



AMERICAN BAR ASSOCIATION

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Testimony of
JAMES E. FELMAN
on behalf of the
AMERICAN BAR ASSOCIATION
before the
UNITED STATES SENTENCING COMMISSION
for the hearing on
FEDERAL SENTENCING OPTIONS AFTER *BOOKER*

Washington, D.C.
February 16, 2012

Chair Saris and distinguished members of the United States Sentencing Commission:

I am honored to have this opportunity to appear before you to express the views of the American Bar Association regarding federal sentencing options after *Booker*. Since 1988, I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. Throughout my career I have taken a keen interest in federal sentencing law and in the Federal Sentencing Guidelines in particular. I am a former Co-Chair of your Practitioners' Advisory Group, and for 14 years I helped to organize and moderate the Annual National Seminar on the Federal Sentencing Guidelines. I am appearing today on behalf of the ABA, for which I serve as the Liaison to the Commission and as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The ABA is the world's largest voluntary professional organization, with a membership of almost 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Wm. T. (Bill) Robinson III to present to the Commission the ABA's position on federal sentencing options.

My testimony will cover four areas. First, I hope to put the topic of today's hearing – the ideal structure of federal sentencing – in its proper perspective by reminding the Commission that we must not elevate form over substance. The greatest threat to rational federal sentencing policy in the United States today is not the structure of the system but the outcomes that result from it. Simply stated, the most pressing problem confronting this Commission is not disparity but severity.

Second, I will discuss the advisory guidelines system and the reasons that sentencing structure best achieves the goals of the Sentencing Reform Act (“SRA”). With continued commitment by the Commission to the promulgation and revision of guidelines based on empirical data and research, I believe advisory guidelines can best advance the purposes of sentencing and reduce both unwarranted disparity and its equally problematic inverse, unwarranted uniformity.

Third, because the briefing materials reference the use of mandatory minimum sentencing statutes as an alternative sentencing structure, I will explain the ABA's longstanding opposition to such statutes, an approach I have previously described as the antithesis of rational sentencing policy.¹

¹See, e.g., Testimony of James E. Felman on Behalf of the American Bar Association before the United States Sentencing Commission (May 27, 2010), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_

Finally, I will offer some thoughts regarding the Commission's recent proposals regarding statutory changes to the advisory system and respond to the Commission's request for comment on whether there is a need to jettison the advisory guidelines regime in favor of binding guidelines driven by jury findings. Although I previously advocated this approach, I did so before the advisory guidelines system was put in place.² I do not support such an overhaul now, and instead endorse the continued use of the advisory guidelines system driven by research and experience.³

I. The Problem is Severity Not Disparity

The ABA is deeply concerned about the over-reliance on incarceration in American criminal justice policy. We are all familiar with the recent statistic that for the first time in our nation's history, more than one in one hundred of us are imprisoned. The United States now imprisons its citizens at a rate roughly five to ten

and_Meetings/20100527/Testimony_Felman_ABA.pdf.

²Memorandum from James Felman to the United States Sentencing Commission dated September 16, 2004, resubmitted as a prepared statement for the Public Hearing before the Commission on November 16, 2004; James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT'G REP. 97 (2004).

³Testimony of James Felman before the Subcommittee on Crime, Terrorism, and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (October 12, 2011), available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011oct12_Booker_t.authcheckdam.pdf.

times higher than the countries of Western Europe. Roughly one quarter of all persons imprisoned in the entire world are imprisoned here in the United States. The incarceration explosion over the last 40 years in this country “is unmatched by any other society in any historical era.”⁴ As noted in a recent article in *The New Yorker*, “there are now more people under ‘correctional supervision’ in America – more than six million – than were in the Gulag Archipelago under Stalin at its height,” and more black men are under such supervision than were in slavery in 1850.⁵

The federal sentencing scheme has contributed to these statistics. In the last 25 years since the advent of mandatory sentences for drug offenses and the Sentencing Guidelines, the average federal sentence has roughly tripled in length. And whereas in 1984 more than 30% of federal defendants received sentences of straight probation,⁶ by fiscal year 2010 that figure had dwindled to a mere 7.3%.⁷

⁴American Law Institute, Model Penal Code: Sentencing, Tentative Draft No. 2, Reporter's Introductory Memorandum, at xx (March 25, 2011).

⁵Adam Gopnik, “*The Caging of America*,” available at http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.

⁶USSC, Fifteen Years of Guidelines Sentencing (November 2004) at 43, Fig. 2.2.

⁷USSC 2010 Sourcebook of Federal Sentencing Statistics at 27 Fig.D. See also Testimony of James E. Felman on behalf of the ABA before the United States Sentencing Commission regarding Alternatives to Incarceration, March 17, 2010, http://ftp.usc.gov/AGENDAS/20100317/Felman_ABA_testimony.pdf.

Focusing on marginally increased rates of inter-district disparity as a justification for potentially overhauling the structure of federal sentencing without addressing the ever-increasing overreliance on incarceration has the feel to me of rearranging the deck chairs on the Titanic.

II. The Success and Continued Promise of the Advisory Guidelines System

The goals of the SRA – the elimination of both unwarranted disparity and unwarranted uniformity in sentencing – remain as legitimate and important as they have ever been. For the reasons set forth below, I believe the advisory guidelines system is the best available means of achieving these goals.

A. Average Sentence Lengths

It is important to recognize at the outset that advisory guidelines have not resulted in decreased sentence lengths. While the ABA views this as unfortunate in the sense noted above that we continue to incarcerate too many for too long, the data do not support the need for systemic change if the argument for such change is an asserted need for longer sentences. The average sentence before *Booker* was roughly

46 months,⁸ and nearly 7 years later is roughly the same at 42.7 months.⁹ The small drop is attributable to two types of cases – unlawfully entering or remaining in the United States and crack cocaine.¹⁰ Average sentences for all other major categories of offenses are either unchanged or slightly higher today under advisory guidelines than before *Booker*,¹¹ with two exceptions. First, sentences imposed for “white collar offenses” are significantly higher today than before *Booker*.¹² Indeed, average

⁸USSC 2001-2005 Sourcebook of Federal Sentencing Statistics, Table 13 (average sentence was 46.8 months in 2001, 46.9 months in 2002, 47.9 months in 2003, 50.1 months in 2004 (pre-Blakely), 45 months in 2004 (post-Blakely), 46.3 months in 2005 (pre-*Booker*)).

⁹USSC Preliminary Quarterly Data Report, 4th Quarter Release (FY 2011) (“Quarterly Data Report”) at 31, Table 19. After increasing to 51.8 months by 2007, USSC 2005-2007 Sourcebook of Federal Sentencing Statistics, Table 13 (51.1 months (2005 post-*Booker*), 51.8 months in 2006, 51.8 months in 2007)), due to increased guideline ranges for economic and drug crimes, USSC 2007 Final Quarterly Data Report, Figures C-I, average sentence length decreased to its present level.

¹⁰Average sentences for unlawful entry or remaining have fallen from 29 months before *Booker* to about 20 months due to the government’s policy of prosecuting an increasing number of less serious offenses and offenders. Quarterly Data Report at 36, Figure G. Average sentences for crack offenses have dropped from 130 months before *Booker* to 100 months, Quarterly Data Report at 38, Figure I, reflecting a deliberate policy choice by Congress and the Commission to lower penalties in light of the undue harshness of the crack cocaine guideline.

¹¹These categories include firearms offenses, Quarterly Data Report at 34, Figure E, alien smuggling, id. at 35, Figure F, and drug offenses other than cocaine, id. at 38, Figure I.

¹²Id. at 33, Figure D.

sentences for the most serious fraud offenders have skyrocketed from 89 months in fiscal year 2006 to 123 months in fiscal year 2010.¹³ Second, while child pornography cases constitute only 2% of all federal cases, average sentence length has continued to escalate, from 75 months before *Booker* to 119.1 months in the fourth quarter of 2011.¹⁴ With these few small exceptions, the advisory guidelines regime is a continuation of the status quo from the perspective of the bottom-line result in the courtroom – average sentence lengths.

B. The Justice Brought by the Advisory Guideline System

While average sentence lengths have not materially decreased as a result of the guidelines' advisory nature, what has changed is that courts have been able to be smarter about who goes to jail for how long because of their ability to more meaningfully consider the aggravating and mitigating aspects of the offense and the individual history and characteristics of the defendant. When mandatory, the

¹³USSC 2006-2010 Data files, USSC FY06 - USSC FY10, Figure 5 to *Sentencing Trends* distributed by USSC ABA USSC Booker Testimony 2-16-12 Chair William B. Carr at ABA WCC Conference, San Diego, Cal. Mar. 3, 2011 (on file with the author).

¹⁴USSC, 2005 Sourcebook of Federal Sentencing Statistics, Table 13; Quarterly Data Report at 31, Table 19. Indeed, the penalty increases for these offenses are even greater than suggested by these figures because the Commission's pre-*Booker* data lumped child exploitation offenses in together with simple possession, receipt, and distribution offenses. See USSC, 2009 & 2010 Sourcebook of Federal Sentencing Statistics, Appendix A.

guidelines were widely and justifiably criticized for their rigidity and failure to distinguish among or take into consideration important individual circumstances.¹⁵ This led to unwarranted uniformity – treating alike those offenders and offenses that are not alike.¹⁶

My own experience matches the consensus viewpoint. In my practice I am continually reminded that the mix of information presented by offenses and offenders is so rich that it simply cannot all be predicted, written down, and appropriately weighed in advance with unfailing success. This reality has long been acknowledged by the Commission¹⁷ and was anticipated by Congress in enacting the SRA. The Senate Report stated:

¹⁵See, e.g., ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>); *The Constitution Project, Principles for the Design and Reform of Sentencing Systems*, http://www.constitutionproject.org/pdf/sentencing_principles2.pdf; Kate Stith & Jose Cabranes, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (Chicago 1998).

¹⁶See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 870 (1992).

¹⁷“[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.” See U.S.S.G. § 1A1.1, editorial note, Part A(4)(b).

[E]ach offender stands before the court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors . . . and the appropriate purposes of the sentence to be imposed in the case – cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.¹⁸

Even the most carefully crafted guidelines, if mandatory, will yield instances of undue uniformity.

Making guidelines advisory, coupled with appellate review for reasonableness, cured the undue rigidity of the mandatory guidelines.¹⁹ At the same time, the advisory guidelines bear no resemblance to the “unbridled discretion” of the pre-guidelines era. Advisory guidelines strike the right balance between the two. Moreover, the Supreme Court has made the guidelines more prominent than the statute compels by requiring judges to treat them as “the starting point and the initial benchmark.”²⁰ Although district judges may not presume the guidelines to be

¹⁸S. Rep. No. 98-225, at 150.

¹⁹Thus, for example, a court may now consider the circumstances that the defendant was an unemployed drug addict estranged from his family at the time of the offense but by the date of sentencing had attended college, achieved high grades, was a top employee at his job slated for promotion, re-established a relationship with his father, got married, and supported his wife’s daughter. *Pepper v. United States*, 131 S.Ct. 1229, 1242-43 (2011).

²⁰*Gall*, 552 U.S. at 49.

appropriate, most begin with the assumption that they will impose a guidelines sentence unless there is good reason not to do so.²¹

As should be expected under a system that permits sentencing courts to more meaningfully consider the purposes of sentencing and individualized circumstances, the percentage of below-range sentences for reasons not directly sponsored by the government has modestly increased since *Booker*. That figure has increased from 12.7% one year after *Booker* 17.1% during the fourth quarter of 2011.²² This rate of non-government-sponsored below range sentences has leveled off, however, and has recently been falling. The fourth quarter statistic for 2011 demonstrates a decrease since the fourth quarter of 2010, when the rate was 18.7%.²³ The rate of below-range sentences sponsored by the government is substantially higher, now at 26.2%,²⁴ and has remained fairly constant. The “conformance rate” – defined by the Commission

²¹The reason for this is twofold. The first is habit – federal judges have been sentencing under the guidelines for more than two decades. They are comfortable and familiar with them. The second is practical – judges see that the guidelines have a specific number attached, whereas the other Section 3553(a) factors do not.

²²Quarterly Data Report at 12, Table 4.

²³*Id.* This decrease is likely due to the reduction in the crack guidelines and other smaller changes as the Commission reviews and revises the guidelines.

²⁴*Id.*

as within-range sentences and government sponsored below-range sentences – was 81% during the fourth quarter of 2011.²⁵ Another 1.9% were upward departures.²⁶

Moreover, in evaluating the effectiveness of advisory guidelines, it is critical to avoid undue focus on the percentage of cases sentenced outside the guideline range because this obscures the need to look equally carefully at the extent of such variances. Sentences 10% and 100% below the guidelines range look the same when viewed only from the perspective of whether they are variances. As foreshadowed by the bottom line statistic of static overall sentence lengths, the extent of variances during the pre- and post-*Booker* periods is virtually identical. The median downward departure not sponsored by the government before *Booker* was 12 months.²⁷ As shown in the Appendix, the median decrease is less than 13 months and has remained stable since *Booker*. Thus, the data suggest that the advisory guidelines permit greater individualization of sentences while still producing rough similarity of results across all offense type categories.

²⁵*Id.*

²⁶*Id.*

²⁷USSC 2003-2004 Sourcebook of Federal Sentencing Statistics, Table 31A (12 months in 2003 and 2004). It is not possible to make accurate comparisons before 2003 because until then the Commission reported government-sponsored “fast track” departures in the same category as non-government-sponsored departures.

While some claim that inter-district and inter-judge disparity has increased under the advisory system, unfortunately this has frequently been exaggerated by including government sponsored sentences based on substantial assistance and “fast track” programs in the percentage of below-range sentences cited. This is plainly misleading. In any event, there is no compelling evidence of the nature or extent of increased inter-district disparity since *Booker*. Moreover, the SRA did not seek to compel nationwide uniformity, but instead recognized the relevance of regional differences in “the community view of the gravity of the offense,” “the public concern generated by the offense,” and “the current incidence of the offense in the community.”²⁸ There have always been regional and inter-judge differences in sentencing practice, and many variations are reflections of differing case loads and prosecutorial practices rather than judicial philosophies.²⁹ In any event, even a modest increase in regional or inter-judge disparity would not outweigh the enormous benefits of the advisory guidelines system. Moreover, for the reasons discussed below in Part IV, such disparities cannot be reduced by any superior alternative to advisory guidelines driven by empirical feedback.

²⁸28 U.S.C. § 994(c) (4), (5), (7).

²⁹See Samuel A. Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 FED. SENT’G REP. 166 (1992).

Some have suggested, citing a preliminary study by the Commission³⁰, that racial disparities have increased under the advisory guidelines. As the Commission has acknowledged, however, no such conclusion is possible because its analysis did not account for many legally relevant factors that legitimately affect sentencing decisions.³¹ Moreover, unproven allegations of racial bias under advisory guidelines divert attention from proven sources of unwarranted racial disparity that cannot be corrected in a mandatory system.³² All defendants, regardless of race, are treated more fairly when their individual characteristics are taken into account as permitted under an advisory system.

³⁰USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis*, 22-23 (2010).

³¹The Commission's report itself states that it "should be interpreted with caution," because it does not control for "many legal and other legitimate considerations that are not and cannot be measured" because they are "unavailable in the Commission's datasets." *Id.* at 4. These include factors such as violence in a defendant's past, violence in the instant offense not reflected in the offense level, crimes not reflected in the criminal history score, and employment record. *Id.* at 4, 9-10 & nn.37-39.

³²*See, e.g.,* USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, 363-64 (2011) (describing disparate racial impact of mandatory minimum firearm sentences under 18 U.S.C. § 924(c)).

C. The Promise of the Advisory Guidelines System

Although the big picture data show an advisory system that has improved on the mandatory regime, there is more work to be done to improve the advisory guidelines. This work falls into two rough categories – first, gathering and publishing additional data and, second, acting on the data received. The guidelines must be revised over time in light of empirical research and sentencing data, as Congress originally intended and as the Supreme Court has re-emphasized. The decreasing percentages of non-government-sponsored below-range sentences noted above give reason to believe this process is well underway, but it is far from complete.

1. Collecting and Publishing More Data

While the Commission has done a tremendous job compiling a vast array of important post-*Booker* data, there is still a great deal we do not know. For example, we do not yet have any data by offense type on why district courts are sentencing within or below guideline ranges. I have yet to encounter a federal district judge who does not approach his or her job in general, and sentencing in particular, with anything other than the utmost solemnity. Frivolous people do not get appointed to the federal bench in this country. Any serious study of sentencing practices under advisory guidelines remains incomplete in the absence of data that shed light on why these conscientious men and women are sentencing as they are. We need to know the

bases for variances by offense category and their relative rates of frequency. And we also need these data cross-referenced by extent of the variance.

How judges engage with the newly invigorated array of sentencing considerations in Section 3553(a) presents a valuable learning opportunity that should not be squandered. While the initial guidelines were always intended to evolve based on further knowledge,³³ they suffered from structural aspects that made this difficult to accomplish. I recently heard a Vice Chair of the Commission explain it this way: under the mandatory guidelines the Commission knew that judges were sometimes dissatisfied with the result dictated by the guidelines, but there was no effective way for judges either to express their disagreements or to demonstrate how they would have resolved them via a specific sentencing outcome. Now, under advisory guidelines, we can learn not only what judges think about the considerations captured by the guidelines, but also why in some cases their evaluation of the purposes of

³³See S. Rep. No. 98-225, at 178 (Commission should not “second-guess individual judicial sentencing actions either at the trial or appellate level,” but should learn “whether the guidelines are being effectively implemented and revise them if for some reason they fail to achieve their purposes.”); *Kimbrough v. United States*, 552 U.S. 85, 107 (2007)(“ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”); *Rita v. United States*, 551 U.S. 338, 350 (2007)(“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.” The Commission will “collect and examine” sentencing data and reasons and “can revise the Guidelines accordingly.”).

sentencing leads to a non-guidelines sentence. The Commission has a unique and historic opportunity to gather and study data on specific sentencing considerations in individual cases, and thereafter to measure the effectiveness of these sentences and relative rates of recidivism.³⁴ I strongly suspect that nearly every variance is granted for reasons that more effectively serve the purposes of sentencing. If so, this underscores both the effectiveness of advisory guidelines in achieving fairness and the need to address these considerations in the guidelines.

2. *The Benefits of Acting on More Data*

This leads to my second point regarding the opportunities for refinement of the advisory guidelines based on judicial feedback and other empirical efforts. There is room for disagreement regarding precise outcomes in specific cases. But no one can disagree with the proposition that sentencing should be driven by the most thoughtful consideration that can be accomplished of all relevant factors in each case. Having a laboratory in each courtroom affords us a new wealth of thought to be harnessed and put to use. The dynamic between the judiciary and the Commission is thus best

³⁴See James Felman, *The State of the Sentencing Union: A call for Fundamental Reexamination*, 20 FED. SENT'G. REP. 337 (2008). Most judges announce their reasons for sentencing on the court record rather than in published opinions, and the “statement of reasons” forms completed as part of the sentencing judgment are inadequate to capture these reasons in detail. It is thus critical for the Commission to fill the role of this data collection and dissemination.

viewed as a dialectic – a process of improvement through a synthesis of views based on actual practice. Where judges are consistently differing with a guideline for the same or similar reasons, this almost certainly suggests a need to improve the guideline. When this process of refinement improves the rationality of the guidelines, it should also lead to greater conformity with them.³⁵ In the simplest terms, if the guidelines make more sense, there will be more within-guideline sentences.³⁶

In sum, the advisory system is generating consistent average sentence lengths and sentences within a fairly tight cluster around the guidelines range. With greater and more targeted data collection, further use of judicial feedback and continuing empirical research, the advisory system can generate unprecedented compliance with the purposes of sentencing.

³⁵See Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. POL'Y REV. 93, 104 (1999); Kate Stith & José Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 172 (1998); Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT'G. REP. 165, 166 (2007).

³⁶See *Rita*, 551 U.S. at 382-83 (Scalia, J., concurring) (as the Commission “perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts, . . . , district courts will have less reason to depart from the Commission's recommendations, leading to more sentencing uniformity.”).

III. The Defects of Mandatory Minimum Sentencing Statutes

In light of the overall success of the advisory system and its promise for the future, the ABA does not see a need for sentencing reform legislation focused on the advisory guidelines at present. In its meeting materials for today, the Commission also invited comment on whether the Congress should increase the use of mandatory minimum statutes. The ABA urges the rejection of this approach in accordance with our longstanding principled opposition to the use of such statutes.

As noted above, sentencing by mandatory minimums is the antithesis of rational sentencing policy. Advisory guidelines driven by judicial analysis and scrutiny permit rational and dispassionate sentencing based on a wide array of relevant considerations, including the nature and circumstances of the offense, the defendant's role in the offense, whether the defendant has accepted responsibility for his or her criminal conduct, the history and characteristics of the defendant, and the likelihood that a given sentence will further the various purposes of sentencing, such as just desserts, deterrence, protection of the public, and rehabilitation. But where advisory guidelines exalt reason and rationality, sentencing by mandatory minimums does not. Mandatory minimums reflect a deliberate election to jettison the entire array of undisputedly relevant considerations in favor of a single solitary fact – usually a quantity of something that may bear no relationship to the defendant's

particular degree of culpability. Mandatory minimum sentencing declares that we do not care even a little about a defendant's personal circumstances. These statutes announce as a policy that we are utterly uninterested in the full nature or circumstances of the defendant's crime. Mandatory minimums blind the courts to the defendant's role in the offense and his or her acceptance of responsibility. Sentencing by mandatory minimum is uniformly indifferent to whether the result furthers all or even any of the purposes of punishment.

For the above reasons and others I have described at length in prior testimony, the ABA has opposed mandatory minimums for more than 40 years.³⁷ We see no advantages of any kind to be obtained through the use of mandatory minimum statutes rather than advisory guidelines driven by the Commission's empirical research as informed by judicial feedback regarding the ongoing use of the guidelines in the courtroom.

IV. Potential Systemic Revisions

As a final matter, the Commission has requested comment on a number of specific proposals regarding the advisory system it presented in recent testimony

³⁷*See* notes 1 & 3, *supra*.

before the House Crime Subcommittee,³⁸ as well the question whether there is a need to fundamentally overhaul the structure of federal sentencing by jettisoning the advisory system in favor of a binding one. The ABA does not have formal policy on these matters, but I offer my personal views on them below.

A. The Commission's Proposals Regarding the Advisory System

Policy makers assessing the wisdom of any serious statutory change to the federal sentencing structure must weigh the need for and advantages brought by the proposed change against the possible harms that may come from their enactment. My view of this balancing mitigates against a number of the Commission's proposals because I do not see a great need for them, they do not appear likely to bring significant improvement in outcomes, and there is a significant possibility that some of the proposals will not withstand constitutional scrutiny. For example, the Commission suggests Congress should enact a statute requiring district courts to give the guidelines "substantial weight." As the data above suggest, however, most district courts already give the guidelines significant consideration. It is difficult to discern what further attention courts would give the guidelines if statutorily directed to be sure that the "weight" to be afforded them is "substantial." On the other hand,

³⁸Testimony of the Honorable Patti B. Saris before the Subcommittee on Crime, Terrorism, and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (October 12, 2011).

beyond the lone dissents of Justice Alito in *Gall*³⁹ and *Pepper*,⁴⁰ I do not read much of the Supreme Court’s growing body of post-*Booker* jurisprudence to suggest such a statute would comport with the Sixth Amendment.

I take the same view regarding the Commission’s proposals that Congress statutorily require district courts to give greater justifications for greater variances and require appellate courts to deploy a heightened standard of review for so-called “policy disagreement” variances. The data do not demonstrate a pressing need for these changes, and I believe drafting them in terms with specific enough meaning to have any reliable or predictable effect would be quite difficult. And, as with the first proposal above, I do not read the Supreme Court’s decisions in *Gall*, *Rita*, and *Kimbrough* as providing any significant comfort about the constitutionality of these measures. The lessons of numerous re-sentencings in the wake of *Booker* should counsel significant caution about the enactment of statutory sentencing modifications subject to potentially successful constitutional challenge, particularly where there is no pressing need for them and the expected benefits are marginal.

³⁹*Gall v. United States*, 552 U.S. 38 (2007).

⁴⁰*Pepper v. United States*, 131 S.Ct. 1229 (2011).

B. Advisory Guidelines Should Not Be Jettisoned In Favor of Binding Guidelines

In anticipation of *Booker*, a number of suggestions emerged regarding alternative sentencing regimes that would pass constitutional muster by triggering enhanced punishments based only on facts found by the jury. In my personal capacity, I suggested a simplified guideline system based on a limited set of core culpability factors to be determined by the jury.⁴¹ Others have since discussed such an alternative at greater length.⁴² I now believe such an overhaul is unwarranted.

First, it does not appear that a simplified system driven by jury findings would result in more uniform sentencing outcomes when compared with the present advisory system. This is because the ranges under a jury-driven system would almost

⁴¹*See* note 2, *supra*. I also participated in further and extensive discussions of this option in connection with an ABA task force chaired by Professor Steven Saltzburg whose members included the Honorable Charles Day of the District of Maryland and the Honorable Paul Friedman of the District of Columbia, as well as a task force assembled by the Constitution Project co-chaired by Edwin Meese III and Philip Heymann whose members included Judges Jon Newman, Paul Cassell, Nancy Gertner, and, until his nomination to the Supreme Court, then Circuit Judge Samuel Alito, as well as Frank Bowman. *See also* Testimony of James Felman before the Subcommittee on Crime, Terrorism, and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (March 16, 2006).

⁴²*See, e.g.,* William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305 (2011) (“At the Crossroads”); Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149 (2005).

certainly have to be significantly wider than the ranges under the present guidelines. Given that the median variance under the advisory system is roughly 12 months, virtually all sentences that are considered variances today would be well within the guideline range under a jury-driven system. To overhaul the system in this manner could actually increase variations among sentences because the ranges would be so much wider.⁴³ Starting over with an entirely new regime driven by jury fact-finding would be a significant and complex undertaking. There is no compelling reason to put the federal criminal justice system through such upheaval to accomplish sentencing results that vary more widely than under the existing advisory system.

Second, while scrapping the advisory system and substituting a new jury-driven system would be a great deal of work for little or no policy benefit, there are real potential disadvantages of such a new system. Asking juries to decide matters that were traditionally thought of as sentencing considerations could change trial dynamics in ways that are difficult to foresee and that would require highly complex jury instructions and bifurcation of proceedings in some cases. Moreover, like the initial guidelines, any system of binding guidelines will risk a return to the prior systemic flaws of undue rigidity and unwarranted uniformity.

⁴³Judge Sessions' proposal, for example, would provide for 36 ranges varying in width from 16 months to 286 months, with two-thirds of the ranges being 80 months wide or wider. *See At the Crossroads*, *supra* note 42, at 341.

Third, such a system would introduce intractable sources of unwarranted disparity. Individual prosecutors would determine the sentencing range in many cases by deciding what facts to charge and what facts to bargain away. Those decisions would not be made or explained in open court or subject to judicial review. A jury-driven system would also prevent policy evolution based on empirical data and judicial feedback. The sentencing range in each case would be set by the prosecutor's charges and the jury's fact finding or the defendant's admissions in a plea. Judges would have no role in determining the range and little ability to sentence outside the range based on individualized considerations or the purposes of sentencing.

Fourth, if the only argument for replacing the advisory system with a new jury-driven system is concern about the percentage of cases sentenced outside the guidelines range, and I have heard no other argument advanced, the argument lacks force because the rate of below-range sentences is already dropping. The promise of the continued evolution of a sentencing system that can respond to empirical research and judicial feedback stands before us. We may be on the verge of true and lasting sentencing reform. We should not quit before we have seen what can be accomplished.

Finally, it should perhaps go without saying that I believe so-called "topless" guidelines, in which the guidelines would fix only the bottom of the range, is the least

desirable of all pending guidelines proposals. This alternative may itself be unconstitutional if the Supreme Court overrules *Harris*.⁴⁴ As a policy matter this proposal does nothing to address unwarranted disparity resulting from overly severe sentences and essentially sends the message that we are unconcerned with unduly harsh sentences so long as no one is punished too leniently – a proposition that flies in the face of the long-established principles of parsimony and lenity. I also note that the “topless” proposal has been abandoned by the only person I know to have suggested it.⁴⁵ Before concluding, I would like to repeat once more that the views expressed on the Commission’s proposals and a possible jury-based sentencing system are my own and do not purport to represent the policies of the ABA.

V. Conclusion

In closing, I appreciate the Commission’s consideration of my and the ABA’s perspectives on these important issues, and we are happy to provide any additional information that the Commission might find helpful. Thank you for the opportunity to address you today.

⁴⁴*Harris v. United States*, 536 U.S. 545 (2002).

⁴⁵*See* transcript of November 16, 2004, hearing before the United States Sentencing Commission (exchange between Mr. Bowman and me); Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149 (2005).

**APPENDIX
NUMBER AND EXTEN OF DECREASE – FY2005- 2011**

		2005 After 1/12/05	2006	2007	2008	2009	2010	2011
GOVERNMENT SPONSORED								
	Total number	11,662	17,239	17,896	19,063	18,671	19,174	19,816
5K1.1	Number & percent of all below-range	7,206 61.8%	10,134 58.8%	10,049 56.1%	10,048 52.7%	9,296 49.8%	8,974 46.8%	8,298 41.9%
	Median Decrease in months	34	30	29	30	30	30	30
5K3.1	Number & percent of all below-range	3,092 26.5%	5,166 30%	5,233 29.2%	5,894 30.9%	6,701 35.9%	7,205 37.6%	8,106 40.9%
	Median Decrease in months	8	8	7	7	7	7	7
Other Govt	Number & percent of all below-range	1,364 11.7%	1,939 11.2%	2,614 14.6%	3,121 16.4%	2,674 14.3%	2,995 15.6%	3,412 17.2%
	Median Decrease in months	11	12	10	10	12	15	15
NON-GOVERNMENT SPONSORED								
	Total number	6,199	8,507	8,433	9,972	11,925	13,809	13,588
3553(a)	Number & percent of all below-range	2,979 48.1%	4,243 49.9%	4,957 58.8%	6,678 67%	8,892 74.6%	10,590 76.7%	10,476 77.1%
	Median Decrease in months	13	12	12	12	13	13	13
Down Dep	Number & percent of all below-range	1,117 18%	1,903 22.4%	1,757 20.8%	1,544 15.5%	1,456 12.2%	1,598 11.6%	1,841 13.5%
	Median Decrease in months	11.9	10	10	10	10	10	11
Down Dep w/3553(a)	Number & percent of all below-range	464 7.5%	1,432 16.8%	1,013 12%	9415 9.2%	807 6.8%	814 5.9%	849 6.2%
	Median Decrease in months	13	15	15	15	18	18	18
All Remaining (counted as non- government sponsored)	Number & percent of all below-range	1,639 26.4%	929 10.9%	706 8.4%	835 8.3%	770 6.4%	807 5.8%	422 3.1%
	Number & percent of all below-range	10	8	6	6	6	6	6

Source: USSC, 2005-2010 *Sourcebook of Federal Sentencing Statistics* tbls. 30-31D; USSC, 2011 Preliminary Quarterly Data Report, Fourth Quarter Release, tbls. 7-13