

Written Statement of Judge William K. Sessions, III, District Judge, District of Vermont
Before a hearing of the United States Sentencing Commission
Washington, DC, February 16, 2012

THOMAS E. FAIRCHILD LECTURE

INTRODUCTION

Good afternoon. It is an enormous honor and pleasure to be here with you today to deliver the twenty third Thomas E. Fairchild lecture. Judge Fairchild served with exceptional distinction on the United States Court of Appeals for the Seventh Circuit for forty-one years, from 1966 up until his death in February 2007. He was a man of extraordinary courage which led him to run as a Progressive Democrat against Senator Joseph McCarthy in the 1950s. He was a passionate protector of civil rights and civil liberties for all Americans, and at the same time he was described by those who appeared before him as empathetic, kind, courteous and wise. He was a legendary judge, and what an honor to participate in this lecture series.

I have been asked to give a lecture. I am reminded of comments made by Judge Richard Arnold of the Sixth Circuit when he was asked to give a lecture. Judge Arnold was a personal friend and one of my heroes. He observed: "I dislike the term lecture. I am not really sure why anybody would come to an event billed as a lecture. I supposed the students had to come. I don't know what inducement was offered to you or what punishment was threatened, but no one likes to be lectured at or lectured to. So I think of this as a conversation." So just as Judge Arnold approached his lecture as a conversation, so shall I.

INTRODUCTION OF TOPIC

My charge today is to discuss the evolution of federal sentencing policy since the Sentencing Reform Act of 1984 and the changing role of the United States Sentencing Commission. I'll focus particularly on the past 11 years during which I served on the Commission. But in a broader sense, I'll reflect on my observations of how our system of government works on issues as controversial as sentencing policy.

The mid-1990's were turbulent times for the Sentencing Commission. In fact, from 1997 to 1999 there were no commissioners. In 1999, President Clinton appointed me and six other Commissioners to serve on the United States Sentencing Commission. We were confirmed by the Senate as part of a grand compromise between the parties in Congress. I served for eleven years on the Commission, having been reappointed by President Bush in 2004. President Obama nominated me to serve as Chair of the Commission soon after he assumed the Presidency, and I was subsequently confirmed by the Senate in September 2009. My term expired in December 2010.

One might ask how does a judge from the sticks of Vermont – and I am from the sticks; my home town has a population of about 1,000 - get picked by Presidents Clinton, Bush and Obama to serve on the Commission and ultimately become its Chair. It clearly was a merit selection. My merit was having been a campaign manager and friend of the Chairman of the Senate Judiciary Committee, Patrick Leahy. But that's a story for another day.

The Commission sets sentencing policy in a most generalized way it establishes guidelines and policy directives for the courts. And in doing so, it works at the center of and in response to the demands of the three branches of government, each of which claims an interest in sentencing policy. Its members are appointed by the President and confirmed by the Senate.

During that decade-long period, sentencing policy endured a number of tidal waves of change in policy directives brought by Congress and the Supreme Court. I will describe the inherent tension among the branches of government and the inevitable upheavals in policy that tension creates. Many of those changes over the past 10 years have resulted in a consistent increase in penalties, and not coincidentally, the federal prison population has mushroomed. Between 1999 and 2010, the federal prison population increased by 76% from 119,185 to 210,142, resulting in a 37% over-capacity in the Bureau of Prisons facilities. I'll then give you my assessment of federal sentencing policy today.

Finally, I'll describe proposals for change in the guideline structure, to provide a greater sense of stability and overall fairness. I propose a new presumptive guideline structure in return for reduced numbers of mandatory minimum sentences. This new system would have wider ranges within the sentencing table to provide more judicial discretion and would allow for greater use of offender characteristics to permit judges to more accurately tailor sentences to individual defendants and the circumstances of each case. Finally, I propose a more rigorous appellate standard of review to insure greater consistency across the country.

But before setting forth my proposals, let me put the federal guideline system in its proper historical context.

SENTENCING REFORM ACT OF 1984

The historical underpinnings of the Commission and the guidelines appeared more than a decade before the enactment of the Sentencing Reform Act (“SRA”)¹ when, in 1973, Judge Marvin E. Frankel published his brief but potent book, *Criminal Sentences: Law Without Order*. His monograph described the existing federal sentencing system, in which federal judges

imposed sentences within broad statutory ranges of imprisonment without any uniform standards and typically with little transparency. He described “wanton and freakish disparities” that existed in federal sentencing whereby defendants with similar offenses and records received dramatically different sentences from different judges. He reacted by proposing significant changes in the system, including three key reforms: (1) creation of a sentencing commission made up of experts in the field; (2) the creation by such a commission of a detailed profile of factors that would include a numerical grading system of offense and offender characteristics; and (3) meaningful appellate review to assure consistency.

Judge Frankel’s proposals resonated among academics and on Capitol Hill, particularly with Senators Edward Kennedy and Strom Thurmond, and led to the passage of the Sentencing Reform Act of 1984. In enacting the SRA, Congress sought to achieve several noble purposes, including: (1) the reduction of “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors”; (2) truth in sentencing by removing parole; and (3) transparency in sentencing by creating a detailed, rational process for determining a sentence. The guideline structure was to be authored and monitored by a new Sentencing Commission. The SRA envisioned the Sentencing Commission as an “independent,” “expert” agency located within the Judiciary but answerable to all branches of government.

The original Sentencing Commission submitted proposed guidelines to Congress in 1987. The guidelines went into effect in November of that year. The guidelines drafted by the Commission were a product of many compromises, according to one of its authors, Justice Stephen Breyer. The sentencing guidelines that went into effect in 1987 reflected a “mandatory”

or “presumptive” system by which federal judges were provided detailed guidance in the exercise of their sentencing authority. Superimposed on the existing, typically broad, statutory ranges of punishment were binding, narrower guidelines ranges that in many cases were driven by extremely detailed sentencing factors. Those ranges were modeled on a grid system, with axes for offense levels and criminal history.

With respect to offense conduct, the guidelines provided that virtually all aspects of the offense of conviction as well as any related or relevant conduct before, during and after the offense of conviction were pertinent at sentencing, including relevant uncharged conduct that was proven by a preponderance of evidence. In fact, acquitted conduct could also be considered. The offense conduct would be rated on a scale of 43 offense levels.

A separate scale was created for analyzing a defendant’s criminal history with sex categories. The initial determination of the sentencing range would be calculated where the offense level and the criminal history category met on the grid. The severity levels were set based upon a study of average sentences that were imposed for given offenses, but then skewed by new minimum sentences passed by Congress. The Commission then added a number of aggravating or mitigating factors which increased or decreased the severity of the sentence for the underlying criminal offense. The Commission discouraged consideration of many offender characteristics, such as age and family circumstances, and instead focused on a defendant’s criminal record as the most important offender characteristic. Adjustments or departures from the guideline structure were authorized only in exceptional circumstances.

EXHIBIT 1: SENTENCING TABLE

EXHIBIT 2: 2D.I.I

EXHIBIT 3: CHAPTER 3 ACCEPTANCE OF RESPONSIBILITY, ROLE IN
OFFENSE

EXHIBIT 4: 5H - AGE, MENTAL AND EMOTIONAL CONDITION

EXHIBIT 5: 18 U.S.C. SEC. 3553(A)

From the outset, many sentencing judges, practitioners and academics criticized the guidelines system as being too complex, rigid and harsh and as having replaced judges' traditional sentencing discretion with an inflexible formula that turned judges into computers. Judges in particular objected to the inability to use offender characteristics to fashion sentences they deemed just.

COMMISSION'S ROLE IN RELATIONSHIP TO BRANCHES OF GOVERNMENT

The Commission functions at the crossroads of the three branches of government. Each branch has a constitutional investment in sentencing policy. Although the Commission is an agency within the Judiciary, its members are selected by the Executive and confirmed by the Legislature. The Commission is charged with passing amendments to the guidelines, but those amendments become effective only if Congress has not rejected them within six months of passage.

Each branch of the federal government has a unique interest in sentencing policy, due in large part to its respective role in government. Congress defines criminal offenses and prescribes sanctions. It has traditionally set maximum, and in many cases, minimum sentences for those offenses it creates. The Executive branch has the responsibility to execute the laws, and to that extent has an interest in seeing that criminal offenses result in just punishments. And judges, of course, have the duty to insure justice is done in each case by the sentences they impose. Each branch places demands upon the Commission to establish penalties and procedures that satisfy

its constitutional interests, oftentimes at the expense of the interests of the other branches. The struggle over the interests of each branch of government has dominated the Commission's history since its inception.

Congress afforded the Commission wide latitude concerning federal sentencing policy when it enacted the SRA in 1984. Yet, within two years of passage of the SRA and before the Guidelines took effect, Congress proceeded to co-opt a significant area of sentencing policy by enacting mandatory minimum statutory penalties in a large segment of federal criminal cases, mostly drug and firearms offenses. Congress imposed five and ten year mandatory minimum sentences for numerous drug trafficking offenses and a five year mandatory minimum sentence if a weapon was possessed in furtherance of drug activity.

These mandatory minimum sentences conflict both in practice and spirit with a guideline system. Their impact can be felt in two distinct ways. First, the statutory mandatory minimum sentences are often greater than the sentences called for by the guidelines, resulting in the guideline sentences being "trumped" by the mandatory minimums. Second, the original Commission made an important policy decision in setting guideline ranges. Where Congress had made a policy decision regarding penalties for given criminal acts by imposing mandatory minimums, the Commission would incorporate those policy decisions into the Guidelines so that "cliffs" between guideline and mandatory minimum sentences would be reduced. Thus, the Guideline ranges were impacted directly by the passage of mandatory minimums, resulting in the constant ratcheting-up of penalties as a result of Congressional action.

In addition to, or sometimes in lieu of, mandatory minimums, Congress has issued countless directives to the Commission over the past twenty-five years. There have been different species of directives, some of which required precise changes in specific guidelines.

Some directives have been appropriate reflections of congressional oversight that highlighted general policy concerns, while others invaded the detailed work of the Commission. Such was the case with the directives issued by the PROTECT Act in 2003 which mandated precise changes to the guidelines. Even when directives have not dictated specific increases in guideline penalties, the Commission often has felt compelled to add additional aggravating factors and thereby increase guideline sentences in order to ward off mandatory minimum penalties.

The Commission's relationship with Congress became most strained in 1995 over mandatory minimum sentences for crack cocaine. Congress had set a five year threshold penalty for possession or distribution of five grams of crack cocaine, while the same threshold for powder cocaine was established at 500 grams, a ratio of 100-1. The Commission by a vote of 4 to 3 promulgated an amendment and issued an accompanying report to Congress recommending that penalties for powder and crack cocaine be equalized. For the first and only time in history, Congress rejected an amendment proposed by the Commission and an accompanying amendment regarding penalties for money laundering. Congress then failed to reappoint any of the commissioners when their terms expired. By 1998, the Sentencing Commission had no commissioners.

Meanwhile, struggle between Congress and the Judiciary over sentencing policy continued. In 1996, the Supreme Court in *Koon v. United States*, reallocated to district judges more discretion to impose sentences below the guideline ranges by amending the appellate standard for departures. In *Koon*, the Court held that a sentencing judge's discretion to depart from a sentence within the Guideline range was to be reviewed with "substantial deference on appeal" - for abuse of discretion - rather than de novo as the executive branch had advocated. Within three years of *Koon*, district courts were exercising broader discretion and departing from

the guidelines in significantly greater numbers. Between 1995 and 1999, the number of non-government-sponsored or judge-initiated downward departures had nearly doubled, rising from 8.4% to 15.8%.

In response to the growing number of departures, Congress enacted the PROTECT Act of 2003, which reallocated power in the federal sentencing arena away from the judiciary. Among other things, it required the Attorney General to report to Congress on downward departures. It amended the SRA to provide for a maximum--rather than, as before minimum--of three federal judges as members of the Commission. The legislation also dictated precise changes in the child pornography guidelines, mandating specific offense levels for certain conduct and severely restricting downward departures in these and other types of cases. The Act provided a return to pre-*Koon* de novo appellate review in all types of federal criminal cases. Finally it contained a directive to the Commission to “substantially reduce” the number of downward departures generally.

The Supreme Court responded quickly with a series of cases which had the effect of dramatically reclaiming judicial discretion in sentencing. In *Blakely v. Washington*, construing a state “presumptive” guideline scheme, the Court held that, if a guideline system ordinarily requires a sentence to be imposed within a certain guidelines range, (typically well below the statutory maximum of the relevant penal statute), a jury, not a judge, must find beyond a reasonable doubt the facts justifying a sentence above the otherwise applicable guideline range. In other words, a defendant has a right to have a jury decide whenever a proposed sentence is above the guideline range. *Booker v. United States* soon followed, in which the Court essentially applied the *Blakely* decision to the federal guidelines. In *Booker*, the Court held that, as long as the guidelines remained mandatory, a sentencing court would violate the Constitution if it

increased an offender's sentence above the guidelines range based on aggravating facts not found beyond a reasonable doubt by a jury. It then obviated the constitutional issue by judicially rewriting the SRA to make the guidelines merely advisory. Judges were to apply a three-step process in passing sentence. First, since the guidelines remained an important part in the sentencing process, judges were to make the guideline calculations and establish a guideline range. Next, they were to determine if any departure grounds were applicable. Finally, sentencing courts were to consider the factors set forth in 18 U.S.C. §3553(a) to determine if the guideline sentence was greater than necessary to satisfy the purposes of sentencing. Many of the § 3553(a) factors require a sentencing court to consider the personal characteristics of the offender in establishing a fair and just sentence, factors generally discouraged by the guidelines.

Two subsequent decisions in 2007 reinforced *Booker*. In *Kimbrough v. United States*, a case addressing application of the crack-powder cocaine disparity within the guidelines, the Supreme Court held that district courts are free to reject particular guidelines as a matter of "policy" differences with Congress's and the Commission's judgments and to vary from the guidelines to impose a non-guideline sentence under 18 U.S.C. §3553(a). In *Gall v. United States*, the Court rejected the government's argument that a district court may not impose a non-guidelines sentence except in an extraordinary case. *Kimbrough* and *Gall* have been applied most recently in *Pepper v. United States*, in which the Court held that sentencing judges may reject policy determinations made by the Commission and to impose non-Guideline sentences if they disagree with the Commission's views. As a consequence of *Booker*, *Kimbrough*, *Gall* and now *Pepper*, district courts must give the Commission's policy directives "respectful consideration" but are free to reject policy directives from Congress and the Commission in appropriate circumstances, a clear challenge to Congress's and the Commission's role in

sentencing. Courts have increasingly imposed sentences outside the guideline range, and in only the most extreme cases have the courts of appeal reversed such variances as “substantively unreasonable.”

Justice Breyer stated in his opinion in *Booker* that the “ball” is now in Congress’s court, suggesting Congress needs to take the next step in this evolving process. To date, there has been no *Booker* “fix”, if what is meant by such a “fix” is one piece of legislation which will dramatically limit the exercise of judicial discretion. But the real “fix” is in the passage of more mandatory minimum sentences in which Congress sets the sentence. The call for more and more mandatory minimum sentences has increased among members of Congress. We may see legislation along the lines of the PROTECT Act, designed to roll back judicial discretion and to establish Congressional will through a reinforced guideline system, or, as has been happening since *Booker*, we may see more and more mandatory minimum sentences. Either way, Congress appears poised to act.

WHERE ARE WE NOW AND WHERE ARE WE HEADING

The framers of the guidelines system envisioned an independent, bipartisan body staffed by experts in sentencing policy who would create, monitor and modify, as warranted, a set of guidelines that would be followed by judges and practitioners. Congress envisioned the guidelines would have a certain level of flexibility to permit judges to adjust sentences based upon individualized factors and that judges would respect the policy-making role of Congress in setting statutory penalty ranges. Congress had intended to set maximum, and in rare cases, minimum penalties as criminal sanctions but to refrain from defining and adjusting individual guidelines.

In the past twenty-five years, the guidelines system has undergone seismic shifts in policy, prompted by decisions of Congress and The Supreme Court. Now is a suitable time to reflect upon the system as a whole, especially to assess it in comparison with the intentions and expectations of those who created it. In particular, what impact have those changes in policy had upon federal sentencing practices?

For the answer, we turn to studies and sentencing statistics compiled by the Commission. Each sentence imposed in the federal system is forwarded to the Commission for analysis. The Commission reports the results of its analyses of all federal sentences on an annual basis. Trends taken from those statistics form the basis of policy decisions made by the Commission.

A. Judges and the Guidelines Culture

In 1987, when the federal sentencing guidelines first went into effect, the notion of sentencing pursuant to mandatory guidelines and a numeric grid was foreign to everyone in the federal criminal justice system. More than anyone, federal district judges balked at the guidelines as anathema to the concept of “judging.” A quarter century later, a different view of sentencing guidelines prevails among district judges--the vast majority of whom were appointed to the bench after the guidelines went into effect. The Commission conducted a survey of district judges in 2010 to explore their views regarding the functioning of the guideline system. Seventy-five percent of responding judges preferred the *Booker* “advisory” system currently in place to the pre-*Booker* “mandatory” system. Yet most judges are supportive of the guidelines structure. In that same survey, 78% opined that the guidelines reduced disparity, and 67% felt that the guidelines increased fairness. Judges support the “real offense” sentencing model upon which the federal guidelines are based, including “relevant conduct” and the preponderance of evidence standard applicable at sentencing. With exceptions for possession of child pornography

and crack cocaine offenses, most judges do not object to the overall severity of the Guidelines offense levels. That observation is supported by sentencing statistics which show that, with the exception of sentences for crack cocaine and possession of child pornography, the average length of imprisonment for all other offenses has remained relatively constant over the past ten years, despite *Booker* and its progeny. Even when judges depart from guideline ranges, the average length of those adjustments has remained consistent and relatively modest. Essentially, then, the guidelines have become accepted as part of the culture of the federal criminal justice system.

But patterns in post-*Booker* sentencing statistics suggest signs of increasing disparities among districts and circuits and within individual courthouses. Sentences within the applicable guideline range have slipped from 56.8% one year ago to 54% in October, 2010. Judicially initiated departures or variances have increased from 13.8% in 2008 to 18% in 2010.

Comparison of sentencing statistics among circuits reveal even more significant disparities. In the third quarter of 2010, defendants in the District of Columbia Circuit were given sentences within the applicable guideline range in only 31.3% of cases, while judges in the Fifth Circuit imposed guideline sentences in 71.3% of cases. In the First Circuit, within-range sentences in the District of Massachusetts represented only 28.3% of cases while in the District of Puerto Rico, within-range sentences represented 72.1% of all cases. In a recent article published in the *Stanford Law Review* studying the post-*Booker* sentencing patterns of judges in Boston, Professor Ryan W. Scott observed a dramatic spike in inter-judge sentencing disparity.

The Commission's sentencing statistics reflect a troubling increase in sentencing disparities--both inter-judge and demographic disparities. As noted earlier, the primary purpose of the SRA was to reduce unwarranted disparities in sentencing. If Congress concludes, based upon national statistics, that the current guidelines system fails to reduce unwarranted disparities

because of inconsistent sentencing practices under the advisory regime, the most obvious remedy is the increased use of mandatory minimum sentences.

B. Mandatory Minimum Sentences

The initial Sentencing Commission created a guideline structure that was “mandatory” or “presumptive”, whereby judges were discouraged from departing from applicable guideline ranges absent exceptional circumstances. Mandatory minimum sentences were unnecessary in such a system, as the guidelines had adequate authority to direct that certain sentences be imposed. In 1991, the Commission filed a report with Congress opposing the use of mandatory minimum sentences as inconsistent with a rational guideline structure. However, Congress’s commitment to the guideline system has been inconsistent. Since 1991, the number of criminal statutes which have mandatory minimum sentences has increased by more than 78%. There are now over 170 provisions which bear mandatory minimum sentences. Twenty-eight percent of the federal criminal cases subject to sentencing guidelines in 2009 involved statutes that carried mandatory minimums. That figure increases to 40% of the docket if immigration cases are excluded. The impact of mandatory minimum sentences is further exacerbated by the Commission’s decision to tie the guidelines to mandatory minimum sentences and Congress’s directive in the PROTECT Act to require the Commission to adopt guidelines that are “consistent with all pertinent provisions of any Federal statute...” In practice, the Commission has increased guidelines penalties each time a new mandatory minimum sentence is passed by Congress. As a result, penalties have increased significantly over time, resulting in the dramatic increase in the federal prison population I described earlier.

It is not my intention to dwell on the wisdom of mandatory minimum sentencing as a matter of policy or to criticize the Commission's linkage of the guideline ranges to mandatory minimums. Congress has the constitutional authority to establish sentencing policy. It may be true that creating mandatory minimum sentences with penalties at relatively low levels could further a worthy goal by helping to ensure certainty of punishment while leaving to judges and practitioners the ultimate authority to determine appropriate sentences. The problem lies with mandatory minimum sentences that require significant lengths of imprisonment. Those sentences are overly blunt instruments, bringing undue focus upon the charge of which a defendant is convicted to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of the individual defendant. Mandatory minimum sentences set at severe thresholds increase disrespect for the guideline system and encourage practitioners to use techniques to circumvent their implementation.

C. Specific Directives from Congress

Congress's use of specific directives to the Commission to amend guidelines provisions has increased significantly over the past decade. The directives have had varying degrees of flexibility in implementing changes to penalties. The PROTECT Act marked a dramatic change in the nature of directives to the Commission. In that statute, Congress directed the Commission to make specific changes to guidelines, including incorporating certain increases in enhancements based upon conduct Congress felt worthy of such changes. That meant the Commission could not conduct rigorous empirical research before amending the guidelines, nor could the Commission ensure that the changes were consistent with other guidelines. In an advisory Guidelines system, the Commission must be able to demonstrate to judges and

practitioners that its changes to the Guidelines have been empirically researched and justified. The Commission's inability to justify amendments dictated by Congress fosters disrespect for the Guidelines system. Moreover, specific directives from Congress result in guidelines that are oftentimes criticized for their complexity and their inconsistency with other provisions in the manual.

But the most important reason to eliminate or reduce specific Congressional directives is that they marginalize the role of the Commission in creating sentencing policy. The Commission's role is to perform as the expert body in the field. The Commission must respect Congress's role in sentencing, but at the same time be able to exercise independent judgment. The Commission's acceptance by the criminal justice community depends upon respect for the exercise of its expertise, and specific directives which usurp its policy-making function debases that respect.

D. Offender Characteristics

During the past two years, the Commission traveled throughout the United States, hearing from judges and practitioners their concerns and suggestions about sentencing policy. The Commission consistently heard from judges suggestions to expand discretion at the lower offense levels, to provide alternatives to imprisonment for low-level, non-violent offenders who would benefit from treatment, and to bring consistency between the guidelines and 18 U.S.C. §3553(a). (That section encourages judges to use offender characteristics as factors in arriving at sentences that are no greater than necessary to satisfy the purposes in sentencing.)

The original Commission interpreted the SRA as discouraging the consideration of most offender characteristics at sentencing. The original guidelines thus instructed that age, mental condition, physical condition and military history, among other factors, were not ordinarily

relevant to a judge's assessment of a proper sentence. Such a limitation created confusion among judges, since § 3553(a)(1) instructed them- without limitation - to consider "the history and characteristics of the defendant" in imposing sentence.

During the past year, the Commission made great progress in changing policy in regard to applying offender characteristics as a part of the guideline system this past year. Factors such as age, mental, physical or emotional condition, and military history may now be relevant in certain circumstances. The Commission has more to do in this arena, by expanding the use of offender characteristics in sentencing and by educating judges and practitioners on social science research related to use of these characteristics. Often there are volumes of research addressing the relevance of characteristics such as age to risk of recidivism. The role of educating judges on the relevance of offender characteristics is a new, but vital one. It should be a central part of the Commission's function as the expert body in the sentencing policy arena.

PROPOSAL FOR A REFORMED GUIDELINES SYSTEM THAT RENEWS THE SPIRIT OF THE SENTENCING REFORM ACT OF 1984.

It is entirely reasonable, indeed enlightened, to seek to avoid disparities in sentencing between different judges who sentence similar defendants with similar backgrounds who commit similar crimes. Critics of guidelines who decry unwarranted uniformity in guidelines sentences also have a point. A fair and rational sentencing system would not impose similar sentences on defendants who are dissimilar in significant, relevant respects, regarding either their own personal characteristics or the circumstances of their offenses. Determining what characteristics are relevant at sentencing to distinguish among offenders who committed similar criminal offenses is the rub.

The Sentencing Commission has promulgated guidelines that identify myriad factors it feels are “relevant” in the sentencing decision. The current set of guidelines is an extremely detailed and complex collection of policy choices by the Commission, and in some cases by Congress, which has been monitored and informed by actual sentencing practices. The Guidelines seek to achieve balance among the three most important yet competing considerations in a rational, humane and cost-effective sentencing system: (1) avoiding unwarranted sentencing disparities between similarly situated defendants; (2) treating defendants as unique human beings with unique personal characteristics and criminal histories; and (3) protecting the public from future crimes in a cost-effective manner. Twenty-five years under the federal Sentencing Guidelines has taught that its level of complexity has failed to achieve the appropriate balance among those objectives. The reasons why our complex system fails to achieve the correct balance are straight-forward: it tends to minimize the fact that sentencing judges are thoroughly competent to exercise discretion in sentencing defendants based on a totality of unique facts and circumstances. A sentencing system should strike a balance between limiting judges’ abilities to use their own subjective sense of justice so to reduce disparity and offering judges the right to consider unique aspects of offenders and the offenses that they committed in fashioning an appropriate sentence. Too much complexity in Guidelines for the purpose of limiting judicial discretion puts a thumb on the scales in favor of the former, while too much simplicity as a means of affording significant discretion puts a thumb on the scale in favor of the latter.

As an initial matter, I agree with Professor Kevin Reitz, the reporter for the ALI’s Model Penal Code’s Sentencing Revision, that “voluntary [guidelines] provisions are by definition unenforceable and thus allow for the emergence of sentencing disparities that motivated many American sentencing reforms in the first instance.” “Binding guidelines and searching appellate

review are needed to make sentencing decisions more consistent and legitimate.” If the guidelines are once again presumptive, as they were before *Booker*, there will be little if any need for severe mandatory minimum statutory provisions, which are contrary to a rational guidelines system. In the words of Senators Kennedy, Hatch, and Feinstein, who filed an amicus curiae brief in *Booker*: presumptive guidelines “offer [] middle-ground approach between sticking with the failed [pre-SRA] indeterminate system of sentencing and adopting a rigid system of determinate sentencing, in which Congress specific[s] applicable sentences for federal offenses and judges simply impose [] sentence without any individualized consideration of the offender or his criminal conduct.”

In that same spirit of compromise that produced the original sentencing guidelines in the mid-1980's, I set out a proposal that meets the principal objective of all three branches of government: presumptive guidelines subject to meaningful appellate review that are simpler than the current guidelines, that afford sentencing judges meaningful discretion within fewer and broader sentencing ranges, and that are subject to few or no mandatory minimum statutes.

A. Broader Presumptive Ranges with Advisory Sub-Ranges

The sentencing grid is the most important part of a guidelines system because it provides the mechanism for implementing the calculations that consider both offense and offender characteristics. The current table has 43 offense levels and 6 criminal history categories. Add to that complexity a vast array of different guidelines that have grown increasingly detailed over the years as a result of the “factor creep” described earlier, many of which have invited litigation over sentencing minutiae. A simpler grid with fewer and broader sentencing ranges would be the most significant reform in the federal guidelines structure.

I recommend consolidating offense levels and criminal history categories to reduce the current system's use of 258 possible ranges or cells to between 30 and 50 ranges. Rather than having separate cells for each of the 43 offense levels, my proposal would tie groups of offense levels to a single broader cell on the grid. As an example, I would tie offense levels 10 through 18 into a single cell, suggesting offenders with scores at the lower and higher levels of the range be sentenced toward the bottom and at the top end of the sentencing range accordingly. I propose including three sub-ranges within each larger cell. The middle of the three ranges would represent the appropriate sentencing range for a typical case in that cell. This simplified grid would include certain cells that would afford court discretion to impose an alternative sentence, such as probation with conditions of home detention or community confinement. I have intentionally broadened the use of alternatives to imprisonment in my proposed grid. I agree with Attorney General Holder that a "smart sentencing" regime is more open to alternative sentences in appropriate cases - in particular, in the case of a "first offender who has not been convicted of a crime of violence or an otherwise serious offense."

EXHIBIT 6: NEW SENTENCING TABLE

EXHIBIT 7: NEW USE OF OFFENDER CHARACTERISTICS

The current guidelines' use of six criminal history categories is sound and is based on solid empirical evidence related to recidivism, which is the primary reason for considering a defendant's criminal history as a basis for increasing punishment. However for the sake of simplification and without under-cutting the predictive value of a defendant's criminal history score, I propose that the six categories be reduced to four in a manner that would still adequately take recidivism into consideration.

Central to my proposal is a fundamental pre-requisite: the resurrection of a presumptive guideline system in response to a reduction in the use of mandatory minimum sentences. My proposed guideline system would pass constitutional muster under both *Blakely* and *Booker*. In calculating a defendant's offense level so as to determine in which cell on the grid a defendant would fall, a judge would be constrained by the Sixth Amendment principle outlined in *Blakely* - meaning that any facts that would increase the base offense level in a manner that also would increase the maximum of the applicable cell on the grid would have to be submitted to a jury and proved beyond a reasonable doubt. Some core aggravating facts, such as drug quantity, loss amount, use of weapons and violence enhancements may require a jury determination, since those factors would impact changes in grid scores. Of course, there is nothing unusual about jury involvement in sentencing in our jurisprudence. As Judge Richard Posner stated in the lower court opinion in *Booker*, “[t]here is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated trial....”

My proposal includes an important “advisory” aspect to the otherwise presumptive nature of the guidelines. Within each cell on the grid, a judge would have discretion to impose a sentence within any of the three sub-ranges. In this sense, the within-cell ranges would be advisory, in the same manner as the entire guideline table is now advisory under *Booker*. Because the sub-ranges would be advisory, a sentencing judge could impose, consistent with the Constitution, a sentence anywhere within the larger cell; aggravating factors that would not alter the calculation of which larger cell a defendant falls in would not be subject to *Blakely* requirements. I envision judges considering aggravating and mitigating circumstances in deciding where within the larger cell the sentence will fall. In our current parlance, my system

would be “*Blakely*-ized” with respect to the larger cells but “*Booker*-ized” with respect to the three sub-ranges within each cell.

B. Simpler Guidelines

Another proposal for simplification would reduce the number of numeric aggravating and mitigating factors in the Guidelines that result in increases and occasional decreases in the base offense level. The current complex scheme of aggravating factors “has provided an opening for continued congressional intervention in the details of sentencing law.”

As a means of achieving meaningful simplification, the system would distinguish between two types of aggravating factors: (1) those core aggravators that impact which cell is to be applied and must be proven beyond a reasonable doubt to a jury; and (2) a second type of aggravator that would be advisory and would be relegated to the application notes following the relevant guideline. The core aggravators would continue to have numeric values, since they will be applied to determine the applicable cell. The advisory aggravating factors will have no numeric value and would be the basis of a judge’s exercise of discretion to impose a sentence in the higher sub-range within a particular cell. Most of the Chapter Three adjustments, such as obstruction of justice and role in offense, would become advisory considerations for choosing sub-ranges within a cell. The one exception would be acceptance of responsibility, which would continue to involve a numeric reduction in the offense level.

In retooling the guidelines in the manner I have described here, the Sentencing Commission would be required to make difficult policy choices in deciding which aggravators would remain in the guidelines and which would become advisory considerations in the application notes. But that potential difficulty should not bar this type of simplification reform.

C. Relevant Conduct

Uncharged relevant conduct would play a much more limited role in my proposed guideline system. In a *Blakely*-ized system, an offense level could not be adjusted upward based on conduct that is not charged in an indictment and proved to a jury beyond a reasonable doubt. Uncharged relevant conduct could only be used to sentence within a larger cell on the simplified grid (and then only if found by the court by a preponderance of the evidence). Acquitted conduct, a highly controversial topic in the post-SRA era, could not increase a defendant's offense level, but could be considered within sub-ranges.

D. Departures and Variances

The new system would significantly affect the practice of “departures” and “variances,” both the upward and downward varieties. Variances and departures would be merged, since the guidelines would become presumptive and factors within §3553(a) would be incorporated within the guideline structure. Upward departures would no longer be available. Most of the upward departures granted in the current system, which have consistently taken place in less than 2% of the cases, would be subsumed within the expanded ranges. The other upward departures – those that would increase sentences beyond the expanded ranges – would require notice and proof to a jury beyond a reasonable doubt in the *Blakely*-ized system.

Judges would continue to have the discretion to depart downward from the guideline structure, although discretion to depart would be based on truly extraordinary offender or offense characteristics. The system would not change the current rules concerning a sentencing court's consideration of a defendant's prior convictions. A defendant's criminal record would remain an important consideration under Chapter Four of the Guidelines. The current practice of downward departures based on a defendant's “substantial assistance” to the authorities under USSC §5K1.1 would continue as well.

E. Heightened Appellate Scrutiny

The issue of appellate review in a simplified system is critical. To put it bluntly, as others have, “[t]he threat of reversal [on appeal] is a key component of [effective] guidelines.” In this post-Booker world, there is a good deal of confusion and uncertainty about whether there is any meaningful appellate review of sentences. Appellate review in the system I propose would promote the legitimacy of the new presumptive guidelines. Appeals would involve a determination whether the judge applied the guidelines correctly. District courts’ choices of sentences within an applicable cell on the grid would be essentially unreviewable on appeal as long as the courts considered all of the relevant aggravating and mitigating factors and all relevant factors in the manual. Government appeals of downward departures would receive relatively strict scrutiny by the appellate courts, thereby maintaining the presumptive nature of the simplified guideline system.

F. Benefits of Proposed Guideline System

The presumptive system I’ve described is aimed at reducing unwarranted sentencing disparities, yet it also seeks to afford sentencing judges meaningful discretion within broader ranges to consider relevant offense and offender characteristics. It would be much simpler to implement, it would reduce disparities by reducing departures, and it would conserve judicial resources by simplifying appellate review. The system would also satisfy constitutional concerns under *Blakely* and *Booker* and is respectful of the important role of judges and juries in our democratic form of government. Most importantly, the system may result in the elimination or reduced use of mandatory minimum sentences, since the presumptive guideline system will ensure consistency and accountability in sentencing.

Thank you for being patient in listening to my comments. It has been a true honor to give this lecture. I look forward to hearing your questions, thoughts or comments.

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8
Zone A	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
	9	4-10	6-12	8-14	12-18	18-24
Zone B	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
	12	10-16	12-18	15-21	21-27	27-33
Zone C	13	12-18	15-21	18-24	24-30	30-37
	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	Zone D	25	57-71	63-78	70-87	84-105
26		63-78	70-87	78-97	92-115	110-137
27		70-87	78-97	87-108	100-125	120-150
28		78-97	87-108	97-121	110-137	130-162
29		87-108	97-121	108-135	121-151	140-175
30		97-121	108-135	121-151	135-168	151-188
31		108-135	121-151	135-168	151-188	168-210
32		121-151	135-168	151-188	168-210	188-235
33		135-168	151-188	168-210	188-235	210-262
34		151-188	168-210	188-235	210-262	235-293
35		168-210	188-235	210-262	235-293	262-327
36		188-235	210-262	235-293	262-327	292-365
37		210-262	235-293	262-327	292-365	324-405
38		235-293	262-327	292-365	324-405	360-life
39		262-327	292-365	324-405	360-life	360-life
40		292-365	324-405	360-life	360-life	360-life
41		324-405	360-life	360-life	360-life	360-life
42		360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	

PART D - OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

Historical Note: Effective November 1, 1987. Amended effective November 1, 2007 (see Appendix C, amendment 711).

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by 2 levels; (ii) level **34** or level **36**, decrease by 3 levels; or (iii) level **38**, decrease by 4 levels.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the

controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

- (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.
- (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.
- (5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.
- (6) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.
- (7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.
- (8) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.
- (9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.
- (10) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
 - (C) If—

- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.
- (11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

PART B - ROLE IN THE OFFENSE*Introductory Commentary*

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 345); November 1, 1992 (see Appendix C, amendment 456).

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

PART E - ACCEPTANCE OF RESPONSIBILITY**§3E1.1. Acceptance of Responsibility**

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

PART H - SPECIFIC OFFENDER CHARACTERISTICS*Introductory Commentary*

The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.

The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 357); November 1, 1991 (see Appendix C, amendment 386); November 1, 1994 (see Appendix C, amendment 508); October 27, 2003 (see Appendix C, amendment 651).

§5H1.1. Age (Policy Statement)

Age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 1997 (see Appendix C, amendment 569); November 1, 2004 (see Appendix C, amendment 674).

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

EXHIBIT VI

My proposed sentencing grid would look something like this:

Criminal History Category

(Criminal History Points)

Italicized Ranges Permit Alternative Sentences

Offense Levels	I (0-1)	II (2-5)	III (6-9)	IV (10 or more)
	<i>0-5</i>	<i>0-7</i>	<i>0-8</i>	<i>0-10</i>
1-12	6-10	8-14	9-17	11-21
	<i>10-16</i>	<i>15-22</i>	<i>18-27</i>	<i>22-32</i>
13-18	12-19	15-22	18-27	20-35
	<i>20-26</i>	<i>23-31</i>	<i>28-38</i>	<i>36-50</i>
	<i>27-33</i>	<i>32-40</i>	<i>39-48</i>	<i>51-66</i>
19-24	30-41	33-46	37-54	41-69
	<i>42-52</i>	<i>47-61</i>	<i>55-73</i>	<i>70-98</i>
	<i>53-63</i>	<i>62-76</i>	<i>74-91</i>	<i>99-126</i>
25-30	57-78	63-90	70-104	75-131
	<i>79-99</i>	<i>91-117</i>	<i>105-139</i>	<i>132-186</i>
	<i>100-121</i>	<i>118-145</i>	<i>140-174</i>	<i>187-242</i>
31-34	108-134	121-155	135-180	150-225
	<i>135-161</i>	<i>156-190</i>	<i>181-225</i>	<i>226-300</i>
	<i>162-188</i>	<i>191-226</i>	<i>226-271</i>	<i>301-376</i>
35-36	168-190	188-219	210-252	240-316
	<i>191-213</i>	<i>220-250</i>	<i>253-295</i>	<i>317-393</i>
	<i>214-235</i>	<i>251-282</i>	<i>296-338</i>	<i>394-470</i>
37-38	210-238	235-273	262-315	300-395
	<i>239-265</i>	<i>274-312</i>	<i>316-368</i>	<i>396-490</i>
	<i>266-293</i>	<i>313-352</i>	<i>369-422</i>	<i>491-586</i>
39-42	262-Life	292-Life	324-Life	360-Life
43	360-Life	360-Life	360-Life	360-Life

As with the other provisions in this manual, these policy statements "are evolutionary in nature". See Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. See, e.g., 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a "clearinghouse and information center" on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the "forbidden factors" specified in 28 U.S.C. § 994(d) and (B) the "discouraged factors" specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 357); November 1, 1991 (see Appendix C, amendment 386); November 1, 1994 (see Appendix C, amendment 508); October 27, 2003 (see Appendix C, amendment 651); November 1, 2010 (see Appendix C, amendment 739).

§5H1.1. Age (Policy Statement)

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 1993 (see Appendix C, amendment 475); October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, amendment 674); November 1, 2010 (see Appendix C, amendment 739).

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); November 1, 1997 (see Appendix C, amendment 569); November 1, 2004 (see Appendix C, amendment 674); November 1, 2010 (see Appendix C, amendment 739).