

JUDGE HINOJOSA: We're ready with our very patient last presenter, Mr. Christopher W. Wray, who's the Assistant Attorney General in charge of the Criminal Division with the U.S. Department of Justice. Thank you for being here this afternoon now. Go ahead, sir.

MR. WRAY: Thank you, Mr. Chairman, Members of the Commission, distinguished guests. On behalf of the entire Justice Department I want to thank the Commission for holding this important hearing and for giving the Department and other interested parties a forum to discuss with you the future of federal criminal sentencing.

I would say I'm hard pressed to think of any more important and more cross-cutting subject for the entire criminal justice family and for federal crime policy than what we're here talking about today.

In the roughly five months since the Supreme Court's decision in Blakely, I think it's fair to say an unprecedented level of uncertainty has taken hold in the federal criminal justice system, that that uncertainty has already led to serious consequences, both in individual cases and on the enforcement of federal law in general, and there is looming the potential for even greater and more devastating consequences.

So I think it's critical that in weeks and months to come, the Commission and the Department work together closely and with the federal judiciary, the Congress and other interested groups to ensure that federal sentencing policy is crafted in a way, obviously, of course, to comply with the requirements of the Constitution, but also to embody the values of the Sentencing Reform Act itself.

In the wake of Blakely and in anticipation of the Court's decision in Booker and Fanfan, the Department has been working hard to consider various ways to address the concerns raised by a majority of the Court in Blakely. In that work we've been guided by one fundamental fact, that sentencing reform has been a success both in reducing unwarranted disparity and in reducing crime. And I think it's important before we start talking about options for addressing the concerns underlying Blakely to step back and remember the Sentencing Reform Act itself, both the reasons for its development and implementation and the many ways in which it has been, we think, highly successful.

Just over 20 years now, after more than a decade of bipartisan efforts, that the 98th Congress passed the Act creating this Commission. Under its mandate the Commission established sentencing policies and practices to avoid unwanted disparity and to achieve the purposes of sentencing, punishment deterrence, incapacitation and rehabilitation.

The Commission created guidelines accomplishing this monumental task--sort of funny to say this in hindsight--accomplishing that monumental task in only 18 months, and the guidelines took effect in November of '87. Two years later, and with only a single Justice in dissent, the Supreme Court, of course, upheld those guidelines against a whole bunch of constitutional challenges in Mistretta. By all quantifiable measurements, the resulting sentencing reform has been successful.

The guiding principle behind the Sentencing Reform Act was truth and transparency in sentencing and a similar treatment of similar defendants with similar criminal records who committed similar criminal conduct. The system of sentencing guidelines created by the Commission is both structured and tough. The structure provides fairness, predictability, and appropriate uniformity. In addition, the guideline structure allows for targeting longer sentences to especially dangerous or recidivist criminals. In 2002, over 63,000 convicted defendants were sentenced in federal courts under the sentencing guidelines. And because the guidelines sentences in those cases did not depend on the district where the offense was committed or the judge who imposed the sentence, the guidelines minimized the probability that similarly-situated defendants were going to be subject to unwarranted

disparity in punishment.

Instead, for the last 17 years, defendants have been subject to guidelines that are the result of a process of collaboration between this Commission and all major stakeholders in the federal criminal justice system, interested observers, and the general public. Through the years the Commission has worked with not only the Justice Department, but also the Judicial Conference's Committee on Criminal Law, and advisory groups with expertise on all kinds of crimes. That constant collaboration, we think, has ensured that the guidelines are fair and are perceived as legitimate and credible. In the last 15 years, obviously, there has been healthy debate, and that debate continues about various details of the guidelines, but we also think there is a genuine consensus in support of the Act and around the principles that it embodies of sentencing reform and determinate sentencing. And regardless of how the pending litigation turns out, the Department is committed to those principles of sentencing reform because they embody the promise of both fairness and crime control, and we think we can ask no more and no less of our criminal justice system.

It's also important to reflect on how much progress has been made as a result of the efforts of sentencing reform. This country is right now experiencing a 30-year low in crime. That means that nearly 35 million violent crimes were not committed in the last decade because of that reduction in crime. According to the Bureau of Justice Statistics, in 2003, the public experienced 5.4 million violent victimizations. By contrast, had the per capita rates of 1993--shortly after the guidelines were really taking effect--occurred in 2003, we would have suffered nearly 12 million violent acts of murder, robbery, sexual assault and assault in that one year alone. Look at it a little differently. If in 2003 the murder rate had been the same rate as it was in 1993, the U.S. would have experienced about 11,200 more murders. Or look at property crimes. During the same 10-year period, reduced crime rates have resulted in nearly 107 million fewer property crimes taking place.

We can all talk about statistics. Needless to say, whenever you start about statistics, you need to step back and remember that behind each one of those one of those millions is a victim and a victim's family, and those were people who were not victims as a result of the reduction in crime, and we think that reduction is heavily attributable to the kind of sentencing reform that has occurred over the last 20 years.

Looking at those numbers, we think it's awfully hard to accept the claim of some that society is somehow mispending its resources on longer sentences.

One of the big reasons that the U.S. is experiencing such low crime rates is the effect of tougher determinant sentencing and the elimination of parole that the 1984 Federal sentencing reforms reflect and that many states have also adopted. The key elements of that kind of reform were overall consistency in sentencing, truth in sentencing, limited judicial discretion, and mandatory minimum sentences.

The new sentencing systems adopted in many states and the Federal system recognize the need to place the public safety from crime first, and to further that end through adequate deterrence, incapacitation of violent offenders, and just punishment.

The FBI just recently announced that the violent crime in the U.S. decreased by another three percent from 2002 to 2003, adding to an overall drop in the violent crime rate of 26 percent in the last decade.

These statistics confirm and underscore the historic drop in violent crime and other serious offenses that began in the early '90s, shortly after the Sentencing Reform Act took effect and continuing

when Truth in Sentencing grants were made available to the states.

The bottom line is that fewer Americans are now being victimized by crime as a result of effective sentencing laws.

I think we've learned a pretty basic lesson, which is, unsurprisingly, that the more offenders who are deterred and incapacitated, the fewer the people who are victims of crime.

Critics will tell you, and we've heard plenty of them, that our current sentencing system is a failure and that our prisons are filled with non-violent first-time offenders. But the statistics don't support claims like that. Instead, they show that more than 90 percent of prison inmates had a prior criminal record, were imprisoned for a violent crime, or both.

And that's looking at state and Federal prisoners together.

But even focusing exclusively on the Federal prison population, approximately two-thirds of all Federal prisoners are in prison for violent crimes or had a prior criminal record before being incarcerated--two thirds.

Looking exclusively even at the non-violent prisoners, a recent BJS study showed that an estimated 80 percent of those non-violent offenders, when they were released from prison, had had prior criminal records that, on average, reflected 9.3 prior arrests and 4.1 prior convictions.

In addition, about a third of even these prisoners had a history of arrest for violent crimes. In other words, the claim that our prisons are somehow filled with non-violent first-time offenders is just simply not true.

Given the active criminal careers and the propensity for recidivism of most prisoners, we believe that incapacitation works and that the American people are safer for it.

History teaches us that tough sentencing means less crime, and I think we need to stay mindful of that as we evaluate any of the various alternatives to the current sentencing guideline.

Now, as we're all painfully aware, the uncertainty created by Blakely has caused considerable doubt, to put it mildly, about the procedures used in other states and in Federal sentencing. And it's been our experience that in the many cases where courts have applied Blakely to the Federal guidelines, the result has been a distortion of the principles of sentencing reform that I just finished talking about.

Judges around the country have differed widely in their interpretation of how Blakely might apply to the guidelines, resulting in some of the same disparate sentences that the Sentencing Reform Act was created to avoid in the first place.

There have been some very well publicized cases. One here in Washington. One in West Virginia, and there have been others. But even in other less publicized cases, courts around the country have handed out sentences that have also violated the letter and the spirit of the guidelines.

As a protective measure, as you all know, our prosecutors have begun to include in indictments all readily provable guidelines upward adjustment and upward departure factors. While hardly ideal and fraught with all kinds of problems, we hope and foresee that those measures will help ensure that most sentences handed down during this particularly uncertain time will be upheld.

In Booker and the Fanfan, the Department, like the Commission through its Amicus Brief, have argued that the Federal sentencing guideline system is significantly distinguishable from the Washington State guideline system at issue in Blakely and that the design of Congress and this Commission for arriving at Federal sentences and used in hundreds of thousands of cases over the past 15 years meets all constitutional requirements.

But, of course, we're all awaiting the Supreme Court's decision.

Regardless, of the outcome of the Booker and Fanfan cases, the Department is confident that working together with this Commission, we will succeed in maintaining a sentencing system that upholds the principles of sentencing reform--truth in sentencing, proportionality, and the reduction of unwarranted disparity. Any necessary policy steps following the decisions in Booker and Fanfan, whether legislative or otherwise, must, we believe, embody these principles and conform, of course, to all constitutional requirements articulated by the Court.

Ever since Blakely was decided, the Department has been preparing for the possibility that the sentencing guidelines might have to be substantially changed in order to comply with the Supreme Court's holding regarding their constitutionality.

Until the Court makes a decision, all analysis and commentary must be viewed as provisional. We have, however, consulted within the Department and with the U.S. Attorney's offices around the country, and with other branches of government in order to try to consider and evaluate carefully the various options that have been proposed in the event that the Court finds the sentencing guidelines unconstitutional.

They tend to fall into certain broad categories, although there seem to me to be an infinite number of variations off of each one, and I can't profess familiarity with each one of those variations. But taking them in broad categories. First, one option that you've all heard about is what's being referred to as Blakelyization of the guidelines.

Under that proposal, of course, Blakely procedures, like jury determination and proof beyond a reasonable doubt would be applied to the current guidelines or a simplified version of them.

That proposal has significant barriers and radically alters the role of judges and juries.

For over 200 years, the law and practice in this country has been that juries determine guilt, and judges determine what a sentence a defendant deserves. Indeed, juries, as we all know, are consistently instructed that they are not even to consider penalties.

Under a Blakelyized system, the traditional role of judges in sentencing would actually be substantially diminished. In addition, the procedural issues involved in including juries in the sentencing phase would be terribly complicated.

There are a number of barriers to implementation, such as the decision of what rules of law and procedure would apply, how to instruct the jury, how to conduct a sentencing phase in multi-defendant cases. Certain factors are inappropriate for juries to consider. Others would be lost altogether, while others would significantly extend the length of the trial.

And these procedures would impose significant burdens on every phase of the criminal justice system, burdens that are not constitutionally required and are not more like to result in fair and consistent sentences.

Last, but not least, this proposal may raise its own share of constitutional questions, addressed in Mistretta, of whether the Commission rather than the Congress can promulgate sentencing factors that would then appear indistinguishable from elements in that they define crimes and set penalties, rather than channel the Court's discretion within the statutory limits set by Congress.

A second option is to make the sentencing guidelines advisory. Under that one, courts would use the guidelines on a voluntary basis to determine a sentence between the statutory minimum and maximum. Although unquestionably constitutional and easy to implement, this option goes against the principles of the Sentencing Reform Act. Congress explicitly chose against making the guidelines

advisory because compliance with advisory guidelines would be inconsistent. And sentences would once again lack predictability and transparency, and disparity would, no doubt, increase.

A third option is for Congress to create additional mandatory minimum sentences, an option that would require we think significant legislative action.

Under a fourth proposal, the guidelines minimum would remain the same as is the case under current--the guidelines minimum, I should say, would remain the same as the case is under the current guidelines, but the maximum would be the statutory maximum as set by Congress.

That would make clear that a defendant is always subject to the maximum statutory penalty defined by Congress based on the jury verdict alone. The sentencing guidelines would still work in the same manner that they have for 20 years, identifying aggravating and mitigating factors that will be determined by a judge and that will help cabin judicial discretion to bring a more consistent, more certain, and more just result.

While I am not in a position to endorse this proposal or any other proposal at this time, there do appear to be many advantages to this proposal.

This system would preserve the traditional roles of judges and juries in criminal cases. This system would retain the role of the Commission. This system would be relatively easy to legislate, relatively easy to practice, and the results would actually replicate the current guidelines. It would also fulfill the important sentencing policies embodied in the Sentencing Reform Act. We don't believe that a new, enlarged sentencing range would result in more severe sentences. Data from this Commission showed that under the current sentencing system, 99.2 percent of sentences imposed are within or below the sentencing range. In other words, only 0.8 percent of sentences imposed are above the sentencing range. That's zero point eight percent. That strikes me as pretty strong evidence that judges are not likely to sentence outside the current ranges, even given more freedom to do so.

Under this proposal, advisory maximum sentences would be issued as part of the guidelines manual, which would give district and circuit courts across the country the benefit of the Commission's collective wisdom and statistical analysis regarding sentencing and would provide a suggested, though not legally mandated, maximum sentence similar to the current maximum. In addition, at the Department we would be free to issue an internal policy to require prosecutors to recommend a sentence within a certain range in the ordinary case.

Some I know, including the Practitioners' Advisory Group, have evidently expressed concerns about the constitutionality of this proposal, as it can survive only as long as the Supreme Court declines to extend the rule in Blakely to findings necessary to enhance a mandatory minimum sentence. We freely acknowledge that the proposal relies on the Supreme Court's holding in Harris and in McMillan, which held that judges rather than juries can sentence defendants based on facts as long as these facts don't increase the maximum sentence a defendant faces. In other words, courts may determine mandatory minimum sentences as long as that sentence does not increase the sentence based on the jury verdict alone. Yet there's no reason, we submit, to believe that these cases have been weakened.

Although Harris was a plurality opinion, it was issued only two years ago, following Apprendi, which the Court explicitly found did not apply.

And while Blakely has redefined what is the maximum sentence quote unquote faced by a defendant, it has not undermined the concept that courts can find facts that determine mandatory sentences within the maximum sentence.

So, we think this proposal appears to address the Court's concern and complies with Blakely, even if the Court applies its rule to the Federal guidelines by allowing only judicial fact finding within the guideline range.

We believe that the constitutionality of any proposal ought to be measured in the context of stare decisis; so unless the Supreme Court states otherwise, stare decisis should be our guiding principle, especially when overruling a decision would dislodge settled rights and expectations or require an extensive legislative response.

Of all the legislative proposals being discussed as possible solutions, this option adheres most closely to the principles of sentencing reform, truth in sentencing, certainty, and fairness in sentencing, and the elimination of unwarranted sentencing disparities.

The Department is committed to ensuring that the Federal criminal justice system continue to impose just and appropriate sentences that serve the same policies embodied in the Sentencing Reform Act. As we've been doing for the last 20 years, we look forward to working with the Commission to ensure that Federal sentencing policy continues to play its vital role in bringing justice to the communities across this country. Thank you.

JUDGE HINOJOSA: Thank you, Mr. Wray. We have questions. Vice Chair Sessions?

COMMISSIONER SESSIONS: Mr. Wray, I want to sincerely express my appreciation for you coming. I know that your schedule is incredibly busy, and on behalf of the Commission, just really appreciate your coming here.

And there are many--we've worked really well with the Department as long as I've been on the Commission for the past five years. I think Commissioner Rhodes, Commissioner Hinojosa just had a great relationship with, and we've worked closely and well; and in many ways, we share a lot of the same concerns. We are all shaken by the Blakely decision. No question about that. And we're concerned about maintaining a guideline system because we all agree, I think you and I agree and the Commission agrees, that the guidelines have been successful.

One of the concerns I want to say about this proposal, the Bowman fix, for lack of a better word, is that it raises significant constitutional questions, and, if, by chance, we're wrong again, and the Supreme Court decides to revisit Harris and change its ruling, if we have the Bowman proposal at that point, we are without a guideline system. And it's the second time. It will have been the second time that the guideline system will be found to be unconstitutional.

And my concern is in light of that confusion, where do we go from there? And I wonder if there are other ways, modified ways, neutral ways, punishment wise, that we can explore alternatives now with the Department so that we could develop a quick alternative, followed by a future alternative that would provide less risk. I wonder if you see the same risk? I wonder if you've thought about where we go if all of a sudden the Supreme Court say, you know, Harris is changed. And whether you've thought about in your deliberations with everyone in the Department alternatives so that we don't run that rocky road.

MR. WRAY: Well, certainly, we've been considering all kinds of alternatives, and I think it's fair to say that the climate that we're in, in light of the Supreme Court's decision in Blakely and the pending cases, is one that creates uncertainty on all kinds of fronts, not only legal uncertainty, but all sorts of practical uncertainty. And I think any plan we make is going to carry with it some degree of risk, and I think we're not unmindful of the fact that the proposal, which I am not endorsing but merely describing today, that it carries with it a share of risk along the lines that you're describing.

We have, however, consulted very carefully with the people you would expect us to consult with about what we think of the continued viability of Harris in particular, and I don't think I would say what I've said about that proposal if we didn't feel pretty confident that the Harris decision is still good law, and that, therefore, that proposal would survive constitutional scrutiny.

Of course, we want to work with the Commission. We value the kind of open dialogue that I think we've had. I count on Deborah to be a key part of that, and I think she's done a great job at it and would expect her to continue to do that. And we would want the lines of communication to be open, and, again, of course, I haven't sitting here today endorsed a particular proposal.

But I think that the kinds of uncertainties, not only constitutional but other, that go along with the sort of Blakelyized version, which would appear to me to be sort of the leading alternative category of options, if you will, presents greater risks than the one I've just described.

JUDGE HINOJOSA: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yeah. I'd also like to thank you, Mr. Wray, for coming down and talking to us today. We recognize that there's obviously a lot going on at the Department now, and I'm sure your schedule is not a light one at the present time, but we appreciate your coming down. We also appreciate obviously the service of Commissioner Rhodes, and she's been a great addition to the Commission. I think has represented you quite well at the Department.

Two questions that I would ask are as follows: one is that you mentioned in your introductory remarks about the drop in crime rate, and that we've seen a lot of the attempts by states to enact truth in sentencing laws and to try to have greater transparency and greater uniformity in state sentencing as well. We all I think recognize the fact that the bulk of crime prosecution, especially violent crime prosecution, occurs actually in the states, not so much in the Federal Government. And I wonder as a sort of a practical matter in looking at sentencing reform whether or not you think and whether or not the Department believes that it's also worth looking at the state models and how states have actually handled sentencing as a means of, you know, seeing perhaps alternatives or better models that the Federal Government could implement.

I guess the second question that I'd ask is perhaps it's difficult to do that in many respects because obviously states, all the states that I'm familiar with at least, have actual criminal codes. And one of the deficiencies that we act under in Federal criminal law is at least a lack of any sort of a unified or a uniform Federal criminal code. And I was wondering if the Department would support any sort of a long-term project to look at, really a recodification of Title 18, and looking at Federal criminal code reform generally?

MR. WRAY: Well, as to the first question having to do with looking at states, I do think we can learn plenty from the states. And I think we have as part of our analysis tried to look at the experience of different states. One of the things that's been particularly instructive to me is to talk to prosecutors around the country in U.S. Attorney's offices, many of whom have been state prosecutors in their same jurisdiction and they're comparing the two systems that they've been in. And it varies considerably from region to region.

So, I do think that's been part of what we've been looking at as we've been doing that assessment, and I think that's highly appropriate. I think it still leads me towards the description, though not endorsement, that I provided here today.

As to the question of sort of an overhaul of Title 18, I think we're always interested in ways to improve the current Federal system, and I don't doubt that there might be some things that could be

done to make it work even better, and we'd be certainly happy to work with the Commission on that. I, for--the devil's in the details, of course. And I'm not aware of any sort of current pending project that would encompass massive overhaul, but there may be some things that we would want to look at in that regard.

JUDGE HINOJOSA: Mr. Wray, I have a couple of quick questions. First, has the Department thought about the differences between the unnamed proposal and Blakelyization with regards to resources and budgetary considerations.

And the second question is not necessarily related to in this fashion, but with regards to Blakelyization, is there some view on the part of some prosecutors that the benefit to that from a prosecution standpoint is it would increase, it certainly seem to me, the authority of the prosecutor to eventually affect the sentencing with regards to a plea bargain agreement or with regards to putting it in a situation where you decide you're not going to proceed with that enhancement if you plead guilty, for example. It certainly increases the tools available to the prosecution, and I don't know if that's been addressed as much. People have been concerned about the strong hand of the prosecution in their comments in the last two days. I haven't heard much addressing it with regards to the Blakelyization situation as to increasing the hand of the prosecution from the standpoint of plea bargaining; and, therefore, the judiciary or the judges really would have no control if the government decides not to proceed with an enhancement, and do you find that appealing from a prosecution standpoint?

And so, they're two unrelated questions, but, as Chair, I get to do that I guess.

MR. WRAY: Yes, Judge, I'd be happy to address those.

The first issue, on the resources front, it's obviously a little bit difficult to say, but I think our assessment is that the Blakelyized version would have a more adverse impact on us from a resource standpoint than the unnamed proposal.

I say that for a couple of reasons, not the least of which is--

JUDGE HINOJOSA: The elephant is sitting in the room.

MR. WRAY: Well, I wasn't going to refer to an elephant. But--

JUDGE HINOJOSA: Well, I think an elephant is a good thing, Mr. Wray. So, I don't consider that bad.

MR. WRAY: Just from a commonsense standpoint, we look at some of the Blakelyized proceedings that have happened during the five months since Blakely was decided, and the indications are significantly protracts and complicates the cases. A whole slew of cases have had to be represented to grand juries. We've had bifurcated, even trifurcated, one almost --whatever the word would be--quadruccated or something cases, and I think that necessarily means more prosecutors working on fewer cases, and, therefore, less enforcement overall.

Whether that would affect only certain kinds of cases more than others is little hard to say. I do think it's likely that the most complicated multi-victim kinds of cases are the ones in which there would be perhaps the most dramatic drop off. But I think it would affect our enforcement efforts overall in a way that would not be positive. I think that's more or less a consensus.

As to the second issue, that one, of course, before I leave that, I should say on the proposal that I've described but not endorsed, we believe that is, by far, the closest to maintaining the current system, and, therefore, would have, by far, the least impact on our current resource allocation, our current effectiveness in reducing crime and in being forceful in the areas that we think the country expects to be forceful.



On the second issue, in terms of the hand of the prosecutor and whether we would embrace a Blakelyized version from the sort of standpoint of tactical advantage if you will for prosecutors, which I understand to kind to be your question there.

JUDGE HINOJOSA: Well, do you find it appealing for that reason, is the question I guess.

MR. WRAY: Not as appealing as the other. I think there might be pockets around the country where, because of the nature of the jury pool, the prosecutor might feel that that kind of system gave him a freer hand perhaps to play off the knowledge that he and his opponent share about the attitudes of the jury pool in that community and that sort of thing. But that, to me, is precisely one of the reasons why that variation is likely to produce more disparity I think.

In other words, there might be certain pockets in the country where people would say that's great; that gives me a freer hand, and then sort of say, well, look, you really want me teeing up to a jury, whether or not you are an organizer or leader, do you really want me teeing up to a jury whether the loss was X or Y? They're not going to--you know how juries in this town work, et cetera, et cetera. And that might be an effective tool in plea bargaining in some communities, but in other communities it might work exactly the opposite way. And that suggests to me that we'd start going down the road that the Sentencing Reform Act was designed to prevent.

I think we believe that the other variation provides a greater level of predictability and determinacy, which is itself a useful tool in plea bargaining. I think all parties benefit in the plea bargaining process when there's some level of--like I said predictability to the process. Otherwise, you have people essentially rolling the dice, making educated guesses. I happen to be a big fan of the jury system, but I think anybody who's tried cases, and I have both as a prosecutor and as a defense attorney, would say to you, you never know what 12 people are going to do. And if you add that element into all the things that are in the sentencing guidelines, I don't know what that's going to entail.

JUDGE HINOJOSA: Commissioner Horowitz.

COMMISSIONER HOROWITZ: Just following up on the tactical question and the impact. I agree with you that the topless system, we'll give it a name, would on a macro level, given our statistics, likely not cause substantial increases in sentences. I actually think they would tend to drive sentences to the bottom number, because that would be a safe harbor number with no appeals.

And I guess my question is, and asked about this to the prior couple of panels, is much about maintaining the current system and making sure that the system works is the appellate view, as we saw last year in the whole Protect Act, post-Protect Act debate--the significant concern was regional disparities; some districts having significant departure levels; others having minimal to no departure levels.

And I wonder if the Department has considered at this point whether it would advocate a--two different standards essentially of appeal rights and appellate review standards in a topless system, which is one standard of review if there's--would now be a within guideline system, since there is no such as an upward departure versus a different standard of review for a downward departure, which I would think would be politically difficult to explain but might be doable. But in the absence of that, in a post-Blakely world, it would be difficult to write a rigorous--it seems to me--a rigorous appellate standard falling within guidelines systems. So, I wonder whether realistically you could maintain the current system in a topless system world and whether you're not buying a system that drives sentences actually down to the bottom point, and potentially opens us up again to a system of regional disparity where the departure levels start to vary widely because there isn't a meaningful standard of appellate review

anymore.

MR. WRAY: Well, I guess I would say a couple things. The first is that as to the question of regional disparity, I think it's fair to say that any of the various options that have been discussed, with the possible exception of just an across the board, some kind of an across the board mandatory minimums left and right kind of thing, but leaving that aside, any one of the variations I think runs the risk of greater disparity regional and other than we have right now under the current pre-Blakely, pre-Booker Fanfan guidelines.

I would also say that I suspect that the regional disparity would likely be greater, although I don't have empirical, you know, statistics to demonstrate this, but just my assessment of the way things have gone, would be greater under a Blakelyized system than under the, as you called it, topless system.

As to the appellate review question, well, again, we're not endorsing a particular variation, much less a particular proposal. I think I could see a scenario under which the departures below the floor would be reviewed much the way they are now after the Protect Act, under a de novo standard, and the sentence within--but would be within the range at that point might be reviewed under more of an abusive discretion type standard.

JUDGE HINOJOSA: Mr. Wray, we thank you very, very much, and I'd like to echo the comments about the contribution that Commissioner Rhodes brings to the Commission. She represents the Department ably and works well with every member of the Commission, and we appreciate her representing the Department.

And we do appreciate the way in which the Department cooperates with the Commission whenever we are in a situation where we do consult with you, like we attempt to consult with other groups that are interested in the criminal justice system; and I would also like to echo that I'm sure that Commissioner Rhodes would also indicate that she's ably served in her work with the Commission by Jonathan and Michelle, who always attend our meetings, and also we appreciate their being able to come.

MR. WRAY: Well, thank you. We certainly can agree on that. So, I thank you for your kind words about--

JUDGE HINOJOSA: We can name that proposal for sure. Thank you very much.

MR. WRAY: Thank you.

[Whereupon, at 1:17 p.m., the hearing was ajourned.]