'Neill's question regarding consistency if we take the tops off under the Bowman proposal and ask--we heard yesterday and today comments that that would make the system a one-way system, or we've heard the adjusted offense levels referred to as mandatory minimums. And my question is: Are you--it seems that you're assuming that under the tops-off proposal, the adjusted offense level, the base offense level and adjusted levels would be more rigid than they are now and that they would not move down for downward adjustments or downward departures in much the same way they do now.

So if you're making that assumption, I would ask why. And if you're not making that assumption and you would recognize that still courts can go down, I would ask why you think it's a one-way system as opposed to very much like we have now, with sentencing incentives being very similar to what we have now.

MR. BERMAN: I think it is very similar to what we have now, and I like the Bowman fix. It's an elegant way to try to preserve the status quo. The concern I have is it's not clear that this court is going to be comfortable with preserving a version of the status quo and that's what I feel is going to get litigated in a way that unless we come to the conclusion that the Bowman fix is the perfect long-term solution, to move there in the interim doesn't make a lot of sense just as a short-term strategy. And this is another reason why I'm looking forward to the 15-year report, because if the 15-year report says all is well with how everything has been done, then I think that's a strong sentiment for trying to figure out if the Bowman fix can escape constitutional scrutiny in a way to get us back to where we were. But given at least my sense that an awful lot of folks didn't like where things were before, taking an opportunity to use a constitutionally convoluted or questionable way to get back to where we were before, that, again, we're not even there now, right? And we can't get back there, I don't think, for ex post facto reasons for at least a couple years.

And so it's really a look at those practice dynamics more so than a sense that it doesn't do what happened in the past, but it does leave me to wonder whether that's what we want to be embracing at this moment.

JUDGE HINOJOSA: Vice Chair Sessions?

COMMISSIONER SESSIONS: There are a number of issues that have been raised by the Bowman proposal, criticisms of the Bowman proposal: number one, Harris could very well declare the guidelines unconstitutional, and if we get a second declaration of the guidelines being unconstitutional, where do we go from there? As a practical matter, what happens then?

But more than that, there's been criticism of the Bowman proposal because once in the real world--and I'm using your expression, the real world--we make changes to the guidelines, that's now the status quo. And so each of you I find--I mean, this is interesting. Each of you say we don't want to go down that road in the Bowman proposal, we want to go toward simplification, maybe simplifying your positions. But you heard a simplification program proposed by Professor Goldsmith yesterday. A simplification process, that's where we want to go.

Well, why do we take necessarily a risk to go to a Bowman proposal, which could be declared unconstitutional, and then ultimately risk the entire system as opposed to moving in the direction that you're talking about where we should be going, and that is to try to simplify the process so that we're moving in the right direction?

JUDGE HINOJOSA: Who wants to take that leading question?

[Laughter.]

MR. ROSENZWEIG: I completely support your desire to get toward simplification. I think that we are all agreed, however, that the practical reality is that you can't get there immediately. It's going to take a year, I think two, but, you know, I'll defer to anybody else's judgment on how long it will take you to actually rewrite the guidelines. I'll let you decide.

I think my recommendation for doing something inadequate in the interim is based on a very raw political calculus. It's not a principled, you know, argument for the status quo, which has its problems. It's not an argument from optimum policy. It's an argument from the concrete numbers on the ground that reflect the electoral results of last--you know, two, three weeks ago and my estimation of what the likely reaction will be to too long term a timeline for change and fix. If this Commission were to announce today that it intends to revise the--or the day Blakely--or Booker is decided, it was announced today we've begun a one-year program to fix this and for a year we'll have to muddle through, but we'll all be ready in a year, my estimation is that the program would be moot in six months.

And if I'm wrong, so be it. I'm offering now political advice, and I have no insight, no special insight. And I think that the results would be more severe and ones that nobody on the Commission or at the table would, you know, necessarily think is the optimum.

COMMISSIONER SESSIONS: One of the difficulties with setting a deadline is that when you set the deadline on a particular date, six months before that everybody in the system is waiting for the deadline.

MR. ROSENZWEIG: There are--

COMMISSIONER SESSIONS: You know, you're not getting the changes of plea, you're not getting the sentencings because everything is at a halt. And that covers its own problems, especially when if you apply a Bowman fix, it doesn't apply to the cases which exist now, the 40,000 cases that are out there in the mix. So then what cases does it apply to? A very small window of cases. And is it worth taking that kind of risk for that small window of cases?

MR. ROSENZWEIG: I'm not so sure I agree it's that small. If the Bowman fix became law today, you know, we get 60,000 a year and you took a year and a half, it would be--you know, it would roll in with crimes beginning today. It would probably be about 60,000 as a rough estimate.

You know, I mean, I guess my fear is, transition issues aside, I'm more concerned about intemperate, rent-seeking reactions.

JUDGE HINOJOSA: Having lost total control with phones ringing, time problems, I will attempt to limit this to one more question from Judge Castillo. And in the courtroom, it's different when you have marshals.

COMMISSIONER CASTILLO: Especially when you have two judges in one courtroom.

I'm going to end with just a plea and then giving you some information. My plea is I realize we are all shooting in the dark here, and I appreciate this panel's testimony. Once this decision comes down, I would urge you not to hesitate to take some time and then send us whatever you think is the appropriate modification to your testimony, or you could just send us a one-page letter saying, "I stand completely by my testimony, I've predicted it."

Now, by way of information, I'll especially address this to you, Professor Berman. First of all, good to see you again.

MR. BERMAN: Good to see you as well.

COMMISSIONER CASTILLO: I will tell you, one, our Chair did announce that the 15-year report is now going out on our website and will become publicly available.

Two, the five months of data that you're urging us to release, I will tell you we've closely analyzed what is going on in the Seventh and the Ninth Circuit, as well as the rest of the country.

My personal judgment is that it's inconclusive. One of the problems is that the Booker and Fanfan cases were accepted in August, and what's happening in the Seventh Circuit where I sit is that sentencing decisions, but for a relatively handful of cases that are being bargained--no big surprise there--are just being delayed. So what we're seeing is a big delay in sentencing in both the Seventh and the Ninth Circuit, as well as some other circuits that, you know, don't readily explain themselves because of circuit decisions that say proceed. But we're seeing a lot of district court judges who are not proceeding.

So we will attempt to release that data as soon as we can, but I just want you to know that.

MR. BERMAN: Great. Glad to hear it.

JUDGE HINOJOSA: If we don't have anything else, I want to thank you all very much for your time. Professor Berman, we'll let you get back to that other job that you have. Since we had this discussion, maybe you can devote some time of that to the BCS.

MR. BERMAN: I absolutely will. Another pressing national issue.

[Laughter.]