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SG**UNITED STATES SENTENCING COMMISSION**

PUBLIC HEARING

Tuesday, February 15, 2005

Thurgood Marshall Federal
Judiciary Building
Judicial Conference Center
Washington, D.C.

The meeting convened, pursuant to notice, at 2:00 p.m.

COMMISSIONERS:

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P R O C E E D I N G S

CHAIRMAN HINOJOSA: I will go ahead and call the public hearing of the United States Sentencing Commission to order.

Before we start, on behalf of the Commission I do want to thank all the members of the different panels who have taken the time and made the effort to come and share their thoughts with the United States Sentencing Commission. Professor Berman in his blog has described this as a stellar cast, leaving out the fact that he is one of the members of the cast. But I think it is an apt description, including himself.

I also want to give a brief statement with regards to what the Commission has been up to since our last public meeting on January 26th. Since then, the Commission, through the Chair, has testified before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Many of you may have already seen the testimony from the standpoint of our website and/or other sources, including the blog. But I would like to give a brief outline as to what the testimony on behalf of the Commission was.

The Commission did indicate that obviously the

opinion continues the role of the Commission and that the Commission remains in place and continues and maintains its responsibilities under all the statutory requirements of the Sentencing Reform Act; that the opinion basically only deals with excising two portions of the Sentencing Reform Act--one dealing with regards to the mandatory nature of the guidelines, and the other one with regards to appellate review of sentencing within the Act.

The other point that was made on behalf of the Commission was that it is the Commission's strong belief that the opinion in the Sentencing Reform Act clearly states that the guidelines have to be considered and, as the opinion says, consulted and used in reaching a determination with regards to a sentence.

What that means as far as the way the Commission reads the act is that that requires--in order to consult and consider the guidelines and take them into account with regards to imposing a sentence, in order to do that a sentencing court would actually have to make the determinations under the guidelines, because how can you consult the guidelines if you have not made the determinations?

The statute also requires that the sentencing court consider the policy statements within the guidelines, which obviously include the departure statements in the guidelines. And, therefore, it is the Commission's position that a sentencing court should consider the guideline range and make the findings with regards to the guideline range, consider the policy statements, including the departure statements within the guidelines, and then consider the factors in the Sentencing Reform Act as a whole, and then impose a sentence.

The Commission also feels strongly that there should be substantial weight given to the Sentencing Guidelines and imposing a sentence. The reason for that, as far as the Commission is concerned, is quite simple. The statute itself requires the Commission to have considered the factors in the Sentencing Reform Act in initially promulgating the guidelines as well as in the amendments to the guidelines. The promulgation and the amendment of the guidelines also has required by statute the approval of the United States Congress because anything that the Commission does gets sent to Congress and, unless they vote not to approve it, becomes law.

Obviously, Congress wrote and voted on and passed the Sentencing Reform Act, so one would assume that in approving the guidelines they have considered the factors within their own act and allowing them to stand.

The Commission also is aware and has put out the notice that the act remains intact with regards to the reporting requirements that have to be made to the United States Sentencing Commission. In that regard, we have worked closely with the Criminal Law Committee of the Judicial Conference of the United States with regards to continuing to inform the courts of the necessity under the act to continue to send five documents by the Chief Judge of each district within 30 days of the entry of judgment, that being the judgment and commitment order, the statement of reasons, the presentence report, the indictment or charging instrument, and also the plea bargain agreement, if there is one.

We have, as I indicated, received a lot of cooperation from the Criminal Law Committee with regards to continuing to get this word out.

Also during the testimony before the House Subcommittee, the Commission did inform the subcommittee

about the statistics that we had been able to determine and assess at that particular point. As I indicated there, and I will indicate again today, we have to look at these with great caution. We have to realize they are very preliminary and at a very early stage. We also have to realize that they do not necessarily represent the entire country.

At this point we have made some more recent calculations with regards to the cases that have come in. We have been able to go through approximately 1,118 cases. How does this compare to the total that one would expect in a particular year? It is the usual average, as it has been recently, that we have about 65,000 to 70,000 sentencings per year, so this is a very small number, not necessarily representative of the entire country, and it is within a very short period after January the 12th. So that may in itself indicate something with regards to what has been coming in.

Out of those 1,118 cases, the Commission was unable to determine in 94 cases the information to be able to slot them into the calculations because of some missing information.

Some of these 94 cases, which does represent 8.4

percent of the total cases, may be because they are misdemeanor cases where no presentence report was prepared. They may be cases where the sentence is time served, sometimes in the immigration field and there was no presentence report prepared. And then there may be just some other cases that, for whatever reason, we have been unable to get all the documentation necessary, and we will try to keep on top of those situations and try to get that corrected as much as we can with the cases that we receive that we are unable to count.

That leaves 1,024 cases that we were able to make determinations on. Of those 1,024 cases, 629, or about 61.4 percent, were sentenced within the guideline range calculations. That compares to about--the range has been usually in the last three fiscal years that we have prepared as far as data publication, those ranges have usually been about 64 to 65 percent, within the guideline range calculation. Of these 1,024 cases, 24 have been above the guideline range calculations, which is about 2.4 percent. The traditional number has usually been about 0.7 percent.

Of those above the guideline range, the upward departure, where an upward departure was indicated on the

statement of reasons, is about 1.3 percent of the cases, and the upward departure where there is no indication in the statement of reasons is about 1.1 percent.

Those cases sentenced below the guideline range calculations are 371, which is about 36.2 percent. The traditional number has been about one-third below the guideline range in the last three fiscal years that we have published data on.

Of those 371 cases, about two-thirds of those, 246, are what we call government-sponsored departures. And they represent 24.0 percent of the cases. Government-sponsored means as follows: 5K1.1 motions for substantial assistance; those are 169 cases; they represent 45.5 percent of the departure cases and 16.5 percent of the total cases. 5K3.1 departures, which is known as fast track and/or early disposition, those are 65 cases, and they represent 17.5 percent of the departures and 6.3 percent of the cases. Departures pursuant to a plea bargain agreement between the government and the defendant represent 12 cases, which is about 3.2 percent of the departures and about 1.2 percent of the total number of cases.

Other departures that cannot be identified as

government-sponsored are 125 cases, which is about 12.2 percent of the total cases. Downward departures which are indicated on a statement of reasons, 55 cases, which is about 5.4 percent, and downward departures that are not indicated in the statement of reasons is 70 cases, which is about 6.8 percent of the cases.

Where does this leave us as to sentences that are being handed down within the guideline range and the policy statements? One would say that the Booker departures can be as low--within this group, with all the cautionary statements I have made about this, can be as low as 7.9 percent and possibly as high as 14.6 percent. The reason I say "possibly as high" is because we are making the calculations within the upward departures that are indicated in the statement of reasons because many of those may actually indicate guideline departures, whether it's criminal history or any other applicable guideline departure. What we do know is that 7.9 percent of the cases we have no indication as to what the--there was no departure reason indicated in the statement of reasons and, therefore, one would have to consider those as strictly Booker variances from the guidelines because we have no way to

determine this, and that is part of the message, to make sure that the courts continue to get us the information and they state in the statement of reasons what the reason was for a departure within the guideline system and/or a variance from the guideline sentence.

And so basically that is the report that we have prepared, the more recent report with regards to the cases and the statistics. It is cautionary on the Commission's part, and I indicated that we are making some further refinement as to whether the Booker variances are either 7.9 percent or a somewhat higher number than that. But we know for sure it is not higher than 14.6 percent and probably less than 14.6 percent after we check as to what the reasons were checked for the box for the departure in the statement of reasons.

That concludes my more than five-minute allotted time for my report, and at this point I would ask the first panel to come forward. The first panel consists of two judges. We have the Honorable Thomas F. Hogan, who is the Chief Judge of the District of the District of Columbia. He is a United States District Judge whom I am quite familiar with since we both attended baby judges school together. He

actually took the bench in 1982, and I took the bench shortly thereafter, in 1983, and it is nice to see him. And in addition to being the Chief Judge of the District of the District of Columbia, he is also a member of the Executive Committee of the Judicial Conference of the United States.

We also have with us the Honorable Lawrence Piersol, who is the Chief United States District Judge for the District of South Dakota. He is also the Chair of the Federal Judges Association, which is an organization comprised of federal judges from across the country that stands up and speaks up on behalf of the judiciary. It is an independent group, and he obviously plays a very important role within the Judges Association as the Chair of that organization. And he does give of his time to do that.

So at this point I would call on Judge Hogan first.

JUDGE HOGAN: All right. Thank you, Mr. Chairman, members of the Commission, for inviting us to testify today about the impact on the judiciary of the Supreme Court's decision in United States v. Booker. Unfortunately, my remarks this afternoon have to be somewhat limited necessarily because the United States Judicial Conference,

of which I'm a member, has not yet taken an official position on sentencing in the wake of the Booker decision. So I speak today as an individual United States District Court Judge and not on behalf of the official position of the federal judiciary, although I am a member of the Executive Committee of the Judicial Conference.

I wanted the chance and I appreciate the chance of talking to you all because the Judicial Conference is the principal policymaking body of the United States court system and, as such, speaks for the entire federal judiciary pursuant to 28 U.S.C. 1331.

The Conference meets twice a year and has not yet had an opportunity to consider and approve a position, but I can assure you it is well aware of the significance of the Booker decision and is considering its potential impact upon us and the entire federal judiciary.

Our governance is such that under our procedures the matters that come before the Judicial Conference are first considered by an appropriate committee prior to the Conference. Consistent with this practice, the Judicial Conference Criminal Law Committee that has jurisdiction over this issue under the chairmanship of Judge Sim Lake has

taken the lead and is now hard at work developing policy recommendations for the Conference's consideration. That committee will coordinate with the Rules Committee and has been and is holding, I believe, meetings yesterday and today, some in a joint session with the Sentencing Commission, to discuss the Booker and Fanfan decisions. I understand that the Chair of the Rules Committee, Judge David Levy, is also participating in this special meeting.

We know the Criminal Law Committee is developing empirical data and has asked for substantial staff work. They will review that, and then we anticipate that they will make recommendations which will then be considered very shortly by the Judicial Conference. We have our semi-annual meeting on March 15th, in a month, and at that conference we will take up--the Judicial Conference will consider recommendations from the Criminal Law Committee and hopefully adopt a policy and position as to the impact on the judiciary of the Booker decision.

It is obvious that it is going to have impact on our workload. It will have an impact on our budget. The Administrative Office of the United States Courts is monitoring these factors. I have met with them. If

necessary, they may have to submit a supplemental appropriation request. But right now it is too early to measure accurately the impact of the decisions upon our work. The Courts of Appeals are just beginning to render decisions interpreting the Supreme Court decisions. The district judges are just beginning to sentence or resentence defendants. There is going to be an impact on our budget, but we cannot quantify it at this time. It is too early. But throughout this all the Administrative Office, the Criminal Law Committee, and other committees of the Judicial Conference have all been instructed to closely monitor any developments and then we will make appropriate recommendations to our Conference when needed, and we will act upon them.

The judiciary, I know, is committed to reaching out and working cooperatively with the Department of Justice, with the Sentencing Commission, and with Congress as we move forward in this aftermath of the Booker decision. On a personal basis, I can say, from my experience as Chief Judge at our court of 15 active judges and some senior judges with our criminal docket, that the brief experience we have had post-Booker has been as the Chairman has

reported, I think, generally the experience across the country. Judges are paying close attention to the guidelines and following the guidelines as presumptively valid, and I believe that is hopefully the experience we will see across the country and that we will have some time, a year or more, to develop empirical data to see what changes, if any, are needed. That is a personal position, not the official position of the Conference at this time.

Thank you all very much for the chance to be here, and I will be happy to answer questions at any time.

CHAIRMAN HINOJOSA: Judge Hogan, thank you very much, and you have made your baby judges class very proud.

Judge Piersol?

JUDGE PIERSOL: Thank you, Mr. Chairman and members of the Commission. Thank you for allowing me the opportunity to appear before you again, this time not on Native American matters. As the Chair indicated, I am the Chief Judge of the District of South Dakota and also the President of the Federal Judges Association, which about two-thirds of the Article III judges are members of.

Subsequent to the Booker decision, the Federal Judges Association Board of Directors unanimously adopted a

resolution which is as follows:

The Board of Directors of the Federal Judges Association has resolved that the position of the FJA should be to ask Congress to allow the present situation time to work, and only if it does not ultimately work to the satisfaction of Congress, should Congress then proceed, in consultation with the Courts, academics, the Justice Department, the United States Sentencing Commission, and other interested parties, to fashion some changes.

I would like to address you now from my personal point of view. Unlike some other judges, I haven't written any post-Booker decisions because I haven't had any unusual sentencings since Booker. I have sentenced 17 people since Booker and six more tomorrow. All the sentencings were within the advisory guideline range with one having been a downward departure because of diminished capacity. The 18th sentencing I put off until tomorrow because I gave notice of an intent to depart upward. It doesn't mean that it will, but it's a high probability.

Now, as I said, none of these were so unusual as to warrant a variance. A variance is the term that I use to describe a sentencing that is outside the advisory

guidelines as well as outside the departures available under the guidelines.

I believe that Booker provides a nearly perfect system. Advisory guidelines are helpful to judges and to the parties. They provide a thorough review of many but not all considerations, an indication of what is generally being done in other cases, and an indication of congressional intent. There is now an ability on the part of sentencing judges to sentence outside the guidelines and its departures. Given the clear expression of congressional intent through the guidelines, it would seem that a sentence outside the guidelines and its departures, a sentence that I call a variance, would seldom occur. When a variance is appropriate, however, it is terribly important, in my opinion. It allows justice to be done where otherwise it would not be done. A variance would be those instances where an unjust sentence would result from an advisory guideline sentence. The variance should not be for a reason that Congress has clearly indicated should not be a sentencing factor. An example that has been discussed is socioeconomic status. Judge Cassell, who will speak to you later, has demonstrated in pages 13 to 17 of his second U.S.

v. Wilson opinion, dated February 2nd, that there is adequate congressional intent indicating that socioeconomic status one way or the other cannot be a sentencing factor, even though it is doubtful to me that it was really a factor in the Wisconsin decision that was being discussed.

Now, as did the Chair and Commissioner Steer, I attended the House Judiciary Subcommittee on Crime hearing chaired by Representative Coble last Thursday--a good hearing, I thought, parenthetically. Just as the Senate Judiciary Committee hearing last summer concerning Blakely, which we all also attended, the Members of Congress were trying hard to determine what they should and shouldn't do, both short as well as long term. They asked good questions. And from this, I urge the Sentencing Commission to take an active role. You have much to offer and can make a difference. First of all, you must gather accurate information of what the courts as a whole are doing in sentencing after Booker rather than having a few unusual results color the debate about what, if anything, should be done after Booker--in other words, what the outliers control. The Supplemental Statement of Reasons form that was used with judgments after Blakely does not accurately

reflect what we should now record from a criminal judgment.

Parenthetically, I want to add that I talked to Chairman Lake, Sim Lake at noontime and found out that the forms are being changed to accurately reflect what we need now post-Booker as opposed to post-Blakely. At a minimum--and I was telling him what I thought we should have, and he said, "I agree with you right along the line," because they had already passed it and I didn't know it.

We should know whether the sentence was within the advisory guidelines, whether the sentence was a departure upward or downward within the advisory guidelines, and if not, we should know that the sentence was a variance from the advisory guidelines and its departures.

I understand it is going to be called a non-guideline sentence as opposed to a variance, but, anyway, that is what Judge Lake told me.

I urge the Sentencing Commission to play an active role in the post-Booker debate. I urge the Commission to take the position that the "Bowman fix" is no fix at all. I think it is somewhere between a flat tire and a blowout, and that is no criticism of Professor Bowman because in his testimony both before the Senate this summer as well as

before the House last week, he was not urging his fix, and now he is not urging it because Booker changed that. At any rate, the fix has been something that was put up only as an idea for a temporary fix, but one that some Members of Congress were enamored of. The Bowman fix would be at least, I think, declared unconstitutional in some circuits, so we would now have a year or two where federal sentencing law would be in an upheaval while that issue was being initially resolved. And I just say initially resolved because that would be a question of what happened to the Harris decision and so on and then ultimately the Supreme Court would have to answer that question. And I say initially because if the Bowman fix or something like it went in and was determined constitutional in some circuits, then we'd have the resulting resentencings and the post-conviction proceedings and so on that would go well beyond a year or two.

I urge that the Commission assist in brokering a compromise if it is the will of Congress to change federal sentencing law either sooner or later.

I don't think you can find a judge who has done any significant amount of sentencing who does not have an

instance where justice was not served by mandatory guidelines. I usually sentence 150 to 180 people a year, and usually the mandatory guidelines work just fine. But that is not good enough. I maintain that the varying degrees of restiveness among trial judges comes from those instances where the mandatory guidelines did not do justice. We could debate what justice is and how we know if the federal courts are doing their ultimate duty--that is, delivering justice to the people. We know that we are humans and that we have an ethical sense that can warn us in those hopefully rare instances when our laws and our institutions have failed to deliver justice.

One little additional insert. Let us not forget the public. What lay person sitting in a courtroom listening to some arcane guidelines arguments is really going to believe justice was being done? In these times of examination, simplification should be considered. I realize it is difficult, but it should be.

Let me give you an example of why the system we now have is a real improvement. Several years ago, I sentenced a man in a $1.3 million investment fraud case with a lot of small victims. Some victims had forgiven him; some

had not. The defendant had one previous conviction for tax evasion resulting in three criminal history points, a Category II. He was not in good health but not bad enough to warrant a downward departure. He was 59 years old. A sentence of a little over 20 years as mandated by the guidelines amounted to a life sentence of incarceration. If he had been 30 years old, it would not have been a life sentence. Older persons should not get a get-out-of-jail-free pass, but some consideration should have been able to be given. It was not available. I don't know what would be done now if I had the opportunity, but I give that example.

I don't believe any statutory or guideline changes are necessary at this time. The 2nd and 4th Circuits have already entered helpful opinions on the procedures to be used post-Booker, the Hughes and the Crosby decisions, Mr. Chairman, referenced to in testimony last week. Other circuits will surely do the same. The 4th Circuit indicated it would "affirm the sentence imposed as long as it is within the statutorily prescribed range...and is reasonable...." The 8th Circuit has also spoken on reasonableness in a recent opinion. The courts regularly

deal with applying the concept of reasonableness and need no legislation nor regulation to perform that task. *De novo* review could be reinstated by Congress, but it is no better of an idea now than it was when it was initially put in. Reasonableness is an appropriate standard of appellate review, and it should be a standard applied to each sentence, no matter whether it is an advisory guidelines sentence, a guidelines departure, or a variance from the advisory guidelines. A reasonableness review would, for example, find a sentence based upon a sentencing factor which Congress had indicated should not be a sentencing factor, such as race or socioeconomic status, to be an unreasonable sentence.

In conclusion, which isn't written, especially because of my involvement with the Federal Judges Association, I do get an opportunity to informally learn the views of many federal judges, especially what is bothering them. I think there was much pent-up frustration over the mandatory guidelines in those few instances where they didn't work. I think also a view that advisory guide--I think there is also generally a view that advisory guidelines would be helpful. Now that they are advisory, we

must exercise judicial restraint, particularly during this time of some uncertainty about what Booker has brought. In court decisions, the uncertainty from Booker will soon evaporate. The Sentencing Commission and the judiciary must be able to forcefully urge Congress that the system we have, once the dust has settled, is ideal. It does not need overhaul. It only needs the continuing attention of this Commission.

Thank you.

CHAIRMAN HINOJOSA: Thank you, Judge Piersol.

Are there questions or comments from any of the Commissioners?

COMMISSIONER SESSIONS: I would ask--Judge Piersol has made an observation that we as the Sentencing Commission should take an active role in the debate, and I guess my question is on behalf of all of the judges of the United States and your role with the Federal Judges Association: What are the judges looking to us for? Any kind of guidance in any particular way? What would they want from the Sentencing Commission?

JUDGE PIERSOL: Well, I can't answer for all judges on that, but from my own point of view, again, I

think that, frankly, the Federal Judges Association has become an advocate in these sentencing issues because we think it's necessary. The Judicial Conference, which ultimately speaks for the Judiciary, when some things come up quickly, can't due to the committee process and all of that sometimes respond as promptly as might be necessary. And so the Sentencing Commission, you're the ones that have the statistics; you're the ones that have the expertise; you're the ones that have the staff. And you are supposed to be, at least whenever it serves Congress' ends, an arm of the judiciary rather than an arm of Congress. So we would look to you to be the advocates for the judiciary for what should appropriately be done in interfacing with Congress.

Now, what should you do with regard to the judiciary itself? I don't know other than be our advocate and continue to provide changes to the guidelines as necessary, you know, provide them to Congress as well as provide them to us, because you're the proper body to do it, not Congress. They don't have the staff, they don't have the expertise. They just come in and pick particular areas, and I think that Congress can be more easily driven than can the Commission, because they don't have the staff, they

don't have the expertise that you do.

COMMISSIONER REILLY: Chief Judge Piersol, you mentioned simplification as being an issue as well. Any particular areas with regard to the guidelines that judges have indicated to you that they would like to see us try to simplify?

JUDGE PIERSOL: I couldn't say one area that judges, you know, have come to me. What I hear was, I think, generally frustration for those limited number of instances where, for whatever reason, a case--a judge felt a sentence that he or she had to enter wasn't fair. But I haven't heard on any particular area.

I think one of the areas that's most difficult--and it's also the most difficult to simplify--probably is the fraud area. You know, fraud has so many faces that it is very difficult. It seems to me that what you have now in the guidelines might be too much dollar-driven with regard to the fraud as opposed to the other moral implications that come out of some fraud causes. You know, sometimes it might not be a particularly high amount, but it might be especially egregious. Now, I know you try and capture that with regard to its relationship,

enhancements and so on. But--and the other part of it is sometimes if I'm sentencing on a fraud case, you've got a bunch of people sitting out there that lost $5,000 or $10,000 or their child's college fund--I have had those. And you're sitting there and you're going through those things. I try and make a recapitulation that makes sense to them, but, nonetheless, you might spend half a day and it sounds like you're speaking Greek up there to these people that are victims. And I do try and put a face on it at the end of it.

So just from my own point of view, fraud might be the hardest to simplify, but at the same time it may be one of the more necessary ones.

COMMISSIONER STEER: Chief Judge Piersol, I'd like to ask you to flesh out the concept of reasonableness as you see it a little more if you could. I take it that you think it might have a procedural aspect as well as a substantive aspect. Let me take the case that you gave as an example of a variance.

I take it that if in a case like that you had simply gone to the final result that you thought appropriate, whether it was with reference to actuarial

tables or whatever, and not gone through the process of applying the guidelines, looking to see whether there was an appropriate policy statement for departure, but that instead had simply based your sentence on what you thought was actuarially appropriate, that an appellate court might look at that process and find that to be unreasonable?

JUDGE PIERSOL: I think that the best one could hope for if you did that would be a reversal of resentencing because I think the 2nd and 4th Circuits have indicated appropriately what you should do, just as the Chair indicated, and that is, you go through and you determine the guideline range to begin with, you look at appropriate departures to see--if the guideline range itself you feel won't capture what you think should be done in that case, then you go and analyze the departures upward and downward, and then, only then, you look outside to see if there was some non-prohibited or even discouraged--you'd look at the departures and then the areas that are discouraged but not prohibited before you would go beyond that into variances. And if you hadn't gone through that process, I think that it is likely that you're going to have an inaccurate record and at the least you would get a reversal sent back for

appropriate consideration.

I think the 2nd and 4th Circuits have outlined a good procedure.

CHAIRMAN HINOJOSA: Does anybody else have any other questions?

[No response.]

CHAIRMAN HINOJOSA: Thank you all very much. We do appreciate you taking your time. We understand how busy both of you are, and we appreciate what you all do for the judiciary.

JUDGE PIERSOL: I'm sorry I talked too long.

CHAIRMAN HINOJOSA: You didn't.

If the next panel would come on up? The next panel is also composed of individuals who are members of the federal judiciary. We have the Honorable Paul G. Cassell, who is a United States District Judge in the District of Utah, who has been on the bench since the year 2002. We have the Honorable Richard G. Kopf, United States District Judge in the District of Nebraska, who has been on the bench since 1992. And we have the Honorable Lynn S. Adelman, who has been on the bench since 1997, and he serves as a United States District Judge in the Eastern District of Wisconsin.

Each one of these judges has written an opinion post-Booker on some of the issues that we have discussed and have already heard discussed and we'll continue to discuss. And we'll start with Judge Cassell since you were first of the bat with an opinion.

JUDGE CASSELL: I had a little more sleep today. My staff and I spent quite a while getting that together, and we have some useful things for folks in it.

I am pleased to be invited to talk about the impact of Booker in federal sentencing. My view, as you know from the Wilson opinion, is that we ought to be changing our practices very little in the wake of Booker. After Booker, of course, judges are required to consider the guidelines in an advisory capacity, and I think that since the touchstone remains achieving congressional purposes in sentencing, we ought to give those guidelines heavy weight and vary or impose a non-guideline sentence only in unusual cases for persuasively demonstrated reasons.

If there are any significant changes needed in the guidelines, I think that might be in the area of the new Crime Victim Rights Act, and I wanted to mention just a few things about that.

I've got some prepared testimony that breaks into four parts, and let me just try to briefly summarize each of those parts.

In the first part, I try to explain my view that the guidelines are entitled to heavy weight and that we should vary from those guidelines only in unusual cases for clearly identified and persuasive reasons. Congress has spent many years--it had to create the Commission, appoint its members; it had to approve the guidelines, or at least allow them to go into effect. As you well know, in many cases Congress has directed changes in the guidelines or suggested changes to the Commission. And as a result of that, I think we're quite clear that the guidelines embody what the congressional view is for appropriate sentences in this country.

And as a result I think the guideline sentence will usually be the appropriate sentence to impose.

In part two I try to critique the view expressed by several District Courts that the guidelines should just be considered as one factor among many other factors. I don't think that's the proper way to approach these issues. The problem is when you start handling things in those ways

you begin to look at factors that I think Congress would view as inappropriate. For example, some courts have looked at socioeconomic status of a defendant in imposing sentence despite a clear congressional command that both rich and poor are to be treated equally in criminal justice sentences. Also that approach will inevitably lead to unwarranted sentencing disparity since judges will inevitably weigh those factors differently when they have similarly situated defendants in front of them.

In the third part of my testimony I try to offer seven specific suggestions to the Commission for improving the guidelines. First I think the Commission might consider reemphasizing that certain factors are forbidden considerations, for example, race, sex, and I think socioeconomic status ought to be included among those.

Second, I think the Commission ought to provide greater explanation for its policy statements on offender characteristics and departures. I was trying to do some research on an offender characteristic, lack of youthful guidance, and the best I could find was an excellent law review article by Commissioner Steer and former Commissioner Wilkins that explained what was going on there, but a judge

shouldn't have to go look for law review articles to determine what the reasoning behind those policy statements. That ought to be clearly articulated in the commentary.

Third, I think the Commission ought to list as a forbidden factor cooperation with the Federal Government as the basis for varying or departing downward, absent a Government motion. Judges are poorly situated to evaluate those kinds of things, and only if there's a governmental motion ought that issue to be on the table.

Fourth, I think the Commission should clarify that a preponderance of the evidence standard is the appropriate standard for sentences. That was the Commission's view before and there's no reason to change now that the guidelines are purely advisory, but fortunately, the Commission's view is expressed in a commentary by the national policy statement or guideline, and I think that ought to be raised to greater prominence.

Fifth, while we're talking about policy statements, I think the Commission ought to change all of its policy statements to guidelines. Why do we have policy statements? I guess it was to indicate some greater degree of discretion, but now that the entire guideline apparatus

is advisory, I think the label on everything ought to be changed to guidelines.

Sixth, I think the Commission should come up with some terminology for describing sentences that fall outside of the guideline. My recommendation, as I was pleased to see the Chairman and Commissioner Steer talking about variances, I think that's a good term. I know that others have talked about a nonguideline sentence. The problem from a purely stylistic point of view, as somebody who's written a number of pages on these issues, is there's no verb in a nonguideline sentence. Variance allows the quick and easy form of vary, but the ultimate terminology here is not important.

What may be important is my seventh, that the Commission ought to require courts as a procedural matter to first look to departures, and only if the departure methodology does not produce an appropriate sentence ought courts to consider variances or nonguideline sentences.

In part four I turn to recent crime victims legislation, the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis and Nila Lynn Crime Victims Rights Act. I mention the lengthy title because Scott Campbell is

the lead person identified and Colleen Campbell, I believe, will be on the next panel for the Commission, Scott Campbell's mother. As you know from looking at that Act, it may require a number of changes in the way we do federal criminal justice proceedings. I think it has a particular impact for the sentencing guidelines.

The procedural provisions that are in there right now allow parties to dispute sentencing factors. In the wake of the new Act I think it's quite clear that victims could also dispute factors since they have the right to be reasonably heard at sentencing proceedings, and I believe the Commission's procedural provisions ought to be changed to reflect that.

In conclusion I think it's important that we exercise the opportunity as the Judiciary to responsibly handle the new freedom that we've been given, that that freedom is used not to thwart congressional objectives but to implement them discriminatingly in particular cases. That will be ultimately I think the best solution with everyone involved in criminal justice proceedings. And I urge the Commission to do whatever it can to encourage judges to follow the guidelines.

CHAIRMAN HINOJOSA: Thank you, Judge Cassell.

We'll turn to Judge Adelman.

JUDGE ADELMAN: Thank you, Mr. Chairman, and members of the Commission. I agree with a lot that everybody said. I guess I want to start out by expressing that I agree with Judge Piersol who said that the Booker decision really, whether by intent or accident, it really creates the potential for a tremendously improved federal sentencing practice. I mean I really think that Booker is in a sense a great opportunity for judges, for the Commission, for everybody to really work out a sentencing system that pretty much everybody agrees is fair and just.

I have prepared some written testimony. I don't want to go through all of it, but some of it I do. I guess they're reasons for the assertion I just made.

First, Booker restores federal judges to a meaningful role in the sentencing process, and that's tremendously important. Secondly, it makes clear that fairness in sentencing requires considerations of many factors, not just reduction of disparities. That's not to say that reducing disparities is not important, it is. There are many other things that are important also.

I think that a lot of the flaws in our present system flow from the mistaken view that the main problem in sentencing is judges, and that the solution to the problem is to remove judges from the decisionmaking process as much as possible. I just think that's completely wrong. Based on my experience, which I agree isn't as long as many people here, but federal judges I think are very conscientious and very thoughtful, some you might even characterize as being wise, and how the notion is that somehow it's important to prevent them from exercising the qualities that got them put on the bench just seems to me kind of misguided.

And I think even without the constraints on judicial discretion that remain in place after Booker, judges would not abuse the authority that Booker confers on them. But even if they were inclined to, which I see no evidence of at all--and I think some of the statistics that the Chairman went through illustrated that. Although I would emphasize that I don't think the most meaningful statistic is how many guideline or nonguideline sentences there were. I think what's really meaningful is in either case how good an explanation did the judge give when he gave a sentence that was either in guideline or nonguideline.

This is not just a numbers game and if you're within this, then you're okay. There might be sentences within the guidelines that aren't okay. There might be something wrong with the guidelines application to that particular sentence.

The question really is the reasoning and the why. That's everything, the process. See, I'm getting a little ahead of myself, but I really think that Booker creates the opportunity for a real dialog between judges, between judges and the Commission. I mean I think the role of the Commission in this new era is going to be a little different, but it's going to be probably more important I think.

But anyway, there are constraints on discretion after Booker, and they ensure that the post-Booker regime will not be a return to the pre-guideline world where a judge's discretion was total. That's never going to happen and for good reason.

First of all, judges have operated under the guidelines for a very long time, and to a considerable extent have internalized guideline thinking. Judges are not going to give up this way of thinking just because the guidelines are advisory, and I think that's already clear.

The judges have been essentially socialized into thinking in guideline terms, and that's not going to chance.

Secondly, Booker directs judges to consider the guidelines, and judges most assuredly are going to follow that.

Third, the fact that sentences are reviewable for reasonableness, and if the history of departures is any guide where Courts of Appeals have been very, very tough on sustaining departures and have looked at District Court departures very carefully, the fact that sentences are reviewable for reasonableness will cause judges to think carefully about the sentences they impose, and to explain in detail any sentence that they believe that the government or the defendant is going to seriously question.

As I stated in Ranum, an advisory guideline regime is going to make sentencing more difficult for judges. Lawyers will be able to present a broader range of arguments, judges will be forced to think about them. That's what judges should do. That's why they're judges. Judges will still be able to use the guidelines as a point of reference, but their sentences will be their own. The result will be that sentencing will be less mechanical, and

the process and the outcomes--and I think they're probably both important, the sentencing process and the outcomes--will more closely comport with the public's intuitive understanding of what a just sentencing is. I think that point was made by one of the speakers earlier. There's a certain sort of a cathartic, if you will, quality in sentencing that's ritualistic, a symbolic quality, and the public comes to expect certain things, and I think now that will be more likely to happen.

I think Booker also promotes greater fairness by directing courts to consider a broad range of relevant factors other than disparity. I think that the focus on disparity has been excessive and has made our system less just. Even under the old guideline regime there's lots of disparities, all kinds, some created by the guidelines, fact bargaining, charge bargaining, ways by which lawyers try to work around the guidelines, variations between districts and the number of substantial assistance motions, the use of fast-track programs in some districts and not others. There's lots and lots of disparities of many different kinds. And, sure, we should try to get at them, no doubt about it, but that can't be the sole focus.

Booker enables judges to treat people being sentenced as they should be treated, as individuals, and to craft sentences that are appropriate to them. Insofar as is possible a sentencing system should not force judges to impose sentences that they don't believe in. It might be said that Booker constitutes a recognition of the irreducible need for individualized judgment and humanity in sentencing.

A little bit about the guidelines. Booker said that the Federal Sentencing Guidelines violated the Sixth Amendment, and I think that some of the suggestions that are made that we should do as little as possible or that the guidelines are still really, really entitled by really heavy weight, that's unlawful. The Supreme Court said that was unlawful. It's a new system now. It's not just the old system with some different terminology. And I think that a system that was too much like the old system runs the risk of violating both the merits majority of Booker and it also runs the risks of violating the remedial majority in Booker.

Let's talk a little bit about this issue of the proper weight to be accorded the guidelines. Based on the statutory scheme that remains after Booker's excision of

3553(b), I think the guidelines should be given the same weight as the other factors set forth in 3553(a), and I might add that the Second Circuit in Crosby and the Ninth Circuit in Amline, although neither of them cited Ranum, both essentially took that position. I've got Amline here, I can quote it.

3553 cites seven factors, and it says that the Court shall consider these factors, and those factors include the guideline range, the policy statements, but there's nothing in that statute, as modified by Booker, that says any one factor as a general principle is entitled to more weight than others. Now, it might be in a specific case. The guidelines might decide a specific case, and probably they will in most cases, but as a general rule I don't think there's anything in 3553 or in Booker that says that they're entitled to greater weight.

First, when it directed sentencing courts to consider the guidelines but allowed them to "tailor the sentence in light of other statutory concerns," Booker recognized that the guidelines do not take into consideration all of the 3553(a) factors. If the court believed that the guidelines took all of those factors into

account, it would not have used this language. Secondly, as I discussed in Ranum, the guidelines do not take into consideration all of the 3553(a) factors, and in fact, advise courts not to consider them. For example, 3553(a) directs courts to consider "the history and characteristics of a defendant." Now, how you can square that with statements in the guidelines that you're not allowed to look at history or age or education or mental condition or drug or alcohol dependence or employment or family ties or responsibilities or civic and military ties? It seems to me that no matter how you kind of try to fudge that, 3553(a) says something different.

There's a lot of support for what I am saying. This is not just something that I've made up. I'm reading Booker, I'm reading 3553(a). Go back to Daniel Freed wrote a law review article back in 1992, "Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers," 101 Yale Law Journal, 1681. He states, the "5H policy statements...are inconsistent with 3553(a) and 3661 of title 18," which require the judge to consider without limitation information on the offender's background and character, and that "in the end the

Commission chose to acknowledge the relevance only of a person's criminal characteristics." So I disagree with Judge Cassell strongly on that issue.

And even if the Commission did take some of these factors into account, the argument that the courts should accord the guidelines heavier weight than other 3553(a) factors does not withstand scrutiny. As stated, 3553(a) contains no suggestion that any factor be accorded more weight than any other. Moreover, 3553(a) states that "in determining the particular sentence to be imposed," courts "shall consider" the factors listed in the statute. The use of the word "shall" requires courts to consider these factors, and I think it also prohibits them from turning that responsibility, that is, the responsibility to consider those factors, over to some other entity. Other parts of 3553(a) reinforce the conclusion that the sentencing judge, not any other person or entity, including this Commission, is responsible for weighing the statutory factors. Under the statute it is the judge who has to consider the nature and circumstances of the offense. It's the judge who has to consider the history and characteristics of the defendant. It's the judge who has to determine the particular sentence

to be imposed and to impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing.

Thus, whether or not this Commission considered certain factors in crafting the guidelines, to comply with Booker and with 3553(a) the judge has to independently consider them. Similarly, whether or not Congress, through its inaction, expressed a view that the Commission performed well--and it's very hard, as all of you know, to infer something from non-action by Congress--but even assuming that by inaction Congress incorporated the purposes of sentencing into the guidelines, the clear statutory command of 3553(a) is that the court has to consider all those factors.

I don't think that there's any way to get around that, nor should we get around it. This is as it should be. 3553(a) creates a process by which individual judges sentence individual defendants. The statute further requires judges to consider a number of factors specific to the defendant who is before them. The Sentencing Commission can do many, many good things, but it cannot perform that function. This is so because the Commission has no

knowledge of the individual being sentenced, or of the particulars of the offense that he committed. The Commission "operates from an ex ante system-wide perspective; it has created guidelines by examining sentencing outcomes in the aggregate", but it has not directly considered any of the individual human beings who have violated federal law.

Finally, I believe the guidelines will continue to play an important role in sentencing, although it's a slightly different one. Courts will consider the guidelines in all cases, and have to, and should, and they will impose guideline sentences in many, probably most cases, and even when a court sentences outside the guidelines, the guidelines will be of tremendous value in determining the specific sentence to impose. This is because the judge can use the guideline terminology as a way of translating findings under 3553(a) into a specific numerical sentence. I think this is exactly what Justice Breyer had in mind when he instructed judges to consider the guidelines but tailor their sentences in light of the other factors set forth in 3553(?).

Just a few more points. I'll skip some other of

these points I've made.

I just want to note, it hasn't been noted much--I think that in Crosby there was a mention of it--but it hasn't been noted much that there's an existing body of law that really can guide both the District Courts and the Appellate Courts in carrying out their post-Booker duties, and that is the law that relates to sentencing after revocation of probation and supervised release. That is what we've long used advisory guidelines, and Appellate Courts have reviewed such sentences to determine whether they were plainly unreasonable. There's a whole body of law as to how that works, and it seems to me it's eminently transferable because now all guidelines are advisory and all review is for reasonableness. So I don't think we're going into such a tremendously uncharted territory. I think there's lots of law and lots of guidance that we can all rely on.

I'm going to skip over some. With respect to what action is required, I agree with I think just about everybody who has spoken up here, that the Congress and this Commission should really take a cautious approach. Let this system play itself out, and I really think that it has the

potential for really working well.

I think that one of the things this Commission can do, it can collect all the data on when judges are not giving guideline sentences and what are the factors, and judges have to write down why, and then the Commission can sort of reflect and criticize those particular sentences, and disseminate information to other judges about what's going on.

By the same token this Commission isn't perfect, and many of the guidelines are also potentially subject to criticism, and when courts are going to give a sentence that's a nonguideline sentence or they're going to say "I don't think that the guidelines reflect what should happen in this particular case," and hopefully it will be a broader statement, then courts can discuss where they think there is some error in the guidelines. So it will be a two-way, back and forth process, a true dialog where you're not just sort of free form, you have the guidelines and you have this Commission. You have a sort of a stable center point, but you also have the judges now with a little greater freedom to talk more honestly.

And then you have the Commission if a judge or

judges are making decisions that seem to be--I'm not really talking about criticizing. Just by collecting data I think this Commission will be able to evaluate and make public, let the public evaluate whether the nonguideline sentences, when they're given, whether they're for good reason, whether they make sense. And if they do, then maybe this Commission should rethink some of the guidelines. Nothing is locked in stone, and that's where I think the beauty of Booker is.

The Commission is a judicial branch agency, and I guess I would like there to be a true partnership between this Commission and the judges, and we would help each other, nobody would dictate to each other. It would be a mutual process. As I said, the Commission would analyze nonguideline sentences and disseminate them and participate with judges.

There's been a lot of talk for many years about the creation of a common law of sentencing, and I think now we have the ability to do that. We can create a true common law of sentencing where the judges and the Commission both participate. And for their part there's a huge responsibility on judges. Judges have to write thoughtful decisions. They have to explain their sentences. Whether

or not they're outside the advisory guidelines, any time I have a sentence that raises an issue I write on it because I think it's terribly important. This will assist the Commission in understanding what judges are doing, and it will also make it clear to legislators and others that judges are not exercising discretion arbitrarily.

I think courts, under the guidelines, created somewhat of a disappointing legacy. They didn't really share their experience, they didn't really--and I think the Courts of Appeals were at fault in this too. There was really no dialog. It was, "Here's the guidelines, and it's really hard to depart, and if you depart a little bit too much, then you'll get knocked down by the Court of Appeals." That was not a good system. I mean, with all due respect, and I think everybody who was a judge on this Commission knows it was not a good system.

Now we can really take the best of that system but also the flexibility that the new system provides. I am very, very hopeful. I think that everybody should kind of--let's see how this works. Nobody should get too active. I think there's a good chance if all of us, that is the Commission, the judges and other interested parties, kind of

take this position as many players have. Congress won't want to do anything either for a while. Maybe we'll have enough time to let things work out in a very positive way.

I talked too long, but thank you very much.

CHAIRMAN HINOJOSA: Thank you, Judge Adelman.

Judge Kopf, I guess I was very interested in your opinion. With all my years on the bench I've never actually seen somebody offer to buy a beer for someone if they got reversed.

[Laughter.]

CHAIRMAN HINOJOSA: That definitely ensured that I read the entire opinion.

[Laughter.]

CHAIRMAN HINOJOSA: And it's your turn at bat here.

JUDGE KOPF: I should mostly court affirmance, Your Honor, unless you think I paid too little attention or too much attention to issues of personal characteristics such as viewer depression.

I won't read my testimony. It's limited to one page, and if you think it worthwhile, take a gander at it. Otherwise--

CHAIRMAN HINOJOSA: You can summarize it if you like or if you want to--

JUDGE KOPF: I think it's short enough that I'll just leave it as it is. Thank you for the invitation.

CHAIRMAN HINOJOSA: Thank you, sir.

Are there any questions?

COMMISSIONER RHODES: I have one for Judge Cassell.

CHAIRMAN HINOJOSA: Sure.

COMMISSIONER RHODES: We've heard from Judge Adelman. We've heard from others today, and over the past few weeks, that it might be best to do nothing. Let's give it a year. Let's collect all the date. I've been trying to get a sense of exactly where you stand on that because you've put forth some very interesting proposals, you know, some what I call sort of light-handed legislative proposals, some things that could be done that could, for want of a better word, sort of feed the beast of those in Congress who are anxious to do something to respond back to the Supreme Court.

What exactly are your views about whether or not the Sentencing Commission, whether you describe it as an

active role, saying do nothing, or an urging do nothing and let us just collect data in an active way, versus some others who say just play a broker role and try and help facilitate communications between the Department of Justice and the Judicial Branch and members of Congress, and actually coming forward and supporting a proposal, a light-handed legislative proposal that would certainly, of course, maintain advisory guidelines but with some incentives for judges to follow those guidelines and consider them when they're sentencing?

JUDGE CASSELL: First let me say I'm not sure I would agree with the feeding the beast. I just think Congress is a wonderful thoughtful body that has worked very hard to develop these guidelines over many years. But the question then is what are we going to do over the next year? Some said do nothing. I think that would be the wrong thing to do. There are specific areas where the Commission could act and should act immediately to address questions that have come up. Judge Adelman and I disagree on whether socioeconomic status ought to be a factor that should be--

JUDGE ADELMAN: I don't--you've misrepresented my opinion, Judge Cassell.

CHAIRMAN HINOJOSA: Judge Adelman, we'll just let Judge Cassell finish and then we'll get to you. We'll have plenty of time here. I don't limit myself to the exact time, and so Judge Cassell, and then we'll get to Judge Adelman.

JUDGE CASSELL: I think we disagree on whether that ought to be a factor at sentencing. It's listed in the opinion and I think that's inappropriate. I think if the Commission agrees with that, one of the things the Commission could do is list that as a factor that ought not to be considered in sentencing.

Another example, I know the Justice Department's testimony last week was very concerned about what to do with substantial assistance motions because now there's always the possibility that some defendant will say, "Well, it's the soft-hearted judge up there. I'll give the Department a little bit and then hope I can sweet talk the judge into getting a good break at sentencing." I think that's a very difficult situation to leave the Department in, and I'd like to be able to say that I'm just as good as Department prosecutors in assessing cooperation. I don't think I am. I don't think I can with a straight face make that sort of a

claim.

Again, the Commission could and should act now to say that without a governmental motion there's no reason for the court to even consider governmental cooperation.

Another area where there ought to be immediate action is this new crime victims legislation. I think it's quite clear that the Commission's current procedures are not in compliance with congressional command. In my view victims are entitled to dispute sentencing factors even though the Commission's procedural provisions limit that right exclusively to parties. So again, there's something that needs immediate action.

Now, how far to go, how light-handed should the touch be and so forth? I mean, obviously, that's a judgment call. But in my view, doing nothing would be a mistake. I don't think we should sit here and let another year of sentences go by and then realize, gee, there were some things we could have done a year ago. I've tried to lay out some specific things.

I guess I would just say that judges are looking for help from the Commission on the procedural side of things. Maybe Judge Adelman and I and others disagree about

what the substantive outcomes ought to be, but the Commission could say, "Look, here are the procedures you ought to go through," figure out the guidelines, look at departures, look at variances, so on and so forth. And in that sense the Commission could be very useful.

CHAIRMAN HINOJOSA: Judge Adelman, did you want to say something?

JUDGE ADELMAN: No, I apologize for interrupting. I shouldn't have. I just think--

CHAIRMAN HINOJOSA: I didn't mean to cut you off either.

JUDGE ADELMAN: No, no, that's fine. You were totally right. I just think that my decision in Ranum, which Judge Cassell wrote an opinion critical of, Ranum, that was not really about socioeconomic factors, and whether or not you believe that shouldn't be a factor. The guidelines are advisory in any case, so if you take into consideration in some unreasonable way or improperly, it's going to be unreasonable and you're going to get reversed. So I just think the focus on that particular issue is not really what we ought to be talking about.

CHAIRMAN HINOJOSA: Let me go ahead and ask this

question, which is a variance to the question of Judge Cassell, but directed at you, Judge Adelman.

Let's say you're a member of Congress and you heard someone say, "3353(a) factors, they all have the same weight, and that's the way it's written." And you're in Congress and you say, "But, no, that's not the way it was written. 3553(b)(1) made them mandatory, so when we wrote 3553(a), by writing (b)(1) also, we obviously meant to give them substantial weight or more weight than the other factors. And that is no longer the case because Booker says (b)(1) is no longer in existence, it is now advisory."

And if you're a member of Congress and you come to you and you've heard your thoughts and your sincere thoughts, and well-thought-out thoughts in the way you view 3553(a), and you say, "I as a member of Congress would like to word this in such a way that it becomes clear to you and everybody else that we do mean this to have more weight."

What could be done from your standpoint that would be the least offensive from the way you view things as to what Congress could do to make that point clear if they so desired to, if that would be possible?

JUDGE ADELMAN: It's hard for me to say what a

congressman--I ran for Congress a couple times unsuccessfully, so I wouldn't really--

[Laughter.]

JUDGE ADELMAN: I'm not the best--but I really don't--first of all, I think it would be very hard--

CHAIRMAN HINOJOSA: I've run for office unsuccessfully also, and I like this job a lot better.

[Laughter.]

JUDGE ADELMAN: Me too. We both did okay.

I think that it would be very hard for Congress, assuming they wanted to. My own gut feeling is if things work out pretty well and no judges are giving sentences that cannot be justified or there are very few, my guess is Congress is not going to do anything. Congress responds to problems. They've got lots of problems facing them now, tons or problems. And if it looks like the post-Booker world is working okay and there's no gross kind of problems, I think Congress is going to be happy, frankly.

And I think that if they did try to write a law that said the guidelines are entitled to X amount of weight but not Y amount of weight, they've got a huge problem with negotiating the Booker merits majority. So I think probably

if we do our jobs, Congress probably will let us.

CHAIRMAN HINOJOSA: Judge Kopf, you had your hand up. I didn't mean to interrupt you.

JUDGE KOPF: No. Thank you, Judge.

In response to a question, the thing that concerns me are the unintended consequences. Once this snowball starts rolling down the hill, to use a bad metaphor, I don't know--perhaps your political skills are much better than mine.

CHAIRMAN HINOJOSA: I lost the election.

[Laughter.]

JUDGE KOPF: I worry where it might end up, and that's my primary concern. In a perfect world, I would agree, Judge, with your suggestion, that it would have a fairly easy fix, put a weight statement in the statute, a standard of review in the statute perhaps. But once you start down that line, one wonders whether that's all that's going to happen, and that would be my concern.

I share both Judge Adelman's and I think Judge Cassell's view that we have the makings of a system that whether the previous system was bad or not, you're going to have much greater adherence from many more judges with a

system that is advisory, if for no other reason, ego sorts of things. And to the extent that we can have a pretty close photograph, the old system compared to the new system, and we buy greater acceptance by some segment of the Judiciary, that's a real valuable thing. I think that's worth spending some time seeing if you can buy that sort of acceptance without worrying about the unintended consequences.

CHAIRMAN HINOJOSA: Commissioner Sessions?

COMMISSIONER SESSIONS: Paul, just a couple of questions to follow up, and then I'd like to ask for comments from others. But you suggested that we should become active, proactive essentially at this point. And I think I read this correctly, that we should restrict in some ways the information that judges can rely upon in imposing sentence because either we're not qualified or less qualified than say the Justice Department, but also that politically that might be a wise step at this particular point. My question is how do we do that? Do we do it by way of a policy determination of the Sentencing Commission, and if so, would judges listen to that? Would they apply that to a nonguideline range of sentence, or would they say

the Sentencing Commission only deals with the guidelines?

And then if we did that, my next question is would that meet constitutional muster? That is, would we have judges say to us, "Your restriction of the kinds of information that you can consider makes these a mandatory system de facto, and as a result violate Booker?

JUDGE CASSELL: It's an interesting question because of this, what are you supposed to do? Do you take the guidelines and then put them in bold type or something so that everybody understands that they're to be taken quite seriously?

Although I think there are a couple of things you could do practically. One is you could elevate certain factors to a forbidden list, and maybe indeed put it in bold type. Part of what you need to do though I think is also explain the reasoning behind these things. Judge Adelman and I probably agree on 95 percent of the factors that one ought to look at, but we disagree on a few of them. When I was trying to figure out why did I disagree with him on one point or another, I ended up searching in law review articles and things like that. I ought to be able to look at the Commission's commentary and see the Commission

believes this factor ought not to be considered or ought to give a little weight for these reasons. It ought to be laid out so that then judges can look at that and agree with it.

Now, does that end up violating Booker? Well, at the end of the day I think whatever you tell us is going to be advisory, so I don't think it violates Booker in any way. So maybe you would say, "Well, is it worth spending a lot of time and energy if at the end of the day what you say is advisory?" I think it is. I think judges are going to pay considerable attention to what the Commission has to say over the next year or so.

CHAIRMAN HINOJOSA: Commissioner Castillo.

COMMISSIONER CASTILLO: So that there's no misunderstanding, Judge Cassell, your action items, you're proposing these as guideline changes that we should consider?

JUDGE CASSELL: Yes. I think they ought to go into the guidelines, and then when we pick up the manual to try to figure out what we are considering by way of advice, then some of these things would be part of that consideration process.

COMMISSIONER CASTILLO: The other thing I wanted

to say, just so you all understand what we're struggling with--and I'm glad all judges have been consistent about this--this distinction between judges that are currently sentencing within the guidelines, albeit with departures or without, versus the variance or the nonguideline sentences, this is such a critical distinction for us to capture because Judge Adelman talks about Congress evaluating if things are working out pretty well. Well, what people are going to evaluate are the statistics, and we can only give as good as we get, and unfortunately, even just hearing the preliminary report, there are a lot of cases that we just can't discern what is going on. I think unless judges drive this point home as to what exactly is being done, a lot of data is going to be misunderstood and could drive legislation that is ill advised. That's my concern as one Commissioner, and I think it's shared by a lot of others.

JUDGE CASSELL: I think that's one concern I have. Judge Adelman recommends not using the departure methodology. I think in the long run that may end up undercutting the position that people like Judge Adelman are advocating because then Congress will see a big number of sentences that look like judges ignoring the guidelines,

when in fact, as the data that was presented a moment ago suggests, many of those will be faithful application of the guideline process.

COMMISSIONER CASTILLO: Completely agree.

CHAIRMAN HINOJOSA: Commissioner Steer gets the last question.

COMMISSIONER STEER: Judge Cassell, I agree with many of your suggestions, have a hesitancy about one, and that is your suggestion that we make all of the policy statements guidelines, in effect. My hesitancy is that given that a ground of appeal still remains the incorrect application of the guidelines and that we don't yet have case law saying that a within-guideline sentence in any situation could be unreasonable, wouldn't converting policy statements on departures such as say family circumstances, set up a situation where a judge who failed to depart for a set of family circumstances that might, had the judge departed, be held to be a reasonable sentence, wouldn't that create a whole new set of legal problems?

JUDGE CASSELL: I don't think so because we are in a strange world right now where we have--we're supposed to consider advisory guidelines, and then we have policy

statements, and then we have the 3553(a) and (b) factors I guess. It just seems to me that if people are talking about simplifying the guideline structure, one way of doing that is to collapse everything into a single set of rules. Now, would that create the greater possibility for appeal? I don't know. Obviously, we don't have a lot of case law on what reasonableness means yet, the standard for appellate review.

But I guess when I wrote that provision I was thinking about this. I was working on my opinion, trying to figure out what the difference is between a policy statement and a guideline, and you chase the little rabbits through the case law out there and you're not sure. And I'm just thinking at the end of the day is it really worth having a distinction, or wouldn't it be simpler, particularly if we're trying to think about ways to bold type the guidelines and suggest to judges that they pay serious attention to all of these, would one way of doing that be to simply say, "Look, everything in here is a guideline." That's where I am.

CHAIRMAN HINOJOSA: Commissioner Horowitz is going to make me a public liar because he gets the last question.

COMMISSIONER HOROWITZ: I'll ask a lead in to the next panel.

Judge Cassell, in his testimony and presentation, talked about the Victims Rights Act and changing the procedures to allow victim participation. I was wondering if either Judge Kopf or Judge Adelman have any thoughts on that with regard to participation by victims at sentencings, and also the possibility that having another party at this sentencing proceeding provides a further check on what I know many have been concerned about, which is fact bargaining between the prosecutor and the defense lawyer, if you have any thoughts on that before we hear from some interested other parties on this?

JUDGE KOPF: Just very briefly. I have some thoughts on it, but I'm not going to tell you.

[Laughter.]

JUDGE KOPF: And the reason, I really think that the more uncertainty, anything you do to change the status quo, as screwed up as it is, you're going to inject such uncertainty into this system that it really can create enormous unintended consequences, and I would urge you simply to do nothing. And sometime in the future, if you

really care what some guy out in the hinterlands thinks about this, I'd be happy to give you my ideas.

JUDGE ADELMAN: I want to agree with Judge Kopf. I think that this new system is--I have a lot of faith in judges, as I said, and I think they're going to work this system out in a very positive way that virtually everybody is going to praise. So I think that we should let that process happen, and then once things settle down a bit, then if there's fine tuning or changes, go ahead and make them.

CHAIRMAN HINOJOSA: Thank you all very much. I do appreciate your time.

Judge Adelman, having just testified last week, I have to say that I did find it was not like my courtroom where I could interrupt and say anything I wanted, and I found my courtroom a much more pleasant experience when I got back to it.

Thank you all very much.

We're ready for our next panel. Our next panel consists of two individuals that represent what our entitled advocacy groups. We have Mary Price, who is with the Families Against Minimums, and faithfully attends all Sentencing Commission meetings. And we have Ms. Colleen

Campbell, who is with the Memory of Victims Everywhere. And I will go ahead and call on Ms. Price first.

MS. PRICE: Thank you for seeking our views at this very important time.

Over the years Families Against Mandatory Minimums has advocated sentencing reforms to ameliorate the harshest impact and aspects of guideline and statutory sentencing.

We steadfastly have opposed mandatory minimums sentences, and we've been strong and remain strong supporters of guided judicial discretion. We believe the sentencing guidelines can cabin judicial decisions while also providing judges the flexibility that they need to give true effect to the circumstances of offense and defendant that can't be captured in a mechanistic grid-based system.

Though we've been highly critical over the years of some of the terrible inequities and failures of sentencing guideline systems, we've lately fallen out of the habit of bringing to you sort of sweeping proposals for change. This is understandable. FAMM is cognizant of the possibilities, the political lay of the land, the balance of power and the line that you walk.

As you pointed out recently in the report, the

creation and amendment of guidelines fully informed by Commission expertise and the product of genuine collaboration among the branches is giving way of necessity, overridden or ignored in policymaking through the enactment of mandatory minimums or specific directives to the Commission.

This state of affairs reached perhaps an extreme in 2003 when Congress took on the task of directly amending the guidelines. So the PROTECT Act perhaps foreshadowed the next big thing. In quick succession we had Blakely, and then Booker and Fanfan, and those decisions have forever altered our understanding of the rules of sentencing.

We do agree with many others here today and before us that there is no need to rush in to fix federal sentencing. While the current advisory guideline system is not ideal, it's eminently workable in this interim period. As you undertake the job of recommending to Congress what sentencing ought to look like, you can do so secure in the competence of the courts to impose and to review sentences.

Today we invite you to use your unique perspective to help Congress take advantage of the immense opportunity the Supreme Court has given you. The Blakely and Booker

opinions launched what you recently and rather eloquently described as a national conversation about sentencings. Your voice has to be heard prominently in that discussion. This is not a time to tinker around the edges of reform. It's not a time to rush in to adopt measures designed to just meet, or worse, to avoid constitutional requirements. Instead, we urge you to embrace the opportunity to help Congress critically examine federal sentencing.

You're in the best position to do this, to challenge unwarranted or unjust assumptions underlying the guidelines, to take a lesson from the failures and the inequities of the system, to rethink long-held assumption about the core purposes of sentencing, and attend to the oft-expressed criticisms of guideline sentencing. We ask that you think very big and to reach back to core principles and foundations of justice.

Chief among the philosophical underpinnings is the principle of parsimony. Cesare Becarria articulated the concept that punishment should never be greater than necessary, and his thinking has influenced the Founding Fathers of our nation and is enshrined in our own sentencing statute.

So were you to start to construct a sentencing system from the ground up, knowing what you know, with the experience that you have, what would you keep and what would you discard? What aspects of guidelines would you alter? For example, what kinds of differences in offense, offender and context are worth accounting for, or better giving judges the opportunity to account for? What kinds of disparity are accepted under the guidelines, and are they actually acceptable? What are the measures of culpability and are they reliable? How much play is there in the joints of sentencing and how much should there be? And what use will we have any more for mandatory minimum sentences?

The guidelines were devised in part out of congressional concerns with unfettered judicial discretion, and while the guidelines appear to have reduced some forms of disparity, they contribute to the institutionalization of others. Perhaps chief among them is race-based disparity. The gap in average sentences between white and minority defendants was relatively small and whites dominated the federal criminal population prior to the adoption of the guidelines. Today minorities dominate the criminal docket, and the gap in average sentences between African-American

and some other groups, which began to grow at the time that the guidelines were implemented, is significant.

The Commission concludes that the sentencing rules themselves explain the disparities, in particular the cocaine sentencing rules contribute significantly to the widening gap in sentences between black and other defendants. The Commission has repeatedly called for the revision of the crack cocaine sentencing structure and for good reason. The Commission should include in any proposal to Congress a proposal to revise sentencing and have a renewed call to restructure cocaine sentencing.

And while we're on the subject of mandatory sentencing it's a perfect time to urge Congress to do away with those as well. Today we have two irreconcilable systems living together, on the one hand mandatory minimum sentences, on the other advisory guidelines. Congress is likely to institute a system that will be more enforceable than the current advisory system, as much as some of us would like to maybe see it go forward. Enforceable guidelines can make mandatory minimums redundant.

Mandatory minimum sentences, as you have pointed out, distort the operation of the guidelines because they

install an artificial but practically impermeable floor beneath sentences. This unhappy marriage has prohibited the guidelines from operating as they were intended, driven sentences higher than necessary, and provided unnatural power over sentencing at the front end to prosecutors who can control what amounts to strict liability sentencing, ameliorated practically only by the ability to determine who will receive substantial assistance departures. Now when Congress is poised to revisit sentencing, it's a perfect time to remind lawmakers of the sound reasons for your longstanding opposition.

While mandatory minimum laws have set the stage for sentencing and justice, the Commission has contributed to the overall unfairness of sentencing in other kinds of sentencing by placing undue emphasis on single factors such as amount or quantity. This practice has, for example, exacerbated and perpetuated the impact of 5- and 10-year mandatory minimums. Those terms, originally designed by Congress for the most serious and culpable offenders are today merely the starting point or the jumping off points for much higher sentences. Those are driven by relentless increases in offense levels based on incremental increases

in quantity or amount.

No single incremental factor should play such an overwhelming role in sentencing. Mandatory minimums and guideline sentences need not be inextricably linked, particularly if the Commission can limit the impact of one-dimensional sentencing. So while revisiting the decision to sentence in one-dimensional ways, the Commission might encourage a broad view of the benefits of multi-dimensional sentencing. We're convinced this system that better accounts for such things as defendant's background beyond the mechanistic totting up of criminal history and characteristics of the offense can better lead to reliable sentencing outcomes.

Consider recommending the sentencing be structured to better account for important characteristics that measure culpability, whether currently forbidden or not. Imagine a system that actually can account for drug addiction, which is really a very important factor in a lot of drug cases, poverty or family circumstances or history of abuse, role in the offense and other things that might be considered a measure of culpability or a mitigation or an aggravation.

Federal sentences of course are longer than

necessary. The guidelines have contributed to what many, most famously, Justice Anthony Kennedy, have criticized as unduly severe sentencing. Between 1984 and 2002 the mean federal sentence increased from 24 months to 55.4 months.

Similarly, incarceration is overused in our criminal justice system. The Commission should encourage Congress to take a close look at using alternatives to incarceration, especially for non-violent first-time offenders who pose no threat to public safety. A number of states have experimented with just such regimes.

The Commission should challenge underlying assumptions. Following the very short debate over the passage of the Feeney Amendment to the PROTECT Act, we became increasingly disturbed about the assumptions underlying what are acceptable bases for disparity. It became apparent that among those factors that lead to disparity the system can live with or does live with now are included those that facilitate the prosecution of others or to ease the prosecutorial caseload. Whatever one thinks about the extent of or justification for judge-based disparity in sentencing, important differences in sentences for similarly situated defendants also exist for the sole

purpose of making cases or easing caseloads.

Much has been written about the problems in this regard with respect to substantial assistance departures. But the relatively new fast-track system is also presenting new forms of disparity, and as Judge Kaplan recently wrote, if the overall goal here--he was talking about the new fast-track system and the difference in sentences depending on where one is apprehended, that being the main factor, of course. He wrote, "If the overall goal here is equal treatment for equal conduct, then there is at least a question whether administrative convenience or a reluctance to invest the resources required to prosecute all of these cases in the normal fashion warrants such wholesale disregard of the [principle] of uniformity."

So as we explore building a new sentencing system, it's going to be critical to encourage Congress to examine the underlying assumptions that guide when sentence length can be shortened and what are and are not acceptable grounds and limits for disparity.

The Commission demonstrated in the Fifteen-Year Study that "punishment became not only more certain but also more severe," and it laid a lot of responsibility for that

on the door of the Sentencing Commission. The result has been an unprecedented growth in number of people serving time in federal prison.

The Justice Department has recently and repeatedly pointed out in testimony here and before the Congress that increased incarceration has led to the lowest crime rate in decades. Assistant Attorney General Christopher Wray, announced the day of Booker's release, that, "[t]he Sentencing Guidelines have helped reduce crime by ensuring that criminal sentences take violent offenders off the streets, impose just punishment and deter others from committing crimes."

Despite the appeal of such a compelling and straightforward explanation, the facts demonstrate if not otherwise, at least that the contribution to lower crime rates is not nearly so direct. The argument is flawed in important respects. The correlation is imperfect, the relationship anything but direct, and the claim ignores the impact of a variety of factors that combine to contribute to the decline in the crime rate.

The crime rate measures violent and property offenses that are reported to the police. It does not

measure drug crimes. Drug offenders have contributed most significantly, however, to the increase in the incarceration rate in state and federal prisons and jails. The failure to account for drug crime in the crime rate thus obscures the overall crime picture, making it look as if there's less crime overall, and making it appear that increased incarceration has led to a lower incidence in crime.

Moreover, one would expect that if the general statement were always true, that locking up all criminals reduces the crime rate, then the specific should follow directly: locking up more drug offenders thus lowers the drug crime rate. While drug incarceration has driven the overall incarceration rates, drug use and drug crime continue to rise, however, in part because drug markets are inherently demand driven.

Moreover, experience at the state level doesn't support the claim that correlation is consistent with causation. The Sentencing Project examined crime and incarceration rates in the state--not the federal level--for the years 1991 to 1998. They found that states with the largest increased in incarceration experienced on average smaller declines in crime than other states.

I don't mean to say that incarceration has no impact on crime. It certainly does. It's probably among a number of factors. It's bound to do so. But studies and research demonstrate that there are a variety of factors that contribute to our increasing security. They include a growing economy, an aging population, increased and more effective law enforcement, community and problem oriented policing and the greater possibility of apprehension. So we urge extreme caution in using crime statistics to justify the burgeoning prison population or harsh sentencing laws.

Because I speak for FAMM, and one of our jobs is to bring you the human faces of sentencing, I want to tell you one story before I close. FAMM member Chrissy Taylor was a drug user when she was sentenced to nearly 20 years in prison. Her guideline sentence was driven by the quantity of precursor chemicals her boyfriend convinced her to purchase on his behalf. Chrissy never manufactured methamphetamine and believed what her boyfriend told her, that it was legal to buy the precursor chemicals. She went to trial and she was convicted. Her offense was nonviolent. She had priors, one for shoplifting, another for some drug possession. She was not a kingpin, and yet she received a

greater than kingpin length sentence. She was 19-years-old at the time.

Chrissy left prison last week. She called us. She told us when she got out of the prison that the experience has institutionalized her in ways that she didn't expect and it will take years for her to overcome. She said something happens to a person when they reach the 10-year mark in prison, something in them begins to die. And she said, a lot of women felt the same way, that the 10-year anniversary in prison was a turning point for them. After that milestone, she said, the years became unbearably long.

Chrissy's sentence represents a lot of what's been wrong with guideline sentencing today. It was driven by quantity, unmitigated by the fact of her addiction or the low level of involvement, and all together too long to be other than mindlessly punitive. It's a sentence that neither protected the public or after a certain period of time did anything for her.

So we call on you from FAMM to please really fix sentencing, and it's important to do so. Thanks.

CHAIRMAN HINOJOSA: Ms. Campbell?

MS. CAMPBELL: Thank you.

Mr. Chairman and Honorable Commissioners, I come to you from the real world that nobody wants to be in, but on behalf of thousands of crime victims I represent, we thank you for allowing me to be here today.

This isn't about me or the people that are victims. This is trying to stop other people from wearing the same shoes that we have to.

There's no one that wants to be educated in the justice system like my family has been forced to do. Our first life-changing tragedy was caused by the lack of mandatory sentencing. As you are well aware, leniency afforded to evil and violent criminals frequently causes enormous loss and suffering to good people.

Statistics are not kept on the "oops" factor of releasing dangerous criminals. However, those mistakes are forever deeply engraved in the hearts and the lives of the subsequent victims.

I have the greatest respect and place tremendous importance on your recommendations, and because I know firsthand the great need for improvement, I felt I must be here today, and that wasn't easy for me. Yesterday at this time I was in the California Superior Court listening to

another stressful bail motion in the 17-year-old murder case of my brother, auto-racing legend, Mickey Thompson and his wife, Trudy. Last evening, following the painful day in court, I climbed on a plane and flew all night to be here with you.

My knowledge and experience of the justice system is not one to be envied. I've been in the system for 23 straight years without a break. Our only son was murdered in 1982. He was robbed, strangled, and thrown from an airplane into the Pacific Ocean. His body was never recovered. Like thousands of other victims, our son, Scotty, was murdered by a dangerous felon who was released early. At that time there was no mandatory sentencing guidelines. Had there been, our son would be alive today, and believe me, that's not easy for this old bag to swallow.

Prior to killing our son, his murderer received four indeterminate life sentences, but instead of spending his life behind bars, he was released within four years, giving him the opportunity to do more violence and to destroy families.

We are among the many who have suffered devastating results from crime due to a system that placed

emphasis on returning dangerous criminals back into society instead of protecting innocent men, women and children. In doing this, our government failed to carry out its most important mandate, that of public safety.

Please don't allow these types of horrible mistakes and poor judgment to be repeated by continuing the misplaced focus on leniency for violent criminals. Renew the commitment to protect America's law-abiding families. Make certain strong mandatory sentence guidelines are in place and not ignored.

In every case I would wish the decisionmakers would internalize their decisionmaking process by asking themselves, "Would I feel comfortable allowing this inmate to spend an unsupervised evening with my mother, my daughter or my son?" If the answer is no, then please don't allow that criminal to return to society and be with another person's family.

It's interesting to note that every 10 weeks as many people are murdered in America as was killed in all three 9/11 terrorist attacks, every 10 weeks. We all despair tremendously over our military deaths in Iraq, it's horrible, but we want the world to be peaceful and free.

Along with their families our courageous servicemen and women are making huge sacrifices to eliminate evil to keep us safe. Since 9/11 there have been 1,110 Americans killed in action and 65 more killed in Afghanistan. That's a total of 1,185 of our highly-valued American military killed in our fight to stop terrorism and bringing peace to the world and our country.

But let's not forget the Americans at home. What's going on here in our country? During that same period of time since 9/11 there have been more than 55,000 Americans murdered right here in our own homeland. That, Commissioners, is 50 times more than in the war zone. Every day, every week, every month, every year, 50 times more Americans have been murdered right here in our own nation than have been killed in action in Iraq and Afghanistan.

I'm not just talking about crime. I'm talking about murder, loved ones dead, never to come back to their mom and dad or their sister or their brother. They have been killed. They're lifeless and they're gone forever.

We need to once and for all set the balance true. It is a necessity to send strong and clear messages that the lives and well-being of honest, law-abiding Americans are

more important than gambling on those who have shown they cannot be trusted in a free society, those who have forfeited their rights to freedom, those who have caused great pain and misery to good people. They are the dangerous and the violent among us.

We must make certain that fair and reasonable, but realistic and tough sentencing guidelines are in place and followed. We have an obligation to be very positive that our standards are not weak, nor should we be given--or should those standards of weakness be given to anyone with a propensity for violence.

We need to protect honest citizens and must recognize that we have a huge battle in the fight against crime right here in our own country.

Federal judges have once again gained vast sentencing power. And it would be helpful to this Commission's work to recall the reasons for mandatory sentencing guidelines in the past. It was a justiciary that was unaccountable and out of step with the American people. They had embraced the false promises that everyone is good and can in fact be rehabilitated. However, virtually every institution and the American people lost confidence in the

court's ability to protect us, the honest people. And make no mistakes, protecting the people is the court's highest responsibility, and it's just.

Let me tell you, when your child is laying dead, murdered by a violent, evil killer, lip service does not heal the problem. We know that protection of the citizens has not been the top priority. It simply hasn't been happening. It took an act of Congress to help correct this free fall of chaos and to begin to see that top priority should and must be first and foremost to protect the good people before the bad.

This Commission must build into its sentencing policies and procedures a requirement that judges are obligated to give the victim a right to be heard, and must take into consideration and understand the impact of the crime along with the views of the victim prior to making any sentencing decisions. I wish I had the time to tell you the real world out there where victims can't be heard and they're excluded from the courtroom and the things that happen in that courtroom that victims could help with.

Judge Cassell proposed that the Commission amend its procedures to ensure that victims can be heard in

sentencing proceedings at a time when their statements can make a difference to guideline calculations. I strongly endorse his proposal and am confident that most victims advocates would do so as well. And like he said, certainly you are aware this is now mandated by Congress in 18 USC Section 3771, which is the new Crime Victims Rights Act.

It is vitally important for the survival of our republic that all laws truly work to protect the innocent and to punish the guilty, and remember, there is no better indication of future behavior than a person's past behavior. Romans 13, Verse 1 and 4 in essence says, Those who are in authority are ordained by God, for they are his ministers to reward those who do good and execute judgment on those who do evil.

I will close with the truly well-respected phrase: "Evil triumphs when good people do nothing." Please do the right thing so mothers, sisters and brothers like me will no longer have to come before bodies such as this and request true American justice. Please do not hesitate to ask me questions. I'm such a mess that probably most people would hesitate, but thank you for letting me be here.

CHAIRMAN HINOJOSA: Thank you both very much.

Are there any questions for either Ms. Price or Ms. Campbell?

COMMISSIONER REILLY: Mr. Chairman?

CHAIRMAN HINOJOSA: Yes. Commissioner Reilly.

COMMISSIONER REILLY: I just want to say I've had the distinction of serving with Ms. Campbell. She's recently been appointed by the President to the National Institute of Corrections Advisory Board. Her story is one that obviously we all have great compassion and empathy for. And I know how hard it was for you to be here today, Colleen, so thank you for sharing your thoughts with us.

MS. CAMPBELL: Thank you.

CHAIRMAN HINOJOSA: Commissioner Steer?

COMMISSIONER STEER: Ms. Campbell, I would also like to thank you for sharing your experience with us, as painful as it is to relive it, and for taking the time and trouble to come all this way.

I wonder if you or your organization have given thought to what information you believe should be shared with the victim in order for you to be effective in making a presentation to the court? I know you want an opportunity to be heard, and that procedurally may be easier to

accomplish than--I don't know, I hadn't given thought to whether, for example, the presentence report is a document that you feel victims should have access to or have some input into its preparation.

MS. CAMPBELL: I'll try to make this as short an answer as I can. I believe it's critical. There are a lot of different types of victims, families that are close, like I'm sure that your families are, families that love their children, they know what's happened. When they're kept out of the courtroom or something they don't know what's going on in the courtroom. Unfortunately, there is a lot of untruth told inside of the courtroom, and when you're outside you're not able to do anything about that.

But when you--I think it's important that your prepared statement is very accurate, that the prosecutor has an opportunity to make certain that you're not stepping over the line. I am not sure--during my son's murder trial I was kept out during three trials, not allowed to be heard, and there was a lot of inaccuracies in there. The last day, the last moment they let me come in when the defendant was testifying. I caught him in a huge lie and was able to send it up to the district attorney who went ahead and found that

lie to be untrue, and he was convicted because he was able to do that.

So should victims be in the courtroom, should they have that opportunity? I think that that's a very interesting question because if you're talking about a family that isn't honest, that they're into bad things, they probably shouldn't be in the court. It would just generate more lies. But for good people--and that again isn't fair to some--but for good honest people that could give some information to the judge that they may not have, I think that's very important, and I think probably a prepared report that's looked at by a prosecutor would be very important to do that.

It's not yes, our heart's torn out, yes, our Christmases are never the same. It's can you give some information that might help that judge do the sentencing. A judge knows. They don't need to hear all of that stuff again.

And so it's very hard, and what we did in California--I also sit on the Post Commission--we put together a video to help train victims how to work better with law enforcement in the court, how to have information

and also how to prepare a report to the judge if they're allowed to be heard.

I think that victims need to have some type of education on how to deal with the system, and it needs to be in several different languages. In California we have it in five different languages, and it's very hard.

My father was a policeman, and one day all of a sudden I'm faced with my son's disappearance and not knowing where he went or what happened to him. And I had to learn a lot, and hopefully that I can share that with any of you that want the information. It's not a nice story. And then while we're in that trial, eight-year trial, my brother and his wife were also murdered and we're still on that trial. And they were my only son, my only siblings.

So unfortunately I've got a lot of information in this old head and I represent, I think, and have bios on more victims than anybody in the nation as far as breaking the information down, what happened. And I'm not talking about parents of murdered children or somebody like that, they certainly have more. But we work with Force 100 on what happened in the courtroom, and there's a tremendous amount of information that we need to get out. Nobody has

any idea.

CHAIRMAN HINOJOSA: Thank you both.

Does anybody else have any other questions?

[No response.]

CHAIRMAN HINOJOSA: Thank you all both very much. I will say that for anybody who's on the bench, when you sentence an individual you certainly have to consider the defendant in that particular situation, that individual defendant, but we all also consider the public and the public interest in the particular case, although the public may not be present. And you both represent two of the issues that face everyone who does this, and face the Commission when it determines what the guideline range should be, and that is whether it's too much of a sentence or too little of a sentence, and I think those are issues that the Commission faces when it writes the guidelines, and those are issues that every judge, in determining a sentence, also goes through in each case.

So we appreciate your taking the time to come share your views.

MS. CAMPBELL: Thank you.

CHAIRMAN HINOJOSA: Thank you all very much.

We'll go on to the next panel. The next panel is from academia, which, therefore, means smarter than the rest of us.

[Laughter.]

CHAIRMAN HINOJOSA: We have Professor Paul Rosenzweig, who is a senior legal research fellow with the Heritage Foundation and is an adjunct professor at George Mason University School of Law. We also have Professor Douglas A. Berman, who is a professor at the Michael E. Moritz College of Law, The Ohio State University, whose biggest concern is when the University of Texas Longhorns come to play them in football sometime in September of this year. He is also famous for his blog, which I have dubbed "the blob," as it keeps getting bigger and bigger.

Professor Rosenzweig?

MR. ROSENZWEIG: Thank you, Mr. Chairman.

CHAIRMAN HINOJOSA: I will start with my right.

MR. ROSENZWEIG: Okay. Well, thank you very much, Mr. Chairman. Thank you very much for inviting me. I was here last November and confidently offered a number of predictions about the likely result in the Supreme Court, almost none of which proved to be true, proving that I--

CHAIRMAN HINOJOSA: You were like everybody else.

MR. ROSENZWEIG: Yes, proving that I take no caution at all from that experience, I will offer some more.

It is, however, a cautionary note, which is that honestly nobody who was here in November and, frankly no observer of sentencing law and procedure prior to the Supreme Court's decision could possibly have predicted what result we got.

CHAIRMAN HINOJOSA: I know some people who did.

MR. ROSENZWEIG: Really? That's very impressive. It does, however, suggest a real note of caution, which is that we should be--though I will say some predictions here and some thoughts, we should be exceedingly humble in our self-congratulations and perhaps move somewhat slowly. I am not one to think that there is a need for any immediate set of reactions. I think that there may well prove to be some as time goes on, but since I have had a bad track record, I'm not going to rush blindly forward again.

I will offer one prediction, though, which is another aspect of caution, and it's one that hasn't--it's a viewpoint that hasn't been offered here today, which is--and I realize full well that the main thrust of today's hearing

is what should we do to live with Booker, and that's right and true because Booker is immediately in front of us.

I honestly don't think that Booker will last. I don't think that five years from now the sentencing regime that we are now trying to build will be the sentencing regime in the federal system. Either Congress will change it because it doesn't like it, or of equal possibility, it will collapse of its own weight because it is--and I say this with all respect to the Supreme Court and the jurists who have crafted the decision. It is incoherent and self-contradictory. We have a system that is now based upon, I think everybody would acknowledge, a transparent fiction that had Congress had the choice, this Congress had the choice, they would have asked for advisory guidelines; that notwithstanding the rejection of those in the '80s and the Feeney amendment and other congressional (?) this Commission is more than familiar with in the last few years, no legal structure that is based upon a fiction can last too terribly long, I think.

The other one is the inherent contradiction between the merits opinion and the remedial opinion. And, after all, we now have a system in which the right to a jury

trial that lies at the core of the constitutional rules that we are constructing has produced a system in which there is more or less unfettered judicial discretion, and the jury has almost no role at all. And those two things to me seem to suggest that in the long run Booker will come back upon itself.

The other reason I am skeptical of its long-term vitality is because the provision for reasonableness review will either prove to be nothing at all, in which case we will have a *de facto* every decision is reasonable and judges will routinely affirm on some abuse of discretion standard that is a review standard in theory and not in practice, or will actually have some real bite_and the courts of appeals will wind up instituting reasonableness reviews that have some real structure and meaning. But if they actually have some real structure and meaning and become legally constraining on district court judges, then they will become, in effect, mandatory rules respecting the discretion of judges and will run right back into the Blakely/Booker core remedial problem.

Now, maybe I'm wrong. Maybe a system that has these kinds of cognitive dissonances in it can be sustained

over a long arc of time, over 15, 20 years. But I'm really very skeptical. And what that actually means for me is to commend to you briefly the project I commended to you back in November, which is the guidelines need simplification as well. And that's independent of Booker. We can have a simplified guideline system that goes on top of the advisory guidelines and that is available if we wind up going back to a system of jury fact finding and sentencing.

Right now the structure of the guidelines is far too convoluted, far too complex for it to be readily transformed into a jury sentencing system, and it remains, frankly, far too complex to really allow district court judges to, you know, operate with the new discretion that they have. It's very proscriptive in its ways and engenders some of the thoughts that judges like Judge Adelman have about the necessity for going beyond. If they were simpler, they'd be more appealing, even in an advisory system.

I know that that is a big ask and you've got lots of other things to talk about, including how to deal with Booker directly. But I don't want Booker--if I could urge upon you a course of conduct, I wouldn't want Booker to occupy the entire field of this Commission's attention going

forward.

Turning briefly to Booker, I think you've got a lot, a huge number of issues that are out there. My general sense is that this Commission is best engaged in answering as decisively as possible the procedural questions because those are ones where, to be sure, you can't actually direct people explicitly, but an optimum set of procedures that would in this Commission's judgment act--you know, be reasonable procedures and meet the reasonableness test to the extent the courts apply reasonableness to procedural process rather than substantive results would be, I think, very good. I certainly think that for this Commission, for example, to offer the policy judgment that judges need to continue to calculate the guidelines, as you have in construing this, and to make that part of it is a great contribution, and I would urge more of that.

On the substantive side, I think your question, Judge Sessions, is absolutely right. You're not going to be able to constrain district court judges. If you could, it would, again, run right back into the Booker/Blakely remedial problem. But you have, I think, a great deal of moral authority. I heard Judge Hinojosa at the ABA earlier,

and he talked about the unique place of this Commission at the intersection of all three branches--executive, legislative, and judicial. And that gives you really, I think, a great opportunity to define the reasonableness, at least the broad outer parameters. And to the extent that you continue to do so, I would urge you to continue to do so.

I've offered some more particularized answers to some of the more specific questions that you've asked in my testimony. I won't bore you by repeating them here. But I think that, by and large, Booker should be seen as less a change agent--or as minimal a change agent as possible going forward, and that that's a formula for success. If it becomes a license for wildly disparate sentencing, wildly disparate procedures in different circuits, wildly disparate substantive sentencing treatments--one area I predict that this may very well happen, for example, is in the crack/powder area. If it becomes a license for that, that politically I think will engender a counterrevolution far more rapidly than is warranted. And so I would urge the Commission to try and guide the judiciary away from that.

I'll conclude there.

CHAIRMAN HINOJOSA: Thank you, sir.

Professor Berman?

MR. BERMAN: Well, I liked Paul starting "deja vu all over again" because Yogi Berra did set the tone for my opportunity to both thank you again for a chance to come back and really to reiterate some of the principles that I spoke to in November but now reshape them in light of how Booker has reshaped our collective universe.

I want to focus particularly on some principles. I think the remarkable remedy--and "remarkable" is a word that I think fits because people who have different views of whether that's a good or bad reality, but it was a remarkable remedy. It does provide us, all the same, with a remarkable opportunity to return to first principles, but to do so with the collective wisdom that 20 years of guideline sentencing in the federal system have brought upon us. Though there's dozens of principles we might focus on, I'm going to put them into three categories. I did in my testimony, and I just want to echo some of those points, what I'm sort of dividing into institutional principles, substantive principles, and procedural principles, which I believe should guide the work of this Commission in the

weeks and months ahead.

On the institutional front, I start with a point echoed by many before, the Commission's leadership. Justice Breyer properly, and perhaps not accidentally given his prior status on this Commission, emphasized twice in the Booker opinion the unique importance of the Commission, your critical role, your unique responsibility. It reinforces the idea that this Commission is the only institution which, by virtue of its information and insight, can take a truly comprehensive and balanced view of the entire federal sentencing landscape. It is for that reason that this Commission should continue to take a highly visible role as a vocal advocate for sound federal sentencing reforms. I want to compliment you for the job you've done, releasing the Fifteen-Year Report, providing as much public data as possible during this period of incredible transition. I want to encourage you to continue to do that, continue to speak about your role as leaders going forward about the importance of a data-driven approach to federal sentencing. And as I'll outline in a few minutes, I particularly want to encourage you to produce for at least the next year quarterly reports to Congress about post-Booker sentencing

developments, which include specific recommendations concerning potential short-term and long-term legislative responses to Booker.

I'll get back to that in a minute, but other institutional principles, broad and transparent collaboration with all the institutions and actors in the federal system and, again, to compliment you on putting this hearing together, state actors as well. We've heard a lot of talk, and rightly so, that many states operate under advisory guideline systems, and I think they have an awful lot to teach us. I look forward to hearing what they have to say tomorrow. I encourage this Commission to continue to aspire to be a true hub of sentencing information and knowledge by encouraging various entities--public policy groups, federal agencies, state sentencing commissions and the like--to share and allow for public dissemination, perhaps on your website, the data that's being collected and analyzed concerning not just the operation of the federal sentencing system, but also a number of state systems that can be valuable models and visions of contrast in a host of things.

Finally, institutionally, judicial involvement, a

point that obviously the judges on this Commission understand full well that I think this Commission doesn't need to be instructed on, but that it's important for you to highlight to all the others acting within the system. Federal judges, I think as we've seen already today, care passionately about these issues and having them involved in the policymaking process is critically important, and yet a role that they are not always familiar or comfortable with. That's why calling them to testify, encouraging them to take a proactive role in this process is a role that this Commission can play, and to highlight to others involved that the voice of the judiciary is not only one to be sought out but heeded in many respects.

Turning to substantive principles, I want to emphasize the importance of dividing up the federal sentencing universe and particularly that this Commission focus upon violent and repeat offenders. In the wake of Blakely and now also in the wake of Booker, the U.S. Department of Justice has in a variety of sorts of ways suggested that the toughest federal sentences should be directed toward violent and repeat offenders. And I thought Attorney General Gonzales' comments during his confirmation

hearing that prison is best suited "for people who commit violent crimes and are career criminals," and also that he stressed that a focus on rehabilitation for "first-tie, maybe sometimes second-time offenders...is not only smart,...it's the right thing to do." In his words, "it is part of a compassionate society to give someone another chance."

Unfortunately, some of the statistics bear out that the federal system has not always done a great job of focusing its prison resources on violent and repeat offenders. I don't want to debate the particulars of any of the statistics right now. My goal, rather, is to spotlight that I think there is broad agreement that the federal sentencing system should be particularly concerned with violent and repeat offenders, and to suggest that post-Booker analyses and reforms should be especially attentive to the distinction between first-time non-violent offenders and repeat violent offenders.

Other critical substantive principles, mandatory sentencing laws. You all have said over and over again how in crude ways they disserve the goals embraced by Congress in the Sentencing Reform Act. Just continuing to reiterate

that message as various proposals move around I think is very important.

Offender circumstances. One of the reasons why mandatory sentencing laws are criticized and have been found to be often ineffective and unjust is because by describing a sentence based on only one aspect of an offense, they often mandate identical sentences for defendants who are substantially different. Unfortunately, the guidelines have been criticized for sometimes likewise placing undue emphasis on precise quantity of harm, allowing that to drive the sentence, and giving insufficient attention to offender circumstances.

It's not surprising then that in a survey of Article II judges that this Commission conducted quite recently, a significant percentage of judges suggested that more emphasis be given to a broad array of mitigating offender circumstances, and a majority of respondents stated that age, mental condition, and family ties and responsibilities should play a greater role in federal sentencing.

What we have now after Booker is a remedy that obviously enables judges to give greater consideration to

these offender circumstances, and the fact that the survey showed they want to is a sign that it's going to come into play whether they intend it to or not. That's one of many reasons why this Commission should especially focus through its data collection and analysis on whether and how offender circumstances can and should be sensibly incorporated into federal guideline sentencing.

I think one of the concerns and a viable concern is that offender circumstances can produce disparity, but only by ignoring or not effectively channeling the consideration of offender circumstances is that a serious problem.

This then relates to the last key substantive principle, a balanced pursuit of uniformity. Achieving sentencing uniformity was an important goal of the Sentencing Reform Act, but not the only goal. And the emphasis in Booker on 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed reducing disparities as only one of a number of goals. Your own Fifteen-Year Report highlights the challenges of chasing down disparity because of geographic variation, because of presentencing disparities. The simple story is that

absolute sentencing uniformity is not an achievable goal, and it should not be doggedly pursued without recognizing that a just sentencing system needs to strive to achieve a host of other important values.

This then leads to some procedural principles. There's an incredible link between procedure and substance that I think has gone lost or forgotten in our effort to reform federal sentencing laws. Assistant Attorney General Christopher Wray rightly stressed in his testimony to the House subcommittee last week that "to have consistent sentences, it is essential that sentencing hearings have consistent form and substance." I think this Commission should make procedures--and we've heard this from a number of witnesses--a key consideration because among the variation we may see in the wake of Booker may actually turn on different applications of sentencing procedure rather than different substantive judgments, and among the procedural focus points going forward, I think, concerns about fair notice. There have been consistent complaints that oftentimes defendants do not get the notice they need before entering pleas about the facts and factors that come into guideline calculations, exploring ways to increase

notice effectively, transparency in the decisions that are made presentencing. I think some procedural reforms could achieve goals that way.

The burden of proof issue, one that's very challenging but one that I think is incredibly important. As you may realize, a number of defense attorneys are already arguing that a beyond a reasonable doubt standard, not a preponderance of the evidence standard, should be applicable in the wake of Booker. I must say that I see some merit to the contention that the Due Process Clause should be understood to require that all facts which can lead to enhanced sentences be proved beyond a reasonable doubt. After all, as the Supreme Court stressed in In re Winship, this heightened proof standard provides "concrete substance for the presumption of innocence--that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law."

Put simply, preponderance of the evidence is a civil standard. We learn it as a civil standard in law school. My students have always been distrustful of me when I teach them (?) and explain to them that in the criminal system, even after you're acquitted by a beyond a reasonable

doubt standard, that consideration, those facts can still come to bear at sentencing.

Importantly, the Sentencing Reform Act doesn't speak to burdens of proof at all. The commentary as a part of guideline 6A1.3 does say that the Commission believes the use of the preponderance standard is appropriate to meet due process requirements and policy concerns. But that policy statement I believe hasn't been seriously reexamined since Jones, Apprendi, Blakely, and Booker have reshaped our understanding of the significance of procedure and the constitutional rules that attend to them.

I encourage this Commission to give steady attention and serious consideration to these burden of proof issues, to monitor how lower courts are addressing these matters, and to think through whether new policy guidance is appropriate in light of these issues, not just the legal jurisprudence but also broader public policy issues.

That then leads to the data points. Unfortunately, headline-making cases always have unique purchase in the development of sentencing laws and policies, and there is, I think, a particular concern that anecdotal accounts of particular cases may unduly impact and shape

public debates over the future of the federal sentencing system. That makes your challenges especially significant and especially important that you help inform all key policymakers to stay focused on the cumulative data rather than be looking at anecdotes. There will always be outlier cases. In a system that processes 60,000 cases, I would be concerned if there weren't the occasional ugly case. Among the things to recognize, of course, is an ugly case at the district court level may not stay an ugly case. Appellate review oftentimes will fix that, and I'm particularly concerned, in light of the Feeney amendment, that there is a tendency to focus on ugly cases without having them be appealed and go through the processes that exist to correct those uglinesses that inevitably are going to happen in a system that is so huge.

Importantly, the challenges for this Commission are not only in collecting and disseminating data, but describing effectively and accurately this variance, non-guidelines sentencing idea, important to get nomenclature down, important, I think as well, as we focus on variances and departures that we look at the magnitude as well as the number of variances. Small variances are not as

disconcerting as very large ones. One of the things that I've noticed in just looking at anecdotal reports--that's all I can see from the newspapers--is even in some of these variance cases, we have defense attorneys arguing for probation, the guidelines providing for maybe five years, and the judges still giving two or three years, still giving a prison sentence, still not being unduly lenient, all things considered, but it may still go down as a variance. And without effective coding and analysis of the amount of the variance and its nature, there will be a misimpression of what judges are doing out there.

Similarly, I think breaking down, as I suggested, the statistics between first-time non-violent offenders and repeat violent offenders, I think breaking down drug cases versus sexual offenses versus fraud cases, I think distinguishing men and women in this coding, something that you all do and do very well in your big reports, but don't always get out there as effectively in the public policy conversation is a very important thing to do as you put this data together.

The last point I just want to reiterate is the sort of go-slow attitude is not only important, I think, as

a policy matter but as a pure litigation matter. The circuits are proving to us yet again how complicated life becomes when you change an intricate, detailed system. And I think any significant change--rapid, slow, whatever you want to say they are--are going to have enormous transition costs, years and years of litigation to work out. One of the things that you all can do effectively is start mapping out a plan for incremental changes, helping Congress see that maybe amendments are going to be a more efficient way to make some of the changes that are necessary than broad legislation.

I haven't even had a chance to look at all the sort of Feeney aftermath, but one of the things that I've noticed is that legislation itself has had questions surrounding it in litigation terms that can sometimes undermine the goals, even if it's brilliant legislation, if there are constitutional challenges, I heard the prediction that some circuits would find the Bowman fix unconstitutional. That is scary enough to encourage away from it, whatever you think its policy merits are, because it is inevitably the reality of how these things play out on the ground. And in a system that's designed to achieve

uniformity, anytime you get circuit splits, you need to serve the goals of the system no matter how good the laws are written. And so for that reason as well, beyond the policy merits, the litigation realities encourage me to encourage you to leave well enough alone for now and to map out a strategy for slow, incremental changes for whatever problems get identified going forward.

Thank you very much.

CHAIRMAN HINOJOSA: Thank you both.

Any questions?

[No response.]

CHAIRMAN HINOJOSA: We've got to have questions.

COMMISSIONER RHODES: All right. I have a question. Encouraging that policymakers do not consider the outlier cases and instead take those cases to the appellate review process for correction, what is your analysis of the reasonableness standard actually providing a remedy for those outlier cases, you know, considering the various different circuits that have their own characteristics?

MR. BERMAN: I really like the idea--and it's my old boss, Judge Newman, who sort of seemed to set this tone--that reasonableness will particularly govern the sort

of outlier process, that I really think what we should be aspiring to do and what Booker may at least provide a really nice setting for is that we ensure not just sort of a fair process but a deliberative process. And the real risk of the outlier cases, the real challenges, are going to be when judges sort of wave their hand at the guidelines and say, well, I kind of have an idea, or among other things, I'm a little concerned about this in Crosby as a matter of fact. I don't need to figure out the loss because, you know, that's complicated and, you know, I'll just say I wouldn't have given a sentence over ten years anyway. And so I think really sort of encouraging and regulating a process, and encouraging among other things the Department of Justice to appeal those cases where the process looked hinky, and making sure that it's deliberative along the way is one of the ways to sort of maximize the chance that the outliers at the end of the day really aren't outliers, that they are the product of true deliberation, because I think if there has been a deliberative process, the risk that the outliers should be looked at askance is much less. And so, I mean--and my instinct is that a procedural regulation--and again, this Commission can do a great job of encouraging a

certain set of procedures and reform--you know, defining the terms, all of that can be very, very effective. I think that minimizes the risk that the outliers produce real concerns.

MR. ROSENZWEIG: I guess I'm a little less sanguine than Doug. I think that reasonableness review with some help from this Commission and the circuits will pretty quickly define procedural requirements that everybody will have to follow. And that's mostly because judges don't care--I mean, they care about what procedures they have to follow, but all they really want is the formula to follow. You know, if you've ever been at a plea colloquy--right?--they want to make sure that they know what has to be on the checklist, and if the court of appeals tells them to put something new on the checklist, they'll put it on, and they're happy to do that.

I'm a little less optimistic about the likelihood that in the end the substantive reasonableness review will prove constraining. I am hopeful, I think, that if people adopt guidelines as presumptively reasonable, that will encourage that, for example. I think that if my reading of 3742(a) as to not allow appeals for sentences within the

guidelines is an accurate reading, which I think it is, that will encourage it.

But I think that there is a great deal of sense within which district judges, some district judges will find themselves trending towards the outliers. I've even had one district judge tell me that, you know, he's looking forward to it. I don't know if he was joking or not, but, you know, ideas--we were talking earlier, for example, about whether or not judges in defining--in sentencing can consider the factors that the guidelines purport to exclude--age, race, socioeconomic. And it's quite clear to me that many judges think that those are relevant factors that bear upon their reasonableness. It's also quite clear to me that different judges, you know, look at them in absolutely different directions. Some see poverty as a justification for a lower sentence. Some actually see high socioeconomic status as a reason not to impose sentence because, of course, they're being punished substantially by the loss of a license or something like that as well.

Unless and until the courts of appeals impose some uniformity on the degree--whether or not that's okay in the first instance, and if it is, the degree to which it is

acceptable, the reasonableness may not have as much success in constraining the outliers. I mean, it's all going to come down, if you will, to the standard of review and what people think it means, and where we're playing, we don't know that yet.

CHAIRMAN HINOJOSA: Commissioner Castillo?

COMMISSIONER CASTILLO: Do you have any expert opinion on this? What do you think of Judge Cassell's recommended action items?

MR. BERMAN: They all look sensible to me. I haven't had a chance to go through each individual one. I think the 5K1.1 issue sort of came to my attention for two reasons. One, I think the government has a real reason to be concerned about still having the kind of cooperation leverage that it feels it needs in order to create effective dealing. At the same time, I also think having them as sole gatekeepers is itself disconcerting at times, especially in light of the purposes of punishment and the act's specification of the different goals that the sentencing system is seeking to achieve.

There may be instances--and this is something that, again, your own work as the Commission has

highlighted--where a person can't give substantial assistance, no matter how much they'd like. They can give assistance. It just doesn't turn out to be substantial. Or as much of a concern perhaps is the quite variable standards that different U.S. Attorney's Offices are using to define what gets a 5K motion and what doesn't.

And so I like the idea of figuring out effective ways to ensure that there is an opportunity for substantial assistance to both be rewarded appropriately and for the government to have the leverage that it necessarily needs in order to get effective cooperation. I think that needs to be balanced. Really what it is--and I would say vis-a-vis all of Judge Cassell's proposals--is, you know, a healthy balance. And I think the preponderance standard, the other point that I noticed, concerns me. It doesn't feel to me like a healthy balance. I'm not sure that beyond a reasonable doubt is a healthy balance either for every single kind of factor. I've seen some very interesting work already done on the fraud loss issues that beyond a reasonable doubt actually is a problematic standard because anybody with a good forensic accountant can raise a reasonable doubt.

What that highlights to me, though, is there's important nuance in all of these matters, that maybe in fraud cases a certain degree of loss, you know, needs to be clear and convincing. You know, what's wonderful about being lawyers is we can come up with a bunch of different standards, and I won't reveal which judge told me on burden on proof, well, they're all the same, anyway, what's the big deal?

[Laughter.]

MR. BERMAN: But I do think it--

CHAIRMAN HINOJOSA: What was your answer to that question? What is the big deal?

MR. BERMAN: Well, I think it makes a statement, right? I mean symbolically--right?--to say that people can go to jail for longer periods of time just because we're more convinced than not. And after a jury has said we're not convinced beyond a reasonable doubt, again, I'm embarrassed to teach that to my students, quite honestly, you know, when they say to me, So how does that make sense? I said, well...

CHAIRMAN HINOJOSA: Does it bother you that a judge could do that under the old system without--and

apparently under the system where we had no guidelines, all members of the Supreme Court seemed to say that would be fine.

MR. BERMAN: One of the things, I think, is a key difference is in those settings judges had an opportunity to add on top of that consideration judgments, so that judges had an opportunity to in a sense calibrate the scale. Well, that evidence is a little bit fishy and so, you know, not so sure. Again, the case that brings that to my mind is the case out of the 4th Circuit, Hammud, where based on what seemed like pretty questionable evidence of terrorist ties, the person had to go--and, again, this is the key point--had to go from a sentence of five years to 155 years. And, you know, if he's a terrorist, I'd want him to go away for 155 years. If he's not a terrorist--you know, part of, again, what's important about burden of proof issues is if the goods are there, the person is still going to get convicted, still going to be sent away, still going to be an opportunity. And I would wonder in that sort of case if a judge had the discretion to come somewhere in between, to say, you know, I think the evidence is not convincing, but I have concerns, I don't think five years is enough, I think

155 years is too long. What makes it different is that the preponderance standard in a discretionary system--now technically we have that again--gives the judge more authority to sort of weigh effectively.

CHAIRMAN HINOJOSA: But you don't think under a mandatory system of the guidelines the judge didn't have that discretion to begin with?

MR. BERMAN: What is disconcerting to me is the judge would have to paper over that discretion, right? So the judge would have to say, well, I'm not convinced by a preponderance, even if maybe he or she was. Right? That's the concern I have, that in a standard system that's put that way to a judge, if a judge wants to exercise discretion on that variable, his or her choice is not to actually honestly say here's what I think the proof bears out, here's what I'm going to do. It would be, rather, to sort of look for gaps in the system. I know Professor Bowman has sort of spoken to this as well. Certainly they had discretion. What's disconcerting to me, especially as an ivory tower academic, is that that discretion would have to get buried into a statement about proof standards rather than brought to the surface in a way that, again, now it can be and this,

you know, in some sense relates to some of the points that Judge Adelman is making.

I wouldn't like a judge now to say, well, I know it's a five-point enhancement for, you know, brandishing a gun, but, ah, you know, I don't think that was really proven to me--when, in fact, what the judge is saying is I think there was a gun, I just think in this case the purposes of punishment justify some other sort of consideration. And so, again, it's a view of making sure the statements match with the judicial perspective because--you know, really it's the cynic in me--that perspective is going to come to bear anyway. That's going to come to influence the judge, consciously or subconsciously, no matter what the legal rules are, better it be in an environment in which the judge can talk about that and express it freely rather than have to sort of subsume that into a non-written record or into a judgment that doesn't really reflect what's going on.

MR. ROSENZWEIG: I actually think I disagree with Doug on this point, and it's because of the exact opposite effect, which is that if it were--well, substantively if there is a burden of proof that is beyond a reasonable doubt in an advisory system, the judge is going to bury that as

well if he wants to--if he feels he needs to to enhance the punishment at issue.

In my view, actually, given a truly advisory system, the burden of proof is kind of irrelevant because the judge can expressly take into account, you know, whatever the weight is. I mean, that's the commonality in the civil system. Here, I'll let it in for what it's worth, right? And it may very well be that in the Hammud case, we let it in for what it's worth, and we find it somewhat persuasive so that we think that it--you know, that there's some chance that he's a terrorist, and that motivates us to go from five to ten to 15 as opposed to 155. And I don't want a judge either falsely declaring that it's beyond a reasonable doubt and jumping up to 155.

So it actually strikes me, first, that maintaining the burden of proof at the lowest standard affords the judge the greatest discretion within the--to account for the weight he's giving the evidence in an advisory system.

The other thing that I really would caution about is the perception, which is if Booker becomes a reason for judges at the appellate level to impose higher standards of proof, that's--it strikes me as something that the

legislature believes is generically within its province, and for describing these things, and I think that if we see--if it is construed--reasonableness is construed as making it harder in many ways, that's the type of thing that will engender a counterrevolutionary reaction, Thermidor, if you will.

I think that it is far better generically to assume that Booker changes as little as possible, doesn't change procedures. I mean, another question that it raises, for example, is whether or not the present fact-finding methodology of *ex parte* contact between the probation office and the prosecution probation office and the defense bar is reasonable.

Now, you know, sitting outside in my academic chair, I think there is a lot to be questioned about that system. It lacks all kind of adversarial components that we think are fostering truth finding. But if the judiciary or this Commission were to urge the judiciary to seek the reasonableness standard as a reason to change those settled expectations, that's precisely the type of kind of--you know, evulsive reaction, you know, major change that will engender a very strong counter-reaction, I think. It seems

to me that Booker doesn't change that much about procedure or shouldn't be viewed as changing that much about procedure, both because it substantively leaves the judges with the greatest number of tools and because politically--and I shouldn't say that here, but politically that's the wise thing to do.

COMMISSIONER SESSIONS: I'd like to sort of focus on what we should do at this particular point, at this juncture of history. You talked about process, focusing on process. But you've also been talking a little bit about substantive issues. And the question is: What does the Commission do at this particular point? Do we allow these substantive issues to be fleshed out in Congress? Do we allow the courts to proceed without any kind of direction from the Sentencing Commission? Or do we take a proactive stand and address some of the questions which have been raised today?

MR. ROSENZWEIG: I think that this Commission has two goals to fulfill. The first is that, to the extent it identifies clear need for statutory revisions, inconsistencies either in the statute or the procedural rules, it's in a better position than anybody else to call

those authoritatively to the attention of the legislature.

COMMISSIONER SESSIONS: Procedural statutes as opposed to substantive changes?

MR. ROSENZWEIG: Generically, yes, procedural statutes. So that's kind of what I perceive as your role vis-a-vis the legislature. Your role, I think, vis-a-vis your colleagues on the bench, the judiciary, is unfortunately one only of moral suasion. I don't think you have any ability to order judges to stay within the guidelines, and indeed, as you pointed out, if you ordered them to and it were effective, that would violate Booker and Blakely.

I think, however, that at this juncture district judges are essentially in real time defining their roles, and a large part of what they're defining is the nature of their relationship to the legislative branch. And perhaps it's a little impolitic to say so, but I would counsel you to counsel them towards humility.

I fully accept judges as--

COMMISSIONER SESSIONS: Is that inconsistent with life tenure?

[Laughter.]

MR. BERMAN: Well, judges--

[Simultaneous conversation.]

MR. ROSENZWEIG: And that means, you know, urging them to be cautious in variances, urging them to give strong consideration--I mean, I think that the idea that they are just one factor ignores the context in which they were written with 3553(b) and their mandatory nature. You know, it will be the outliers that catch people's attention, unfortunately, notwithstanding the need for data. And at this juncture you can't tell people, tell the judges what to do. You just can't. But you can urge upon them--I mean, it's no secret, because I've read it in the paper, that immediately after Booker all the district judges kind of got together on the Internet and started trying to talk to each other about how to react to this. And I think that that's the right thing to do. And you are, in effect, kind of the capstone of that discussion that I hope will bring forward, you know, a sense of, you know, take the guidelines as a generic reflection because we've worked hard at trying to find what the right balance is. If you have a good reason, put it on paper so that people will know about it. Don't hide behind standards of proof. Put it on paper, and if it

survives appeal, good for you. That's great. That's how the system will work. But don't kind of treat with disdain the product of our work and, because Congress has approved all of it, inferentially, you know, the work that the elected representatives of the United States have adopted.

MR. BERMAN: Let me just sort of--

CHAIRMAN HINOJOSA: I do want to just thank him on behalf of the press who might be here for the fact that Professor Rosenzweig gets his news from the print media rather than from the blogs.

[Laughter.]

MR. BERMAN: Playing my role, which reinforces my sense that what I think being active--and why I'm encouraging quarterly reports with data and, again, quarterly may not fit your schedule but regular, to frame the conversation because in so many ways, especially at a time of so much uncertainty, how this gets talked through in lots of ways defines how people look at this universe and how it's going to be sort of comprehended in a sense. And already it seems like--and I certainly agree with Judge Cassell's point here--that, you know, encouraging going through the departure steps, defining a distinction between

departure sentences, so-called guideline sentences, and variances versus non-guideline--I mean, that's a very important item to get out the data, to get people talking about it, to be working through.

Similarly, you know, Frank Bowman again, it became the Bowman fix not because it was, you know, any super original idea but because he got out there and framed the conversation, defined the terms of it. Good, bad, or indifferent, it's another piece of evidence that whoever is out there articulating the way these issues should be looked at sets the terms of debate in ways that can be effective or ineffective. And, again, I believe this Commission is going to do not only as good a job but a much better job than many other possible actors or institutions in defining those items. And that's why I think sort of regular production--and it may just be nothing more than what's done for this hearing, you know, topics of discussion, defining the issues in ways so that the public conversation can move forward, I would say that's both substance and procedure.

And so, again, I've sort of emphasized the distinction between violent and non-violent offenders, first and repeat offenders as being important because, you know,

there's that Mark Twain quote which I love so much, "There's lies, damn lies, and statistics." You know, even a focus on data can be reshaped in a lot of different ways, and there will be lots and lots of different folks who will have lots and lots of different reasons to want to define the terms of a debate. And, again, I would trust you and encourage you to be active in at least getting the conversation moving in the sets of directions that you recognize as healthy to move in.

CHAIRMAN HINOJOSA: Well, we want to thank you all very much, and I want to thank all the participants. I will say that today's hearing has been a big success. Carmen has not managed to disrupt one single panel here.

[Laughter.]

CHAIRMAN HINOJOSA: And so that has been a major success for the Commission.

Thank you all very much, and we will see you all tomorrow morning.

[Whereupon, at 4:40 p.m., the meeting was adjourned.]