

Other Stakeholders' Views on Sentencing Reform

INTRODUCTION

In 1984, Congress responded to the widespread sentencing disparity that existed in the federal sentencing system by enacting the Sentencing Reform Act of 1984 (“SRA”). The SRA created the United States Sentencing Commission and tasked it with promulgating mandatory guidelines to meet the statutory purposes of sentencing. In meeting those purposes Congress specifically charged the Commission with ensuring that the federal sentencing guidelines provide certainty and fairness, avoiding unwarranted disparities so that defendants with similar records who were found guilty of similar conduct would receive similar sentences, while maintaining sufficient flexibility to permit individualized sentences when warranted.

Congress also charged the Commission with assessing whether sentencing, penal, and correctional practices are meeting the purposes of sentencing.¹ It was anticipated that the guidelines would evolve over time in response to data and public comment, and would continually reflect advancements in knowledge of human behavior as it relates to the criminal justice system. The mandatory nature of the guidelines scheme was central to achieving all of these goals.

However, Congress noted that the post-SRA system did not “remove all of the judge’s sentencing discretion.”² While Congress envisioned “that most cases will result in sentences within the guideline

range,” there would be “appropriate” instances when sentences fell outside the applicable guideline range.³ The SRA preserved judges’ discretion to depart from the guideline range in a particular case under prescribed circumstances, *i.e.*, if the court found an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Commission in formulating the sentencing guidelines.⁴

The Commission also recognized that departures would play an important role in the guidelines system because of the “difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.”⁵ The Commission intended sentencing courts “to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”⁶ The court could consider whether a departure was warranted “where conduct significantly differs from the norm.”⁷ The system provided flexibility “in providing the sentencing judge with a range of options from which to fashion an appropriate sentence.”⁸

For nearly 20 years, the sentencing guidelines system that resulted injected the federal sentencing process with greater certainty, uniformity, and fairness. Then, in January 2005, the Supreme Court issued its landmark decision rendering the federal sentencing guidelines “effectively advisory.”⁹ In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge’s

¹ 28 U.S.C. § 991(b)(2).

² S. REP. NO. 98–225, at 50 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3233.

³ *Id.* at 52. Congress specifically noted that it believed a sentencing judge “has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.” *Id.*

⁴ 18 U.S.C. § 3553(b)(1), *invalidated by* United States v. Booker, 543 U.S. 220 (2005).

⁵ USSG Ch.1, Pt.A (4)(B) (Apr. 1987).

⁶ *Id.*

⁷ *Id.*

⁸ S. REP. NO. 98–225, 50.

⁹ *Booker*, 543 U.S. at 245.

determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment's right to jury trial.¹⁰ To remedy the Sixth Amendment problem, the Court struck two provisions of the SRA. The first required the court to impose a sentence within the applicable guideline range unless "the court finds there exists an aggravating or mitigating circumstance of the kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."¹¹ The second provided for a *de novo* standard of review for departures from the guideline range. Striking these two provisions effectively rendered the federal sentencing guidelines advisory.¹²

Although the Court recognized that Congress expected the guidelines system to be mandatory, it reasoned that Congress would prefer an advisory guidelines system that maintained "a strong connection between the sentence imposed and the offender's real conduct" to a system that would "engraft onto the existing system today's Sixth Amendment 'jury trial' requirement."¹³ According to the Court, Congress's important objectives when creating the Commission to promulgate sentencing guidelines included honesty, uniformity, and proportionality in sentencing.¹⁴ The Court explained that "[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives."¹⁵ For example, "[t]he Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process."¹⁶ Nonetheless,

the Court recognized that it would not have the final word on the new sentencing regime: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."¹⁷

OTHER PROPOSALS FOR FEDERAL SENTENCING

While the Commission stands by its recommendations to Congress made in October 2011 and described in this report, it recognizes that more substantial reforms may be necessary in the future should these reforms fail to reduce the existing unwarranted disparities. Moreover, other stakeholders have proposed other ways to address federal sentencing that Congress may wish to consider. In February 2012, the Commission held a public hearing inviting participants to comment on the Commission's proposals and those of other stakeholders. A comprehensive summary of that hearing is in an appendix to this report. This section briefly describes other proposals that have been presented and discusses their possible advantages and disadvantages.

On one end of the spectrum, some have proposed that Congress could, consistent with the Supreme Court's Sixth Amendment jurisprudence, replace the sentencing guidelines with a system of mandatory minimum sentences, triggered by judge-found facts. On the other end of the spectrum, others have concluded that Congress should take no action, leaving in place the advisory system as it currently operates. Still others adopt neither of these positions and instead promote either restrictions on the use of judge-found facts to prescribe only the bottom of the defendant's guideline range, or incorporation of jury factfinding into the guidelines. The following represents a brief analysis of these various alternatives, including some of the potential advantages and disadvantages of each approach.

¹⁰ *Id.* at 244 (Stevens, J., majority).

¹¹ *Id.* at 259 (Breyer, J., majority).

¹² *Id.* at 245.

¹³ *Id.* at 248.

¹⁴ *Id.* at 264.

¹⁵ *Id.*

¹⁶ *Id.* at 263.

¹⁷ *Id.* at 265.

Replace Guidelines with Mandatory Minimums

The Supreme Court has affirmed that mandatory minimums are a constitutionally-permitted exercise of Congress’s authority to “channel judicial discretion – and rely on judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings” so long as such sentences are within the range authorized by the jury’s verdict.¹⁸ As proposed by some commentators, one alternative to the current system would be to enact a comprehensive set of mandatory minimums to replace the guidelines, binding judges in the cases in which they apply.

In 2011, the Commission published a comprehensive report assessing the impact of mandatory minimum penalties on the current sentencing system, relying on analyses of relevant legislation, its own data, scholarly literature, and input from stakeholders across the federal criminal justice system.¹⁹ While members of the Commission had a spectrum of views regarding mandatory minimum penalties, the Commission agreed that certain mandatory minimum penalty provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute. This has led to inconsistencies in the application of some mandatory minimum penalties, resulting from differing charging and plea practices in various districts around the country. If Congress enacted a new, comprehensive system of mandatory minimum statutes to replace the

guidelines, the new mandatory minimums may be subject to the same problems.

In contrast to mandatory minimum penalties, the guidelines prescribe proportional individualized sentences based on many factors relating to the seriousness of the offense, the harms associated with the commission of the offense, the culpability of the offender, and the criminal history and other characteristics of the offender. The guidelines’ multi-dimensional approach seeks to avoid the problems inherent in the structure of mandatory minimum penalties. For these reasons, the Commission concluded that a strong and effective guideline system best serves the purposes of the Sentencing Reform Act.²⁰

“Topless” Guidelines

After the Supreme Court’s decision in *Blakely*, but before its decision in *Booker*, Professor Frank Bowman advocated changes to the federal sentencing system designed to bring it into compliance with the interpretation of the Sixth Amendment articulated in *Blakely*. Professor Bowman proposed amending the guideline ranges in the sentencing table “to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.”²¹ This proposal became known as “topless guidelines.” It was based on the idea that, because the Supreme Court in *McMillan* and *Harris* had authorized the use of judicial fact-finding to set minimum sentences within the statutorily authorized range, but not to increase a maximum sentence, judicial factfinding that set only a minimum guideline range would fully comport with the Sixth Amendment.²² As Professor Bowman acknowledged,

¹⁸ *Harris v. United States*, 536 U.S. 545, 557 (2002). Some commentators have suggested that *Harris* is inconsistent with subsequent Supreme Court jurisprudence, including *Booker*, and question whether the Court might overturn it in the future. See, e.g., Erwin Chemerinsky, *Making Sense of Apprendi and its Progeny*, 37 *McGeorge L. Rev.* 531, 541 (2006). The Court granted review in a case presenting this question in October of 2012. *Alleyne v. United States*, 133 S. Ct. 420 (2012). For a more detailed discussion of the Supreme Court’s decisions in this area, see U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011) [hereinafter 2011 MANDATORY MINIMUM REPORT], Appendix E.

¹⁹ 2011 MANDATORY MINIMUM REPORT, 3-6.

²⁰ 2011 MANDATORY MINIMUM REPORT, 368.

²¹ Memorandum from Frank Bowman to U.S. Sent’g Comm’n (June 27, 2004), reprinted in 16 *Fed Sent’g Rep.* 364, 367 (2004) (emphasis removed).

²² Memorandum from Frank Bowman to U.S. Sent’g Comm’n (June 27, 2004), reprinted in 16 *Fed Sent’g Rep.* 364, 367 (2004). As noted above, some commentators (including Professor Bowman) have subsequently questioned whether *Harris* survives *Booker*. See, e.g., Frank O. Bowman III, *Mr. Madison Meets A Time Machine: The Political Science of Federal Sentencing Reform*, 58 *Stan. L. Rev.* 235, 261 (2005). The Supreme Court granted review in a case presenting this question in

implementing this system would have required Congress to amend 28 U.S.C. § 994(b)(2), the portion of the SRA that limits the size of all guideline ranges by requiring that the top of a guideline range be no more than 25 percent higher than the bottom of that range.

In addition to expanding the top of the guideline range, Professor Bowman proposed that the Commission consider adding a policy statement that recommended that sentences not exceed the previously applicable guideline range unless a factor that would have previously warranted an upward departure was present. Failure to adhere to this recommendation, under Professor Bowman's view, would not have been appealable, and therefore the recommendation would have guided judges' exercise of discretion without violating the Sixth Amendment.

A bill that, among other things, would have implemented a version of this proposal was first introduced in the House of Representatives by Representative Sensenbrenner on April 6, 2005.²³ Section 12 of that bill would have amended title 18, section 3553 to prohibit judges from considering a variety of factors in imposing a sentence below the guideline range, but would have permitted consideration of those factors when imposing a sentence within or above that range. Further, the bill would have placed procedural limitations on sentences below the guideline range, including special notice requirements and a heightened burden of proof, except where the lower sentence was requested by the government.²⁴ The Subcommittee on Crime, Terrorism, and Homeland Security considered the bill and forwarded it to the full Judiciary Committee, but no action was taken by the Committee. Around this same time, the Department of Justice advocated a similar legislative approach.²⁵

According to Professor Bowman, the primary advantage of this proposal was that it would have

October of 2012. *Alleyne v. United States*, 133 S. Ct. 420 (2012).

²³ H.R. 1528, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*.

²⁴ *Id.*

²⁵ Alberto Gonzales, U.S. Att'y Gen., *Federal Sentencing Guidelines Speech* (June 21, 2005), reprinted in 17 Fed. Sent'g Rep. 324, 326 (2005).

preserved most of the major features of the pre-*Booker* system, including judicial factfinding and application of the sentencing guidelines, plea bargaining, and jury trials limited to determining convictions only. Other commentators have argued that enacting such a proposal would not be clearly constitutional.²⁶ Additionally, commentators have suggested that implementing such a proposal would shift too much power to prosecutors and produce unwarranted sentencing disparities, among other undesirable outcomes.²⁷ When he initially proposed topless guidelines, Professor Bowman suggested that such a proposal might ultimately be only a "stopgap" to allow the system to continue to function while further changes were planned. Indeed, since that time, Professor Bowman has disavowed the proposal.²⁸

Incorporating Jury Factfinding

After the Supreme Court's decision in *Booker*, many proposals centered around incorporating jury factfinding into the federal sentencing system to varying degrees. Such proposals are often referred to as "*Blakely*-ized guidelines" because they are based on a compulsory guidelines system, but require jury factfinding to apply these guidelines. Many, though not all, of the proposals suggest some degree of simplification of the guidelines relative to the current set of guidelines to alleviate the increased procedural burden it is assumed jury factfinding would create. Three versions of these proposals are discussed below.

²⁶ *See, e.g., United States v. Booker: One Year Later--Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec., H. Comm. on the Judiciary, 109th Cong. (2006)* (statement of Paul G. Cassell, U.S. Dist. J. for the Dist. of Utah).

²⁷ *See, e.g., Douglas A. Berman, Tweaking Booker: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 363-64 (2006); Thomas R. Schuck, *Making Sense Out of Sentencing*, Fed. Law., June 2005, at 4.

²⁸ *United States v. Booker: One Year Later--Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec., H. Comm. on the Judiciary, 109th Cong. (2006)* (Testimony of Frank O. Bowman). As discussed below, Prof. Bowman has recently endorsed a version of *Blakely*-ization. *See Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 Fed. Sent'g Rep. 356 (June 2012).

a. *Justice Stevens' Remedial Dissent in Booker*

In *Booker*, Justice Stevens advocated in his dissent from Justice Breyer's remedial opinion what may be the most direct form of *Blakely*-ization. According to Justice Stevens, instead of striking parts of the SRA and rendering the guidelines advisory, the majority should have held that judicial factfinding that increases a defendant's sentence under the guidelines violates the Sixth Amendment, and jury factfinding would necessarily include "any fact that is *required* to increase a defendant's sentence under the Guidelines."²⁹

In *Booker*, Justices Breyer and Stevens disagreed about the impact of the *Booker* remedy on (i) real offense conduct, (ii) the complexity of sentencing proceedings, and (iii) the balance between a prosecutor's power to control the sentence a defendant ultimately receives and a judge's power to impose the sentence he or she finds best serves the purposes of sentencing. Justices Stevens and Breyer agreed that a *Blakely*-ized system would impose some limits on the system's ability to correlate a defendant's sentence with his or her real offense conduct. In Justice Breyer's view,

[t]o engraft the [Sixth Amendment] requirement onto the sentencing statutes ... would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.³⁰

In contrast, in Justice Stevens' view, such information could be considered when determining where within the guideline range the defendant should be sentenced, when a defendant has pleaded guilty and waived his Sixth Amendment rights in this respect, or

²⁹ *Booker*, 543 U.S. 220, 284-85 (Stevens, J. dissenting).

³⁰ *Id.* at 252 (Justice Breyer, J., majority).

when the facts have been proven to the jury, either during or after the trial phase.³¹ Further, Justice Stevens argues that imposing limits on the impact of "real offense" sentencing is actually appropriate "because the goal of such sentencing—increasing a defendant's sentence on the basis of conduct not proved at trial—is contrary to the very core of *Apprendi*."³²

Justice Breyer also emphasized that a *Blakely*-ized system would "create a system far more complex than Congress could have intended," requiring indictments to allege many more facts than they currently do, raising questions about how defendants can contest both conviction and sentencing issues, and requiring juries to make difficult factual findings about issues such as loss in complex fraud cases.³³ Justice Stevens opined that there are only a "very small number of cases in which a Guidelines sentence would implicate the Sixth Amendment," that many of these cases would involve relatively straightforward factual findings such as drug quantity or weapon possession, and that even in the complicated cases "[t]his may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern."³⁴

Justices Breyer and Stevens also disagreed about the impact of *Blakely*-ization on the balance of power between prosecutor and judge in setting the defendant's ultimate sentence. Justice Breyer concluded that in a *Blakely*-ized system "any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely," and the prosecutor "would thus exercise a power the [SRA] vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment."³⁵ Justice Stevens disagreed with this assessment, instead arguing that such facts would have been excluded from the judge's consideration only when they would increase the

³¹ *Id.* at 287 (Stevens, J., dissenting).

³² *Id.* at 288.

³³ *Id.* at 255-56.

³⁴ *Id.* at 289.

³⁵ *Id.* at 256-57.

defendant's sentence.³⁶ Justice Stevens asserted that "[n]ot only is fact bargaining quite common under the current system, it is also clear that prosecutors have substantial bargaining power." He noted "surely ... a prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining power than if required to prove the same fact beyond a reasonable doubt."³⁷

Other commentators have generally concluded that *Blakely*-izing the guidelines as currently written would be procedurally unworkable because their complexity would overwhelm the system if juries, rather than individual judges, were forced to make all the findings necessary to apply them.³⁸ As a result, most commentators who have analyzed *Blakely*-ization alternatives have considered a version that also includes simplifying the guidelines.

b. Blakely-ization and Simplification

In 2005, the Criminal Justice Section of the American Bar Association issued a report on *Booker* containing recommendations to Congress.³⁹ The ABA report recommended that Congress not take immediate action; however, the report also proposed a basic outline of a restructured federal sentencing system if Congress decided to move away from the advisory system created by *Booker*.⁴⁰ The basic outline was of a *Blakely*-ized system like the one favored by Justice Stevens in *Booker*, but the ABA also suggested "simplifying the guidelines by reducing both the number of offense levels and the number of adjustments and presenting the remaining, more essential, culpability factors to the jury."⁴¹

³⁶ *Id.* at 289-90.

³⁷ *Id.* at 290-91.

³⁸ See Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing after Booker*, 2005 U. Chi. Legal F. 149, 191 (2005) ("the consensus view is that the Guidelines as now written are simply too complex and confusing to operate through juries.").

³⁹ ABA Criminal Justice Section, Report and Recommendation on *Booker* (Jan. 2005), reprinted in 17 Fed. Sent'g Rep. 335 (2005).

⁴⁰ *Id.* at 336.

⁴¹ *Id.* at 339.

The ABA proposed that the Commission take up the task of determining which facts represent "critical culpability factors" that would be found by the jury and would determine the "ordinarily binding" sentencing range within the statutory range.⁴² Other facts that the Commission considered relevant but not critical would be "relegated to 'within range' consideration."⁴³ As a corollary, the ABA suggested that Congress repeal the 25 percent rule so that the sentencing table could be modified to provide ten offense levels, rather than the current 43.⁴⁴

The ABA also proposed that the concept of a downward departure based on circumstances of a kind or to a degree not adequately considered by the guidelines be retained, but noted that *Booker* would not permit upward departures to be retained.⁴⁵ With respect to appellate review, the ABA proposed no right to appeal a sentence within a properly calculated guideline range, and no right for a defendant to appeal the denial of a downward departure, except where such a denial was a matter of law. The ABA proposed that the government be permitted to appeal downward departures on either legal or factual grounds.⁴⁶

Finally, the ABA noted procedural issues such as the need for a bifurcated trial in some cases, changes to jury instructions, and other rules of procedure.⁴⁷ The ABA also argued that extension of pretrial evidentiary disclosure rules to cover the new critical culpability factors would mitigate "the risk of undue prosecutorial leverage" because "[a] prosecutor [would] have a difficult time leveraging a defendant to plead guilty to an unduly severe charge if the defendant [were] provided with the government's evidence and [could] evaluate the likelihood of a jury conviction on such a charge."⁴⁸

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 339-40.

Comparing the ABA’s proposal with the basic *Blakely*-ization proposals discussed by Justices Stevens and Breyer in *Booker*, it is clear that the ABA report proposes simplification of the guidelines to address the concerns Justice Breyer raised in *Booker* about complexity in a *Blakely*-ized system. By highlighting the need for changes to pretrial disclosure rules, the ABA report addressed Justice Breyer’s concern about an improper shift of power from judges to prosecutors. The ABA proposal does not appear to address Justice Breyer’s concern about real offense conduct and its role in federal sentencing.

c. Presumptive Guidelines

In 2011, U.S. District Judge and former Commission Chair William K. Sessions III published a proposal for restructuring the federal sentencing system that, generally speaking, is a hybrid of the current advisory system and *Blakely*-ization, though like the ABA proposal, it contains several additional modifications.⁴⁹ As Judge Sessions noted, “[m]any distinguished authorities in criminal justice representing different points across the ideological spectrum – including judges, leading practitioners, and academics – have proposed the same basic components ... including most recently the Constitution Project’s Sentencing Initiative.”⁵⁰ Judge Sessions’s proposal called for broader “presumptive” ranges, similar to the system proposed by the ABA. These ranges are *Blakely*-ized, *i.e.*, determined based on jury findings.⁵¹ However, unlike the ABA proposal, which did not propose any guidance for judges exercising discretion within these broader

ranges, Judge Sessions’s proposal contemplated a *Booker*-like advisory system for determining a narrower sub-range within the broader jury verdict-authorized range.⁵² Judge Sessions also advocated retaining the general structure of the current criminal history categories, although he suggested reducing the number of categories to four (down from the current six) in order to reduce complexity “without undercutting the predictive value of a defendant’s criminal history score.”⁵³

Like the ABA, Judge Sessions’s proposal would eliminate most upward departures due to constitutional concerns. However, Judge Sessions’s proposal would preserve upward departures based on the defendant’s prior criminal convictions, which Judge Sessions argued is permitted under the Supreme Court’s Sixth Amendment jurisprudence. Also, like the ABA, Judge Sessions’s proposal would retain downward departures, though in this case limited only to “truly extraordinary offender characteristics.”⁵⁴

Judge Sessions’s proposal addresses appellate review standards, emphasizing their importance in creating the “presumptive” nature of the system. Under his proposal, a within range sentence would be reviewed to determine whether the judge correctly applied the guidelines in reaching that range, but would otherwise “be essentially unreviewable on appeal ... [unless] a district court refused to consider all relevant factors or instead considered a prohibited factor, such as a defendant’s race or gender.”⁵⁵ Downward departures appealed by the government “would involve relatively strict scrutiny by the appellate court.”⁵⁶

Some commentators have criticized this proposal on the grounds that, by eliminating many

⁴⁹ Hon. William K. Sessions III, *At the Crossroads of Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J. L. & Politics 305 (2011).

⁵⁰ *Id.* at 352. The Constitution Project’s Sentencing Initiative assembled a group of practitioners, judges, and scholars and produced a 2006 report to Congress, the Commission, and the Criminal Rules Committee of the United States Judicial Conference that set forth broad principles for responding to *Booker*. The committee was co-chaired by Edwin Meese, III and Philip B. Heymann, and its report was reprinted at 18 Fed. Sent’g Rep. 310 (2006).

⁵¹ *Id.* at 341-342.

⁵² *Id.* at 347. See also Bowman, *Beyond Band-Aids*, 2005 U. Chi. Legal F. 149, 205-09 (2005); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. Davis L. Rev. 587, 612-13 (1992); R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 770-74 (2001).

⁵³ Sessions, *At the Crossroads*, *supra* note 49, at 342.

⁵⁴ *Id.* at 351.

⁵⁵ *Id.* at 353-54.

⁵⁶ *Id.* at 354.

judicial departures and variances, it would reduce the Commission's ability to identify problem areas in the guidelines.⁵⁷ Others have suggested that wider ranges would actually lead to increased disparity overall.⁵⁸ Still other commentators have endorsed Judge Sessions's proposal, including Professor Bowman, who concluded that this model "represents the most desirable option among the constitutionally permissible architectures."⁵⁹

Retain Advisory Guidelines

Some commentators have argued that the current advisory guidelines system should be retained without any substantial modification because it is unclear that the system currently is leading to unwarranted sentencing disparity.⁶⁰ Additionally, some commentators have argued that in the long term, the advisory system represents the appropriate balance among the various actors in the federal sentencing system, and that Congress should do nothing to alter that balance.⁶¹

⁵⁷ Amy Baron-Evans, Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1716 (2012). The authors also raise concerns about the constitutionality of this proposal. See also Michael Tonry, *The U.S. Sentencing Commission's Best Response to Booker Is to Do Nothing*, 24 Fed. Sent'g. Rep. 5, 387 (June 2012); Sara Sun Beale, *Is Now the Time for Major Sentencing Reform?* 24 Fed. Sent'g. Rep. 5, 382 (June 2012).

⁵⁸ *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 112th Cong. (2011) (Statement of James Felman, Co-Chair, American Bar Association's Criminal Justice Section Committee on Sentencing, written statement at 22-23).

⁵⁹ Bowman, *Nothing is Not Enough*, 24 Fed. Sent'g Rep. 5, 356 (June 2012).

⁶⁰ Rep. Robert C. "Bobby" Scott, *Booker Is the Fix*, 24 Fed. Sent'g Rep. 5, 341 (June 2012).

⁶¹ Amy Baron-Evans, Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1681 (2012). See Michael Tonry, *The U.S. Sentencing Commission's Best Response to Booker Is to Do Nothing*, 24 Fed. Sent'g Rep. 5, 387 (2012); Sara Sun Beale, *Is Now the Time for Major Sentencing Reform?* 24 Fed. Sent'g Rep. 5, 382 (2012).

The Commission's 2010 survey of United States district judges indicated that 75 percent of respondents thought that the current advisory guidelines system best achieves the purposes of sentencing, as opposed to 14 percent who favored "[a] system of mandatory guidelines that comply with the Sixth Amendment (e.g., with facts supporting sentencing enhancements found by a jury beyond a reasonable doubt or admitted by the defendant) and have broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimums."⁶² Only eight percent of respondents thought that a return to the pre-guidelines system would best serve the purposes of sentencing, and three percent thought that the pre-*Booker* guidelines system best served these purposes.⁶³ When assessing the overall effect of the guidelines since their inception, 78 percent of respondents agreed that the guidelines had reduced unwarranted sentencing disparity among similarly-situated defendants, 76 percent agreed that the guidelines had increased certainty in sentencing, and 67 percent agreed that the guidelines had increased fairness in sentencing.⁶⁴

Some commentators have argued that *Booker* increased the extent to which judges "consider all relevant circumstances of the offense and characteristics of the defendant."⁶⁵ These commentators argue that the advisory system, in contrast with the pre-*Booker* system, has led to positive improvements to the system from the Commission, Congress, and the Department of Justice.⁶⁶ In particular, these commentators argue that

⁶² U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010), at 23 (Question 19, Table 19).

⁶³ U.S. SENT'G COMM'N, 2010 JUDGES' SURVEY at 23 (Question 19, Table 19).

⁶⁴ U.S. SENT'G COMM'N, 2010 JUDGES' SURVEY at 22 (Question 17, Table 17).

⁶⁵ Amy Baron-Evans, Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1668 (2012).

⁶⁶ *Id.* at 1667-81 (2012). See also *USSC Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Raymond Moore, Federal Public Defender, Districts of Colorado and Wyoming, written statement at 6) ("*Booker* has also had a salutary influence on Department of Justice policies. In 2010, the

Booker has increased judges' ability to provide feedback to the Commission about the operation of the guidelines⁶⁷ and to ameliorate unwarranted disparity caused by differing charging practices across the country.⁶⁸ Some commentators have also expressed the view that the quality of sentencing advocacy has improved under the advisory system.⁶⁹

Some commentators also argue that the advisory system has not resulted in "unduly lenient" sentences.⁷⁰ Similarly, some commentators have observed that although the number of sentences outside the guidelines increased after *Booker*, that rate has plateaued in the two most recent fiscal years.⁷¹

Attorney General issued a memorandum allowing prosecutors for the first time to seek *individualized* sentences under § 3553(a) with supervisory approval. Just recently, citing the advisory guidelines, the Department instituted fast track programs in illegal re-entry cases nationwide, essentially acknowledging that the penalties recommended by the illegal re-entry guideline are too high.”).

⁶⁷ *Id.*

⁶⁸ *USSC Public Hearing on Federal Sentencing Options After Booker*, Washington, D.C. (Feb. 16, 2012) (Statement of Lisa Wayne, President, National Association of Criminal Defense Lawyers, written statement at 3-4).

⁶⁹ *USSC Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of David Debold, Chair, Practitioners Advisory Group, written statement at 2) [hereinafter *Debold 2012 Public Hearing Statement*]; see also *Debold 2012 Public Hearing Statement*, written statement at 3 (“*Booker* reinvigorated several long-overlooked dimensions to the sentencing process. A judge’s greater ability after *Booker* to consider a wide variety of information produced a corresponding mandate for practitioners to provide more information. We find that our colleagues now pay even more attention to our clients as people: they take a more penetrating look at their personal attributes, their social contributions, and their precise conduct in the offense – among other factors[.]”).

⁷⁰ Amy Baron-Evans, Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1667-81 (2012); Mary Price, *Everything Old is New Again: Fixing Sentencing by Going Back to First Principles*, 36 New Eng. J. on Crim. & Civ. Confinement 75, 89 (2010).

⁷¹ In fiscal years 2006 and 2007, the rate of non-government sponsored below range sentences was 12.1 percent; it increased to 13.4 percent in 2008, 16 percent in

Ultimately, these commentators conclude that “*Booker* was the fix.”⁷²

However, other commentators disagree. They contend that the advisory guidelines have led to increases in unwarranted disparity.⁷³ Additionally, some commentators disagree that the advisory system sufficiently addresses what they view as problems in the pre-*Booker* system.⁷⁴

2009, and 17.6 percent in 2010, then decreased slightly in fiscal year 2011 to 17.4 percent. See U.S. Sentencing Commission *Sourcebook of Federal Sentencing Statistics*, Table N, for fiscal years 2006-2011. See also Amy Baron-Evans, Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1677 (2012).

⁷² Amy Baron-Evans, Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1743 (2012). See also Rep. Robert C. “Bobby” Scott, *Booker Is the Fix*, 24 Fed. Sentencing Rep. 5, 341 (June 2012).

⁷³ Sessions, *At the Crossroads*, 26 J. L. & Politics 305 (2011); Matthew S. Miner, Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, October 12, 2011, reprinted in 24 Fed. Sent’g Rep. 5, 352 (June 2012).

⁷⁴ See, e.g., Bowman, *Nothing is Not Enough*, 24 Fed. Sentencing Rep. 5, 356 (June 2012).

CONCLUSION

The Commission continues to believe that a strong and effective guideline system best serves the purposes of the SRA. The continued importance and influence of the guidelines on sentencing decisions is evident from both Supreme Court decisions and sentencing data, as the overwhelming majority of offenders – 80.7 percent in fiscal year 2011 – still receive a sentence either within the guideline range or below the guideline range for a reason sponsored by the government (most often, but not always, congressionally authorized reductions for substantial assistance to the government or an expedited guilty plea pursuant to an Early Disposition Program approved by the Attorney General).

However, as sentencing decisions are increasingly based more on section 3553(a) factors other than the guidelines and policy statements, inconsistencies in sentencing practices – nationally, locally, and by offense type – have increased and demographic differences in sentencing have increased. The Commission believes the trends demonstrated in this report are troubling and should be addressed. Accordingly, as envisioned by the Sentencing Reform Act, the Commission will continue to refine the guidelines in response to feedback and information it receives. The Commission stands ready to work with Congress on its recommendations, or other possible legislative reforms, to strengthen and improve the sentencing guidelines system, ensuring certain and fair sentencing that avoids unwarranted sentencing disparities while maintaining sufficient flexibility.⁷⁵

⁷⁵ See 28 U.S.C. § 991(b)(1)(B).

Appendix: Other Stakeholders' Views on Sentencing Reform

I. SUMMARY OF 25TH ANNIVERSARY REGIONAL HEARING TESTIMONY

- ❖ Assessment of the Post-*Booker* Sentencing Regime
- ❖ Appellate Review
- ❖ Suggested Improvements to the Guidelines System

II. SUMMARY OF THE FEBRUARY 2012 PUBLIC HEARING TESTIMONY

- ❖ The State of the Current System
- ❖ Whether Any Legislative or Guidelines “Fix” is Necessary after *Booker*
- ❖ Discussion of Specific Proposals
- ❖ Other Issues

III. JUDGE’S SURVEY SUMMARY

- ❖ Statutory and Structural Issues
- ❖ Sentencing Hearings
- ❖ Guideline Application Issues
- ❖ Departures
- ❖ General Assessment

Summary of 25th Anniversary Regional Hearing Testimony

In 2009 and 2010, the Commission held seven regional hearings across the United States coinciding with the 25th anniversary of the Sentencing Reform Act. Over the course of fourteen days, the Commission heard testimony from over 125 witnesses including district and circuit court judges, prosecutors, defense lawyers, probation officers, law enforcement, members of the academic community, and community interest groups. These witnesses were asked to give suggestions regarding changes to the Sentencing Reform Act and other relevant statutes, the federal sentencing guidelines and policy statements, and the Federal Rules of Criminal Procedure that, in the views of the witnesses, would further the statutory purposes of sentencing. The hearing transcripts and written statements of hearing participants are available at the Commission's website (www.ussc.gov).

I. ASSESSMENT OF THE POST-*BOOKER* SENTENCING REGIME

The majority of participants in the Commission's hearings expressed general satisfaction with the current sentencing system. Many participants described the current system as an appropriate balance between uniformity and judicial discretion. This view was encapsulated by one participant's observation that post-*Booker* sentencing "strikes a reasonable balance between judicial discretion, on the one hand, and uniformity and certainty of sentencing on the other."⁷⁶ Other participants expressed a similar sentiment, with one district court judge describing the system as "the best of both possible worlds,"⁷⁷ and another as "a fair balance of both consistency and flexibility."⁷⁸ Similarly, a circuit court judge described the system as "a proper blend,"⁷⁹ a federal public

⁷⁶ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable J. Leon Holmes, Chief District Judge, Eastern District of Arkansas, Austin transcript at 256) [hereinafter *Holmes 25th Anniversary Testimony*]; see also, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Philip Peter Simon, District Judge, Northern District of Indiana, Chicago transcript at 103) ("*Booker* . . . struck the exact right balance between uniformity in sentencing on the one hand [and] flexibility on the other"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Testimony of Mario Moreno, Chief Probation Officer, District of Arizona, Phoenix transcript at 112) (federal sentencing practice post-*Booker* "strike[s] an appropriate balance between judicial discretion and uniformity").

⁷⁷ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Robin J. Cauthron, District Judge, Western District of Oklahoma, Austin transcript at 11) [hereinafter *Cauthron 25th Anniversary Testimony*].

⁷⁸ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of the Honorable William T. Moore, Jr., Chief District Judge, Southern District of Georgia, Atlanta transcript at 138) [hereinafter *W. Moore 25th Anniversary Testimony*]; see also, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Karen K. Caldwell, District Judge, Eastern District of Kentucky, Chicago transcript at 96) [hereinafter *Caldwell 25th Anniversary Testimony*] ("while I value the guidance that the Commission provides me, I [] enjoy life after *Booker* and the flexibility that an advisory system provides me"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Joe E. Sanchez, Chief Probation Officer, Western District of Texas, Austin transcript at 138-39) [hereinafter *Sanchez 25th Anniversary Testimony*] ("our judges do enjoy that flexibility when applying the advisory guidelines").

⁷⁹ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Fortunato P. Benavides, Circuit Judge, United States Court of Appeals for the Fifth Circuit, Austin transcript at 234).

defender called it “a better balance,”⁸⁰ and an academic asserted that it is “the right balance between proportionality and uniformity.”⁸¹

Participants who identified judicial discretion as an appropriate counterbalance to guideline certainty viewed judicial discretion as engendering three positive outcomes: fairness, including the individualization of sentences, an increased role for judicial experience in sentencing, and more robust sentencing advocacy on the part of defense attorneys. Regarding fairness, one participant noted that the current system allows judges to “impose sentences that are not only consistent but also fair”⁸² and another participant stated that “the advisory guideline system has greatly improved fairness, honesty and transparency in sentencing.”⁸³ The perception of fairness was based in substantial part on participants’ view that post-*Booker* sentencing allows for an increased focus on the individual defendant. One participant testified that “federal sentencing has become more fair and transparent, in large part because there is a greater emphasis on the individual.”⁸⁴ Another participant, a district judge, stated that the discretion to impose a sentence outside the guidelines was important “because in imposing a sentence, we are not imposing sentence on categories or types, we’re imposing sentence on human beings with their own individual characteristics and history.”⁸⁵ A chief probation officer observed that “probation officers . . .

⁸⁰ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Statement of Julia O’Connell, Federal Public Defender, Northern District of Oklahoma, Austin written statement at 1) [hereinafter *O’Connell 25th Anniversary Statement*]; see also, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable Fernando Gaitan, Jr., Chief District Judge, Western District of Missouri, Denver transcript at 266) [hereinafter *Gaitan 25th Anniversary Testimony*] (“[the] current system post-*Booker* provides [the] needed balance. It requires the court to consider the guideline applications to the defendant as a starting point; however it gives the court flexibility in considering relevant 3553(a) factors”).

⁸¹ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of Professor Rachel Barkow, New York University School of Law, New York transcript at 408).

⁸² *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Donetta W. Ambrose, Chief District Judge, Western District of Pennsylvania, New York transcript at 334) [hereinafter *Ambrose 25th Anniversary Testimony*].

⁸³ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of Nick Drees, Federal Public Defender, Northern and Southern Districts of Iowa, Denver written statement at 1) [hereinafter *Drees 25th Anniversary Statement*]; see also, e.g., *Cauthron 25th Anniversary Testimony*, Austin transcript at 11 (“the present system enhances the perception of fairness in sentencing from the viewpoint of all participants”).

⁸⁴ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Statement of William Gibbens, CJA Panel Representative, Eastern District of Louisiana, Austin written statement at 1); see also, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of Thomas Telthorst, CJA Panel Representative, District of Kansas, Denver written statement at 3) (the “advisory guidelines have restored a human element to sentencing”) [hereinafter *Telthorst 25th Anniversary Statement*]; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Testimony of the Honorable Martha Vazquez, Chief District Judge, District of New Mexico, Phoenix transcript at 58) [hereinafter *Vazquez 25th Anniversary Testimony*] (“It’s truly extraordinary after 17 years to have some discretion. It means to be able to be fair. It means individualized sentencing. It means to be able to ask for information from both parties and for once to be able to do something with the information you were never able to do before”).

⁸⁵ *Holmes 25th Anniversary Testimony*, Austin transcript at 255; see also, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable James G. Carr, Chief District Judge, Northern District of Ohio, Chicago transcript at 41)

are more confident that offenders are now being treated as individuals by considering the totality of circumstances as they relate both to the offense and the offender.”⁸⁶

Regarding the increased role of the district judge at sentencing, one district court judge described feeling like “a small or nonplayer in the critical sentencing decisions” before *Booker* and now finding that he is “again a major participant in the sentencing process,”⁸⁷ while another district judge described as “a very significant consequence of *Booker*” the restoration of the “judicial counterweight to the prosecutorial discretion that still plays a great role in the ultimate outcome and the ultimate sentence.”⁸⁸ Another district court judge believed that the advisory guideline system has “improved the quality of sentences” that he has rendered.⁸⁹ Still another district court judge appreciated that the stability and certainty of the guidelines are now coupled with “the justice and common sense [] of judges with years of experience in their application of the other 3553(a) factors.”⁹⁰

Several participants identified robust defense advocacy as one of *Booker*’s most efficacious outcomes, with one district court judge indicating that “[o]ne benefit of the *Booker* change . . . is the opportunity for effective advocacy on the part of defense counsel.”⁹¹ This judge viewed “the chance to actually influence the sentencing judge” as “bringing a renewed energy to the defense bar.”⁹² A defense attorney believed that “we in the defense community have been able to put the passion back [] in making our sentencing arguments.”⁹³ Another defense attorney testified that the advisory nature of the current system had “given me my soul back” because:

I am able to go to court, and whether I win or I lose, whether the defendant gets a big sentence or a small sentence, I walk away from sentencing hearings now feeling as though I was heard, the

[hereinafter *Carr 25th Anniversary Testimony*] (“*Booker* gives us the opportunity . . . to individualize, to localize and ultimately to humanize our sentences”).

⁸⁶ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of Kevin Lowry, Chief Probation Officer, District of Minnesota, Denver transcript at 107) [hereinafter *Lowry 25th Anniversary Testimony*]; see also, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of Richard Tracy, Chief Probation Officer, Northern District of Illinois, Chicago transcript at 139) (“the Sentencing Reform Act has been a resounding success in taking a huge leap towards achieving the elusive goal of fairness,” while “[t]he *Booker* decision has allowed the system to take the next step in our evolution towards sentencing and considering fairness as well as the unique individual circumstances of each case”).

⁸⁷ *Gaitan 25th Anniversary Testimony*, Denver transcript at 264.

⁸⁸ *Carr 25th Anniversary Testimony*, Chicago transcript at 24.

⁸⁹ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of the Honorable Robert W. Pratt, Chief District Judge, Southern District of Iowa, Denver written statement at 3) [hereinafter *Pratt 25th Anniversary Statement*].

⁹⁰ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable B. Lynn Winmill, Chief District Judge, District of Idaho, Stanford transcript at 448).

⁹¹ *Cauthron 25th Anniversary Testimony*, Austin transcript at 13.

⁹² *Cauthron 25th Anniversary Testimony*, Austin transcript at 13.

⁹³ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Jason Hawkins, Federal Public Defender, Northern District of Texas, Austin transcript at 157) [hereinafter *Hawkins 25th Anniversary Testimony*].

defendant was heard, his side was heard, and that the court had the ability to make the sentencing decision based not solely on the conduct that resulted in the conviction, but also on all of the factors that speak to [18 U.S.C. §] 3553(a), the purposes of sentencing.⁹⁴

Participants expressed appreciation not only for renewed judicial discretion and defense advocacy, but also for the continued importance of the guidelines themselves. Most participants identified the guidelines as a critical element of the current system's success, because of the consistency and uniformity they impart to the sentencing process. As one circuit court judge opined, "when there's not enough constraint on sentencing, the individual idiosyncrasies of judges play far too much a role in sentencing."⁹⁵ A district court judge noted that "[t]he systematic approach provided by the guideline system has brought order, consistency, and rationality to federal sentencing law."⁹⁶ The same district court judge "applaud[ed] the Sentencing Commission for giving prosecutors, defense attorneys, probation officers, and judges an empirically-based heartland from which the start the sentencing process," explaining that:

I have found that the most difficult task for me as a judge is to sentence other human beings. Human tragedy is reflected in each hearing, and the responsibility to judge wisely and compassionately while balancing the need to protect society and deter crime and provide just punishment and aid the effort at rehabilitation weighs heavily on the heart. I would feel at a loss in those tough moments of decision if I only had my own idiosyncratic preferences or anecdotal experience to follow. Instead, for the past 25 years judges have had the beneficial resource to consult which reflects for the most part the sentencing practices of colleagues across the country and across the years.⁹⁷

Another district court judge expressed his belief that the guidelines "still play a critical role" in the sentencing process because:

They [] provide an enormously helpful starting point, for it is comforting to be able to begin with an empirically-based heartland range which is drawn from the collective wisdom and experiences of colleagues from all around the country. In addition, the required analysis frames the issues in a

⁹⁴ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Julia O'Connell, Federal Public Defender, Northern District of Oklahoma, Austin transcript at 189) [hereinafter *O'Connell 25th Anniversary Testimony*]; see also, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Statement of Carol Brook, Federal Public Defender, Northern District of Illinois, Chicago written statement at 15) [hereinafter *Brook 25th Anniversary Statement*] ("The ability to speak the truth [about a client's background] in the courtroom and be heard promotes respect for the system and the law").

⁹⁵ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable Harris Hartz, Circuit Judge, United States Court of Appeals for the Tenth Circuit, Denver transcript at 24-25) [hereinafter *Hartz 25th Anniversary Testimony*]; see also, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable James B. Loken, Chief Circuit Judge, United States Court of Appeals for the Eighth Circuit, Denver transcript at 33) [hereinafter *Loken 25th Anniversary Testimony*] ("Curbing the extent to which judge's sentencing philosophies, disparate philosophies, create sentencing disparity, that's, to me, the real objective of the Reform Act and the guidelines, and that is an absolutely proper, essential objective[.]").

⁹⁶ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of the Honorable Robert J. Conrad, Chief District Judge, Western District of North Carolina, Atlanta transcript at 128) [hereinafter *Conrad 25th Anniversary Testimony*].

⁹⁷ *Conrad 25th Anniversary Testimony*, Atlanta transcript at 128.

way that makes it more likely that we will reach a fair and just result. Finally, the goals of the guidelines, honesty in sentencing, reasonable uniformity in sentencing, and proportionality in sentencing, are still laudable, and the guidelines continue to advance these goals.⁹⁸

Still another district judge opined that “[j]udges in my view want guidance” and “[n]o one wants to return to the preguideline free-for-all which produced vastly different sentences for the same criminal conduct.”⁹⁹ Another district court judge stated that “most judges . . . would like very much to adhere to the guidelines.”¹⁰⁰ This district court judge explained further that the guidelines are:

helpful because if your feeling about what the sentence [should be] is far outside what the guidelines provide, it’s a wake-up call to help you decide whether your assumptions are correct, whether you’re viewing the matter properly, or whether you’re driven by some misunderstanding or some other factor.¹⁰¹

In addition, a probation officer commended the guidelines for “provid[ing] a mechanism for establishing equity for similarly situated defendants who have committed like offenses” and for allowing “individual cases to initially start with the same benchmark.”¹⁰²

Many participants identified the guidelines’ strength as their ability to avoid unfairness and unwarranted disparity. This view found voice in one district court’s observation that “[t]he guidelines have brought some significant institutional improvement to the judiciary as a whole in the exercise of our sentencing responsibility” by “reducing the unfairness that is inherent in disparities and lack of uniformity of sentencing individuals with similar backgrounds convicted of identical crimes.”¹⁰³ Another district court judge noted that “the statute

⁹⁸ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Denny Chin, former District Judge, Southern District of New York, New York transcript at 130-31).

⁹⁹ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of the Honorable Gregory A. Presnell, District Judge, Middle District of Florida, Atlanta transcript at 134-35) [hereinafter *Presnell 25th Anniversary Testimony*]; see also, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Henry J. Bemporad, Federal Public Defender, Western District of Texas, Austin transcript at 7) (“I’ve heard from many of my judges, I think all of them, [that] they are very comfortable with the guidelines . . . because they are expecting and trusting the Commission to get the guidelines right in the mine-run case, that [the Commission is] going to do the job of fairness and certainty of avoiding more disparities, but allowing for flexibility”).

¹⁰⁰ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Vaughn R. Walker, Chief District Judge, Northern District of California, Stanford transcript at 403) [hereinafter *Walker 25th Anniversary Testimony*].

¹⁰¹ *Walker 25th Anniversary Testimony*, Stanford transcript at 403.

¹⁰² *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Testimony of Kenneth O. Young, Chief Probation Officer, Southern District of California, Phoenix transcript at 101) [hereinafter *Young 25th Anniversary Testimony*] (“The absence of such a benchmark, advisory or otherwise, would only lead to further disparity [at] sentencing, which is truly contrary to the intent of the guidelines and those factors contained in 3553(a)”).

¹⁰³ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Gerald E. Rosen, Chief District Judge, Eastern District of Michigan, Chicago transcript at 49) [hereinafter *Rosen 25th Anniversary Testimony*].

specifically provides that we should impose a sentence that avoids unwarranted disparities and . . . [i]n this respect, I do believe that the guidelines are an essential tool for sentencing.”¹⁰⁴ Another judge stated that the guidelines should be maintained “in their present form with little or no alteration” because they are “rational, creative, and help to ensure some uniformity among the judiciary for all 50 states in sentencing people similarly situated.”¹⁰⁵ Still another district court judge believed that the “guidelines contribute to the quality, the justice, and wisdom of sentences not primarily because they reduce unwarranted disparity, because they provide a good starting point and a good reality check.”¹⁰⁶

Other participants regarded the benefit imparted by the guidelines to be the disciplined process that each district court judge must go through at sentencing. As one district judge noted, “the guidelines provide us with an invaluable tool for the analysis of a substantial body of data in a systematic way.”¹⁰⁷ The same judge explained that:

I like the idea of having a structured process because sometimes discretion is the freedom to make a bigger mistake, so I think that discipline in the process lends credibility to the process and assists us in doing a difficult job.¹⁰⁸

Another district court judge expressed a similar sentiment: “The methodical arrangement of the Sentencing Guidelines creates a logical framework for considering similar factors in every criminal case.”¹⁰⁹ A probation officer stated that “overall [probation] officers feel that the guidelines provide a solid framework in which judges can rely on to sentence defendants,”¹¹⁰ while a United States Attorney applauded the guidelines for “provid[ing] a significant degree of predictability and certainty, coupled with a well-established and supported framework in which to discuss and resolve sentencing issues.”¹¹¹

¹⁰⁴ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Micaela Alvarez, District Judge, Southern District of Texas, Austin transcript at 264) [hereinafter *Alvarez 25th Anniversary Testimony*].

¹⁰⁵ *W. Moore 25th Anniversary Testimony*, Atlanta transcript at 139.

¹⁰⁶ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of the Honorable Robert L. Hinkle, Chief District Judge, Northern District of Florida, Atlanta transcript at 135).

¹⁰⁷ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Jon P. McCalla, Chief District Judge, Western District of Tennessee, Chicago transcript at 86) [hereinafter *McCalla 25th Anniversary Testimony*].

¹⁰⁸ *McCalla 25th Anniversary Testimony*, Chicago transcript at 86-87.

¹⁰⁹ *Caldwell 25th Anniversary Testimony*, Chicago transcript at 97.

¹¹⁰ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of Thomas W. Bishop, Chief Probation Officer, Northern District of Georgia, Atlanta transcript at 53) [hereinafter *Bishop 25th Anniversary Testimony*].

¹¹¹ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Benton J. Campbell, United States Attorney, Eastern District of New York, New York transcript at 295-96) [hereinafter *Campbell 25th Anniversary Testimony*].

II. APPELLATE REVIEW

Testimony regarding the appellate standard of review was mixed, with different constituencies voicing different opinions. As discussed above, almost all district court judges and defense attorneys testified positively about the amount of discretion afforded to the sentencing judge post-*Booker*. This general approval of the post-*Booker* system by district court judges and defense attorneys extended to approval of appellate review.¹¹² One district court judge stated that the Supreme Court cases regarding the post-*Booker* standard for appellate review “reached the proper result which is considerable deference to the sentencing judge’s determination.”¹¹³ One public defender described the post-*Booker* review for reasonableness as “striking the appropriate balance between the district and appellate courts.”¹¹⁴ Another described appellate review after *Booker* as a return of discretion to the district courts and a correction of the appellate courts’ previous “overly strict enforcement of the guidelines [which] created unwarranted uniformity.”¹¹⁵ Similarly, numerous district court judges and at least one defense attorney testified that appellate review as it exists post-*Booker* is an effective tool for constraining the discretion of the sentencing court.¹¹⁶

There were some exceptions to district court judges’ satisfaction with the appellate standard of review post-*Booker*. For example, one judge testified that a stronger appellate standard will become necessary over time because disparities will grow as the courts move farther away from the mandatory guideline regime.¹¹⁷ Another district court judge suggested that the appellate standard of review for sentences should be even more lenient, like the standard of review in Social Security appeals, and that sentences should be upheld unless there are no facts to

¹¹² *Cauthron 25th Anniversary Testimony*, Austin transcript at 12; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Statement of Jason Hawkins, Federal Public Defender, Northern District of Texas, Austin written statement at 23) [hereinafter *Hawkins 25th Anniversary Statement*]; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Statement of Jacqueline Johnson, First Assistant Federal Public Defender, Northern District of Ohio, Chicago written statement at 2) [hereinafter *Johnson 25th Anniversary Statement*].

¹¹³ *Cauthron 25th Anniversary Testimony*, Austin transcript at 12.

¹¹⁴ *Hawkins 25th Anniversary Statement*, Austin written statement at 23.

¹¹⁵ *Johnson 25th Anniversary Statement*, Chicago written statement at 4.

¹¹⁶ *See, e.g., Carr 25th Anniversary Testimony*, Chicago transcript at 26-27; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Richard J. Arcara, Chief District Judge, Western District of New York, New York transcript at 102) [hereinafter *Arcara 25th Anniversary Testimony*]; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable John A. Woodcock, Jr., Chief District Judge, District of Maine, New York transcript at 122-23); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Nancy Gertner, former District Judge, District of Massachusetts, New York transcript at 357-59); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Robert S. Lasnik, Chief District Judge, Western District of Washington, Stanford transcript at 83-84); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of Michael S. Nachmanoff, Federal Public Defender, Eastern District of Virginia, New York transcript at 245) [hereinafter *Nachmanoff 25th Anniversary Testimony*].

¹¹⁷ *McCalla 25th Anniversary Testimony*, Chicago transcript at 120-21.

support the decision.¹¹⁸ Some district court judges also expressed concern regarding the ability to appeal all sentences. Judges from at least one district suggested that the right to appeal is too broad, and that appeals of within-guideline sentences following a guilty plea should be prohibited.¹¹⁹ Another judge suggested that there should be limited appellate review, which would only apply in cases in which the sentence falls “outside an informed empirically-based advisory range.”¹²⁰

There were also exceptions to the defenders’ general satisfaction with the appellate standard of review post-*Booker*. Notably, one defender testified that the deferential standard of review on appeal prevented appellate courts from addressing disparities created by “different attitudes of probation officers and judges in applying the guidelines to a common set of facts.”¹²¹ This public defender stated that the deferential standard of review, when “applied to what are considered fact-dependent determinations,” is not effective in addressing disparities.¹²²

In general, defense attorneys and public defenders suggested that much of the disparity in sentencing comes from prosecutorial decision-making in charging and plea bargains,¹²³ decisions which generally are not open to appellate review. Several district court judges also expressed concerns about prosecutorial influence on sentencing as well as concerns that such influence might lead to disparity.¹²⁴ A district court judge stated his

¹¹⁸ *Gaitan 25th Anniversary Testimony*, Denver transcript at 293.

¹¹⁹ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Statement of the Honorable William T. Moore, Jr., Chief District Judge, Southern District of Georgia, Atlanta written statement at 3) [hereinafter *W. Moore 25th Anniversary Statement*].

¹²⁰ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Raymond Dearie, Chief District Judge, Eastern District of New York, New York transcript at 343) [hereinafter *Dearie 25th Anniversary Testimony*].

¹²¹ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Statement of Henry J. Bemporad, Federal Public Defender, Western District of Texas, Austin written statement at 5-6) [hereinafter *Bemporad 25th Anniversary Statement*].

¹²² *Bemporad 25th Anniversary Statement*, Austin written statement at 6.

¹²³ *See, e.g., U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of Douglass A. Mitchell, CJA Panel Attorney, District of Nevada, Stanford transcript at 332); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Statement of Alexander Bunin, Federal Public Defender, Northern District of New York, New York written statement at 1-3); *Drees 25th Anniversary Statement*, Denver written statement at 6-12; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, N.Y. (July 9-10, 2009) (Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, New York written statement at 20-21) [hereinafter *Nachmanoff 25th Anniversary Statement*] (“The government insulates sentences from appellate review by extracting appeal waivers, often in return for dropping or foregoing mandatory minimum charges or enhancements.”); *see also U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of the Honorable B. Todd Jones, United States Attorney, District of Minnesota, Denver written statement at 8) [hereinafter *B.T. Jones 25th Anniversary Statement*] (discussing “charging alternatives in cases where below-range sentences are otherwise likely” and the practice of charging defendants “as armed career criminal[s] when possible because of the certainty of the sentence under that statute” and working to “establish grounds for a charge of ‘receipt’ [of child pornography] because that offense has a mandatory minimum”).

¹²⁴ *Arcara 25th Anniversary Testimony*, New York transcript at 115-16; *McCalla 25th Anniversary Testimony*, Chicago transcript at 87; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Statement of the Honorable Robert L. Hinkle, Chief District

belief that plea bargaining is fairer post-*Booker*.¹²⁵ In contrast, a defense attorney testified that the post-*Booker* advisory guideline system “has restored some balance to the process of pleading guilty and the plea bargaining process.”¹²⁶ Although, in this attorney’s experience, most prosecutors continue to seek appeal waivers, she feels more comfortable advising her clients not to sign such waivers.¹²⁷ A public defender also stated that appeal waivers are detrimental in the development of sentencing law.¹²⁸

Other defenders noted that there are disparities between different judges’ sentencing practices.¹²⁹ However, one defender testified that while “this is a problem, [he does] not believe that the answer is a stricter standard of review” because the circuit court “permitted this when the standard of review was de novo, while reversing most downward departures under the same standard.”¹³⁰ Rather than a stricter standard of review, this defender testified that “the Commission could promote meaningful procedural review by providing relevant information for judges to consider when determining the appropriate sentence under § 3553(a),” but that the Commission should not concern itself with substantive reasonableness review.¹³¹ This desire for more information to support specific guidelines was a common theme in the defenders’ testimony, with several defenders testifying that additional explanations for the guidelines would assist judges at the sentencing and appellate levels, and one defender stating that such explanations would give “appeals courts a rationale for substantive review.”¹³² This view was shared by at least one district court judge.¹³³

While district court judges and defense attorneys expressed general satisfaction with the appellate standard of review post-*Booker*, appellate judges and prosecutors expressed concerns regarding issues ranging from the level of deference given to the sentencing court to the lack of clarity regarding the standard of review to the amount of work put into sentencing appeals when sentences are rarely overturned to predictions that sentencing disparities will increase without a stricter standard of appellate review.

Judge, Northern District of Florida, Atlanta written statement at 6-7); *Vazquez 25th Anniversary Testimony*, Phoenix transcript at 56-58.

¹²⁵ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Gustavo A. Gelpi, Jr., District Judge, District of Puerto Rico, New York transcript at 349-50) [hereinafter *Gelpi 25th Anniversary Testimony*].

¹²⁶ *O’Connell 25th Anniversary Statement*, Austin written statement at 10.

¹²⁷ *O’Connell 25th Anniversary Statement*, Austin written statement at 10.

¹²⁸ *Nachmanoff 25th Anniversary Statement*, New York written statement at 19-20.

¹²⁹ *See, e.g., Hawkins 25th Anniversary Statement*, Austin written statement at 2; *Bemporad 25th Anniversary Statement*, Austin written statement at 5-6.

¹³⁰ *Hawkins 25th Anniversary Statement*, Austin written statement at 2.

¹³¹ *Hawkins 25th Anniversary Testimony*, Austin transcript at 29.

¹³² *Brook 25th Anniversary Statement*, Chicago written statement at 15; *Nachmanoff 25th Anniversary Statement*, New York written statement at 19; *Nachmanoff 25th Anniversary Testimony*, New York transcript at 274-75.

¹³³ *Dearie 25th Anniversary Testimony*, New York transcript at 346.

A prevalent theme in appellate judges' testimony was concern over the lack of clarity in the Supreme Court's directives in *Booker*, particularly with respect to substantive reasonableness.¹³⁴ One appellate judge testified that "it is very difficult to find a principled basis after *Gall* and *Kimbrough*, for saying that a sentence is unreasonable."¹³⁵ Moreover, appellate judges noted that after *Booker*, there are many more sentencing appeals, but the appellate standard of review as interpreted by the courts is so deferential that there is little practical impact on sentences imposed despite the increased workload.¹³⁶ Even those judges who described the post-*Booker* advisory guideline system as "working" or operating well testified that they need additional guidance regarding the standard for substantive reasonableness.¹³⁷ Judges in the two circuits that see the most sentencing appeals, the Fifth and Ninth Circuits, expressed significant concern over both the lack of clarity regarding the standard to be applied when reviewing a sentence for substantive reasonableness and the resulting unintended deference to the district court's discretion.¹³⁸ One judge expressed his concern "that appellate judges really don't have the tools to perform substantive reasonableness review in the one area where it seems to matter, significant variances upward or downward."¹³⁹ Moreover, some judges in the circuits with the highest volume of sentencing appeals view the development of a reasonableness standard based on a review of past cases as "unrealistic."¹⁴⁰ Several judges testified regarding their doubt that cases decided on the basis of substantive reasonableness could have any precedential value because they are so case-specific.¹⁴¹

¹³⁴ See, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Danny J. Boggs, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Chicago transcript at 214) [hereinafter *Boggs 25th Anniversary Testimony*] (noting the lack of guidance from Congress, the Supreme Court or the Sentencing Commission regarding the "task of trying to sort the unwarranted disparities from the warranted disparities").

¹³⁵ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Edith Jones, Chief Circuit Judge, United States Court of Appeals for the Fifth Circuit, Austin transcript at 219) [hereinafter *E. Jones 25th Anniversary Testimony*].

¹³⁶ See, e.g., *E. Jones 25th Anniversary Testimony*, Austin transcript at 218; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Alex Kozinski, Chief Circuit Judge, United States Court of Appeals for the Ninth Circuit, Stanford transcript at 48) [hereinafter *Kozinski 25th Anniversary Testimony*] (stating that appellate courts are "looking at more cases with fewer tools to do anything about it"); *Boggs 25th Anniversary Testimony*, Chicago transcript at 214.

¹³⁷ See, e.g., *E. Jones 25th Anniversary Testimony*, Austin transcript at 212, 219 (stating that "the guidelines, as a practical matter, after *Booker*, are working well" but that "it is very difficult to find a principle[d] basis. . . for saying that a sentence is unreasonable"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Jeffrey S. Sutton, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Chicago transcript at 207) [hereinafter *Sutton 25th Anniversary Testimony*]; *Loken 25th Anniversary Testimony*, Denver transcript at 57.

¹³⁸ See, e.g., *E. Jones 25th Anniversary Testimony*, Austin transcript at 218 (stating that "I read the comments of a number of the other appellate judges who have testified before you, and I guess we're all just wringing our hands about what reasonableness review constitutes, not something that you or we can remedy on our own. It remains to nine Supreme Court Justices to try to help us out."); *Kozinski 25th Anniversary Testimony*, Stanford transcript at 43-49 (stating that "there's nothing that I have figured out on appeal that we can really do to constrain the outlier judges").

¹³⁹ *Sutton 25th Anniversary Testimony*, Chicago transcript at 209-10.

¹⁴⁰ *E. Jones 25th Anniversary Testimony*, Austin transcript at 219; see also *Sutton 25th Anniversary Testimony*, Chicago transcript at 209 (describing reasoning on substantive reasonableness as "good for one train and one train only").

¹⁴¹ *Sutton 25th Anniversary Testimony*, Chicago transcript at 209.

At the same time, several circuit judges expressed frustration with remanding cases for resentencing based on procedural issues, because on remand the sentencing judge is likely to provide a more detailed explanation for the same sentence, which will satisfy the standard for procedural reasonableness.¹⁴² This frustration led an appellate judge to describe the appellate role as “make-work.”¹⁴³ Moreover, appellate judges described a system in which procedural issues were fruitlessly over-litigated because those were the issues addressed by the appellate courts.¹⁴⁴ One appellate judge testified that procedural review should focus primarily on whether the “guidelines have been interpreted correctly” and that “much of the rest of procedural reasonableness review has become either irrelevant or academic.”¹⁴⁵ Appellate judges stated that the harmless error standard was useful in limiting the costs of resentencing when it is clear that the sentencing court would impose the same sentence on remand.¹⁴⁶ One appellate judge suggested that the Commission assist the courts of appeals in crafting a “rigorous” harmless error standard for procedural error cases.¹⁴⁷ The defenders generally do not support the use of the harmless error standard.¹⁴⁸

Many appellate judges also voiced concerns about the ability of the reasonableness standard of review to prevent disparities in sentencing.¹⁴⁹ Several prosecutors shared similar concerns.¹⁵⁰ Some appellate judges testified that they have already noted an increase in sentencing disparity based on the increased discretion at the district court level and the limited power of the appellate court to reverse sentences under the reasonableness

¹⁴² See, e.g., *E. Jones 25th Anniversary Testimony*, Austin transcript at 249 (describing “the sense of futility” in remanding cases for procedural unreasonableness); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Frank Easterbrook, Chief Circuit Judge, United States Court of Appeals for the Seventh Circuit, Chicago transcript at 193) [hereinafter *Easterbrook 25th Anniversary Testimony*] (describing remand on procedural reasonableness as “an exercise that has a limited, if any, effect on the sentence”); *Hartz 25th Anniversary Testimony*, Denver transcript at 45-46.

¹⁴³ *Easterbrook 25th Anniversary Testimony*, Chicago transcript at 193 (describing remand on procedural reasonableness as “a make-work prescription”); see also *Sutton 25th Anniversary Testimony*, Chicago transcript at 205 (asking whether “appellate review of criminal sentences [is] worth it”).

¹⁴⁴ See, e.g., *Loken 25th Anniversary Testimony*, Denver transcript at 35; *Sutton 25th Anniversary Testimony*, Chicago transcript at 205; but see *Hartz 25th Anniversary Testimony*, Denver transcript at 46-47 (noting that the court is regularly receiving “20-page briefs” on substantial reasonableness and describing his practice of “try[ing] not to write more than a paragraph” about substantive reasonableness as an attempt to “send a signal to counsel on both sides [not to] bring these appeals on substantive reasonableness”).

¹⁴⁵ *Sutton 25th Anniversary Testimony*, Chicago transcript at 205.

¹⁴⁶ *E. Jones 25th Anniversary Testimony*, Austin transcript at 237; *Loken 25th Anniversary Testimony*, Denver transcript at 44-45; *Easterbrook 25th Anniversary Testimony*, Chicago transcript at 194-95; *Boggs 25th Anniversary Testimony*, Chicago transcript at 222.

¹⁴⁷ *Loken 25th Anniversary Testimony*, Denver transcript at 36.

¹⁴⁸ See, e.g., *Hawkins 25th Anniversary Testimony*, Austin transcript at 162-63.

¹⁴⁹ See, e.g., *Kozinski 25th Anniversary Testimony*, Stanford transcript at 43 (“there’s nothing that I have figured out on appeal that we can really do to constrain the outlier judges”); *Boggs 25th Anniversary Testimony*, Chicago transcript at 214.

¹⁵⁰ See, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Statement of the Honorable Joyce W. Vance, United States Attorney, Northern District of Alabama, Austin written statement at 2-3).

standard.¹⁵¹ Other judges expressed concern over growing disparities in the long term.¹⁵² Some judges predicted that as new sentencing judges with no experience under the mandatory guideline system come in, more disparities will result,¹⁵³ while others worried that over time the lack of appellate control over sentences will lead judges who sentence at the upper and lower extremes to “become more frequent outliers.”¹⁵⁴

After voicing these concerns, appellate judges offered a variety of potential changes regarding the appellate standard of review. At least two judges suggested returning to a simplified mandatory system in which within-guideline choices would not be appealable.¹⁵⁵ Several judges suggested that the Commission expand the sentencing zones, creating more overlap and thereby making more errors harmless.¹⁵⁶ One judge stated that it might be helpful for the Commission to try to define reasonableness for the courts of appeals,¹⁵⁷ while another stated that it would not be helpful because the concept is difficult to define and, under *Kimbrough*, sentencing courts could disregard the Commission’s guidance.¹⁵⁸ Other suggestions were more specific, such as requiring district courts to articulate more reasons when sentencing “outside of the heartland.”¹⁵⁹ This requirement could come from a statutory standard or appellate decisions.¹⁶⁰

Prosecutors and law enforcement shared the appellate judges’ concerns regarding the deference afforded to sentencing courts, particularly when combined with the deferential standard of review applied by the courts of

¹⁵¹ See, e.g., *Kozinski 25th Anniversary Testimony*, Stanford transcript at 43; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Richard C. Tallman, Circuit Judge, United States Court of Appeals for the Ninth Circuit, Stanford transcript at 33) [hereinafter *Tallman 25th Anniversary Testimony*].

¹⁵² See, e.g., *Sutton 25th Anniversary Testimony*, Chicago transcript at 210.

¹⁵³ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Brett M. Kavanaugh, Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, New York transcript at 39) [hereinafter *Kavanaugh 25th Anniversary Testimony*].

¹⁵⁴ *Kozinski 25th Anniversary Testimony*, Stanford transcript at 43.

¹⁵⁵ *Kavanaugh 25th Anniversary Testimony*, New York transcript at 97; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable D. Michael Fisher, Circuit Judge, United States Court of Appeals for the Third Circuit, New York transcript at 98).

¹⁵⁶ See, e.g., *Loken 25th Anniversary Testimony*, Denver transcript at 44; *Easterbrook 25th Anniversary Testimony*, Chicago transcript at 193; *Sutton 25th Anniversary Testimony*, Chicago transcript at 217; *Dearie 25th Anniversary Testimony*, New York transcript at 346; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Jon O. Newman, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, New York transcript at 69-71); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of the Honorable Dennis W. Shedd, Circuit Judge, United States Court of Appeals for the Fourth Circuit, Atlanta transcript at 22).

¹⁵⁷ *Kozinski 25th Anniversary Testimony*, Stanford transcript at 66-67, 71-72, 77-79.

¹⁵⁸ *Easterbrook 25th Anniversary Testimony*, Chicago transcript at 236.

¹⁵⁹ *E. Jones 25th Anniversary Testimony*, Austin transcript at 227.

¹⁶⁰ *E. Jones 25th Anniversary Testimony*, Austin transcript at 227.

appeals.¹⁶¹ Several prosecutors testified that the government has curtailed its appeal of low sentences because of this deferential standard of review.¹⁶² Despite the government's decrease in the number of sentencing appeals it brings, it still bears the burden of the increase in defendant-initiated appeals.¹⁶³ Accordingly, some prosecutors recommended placing some restrictions on the appellate process to limit the number of sentencing appeals.¹⁶⁴ Prosecutors and law enforcement also noted that different standards of review in different circuits lead to different practices among U.S. Attorneys' offices.¹⁶⁵

Prosecutors similarly perceived increasing disparities in sentencing following *Booker*¹⁶⁶ and questioned the efficacy of appellate review under the reasonableness standard as a mechanism for ensuring uniformity.¹⁶⁷ As

¹⁶¹ See, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Joyce W. Vance, United States Attorney, Northern District of Alabama, Austin transcript at 316-18); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable David M. Gaouette, United States Attorney, District of Colorado, Denver transcript at 164) [hereinafter *Gaouette 25th Anniversary Testimony*]; *Campbell 25th Anniversary Testimony*, New York transcript at 302; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Dana J. Boente, United States Attorney, Eastern District of Virginia, New York transcript at 315-16) [hereinafter *Boente 25th Anniversary Testimony*]; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan 20-21, 2010) (Statement of the Honorable Dennis Burke, United States Attorney, District of Arizona, Phoenix written statement at 9-10) [hereinafter *Burke 25th Anniversary Statement*].

¹⁶² *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable B. Todd Jones, United States Attorney, District of Minnesota, Denver transcript at 155-56); *Gaouette 25th Anniversary Testimony*, Denver transcript at 166; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois, Chicago transcript at 247) [hereinafter *Fitzgerald 25th Anniversary Testimony*]; *Boente 25th Anniversary Testimony*, New York transcript at 315-16; *Campbell 25th Anniversary Testimony*, New York transcript at 317-18.

¹⁶³ *Burke 25th Anniversary Statement*, Phoenix written statement at 10.

¹⁶⁴ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Statement of the Honorable Edward M. Yarbrough, United States Attorney, Middle District of Tennessee, Chicago written statement at 7) [hereinafter *Yarbrough 25th Anniversary Statement*].

¹⁶⁵ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Testimony of John Morton, Assistant Secretary for the U.S. Immigration and Customs Enforcement, Department of Homeland Security, Phoenix transcript at 24) [hereinafter *Morton 25th Anniversary Testimony*]; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan 20-21, 2010) (Testimony of the Honorable Dennis Burke, United States Attorney, District of Arizona, Phoenix transcript at 31-32).

¹⁶⁶ See, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Statement of the Honorable Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois, Chicago written statement at 3) [hereinafter *Fitzgerald 25th Anniversary Statement*] (noting that following *Gall*, "around 42% of contested sentencings [in the Northern District of Illinois] resulted in below-range sentences" while "nationwide, only 19% of contested sentences were below-range"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of the Honorable David M. Gaouette, United States Attorney, District of Colorado, Denver written statement at 3) [hereinafter *Gaouette 25th Anniversary Statement*] (predicting that the deferential standard of review will lead to inequalities that "will have the imprimatur of the courts"); see also *Campbell 25th Anniversary Testimony*, New York transcript at 298 (stating that the number of departures has not changed significantly but it appears that the size of departures and variances has increased and the range of variation between judges has grown following *Booker*).

noted above, some prosecutors claimed to have altered some of their charging, plea bargaining and litigation practices in response to *Booker*.¹⁶⁸ These practices, which may lead to a mandatory minimum or otherwise statutorily mandated sentences, are generally insulated from appellate review. However, at least one prosecutor testified that practices related to charging, mandatory minimums, enhancements, and binding plea agreements have not changed following *Booker*.¹⁶⁹

III. SUGGESTED IMPROVEMENTS TO THE GUIDELINES SYSTEM

A. *Alternatives to Incarceration*

Many participants at the Commission's hearings expressed support for increased study and use of alternatives to incarceration, especially for low-level offenders. The Commission heard testimony from a number of district judges and others currently involved in such programs.¹⁷⁰ One chief district judge expressed his view of these programs as follows:

Effective alternative sanctions are important options in the federal criminal justice system. For appropriate offenders alternatives to incarceration provide a substitute for costly confinement. Ideally alternatives also provide those offenders opportunities by diverting them from prison, or reducing time spent in prison and these programs provide the life skills and treatment necessary for becoming law-abiding, productive members of society. Efforts to assist felons [to] assimilate productively into society under the auspices of second chance efforts, workforce development initiatives, and reentry programs should be encouraged.¹⁷¹

One researcher emphasized that incarceration of an individual affects the broader community as well, because those who have been incarcerated struggle to maintain employment and family ties once they return to the

¹⁶⁷ See *Fitzgerald 25th Anniversary Statement*, Chicago written statement at 6; see also *Yarbrough 25th Anniversary Statement*, Chicago written statement at 4.

¹⁶⁸ See, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Statement of the Honorable Karin J. Immergut, United States Attorney, District of Oregon, Stanford written statement at 13) (stating that "*Booker* has had a significant impact on how we negotiate plea and litigate sentencing issues"); *B.T. Jones 25th Anniversary Statement*, Denver written statement at 8 (discussing "charging alternatives in cases where below-range sentences are otherwise likely" and the practice of charging defendants "as armed career criminal[s] when possible because of the certainty of the sentence under that statute" and working to "establish grounds for a charge of 'receipt' [of child pornography] because that offense has a mandatory minimum").

¹⁶⁹ *Campbell 25th Anniversary Testimony*, New York transcript at 301.

¹⁷⁰ See, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Keith Starrett, District Judge, Southern District of Mississippi, Austin transcript at 18-20) [hereinafter *Starrett 25th Anniversary Testimony*]; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Eric J. Miller, Associate Professor of Law, Saint Louis University School of Law, Austin transcript at 99-108) [hereinafter *Miller 25th Anniversary Testimony*].

¹⁷¹ *Conrad 25th Anniversary Testimony*, Atlanta transcript at 131.

community.¹⁷² Several participants also related the use of alternatives to incarceration to concerns about the increasing costs associated with increasing incarceration rates.¹⁷³

A number of participants expressed the view that the justice system in general should be focused on reducing recidivism, and that alternatives to incarceration play an important role in achieving that goal.¹⁷⁴ These participants emphasized the need for alternatives to incarceration both on the “front end” and on the “back end”; that is to say, both non-imprisonment sentences imposed as an initial matter, and re-entry programs for those who have served some period of incarceration and are transitioning back into the community.¹⁷⁵ In general, participants emphasized the need to conduct and rely upon research studying the efficacy of these programs in determining which programs to use, and they encouraged the Commission to continue to take an active role in this research.¹⁷⁶

B. *Specific Guidelines*

A number of participants also addressed the areas within the current guidelines structure that they felt needed improvement. The most frequently-addressed areas were child pornography, fraud, and crack cocaine offenses. Participants from areas of the country near the United States border also expressed concerns about particular aspects of the immigration guidelines.

¹⁷² *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of Rodney L. Engen, Ph.D., Professor of Sociology, North Carolina State University, Atlanta transcript at 173-74).

¹⁷³ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Adam Gelb, Director, Public Safety Performance Project, Pew Center on the States, Austin transcript at 93-98) [hereinafter *Gelb 25th Anniversary Testimony*].

¹⁷⁴ *See, e.g., Starrett 25th Anniversary Testimony*, Austin transcript at 20 (asserting that while “punishment needs to occur,” the focus should be “changed from punishment to reducing recidivism.”); *Gelb 25th Anniversary Testimony*, Austin transcript at 90-91 (stating that “when we do community corrections right, we can get a 20 to 30 percent reduction in recidivism.”).

¹⁷⁵ *Starrett 25th Anniversary Testimony*, Austin transcript at 22-23 (stating that reentry programs “are primarily for the back end of sentences,” for defendants who have “been to the penitentiary” and have returned to the reentry program and recommending that “the Sentencing Commission should consider some form of front end program.”); *Gelb 25th Anniversary Testimony*, Austin transcript at 89 (stating that a “combination of [better risk assessment tools and advances in technology such as ignition interlocks, rapid result drug tests and GPS monitors] can lead to a “very robust system of community corrections and alternatives on the front end, as well as the back end of the system.”); *Miller 25th Anniversary Testimony*, Austin transcript at 101 (stating that “the central issue for an over-incarcerative criminal justice system is how to screen offenders out of the system,” and maintaining that this can be done “at the front end, to ensure that individuals do not become part of the criminal justice system, and at the back end, to ensure finality and certainty in the punishment process.”).

¹⁷⁶ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Statement of Alison Siegler, Assistant Clinical Professor of Law and Director of the Federal Criminal Justice Project, University of Chicago School of Law, Phoenix written statement at 13-14) [hereinafter *Siegler 25th Anniversary Statement*] (recommending that the Commission’s recidivism research relating to offender characteristics should be incorporated into the guidelines and allow judges to consider offender characteristics at sentencing); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of Greg Forest, Chief Probation Officer, Western District of North Carolina, Atlanta transcript at 51-52) (expressing his belief that reliable data regarding sentencing and recidivism would be helpful to judges in imposing evidence-based sentences and to probation officers in effectively implementing sentences, and discussing programs initiated by the Judicial Conference which promote evidence-based supervision practices aimed at reducing recidivism); *Brook 25th Anniversary Statement*, Chicago written statement at 17 (asking the Commission to conduct research and issue reports on recidivism and effective sentencing options).

Many participants expressed the view that the child pornography guidelines frequently resulted in sentences that were too high.¹⁷⁷ Some of these same participants also indicated concern about the impact of changes in technology on the operation of the guidelines and expressed uncertainty about the relationship between child pornography offenses and contact sex offenses.¹⁷⁸ Some participants, though, asserted the contrary view that in their experience the guidelines did not produce sentences that were too high.¹⁷⁹ Yet other participants expressed concern about the increasing rate of departures and variances in child pornography cases.¹⁸⁰

Several participants argued that, in some cases, the fraud guideline produces a sentence that is too low.¹⁸¹ Other participants maintained that the fraud guidelines were too severe and too complicated, with the federal public defenders stating that the “fraud guideline [] easily produce[s] sentences that are greater than necessary to

¹⁷⁷ See, e.g., *Cauthron 25th Anniversary Testimony*, Austin transcript at 14; *Presnell 25th Anniversary Testimony*, Atlanta transcript at 134; *Carr 25th Anniversary Testimony*, Chicago transcript at 37-38; *Rosen 25th Anniversary Testimony*, Chicago transcript at 53-55; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Statement of Alan Dubois, Senior Appellate Attorney, Federal Public Defender, Eastern District of North Carolina, and Nicole Kaplan, Staff Attorney, Federal Public Defender, Northern District of Georgia, Atlanta written statement at 10, 29-32) [hereinafter *Dubois and Kaplan 25th Anniversary Statement*]; *O’Connell 25th Anniversary Statement*, Austin written statement at 16; *Johnson 25th Anniversary Statement*, Chicago written statement at 27; *Pratt 25th Anniversary Statement*, Denver written statement at 1; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of Raymond P. Moore, Federal Public Defender, Districts of Colorado and Wyoming, Denver transcript at 316).

¹⁷⁸ See, e.g., *Cauthron 25th Anniversary Testimony*, Austin transcript at 15 (questioning whether the enhancement for use of a computer “makes sense” and arguing that “widespread as computer use is now, enhancing for use of a computer is a little like penalizing for speeding, but increasing that if you’re using a car.”); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable Joan Ericksen, District Judge, District of Minnesota, Denver transcript at 273) [hereinafter *Ericksen 25th Anniversary Testimony*] (stating that federal sentences for viewing child pornography on a computer are more severe than state sentences for actually abusing a child); *Drees 25th Anniversary Statement*, Denver written statement at 25 (opining that judges have decided to apply only parts of the guideline because some enhancements, like use of a computer, apply in virtually every case); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (July 20-21, 2010) (Statement of Heather Williams, Assistant Federal Public Defender, District of Arizona, Phoenix written statement at 52) (stating that the use of a computer in the offense “is the rule rather than the exception and the vast majority of defendants do not use the computer in a way initially contemplated by Congress.”).

¹⁷⁹ *Caldwell 25th Anniversary Testimony*, Chicago transcript at 100; *Alvarez 25th Anniversary Testimony*, Austin transcript at 273; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Kathleen Cardone, District Judge, Western District of Texas, Austin transcript at 276).

¹⁸⁰ *Gaouette 25th Anniversary Statement*, Denver written statement at 3; *B.T. Jones 25th Anniversary Statement*, Denver written statement at 7-8; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of Ernie Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children, Denver transcript at 207); *Fitzgerald 25th Anniversary Testimony*, Chicago transcript at 250-253.

¹⁸¹ *Bishop 25th Anniversary Testimony*, Atlanta transcript at 55-56 (“[M]any offenders convicted of these type of offenses receive light sentences, pay only a fraction of the restitution, and despite the best efforts of our officers, continue their criminal activity when they are released from prison. In fact, several continue their criminal fraud activity while they’re in prison and while they’re in our federal halfway houses.”); *W. Moore 25th Anniversary Testimony*, Atlanta transcript at 139-41.

satisfy sentencing purposes” and is “also unduly complicated and cumulative.”¹⁸² Another participant recommended simplifying the fraud guideline.¹⁸³

In testimony made prior to recent changes to the statutes and guidelines applicable to crack cocaine offenses that have generally reduced penalties for such offenses,¹⁸⁴ witnesses voiced concern for what they considered unwarranted disparity between sentences for powder and crack cocaine,¹⁸⁵ with many participants arguing that any difference between crack and powder cocaine sentences be eliminated.¹⁸⁶ The federal public defenders “urge[d] the Commission to recommend that penalties for the same quantity of crack and powder cocaine be equalized” and maintained that “differences among offenses and offenders should be taken into account by the sentencing judge in the individual case.”¹⁸⁷

Other participants suggested that the immigration guidelines are too complex and too harsh,¹⁸⁸ lead to unwarranted disparity,¹⁸⁹ and need to be simplified.¹⁹⁰ Participants specifically highlighted the enhancements

¹⁸² *Dubois and Kaplan 25th Anniversary Statement*, Atlanta written statement at 30.

¹⁸³ *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of David O. Marcus, CJA Panelist and District Representative, Southern District of Florida, Atlanta transcript at 80).

¹⁸⁴ See Fair Sentencing Act of 2010, Pub. L. 111–220 (2010); USSG App. C, amend. 748 (effective Nov. 1, 2010), amend. 759 (effective Nov. 1, 2011).

¹⁸⁵ See, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Testimony of Chief John Timoney, Miami Police Department, President, Police Executive Research Forum, Atlanta transcript at 112) (stating that there is essentially no difference between the two forms of the drug, that “the racial disparate impact of that distinction should not go unnoticed and it hasn’t and it needs to be addressed,” and that “[t]here is no law anywhere in America that should ever wind up at the end of the day having a predictable racial impact.”).

¹⁸⁶ See, e.g., *Tallman 25th Anniversary Testimony*, Stanford transcript at 28-30; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Susan Oki Mollway, District Judge, District of Hawaii, Stanford transcript at 98); *Gelpi 25th Anniversary Testimony*, New York transcript at 353-55; *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Karin J. Immergut, United States Attorney, District of Oregon, Stanford transcript at 227-28); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of Marilyn Grisham, Chief Probation Officer, District of Idaho, Stanford transcript at 156-60); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of Larry Fehr, Senior Vice President, Pioneer Human Services, Stanford transcript at 574-76); *U.S. Sent’g Comm’n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of Caroline Fredrickson, Director, Washington Legislative Office, American Civil Liberties Union, Stanford transcript at 605); *Ambrose 25th Anniversary Testimony*, New York transcript at 334-35; *Nachmanoff 25th Anniversary Testimony*, New York transcript at 269-71; *Lowry 25th Anniversary Testimony*, Denver transcript at 96; *Telthorst 25th Anniversary Statement*, Denver written statement at 2.

¹⁸⁷ *Dubois and Kaplan 25th Anniversary Statement*, Atlanta written statement at 23 (“Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with other drug types.”).

¹⁸⁸ *Bemporad 25th Anniversary Statement*, Austin written statement at 10-15.

¹⁸⁹ *Siegler 25th Anniversary Statement*, Phoenix written statement at 1-3.

based on an immigrant's prior criminal history as requiring reform,¹⁹¹ with a chief probation officer asserting that there is a need "for further clarity on what prior state convictions constitute aggravated felonies and crimes of violence[.]"¹⁹² Other participants suggested that the Commission add a departure for cultural assimilation,¹⁹³ a suggestion that the Commission has implemented in an amendment to the guidelines effective November 2010.¹⁹⁴ Several participants advocated for fast track availability in all districts,¹⁹⁵ a policy that the Department of Justice authorized in January 2012.¹⁹⁶ Further suggestions included "a one-level reduction for any alien defendant who agrees to a stipulated order of removal as a term of his or her plea agreement"¹⁹⁷ and increasing the base offense level for alien smuggling offenses under §2L1.1.¹⁹⁸

¹⁹⁰ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of Becky Burk, Chief Probation Officer, Southern District of Texas, Austin transcript at 131-34); *Sanchez 25th Anniversary Testimony*, Austin transcript at 139.

¹⁹¹ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Statement of Brian Anthony Pori, CJA Panel Attorney, District of Mexico, Phoenix written statement at 2-3) (arguing that §2L1.2 should be amended by eliminating the double counting of a prior conviction, limiting felony offenses that increase a defendant's offense level to those occurring within fifteen years, and requiring that an offense qualifying as a "crime of violence" must have resulted in a sentence of no less than one year and one month); *Bemporad 25th Anniversary Statement*, Austin written statement at 10-15 (arguing that the enhancements based on an alien's prior criminal history should be reduced by two to four levels and the 16-level enhancement should be applied only to a limited subset of convictions for especially serious aggravated felonies that are recent enough to receive criminal history points).

¹⁹² *Young 25th Anniversary Testimony*, Phoenix transcript at 103 (indicating that these definitions are of special concern "given the potential impact these convictions have on the immigration Guideline at §2L1.2.")

¹⁹³ *Vazquez 25th Anniversary Testimony*, Phoenix transcript at 88-89; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2009) (Testimony of the Honorable Marilyn L. Huff, District Judge, Southern District of California, Phoenix transcript at 88-89) [hereinafter *Huff 25th Anniversary Testimony*].

¹⁹⁴ USSG App. C, Amend. 740 (effective Nov. 1, 2010).

¹⁹⁵ *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Atlanta, GA (Feb. 10-11, 2009) (Statement of Lyle J. Yurko, Defense Attorney, former Member of the Practitioners Advisory Group, Atlanta written testimony at 7); *Huff 25th Anniversary Testimony*, Phoenix transcript at 67.

¹⁹⁶ See Memorandum of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, *Department Policy on Early Disposition or "Fast-Track" Programs* (Jan. 31, 2012) ("Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326) – the largest category of cases authorized for fast-track treatment – shall implement an early disposition program . . ."), available at <http://www.justice.gov/dag/fast-track-program.pdf>.

¹⁹⁷ *Morton 25th Anniversary Testimony*, Phoenix transcript at 12.

¹⁹⁸ *Morton 25th Anniversary Testimony*, Phoenix transcript at 18-19.

Summary of the February 2012 Public Hearing Testimony

In February 2012, the Commission held a public hearing on federal sentencing options after *Booker* at which the Commission heard testimony from over twenty witnesses including district and circuit court judges, representatives from the United States Department of Justice (DOJ), the Federal Public and Community Defenders (FPD), and the American Bar Association (ABA), the director of the Federal Bureau of Prisons (BOP), defense attorneys, members of the academic community, and several community interest groups. Following a panel about the current state of federal sentencing, participants engaged in a roundtable discussion about improving the advisory guideline system, which focused discussion on the Commission's proposals set forth in the Chair's October 12, 2011 prepared testimony before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security; and a roundtable discussion about the different options for implementing a mandatory guideline system that comports with the Sixth Amendment, which included discussion of so-called "topless" guidelines, "*Blakely*-ization," and a proposal for reform by the Honorable William K. Sessions III, United States District Judge for the District of Vermont. Various academics, community interest groups, and practitioners then compared the options for reforming the present advisory guidelines system. The hearing transcript and written statements of hearing participants are available at the Commission's website (www.ussc.gov).

I. THE STATE OF THE CURRENT SYSTEM

A. Federal Prison Population

Hearing participants agreed that the current rate of growth of the federal prison population is of concern. Officials from the BOP and DOJ testified that system-wide, the BOP is operating at 38 percent over capacity and "[c]ontinuing increases in the inmate population pose ongoing challenges for our agency."¹⁹⁹ The DOJ official explained that the prison population has continued to grow while available resources have remained unchanged and therefore "[w]e are now on a funding trajectory that will result in more federal money spent on imprisonment and less on police, investigators, prosecutors, reentry, and crime prevention."²⁰⁰ The ABA representative noted that the association is "deeply concerned about the over-reliance on incarceration in American criminal justice policy," noting that for the first time in the nation's history, "more than one in one hundred of us are imprisoned."²⁰¹

Participants disagreed about whether sentencing policy could or should play a role in limiting the growth of the federal prison population or the length of time offenders spend in prison. The DOJ and BOP representatives highlighted the BOP's efforts to save money by streamlining operations, improving program efficiencies, and reducing costs, and through improved evidence-based programs that are linked to decreased

¹⁹⁹ *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Charles Samuels, Director, Federal Bureau of Prisons, written statement at 3) [hereinafter *Samuels 2012 Public Hearing Statement*]; see also *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Matthew Axelrod, Associate Deputy Attorney General, United States Department of Justice, written statement at 5) [hereinafter *Axelrod 2012 Public Hearing Statement*].

²⁰⁰ *Axelrod 2012 Public Hearing Statement*, written statement at 3-4.

²⁰¹ *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of James Felman, Co-Chair, American Bar Association's Criminal Justice Section Committee on Sentencing, written statement at 3) [hereinafter *Felman 2012 Public Hearing Statement*].

recidivism.²⁰² In addition, the DOJ noted its newly expanded Fast Track program and explained its proposal to provide limited new prison credits for those offenders who behave well in prison and participate in evidence-based programs linked to reduced recidivism.²⁰³ The DOJ suggested, however, that there is “a tension in allowing [the prison funding issue] to drive our substantive recommendations on what [] the Department of Justice [] think[s] are appropriate penalties for particular crimes.”²⁰⁴ The ABA representative, in contrast, underscored that 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 noted that whereas more than 30 percent of federal defendants received sentences of straight probation in 1984, “by fiscal year 2010 that figure had dwindled to a mere 7.3 [percent].”²⁰⁵ A federal public defender, noting that the rate of prison growth had slowed between 2005 and 2011 and decreased after October 2011, credited the *Booker* decision and its aftermath with this change: “It is clear that the prison population would be greater today and in years to come if not for variances permitted by *Booker*, and ameliorating changes to the guidelines promoted by those variances.”²⁰⁶

B. Advisory Guideline System

Participants expressed divergent views about the current state of the advisory guideline system. Many participants considered the present system to be working well and an improvement over the mandatory guidelines system in place before *Booker*, while others expressed concern that the increasing rate of below range sentences is resulting in unwarranted sentencing disparities.

Several circuit and district court judges who testified at the hearing expressed approval for the current advisory system. One appellate judge testified on behalf of the Judicial Conference of the United States Committee on Criminal Law that “the available evidence seems to suggest that the advisory guideline system is working.”²⁰⁷ This judge noted that “[t]he vast majority of district judges believe that a voluntary guideline system is the best available alternative because it provides judges with a starting place and initial benchmark to determine the sentence, but allows sufficient flexibility to deviate from the guideline recommendation to account for individual circumstances.”²⁰⁸ Another appellate judge expressed his view that “a more practicable goal for

²⁰² *Samuels 2012 Public Hearing Statement*, written statement at 7-10 (“decreases in recidivism, in the long term, will result in decreases in the Bureau’s population”); *Axelrod 2012 Public Hearing Statement*, written statement at 5.

²⁰³ *Axelrod 2012 Public Hearing Statement*, written statement at 5-6; see also *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Matthew Axelrod, Associate Deputy Attorney General, United States Department of Justice, transcript at 65) [hereinafter *Axelrod 2012 Public Hearing Testimony*].

²⁰⁴ *Axelrod 2012 Public Hearing Testimony*, transcript at 65; see also *Axelrod 2012 Public Hearing Testimony*, transcript at 65-66 (“I never want us to be in a position where our line prosecutors are in court saying to you, or thinking to themselves, . . . I think what the appropriate sentence in this case is . . . 36 months but I know the Bureau of Prisons has a funding crisis so I’m going to recommend 12.”).

²⁰⁵ *Felman 2012 Public Hearing Statement*, written statement at 4.

²⁰⁶ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Raymond Moore, Federal Public Defender, Districts of Colorado and Wyoming, written statement at 14) [hereinafter *Moore 2012 Public Hearing Statement*].

²⁰⁷ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Theodore McKee, Chief Circuit Judge, United States Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States Committee on Criminal Law, written statement at 18) [hereinafter *McKee 2012 Public Hearing Statement*].

²⁰⁸ *McKee 2012 Public Hearing Statement*, written statement at 18.

guidelines is uniformity of sentencing policy, and [the] Advisory Guidelines are sufficient to achieve this goal and are in fact achieving it.”²⁰⁹ One district judge, speaking on behalf of the Judicial Conference of the United States Committee on Criminal Law, testified that “[a]n advisory sentencing guideline system is consistent with Judicial Conference positions such as its support for the concept of sentencing guidelines generally and for judicial flexibility.”²¹⁰

Several academics also voiced support for the current system. One academic testified that, “[d]espite the tortured process through which it has been created, the American federal courts now have about as sensible, workable, and just a sentencing system as they are likely to get in our time.”²¹¹ Another academic contended that the current system is “working fairly well,” observing that “all of those working most closely with the federal sentencing system think it ain’t broke: after now more than seven years of experience with the advisory guidelines, front-line sentencing participants still believe *Booker*’s structural changes have been mostly for the better and have furthered the basic goals pursued by Congress when it enacted the Sentencing Reform Act.”²¹²

Many practitioners also testified in support of the advisory system, with the ABA representative indicating that he “believe[s] advisory guidelines can best advance the purposes of sentencing and reduce both unwarranted disparity and its equally problematic inverse, unwarranted uniformity.”²¹³ A defender stated that “[t]he great weight of the reliable evidence shows that the current statutory system is working quite well, and the Commission should report that evidence to Congress.”²¹⁴ Several participants viewed the availability of judicial variances in the advisory guideline system as providing, in the words of another public defender, “much-needed and long-overdue feedback regarding problems with the guidelines, which has assisted the Commission in

²⁰⁹ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Gerard Lynch, Circuit Judge, United States Court of Appeals for the Second Circuit, transcript at 103) [hereinafter *Lynch 2012 Public Hearing Testimony*].

²¹⁰ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of the Honorable Paul Barbadoro, District Judge, District of New Hampshire, on behalf of the Judicial Conference of the United States Committee on Criminal Law, written statement at 4) [hereinafter *Barbadoro 2012 Public Hearing Statement*]; see also *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Paul Barbadoro, District Judge, District of New Hampshire, transcript at 15) [hereinafter *Barbadoro 2012 Public Hearing Testimony*] (“[T]he Conference and the Committee have consistently supported efforts to preserve [j]udicial flexibility in Guideline sentencing.”).

²¹¹ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Professor Michael Tonry, Russell M. and Elizabeth M. Bennett Chair in Excellence, University of Minnesota Law School, written statement at 1) [hereinafter *Tonry 2012 Public Hearing Statement*]; see also *Tonry 2012 Public Hearing Statement*, written statement at 3-4 (“First, [the advisory guidelines system] addresses the greatest injustices in sentences imposed by individual judges – aberrantly harsh, disproportionately severe sentences. . . . Second, within the upper limit that *Booker* prescribes, judges by themselves and in concert usually—in a world in which negotiated pleas are the norm—with prosecutors and defense lawyers, can take account of offenders’ situations and circumstances that they believe just and appropriate.”), *Tonry 2012 Public Hearing Statement*, written statement at 5 (“No system of federal guidelines is going to produce similar sentencing patterns in Arizona, Maine, Louisiana, and Philadelphia. From that perspective, that 80 percent of federal sentences nationally fall within ranges or result from substantial assistance motions is little short of remarkable.”).

²¹² *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Professor Douglas Berman, Robert J. Watkins/Procter & Gamble Professor of Law, The Ohio State University Moritz College of Law, written statement at 1-2) [hereinafter *Berman 2012 Public Hearing Statement*].

²¹³ *Felman 2012 Public Hearing Statement*, written statement at 2.

²¹⁴ *Moore 2012 Public Hearing Statement*, written statement at 1.

beginning to revise unsound guidelines.”²¹⁵ A representative of the Practitioners Advisory Group (PAG) argued that “[f]or practitioners on both sides of the courtroom, the advent of *Booker* has fostered (indeed compelled) great improvements in sentencing advocacy.”²¹⁶

The DOJ, however, expressed concern that “federal sentencing practice has trended away from guideline sentencing and towards more visible, widespread, and unwarranted sentencing disparity.”²¹⁷ The DOJ identified “two lines of thought and doctrine” that it viewed as in tension, “one that insists that the length of federal imprisonment terms be based primarily on the offense and criminal history, and one that suggests that offender characteristics and rehabilitation should join those factors as co-equal determinants,” and suggested that these be “examined more closely and reconciled to the extent possible in order to create a more coherent, national system.”²¹⁸ Noting that the percentage of defendants sentenced within the guidelines range has decreased since *Booker*, the DOJ stated that “federal sentencing practice continues to fragment[,]” with “some judges, some districts, and some circuits [] much more likely to hew closely to the Sentencing Guidelines than others.”²¹⁹ According to the DOJ,

[P]erhaps of greatest import to us in analyzing federal sentencing practice and growing disparities today is the candid assessment of prosecutors, defense attorneys, judges, and probation officers alike concerning sentencing practice. Their view is similar and clear: that in post-*Booker* sentencing, the selection of the judge in a federal criminal case is becoming an increasingly important – and a very significant – determinant of the outcome of criminal case.²²⁰

A private practice attorney expressed a similar sentiment: “By all objective measures, the federal sentencing system is drifting from a guideline-based system to one driven more by luck than by law.”²²¹ Another

²¹⁵ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Henry Bemporad, Federal Public Defender, Western District of Texas, written statement at 1) [hereinafter *Bemporad 2012 Public Hearing Statement*].

²¹⁶ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of David Debold, Chair, Practitioners Advisory Group, written statement at 2) [hereinafter *Debold 2012 Public Hearing Statement*]; see also *Debold 2012 Public Hearing Statement*, written statement at 3 (“*Booker* reinvigorated several long-overlooked dimensions to the sentencing process. A judge’s greater ability after *Booker* to consider a wide variety of information produced a corresponding mandate for practitioners to provide more information. We find that our colleagues now pay even more attention to our clients as people: they take a more penetrating look at their personal attributes, their social contributions, and their precise conduct in the offense – among other factors[.]”)

²¹⁷ *Axelrod 2012 Public Hearing Statement*, written statement at 6 (“Our concern about these unwarranted disparities is not an indictment of the Judiciary; nor is it a denial of the role that prosecutorial decisions play in sentencing outcomes. It is simply a recognition of the obvious: that *Booker* ushered in an era of greater discretion in sentencing, and this era has resulted in greater variation of sentencing outcomes and increased unwarranted disparities.”); see also *Axelrod 2012 Public Hearing Statement*, written statement at 12 (“We believe the post-*Booker* sentencing regime, which gives sentencing courts an unbounded menu of sentencing principles from which to devise the ultimate sentence, will continue to lead, if not reformed, to unwarranted disparities in sentencing outcomes.”).

²¹⁸ *Axelrod 2012 Public Hearing Statement*, written statement at 13.

²¹⁹ *Axelrod 2012 Public Hearing Testimony*, transcript at 24-25.

²²⁰ *Axelrod 2012 Public Hearing Statement*, written statement at 8-9.

²²¹ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Matthew Miner, Attorney, written statement at 3) [hereinafter *Miner 2012 Public Hearing Statement*].

defense attorney succinctly stated that “the federal system is broken and needs to be fixed,” adding that it “suffers from unwarranted sentencing disparity and variance based on geographic location.”²²² An academic faulted the advisory guideline system for “retain[ing] most of the flaws of the system it replaced, while adding new ones,” explaining that “the post-*Booker* system does not solve the biggest problem with the pre-*Booker* system – that its architecture and institutional arrangements predisposed the Commission’s rule-making process to become a one-way upward ratchet which raised sentences often and lowered them virtually never.”²²³ This participant also expressed concern with the “near-absolute power” of district court judges to determine the length of a defendant’s incarceration.²²⁴

Both those participants comfortable with the current state of sentencing and those voicing concerns cited to the percentage of non-government sponsored below range sentences. The DOJ viewed the increase from 12 percent to 17 percent as “significant” and evidence of increasing unwarranted disparities across the nation.²²⁵ In contrast, several public defenders, judges and academics suggested that this increase was minor,²²⁶ that average sentence length had not appreciably changed over time,²²⁷ and that, in any event, any change in the rate of non-

²²² *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Michael Volkov, Attorney, written statement at 3, 6) [hereinafter *Volkov 2012 Public Hearing Statement*]; see also *Volkov 2012 Public Hearing Statement*, written statement at 3 (“In [] place [of a mandatory sentencing guidelines system], we have a defective system, which has been patched together by judicial decisions, and which fundamentally undermines the very principles of the Sentencing Reform Act of 1984.”)

²²³ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Professor Frank Bowman, Floyd R. Gibson Missouri Endowed Professor of Law, University of Missouri School of Law, written statement at 2) [hereinafter *Bowman 2012 Public Hearing Statement*]; see also *Bowman 2012 Public Hearing Statement*, written statement at 11 (“Suffice it to say that the combination of the guideline’s complexity, the desire of the Justice Department for case-level control and rule-making influence, the persistent political incentives for Congress to legislate harsher sentences, and the Sentencing Commission’s institutional inability to resist the alliance of congress and the executive whenever they seek ‘tough’ sentences made the guidelines rule-making process a one-way upward ratchet before *Booker*. I see nothing in the post-*Booker* arrangements that materially alter this reality.”)

²²⁴ *Bowman 2012 Public Hearing Statement*, written statement at 5-6 (“In short, district judges now wield near-absolute power to determine the length of a defendant’s incarceration, far more real-world sentencing power than at any time since the advent of the federal parole authority in 1910. . . . The real difference between the present system and the one it replaced lies not in any material improvement in the Guidelines themselves, but in the fact that judges are legally at liberty to ignore them.”).

²²⁵ *Axelrod 2012 Public Hearing Testimony*, transcript at 24-25 (“The data and the experience of practitioners like me shows that some judges, some districts, and some circuits are much more likely to hue closely to the Sentencing Guidelines than others.”).

²²⁶ *Moore 2012 Public Hearing Statement*, written statement at 10 (noting the “mere” 4.7 percent increase and calling it “modest”); *Barbadoro 2012 Public Hearing Testimony*, transcript at 17 (“[I]t is important to remember that 80 percent of all sentences, even now, are still either within the Guidelines or are agreed to by the government.”); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Professor Michael Tonry, Russell M. and Elizabeth M. Bennett Chair in Excellence, University of Minnesota Law School, transcript at 238) [hereinafter *Tonry 2012 Public Hearing Testimony*] (“[T]hat 80 percent of cases [] are consistent with the guidelines[] is remarkable.”).

²²⁷ *Moore 2012 Public Hearing Statement*, written statement at 10 (“The median decrease remains, as it was before *Booker*, at about 12 months.”); see also *Lynch 2012 Public Hearing Testimony*, transcript at 169 (“I don’t think we’re limping along. I don’t think that an increase from 12 percent non-government sponsored non-Guidelines sentences to 17 or even 20 or even 25 [percent] is some kind of disaster, especially if one of the factors [is] – and I think it’s very important thing for the Commission to study [this] – what are the extent of these variances.”).

government sponsored below range sentences was not necessarily indicative of increasing unwarranted disparities.²²⁸ A representative of the National Association of Criminal Defense Attorneys (NACDL) asserted that “[i]n general, the data shows that sentences have remained constant despite the shift to advisory guidelines—sentence length did *not* undergo much, let alone significant, change following *Booker*.”²²⁹ A district court judge argued that:

[W]hile we need to clearly strive to reduce unwarranted sentencing disparity, it is vital in my view that we not fall into the trap of treating variance as a proxy for unwarranted disparity.²³⁰

In addition, the ABA representative suggested that “even a modest increase in regional or inter-judge disparity would not outweigh the enormous benefits of the advisory guidelines system.”²³¹

Many of these same participants suggested that, to the extent disparities do exist in the federal sentencing system, the disparities were due to factors other than the increased discretion of sentencing judges post-*Booker*, such as prosecutorial discretion²³² and the operation of mandatory minimums.²³³ The ABA representative asserted

²²⁸ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of David Debold, Chair, Practitioners Advisory Group, transcript at 367) [hereinafter *Debold 2012 Public Hearing Testimony*] (“[W]e reject the assumption that having 17 percent of sentences outside the guidelines without some affirmative government sponsorship[] is proof of unwarranted disparity. There’s an awful lot to unpack when it comes to disparity in the different ways in which people are sentenced.”); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Professor Sara Sun Beale, Charles L. B. Lowndes Professor of Law, Duke University School of Law, transcript at 266)[hereinafter *Beale 2012 Public Hearing Testimony*] (“[I]t’s critical not to [equate] sentences outside the range with disparity that is unjustified.”).

²²⁹ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, D.C. (Feb. 16, 2012) (Statement of Lisa Wayne, President, National Association of Criminal Defense Lawyers, written statement at 8) [hereinafter *Wayne 2012 Public Hearing Statement*].

²³⁰ *Barbadoro 2012 Public Hearing Testimony*, transcript at 17; *see also McKee 2012 Public Hearing Statement*, written statement at 19 (“I cannot overemphasize that there is no clear evidence that unwarranted disparity has increased in the advisory guidelines system, and such claims as do exist have not been subject to sufficient research and analysis to justify any fundamental change in a system of advisory guidelines that we have after *Booker* and *Gall*.”)

²³¹ *Felman 2012 Public Hearing Statement*, written statement at 12.

²³² *Lynch 2012 Public Hearing Testimony*, transcript at 102 (“More equal sentencing does not make up for disparities in arrest and prosecution.”); *Moore 2012 Public Hearing Statement*, written statement at 20 (“The Commission’s proposals are aimed at judges, but when judicial discretion is more tightly constrained, judges have less ability to correct for unwarranted disparity built into the rules or stemming from prosecutors’ and agents’ decisions, and prosecutors and agents have more control over sentencing outcomes.”), written statement at 30 (“We are equally concerned by the Commission’s presentation on this topic. The Commission gives a bare listing of rates of non-government sponsored below range sentences, which it has previously recognized shed no light on whether any differences are warranted or unwarranted. The Commission omits any data or discussion of prosecutorial policies and practices, although these differ more widely by district than judicial practices, and are the most important driver of regional differences. The Commission ignores extensive testimony and comments that provided relevant evidence regarding differences among districts. It focuses on rates to the exclusion of outcomes, and it fails to acknowledge that the Sentencing Reform Act recognized that local differences are relevant.”); *McKee Public Hearing Statement*, written statement at 16 (“When examining whether the voluntary guidelines system is successful, it is also important to examine the decisions, not just of sentencing judges, but of other actors within the criminal justice system such as prosecutors.”); *Beale 2012 Public Hearing Testimony*, transcript at 269 (“I want to remind you of[] the enormous variation in prosecutorial practices district to district. And that variation existed before, and existed as well, after *Booker*.”); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of

“the evidence shows that racial disparities are rooted in the harsh mandatory minimum sentences and the integration of mandatory minimum sentences into the guidelines system.”²³⁴ One circuit court judge contended that, in fact, the availability of variances in the post-*Booker* system helped to reduce undue severity.²³⁵ In addition, the PAG representative asserted that “one significant factor in differing rates of within-Guidelines sentences across districts is that the government and the courts have different ways, in different parts of the country, of addressing overly severe penalties various offenses, including fact-bargaining and charge-bargaining.”²³⁶

C. Multivariate Analysis

In addition to pointing to the rate of non-government sponsored below range sentences in support of the claim that unwarranted sentencing disparity has increased post-*Booker*, the DOJ and other participants cited to the Commission’s March 2010 report, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker’s Report Multivariate Regression Analysis*, as evidence of an increase in unwarranted racial, ethnic, and gender disparities.²³⁷ The DOJ found “very troubling” the report’s finding that “after controlling for offense type and other relevant legal factors, demographic factors – including race and ethnicity – were ‘associated with sentence length to a statistically significant extent’ in the post-*Booker* time period.”²³⁸ The DOJ explained that:

Mary Price, General Counsel, Families Against Mandatory Minimums, written statement at 4)[hereinafter *Price 2012 Public Hearing Statement*](“Better accounting for the role of prosecutors in variances and disparity means that lawmakers will have more information to evaluate when deciding whether to upset the current balance of judicial discretion. Alterations to the guideline system that put more power in the hands of prosecutors by tying those of judges strike us as both counterintuitive and counterproductive.”); see also *Axelrod 2012 Public Hearing Testimony*, transcript at 70 (“It’s harder to get a handle on differences in plea bargaining practices from district to district. And it is a tension. And I think it is the same tension that the Commission is grappling with, and that we are all grappling with on the sentencing side as to how do you balance the need for flexibility to meet individualized circumstances with the need for justice not depending on which judge you draw, or which prosecutor you draw.”).

²³³ *Berman 2012 Public Hearing Statement*, written statement at 4 (“[T]his Commission’s recent report to Congress on mandatory minimum penalties, the Commission’s prior survey of district judges, and new independent research all strongly indicate that, to the extent that there is a major problem with unwarranted sentencing disparities in the modern federal sentencing system, such disparities are principally attributable to the operation of mandatory minimum sentencing provisions as impacted by the exercise of prosecutorial discretion.”).

²³⁴ *Wayne 2012 Public Hearing Statement*, written statement at 9.

²³⁵ *McKee 2012 Public Hearing Statement*, written statement at 11 (“Departures and variances may not reveal a problem with the advisory guidelines but may in fact alleviate undue rigidity in individual cases.”); see also *Bemporad 2012 Public Hearing Statement*, written statement at 1 (“Judicial variances . . . have reduced unwarranted disparity caused by prosecutorial decisions, probation office policy, and the guidelines themselves.”); *Moore 2012 Public Hearing Statement*, written statement at 15 (“[E]vidence [] reliably demonstrates that judges have exercised their discretion to alleviate unwarranted racial disparities built into the sentencing rules and arising from the decisions of law enforcement agents and prosecutors, and evidence that all defendants are treated with greater respect and fairness when judges consider them as individuals in ways the guidelines do not.”).

²³⁶ *Debold 2012 Public Hearing Statement*, written statement at 9.

²³⁷ See, e.g., *Volkov 2012 Public Hearing Statement*, written statement at 7 (“The Commission has identified a significant and troubling trend which needs to be studied further – federal sentences for African-American defendants are significantly higher than those for white defendants.”).

²³⁸ *Axelrod 2012 Public Hearing Statement*, written statement at 11.

Together with the Commission's study exposing an increase in unwarranted racial and ethnic disparities in post-*Booker* federal sentencing practice, we have real concerns that current policy is not meeting the long term goals of the federal criminal justice system, including the goals of fostering trust and confidence in the criminal justice system and eliminating unwarranted disparities in sentencing.²³⁹

Other hearing participants, in contrast, questioned the report's methodology and conclusions. One circuit court judge indicated that "[w]hile multivariate regression analysis has long been a tool used by social scientists due to its many advantages, it is essential to emphasize its drawbacks each time a conclusion is reached based on this statistical technique."²⁴⁰ This same judge explained:

As the Commission has stated in prior testimony . . . , one must always be cautious when drawing conclusions about racial disparity based on regression analysis due to the lack of relevant data. Different statistical methodologies, based not on available data but on researchers' choices, can also lead to different results. . . . Any claim of increased disparity must therefore be subject to as much research as possible by different researchers to increase confidence in statistical conclusions.²⁴¹

Several participants cited to a separate study by Jeffrey T. Ulmer, Michael T. Light, and John H. Kramer as evidence of the different conclusions that can result from methodological choices.²⁴² A federal public defender opined that "[the Commission's] study should play no part, or at least no important part, in the Commission's account of sentencing after *Booker*," arguing that "it would be seriously misguided to enact legislation constraining judicial discretion on the basis of a study that does not show that judges exercise racial bias in sentencing, that has been undermined by a different peer-reviewed study, and that it appears is not even well understood."²⁴³ Those that criticized the Commission's multivariate analysis suggested, in the words of the same public defender, that "other, stronger evidence . . . shows that there are much more troublesome and proven sources of unwarranted disparity," such as mandatory minimums, the incorporation of these mandatory minimums into the guidelines, and prosecutorial decision making.²⁴⁴

²³⁹ *Axelrod 2012 Public Hearing Statement*, written statement at 12-13; *see also Miner 2012 Public Hearing Statement*, written statement at 5 ("Finally, who could defend a system in which statistics prove that racial and educational disparities are on the rise as judges drift from guideline-based sentences to a discretionary system?"); *Volkov 2012 Public Hearing Statement*, written statement at 7 ("The Commission has identified a significant and troubling trend which needs to be studied further – federal sentences for African-American defendants are significantly higher than those for white defendants.").

²⁴⁰ *McKee 2012 Public Hearing Statement*, written statement at 15.

²⁴¹ *McKee 2012 Public Hearing Statement*, written statement at 15-16; *see also Moore 2012 Public Hearing Statement*, written statement at 25 ("However it is spun, this study should play no part, or at least no important part, in the Commission's account of sentencing after *Booker*. The study has been criticized and contested for numerous reasons. Like other multivariate regression research in this area, its results are problematic in light of missing data and questionable methodological choices.").

²⁴² *McKee 2012 Public Hearing Statement*, written statement at 15 (citing Jeffrey T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity in the wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 *Criminology & Pub. Pol'y* 1077 (2011)); *Moore 2012 Public Hearing Statement*, written statement at 26 (citing same study).

²⁴³ *Moore 2012 Public Hearing Statement*, written statement at 25.

²⁴⁴ *Moore 2012 Public Hearing Statement*, written statement at 25; *see also Wayne 2012 Public Hearing Statement*, written statement at 9 ("[R]acial disparities are rooted in the harsh mandatory minimum sentences and the integration of mandatory minimum sentences into the guidelines system").

The same federal public defender also argued that “judges do not disfavor African American defendants or favor White defendants in their decisions to impose sentences below the guideline range. But mandatory minimum sentences prevent judges from imposing below-guideline sentences for African American defendants more often than they prevent below-guideline sentences for White defendants.”²⁴⁵ Many of the same hearing participants contended that judges had in fact exercised their discretion post-*Booker* to alleviate unwarranted racial disparities.²⁴⁶ One circuit court judge argued that a return to mandatory guidelines, moreover, would in no way address the problem of racial disparity: “[M]andatory sentence[s] and guidelines cannot be defended on the grounds that they are good for racial minorities. In fact, these practices, especially in the area of narcotics, have led to disastrous increases in the rate of incarceration of minority men.”²⁴⁷ This same circuit court judge expressed his view that limiting judicial discretion would not help racial minorities: “limiting opportunities for leniency works significantly to the disadvantage of the poor and minority groups who are most often arrested and prosecuted.”²⁴⁸

II. WHETHER ANY LEGISLATIVE OR GUIDELINES “FIX” IS NECESSARY AFTER *BOOKER*

Many participants asserted that the current advisory system is functioning well and no legislative or guidelines “fix” is necessary in reaction to *Booker*. The circuit court judge testifying on behalf of the Judicial Conference noted that “[i]t seems clear that the majority of judges believe that the advantages of the advisory system outweigh the possible disadvantages, particularly when compared with available alternatives.”²⁴⁹ As one criminal law professor asserted:

[A]fter now more than seven years of experience with the advisory guidelines, front-line sentencing participants still believe *Booker*’s structural changes have been mostly for the better and have furthered the basic goals pursued by Congress when it enacted the Sentencing Reform Act. Consequently, I have a very hard time seeing just why this Commission should be urging or supporting any kind of so-called “*Booker* fix” when any such fix seems like a solution in search of a problem.²⁵⁰

²⁴⁵ *Moore 2012 Public Hearing Statement*, written statement at 19.

²⁴⁶ *Moore 2012 Public Hearing Statement*, written statement at 15 (“[E]vidence [] reliably demonstrates that judges have exercised their discretion to alleviate unwarranted racial disparities built into the sentencing rules and arising from the decisions of law enforcement agents and prosecutors, and evidence that all defendants are treated with greater respect and fairness when judges consider them as individuals in ways the guidelines do not.”); *Wayne 2012 Public Hearing Statement*, written statement at 10 (“[T]he gap in time served between black and white offenders has consistently declined following *Booker* and, in 2010, reached its lowest point since 1992. This decrease can be directly attributed to the increased judicial discretion provided by *Booker*, as judges can now mitigate the unduly harsh guidelines that disproportionately affect black defendants through below-guideline sentences. The numbers speak for themselves: from 2006 to 2010 below-guidelines sentences spared 2,500 black defendants about 8,222 years of unnecessary incarceration. This would not be the case under a mandatory guidelines system.”); see also *Moore 2012 Public Hearing Statement*, written statement at 18 (“In the name of avoiding racial disparity, the Commission proposes to constrain judicial discretion in a manner that would limit the very ways in which judges have helped to narrow the racial gap. . . . The Commission’s proposals are counterproductive and focus on the wrong problem.”).

²⁴⁷ *Lynch 2012 Public Hearing Testimony*, transcript at 102.

²⁴⁸ *Lynch 2012 Public Hearing Testimony*, transcript at 102.

²⁴⁹ *McKee 2012 Public Hearing Statement*, written statement at 9.

²⁵⁰ *Berman 2012 Public Hearing Statement*, written statement at 3; see also *Bemporad 2012 Public Hearing Statement*, written statement at 1 (“The great weight of reliable evidence shows the current statutory system is working quite well, and the Commission should report that evidence to Congress.”); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing*

Several participants further underscored what they saw as the likely costs of any proposed changes to the advisory guideline system, such as increased litigation about the constitutionality of any changes, and suggested that the costs would outweigh any potential benefits.²⁵¹

Even those participants that believed that changes to the advisory guideline system are needed expressed uncertainty that the options so far articulated are the right ones. Noting that it “share[s] the view of those who believe that the current system is flawed and trending in the wrong direction,” the DOJ explained that “[w]here we haven’t yet spoken is on the question of whether there’s something better out there to replace it with.” The DOJ elaborated that, while it was concerned about the current trend in federal sentencing, it agreed with others that “any change is going to result in lots of litigation and be disruptive. So there are going to be costs to any change from the current system.” The DOJ explained that the question it therefore confronted is “[w]hat are the benefits? . . . And do the benefits outweigh the costs that we know are coming? You know, uncertainty is not great for prosecutors or, I think, for the justice system.”²⁵² The DOJ stated that “until there is sort of specific concrete legislative proposals that we can talk internally about to see whether those benefits would outweigh the costs that we know are going to come from the litigation that will follow, we’re having difficulty sort of presenting a clear position[.]”²⁵³ An academic recommended that “we take a ‘wait and see’ approach for at least another year or two. The current Guidelines system, even in the post-*Booker* world, is still immeasurably better than our pre-1984 sentencing lawlessness.”²⁵⁴

Options After Booker, Washington, DC (Feb. 16, 2012) (Testimony of Mary Price, General Counsel, Families Against Mandatory Minimums, transcript at 324)[hereinafter *Price 2012 Public Hearing Testimony*](“[The Commission’s proposals] would endanger what we see as the healthiest dynamic that the guideline system has ever experienced since its inception – which is the unfolding dialogue between the judiciary speaking through its sentencing opinions on the one hand of the Commission, and the Commission responding by evaluating the judicial feedback that it’s receiving and determining if and how it might do a better job of guiding that conversation.”); *Wayne 2012 Public Hearing Statement*, written statement at 12 (“NACDL strongly opposes any effort to make the guidelines mandatory or binding in nature and, instead, joins many other organizations and individuals in endorsing the continued use of a research—and experience—driven advisory guidelines system.”).

²⁵¹ *Bowman 2012 Public Hearing Statement*, written statement at 12 (“If the current advisory system is to be replaced, we must be reasonable confident that the replacement: (a) is constitutional under the post-*Booker* rules, (b) gives reasonable, but not unlimited, play to individualized sentencing and judicial discretion, (c) prescribes sentences that reasonably effectuate the utilitarian goals of crime control while conforming more closely to most people’s moral intuition about severity than many of the current guidelines, and (d) is capable of evolution without becoming a one-way upward ratchet.”); *Debold 2012 Public Hearing Testimony*, transcript at 363 (“[W]e believe that the advisory system, although not perfect, is working reasonably well. We think that the benefits [of the proposed] statutory modification to the advisory system would not be great, and that any possible benefits would probably not be enough to justify the risks—including litigation over the constitutionality of the some of the proposed changes, should they really modify the way courts are operating currently.”); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Professor Susan R. Klein, Alice McKean Young Regents Chair of Law, University of Texas School of Law, written statement at 5) [hereinafter *Klein 2012 Public Hearing Statement*](“I do not find the Commission’s proposals at all unreasonable, and I sympathize with the desire to make the Guidelines more mandatory and therefore decrease unwarranted disparity. However, I fear that what is in essence tinkering at the edges proposed by the Commission will either be ruled unconstitutional, or will have little or no effect.”).

²⁵² *Axelrod 2012 Public Hearing Testimony*, transcript at 88-89.

²⁵³ *Axelrod 2012 Public Hearing Testimony*, transcript at 89.

²⁵⁴ *Klein 2012 Public Hearing Statement*, written statement at 4.

Other participants articulated the need for some form of a *Booker* “fix” in which the guidelines would once again be presumptively binding on judges.²⁵⁵ While making clear his view that “[t]he ball is in Congress’ court, not the Sentencing Commission’s court” to legislate reform after *Booker*, a defense attorney recommended that both the Commission and Congress work together to create a mandatory, simplified guidelines system.²⁵⁶

Several other participants suggested that the Commission should focus not on a “*Booker* fix” but instead use its institutional knowledge and expertise to fix other perceived problems within the federal sentencing system. One professor reframed the issue as follows: “[T]he question we should be asking today is not whether to ‘restore mandatory guidelines,’ but whether we can design, enact, and then administer an *improved* guideline structure.”²⁵⁷ One circuit court judge suggested that the Commission work on amending the guidelines: “I absolutely believe that it is important to get the Guidelines right, because the Guidelines do direct most sentences.”²⁵⁸ The ABA representative asserted that “the most pressing problem confronting this Commission is not disparity but severity [of the guidelines].”²⁵⁹ Similarly, a federal public defender called for the Commission to “expand and accelerate its review and revision of guidelines that recommend punishment which is greater than necessary to serve the purposes of sentencing and guidelines that promote unwarranted disparities.”²⁶⁰ Several participants also suggested that the Commission focus on so-called “problem” guidelines, or those guidelines, such as child pornography and fraud, that do not command wide support among some groups of sentencing participants.²⁶¹ As

²⁵⁵ *Miner 2012 Public Hearing Statement*, written statement at 5 (“I believe the Commission and Congress should work toward a system wherein the Guidelines are once again presumptively applicable in all cases.”); *Volkov 2012 Public Hearing Statement*, written statement at 3, 7 (stating that “[w]hile the Commission’s legislative proposals all make sense, they assume the continuation of an “advisory” sentencing system, which has been shown to be inconsistent with the very purposes of the Sentencing Reform Act of 1984[.]” and advocating for “mandatory, simplified guidelines”).

²⁵⁶ *Volkov 2012 Public Hearing Statement*, written statement at 7.

²⁵⁷ *Bowman 2012 Public Hearing Statement*, written statement at 2.

²⁵⁸ *Lynch 2012 Public Hearing Testimony*, transcript at 162.

²⁵⁹ *Felman 2012 Public Hearing Statement*, written statement at 2; *see also Berman 2012 Public Hearing Statement*, written statement at 5 (“[U]nwarranted sentencing severity is often the root cause of any unwarranted sentencing disparity, and thus efforts to reduce unwarranted sentencing severity are likely to serve as the most effective way to reduce unwarranted sentencing disparity.”).

²⁶⁰ *Bemporad 2012 Public Hearing Statement*, written statement at 25; *see also U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Henry Bemporad, Federal Public Defender, Western District of Texas, transcript at 115) [hereinafter *Bemporad 2012 Public Hearing Testimony*] (“There are two ways to do that [fix the guidelines]. One is[] the de facto way, making those Guidelines a place where more judges in exercising their discretion fall. That’s by lowering Guidelines that are too high, making Guidelines fair when they’re not fair; explaining parts of the Guidelines that remain unexplained; particularly clarifying Guidelines so that there’s not tremendous disparity in application of those Guidelines.”); *Moore 2012 Public Hearing Statement*, written statement at 7 (“After twenty years of the one-way upward ratchet, the Commission has much to do before seeking to constrain judicial discretion. If the Commission wants judges to follow the guidelines more often, it should reduce unwarranted severity. The answer is not to require judges to give special ‘weight’ to guidelines that recommend excessive terms of imprisonment, or to discourage judges, through de novo review, from transparently disagreeing with unjust guidelines.”); *Berman 2012 Public Hearing Statement*, written statement at 4 (“[T]his Commission should expressly and forcefully shift its focus for federal sentencing reforms to the enduring problem of unwarranted *severity* in the federal sentencing system.”) (emphasis in original).

²⁶¹ *Bemporad 2012 Public Hearing Statement*, written statement at 2; *Miner 2012 Public Hearing Statement*, written statement at 10 (“Such changes might include adjusting the fraud guideline to account more accurately for relative culpability, eliminating the Guidelines’ sometimes bizarre and inconsistent treatment of misdemeanor offenses, and updating Specific Offense Characteristics in the child pornography guidelines to better address modern technology and the means by which sophisticated offenders seek to build networks and evade detection.”); *Berman 2012 Public Hearing Statement*, written

another public defender stated: “If the Commission wants a stronger and more effective guidelines system, the way is clear: Continue to fix broken guidelines to better reflect the purposes and factors set forth in 18 U.S.C. § 3553(a), and to educate Congress about the need to reconsider policies that adversely impact the guidelines.”²⁶² Another professor asserted that judges should be required to find facts by more than a preponderance of the evidence at sentencing.²⁶³

In addition to suggestions directed at the guidelines manual, participants pointed to other areas in need of reform. A circuit court judge recommended that the Commission “renew[] its efforts to study prosecutorial discretion and disparity[.]”²⁶⁴ Another appellate judge proposed that the Commission ask Congress to “reassess the severity, scope, and structure of the recidivist provisions at 21 U.S.C. §§ 841 and 960”; “amend the ‘safety valve’ provision at 18 U.S.C. § 3553(f) [] to include certain offenders who receive two to three criminal history points under the guidelines”; “adopt a similar ‘safety valve’ for low-level, nonviolent offenders convicted of other offenses carrying mandatory minimums”; and “bring prescribed statutory sentences in line with just purposes of punishment.”²⁶⁵

statement at 6 (“Tellingly and unsurprisingly, the types of offenses for which there has most often been expressions of special concerns about potential disparities in the post-*Booker* era — e.g., high loss fraud offenses, some drug offenses, and child pornography downloading offenses — all involve sentencing guidelines with the most severe and jurisprudentially questionable upward enhancements, and guidelines which often recommended very long prison terms even for first offenders with significant mitigating circumstances.”).

²⁶² *Bemporad 2012 Public Hearing Statement*, written statement at 2; see also *Moore 2012 Public Hearing Statement*, written statement at 51 (“If the Commission developed a sound and well-explained set of advisory guidelines, those judges who have previously exercised their discretion to reject flawed guidelines in minerun cases would be more apt to follow them, and judges who follow guidelines in any event will continue to do so. This is the evolutionary process envisioned by Congress, but it was stifled by a form of review that came to simply enforce the guidelines. It is also the process expected by the Supreme Court.”).

²⁶³ *Berman 2012 Public Hearing Statement*, written statement at 8-9 (“[T]hough perhaps not a matter of constitutional necessity, I still strongly believe the standard of proof for fact-finding at sentencing should be higher than the civil proof standard of preponderance of the evidence, especially for any fact that can increase a recommended guideline range significantly. Even though a lesser burden of proof may be constitutionally permissible . . . , the fundamental procedural[] principles articulated by the Supreme Court in many cases strongly suggest that, as a matter of policy, it is not fair or just to apply a civil standard of proof when resolving factual issues in a criminal case that can have defined and potentially severe punishment consequences for a defendant.”).

²⁶⁴ *McKee 2012 Public Hearing Statement*, written statement at 18 (“Given the overarching impact prosecutorial decisions have on what is charged, who is charged and how they are charged, no serious review of the current sentencing scheme can be undertaken that does not already consider the impact, if any, of prosecutorial decisions on the sentencing process and on any sentencing disparity across various demographically delineated groups. It is therefore imperative that the Commission renews its efforts to study prosecutorial discretion and disparity, particularly in the advisory guidelines era, in order to understand the origins and impact of any disparity that may exist at sentencing but also at the presentencing stage. We urge the Commission to work with Congress and the Department of Justice to improve data collection to enable this type of study.”); see also *Berman 2012 Public Hearing Statement*, written statement at 8 (“Of particular concern, I urge the Commission to consider anew complaints that the federal sentencing process still fails to provide defendants fair notice and lacks transparency concerning the facts and factors which can impact a defendant’s sentence during the plea negotiation process. Though an enduring challenge for this institution, I still believe the Commission . . . should try to enhance the transparency of presentencing charging and plea bargaining decisions.”)

²⁶⁵ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of the Honorable Andre M. Davis, Circuit Judge, United States Court of Appeals for the Fourth Circuit, written statement at 2-3) [hereinafter *Davis 2012 Public Hearing Statement*].

III. DISCUSSION OF SPECIFIC PROPOSALS

A. Commission Proposal

Several participants supported the Commission's attempt to make changes to the current advisory system, but had reservations about the manner in which the Commission had attempted to do so or suggestions to improve on the Commission's proposal. A defense attorney stated:

Your proposals are modest. They're all justified. They're all reasonable. But you don't go far enough. You [have] got to start with cutting your Guidelines. You've got to start with taking a reassessment and calling it like you see it. That's where you're best.²⁶⁶

This participant endorsed a mandatory, simplified guidelines system.²⁶⁷

Stating that the relevant question was not whether reform was necessary but rather “[w]hat reforms should be undertaken to repair and revise the SRA[.]” another private practice attorney “applaud[ed] the Commission for embracing this question and focusing on the types of reforms that should be considered and implemented.”²⁶⁸ This participant supported some of the reforms articulated by the Commission, but ultimately recommended a system “wherein the Guidelines are once again presumptively applicable in all cases.”²⁶⁹

A professor declared that she did not find the Commission's proposals “at all unreasonable” and “sympathize[d] with the desire to make the Guidelines more mandatory and therefore decrease unwarranted disparity.”²⁷⁰ This professor, however, was concerned that the proposals “will either be ruled unconstitutional, or will have little or no effect.”²⁷¹ Other participants similarly questioned both the constitutionality and the actual effect of the proposed changes.²⁷² An appellate judge posed the question, “[s]o the real question is what are the

²⁶⁶ *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Michael Volkov, Attorney, transcript at 209) [hereinafter *Volkov 2012 Public Hearing Testimony*].

²⁶⁷ *Volkov 2012 Public Hearing Statement*, written statement at 7.

²⁶⁸ *Miner 2012 Public Hearing Statement*, written statement at 5.

²⁶⁹ *Miner 2012 Public Hearing Statement*, written statement at 5-6 (explaining that such a system would place “greater reliance upon charging aggravating factors and having those factors put to a jury via a special verdict form or, in the case of a guilty plea, having the facts admitted by the defendant,” while “[s]ome factors [w]ould remain advisory considerations subject to the court's discretion.”).

²⁷⁰ *Klein 2012 Public Hearing Statement*, written statement at 5.

²⁷¹ *Klein 2012 Public Hearing Statement*, written statement at 5; *see also Klein 2012 Public Hearing Statement*, written statement at 10-11 (“If the proposal regarding 944(e) and the proposals regarding appellate review and sentencing court justifications are not upheld by the Court, the proposals might result in contributing to law that will be worse, in terms of fair sentencing, than what we have now.”).

²⁷² *Debold 2012 Public Hearing Statement*, written statement at 4 (“If the proposed changes are meant as substantive revisions to the results of the Supreme Court's effort to sever the unconstitutional parts of the Sentencing Reform Act, those changes are themselves likely to be unconstitutional. At a minimum, it will take substantial litigation – with potentially inconsistent results among the circuits over a number of years – to get to a final answer that applies evenly across the country. The confusion and uncertainty during the intervening years will produce unwarranted disparity.”); *Wayne 2012 Public Hearing Statement*, written statement at 7 (“Although these requirements would not explicitly forbid all non-guidelines sentences in all circumstances, if enacted, they would effectively reinstate mandatory sentencing in practice.

benefits [of the Commission’s proposals,]” answering that he saw “relatively few for most of these proposals, even the ones that in the abstract I am inclined to agree with.”²⁷³ A federal public defender added that “[t]he Commission’s proposals [] raise serious constitutional issues[,] . . . are contrary to the Supreme Court’s decisions, and would result in Sixth Amendment violations[,]” and suggested that “[i]f enacted, the proposals would cause disruptive litigation and needless unfairness pending resolution by the Supreme Court, at the conclusion of which the entire guidelines system could well be struck down.”²⁷⁴

1. Appellate review

A private practice attorney opined that “it was not asking too much to codify the appellate standard in view of *Booker*, in view of *Rita*, and in view of the considerations that the Commission outlines through Judge Saris’s testimony.”²⁷⁵ Other participants, however, did not support these changes, with one professor calling the proposed changes “unnecessary” in light of the fact that “[t]here is no evidence that the current system is working badly.”²⁷⁶ Another academic questioned whether altering the appellate standard of review would affect unwarranted disparities and be worth the cost of litigating its constitutionality.²⁷⁷ A circuit court judge opined that changing the appellate standard of review would not have a big impact “unless it’s coupled with the government taking a more aggressive approach to appealing sentences,”²⁷⁸ and instead suggested that, while he was unsure how to accomplish this, he favored “beefed up appellate review . . . to encourage courts of appeals to be more aggressive in dealing with outlier sentences. I think that would be significant.”²⁷⁹

Specifically as to codifying a presumption of reasonableness, one defense attorney called this “a welcome proposal” given that “[t]here is no meaningful appellate standard for reviewing district court sentencing decisions, and there is a current split among the circuits on how to conduct such a review.”²⁸⁰ Several participants, however, questioned whether such a change would have any practical effect on sentencing outcomes.²⁸¹ As the PAG

Further, each of these changes is constitutionally suspect and, if enacted together, would certainly be declared unconstitutional.”).

²⁷³ *Lynch 2012 Public Hearing Testimony*, transcript at 169.

²⁷⁴ *Bemporad 2012 Public Hearing Statement*, written statement at 1; *see also Bemporad 2012 Public Hearing Testimony*, transcript at 117 (“I share [other participants’] concerns that the de jure way of doing it [*i.e.* statutory changes to the sentencing system] is going to lead to at least Constitutional uncertainty, at worst a declaration that the system is unconstitutional, throwing us into the kind of chaos that I think all of us want to avoid.”).

²⁷⁵ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Matthew Miner, Attorney, transcript at 124) [hereinafter *Miner 2012 Public Hearing Testimony*].

²⁷⁶ *Tonry 2012 Public Hearing Statement*, written statement at 1.

²⁷⁷ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Professor Susan R. Klein, Alice McKean Young Regents Chair of Law, University of Texas School of Law, transcript at 107) [hereinafter *Klein 2012 Public Hearing Testimony*] (“I’m just not sure you can get there by changing the standard of review. It’s possible. It would be a risky venture, I think.”).

²⁷⁸ *Lynch 2012 Public Hearing Testimony*, transcript at 164.

²⁷⁹ *Lynch 2012 Public Hearing Testimony*, transcript at 147.

²⁸⁰ *Volkov 2012 Public Hearing Statement*, written statement at 6.

²⁸¹ *See, e.g., Moore 2012 Public Hearing Statement*, written statement at 51 (“[A]lthough some circuits apply a presumption of reasonableness and others do not, there is not an appreciable difference in approach to the child pornography guideline.”).

representative stated, “If such a presumption [of reasonableness] could affect the outcome in some cases, there would have been no basis for the Supreme Court to make it optional.”²⁸² A professor questioned whether a presumption of reasonableness was either constitutional or sound sentencing policy, calling this presumption “very odd” given that no circuit had yet discussed how an appellant might rebut such a presumption or the consequences of such a rebuttal.²⁸³ This participant recognized that such a presumption is not “very odd” if “one just hopes it serves to make the guidelines a ‘sentencing safe-harbor’ for district courts so that any and every within-guideline sentences is functionally immune from substantive reasonableness review[,]” but opined that, even if it were both constitutionally allowed and sound as a matter of sentencing policy, “a blanket presumption of reasonableness for all within-guideline sentences is ultimately tone-deaf to Congress’s commands in 18 U.S.C. § 3553(a), which are the only proper statutory metric for assessing the reasonableness of any particular federal sentence on appeal.”²⁸⁴

As for requiring greater justification for greater variances, several participants suggested that to the extent that this codified what the Supreme Court has already held, it is unnecessary, and to the extent it requires more, it may be unconstitutional. As the PAG representative stated, “a requirement that larger variances be accompanied by proportionately greater justifications would require the courts to choose between invalidating the law as unconstitutional or interpreting it to do no more than the Supreme Court has already required. Neither result would be beneficial.”²⁸⁵ The ABA representative further argued that “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.”²⁸⁶

²⁸² *Debold 2012 Public Hearing Statement*, written statement at 5 (“In short, the only result of any consequence from legislating an appellate presumption of reasonableness for within-Guidelines sentences would be litigation fueled by the natural reluctance to believe that Congress passed a law knowing it would have no practical effect.”).

²⁸³ *Berman 2012 Public Hearing Statement*, written statement at 9 (“I call the presumption of reasonableness for within-guideline sentences ‘very odd’ because, despite its repeated reference and application in the circuits which have adopted it, I am still yet to see a single appellate ruling which thoroughly explores — or, for that matter, even expressly discusses — when and how this ‘presumption’ can be rebutted by an appellant and what might be the legal consequences of any such (phantom) rebuttal. It is very hard to understand why this Commission or Congress should embrace a so-called ‘presumption of reasonableness’ for within-guideline sentences when it is hard understand what the presumption really means and how it is to be applied in the review of sentences for reasonableness.”); *see also Bemporad 2012 Public Hearing Statement*, written statement at 21 (“A mandatory presumption of reasonableness is unwarranted and may operate unconstitutionally.”).

²⁸⁴ *Berman 2012 Public Hearing Statement*, written statement at 9-10 (“Congress’s commands in 18 U.S.C. § 3553(a) — which still guide district court sentencing and appellate review for reasonableness and which still serve as guideposts for this Commission’s work — provide no textual basis whatsoever for finding a guideline sentence ‘presumptively’ reasonable.”).

²⁸⁵ *Debold 2012 Public Hearing Statement*, written statement at 5; *see also Debold 2012 Public Hearing Statement*, written statement at 6 (“If, however, the intent here is to impose a more exacting requirement of proportionality, or to reduce the deference owed by appellate courts, it would likely come too close to creating an impermissible presumption of unreasonableness for sentence outside the Guidelines range.”) (internal quotations omitted); *Klein 2012 Public Hearing Statement*, written statement at 7 (“Requiring a ‘compelling’ justification by sentencing courts would make the guidelines look mandatory, which would violate the Sixth Amendment.”); *Bemporad 2012 Public Hearing Statement*, written statement at 12 (“If enacted into law, the Commission’s proposal for stricter review of non-guideline sentences would result in Sixth Amendment violations.”).

²⁸⁶ *Felman 2012 Public Hearing Statement*, written statement at 21 (“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.”).

Several participants supported the Commission’s proposal for heightened appellate scrutiny of policy disagreements with the guidelines. A circuit court judge stated that his “most significant concern” and the “biggest problem” with the advisory guidelines system is the validity of judicial disagreements with the guidelines based on policy, arguing that “the result that judges are free, individually, to disagree with the policy of the Guidelines is what strikes at the heart of the Guidelines system.”²⁸⁷ This same appellate judge asserted that he “think[s] it is a good idea that policy disagreements, however defined, should be subject to *de novo* review in the courts of appeals, and ultimately in the Supreme Court, so that we do not have a system where some judges think that child pornography is not to be sentenced as severely, and others take a completely different approach.”²⁸⁸

Others opposed the proposal on policy disagreements as both violating Supreme Court precedent and unwise sentencing policy. A federal public defender argued that, “[a]s the Supreme Court has consistently made clear, variances based on policy disagreements are a constitutionally required component of the advisory guidelines system,”²⁸⁹ and opined that “if judges are not free to disagree with the Guidelines on the basis of policy[, and] if judges on the courts of appeals are substituting their judgments on this factor, it is going to lead to unconstitutional sentences.”²⁹⁰ Several participants pointed to practical problems that may arise in legislating policy disagreements, such as “telling the difference between a ‘policy disagreement’ and a determination that a particular defendant’s circumstances (either based on the nature and seriousness of the offense or offender characteristics) warrant a sentence other than one the Guidelines call for[,]”²⁹¹ and cases in which a policy disagreement is one of several sentencing factors articulated by the court.²⁹² “Beyond the practical difficulties of implementing such a rule,” the PAG representative opined that policy disagreements allow the Commission to receive feedback about “the efficacy and wisdom of particular Guidelines” and suggested that “[n]othing more is needed to police against ‘unreasonable’ policy disagreements than a reasonableness review standard.”²⁹³

²⁸⁷ *Lynch 2012 Public Hearing Testimony*, transcript at 104-05.

²⁸⁸ *Lynch 2012 Public Hearing Testimony*, transcript at 105 (“I think that’s [policy disagreements] the biggest problem with the current system, and I would like to see stronger appellate review in those cases.”); *see also Miner 2012 Public Hearing Statement*, written statement at 8 (“I also support the Commission’s proposal for heightened appellate scrutiny for sentencing decisions that are based upon policy disagreements with the Guidelines.”).

²⁸⁹ *Bemporad 2012 Public Hearing Statement*, written statement at 11 (“The only way Congress could eliminate policy disagreements would be to make the guidelines mandatory, and to require aggravating facts to be charged in an indictment and proved to a jury beyond a reasonable doubt.”).

²⁹⁰ *Bemporad 2012 Public Hearing Testimony*, written statement at 118; *see also Klein 2012 Public Hearing Statement*, written statement at 7 (“[I]mposing a heightened appellate standard of review for ‘policy’ disagreements[] may violate the language in *Gall*.”).

²⁹¹ *Debold 2012 Public Hearing Statement*, written statement at 7 (“We oppose efforts to create a separate standard of review for particular types of variances. It would be unwieldy and add little to what the law already provides.”); *see also Klein 2012 Public Hearing Statement*, written statement at 8 (“The Commission would also need to define when a disagreement is a ‘policy’ one.”).

²⁹² *Debold 2012 Public Hearing Statement*, written statement at 7 (“And what about a case where the judge includes a ‘policy disagreement’ as one of several factors?”).

²⁹³ *Debold 2012 Public Hearing Statement*, written statement at 7 (“[W]e see no reason to discourage an examination of the efficacy and wisdom of particular Guidelines as judges apply those Guidelines on a case-by-case basis. District judges have a unique perspective – they sentence hundreds of defendants every year. They are better positioned than appellate judges to assess whether a particular Guideline does what it is supposed to do in the real world.”).

2. Substantial Weight

As for the Commission’s proposal that district courts afford “substantial weight” or “due regard” to the guidelines, a private practice attorney asserted that “[t]he Commission’s proposal . . . is also worthy of consideration as a short term remedy,”²⁹⁴ while other participants did not support this proposal. Several participants questioned whether this proposal would add anything to the sentencing process, since “most district courts already give the guidelines significant consideration.”²⁹⁵ Participants also questioned whether this requirement would comport with the Supreme Court’s Sixth Amendment jurisprudence.²⁹⁶

3. Three-Step Process

Many participants viewed the Commission’s proposal that Congress codify the three-step process as “unnecessary.”²⁹⁷ As the PAG representative stated, “If the proposed changes are meant simply to codify what the Supreme Court has already held, they are unnecessary. Enacting a law that does not change the law is a recipe for confusion and an invitation for more wasteful litigation.”²⁹⁸ Participants also questioned whether the three-step process that the Commission had written into USSG §1B1.1 and sought to have Congress codify was consistent with the Supreme Court’s jurisprudence and would pass constitutional muster.²⁹⁹

Specifically, a federal public defender argued that the requirements in USSG §1B1.1 that courts must consider the specific offender characteristics and departure provisions in Chapter Five of the guidelines “[b]y their terms[] would violate the Sixth Amendment and the Court’s policy against one-way upward levers.”³⁰⁰

²⁹⁴ *Miner 2012 Public Hearing Statement*, written statement at 8.

²⁹⁵ *Felman 2012 Public Hearing Statement*, written statement at 20 (“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.’”); *see also Bemporad 2012 Public Hearing Statement*, written statement at 2 (“The Commission appears to believe that ‘substantial weight’ or ‘due regard’ are equivalent to ‘respectful consideration.’ If that were so, the Commission’s proposal would be superfluous.”).

²⁹⁶ *Felman 2012 Public Hearing Statement*, written statement at 21 (“[B]eyond the lone dissents of Justice Alito in *Gall* and *Pepper*, 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.”); *Klein 2012 Public Hearing Statement*, written statement at 8 (“The Commission proposal to require that district courts give guidelines ‘substantial weight’ is probably going too far toward making them mandatory.”).

²⁹⁷ *See, e.g., Tonry 2012 Public Hearing Statement*, written statement at 1 (“[C]odifying the three-step process—is unnecessary.”).

²⁹⁸ *Debold 2012 Public Hearing Statement*, written statement at 4; *see also Debold 2012 Public Hearing Statement*, written statement at 9 (“One circuit – the Seventh – has declared departures obsolete. We do not believe that this isolated difference in approaches warrants an Act of Congress. Those of us who practice in the Seventh Circuit still invoke departure provisions where relevant to a particular case. And judges still rely on departure language to sentence below the Guidelines in the Seventh Circuit. In fact, they do so at a rate greater than the national average: in 5.3% of cases compared to the national rate of 3.1%.”).

²⁹⁹ *See, e.g., Klein 2012 Public Hearing Statement*, written statement at 9 (“The Commission recommends that the three-step process described in USSG section 1B1.1 be binding by all sentencing judges. Such a Congressional statute would run into the same problems as any attempt to heighten appellate review or require more justification by district court judges for sentences that disagree with Commission policy. That is, such a procedure runs the risk of being declared a violation of the Sixth Amendment when it eventually reaches the Supreme Court.”).

³⁰⁰ *Bemporad 2012 Public Hearing Statement*, written statement at 4-6 (“We again urge the Commissioners to look at the language of its three-step process as written in § 1B1.1. As written, it is not an instruction to calculate the guideline range,

According to this participant, “[t]he Supreme Court has directed district courts to follow a procedure quite different from the Commission’s three-step process[,]” distinguishing the Commission’s process from the Supreme Court’s procedure in these ways: (1) Supreme Court jurisprudence allows courts to hear arguments for a sentence outside the range in “either of two forms,” a departure *or* a variance, and because a party may seek either a departure or a variance, “policy statements or commentary relating to departures need not be considered unless a party raises a ground for ‘departure’”; and (2) *Gall* and *Pepper* stand for the proposition that “[p]olicy statements and commentary that conflict with factors that are relevant to the purposes of sentencing need not be considered, and, if raised in opposition to a variance, may not be elevated above relevant factors described in § 3553(a) or used to deny a variance.”³⁰¹

4. Tension between 28 U.S.C. § 991, *et seq.* and 18 U.S.C. § 3553(a)

Regarding whether Congress should address any tension between 28 U.S.C. § 991, *et seq.* and 18 U.S.C. § 3553(a), a private practice attorney agreed that “[t]hese two statutes must be reconciled to provide clear guidance to the Commission and the Courts.”³⁰² Other participants asserted that these statutes are not in tension.³⁰³ As a federal public defender explained, “Congress recognized that all of the factors set forth in 28 U.S.C. § 994(d) and (e) and in 18 U.S.C. § 3553(a)(1) and 18 U.S.C. § 3661, are relevant to all aspects of sentencing with one exception: the factors listed in § 994(e) are ‘generally not appropriate reasons to impose or lengthen a term of imprisonment.’”³⁰⁴ The PAG representative expanded on this point:

The decision to impose a prison term or to lengthen that term cannot properly hinge on the fact that a defendant has a lackluster employment record, needs education or vocational skills, has no meaningful family ties or responsibilities, or lacks community ties. That is all encompassed within the “general inappropriateness” part of Section 994(e). That directive to the Commission should not – and does not – prevent a judge from considering these same factors in deciding whether to lessen the length of imprisonment.³⁰⁵

An academic opined that if, for example, Congress were to “enact a statute providing that a judge may not increase or decrease a guideline sentence based upon a defendant’s prior military service or his post-conviction

and then consider grounds for departure if raised. . . . The courts do not follow this three-step process because it purports to require deference to policy statements that, taken literally, would reinstate a mandatory guidelines system.”)

³⁰¹ *Bemporad 2012 Public Hearing Statement*, written statement at 6.

³⁰² *Miner 2012 Public Hearing Statement*, written statement at 8.

³⁰³ See, e.g., *Klein 2012 Public Hearing Statement*, written statement at 9 (“These statutes do not necessarily conflict.”); *Wayne 2012 Public Hearing Statement*, written statement at 7 (“[N]ACDL disagrees with the Commission’s position that there is a ‘tension’ between 18 U.S.C. § 3553(a) and 28 U.S.C. §§ 991, *et seq.*, and opposes any statutory change that would limit the discretion of judges to impose an alternative to incarceration or a shorter prison term based on the factors set forth in 28 U.S.C. § 994(e).”); *Debold 2012 Public Hearing Statement*, written statement at 8 (“We do not believe there is irreconcilable tension between [the statutes].”).

³⁰⁴ *Bemporad 2012 Public Hearing Statement*, written statement at 10.

³⁰⁵ *Debold 2012 Public Hearing Statement*, written statement at 8; see also *Wayne 2012 Public Hearing Statement*, written statement at 7 (“The ‘general inappropriateness’ part of § 994(e) states a most obvious truth: increasing a defendant’s prison sentence because he has a poor academic transcript or lacks family support is unjust. On the other hand, providing a judge with the discretion to take into account each defendant’s individual circumstances when deciding whether to lessen a length of prison or forego incarceration for a rehabilitative program in the community is both smart and fair sentencing policy.”).

rehabilitative efforts[. . .] such a bald attempt to reign in judicial discretion might not sit well with the Supreme Court.”³⁰⁶ This academic posited that disallowing judges from considering these factors “would inhibit the growth of sentencing law[.]” and suggested that “[i]t might be wiser to compromise, and convince the Commission to amend the guidelines (especially Parts H and K) to take account of what judges are doing nationwide.”³⁰⁷

B. Sessions Proposal

Several participants expressed support for the Sessions proposal. An academic opined that it “represents the most desirable option among the constitutionally permissible architectures” that “combine[s] a solution to the technical constitutional problem posed by *Blakely* with structural modifications designed to address many of the major substantive criticisms of the pre-*Booker* guidelines.”³⁰⁸ An appellate judge also stated that “. . . if there is to be a change, it seems to me [that the Sessions] proposal moves us closer to being in the right kind of place[.]” although the judge emphasized that in his view “there’s not enough doubt to suggest a change is warranted.”³⁰⁹ A defense attorney also described the Sessions proposal as “a great first start” for discussions between the two parties in Congress and expressed the view that requiring juries to find some sentencing factors would not be overly onerous.³¹⁰

Other participants did not support the Sessions proposal. A defense attorney expressed concern that the proposal would be declared unconstitutional by the Supreme Court, would prevent the Commission from receiving feedback about individual guidelines, would prevent judges from properly accounting for offender characteristics, and would lead to an increase in unwarranted disparities based on the variation of sentences within the broader ranges.³¹¹ Another defense attorney, representing the NACDL, expressed the view that the proposal “would exacerbate disparities and strain resources, and would likely result in another round of litigation challenging the system’s constitutionality.”³¹² The ABA representative also expressed the view that the proposal would increase unwarranted disparity resulting from broader ranges, would burden the system with significantly more complex trials, and would prevent the Commission from receiving feedback about individual guidelines.³¹³

³⁰⁶ *Klein 2012 Public Hearing Statement*, written statement at 9-10 (“Congress’ history of attempting to further cabin judicial discretion with the Feeney amendment backfired spectacularly, when the Court a few years later in *Booker* insisted that the guidelines be considered advisory.”).

³⁰⁷ *Klein 2012 Public Hearing Statement*, written statement at 10.

³⁰⁸ *Bowman 2012 Public Hearing Statement*, written statement at 17.

³⁰⁹ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Theodore McKee, Chief Circuit Judge, United States Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States Committee on Criminal Law, transcript at 228-29) [hereinafter *McKee 2012 Public Hearing Testimony*].

³¹⁰ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, D.C. (Feb. 16, 2012) (Testimony of Michael Volkov, Attorney, transcript at 235-6, 249).

³¹¹ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, written statement at 4-15) [hereinafter *Nachmanoff 2012 Public Hearing Statement*].

³¹² *Wayne 2012 Public Hearing Statement*, written statement at 5.

³¹³ *Felman 2012 Public Hearing Statement*, written statement at 22-24.

C. *Blakely-ization*

Participants underscored several concerns related to the *Blakely-ization* of the guidelines. A professor asserted that while *Blakely-ization* would be constitutional, “it would be both procedurally burdensome and even more restrictive of judicial discretion than the guidelines in their pre-*Booker* form[,]” and “[s]o far as [he] know[s], no institutional actor in federal sentencing favors this approach.”³¹⁴ In addition to it being “a significant and complex undertaking” to create such a new regime,³¹⁵ the ABA representative argued that “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,” given that ranges under a jury-driven system would likely be significantly wider and given that, because “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.”³¹⁶ In addition, this participant opined “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,” such as changed trial dynamics resulting from “[a]sking juries to decide matters that were traditionally thought of as sentencing considerations” and “a return to the prior systemic flaws of undue rigidity and unwarranted uniformity.”³¹⁷

Moreover, according to the ABA representative, “such a system would introduce intractable sources of unwarranted disparity,” because “[i]ndividual prosecutors would determine the sentencing range in many cases by deciding what facts to charge and what facts to bargain away[,]” and “[t]hose decisions would not be made or explained in open court or subject to judicial review.”³¹⁸ The circuit court judge speaking on behalf of the Judicial Conference echoed this concern, explaining that “[p]rosecutors would determine sentencing ranges in many cases by deciding what facts to charge and what facts to bargain away.”³¹⁹ Both participants suggested that “a jury-driven system would also prevent policy evolution based on empirical data and judicial feedback.”³²⁰

D. *Other Proposals*

Two participants offered proposals for reform combining *Blakely-ization* with the simplification of the guidelines. Matthew S. Miner, a private practice attorney, endorsed a sentencing reform in which prosecutors would charge aggravating factors and have those factors put to a jury via a special verdict form, or in the case of a guilty plea, admitted by the defendant.³²¹ Mr. Miner was less concerned than other commentators about the ability of juries to make such complex determinations, noting that juries in capital cases already find aggravating

³¹⁴ *Bowman 2012 Public Hearing Statement*, written statement at 13.

³¹⁵ *Felman 2012 Public Hearing Statement*, written statement at 23; see also *Nachmanoff 2012 Public Hearing Statement*, written statement at 19 (“[i]t would be burdensome and expensive[.]”).

³¹⁶ *Felman 2012 Public Hearing Statement*, written statement at 22-23.

³¹⁷ *Felman 2012 Public Hearing Statement*, written statement at 23.

³¹⁸ *Felman 2012 Public Hearing Statement*, written statement at 24.

³¹⁹ *McKee 2012 Public Hearing Statement*, written statement at 20-21 (“[A] system of jury fact-finding would inevitably elevate some facts while ignoring others.”).

³²⁰ *Felman 2012 Public Hearing Statement*, written statement at 24; *McKee 2012 Public Hearing Statement*, written statement at 21.

³²¹ *Miner 2012 Public Hearing Statement*, written statement at 5.

factors that determine a life or death question.³²² According to this proposal, not all aggravators or offense characteristics would be charged and submitted to the jury: “some factors, such as acceptance of responsibility, would need to remain advisory because it makes little sense to have such questions put to a jury in an adversarial proceeding.”³²³ In order to avoid lengthy special verdict forms in the case of current guidelines with a range of offense characteristics and aggravators, Mr. Miner advocated that “the factors given presumptive effect and submitted to the jury should be streamlined, and Congress and the Commission should give careful study to how best to achieve a balance between streamlined presumptive factors and those to be left to advisory guidelines and judicial discretion at sentencing.”³²⁴

Mr. Miner also asserted that “[i]f such a reform were implemented and juries were given a greater role in sentencing to protect the Sixth Amendment rights recognized by the Supreme Court in *Apprendi* and *Booker*, Congress could once again restore a heightened appellate standard akin to what was in effect when *Booker* was decided – that is *de novo* review of the sentencing judge’s findings.”³²⁵ He indicated that this appellate standard would be appropriate to review key sentencing facts found by a jury or admitted to by the defendant, and that discretionary determinations left to the judge at sentencing (such as where within the prescribed range the sentence would fall or whether probation or an alternative to incarceration was appropriate), as well as advisory considerations, could be subject to a lower standard of review.³²⁶

Michael Volkov, a defense attorney and former federal prosecutor and Senate and House Judiciary staff counsel, offered another proposal for mandatory, simplified guidelines.³²⁷ Mr. Volkov explained that, first, a new set of sentencing guidelines should be created that “is dramatically less complex and easier to use.”³²⁸ Second, the sentencing guideline factors should be simplified and divided into two categories: one category of mandatory guidelines which are based on jury fact finding, and another category of advisory guidelines which are based on judicial determination (for example, acceptance of responsibility).³²⁹ Finally, “a new sentencing table should be developed which includes a much smaller number of broader mandatory guideline ranges[,]” with “judges retaining discretion to impose a sentence within a broader range.”³³⁰ Mr. Volkov recognized that “all of this is easier said than done,” noting the complicating factors of how criminal history calculations can be simplified, how mandatory minimums would be incorporated into the revised guidelines system, and what mechanisms, if any, should remain for departures outside the mandatory range.³³¹

³²² *Miner 2012 Public Hearing Statement*, written statement at 5.

³²³ *Miner 2012 Public Hearing Statement*, written statement at 5-6.

³²⁴ *Miner 2012 Public Hearing Statement*, written statement at 6.

³²⁵ *Miner 2012 Public Hearing Statement*, written statement at 6.

³²⁶ *Miner 2012 Public Hearing Statement*, written statement at 6.

³²⁷ *Volkov 2012 Public Hearing Statement*, written statement at 7.

³²⁸ *Volkov 2012 Public Hearing Statement*, written statement at 7.

³²⁹ *Volkov 2012 Public Hearing Statement*, written statement at 7-8.

³³⁰ *Volkov 2012 Public Hearing Statement*, written statement at 8 (“Most judges will find a mandatory simplified sentencing system much easier to work within. Discretion will be preserved and sentences within the broader range will give judges the ability to give proper weight to individual factors.”).

³³¹ *Volkov 2012 Public Hearing Statement*, written statement at 8.

Professor Frank O. Bowman III articulated several “constitutionally permissible, operationally practicable basic sentencing architectures” that he did not ultimately support, including a return to the pre-guidelines discretionary sentencing scheme “in which district judges had unguided and virtually unreviewable discretion to impose a sentence anywhere between the statutory maximum and minimum sentence as traditionally defined.”³³² Professor Bowman noted that “[n]o institutional actor in federal sentencing favors this approach.”³³³ He also explained that he had advocated for so-called “topless” guidelines based on *McMillan v. Pennsylvania*³³⁴ and *Harris v. United States*³³⁵ as an temporary expedient in response to *Blakely*, in which “post-conviction judicial findings of fact regarding offense level would produce sentencing ranges with minimums as presumptive as they were before prior to *Booker*, but maximums that would be merely advisory.”³³⁶ Professor Bowman no longer supports this approach, noting that this approach is open to the objection that it “asymmetrically favored the government” and vulnerable if the Supreme Court abandoned the rule of *McMillan* and *Harris*; moreover, neither the Justice Department, which originally preferred this remedy, nor any other institutional actor has endorsed it.³³⁷

Professor Bowman also articulated another reform he called the “no-base-offense-level” guidelines, explaining that he “believe[s] one could create guidelines that meet the Court’s Sixth Amendment test by eliminating the correlation between the mere fact of conviction and any particular guideline offense level.”³³⁸ He explained that “[i]n such a system, at the moment of conviction, it would be impossible to determine ‘solely on the basis of facts reflected in the jury verdict or admitted by the defendant’ any maximum limit on the judge’s sentencing authority other than the statutory maximum in the traditional sense.”³³⁹ Under this system:

At the time of the verdict or plea, the defendant, his lawyer, the prosecutor, and the judge might be able to form a good estimate of what facts the sentencing judge might later find and thus how subsequent guidelines calculations would pan out, but as a matter of law, no guideline maximum would be generated until the sentencing proceeding was concluded. The final guideline range would be determined by judicial findings, but the guideline maximum would almost invariably be below, and would never exceed, the statutory maximum sentence determined by the jury-found elements of the offense. Thus, there would be no Sixth Amendment violation.

Professor Bowman stated that this approach was preferable to topless guidelines inasmuch as it would not asymmetrically favor the government, but that it was vulnerable to the extent the Supreme Court might invalidate *McMillan* and *Harris*.³⁴⁰ Bowman did not favor the adoption of its reform because “it could be employed to resurrect the guidelines, with all the flaws enumerated above, virtually unchanged.”³⁴¹

³³² *Bowman 2012 Public Hearing Statement*, written statement at 12-13.

³³³ *Bowman 2012 Public Hearing Statement*, written statement at 13.

³³⁴ 477 U.S. 79 (1986).

³³⁵ 536 U.S. 545 (2002).

³³⁶ *Bowman 2012 Public Hearing Statement*, written statement at 13.

³³⁷ *Bowman 2012 Public Hearing Statement*, written statement at 13; *Nachmanoff 2012 Public Hearing Statement*, written statement at 20).

³³⁸ *Bowman 2012 Public Hearing Statement*, written statement at 13, 15.

³³⁹ *Bowman 2012 Public Hearing Statement*, written statement at 15.

³⁴⁰ *Bowman 2012 Public Hearing Statement*, written statement at 16.

A final proposal discussed but not advocated for by any participant is that Congress increase the use of mandatory minimums.³⁴²

IV. OTHER ISSUES

Participants also raised various issues relating to the Commission's deliberations and data. A private practice attorney suggested that "it makes sense to consider reducing the Commission's size to achieve greater efficiency[.]" and that "[i]t also makes sense to create a mechanism to publish written dissents to Commission rulemakings, which would inform congressional decision-making on whether to approve or disapprove new amendments."³⁴³ A professor opined that "[t]he Sentencing Commission's rulemaking process should be made more akin to that required of other independent agencies by the Administrative Procedures Act and other governmental openness statutes, and [] a mechanism for direct judicial review of the Commission's rules should be devised."³⁴⁴ Another professor suggested that:

this Commission ought to be making a sustained and regular practice of expressly identifying and repeatedly referencing — for the benefit of both district and circuit courts — which guidelines in general and which sentencing enhancements in particular its research and experience reveal to be the most unduly severe and thus the most likely to sometimes result in recommended sentencing ranges that are "greater than necessary" to comply with the purposes of punishment set forth in the Sentencing Reform Act.³⁴⁵

Finally, the PAG representative noted that the Commission often responds to particular requests by judges for data to aid in sentencing a particular defendant and stated that "the PAG is willing and available to work with Commission staff on identifying ways to improve the availability of various categories of data, with the hope that the Commission would ultimately encourage judges, through a policy statement or otherwise, to consider these pertinent sentencing data when imposing sentence."³⁴⁶

³⁴¹ *Bowman 2012 Public Hearing Statement*, written statement at 16.

³⁴² *Nachmanoff 2012 Public Hearing Statement*, written statement at 21-22 ("Congress should not increase the use of mandatory minimums. It should abolish mandatory minimums."); *Davis 2012 Public Hearing Statement*, written statement at 2 ("Mandatory minimums hinder judges from handing out fair and individualized sentences, while prosecutors are given unwarranted power to dictate sentences through charging decisions."); *Felman 2012 Public Hearing Statement*, written statement at 2 ("I will explain the ABA's longstanding opposition to [mandatory minimum] statutes, an approach I have previously described as the antithesis of rational sentencing policy), written statement at 18-19 ("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.").

³⁴³ *Miner 2012 Public Hearing Statement*, written statement at 9.

³⁴⁴ *Bowman 2012 Public Hearing Statement*, written statement at 20.

³⁴⁵ *Berman 2012 Public Hearing Statement*, written statement at 8.

³⁴⁶ *Debold 2012 Public Hearing Statement*, written statement at 8.

Summary of 2010 Survey of Judges on the Federal Sentencing Guidelines

To mark the 25th anniversary of the Sentencing Reform Act, the Commission undertook a survey of all United States district judges concerning their views and opinions on sentencing practices. The Commission's survey, conducted between January and March 2010, asked questions grouped into five broad areas: (1) statutory and structural sentencing issues; (2) sentencing hearings; (3) guideline application issues; (4) departures; and (5) general assessments. Below is a summary of the district judges' responses to a subset of survey questions most relevant to sentencing post-*Booker*. Complete results of the survey are available at the Commission's website (www.ussc.gov).

I. STATUTORY AND STRUCTURAL ISSUES

A. Mandatory Minimums (Question 1)³⁴⁷

When respondents were asked their views about mandatory minimums, a majority responded that, overall, mandatory minimum sentences are too high for those offenses subject to mandatory minimum sentences. Specifically, when asked whether the mandatory minimum sentence was appropriate for all offenses with a mandatory minimum, only 38 percent of respondents agreed, while 62 percent believed that the mandatory minimum was too high.

When asked about specific offenses subject to mandatory minimums, the responses varied by offense type. Respondents expressed most dissatisfaction with the mandatory minimum sentences for trafficking in crack cocaine and for receipt of child pornography. A majority of the respondents believed that the mandatory minimum sentences for crack cocaine trafficking were too high, at 76 percent of respondents, while only 23 percent responded that these mandatory minimum sentences were appropriate and one percent stated that they were too low.³⁴⁸ In contrast, a majority responded that the mandatory minimum sentences for powder cocaine, heroin, and methamphetamine are appropriate, at 52 percent, 55 percent, and 53 percent, respectively, although a substantial percentage of respondents believed that these sentences are too high, at 44 percent for powder cocaine, 43 percent for heroin, and 44 percent for methamphetamine.³⁴⁹ Respondents also disapproved of the mandatory minimum sentences for marijuana: 54 percent of respondents believe the sentences are too high, 43 percent appropriate, and three percent too low. Concerning child pornography, while a majority of respondents believed that the mandatory minimum sentences for production and distribution of child pornography are appropriate (67% and 57%, respectively), only 26 percent of respondents believe that the mandatory minimums associated with receipt of child pornography are appropriate and 71 percent believe that these sentences are too high.³⁵⁰

³⁴⁷ See U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010) [hereinafter 2010 JUDGES' SURVEY], at 7 (Question 1, Table 1).

³⁴⁸ Note that the survey was conducted between January and March 2010, and, in August 2010, the Fair Sentencing Act of 2010, Pub. L. 111-220, lowered the mandatory minimum penalties for crack cocaine offenses.

³⁴⁹ A small percentage of respondents believed the mandatory minimums for these offenses are too low: 4 percent for powder cocaine, 2 percent for heroin, and 4 percent for methamphetamine.

³⁵⁰ Two percent responded that the mandatory minimum sentences for receipt of child pornography are too low.

Respondents were generally comfortable with the mandatory minimum sentences for firearms offenses, other child exploitation offenses, and aggravated identity theft. Sixty-one percent indicated that the mandatory minimum sentences for firearms offenses under 18 U.S.C. § 924(c) are appropriate, while 59 percent believed that the mandatory minimum sentences for firearms offenses under 18 U.S.C. § 924(e) are appropriate. Similarly, 68 percent of respondents thought that the mandatory minimums for child exploitation offenses other than child pornography were appropriate, with six percent stating that they were too low and 26 percent stating that they were too high. Finally, a little more than a majority, 54 percent, believed that the mandatory minimum sentence for aggravated identity theft was appropriate, while 18 percent believed it is too low and 27 percent believed it is too high.

*B. Safety Valve (Question 2)*³⁵¹

Respondents were asked whether they favored expanding the applicability of the statutory safety valve to other offenders and offenses. Respondents expressed most support for expanding the safety valve to receipt of child pornography, with 71 percent of respondents answering “strongly agree” (43%) or “somewhat agree” (28%) when asked whether to expand the safety valve to this offense. Strong support was also voiced for expanding the safety valve to drug trafficking offenses, with 76 percent of respondents answering either “strongly agree” (44%) or “somewhat agree” (32%). Substantial support was also expressed for expanding the safety valve to offenders in Criminal History Category II, with 66 percent of respondents either strongly agreeing (30%) or somewhat agreeing (36%); to all offenses with a mandatory minimum, with 69 percent either strongly agreeing (40%) or somewhat agreeing (29%); and to firearms offenses under 18 U.S.C. § 924(c), with 59 percent either strongly agreeing (31%) or somewhat agreeing (28%), and under 18 U.S.C. § 924(e), with 57% either strongly agreeing (30%) or somewhat agreeing (27%). Respondents expressed some support for expanding the safety valve to aggravated identity theft, with 46 percent answering “strongly agree” (23%) and “somewhat agree” (23%) to this expansion, although 28 percent answered “strongly disagree” (13%) and somewhat disagree (15%) and 26 percent were neutral as to this expansion.

Respondents expressed the most opposition to expanding the safety valve to drug trafficking offenders in Criminal History Category III, with 60 percent answering “somewhat disagree” (26%) and “strongly disagree” (34%). Some opposition was also expressed to expanding the safety valve to production of child pornography: 51 percent of respondents either somewhat disagreed (20%) or strongly disagreed (31%) with this expansion, while 34 percent either somewhat agreed (14%) or strongly agreed (20%) and 16 percent were neutral on the matter.

Respondents did not demonstrate a consensus as to expanding the safety valve to distribution of child pornography, with about equal percentages both supporting (25% strongly agreed and 19% somewhat agreed) and disagreeing (23% strongly disagreed and 18% somewhat disagreed) with such an expansion; 15 percent were neutral. Similarly, no consensus emerged about expanding the safety valve to other child pornography offenses: 34 percent of respondents either strongly agreed (19%) or somewhat agreed (15%) with this expansion, 38 percent either strongly disagreed (23%) or somewhat disagreed (15%) with this expansion, and 28% were neutral.

³⁵¹ 2010 JUDGES’ SURVEY at 8 (Question 2, Table 2).

*C. Opinions about Possible Statutory Changes and Structural Changes to the Guidelines (Question 3)*³⁵²

Respondents were asked their opinion about possible statutory and structural changes to the Guidelines. When asked whether Congress should amend 28 U.S.C. § 994(b)(2) to allow for broader ranges on the Sentencing Table, over fifty percent of respondents agreed that it should, with 24 percent strongly agreeing and 27 percent somewhat agreeing; 36 percent were neutral about this proposal, ten percent somewhat disagreed, and four percent strongly disagreed. Asked whether the sentencing guidelines should be “de-linked” from statutory mandatory minimum sentences, 58 percent of respondents were in support of de-linking, with 34 percent strongly agreeing and 24 percent somewhat agreeing to this change. While 19 percent were neutral about this change, a smaller percentage was in opposition than in support: 14 percent answered “somewhat disagree” and eight percent answered “strongly disagree.”

Respondents generally were not in favor of decreasing the number of criminal history categories or offense levels in the Sentencing Table, with 67 percent either somewhat disagreeing (42%) or strongly disagreeing (25%) with decreasing the number of criminal history categories and 57 percent either somewhat disagreeing (39%) or strongly disagreeing (18%) with decreasing offense levels. Only ten percent expressed any support for decreasing the number of the criminal history categories (4% strongly agreeing and 6% somewhat agreeing) and 16 percent expressed some support for decreasing the number of offense levels (6% strongly agreed and 10% somewhat agreed).³⁵³

Respondents did not express a consensus about whether to decrease the categories in the loss table in USSG §2B1.1 by broadening the monetary ranges: 37 percent were neutral as to this option, while 37 percent either strongly agreed (14%) or somewhat agreed (23%) and 25 percent either strongly disagreed (6%) or somewhat disagreed (19%) with this option. Similarly, roughly equal percentages of respondents agreed, disagreed, and were neutral about decreasing the number of drug quantity ranges in the Drug Quantity Table in USSG 2D1.1 by broadening the quantity ranges: 35 percent were in favor (14% strongly agreeing and 21% somewhat agreeing), 32 percent were against (24% somewhat disagreeing and 8% strongly disagreeing), and 33 percent were neutral.

Finally, a substantial majority of respondents had no opinion when asked whether some of the more generic specific offense characteristics such as weapon use and victim injury in Chapter Two should be moved to Chapter Three: 77 percent were neutral, while only 15 percent were in favor (3% strongly agreed and 12% somewhat agreed) and eight percent were against (5% somewhat disagreed and 3% strongly disagreed).

³⁵² 2010 JUDGES’ SURVEY at 9 (Question 3, Table 3).

³⁵³ Twenty-four percent were neutral about whether to decrease the criminal history categories and 27 percent were neutral about whether to decrease the offense levels.

II. SENTENCING HEARINGS

A. *Relevant Conduct (Question 5)*³⁵⁴

Respondents were asked whether they agreed with a series of statements about what should be considered “relevant conduct” for purposes of sentencing. Seventy-nine percent of respondents agreed that “all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity” should be considered relevant conduct. Seventy-seven percent agreed that “uncharged conduct that is presented at trial or admitted by the defendant in court” should be considered relevant conduct. However, only 32 percent agreed that “uncharged conduct referenced only in the presentence report” should be considered relevant conduct, while only 31 percent agreed that “conduct that was charged in a count that was later dismissed” should be so considered. Finally, only 16 percent agreed that acquitted conduct should be considered relevant conduct for the purposes of sentencing.

B. *Standard of Proof (Question 6)*³⁵⁵

Respondents were asked a series of questions related to what standard of proof should apply at sentencing. A majority of respondents believe that the standard of proof of preponderance of the evidence should apply to the facts establishing the base offense level, and to those supporting adjustments to the base offense level, departures, and variances. When asked what standard of proof should apply to facts establishing the base offense level, 69 percent chose the preponderance standard, 14 percent chose clear and convincing evidence, and 17 percent chose beyond a reasonable doubt. When asked what standard of proof should apply to facts supporting adjustments to the base offense level, 75 percent of respondents chose the preponderance standard, 17 percent chose clear and convincing, and 18 percent chose beyond a reasonable doubt. When asked what standard of proof should apply to facts supporting departures, 85 percent chose the preponderance standard, 13 percent chose clear and convincing evidence, and two percent chose beyond a reasonable doubt. When asked what standard of proof should apply to facts supporting variances, 87 percent chose the preponderance standards, 11 percent chose clear and convincing evidence, and two percent chose beyond a reasonable doubt.

III. GUIDELINE APPLICATION ISSUES

A. *Appropriateness of the Guideline Ranges (Question 8)*³⁵⁶

When queried about the appropriateness of guideline ranges for a variety of offenses, respondents indicated that the guideline ranges for murder, manslaughter, and assault are generally appropriate, at 89 percent, 78 percent, and 83 percent, respectively, although 21 percent perceived the guideline range for manslaughter as too low.³⁵⁷ While still a majority, a smaller percentage of respondents believed that the guideline range for fraud and for larceny/theft/embezzlement are generally appropriate. For fraud, 65 percent responded that the guideline range was generally appropriate, while 24 percent responded that it was too low and ten percent that it was too high. For larceny/theft/embezzlement, 70 percent responded

³⁵⁴ 2010 JUDGES’ SURVEY at 10 (Question 5, Table 5).

³⁵⁵ 2010 JUDGES’ SURVEY at 11 (Question 6, Table 6).

³⁵⁶ 2010 JUDGES’ SURVEY at 13 (Question 8, Table 8).

³⁵⁷ Nine percent believed the range for murder was too low and two percent too high; only one percent believed the range for manslaughter was too high; and 12 percent believed the range for assault was too low, while five percent found it too high.

that the guideline range was generally appropriate, 21 percent that it was too low, and nine percent that it was too high.

When asked about the guideline ranges for drug trafficking crimes, respondents were most critical of the range for crack cocaine trafficking, with only 28 percent responding that the range was generally appropriate and 70 percent responding that it was too high (2% said it was too low). Over 60 percent of respondents report that the guideline ranges for heroin, powder cocaine, methamphetamine, ecstasy and oxycodone are generally appropriate, at 65 percent for heroin, powder cocaine, and ecstasy, 64 percent for oxycodone, and 60 percent for methamphetamine. However, substantial minorities report that the ranges are too high, with 32 percent for heroin, 30 percent for powder cocaine, 34 percent for methamphetamine, 29 percent for oxycodone, and 30 percent for ecstasy.

Respondents were also asked about the guideline ranges for child pornography crimes. While 72 percent of respondents thought the guideline range for production of child pornography was appropriate, and 62 percent for distribution of child pornography, a substantial majority of respondents believe that the guideline ranges for receipt of child pornography and for possession of child pornography are too high. Sixty-nine percent reported that the guideline range for receipt of child pornography was too high, with only 28 percent believing the range appropriate and three percent too low. Seventy percent stated that the guideline range for possession of child pornography was too high, while 26 percent believed the range was appropriate and three percent thought that it was too low.

Along with displeasure at the guidelines ranges for crack cocaine and receipt and possession of child pornography, respondents also expressed disagreement with the guideline range for illegal reentry into the United States, with only 55 percent answering that the range was generally appropriate, 34 percent that it was too high, and 11 percent that it was too low.

Finally, respondents were generally comfortable with the guideline ranges for other child exploitation offenses, firearms, and alien smuggling, with 72 percent of respondents stating that the range for other child exploitation offenses is generally appropriate, 70 percent stating that the range for firearms offenses is appropriate, and 67 percent stating that the range for alien smuggling is appropriate. Regarding other child exploitation offenses, 16 percent find the range too high and 12 percent too low; for firearms offenses, 23 percent find the range too high and 7 percent too low; and for alien smuggling, 12 percent find the range too high and 21 percent too low.

B. Role in the Offense (Question 9)³⁵⁸

Respondents were also asked about their views on how the Sentencing Guidelines treat a defendant's role in the offense. Asked whether the distinction between a "minor" and "minimal" participant should be explained more clearly, the majority, 66 percent, agreed, 31 percent strongly and 35 percent somewhat, while 23 percent were neutral, nine percent somewhat disagreed and two percent strongly disagreed. Similarly, 66 percentage of respondents agreed that the distinction between an "organizer/leader" and a "manager/supervisor" should be explained more clearly: 28 percent strongly agreed and 38 percent somewhat agreed, while 23 percent were neutral, eight percent somewhat disagreed, and two percent strongly disagreed. Finally respondents were asked whether the range of adjustments based on role in the offense should be increased. A minority, 47 percent, of respondents agreed with this statement, fifteen percent strongly and 32 percent somewhat, while 28 percent were neutral, 19 percent somewhat disagreed, and six percent strongly disagreed.

³⁵⁸ 2010 JUDGES' SURVEY at 14 (Question 9, Table 9).

C. Criminal History Calculation (Question 10)³⁵⁹

Respondents were asked a series of questions about calculating a defendant's criminal history score under the guidelines. The responses did not indicate a consensus among respondents as to changes to the criminal history calculations. Notably, although a few questions received a majority of respondents either in favor or opposed, no question received more than 60 percent of respondents in favor or opposed and the answers were often "somewhat" agreeing or disagreeing and not "strongly" agreeing or disagreeing. For instance, 60 percent of respondents disagreed when asked whether offenses committed prior to age 18 should always be excluded from criminal history computations, with 39 percent somewhat disagreeing and 21 percent strongly disagreeing.³⁶⁰ Similarly, 50 percent of respondents disagreed when asked whether the applicable time periods for counting prior offenses under USSG §4A1.2(e) (*i.e.* the "decay factor") should be shortened, with 32 percent somewhat disagreeing and 18 percent strongly disagreeing.³⁶¹ When asked whether misdemeanor loitering offenses should always be excluded from criminal history calculations, 55 percent agreed, with 30 percent somewhat agreeing and 25 percent strongly agreeing, while 19 percent were neutral and 26 percent either somewhat disagreed (22%) or strongly disagreed (4%). Forty-eight percent of respondents agreed to some extent that misdemeanor public intoxication offenses should always be excluded, with 29 percent somewhat agreeing and 19 percent strongly agreeing; 19 percent were neutral, 27 percent somewhat disagreed, and six percent strongly disagreed. Similarly, 48 percent disagreed either somewhat (40%) or strongly (8%) that misdemeanor disorderly conduct or disturbing the peace convictions should always be excluded, while 30 percent either strongly agreed (11%) or somewhat agreed (19%) with this exclusion and more than a fifth of respondents, 21 percent, were neutral.

Moreover, many of the questions received roughly equal percentages of respondents either agreeing or disagreeing with the change. For instance, 39 percent of respondents either strongly agreed (16%) or somewhat agreed (23%) that misdemeanor insufficient funds check offenses should always be excluded from criminal history calculations, while 39 percent either somewhat disagreed (33%) or strongly disagreed (6%) with this exclusion. Almost a quarter of respondents, 22 percent, were neutral about this exclusion. In addition, when asked whether misdemeanor careless or reckless driving should always be excluded from criminal history computations, 42 percent agreed, with 17 percent strongly agreeing and 25 percent somewhat agreeing, and 38 percent disagreed, with 30 percent somewhat disagreeing and eight percent strongly disagreeing; 19 percent were neutral. Similarly, 45 percent of respondents were either strongly (17%) or somewhat (28%) in favor of always excluding misdemeanor driving without a license or with a revoked or suspended license, while 38 percent were either somewhat (29%) or strongly (9%) opposed and 19 percent were neutral.

In addition, many of the questions asked about criminal history calculation elicited neutral responses from the respondents: for instance, a majority of respondents, 55 percent, were neutral when asked whether the combined impact of "recency" points and "status" points under USSG §4A1.1(d) and (e) should be reduced; only nine percent strongly agreed with this change, while 19 percent somewhat agreed, 12 percent somewhat disagreed, and five percent strongly disagreed. Many respondents were also neutral when asked whether sentences resulting from tribal court convictions should be included in

³⁵⁹ 2010 JUDGES' SURVEY at 15 (Question 10, Table 10).

³⁶⁰ Twenty-eight percent either strongly agreed (10%) or somewhat agreed (18%) and 13 percent were neutral about this exclusion.

³⁶¹ Four percent strongly agreed, 15 percent somewhat agreed, and 31 percent were neutral about shortening the applicable time periods.

criminal history computations: 45 percent were neutral, while 36 percent either strongly agreed (12%) or somewhat agreed (24%) and 19 percent either somewhat disagreed (10%) or strongly disagreed (9%). Finally, 43 percent of respondents were neutral when asked whether the career offender provisions at USSG §§4B1.1 and 4B1.2 should be amended to apply only to offenders described in 28 U.S.C. § 994(h), while only nine percent strongly agreed, 22 percent somewhat agreed, 18 percent somewhat disagreed, and nine percent strongly disagreed.

*D. Availability of Sentence Types (Question 11)*³⁶²

Respondents were asked for their views on expanding the sentencing options available for defendants convicted of the following crimes: murder, manslaughter and assault; fraud and larceny/theft/embezzlement; drug trafficking offenses; child pornography offenses and other child exploitation offenses; firearms; and alien smuggling and illegal reentry into the United States. Respondents were asked whether the following sentences should be made more available for each offense: straight probation; probation with community or home confinement; and split sentencing of imprisonment and community or home confinement.

The responses revealed that expanding any of the sentencing options never received majority support, although, for every offense, the more restrictive the sentencing option, the more support was expressed by respondents for the expansion. For instance, while no more than a fifth of respondents supported expanding the option of straight probation for any offense, that percentage rose to no more than 25 percent in support of expanding the availability of probation with community or home confinement for any offense. The most support, though always less than 45 percent, was expressed for expanding the availability of split sentencing of imprisonment and community or home confinement to the offenses.

Respondents rated the following five offenses as the offenses for which it is most appropriate to expand the availability of straight probation: possession of child pornography, at 19 percent answering affirmatively; receipt of child pornography, at 15 percent answering affirmatively; larceny/theft/embezzlement, at 15 percent answering affirmatively; fraud, at 14 percent answering affirmatively; and illegal reentry into the United States, at 14 percent answering affirmatively.

Respondents rated the following five offenses as those offenses for which it is most appropriate to expand probation with community or home confinement: larceny/theft/embezzlement, with 24 percent answering affirmatively; possession of child pornography, with 23 percent answering affirmatively; fraud, with 22 percent answering affirmatively; marijuana trafficking, with 22 percent answering affirmatively; and receipt of child pornography, with 20 percent answering affirmatively.

Finally, respondents rated the following five offenses as those for which it is most appropriate to expand split sentencing of imprisonment and community or home confinement: larceny/theft/embezzlement, with 44 percent answering affirmatively; fraud, with 43 percent answering affirmatively; possession of child pornography, with 41 percent answering affirmatively; marijuana trafficking, with 40 percent answering affirmatively; and receipt of child pornography, with 39 percent answering affirmatively.

³⁶² 2010 JUDGES' SURVEY at 16 (Question 11, Table 11).

*E. Supervised Release (Question 12)*³⁶³

Respondents were generally in agreement with the guidelines' treatment of supervised release. When asked about the availability of supervised release under the guidelines, 87 percent of respondents stated that the number of cases in which the guidelines provide for supervised release is generally appropriate, with only seven percent finding the number of cases too low and seven percent too high. Similarly, 87 percent of respondents believed that the lengths of the terms of supervised release terms provided by the guidelines generally are appropriate; seven percent think the terms are too low and six percent too high. Seventy-seven percent of respondents believe that the ranges of punishments for violations of supervised release provided by the policy statements in Chapter 7 of the Guidelines Manual generally are appropriate, while 16 percent believe the ranges are too low and seven percent say they are too high. However, when asked whether the minimum terms of supervised release provided in USSG §5D1.2 should be eliminated, the response was equivocal, with 32 percent in agreement (10% strongly agreeing and 21% somewhat agreeing) strongly agreeing, 35 percent neutral, and 35 percent in opposition (22% somewhat disagreeing and 13% strongly disagreeing).

IV. DEPARTURES

*A. Factors to Consider at Sentencing (Question 13)*³⁶⁴

Respondents were asked whether various offender characteristics were ordinarily relevant to the within-range calculation; ordinarily relevant to the departure and/or variance consideration; or never relevant. The ten offense characteristics that respondents found most relevant to the within-range calculation were: (1) voluntary disclosure of the offense, with 70 percent of respondents answering that this characteristic was ordinarily relevant; (2) diminished capacity, with 66 percent; (3) emotional condition, with 65 percent; (4) aberrant behavior, with 64 percent; (5) employment record, with 62 percent; (6) exceptional efforts to fulfill restitution obligations, also with 62 percent; (7) post-offense rehabilitation efforts, with 61 percent; (8) age, with 57 percent; (9) family ties and responsibilities, also with 57 percent; and (10) undue influence related to affection, relationship, or fear of other offenders, also with 57 percent.

The ten offense characteristics that respondents found most relevant to the departure and/or variance consideration were: (1) diminished capacity, with 80 percent of respondents answering that this characteristic is ordinarily relevant; (2) mental condition, with 79 percent; (3) exceptional efforts to fulfill restitution obligations, with 75 percent; (4) voluntary disclosure of the offense, with 74 percent; (5) aberrant behavior, also with 74 percent; (6) post-offense rehabilitation, with 70 percent; (7) undue influence related to affection, relationship, or fear of other offenders, with 68 percent; (8) age, with 67 percent; (9) employment record, with 65 percent; and (10) physical condition, with 64 percent. Sixty-four percent of respondents also found stress related to military service as relevant to the departure and/or variance consideration.

Substantially fewer respondents found the offender characteristics never relevant, with the largest percentage, at 12 percent, finding dependence on criminal livelihood never relevant. Ten percent found gambling addiction to be never relevant; nine percent found employment-related contribution never

³⁶³ 2010 JUDGES' SURVEY at 17 (Question 12, Table 12a).

³⁶⁴ 2010 JUDGES' SURVEY at 18 (Question 13, Table 13).

relevant; seven percent found lack of guidance as a youth never relevant; and seven percent found disadvantaged upbringing never relevant.

*B. Departure Provisions (Question 14)*³⁶⁵

Respondents were asked about reasons for not relying on the guidelines' departure provisions. A majority responded that the departure provisions are either inadequate or too restrictive, while only a minority viewed either circuit case law or heightened procedural requirements as the reason for not relying on the departure provisions. Specifically, 76 percent stated that they do not rely on a departure provision within the guidelines manual because the guidelines manual does not contain a departure provision that adequately reflects the reason for a sentence outside the guideline range. Sixty-five percent stated that they do not rely on a departure provision because the departure policy statements in the manual are too restrictive. Forty-one percent of respondents believe that the departure policy statements in the guidelines manual are inconsistent with the factors in 18 U.S.C. § 3553(a). Thirty-eight percent stated that they do not rely on the departure provisions because departures are subject to stricter appellate review than variances, while 35 percent stated that circuit case law regarding departures was too restrictive and 28 percent stated that departures are subject to heightened procedural requirements, such as notice requirement under Federal Rule of Criminal Procedure 32(h).

*C. Substantial Assistance (Question 15)*³⁶⁶

Respondents were asked about possible changes to the manner in which a defendant's substantial assistance affects a defendant's sentence. Respondents voiced most support for not limiting a court's consideration, in determining the extent of a reduction below the statutory mandatory minimum under 18 U.S.C. § 3553(e) or Fed. R. Crim. P. 35(b), to the nature of the defendant's substantial assistance, but instead also allowing consideration of the factors at 18 U.S.C. § 3553(a): 63 percent either strongly agreed (33%) or somewhat agreed (30%) with this change, while 14 percent were neutral, 13 percent somewhat disagreed, and 11 percent strongly disagreed. A majority of respondents also supported an amendment by Congress to 18 U.S.C. § 3553(e) authorizing judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion: 54 percent either strongly agreed (25%) or somewhat agreed (29%) with this amendment, while 11 percent were neutral, 18 percent somewhat disagreed, and 17 percent strongly disagreed. Fifty-four percent of respondents also agreed that the Commission should amend USSG §5K1.1 to authorize judges to sentence below the applicable guideline range to reflect a defendant's substantial assistance, even if the government does not so move, with 25 percent strongly agreeing, 29 percent somewhat agreeing, 12 percent neutral, 18 percent somewhat disagreeing, and 17 percent strongly disagreeing.

None of the remaining proposed amendments garnered majority support either for or against a change. Forty-eight percent of respondents either strongly support (22%) or somewhat support (26%) an amendment to the Federal Rules of Criminal Procedure authorizing judges to reduce a defendant's sentence under Rule 35(b) if the defendant, after sentencing, provides the required assistance, even if the government does not make a motion; 15 percent are neutral, 21 percent somewhat disagree, and 17 percent strongly disagree.

³⁶⁵ 2010 JUDGES' SURVEY at 19 (Question 14, Table 14).

³⁶⁶ 2010 JUDGES' SURVEY at 20 (Question 15, Table 15).

Moreover, for several options, almost a quarter of respondents were neutral as to any change and, for those agreeing with the change, more respondents were “somewhat” in favor of change than were “strongly” in favor. For instance, while 45 percent of respondents were either strongly in favor (15%) or somewhat in favor (30%) of an amendment by the Commission to §5K1.1 providing additional guidance regarding the evaluation of the nature and extent of the assistance provided by the defendant, 22 percent were neutral about any added guidance and 33 percent either somewhat disagreed (18%) or strongly disagreed (15%) with providing additional guidance. Similarly, 42 percent of respondents either strongly agreed (15%) or somewhat agreed (27%) with the proposal that the Commission amend §5K1.1 to provide additional guidance regarding evaluation of the results obtained through the assistance provided, 23 percent were neutral, 20 percent somewhat disagreed, and 16 percent strongly disagreed with any additional guidance. Finally, 42 percent of respondents support the Commission amending 5K1.1 to provide additional guidance regarding the extent to which a court may depart under that provision (*i.e.*, provide specific guidance on the number of offense levels recommended for departures based on the factors enumerated in 5K1.1), but only 14 percent were strongly in favor of this change, while 28 percent were somewhat in favor, 20 percent were neutral, 20 percent somewhat disagreed, and 19 percent strongly disagreed.

V. GENERAL ASSESSMENT

A. Sentencing Disparities (Question 16)³⁶⁷

Respondents were asked to rank, from one to five, the factors that contribute to sentencing disparities. The top five reasons that respondents ranked as contributing to sentencing disparity were: statutory mandatory minimums, charging decisions, judicial discretion, regional differences, and substantial assistance practices under USSG §5K1.1. The largest percentage of respondents, at 33 percent, ranked statutory mandatory minimums as the most important contributor to unwarranted sentencing disparities, while 12 percent chose statutory mandatory minimums as the second most significant contributing factor. Thirty-two percent of respondents chose charging decisions as the most significant contributor, with 25 percent believing it was the second-most significant contributor. Judicial discretion was ranked first by 11 percent of respondents, while seven percent believed judicial discretion to be the second-most significant contributing factor. Seven percent of respondents chose regional differences as the most significant contributor and nine percent chose it as the second-most significant contributor. Finally, substantial assistance practices under USSG §5K1.1 was ranked first by five percent of respondents and ranked second by ten percent of respondents.

B. General Assessment of Guidelines and Federal Sentencing (Question 17)³⁶⁸

A consensus emerged among respondents that the sentencing guidelines have reduced unwarranted sentencing disparities among defendants with similar records found guilty of similar conduct: 78 percent of respondents either strongly agreed (32%) or somewhat agreed (46%) with this statement, while only six percent were neutral, nine percent somewhat disagreed, and seven percent strongly disagreed.

Similarly, a majority of respondents agree that the sentencing guidelines have increased certainty in sentencing. Seventy-six percent of respondents either strongly agree (30%) or somewhat agree (46%) that, overall, the federal sentencing guidelines have increased certainty in meeting the purposes of

³⁶⁷ 2010 JUDGES’ SURVEY at 21 (Question 16, Table 16).

³⁶⁸ 2010 JUDGES’ SURVEY at 22 (Question 17, Table 17).

sentencing. Only nine percent of respondents were neutral, ten percent somewhat disagreed, and six percent strongly disagreed with this statement.

Finally, a majority of respondents agree that the sentencing guidelines have increased fairness in sentencing. Specifically, 67 percent of respondents either strongly agreed (22%) or somewhat agreed (45%) that, overall, the federal sentencing guidelines have increased fairness, while ten percent were neutral, 14 percent somewhat disagreed, and ten percent strongly disagreed.

C. Purposes of Sentencing (Question 19)³⁶⁹

A substantial majority of respondents believe that the current advisory guideline system best achieves the purposes of sentencing. When asked which of various sentencing systems “best achieves the purposes of sentencing,” 75 percent of respondents chose the current advisory guidelines system. Eight percent chose the pre-guidelines system, three percent chose the mandatory guidelines system in effect before *Booker*, and 14 percent chose a system of mandatory guidelines with a jury finding sentencing facts beyond a reasonable doubt or defendants admitting to the same, broader sentencing ranges, and fewer mandatory minimums.

³⁶⁹ 2010 JUDGES’ SURVEY at 23 (Question 19, Table 19).