UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Wednesday, February 16, 2005

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

The meeting convened, pursuant to notice, at 9:30 a.m.

COMMISSIONERS:

RICARDO H. HINOJOSA, Chair

RUBEN CASTILLO

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DEBORAH J. RHODES

BERYL A. HOWELL

EDWARD F. REILLY, JR.

C O N T E N T S

C O N T E N T S (cont.)

P R O C E E D I N G S

CHAIRMAN HINOJOSA: We are going to go ahead and call the public meeting to order of the United States Sentencing Commission with regard to issues that have arisen since the Supreme Court decisions on Booker and Fanfan.

Again, on behalf of the Commission, I would like to thank all the participants in these hearings. Yesterday's hearing was extremely helpful to the Commission, and we appreciate very much the time that each one of you has taken from your busy work and the other things that you need to do to be here and share your thoughts on these issues. We appreciate your expertise and your willingness to come and share it with us.

This morning our first panel is basically a look at state guideline systems. We have Kim S. Hunt, who is the director of the District of Columbia Sentencing Commission; Daniel F. Wilhelm, who is the director of the State Sentencing and Corrections Program at the Vera Institute of Justice; Mark Bergstrom, who is the executive director of the Pennsylvania Commission on Sentencing; and Lyle Yurko, who actually was kind enough yesterday to agree to step in for Richard Kern, who is the director of the Virginia Criminal Sentencing Commission and was called to testify before their state legislature today. Lyle is a member of the North Carolina Sentencing Commission.

So at this point, we will go ahead and start with

Kim Hunt.

MR. HUNT: Thank you, Mr. Chairman and members of the Commission. I appreciate the opportunity to testify.

I'd like to do two things today. I'm the director of the nation's newest sentencing commission. It is an advisory guidelines system. So I'd like to spend a little time describing that system and especially the reasons we made the decisions we made. And secondly, I'd just like to offer a few observations about conditions under which we think successful advisory guidelines systems may operate.

So as I mentioned, we have an advisory guidelines system, in effect since June 2004, for felony cases in the District of Columbia Superior Court. It's too early to assess the effectiveness of that system--we've been in operation about six months--but there are encouraging signs and a lot of support from the various parties. In fact, let me mention I think we will assess in a preliminary way our successes in our November 30, 2005, Annual Report, so probably in about six months we will have a better sense of how things are going.

The first topic I hoped to speak about was the rationale for the system that we selected and a little bit about it. We spent many months considering various structured sentencing systems that had been in effect in various states. Our findings concerning those various systems are contained in our 2002 Annual Report, which is

available on our Web site. We concluded, for four reasons, that advisory guidelines made sense for the District of Columbia.

The first of those reasons was that advisory guidelines can achieve high compliance.

The second reason was that advisory guidelines are less rigid than the mandatory schemes we studied and allow judges more room to structure a sentence to fit the varying circumstances of individual cases. And that was important to us.

Third, advisory guidelines make it easier for the commission to adjust sentencing ranges in the future--and remember, we are calling this a pilot guidelines system; we expect to make some revisions along the way. It also allows us to account for important sentencing factors as needed and to address unanticipated consequences.

Last, and importantly, the commission believed unanimity was important within our commission and that was necessary to ensure the acceptance of our system, and the selection of the advisory guidelines enabled us to reach unanimity.

So let me just briefly describe, and I won't go into great detail about what our system looks like, except to say it's a relatively simple system. There are 12 offense groups and five criminal history categories. The driving force behind our guidelines system, its purpose, is

to bring greater fairness to felony sentencing in the District of Columbia, and we believe we can do that with advisory guidelines.

We studied sentences during the period 1996 to 2003, and we saw a good deal of variation in sentences and variation that couldn't be accounted for by legal factors. We concluded that at least some of that variation was solely due to differences in judicial philosophy. So we developed a guidelines system with that in mind, to reduce unwarranted disparity, without trying to either create longer times served or shorter times served on existing sentences, but rather to bring in the edges toward the middle of historical sentencing patterns.

As a result, we collected the data and we crafted guidelines looking at each cell among these 12 offense groups and five criminal history categories and looking for the middle 50 percent of sentences, taking the top 25 percent of sentences and the bottom 25 percent of sentences and creating the ranges around that middle 50 percent. The important sense there was we were looking for where most of the typical cases resided within our system.

We expected departures. We continue to expect departures, because we believe there are exceptional circumstances and particular cases that don't reflect that middle 50 percent of sentences and the typical cases that reside there. And so rather than trying to eliminate all of

those departures, we crafted a fairly short system of what we considered to be exceptional circumstances--aggravating and mitigating circumstances. We also have an open-ended category, but we ask judges to consider something of equal gravity to the ones that we do mention, about 10 types of circumstances in both the aggravating and mitigating areas.

With that, we will study. We hope to have and are beginning to see some thoughtful responses as to why they departed in particular cases. We don't have a lot of departures yet. And we will use that information as we go forward in this pilot system to reconsider what we've done and perhaps make adjustments as needed.

So that is a brief description of the system. I will be happy to answer questions about that if you have any particulars. I know time is limited, so I'd like to just move to speaking briefly about the prospects for success in an advisory system.

I noted earlier that we studied state sentencing structures. In fact, all the other panelists that are here with me today helped us in this process of studying other sentencing systems, and we concluded that advisory guidelines can work, and do work, in various places around the country.

I think many people will be surprised to hear that, that advisory guidelines can succeed. They lack a formal enforcement mechanism, which some people believe is

necessary to ensure compliance. However, if you look at the compliance rates around the country, I think what you'll find is the compliance varies from jurisdiction to jurisdiction and there is no demonstrable pattern of higher compliance in presumptive systems than there is in voluntary systems.

Now obviously, a state-by-state assessment is hard to do. The rules in effect in each state are different, the structures or their guidelines are different, the width of the ranges would surely affect compliance somewhat. I guess the point I'd like to leave you with about that, though, is that given the various structures in place around the country, in voluntary systems where there's no formal mechanism for requiring people to stay within those rules, people nonetheless largely stay within those rules. And they do so for a variety of reasons that I'd like to mention briefly.

I'm going to also mention another factor that we believe--let me mention four factors, in fact, that I think are important to the success of these kinds of systems. One is transparency--I'd like to describe that briefly; data, information and analysis; effective dialogue; and clear goals and feedback are the range piece.

With regard to transparency, there are examples of sentencing systems in the states that are relatively transparent. I think, in fact, the Pennsylvania system is

probably the most transparent system in the country, in which each judge's compliance rate is reported. It stands to reason that judges would be more inclined to comply with voluntary guidelines if compliance rates are transparent and readily available, and that when they don't comply, they will provide a useful reason for understanding what was unique about that case that led them outside the guideline range.

The second point had to do with data analysis and information gathering, and I don't really have to tell the United States Sentencing Commission or its staff about that. You do a lot of that and have done for many years. What I would mention is what we found when we were constructing our guidelines was that that data analysis, coupled with dialogue among the various parties interested in sentencing policy, provided very effective feedback, and I think you will find that to be the case also.

Obviously, in an advisory guidelines system, it is likely that some offense groups will have different compliance rates than other offense groups. In the process of going through that analysis, you learn a good deal. Creating focus groups or other mechanisms to get regular feedback about the reasons for those areas is going to, I think, be very useful for you.

I would just conclude by mentioning that I think it's going to be very interesting to see how appellate

review of sentences occurs under this new reasonableness standard that's been created. To my knowledge, none of the advisory guidelines systems currently have appellate review. Maybe other participants will talk a little more about that. But that is, I think, one area where the states can learn from the federal experience as that moves forward and you begin to analyze that.

Thank you very much. I'll be happy to answer your questions.

CHAIRMAN HINOJOSA: Thank you, Mr. Hunt. We will go on with the next group of speakers and then we'll open it up for questioning. That has been the procedure we have followed, and I should have stated that at the start.

For the remaining group of speakers, I will note that Professor Doug Berman of blog fame has walked in. Maybe I should give you Miranda warnings, but I don't have time for that.

Mr. Wilhelm.

MR. WILHELM: Thank you, Mr. Chairman, members of the Commission. My name is Daniel Wilhelm, and I direct the State Sentencing and Corrections Program at the vera Institute of Justice in New York. I wanted to thank you for the opportunity to participate in this conversation this morning and to share some of the lessons that we've picked up from states around the country as the Commission considers policy responses to Booker.

Unlike the commissions that are represented here, Vera's role is a bit different in that we don't work within just one specific jurisdiction. We're a not-for-profit organization that works in a nonpartisan way around the country, and the in five years that this program has been in existence--Vera's been around for more than 40 years--we've worked with officials from more than half the states in a variety of sentencing and incarceration policy issues. That's given us kind of a unique vantage point to view what's going on around the country and to assess the construction and operation of guideline structures in many different jurisdictions.

Before I offer some observations about both advisory and mandatory guidelines system, and I'm going to focus most of my comments on the advisory systems that exist, I first want to commend the Commission for taking the time to examine what the states are doing. In our travels around the United States, we often see that the federal and state criminal justice systems operate in parallel but often in an ignorant parallel of what's going on in each other's shops. And this is really unfortunate in many ways because the states have been, I think as the creators of federalism intended, the states have really been laboratories of policy innovation around sentencing reform. And so the lack of a robust federal-state dialogue, I think, has really kind of constrained the conversation in ways that it need not be.

So I commend the Commission for opening up that discussion in a bit more purposeful fashion.

What's interesting to note is that the aims and many of the methods that are being employed in the states are familiar to federal practitioners because they are many of the same goals that undergirded the creation of the Federal Sentencing Guidelines years ago.

To provide some kind of systemic context, it's interesting to note that since the late 1970s approximately 20 states have adopted sentencing guidelines and nearly all of them retain them in some form today. Some of these systems are presumptive in nature and would be familiar to federal actors who practiced in the pre-Booker federal system. Others are advisory in nature, and bear a more striking resemblance to the way the federal system looks after Booker.

But what's interesting is that, as I said, some common missions inform these in concert with the missions that inform the federal system, such as a desire to eliminate unwarranted disparities, to promote proportionality among sentences. And states have tacked on another important function, which is to better manage and control resources expended on prisons and correctional structures. This historically has not been as much of a concern in the federal system, but for states, which in the aggregate incarcerate more than 1.2 million of the 1.3

million prisoners in this country and spend $40 billion a year on prisons, it's become an issue of increasing concern and urgency.

So given those factors, how should a federal inquiry assess advisory and mandatory guidelines systems? Looking at the advisory systems generally and looking with some specificity at the system that the Supreme Court created in Booker, it's worth noting that the system created in Booker is a fully functioning system. By that I mean that the Court's conversion of a mandatory system into a voluntary one does not somehow render the new voluntary system incomplete. I think there has been in some quarters a tendency or propensity to think about the lack of a mandatory feature as creating an incomplete system, but, with the states as a guide, that by no means has to be the case. Reasonable minds can disagree about the propriety of voluntary versus presumptive systems, but it's clear that many policymakers and jurisdictions prefer the former. They prefer voluntary systems. Some 10 states have affirmatively chosen to adopt voluntary guidelines structures and two others are currently in the process of creating them.

It's also worth stressing that even though Booker and Blakely leave many important questions unanswered, which will play out in the federal system and perhaps also in some of the states--not the least of which, what the appellate standard of reasonable means and how it will be

interpreted--the Court's guidelines structure that was created is more or less ready to wear, although some further alteration may be required to make it fit comfortably. Congress may object to the method by which it was created, it may object to the content of what was created, but it doesn't mean that the system is non-operational.

So that is a precursor to the notion that early calls for immediate legislative response may be unwarranted by practical need, in that the system that was created subject to further modification is workable. Political imperatives, however--and politics is never absent from these sorts of sentencing and criminal justice decisions--may compel a different result.

So from what we've seen using the states as a guide, rash action may be unfortunate and it may be unnecessary, so I would urge Congress to take the time to study this system that's been created. The best way to do that, obviously, is by drawing on the historical strengths of the United States Sentencing Commission, allowing the Commission to continue its mandate of study and assessment, which you already have embraced in the post-Booker era, to determine how federal courts are applying this new rule.

Given that the temptation of action by Congress will be omnipresent, it's still instructive to see what state advisory guidelines systems can offer the Commission as you counsel Congress on its policy options. As I stated

a moment ago, depending on how one defines advisory guidelines, about 10 states have created such systems that are in place today. The basic definition of these, as you know, at least as they have traditionally applied in the states, is that do not require a judge to impose a recommended sentence and they generally do not provide for appellate review.

Within that broad rubric, however, there are really pretty significant variations among the ways the states structure the traditional use of these guidelines and the way the judges interact with these guidelines. And it's these structures that, in my opinion, can really determine the success and the acceptability of an advisory or a voluntary system, using the terms "advisory" and "voluntary" interchangeably.

States can measure success in a variety of different ways, depending on what it is that they want to get out of their systems. I mean, for a state where resource control is very important, the ability of their guidelines to predict who's going to prison and predict what their bed needs are going to be is going to be quite important. But there are others of the more kind of altruistic goals, such as those related to fairness and decreasing unwarranted disparities, which are also quite relevant across all the systems we've talked about. And often, in many states these are statutorily mandated or

stated purposes for the creation of the systems in the first place.

So if officials are successful in creating sentences that meet these goals, compliance is a valid measure by which to assess the success of systems. It's interesting to note, as Dr. Hunt had mentioned, that a number of voluntary guidelines states have markedly high compliance rates. It's unfortunate that Dr. Kern from Virginia couldn't be here today, because Virginia has really emerged, I think, in the national conversation as the state system perhaps most analogous to the way that the post-Booker federal system looks now. Virginia, as you may know, reports that judges imposed guidelines-recommended sentences some 80 percent of the time. Departures are evenly split upwards and downwards, 10 percent each, beyond the initial 80 percent.

Now, it's important to know that Virginia also shares one important feature with the new federal system, namely that judges are required in Virginia by statute to consider the guidelines recommendation applicable in each case. Moreover, in Virginia judges are statutorily required to complete a guidelines form that contains written explanations for any departures. Given the high rate of compliance in that state, it may be reasonable to conclude that the process of considering applicable guidelines and formulating a written explanation for departures helps build

awareness.

MR. WILHELM: It may be reasonable to conclude that the process of considering applicable guidelines and formulating a written explanation for departures helps build awareness of what the guidelines require and may help inculcate a sense of fealty to the application of the guidelines in most circumstances.

It is important to note a couple of things about Virginia, though. Judges continue to be very actively involved in the--we're actively involved in the creation and continue to be very actively involved in the maintenance of guideline structures of the state. And, also, the guidelines themselves are based on an historical study of actual sentences served by defendants. And so there is a basis and a belief in the kind of propriety and probity of the underlying guideline system that exists in Virginia that doubtless helps promote compliance.

Something has been made of the fact that in Virginia the legislature selects judges, and so perhaps judges are fearful to not comply with guidelines. There is obviously intuitive appeal to that argument, but there is very little evidence, at least the anecdotal evidence that we have been able to collect and assess that suggest that very few judges are actually not returned to the bench and that judge-specific data, although it has been occasionally released in the past in Virginia, is not regularly made

available either to the legislature or to the public.

Compliance is high in other states that have less-rigorous requirements, such as in Utah and Maryland, and in those states there are some sorts of systems in place procedurally that require judges to take certain steps in regard to the guidelines.

It is fair to say that in some states, where there are virtually no requirements put on judges, compliance has been poor. Missouri, for example, basically, doesn't require judges to do it--recently, required judges to do nothing with its guideline structure. It existed kind of on paper, and maybe in cyber space and, as a result, according to one of the justices of the Missouri Supreme Court, compliance was less than half, recommended guideline sentences were applied in less than half of the cases.

So it is difficult to draw definitive conclusions from these experiences, but several points do emerge.

First, it appears that some rigor in the form of procedural requirements that judges must follow may help promote compliance with advisory guidelines. Here, with the Court's decision that directs federal judges to consider the federal guidelines in an advisory context, that may provide some of the impetus for a high compliance rate in the federal system.

Second, it's worth nothing that in none of the states that we have discussed is appellate review available.

And as Dr. Hunt suggested, there seems to be some sort of normative character that, over time, the existence of guidelines, even if they're advisory in nature, judges tend to use them and apply them, given perhaps some encouragement to do so in the form of procedural requirements. So, as Dr. Hunt said, with the creation of perhaps a more rigorous appellate review standard on the federal level, that may lead to even greater compliance.

Third, what Virginia and the states at this table represent, I think, is the example that a well-informed, data-rich Sentencing Commission that is actively involved in the policy formulation and advising process is essential to the creation of sentencing policy that is not only substantively desirable, but politically legitimate and politically feasible. And so based on what we've seen in the better state examples, this really represents a golden opportunity for the U.S. Sentencing Commission to embrace that role and actively study the data that it's collecting now and to use that as the basis for forceful policy recommendations to Congress and to use that, then, also, as an opportunity to build political support and constituencies for those recommendations.

I will just briefly mention mandatory guidelines, and it may be premature to consider them, given the state of affairs this morning, but maybe the Congress compels a return to mandatory sentencing guidelines. And if that is

the case, it should just generally be remembered that states, also, may have something to offer here. States have taken a variety of approaches with regard to presumptive guidelines, and it's interesting to note that in none of the states has judicial discretion been constrained in the way that the prebook or federal guidelines and mandatory minimums operating in concert have constrained the discretion of federal judges.

It must be noted that there is a big difference, however, between federal and state structures, and that this big difference may limit the ultimate applicability of state models to federal presumptive guidelines, and that is the role that criminal codes play in the different systems. The federal criminal code is a less-precise instrument than the codes found in many states.

The reason the federal system was so deeply implicated by Blakely and Booker is the heavy lifting assigned to the Federal Sentencing Guidelines in fleshing out the severity of an offense and the culpability of a defendant. In the states, most of these tasks are taken up through the provisions of more detailed or finely grained criminal codes and differently graded offenses, which are appropriately considered and included in charging decisions.

So, if the need arises to consider presumptive options, it may be appropriate for the Commission and the Congress to think about whether the aspirations and goals

that supported the creation of Federal Sentencing Guidelines in the first place can be met within the context of the current federal criminal code. Maybe the consideration of this larger, and admittedly much more difficult, political and substantive issue, whether the federal criminal code needs to be reformed has to be answer to the predicate before formulating presumptive policy responses.

If code reform is not feasible, possible or desirable, the experiences of presumptive states may be less directly applicable, but, still, the principles of fairness and justice that the state systems and the federal system hold in common still suggest that the states have something to offer.

So thank you very much, and I look forward to answering any questions you may have.

CHAIRMAN HINOJOSA: Thank you very much.

Mr. Bergstrom?

MR. BERGSTROM: Good morning, Mr. Chairman and members of the United States Sentencing Commission.

I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for this opportunity to comment as you assess the impact of the United States Supreme Court decision in U.S. v. Booker on sentencing issues. I hope that some of the experiences with sentencing guidelines in Pennsylvania during the past 25 years may be of assistance in this effort.

Sentencing guidelines are inherently linked to the sentencing structure and practices of the jurisdiction in which they are developed. For this reason, I doubt that Pennsylvania sentencing guidelines would be effective if transplanted to the District of Columbia or to North Carolina or to the federal courts. So my purpose here today is not to recommend adoption of any specific aspects of Pennsylvania sentencing guidelines for incorporation into the federal system, but rather to highlight some of the characteristics of structured sentencing that have proven effective and useful in Pennsylvania.

Pennsylvania has both sentencing guidelines and discretionary parole release authority. When imposing an incarceration sentence, courts are required to impose both a minimum and a maximum sentence, with the minimum sentence guided by the sentencing guidelines and any applicable mandatory minimum sentences, and the maximum at least double the min with no longer than a statutory maximum sentence.

The minimum sentence serves as administrative notice of the earliest date a person is eligible for parole. There is no good time or earned time for state offenders in Pennsylvania. Therefore, an inmate must serve the entire minimum sentence before being eligible for parole. And since there is no right to parole in Pennsylvania, our appellate courts have long held that the maximum sentence imposed by the Court is the actual sentence. A defendant

may not serve more than the maximum sentence, either in prison alone or through a combination of prison and parole.

Pennsylvania sentencing structure has arguably survived Apprendi challenges because the grading of the offense, which dictates the statutory maximum, is based on proof beyond a reasonable doubt of the elements of the crime. The Court may not impose a maximum sentence longer than the statutory maximum based on the grading of that offense.

Pennsylvania Sentencing Guidelines have arguably survived Blakely challenges because they provide recommendations only relating to the minimum sentence and provide no recommendations regarding the maximum sentence. If you have an interest in reviewing issues of federal sentencing structure beyond guidelines, I commend to you a forthcoming article in the Emory Law Review by Professor Steve Johnson, who is a member of the Commission and a professor of law at Villanova University.

Moving on to guidelines, specifically, Pennsylvania's first sentencing guidelines were adopted in 1982. They were promulgated in order to structure the trial court's exercise of its sentencing power and to address disparate sentencing. Legislative history also indicates that the guidelines were enacted to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict unfettered

discretion given to sentencing judges.

Pennsylvania Sentencing Guidelines structure both the dispositional and durational decisions of the sentencing court. Since the guidelines address sentencing for misdemeanors and felonies, the dispositional recommendations consider the full range of options, including probation, county intermediate punishment, county incarceration, commonly known as jails, which can be used up to five years, a maximum of five years, state intermediate punishments, state incarceration, state boot camps.

Since the early 1990s, the guidelines have provided tradeoffs between the use of incarceration and community-based intermediate punishment options, with great emphasis on the use of clinically prescribed drug and alcohol treatment in lieu of or in addition to incarceration.

Pennsylvania Sentencing Guidelines have often been characterized as advisory due to the relatively weak--I think Mr. Wilhelm described it as procedural review--of our guidelines for most of its history, particularly in review of durational departures from our guidelines. However, in recent years, the Pennsylvania Superior Court has exhibited an increase in the reach of appellate review sentencing discretion, a move towards more presumptive guidelines.

Since this Commission has expressed an interest in receiving comments regarding state appellate review and

presumptiveness of state guidelines, I will focus on this issue. It may be helpful to relate some of the comments from a recent Superior Court opinion in Pennsylvania that addressed the fairly recent changes in appellate review of the guidelines. In Commonwealth v. Walls, the Court stated, "Thus, it would be helpful at this point to dispel a misconception in the law. It is perceived by many that the extension of discretion to the sentencing court has resulted in a situation where the sentencing court is free to impose any sentence within the limits allowed by law, as long as it states its reasons for doing so upon the record."

The corollary to this premise suggests that as long as the Court states a reason for departing from the guidelines on the record, the Superior Court is duty-bound to affirm, regardless of whether or not reasons stated are viewed as reasonable or as justifying the departure. This is simply not so.

The Court went on to discuss its role to review sentences in a more detached manner, so to ensure not only a fair and impartial sentence under the circumstances, but also to protect against grossly disparate treatment of like offenders throughout the commonwealth. The Court relied on the statutory provisions related to appellate review of the guidelines, which defines when a sentence is unreasonable. In determining whether a sentence is unreasonable, the appellate court shall have regard for the nature and

circumstances of the offense and the history and characteristics of the defendant, the opportunity of the sentencing court to observe the defendant, including any presentence investigation, the findings upon which the sentence was based, and the guidelines promulgated by the Commission.

The Court suggested that sentencing guidelines accomplished the goals of consistency and rationality in sentencing by providing a norm for comparison. The standard range of punishment for the panoply of crimes found in the crimes code and providing a scale of progressively greater punishment as the gravity of the offenses increase. By logical extension, the provisions of a norm require an assumption of a type of conduct that typically satisfies the elements of the crime and correlates the norm to that conduct.

The provision of a norm also strongly implies that deviations from the norm should be correlated with facts about the crime that also deviate from the norm for the offense or facts relating to the offender's character and criminal history that deviates from the norm and must be regarded as not within the guidelines contemplation.

Given this predicate, simply indicate that an offense is a serious, heinous or grave offense misplaces the proper focus. The focus should not be upon the seriousness, heinousness or egregiousness of the offense generally

speaking, but rather upon how the present case deviates from what might be regarded as a typical or normal case of the offense under consideration.

If the sentencing court, under the guise of exercising its discretion, imposes a sentence that deviates significantly from the guideline recommendations without a demonstration that the case under consideration is compellingly different from the typical case of the same offense or without pointing to some other sentencing factors that are germane to the case before the Court, including the character of the defendant or the defendant's criminal history, then the Court is not, in reality, merely exercising its sentencing discretion. Rather, the Court is, in effect, rejecting the assessment of the Sentencing Commission as to what constitutes just punishment for a typical commission of a crime in question.

The cases of Gause and Eby indicate that the sentencing court is not free to reject the assessment of just punishment contained in the sentencing guidelines and interpose its own sense of just punishment. Of course, the rationale for this positions should be obvious. If a sentencing court were able to easily sentence outside of the sentencing guidelines, the goals of treating like offenders in a like fashion would be frustrated, and we would be de facto in a sentencing environment that existed prior to the passage of the guidelines.

Regardless of the level of appellate review, the guidelines in Pennsylvania have been found to be effective in both shifting dispositional choices and changing the duration of sentences. Evaluations done by the Commission following the changes in the 1994 and 1997 guidelines found this to be so. When the Commission attempted to shift offenders from state prison down to county jail or from county jail to state prison or from incarceration out to community-based alternatives, we found those changes in the guidelines that promoted that action actually bore fruit. We saw significant changes in sentencing behaviors. We also saw that related to the length of sentence, although we did notice there is an upper cap to that. The Commission, in both those sets of guidelines, increased penalties for violent serious offenders.

In the '94 guidelines, we did see a corresponding shift in sentences imposed for violent offenders. In the '97 guidelines, it appeared that we sort of hit the cap, that we increased, to a degree, and the shift by the courts was less severe or less significant.

The reason for the compliance with the guidelines may be because, in practice, the sentencing guidelines in Pennsylvania are seen as a common starting point for sentencing. Judges with adequate reasons for departure are able to depart, but in the vast majority of cases, the guidelines appear reasonable to all parties. This is, in

part, due because the guidelines were first based on descriptive information, the practices already in place by courts, and then modified by more prescriptive issues raised by the General Assembly or the Executive Branch in increasing penalties or decreasing penalties.

So that is a quick rundown of the sentencing guidelines in Pennsylvania. Thank you for this opportunity, and I look forward to any of your questions.

CHAIRMAN HINOJOSA: Thank you very much.

Mr. Yurko?

MR. YURKO: Thank you. As a 10-year member of the North Carolina Sentencing Commission, I am honored to share our experiences as they relate to Booker with this Commission.

First, most of you know me as a 10-year veteran of the Practitioners Advisory Group, and I enthusiastically endorsed the articulate and comprehensive written testimony of the Practitioners Group presented in this hearing. Their position to give the new advisory guideline system an opportunity to work echoes a letter I sent to the North Carolina Congressional Delegation on January 27th of this year, and that delegation includes Representative Coble, and I included that in the record.

I truly believe that a new advisory system fashioned by Justice Breyer preserves this Commission's dedicated 17-year odyssey toward the creation of just and

fair sentencing reform. This new system, I believe, if allowed to flourish, will promote uniformity, while at the same time diminishing the occasional irrational results required by any mandatory guideline system.

Now, to North Carolina. By the early 1990s, prison overcrowding had spawned a federal court takeover of our prison system. We were paroling some inmates by fax before they arrived, and felons served only 14 percent of their stated sentence. When Michael Jordan's father was killed by two career criminals, the legislature and public required action.

In 1994, our legislature, with bipartisan support, enacted sort of a hybrid mandatory discretionary structured sentencing system. It's offensive conviction based with a grid containing 56 cells. Inside each cell is a presumptive, mitigated and aggravated range. There are statutory aggravating and mitigating factors determined by the Court using a preponderance standard. The vertical axis is based on offense and conviction, graduated on the basis of degree of harm, with violent conduct at the high end and property offenses at the low end. The horizontal axis is based on criminal history.

In about one-third of the cells, the Court has absolute discretion to select an active or alternative punishment. In the other two-thirds, prison must be selected. In any given year, 35 percent of all defendants

receive active sentences, while 65 percent receive alternative punishments, including house arrest, day reporting centers, intensive supervision and split sentences.

Of the average 30,000 sentences imposed each year, 80 percent are in cells with judicial discretion for this active alternative choice. It's about 80 percent. Judges impose aggravated sentences in less than 7 percent of all cases. The systems 10-year review established that prison was being used for violent and repeat offenders. Inmates time served double, but overcrowding was eliminated because the structure gave the legislature, long-term, well-based, predictable resource numbers creating physically sound management tools.

I believe that North Carolina has created one of the best punishment systems in the nation, and many experts agree. We have repeatedly earned awards for our work, including the prestigious Excellence in Government Work from the Kennedy School and Ford Foundation. Because two-thirds of our cells require active incarceration, our Court of Appeals ruled last summer that our system was subject to Blakely. We worked very hard this fall to address the Blakely issues.

Our Commission has 28 members and only two defense lawyers and only four judges. The remaining Commissioners are prosecutors, law enforcement officers and members of the

public. After careful debate, we decided to comply with Blakely and not to dodge it. We debated a Bowman-type fix, and it was soundly rejected. We fashioned a system that is a hybrid between the Breyer-Felman-type approaches. We preserved discretion and provided for jury fact finding for aggravating factors. We believe, with only 7 percent of our cases in the aggravated sentencing range, the increased jury determinations will be manageable. This new legislation will be acted on by the legislature this term and passage is quite probable. Our Blakely compliance was passed by the Commission unanimously.

I hope the patience recommended by all of the speakers so far in this hearing is the response chosen by the U.S. Congress. If, however, Booker is politically unfeasible, I would ask this Commission to carefully examine the Felman proposal and would be happy to share the details and progress of our North Carolina experience any time in the future.

CHAIRMAN HINOJOSA: Mr. Yurko, thank you very much for your part advocacy, part information statement this morning. We appreciate your stepping in at the last minute here.

It is now open for questions on the part of the Commission.

Commissioner Horowitz?

COMMISSIONER HOROWITZ: Let me ask a question,

following up on some testimony we heard yesterday about the Victim Rights Act that Congress passed and some discussion we had yesterday about whether victims should have an opportunity to speak regarding guideline calculations. I was wondering if any of the states you are familiar--your own states or any other states that you are familiar with in the guideline systems--allow victims to comment on guidelines calculations or the facts that might support a guidelines sentence?

MR. BERGSTROM: In Pennsylvania, our Commission does not have a victim representative. Of course, all of our deliberations are open to the public, and we encourage comments from victims. So, in the framing of guidelines, in effect, the district attorney, the prosecutor position, I believe, views that office and that representative on the Commission as the representative of victim's issues and works very closely with victims to represent those views in the structure of the guidelines.

At the individual case disposition, there is a victim impact statement, of course, available and victim comment during sentencing, but I don't know that there is--so Courts take that into account. It can certainly be used as a mitigated or aggravated factor in sentencing, but I don't believe we see it beyond that.

MR. YURKO: We have a victim's representative on the Commission as well, and it is required by statute. We

have a notification provision, where the victim must be notified of the hearing and a mandatory victim impact statement. As far as actual participation in guideline calculations, it's left up to the discretion of the individual prosecutor.

MR. WILHELM: As a general proposition, what we have seen mirrors what these two comments, that several of the Commissions reserve a spot for victim's rights advocates on the commission, so that input is incorporated into the structure of the guidelines that are created in some states. And then in addition, other jurisdictions also provide for victim impact statements.

MR. KERN: Same answer. While we don't have a formal representative on the Commission on victim's rights. One of the citizen members is quite active in making it running smoothly.

COMMISSIONER HOROWITZ: Just to follow up on the comment about the victim's impact statement, how is that prepared? Is that prepared by, we, obviously, have probation officers in the federal system who prepare our reports. Is that who is responsible in your state systems?

MR. BERGSTROM: In Pennsylvania, we have, at the state level, an Office of Victim's Advocate, an independent gubernatorial-appointed position. That office has, in effect, two divisions--one division located in the Department of Corrections, the other with the Board of

Probation and Parole. And then at the county level, each county has an office within the District Attorney's Office of the Office of Victim's--I'm sorry--a victim witness coordinator. And in both of those cases, both the state level and the county level, those staff persons reach out to victims, work with them to develop any testimony that they would give, but also a victim impact system.

MR. YURKO: And we have a victim's coordinator in each DA's office as well.

CHAIRMAN HINOJOSA: Commissioner Steer?

COMMISSIONER STEER: As one who has regularly attended the National Association of State Sentencing Commission meetings, although I, unfortunately, had to miss last year's, I am delighted to have you as part of our process. I think, and I've thought for some time, that there is much to be learned from the various state experiences.

My question that I would ask of those of you who particularly have studied the state systems and with regard to compliance rates is, to what extent do you think the availability of parole or the lack of parole, and the availability of motions to reconsider the sentence after the fact or the lack thereof might affect compliance rates? Let me tell you, specifically, what I am thinking. Maryland has a high compliance rate, but they so frequently grant motions to reconsider that I am wondering whether the nominal

compliance rate means very much.

Your observations, if you have any on that?

MR. BERGSTROM: Commissioner, I think--we have parole in Pennsylvania, and I think one of the struggles is making sure that, to the same degree that we want sentencing to be transparent, I think we need to have parole transparent, that the decisionmaking, maybe the starting point is presumptive for release at the minimum in Pennsylvania, and, to some degree, using the lack of a release as bad time as an alternative to good time, which we don't have in Pennsylvania, that there be clear factors and reasons why someone is rejected for parole. And I think, absent a very transparent, structured process for parole, it undermines anything you do at the sentencing end.

One of the things that we have been concerned about in Pennsylvania is that we did go through a period of time where parole rates were reduced substantially because of some high-profile cases, and we have seen the reaction to sentencing by judges, where judges may depart from our guidelines, anticipating the parole board not paroling a high-profile or violent case, et cetera.

So I think because parole cannot occur in Pennsylvania until the minimum has been served, I think, with presumptive parole or more presumptive parole, I think Courts tend to, I don't think there is kind of factor of parole decisionmaking at sentencing. I think, absent that

more presumptive parole, I think you get into game playing, you get into issues, and it is a concern.

MR. KERN: Just with regard to reconsideration, before I came to the District of Columbia, I worked with a study commission in Maryland for a couple of years, and I think you are quite right in the sense that reconsideration, in Maryland, is probably the most liberal in the country, in terms of the length of time cases can be reconsidered, and I don't know at what rate they actually are reconsidered, and you may know better than I.

In my experience in Maryland, judges did not use reconsideration to appear to comply with the guidelines and then later to change their sentence in a way that departed from the guidelines. That certainly could be studied, and the Maryland Sentencing Commission I think could tell you the answer to that, and I would be happy to connect you up with those folks.

MR. WILHELM: As a general proposition, you have identified something that is important. Any lack of transparency, as has been mentioned earlier in this hearing, really I think undermines public confidence in the operation of the system. And so, to the extent that any system is relying on something like a compliance rate to justify its existence, if you dig into it a little bit, and there is nothing there, you would really put the entire legitimacy of the system at risk.

And so that is, also, coupled, I think, with the observation that there are different ways to measure compliance, and states do it in very different ways. Talking about Maryland, Maryland redefines how it views I guess its dispositions to drug treatment as being compliant with guidelines regulations; whereas, other states would not do that. And so compliance I think is a general, useful tool, but I think it's one that needs to be examined as to its true value. I think it's good to keep that in mind because, if you don't, you risk losing public confidence in the operation of the system.

MR. YURKO: I think one of the highlights of our system is we abolished parole in 1994. The guidelines determine the minimum sentence. The maximum is 20 percent greater by statute, and there is an earned time credit for good behavior in prison, and that is the only way you can get down from the maximum.

There is no motion to reconsider. In fact, even in late substantial assistance, after sentencing substantial assistance cases, there is no way to reduce the sentence unless you jury-rig up some sort of habeas, and that is done in rare cases.

CHAIRMAN HINOJOSA: We have time for one more question.

Commissioner Howell?

COMMISSIONER HOWELL: Mr. Yurko, you just brought

up the point that I wanted to talk about. We heard testimony yesterday criticizing our current guideline system for having too many prohibited considerations from the sentencing judge, while we have also heard testimony suggesting that we should add to those prohibited considerations to have the sentencing judge not consider cooperation with the government or substantial assistance unless there is a government motion.

And I was just interested, and this is one of the issues that I think a lot of people are struggling with under an advisory system and what happens to the 5K1.1 substantial assistance motions by the government and whether Courts can consider that, with our without a government motion, despite the statute. So I was very interested in hearing how, in the advisory systems that you have, whether you deal with substantial assistance evaluations by the government by prohibiting consideration of substantial assistance unless there is a government motion or whether you have some kind of analog to 5K1.1 and exactly how you deal with that issue.

MR. YURKO: For drug-trafficking cases, we have mandatory minimums, and it requires a substantial assistance finding, but the motion can be made by either side, and that seems to work fairly well in North Carolina. I will say that I probably handled a thousand federal cases, and I would say a third of my clients tried to offer substantial

assistance and, in the majority of times, the prosecution has filed a motion.

There are some instances where the client will provide some very valuable information and, for whatever reason, I never like to call anybody lazy--I sometimes call a few law enforcement officers energy challenged--a very substantial proffer will wind up sitting in somebody's drawer. And I think in that instance, when a defendant offers truthful, honest, substantial information, it ought to figure in the sentencing calculus, and it hasn't been able to be figured in the sentencing calculus under the mandatory system.

So I would strongly urge that you not monkey with the system and prohibit a substantial assistance determination solely on government motion.

CHAIRMAN HINOJOSA: If anybody attended--did you want to say something?

MR. BERGSTROM: No.

MR. KERN: Are you sure?

MR. BERGSTROM: Okay. Quickly.

[Laughter.]

MR. BERGSTROM: In Pennsylvania, we have relatively wide guidelines. We allow any number of reasons. We don't provide a list of reasons for departure. And I think we can sort of get away with that because of the structure of our system, the min-max and so forth. In a

federal system, where you have more determinant sentencing, I can see how it's a larger issue, and that's, I think, an important characteristic of what you're doing with that, whether you do, in fact, have to provide specific reasons and how those are proven in trial or at sentencing. And I think we skip that and, as a result, we have a pretty broad list of mitigating or aggravating reasons.

MR. KERN: I would just add one thing. One of our mitigating factors in our departure list is similar to substantial assistance, but, again, those would be viewed as the exceptional cases. We made a conscious choice to try and keep it simple and have relatively few boxes in our grids, also, wide arranges that would allow judges, we think, in most cases to consider a wide variety of legitimate factors and still find a sentence within those boxes and not depart unless it was truly an exceptional case.

MR. WILHELM: I think that that is an approach echoed elsewhere, where, in the construction of the initial guidelines system, there is enough latitude accorded to the Court, so the Court can take a variety of factors into consideration in imposing the final sentence.

CHAIRMAN HINOJOSA: For those of you who were here yesterday, you're going to leave these hearings with the impression that, when I say, "One last question," I obviously don't mean it--

[Laughter.]

CHAIRMAN HINOJOSA: --because Commissioner Rhodes will now have the last.

COMMISSIONER RHODES: Thank you.

I would like to get your thoughts on applying an advisory system to the federal system and specifically focusing on the much broader geographical area that the federal system necessarily encompasses and the regional diversity that we have within our country and different legal diversity in different cultures. I know, Mr. Bergstrom, you commented on the fact that a system arises from the legal culture and wouldn't necessarily--the Pennsylvania system wouldn't necessarily apply in Washington, D.C.

So I am interested in knowing do you see that advisory guidelines could apply to the federal system and, if so, would they need additional reinforcement or strengthening in some way to make them more rigorous? Bearing in mind that one of the original purposes of the guidelines and their mandatory nature was to eliminate regional disparity?

MR. BERGSTROM: I will jump right in on that one because Pennsylvania has been described by some as I guess Pittsburgh and Philadelphia divided by Alabama or something like that.

[Laughter.]

MR. BERGSTROM: And so I think, in most states, you will find a lot of diversity, a lot of differences. We have very rural counties, and we have very urban counties. In fact, one of the reasons Pennsylvania adopted the approach it did 25 years ago, relatively wide guidelines, relatively low appellate review--wide ranges, I'm sorry--relatively low appellate review and the other things was because we were hearing those kind of arguments about how there are differences out there. But keep in mind that our guidelines have, in effect, two steps, and the first step is dispositional.

And when we're controlling or we're setting up guidelines to look at both misdemeanors and felonies, it is a big step to make recommendations for nonincarceration when the trend may have been for incarceration. And then when you go to the second step of duration, we have seen how we have changes.

Now, there might be a different level of change that we see exhibited in Philadelphia versus in Elk County, but, nonetheless, I think guidelines can help to establish a norm, a statewide norm, and sometimes when there is a lot of diversity, you need a little bit wider range to capture that norm, but I think it does have a bearing of cutting out the outliers on either end, and that's I think what our guidelines purport to do.

MR. YURKO: Our North Carolina experience has

really been revealing. Before the guidelines, as you may know, in the Southern states, property crimes are seen as being more severe than in the other parts of the country. And because of the nature of what we were trying to do, reserve prison for violent offenders and for repeat offenders, we have totally changed the culture in just a period of 10 years.

So, again, I think that the advisory system created by Justice Breyer will be a good experiment, and I think the Commission needs to monitor to see if regional differences are as pronounced under the advisory system as evidently they were under the mandatory system.

MR. KERN: If I understood you correctly, you said your statute requires you to eliminate disparity, and you asked for an opinion. So I'll give you my opinion. I think that's an extremely ambitious task to eliminate disparity and that, in the act of attempting to eliminate one form of disparity, you might introduce another form of disparity. We consciously chose to attempt to reduce disparity, recognizing that there will remain some disparity within our system with these wide guidelines, but that we do expect to reduce it.

So you do have a challenging task there, and you're certainly right that the geographical differences--if I were attempting to do that, I think what I would try was to keep it simple, simplify some elements, broaden ranges so

that you have an opportunity to reduce this disparity, and I think you'd accomplish that task.

MR. WILHELM: Just if I may, it is a challenge, and I think flexibility can assist you in responding to that challenge, but it also raises the other important point of, in talking about an advisory guideline system and can it work, I mean, the system itself is a mechanism and kind of devoid of content, for the most part. And so, really, the question then becomes is can this guideline system work, and part of answering that question I think is do federal judges trust in or believe that the current system has legitimacy.

And I think part of what has allowed advisory systems to flourish in Virginia, and the District of Columbia and other places is that judges think that the underlying system of sentencing is just, and they think the sentence is largely because they are based on historical actual sentencing practices and time served patterns reflect reality and reflect, for the most part, the heartland of just sentences for offenses.

And so I think one of the obviously difficult, but bigger challenges and issues that the Commission needs to address is, is the state of federal sentencing at a place where judges will actually embrace it or does it need to be adjusted and moved to a place where judges will feel more comfortable that it accurately reflects just sentencing practice.

CHAIRMAN HINOJOSA: Thank you all very much.

Mr. Bergstrom, your description of the State of Pennsylvania reminds me that you all should think in a bigger fashion like my home state, Texas, which one of my favorite t-shirts reads, "Texas is bigger than France."

[Laughter.]

CHAIRMAN HINOJOSA: Thank you all very much.

If the next group would please come up.

[Pause.]

CHAIRMAN HINOJOSA: The next group are individuals who have studied the issue and/or also worked with groups who have studied and worked on the issue. The first one is Bruce Fein, who is from Bruce Fein & Associates and the Lichfield Group; Professor Stephen A. Saltzburg, who is a professor at George Washington University School of Law and also has worked very closely with the ABA Criminal Justice Section on the issue; and Daniel P. Collins, who is a partner with Munger, Tolles & Olson and has prior experience in the Justice Department.

I realize Mr. Fein may have a time problem, and I have not done a good job of keeping us on time here, so we will start with you, sir.

MR. FEIN: Thank you, Mr. Chairman and members of the Sentencing Commission.

I would like to begin by underscoring what I think is the need the establish a benchmark of what the purpose of

criminal sentencing is before you can, then, examine particular elements of guidelines as either praise worthy or contraindicated.

I don't think that uniformity, by itself, is the goal of criminal sentencing. You could have uniformity by having all crimes punished the same, have no discretion at all. And to fixate on just an attempt to get uniformity, I think, distracts attention from the larger issue that wasn't raised in particular by Booker, but, obviously, moves behind all questions relating to sentencing is what are we searching for in imposing a sentence on someone who has been convicted of a crime?

And I have suggested that it is deterrence. We all want to reduce the incidence of crime in society. Deterrence can be special deterrence, which means the individual has committed the crime, is incarcerated, and he can't commit new crimes while he's in prison, and then there's general deterrence, how much does the example of incarceration by one inmate deter others who might be contemplating a comparable crime?

I think that the guidelines and sentencing procedure would be enhanced by requiring or tailoring the guidelines to the judge's explanation as to how the sentence, given the particular nature and circumstance of the offense and the character of the offender, would seek to deter or would have the effect of deterring crimes, and

maybe because the individual is likely a recidivist, he's a career criminal, so to speak, and maybe because it's thought that the case is high profile and to have a stiff sentence would carry very great weight in communicating to society the severity that is likely to be visited upon someone who commits a new crime.

But that seems to me the appropriate way to tie guidelines into a sensible objective of criminal sentencing in advance, to focus on the guidelines, and I know that one of the questions that the Commission is interested in as to how much you can induce judges to stay within recommended ranges. And if it's 80 percent or 90 percent, that seems to be accepted as a great achievement, but it may or may not be. The highest achievement is to reduce the incidence of crime. For whatever reasons, and I am sure there are multiple, crime rates have tumbled in the last 20 or 30 years. There seems to be some correspondence between mandatory nature of the sentencing, three strikes you're out laws, mandatory Federal Sentencing Guidelines or otherwise, that correlated with reduced crime.

That does not mean that mandatory sentences or limiting judicial discretion is the sole reason or even a majority of the explanation. We still recognize that criminology is a very primitive science, but it does seem to me that we need to continue to think about the Federal Sentencing Guidelines, as they are now, in the wake of

Booker, voluntary as to how that they can be incorporated into having sentences more appropriately and effectively produce deterrence, which I think is the objective of the sentencing system. I, myself, do not think that we ought to give great weight on that score to things like rehabilitation or retribution. They seem, to me, very marginal to the goal of our criminal justice system.

I would like, then, to address, in particular, some of the questions that you had raised for all of the panelists in trying to decipher what does Booker mean now with regard to the sentencing and how will it affect, if Congress leaves the Booker decision undisturbed, the practice of sentencing in the federal system compared to what was in place prior to Booker.

It seems to me that, under Booker, it would be unconstitutional to adopt a system of guidelines where if you were within the range that was recommended, it was automatically deemed "reasonable for purposes of appellate review." That seems, to me, simply a different and more clever way of saying the guidelines are, in fact, law in the sense that they come with a legal premium and fortification if you're within the guidelines whenever you're subject to appellate review.

Now, I agree it is rather puzzling as to what Justice Breyer intended the reasonableness review standard to be, if it's not simply was it reasonable within the

guidelines, because he does not identify the particular factors outside the guidelines that a judge ought or should or might consider and whether there is any particular rationale or reasoning you have to apply in employing those guidelines or those elements in issuing a sentence.

That is why, in my judgment, perhaps the safest course is to require the judges, in each, individual case, to explain how the sentence is serving an overall purpose of the criminal sentencing, as historically understood, deterrence, rehabilitation, retribution or otherwise, as a basis for explaining providing a reasonableness test for an appellate court to review.

I do not think that Booker prohibits a judge or prohibits this Commission from advising that a judge ought to consult a particular topic or ought to refuse to consult it. They just can't be binding on the judge. And so I don't think that substantial assistance, fast track, acceptance of responsibility are elements that a judge may not examine in deciding a sentence after Booker. He's not bound to consider those as circumstances that might justify his thumb pushing any sentencing down, but he may, independently, decide that's the case.

One of the I think misfortunes of the decision in Booker is that it, in my judgment, may create pressure on the judges to be disingenuous as to why they are sentencing. If the guidelines are not mandatory, but you are supposed to

examine them, does a judge who feels that the guidelines really are appropriate say, "I am deciding what the guidelines would recommend, but I am really doing that by my independent judgment and not because I looked at the guidelines"?

And I think it places the judges in this very awkward position, if they believe that the guidelines are very sound, to say, "But I really didn't follow them because I was required to." And if sentencing remains what it was prior to Booker, it suggests the decision was meaningless, which obviously is not the intent of the first majority who held their constitutional right to jury trial was violated under the Mandatory Federal Sentencing Guidelines. I am not exactly sure how, unless Justice Breyer writes an addendum to his opinion, how you approach that particular problem.

Congress, obviously, can move and try to clarify some of these ambiguities. I don't know how fast the typically lit or glacially moving Congress can address the issues. The judges have the defendants coming before them now, and so waiting doesn't seem, to me, an acceptable alternative.

I think that when you look at the various state guidelines, voluntary or mandatory, and the other panelists who dealt with them earlier are experts in their fields, it does seem to me it's very difficulty to reliably extrapolate from the state system how voluntary guidelines at the

federal system would work because of the unique nature defining what is compliant, what is not, how closely there was an effort to correlate the guidelines to what actually was occurring before.

I noticed, in Maryland, where the compliance rate is 39 percent, which seems remarkably low compared to the other states that are typically at 60, 70, sometimes as high as 90, then, the large percentage of the deviations were in the drug cases. And it may well be that in one particular kind of crime that is especially prominent in the docket, there seems to be a misalignment between community expectations and what the experts were writing is as to what they thought was the proper sentence.

All I'm saying is that I would be very reluctant to think that we could, with a high level of confidence, extrapolate from the varied state experience what, in fact, would happen under the federal guidelines.

I, also, think that the sentencing would be improved if this Commission or another entity served as a database to try to follow up on what was the future career of those who are sentenced-- Did they turn to career criminals? Were they recidivists or not?--and using that database to try to discover what seems to be a better correlation between a sentence and deterring future crime.

Again, I go back in saying that's the overarching mission here. The Sentencing Commission should be very

proud if it played a role in reducing the incidence of crime, which I think most people would say is more important than just being uniform in whatever particular sentence is issued. We understand some tension between an equal protection theory--all persons who commit the same crime, under the same circumstances, ought to be the same. Well, people aren't the same, and circumstances are never identical, and the idea of deterrence seems to me more important than making sure that every sentence, in every case, looks to be uniform, even if the individual sentence goes out a couple of times.

Thank you.

CHAIRMAN HINOJOSA: Thank you. We, actually, have worked quite a bit on recidivism, and we have a lot of that information available on our website. We just had a presentation prior to the last meeting to the Commission on the work that is being done on that.

I will state that in the federal system it is a little different because of the fact that approximately one-third of our defendants in the federal system are noncitizens of the United States, so it becomes difficult to track recidivism with regards to that percentage, which is a high percentage of the defendants in the federal criminal system.

MR. FEIN: Is that because most are deported soon after the sentences are served?

CHAIRMAN HINOJOSA: That's mostly the case with regards to the noncitizens and either because they were here illegally to begin with and/or they lose their right to be here because of the conviction that was part of the federal violation.

I am not here to testify, but I, obviously, went in and made some statements.

[Laughter.]

CHAIRMAN HINOJOSA: Professor Saltzburg?

MR. SALTZBURG: Mr. Chairman, members of the Commission, you have my written statement. I don't intend to read it, and I don't intend to go over it point-by-point because you can read it a lot faster than I can talk it, and I can maybe help you get back on schedule.

I have only two points I want to make, and then I'd much rather answer questions later, if you have them, because I think maybe I'd say something that was useful.

As you know, I wear two hats today. I am here officially to represent the American Bar Association, which on Monday adopted a resolution recommending that advisory guidelines be given 12 months to work, that in that period that you provide Congress with data about how they're working and that Congress have hearings to consider whether they're working and what the alternatives are.

If, at the end of the 12-month period they are not working, we recommended a, for lack of a better term, a

"Blakely-ization," where either the Commission or Congress would fix factors that would actually be presented to a jury more simplified than the current guidelines are. It's a version of what a member of our working group, in the ABA, Jim Felman has talked to the Commission about before--no surprises there.

What I am impressed by, and perhaps there are two things that impress me the most right now, when we had the hearings before Booker was decided, no one, none of us academics, none of the Commissioners foresaw that there were going to be two 5-to-4 holdings of the Court and we would be in the situation that we're in.

When the decision came down, I think a lot of us responded with shock. We read it and said, "Gee whiz, no one expected it. What are we going to do?" And as we've had time to talk through it, I regard this--this second point--as a real opportunity, I think, to make this guideline system work even better than it has in the past. And in thinking about this, I know that Judge Paul Cassel testified yesterday here, and he mentioned that he and I had talked about one of the issues that was asked about earlier. I think Commissioner Howell asked about the substantial assistance issue.

And what I learned--this was talking with Judge Cassell was--that reasonable people, I think, agree on a whole lot of things about how an advisory system won't work.

Judge Cassell e-mailed me yesterday, and I skimmed it, and I was flying back from the ABA meeting. I didn't have a chance to read it carefully, but speaking for myself and not the ABA, I agree with the bulk of what he had to say.

I think that there is a lot of agreement that if the guideline system, advisory system is going to work, that it's very important the judges comply with the statute that remains in place, which is they have to do a guideline calculation. They have to figure what a guideline sentence would be and then if they are going to vary.

One of the most important things I think for the Commission is going to be how you present the data as to what is a departure that would have been permissible prior to Booker and what's a variance now from the guideline system. If a judge, under the guidelines that existed, would have been permitted to depart for a recognized reason, that's a guideline sentence. It may be a departure under the guidelines. But if a judge says, "I've done the calculation. There's no departure recognized. I'm going to vary this sentence and issue a nonguideline sentence," that ought to be, I think, captured differently in the data so that we all are talking about the same things.

And I think Judge Cassell really felt strongly about that, too; that if we mixed them up, were' going to have perhaps an impression that there are more departures under advisory than there really are compared to what

happened pre-Booker.

And I think that there are some things--you asked a bunch of questions--one of the most important things, I think, is we have to address, I mean, you have to address, and the system has to address legitimate concerns with the Department of Justice about I think substantial assistance being one, third-level reduction for acceptance of responsibility, another.

My own view, again, speaking for myself, is that judges ought to honor the judgment that was made, which is that prosecutors ought to be responsible for making the substantial assistance motion and that judges ought not to do it on their own. If that is not a policy statement or if that's not something that comes through loud and clear to judges, I fear that what will happen is that Congress will step in. I don't think it's necessary for Congress to step in.

This is the opportunity here, my sense is that, from talking to judges, and there were two judges in our working group--federal judges--in talking to others who weren't in our group, talking to people in the Department, talking to people on the defense side, there's a lot of agreement on what could work in an advisory system that would prevent too much disparity, but perhaps provide a little more leeway for judges to consider those facts and circumstances, which, in any guideline system, no matter how

good it is, I'm never going to catch all--

And I think the last I'll say is one of the other factors that I believe will be most important to the Congress, assuming it gives you time, and the public is not just the number of variances or the percentage of variances, it's the extent of the variances; that there will be, from talking to staffers on the Hill, there is a widespread, I think, acceptance of the fact that small variances, from a guideline sentence, taking into account individual differences, may very well be much more tolerable than judges who basically choose to fight the guidelines and that, I think, is going to be the issue. Are judges going to do what the statute requires, do what 3553(c) requires? If they decide they are going issue a sentence that varies, are they going to do it honestly, state their reasons particularly why the purposes of sentencing are better served with a nonguideline sentence, and permit appellate review. If they do it honestly, and we have appellate review, I think this system can work. And as Judge Cassell said to me--I don't think he would mind my saying this--he said, "You know, there's a chance that we can have almost a perfect system if everything came into line." That was really encouraging.

Now, there is also a chance that the system, you know, will go awry. It depends a lot I think on what kind of fealty judges give to the guidelines and what

reasonableness means. I don't know whether the Commission is going to step into the discussion about reasonableness and say, "We're going to help define it," or step back and say, "Just leave it to the appellate courts." That's an interesting and difficult question, I think, and people smarter than I, as they testify here, probably can give you guidance on that. I find it still puzzling.

And I would be happy later to answer questions.

CHAIRMAN HINOJOSA: Professor Saltzburg, I don't know why I would stop with Mr. Fein here, and make a comment after each member of this panel. But this Commission agrees very strongly with you, and we have tried to make the point that it is important to distinguish between departures within the guideline manual and variances outside of the guidelines. We have done that in testimony before Congress and in every forum that we've had an opportunity to do this, and it is important for us for the data collection to be able to do that, and to continue to have judges make that distinction. It's required, in our view, by the statute itself, because it requires the guideline, to go ahead and consider the guidelines as well as the policy statements, which includes the departures.

Mr. Collins, I hope you give me an opportunity to say something after you finish.

[Laughter.]

CHAIRMAN HINOJOSA: Go ahead, sir.

MR. COLLINS: Judge Hinojosa and members of the Commission, I am pleased to be here this morning. I had the privilege of testifying last week on a panel with the Chairman of this Commission, Judge Hinojosa, before a subcommittee of the House Judiciary Committee. I won't repeat everything here that I said there, but I can reprise the substance of the recommendation that I made there.

I think that the invalidation of the mandatory nature of the guidelines that occurred in Booker is from the point of view of federal sentencing policy something of an accident. It was nothing about the substantive value judgments or commitments that are reflected in the Sentencing Reform Act or in the work that this Commission and the Congress have done since the initial enactment of that Act that brought about the result in Booker. It really was an issue of the mechanics of how the guidelines worked in terms of the jury trial requirement of the Sixth Amendment. Therefore, Booker does not provide an occasion for a wholesale revision of the value commitments of federal sentencing policy as previously reflected in the guidelines manual, in the statutes enacted by Congress.

Since I personally believe that that system was an effective one, was successful by almost every measure, including--and I agree with Mr. Fein that the key measure is did it help reduce crime--and I understand there can be debate about that--but I think that the guidelines were

highly influential despite the fact that the federal system only accounts for a certain percentage. They were influential in starting a movement towards determinate sentencing at the state level, and I think cumulatively that has contributed to the drop in the crime rate.

Therefore, my recommendation to Congress is that it act to restore the system most nearly as it was before Booker with the least changes possible. The easiest way to do that is what has been popularly called "the Bowman fix" although that's perhaps unfair since Professor Bowman has abandoned his child and now recommends against the adoption of that proposal, but that is, essentially in light of the fact that Harris protects the bottom of a mandatory guideline, that all that is needed to do is to raise the top of every guideline range to the statutory maximum, and that will make the system compliant with Booker and all of the Apprendi jurisprudence as it exists today. That does require congressional action because of the 25 percent limitation in existing law on the width of guideline ranges, so the Commission cannot expand ranges to accomplish the same result. Would also require an act of Congress to restore the appellate review sections that were excised by the Supreme Court's decision in Booker, and I believe that that should be done as well.

The fact though that I think that the ultimate solution to the problem should come from Congress does not

mean that this Commission does not have some important work to do. It is the job of this Commission to enforce the Sentencing Reform Act and the relevant statutes. With the law that it has today, I don't think that you have the privilege of waiting for Congress maybe to do something. You need to determine what are the appropriate steps for this Commission to take in implementing the law as it exists today as we sit here today.

In that regard I think there are a number of recommendations that I have suggested in my testimony you may wish to consider.

The first of those--and this is drawing upon the Commission's continued authority to issue policy statements, which is not affected by Booker--is the suggestion that you consider issuing a policy statement that would provide some guidance on the reasonableness inquiry that is left for the courts in wake of Booker. I think one could have a debate over the extent to which policy statements of the Commission will have some binding or normative force in the courts. I could probably brief that either way. I think that's not something you need to be concerned about. Even if it is not strictly normative or binding, it may be useful for the Commission to do that. After all, you are still charged by statute as the entity that is to set federal sentencing policy under the implementation of the Sentencing Reform Act and for the courts, and not the courts as a whole to make

those policy choices.

In defining the concept of reasonableness, I think there are perhaps five things that the Commission could consider doing in that regard. First is to state explicitly what Judge Hinojosa indicated in his testimony to the House last week, which is that the Commission believes that the guidelines should be given substantial weight in making the determination of an appropriate sentence under 3553(a).

Second, I think the Commission could say that a sentence within the range is conclusively deemed to be reasonable, and here I differ with Mr. Fein. I think that the creation of a safe harbor that a sentence within the range is reasonable without more, is not in any sense a requirement to stay in the safe harbor, because sentences outside that safe harbor will also be reasonable, and therefore, I don't think it backs into the Booker problem in the same way that it would if the Commission tried to establish firm lines beyond which courts could not go. Then I do think, as Justice Breyer's dissent from Justice Stevens' Apprendi analysis indicates, that you could back into a Booker problem in that way.

I also think that the fact that the court left unsevered the threshold requirements for filing an appeal means that sentences that are within the range, in the absence of some other factor, are not appealable. You must show that there is an error of law or that there was an

error in the calculation of the guidelines, and those may still result in appeals on the theory that the judge who went through the appropriate guideline calculation might have chosen a different sentence had the range actually been calculated appropriately and in a different way and with a lesser range. So those would still I think be appealable. But you must fit within one of the four categories that is specified within the statute, and if you're within the range and you don't have an error in the calculation of the guidelines, an error of law, it's not appealable, and therefore, I think that the judgment that within-the-range sentences are conclusively reasonable is consonant with the judgment that's reflected on the face of the remaining statute.

It's hard to identify any other potential safe harbors. I mean one that comes to mind is where the unadjusted range embraces the statutory maximum. There is clearly not going to be any conceivable Apprendi problem in that situation. Presumably a sentence that is within that range is reasonable and a sentence that is outside that range can be presumptively unreasonable.

A number of witnesses before the Commission have emphasized the importance of reaffirming the fact that under the statute certain factors are absolutely prohibited in all cases, and that that needs to be reiterated, and that other factors are discouraged. Again, the unexcised portions of

the statute retain the language that allows appellate courts to vacate sentences that are based on impermissible factors.

The Commission could also consider, in articulating the concept of reasonableness, imposing a requirement that there be an articulation, a specific articulation of grounds for going outside of the guidelines range either in a departure or in a variance, as the new terminology is being used. That I also think is consonant with the statute, which in its existing form still requires an explicit articulation for sentences that are outside the range and allows appellate courts to vacate sentences that are outside the range and without adequate explanation.

In terms of things the Commission might do other than defining the concept of reasonableness, I think it would be worthwhile to make clear that the prior notice requirements for going outside the range, either through a departure or a variance, are that that requirement is valuable should be reiterated and reaffirmed, that that applies either to departures or to variances. Courts should give prior notice to the parties that such a course is being contemplated.

There's also a lot of puzzles that come out of Booker, but to me one of the most perplexing is what to do with 3553(b)(2). The Court was quite specific in severing only (b)(1), and indeed it reproduces the text of the severed provision in an appendix. It cannot have failed to

notice that there is another provision, (b)(2), which looks in many respects like (b)(1) but with some critical differences. This was one of the key provisions added by the PROTECT Act, and it creates a different regime of departure authority in the context of certain offenses against children and sex crimes.

And it creates an uneven regulation of departures. It regulates departures downward much more severely than it does departures upward. I think there is a substantial case to be made that the severability analysis of Justice Breyer's opinion does not apply to (b)(2), and would not justify the wholesale severance of (b)(2). It might in fact be that the appropriate severance is to sever the limitations on upward departure authority because given the disparity that appears on the face of the statute, that appears I think most clearly to be what Congress would have wanted under (b)(2) if it knew that it could not do what it did in (b)(2).

And then there's a question whether the Commission could do anything or should do anything to support or reflect that judgment and try and salvage (b)(2) from a potential invalidation. And one thing that the Commission could consider, although I think it raises some difficult legal issues, is whether the Commission could either by amending the guidelines or through a policy statement, remove whatever restrictions exist in the guidelines manual

to the fullest extent the statute would allow on upward departures so as to minimize the Apprendi problems that might exist with respect to (b)(2).

I would be happy to answer any questions the Commission may have.

CHAIRMAN HINOJOSA: Who's got the first question? Commissioner Castillo?

COMMISSIONER CASTILLO: I want to thank Mr. Saltzburg for the ABA's position, which I think is a very reasonable position, and I was heartened by it. I frankly think, I'm hopeful that Congress would give us a little bit more time than the 12 months because there is this fleshing out period of trying to get all of my colleagues to understand the need, the critical need for accurate information, and to not skip to the last and penultimate part of what they believe a reasonable sentence would be, but to make the sentencing guideline calculation as you espouse and others have espoused, which I think is critical. I think the Crosby decision out of the Second Circuit helps us a great deal, but I'm thinking that in the end it might take 18 months for us to have a crystal clear or at least more precise vision as to what is to occur. So I do want to say that.

I also have a question for you, Mr. Fein. You espouse in your written testimony the need to write opinions, and really to focus on deterrence. While I'm in

Chicago and maybe things are not that hectic, I'm just worried that all of my colleagues, especially those along the Mexican border are just not going to be able to write opinions in every single sentencing case as much as I--

CHAIRMAN HINOJOSA: Not if they have to be up here.

[Laughter.]

COMMISSIONER CASTILLO: What do we do about that?

MR. FEIN: Well, I think it's better that--I think anyone who's been in the business of judging and writing in general knows how sharper, or think how much more sharp their thinking is when you've got to put something down on paper. And sentencing is a critical, critical element of our whole objective of prosecutions in trying to reduce the incidence of crime. I think by requiring opinions, not just "I've decided X and don't as me whatever reasoning is behind it," we end up even with a greater labor, even if it delays other cases, a far more overall effective system.

I have encountered too many occasions where judges, they deliver opinion orally, and they're not just marginally, in my judgment, maybe if you're on losing side wrong, but sometimes even when I've won, I think this just isn't a judge who has thought carefully about the case. You're inclined to be that way with overwhelming documents, but when it becomes a sentencing, and individual liberty and the safety of the community in light of deterrence, I just

think that's too important. And I think it's too easy to get away from thinking about deterrence and just say, "Well, if I'm in the guidelines and it's uniform, that's the end of my thought process." That's the beginning of the thought process, not the end. I just think that's critical.

If there's a criticism I have of the current federal judicial system at present, it's because too few opinions are written, not too many. And that betrays a lack of attentiveness to detail and facts all the time. I understand you have caseload problems, you know, go get more judges, but everybody has to toil, and that's one of the prices of public service.

CHAIRMAN HINOJOSA: Commissioner Sessions.

COMMISSIONER SESSIONS: I would like to ask Mr. Collins a question. Perhaps it begins with a statement. I'll try not to make this a statement as opposed to a question, but you've suggested that what was generally referred to as "the Bowman fix" as the appropriate resolution.

CHAIRMAN HINOJOSA: Apparently it's now "the Collins fix."

[Laughter.]

COMMISSIONER SESSIONS: Congratulations, and hopefully you won't change your view along the way.

We've had a number of witnesses testify about concerns about that particular resolution. The first

concern, you can only address this issue once. And my first question is, are you suggesting that this fix would be the permanent resolution?

The second is that there are obvious questions about its constitutionality, especially in light of the Crosby decision from the second Circuit, and that you could very well, by suggesting this particular resolution at this stage, create a situation of confusion over a period of one to two years as courts try to flesh out whether it's constitutional or not. And I would like to ask you to address that.

And then third, you also suggested that perhaps there are things we could do as a Commission at this point to try to guide judges, not to go off the reservation, as it were, and is that not to some extent inconsistent with your approach that a Bowman kind of fix would be the appropriate resolution as opposed to a presumptive advisory system which I think you're also suggesting by addressing questions about acceptance of responsibility, the third point, cooperation, et cetera?

MR. COLLINS: I think that so long as Harris is on the books, and it is still on the books, there is not much doubt that the Bowman fix is constitutional. Under Rodriguez de Quijas v. Shearson/American Express, the lower courts may not overrule or disregard a controlling Supreme Court precedent even if they believe that the current court

might disavow it or that there are grounds for doubting it in later decisions. I don't think that there is much doubt that Harris is controlling on the question whether or not the setting of the bottom of the guidelines as a mandatory, effectively a mandatory minimum sentence, is consistent with Apprendi. I think that Harris settles that question. The Supreme Court may revisit Harris.

And in my testimony to the House last week I suggested to them that they may wish to consider that possibility up front. One of the things that I think is most distressing about Booker is that we have essentially had thrust upon us a system that no one really chose other than the remedial majority of the court, and Congress may wish to address proactively how it would want the issue of severability to be decided in the event that the Court were to abandon Harris. I understand that there's concern about that, that if Justice Breyer, given what he said in his concurrence in Harris, were ultimately to reach a conclusion similar to what Justice Kennedy did in Ring, which is to say that I don't agree with Apprendi, but I now think that internal consistency within it requires that I abandon my position in Harris.

I understand that and that's what has been I think the source of the concern, but I don't think there is any basis for the lower courts to create any confusion in the meantime. I think that they are bound by Harris and should

obey Harris until the Court decides to do otherwise. And I think that Congress should consider writing in a severability provision that essentially indicates that if this is invalid, this is what should take its place.

COMMISSIONER SESSIONS: So the Bowman or the Collins fix you think is the ultimate solution?

MR. COLLINS: I think it is. If we are going to be left with Apprendi, and Apprendi itself is 5-4. We don't know whether or not--I mean we've worried about Harris will survive, we're not quite sure perhaps whether Apprendi will survive. But I do think it would be a long-term fix. I think there is enough empirical data in the 15 years under the guidelines to realize that the loss of the cap at the top of the range is probably not sufficiently great a concern to warrant a more wholesale fix. I think it's the only way you can restore the system to operating basically the way it was before with the least disruption possible and the least expenditure of unnecessary resources.

COMMISSIONER SESSIONS: Can I just quickly follow up with Professor Saltzburg? Do you see concerns about whether District Court judges of Court of Appeals judges will come up with inconsistent conclusions on a Bowman or a Collins kind of fix? In which case, what happens to the justice system at that juncture?

MR. SALTZBURG: Well, Judge Sessions, I'm glad you asked because although the ABA has not explicitly said this,

implicitly twice in the last two years, both in August when it approved Justice Kennedy Commission recommendations, and then on Monday when the vote was unanimous, basically the recommendation the ABA made implicitly rejected this approach, and it did so for a couple reasons.

The main one I think is the concern about whether Harris will be good law. We just don't think it's wise policy to adopt a fix that will I think have the following effect. I agree with Mr. Collins that lower courts will be bound by Harris. But we have to recall then, the Department of Justice made this point very well in what I thought was a very good brief to the Supreme Court in Booker. It said: you four times upheld the Federal Sentencing Guidelines. Every single Court of Appeals has upheld them. The Supreme Court said: So what? We haven't addressed this question exactly and we're striking this down.

What will happen is every single defendant who has a lawyer who's not incompetent will argue that the system is unconstitutional if this fix is imposed even if the Court of Appeals--what the Courts of Appeals will probably do is say: we are bound by Harris, but we recognize Harris may no longer be good law. And there will be a cert. petition filed on behalf of every single defendant until the Supreme Court grants review.

If we could all take a step back and just look at what would happen if the Collins fix, now we're calling it,

were adopted. What it is, is it makes the sentencing--the guidelines mandatory. In fact, all it is is a cosmetic change which basically says everything that the 5-4 majority that said this violates Apprendi, everything they said is still there. And Justice Breyer's position in Harris was he didn't agree with Apprendi, he didn't think Apprendi applied to sentencing. Now that it does and he's lost that battle, I think there's a very good chance that his vote would be to say that that's not constitutional.

But I don't think anybody would think it would be a good thing two years from now to have another decision striking down the guidelines. When there's an alternative, that's the issue that can work. If there was nothing that could work, and we might say, well, you know, we would have to be desperate to try for something, but this advisory system I think can work.

The third part of your question was are there things you can do that will keep judges on the reservation. Unfortunately, I think the answer is no, not completely. This is the worry, I think, that everyone has whether you are Republican or Democrat, conservative, everybody's worry is that judges, particularly those judges who have been on the bench before--that were on the bench before the guidelines came into effect, who have sort of roiled against them and sort of waited for an opportunity to impose a nonguideline sentence, that somebody will go and basically

fight the guidelines. That's the best way I can put it, impose a sentence that is right in the face of the guidelines.

My hope is that the Courts of Appeals will fix that quickly because it's very important that if sentences that are way off get a lot of publicity--and they will. The sentences that fall within the guidelines will get none. It will be the erratic sentences, they'll get publicity, and we know from the past that Congress will feel a need to act, and I hope that we can stop that. Eventually the system, whether you call it substantial weight, as Judge Cassell said, whether you call it presumptive, as some people use, I think the right approach--and I don't know there's any way around it--is there has to be some kind of substantial weight given to the guideline determination, just has to be in this system.

I think judges will do it. I think 99 percent of the judges in this country will do that. It's the 1 percent that we can't control. I don't think you can issue a policy statement--I mean it would have to read: Judges, just be reasonable, which the Supreme Court has already said that.

[Laughter.]

MR. SALTZBURG: And I don't think you'll be able the do more.

CHAIRMAN HINOJOSA: Professor Saltzburg, on behalf of those of us who were on the bench before the guidelines,

actually there was a number of judges who didn't have guidelines, who felt it was a very good system that came into place for the obvious reasons of trying not to impose sentences that were either disparate or not consistent with regards to--and so I do think that it is not viewed by judges who were on the bench beforehand as something that is long awaited.

I guess my question is--and I'm certainly not here to endorse the Collins fix, nor do I even know that I'm a far of it, but doesn't it lead to some kind of distant viewpoint of the Supreme Court if we take very 5-4 decision and say, "Well, we can't take any action in this particular situation because that particular decision is 5-4, whether it's Booker, Fanfan, Harris, Apprendi, in arguing against the Bowman/Collins fix, should we leave that aside and just argue it on the merits as opposed to what the Supreme Court may do with a prior 5-4 decision? Do we run the risk then of being placed in a situation where whenever we face an issue and that there was a 5-4 decision of the Supreme Court that we're relying on, that therefore that type of decision takes a different type of precedence as opposed to a 6-3 decision, for example?

MR. SALTZBURG: Judge, it's a tough question, a good question. My answer is this. I don't think that every 5-4 decision that's rendered requires the Commission or any agency of Government to sit there saying, "Gee, what might

the next decision be? We can't act."

But when we look to what the Court said in this 5-4 decision and what it said in Blakely, which is what triggered this, it is that judicial fact finding that increases sentences is troublesome to 5 people on the Court. The Collins fix, the reason I said it's cosmetic, it's still judicial fact finding that's increasing sentences, and I think this is a chance because of that, just a very basic policy. If the Court revisits it, it will say that that's what we condemned. And so it's not just that it's 5-4, it's the reasoning behind it.

There I an alternative, but it's an alternative, as I say, that the ABA has urged be considered. If we get to the point where we say advisory guidelines won't work, and on the merits the alternative is to set forth those facts which we really think should increase sentences and have juries find them. I mean that is what the Supreme Court's majority prefers to the extent we could find the majority. We have the remedial majority and we have the Blakely majority, and the Blakely majority prefers jury fact finding to judge fact finding. And so there is an alternative there.

The ABA's position remains that advisory guidelines can work, that with the right appellate review and--it was interesting, I hope you'll, as the Commission has its hearings, I hope you'll press harder on the issue of

how appellate review hospital worked in various states, because there's one citation I saw in one of the bits of testimony to an article that's forthcoming that Kevin Reitz [ph] is doing in Columbia. I have not seen the article. The citation suggests that appellate review doesn't work, and while we--I don't claim to be an expert on this--the Minnesota prosecutors and judges claim that the common law of sentencing developed by their Supreme Court has worked very well. And in Ohio my impression is that the Ohio Supreme Court has made their presumptive sentencing approach really very effective and has engaged in a dialog with their trial courts that has been very instructive.

Those two jurisdictions I think are at least worth looking at as the Commission thinks about how appellate review might actually play out in the federal system.

MR. FEIN: Mr. Chairman, if I could add a footnote. Number one, I think that the so-called Bowman fix exults form over substance, as I think Professor Saltzman (sic) pointed out, if you look at the reasoning behind Blakely and the worry that the Court had that you didn't have the reliability of fact finding, you didn't have the citizen protection from an overzealous judge in the sentencing process when you permitted the fact finding by judges after a verdict to be decisive in what the sentence was. And in my judgment that kind of fix ultimately would collapse because it simply is contrary to the whole purpose

that led the Court to its conclusions in Blakely and in Booker.

It also seems to me that it is appropriate in certain circumstances to examine whether a precedent is 5-4, not because it's any less binding than 6-3, it's the holding of the Court. But when you look in this case at what I would consider not the full mandatory nature of the guidelines pre-Booker, but attempts to give the guidelines some extra legal authority or support by saying if you're in the guidelines you get rewarded for these reasons. It's a safe harbor, and you're automatically presumed X, Y and Z.

That's when you have to worry about are you going to peel off that fifth vote and say, no, you're violating what's really the substance of the majority holding on jury trial. When you are creating an overwhelming incentive, a legal incentive for a judge to stay within the guidelines, even though you may call them voluntary, that again you're having form triumph over substance, and that is appropriate to look at in Booker because what pushed Justice Ginsburg to flip from her allegiance on liability on the jury trial to Justice Breyer on remedy would be critical in my judgment in trying to fashion--

CHAIRMAN HINOJOSA: You have any idea what did push her?

[Laughter.]

MR. FEIN: I haven't consulted the articles at

Delphi yet.

CHAIRMAN HINOJOSA: Okay, go ahead.

COMMISSIONER HOWELL: I just want to ask one really quick question, and that's about the data collection and analysis by the Sentencing Commission, because those witnesses yesterday that we've heard, the witnesses we've heard today, and you all, who are urging the Sentencing Commission and urging Congress to hold off for a year or so to let the Sentencing Commission collect data, analyze it, and look at what has been happening under this advisory system that we have been handed to help Congress make an evaluation as to what if anything they should do.

It's a very time-intensive, resource-intensive effort to look at data and then, as you could tell from the Chairman's review of the most recent post-Booker data yesterday, we have to be very careful and cautious in how we analyze it and lay it out.

It seems that you also had some good ideas about some of the things that might be helpful for us in parsing through that data including not just looking at the percentage and numbers of variances in the post-Booker data, but in fact the amount of the variance, you know, sort of the number of months that the variances were made, and that that might be probative.

I've also thought that perhaps it might be interesting to see the types of cases where there were

variances that might be instructive, that it's in--you know, because it may be that some of the guidelines may be viewed as too high in multiple districts and that's why there are some variances in certain types of cases.

Would you agree that some--and could you tell me if there are other--or tell the Commission if there are other kinds of data that we should be parsing from the data we're collecting and analyzing that you think would be helpful as we look and see how well the advisory guidelines are working?

MR. SALTZBURG: I don't envy the task of--I've always been impressed with the data collection and the analysis that this Commission does. It's extraordinary. And I know Commissioner Steer was there at the beginning and I think he deserves some credit for the really rigorous, thorough, and I'd say nonpartisan way this data gets collected, got a lot of pride in that. I don't think anybody in Congress, even those who aren't the biggest fans of the Commission, ever question the accuracy of the data. I think it's important that that be maintained.

Several things matter. I think the number of variances, that is nonguideline sentences, the extent of the variances, and comparing those in which types of cases can be instructive, I think it's going to be important for you to look at whether the judge varied sua sponte or whether there was a motion made. And I think--and this is probably

somewhat more controversial--I think probably you want to track variances by judge to some extent because what you may find is that there is a bell-shaped curve with the vast majority of judges very rarely varying, and then at the end some never, and some--you may find that there are 5 percent variances, that the 5 percent are accounted for by 3 percent of the federal judges, and that also is something I think to be taken into account.

I think that you'll want to be tracking what the appellate courts do with respect to variances. Basically--and if they find unreasonable variances, whether they impose their own sentence or simply remand for resentencing.

One of the reasons I think for gathering data--and this is something I know that you all have thought about more than I--if Congress were to life, as the ABA recommended last year, if they were to lift the 25 percent rule so you weren't bound by that, it would be possible for you to adopt Mr. Collins' approach, and actually if you thought that was the right answer you could do it. It wouldn't take Congress to do it, I believe.

The other alternative, however, is you could look at the state systems, as the ABA urged last year, and conclude that sentencing ranges that were somewhat broader, such as Jim Felman talked about when he made his presentation to you, might make sense, and it may very well

be that with slightly broader sentencing ranges you would have almost no variances. That's one of the other issues, which is if there are variances is it because of the tightness of your ranges? And I think that that's something that also, in terms of long-range policy, would be an interesting thing for you to consider.

So that if--I think we're probably agreed the 25 percent rule should be lifted, but we agree for different reasons--it would free this Commission up to actually do what it was intended to do, which is to be that expert body that would decide and guide judges in sentencing, and to use that expertise. The ABA's view has been that Congress should leave more to this Commission and not do it all by legislation so that the expertise you have can actually come into play.

But it's probably best--I say that for the long term, because dealing with the advisory system in the short run is challenge enough. But as the data comes in, it very well may inform what the future looks like and ought to look like.

CHAIRMAN HINOJOSA: Commissioner Horowitz has the last question unless another Commissioner proves me to be a--

[Laughter.]

MR. COLLINS: I just had one comment on data collection.

CHAIRMAN HINOJOSA: I'm sorry.

MR. COLLINS: I agree with Professor Saltzburg that the Commission's data collection is really outstanding and I think has been a valuable service to the public. I think there were two areas where if you were looking for ways to improve it that you might want to consider. First, there still is a problem with substantial noncompliance by a small number of districts that simply refuse to send in the data to the Commission. I don't know exactly what the Commission can do about that or what Congress can do about it, but it is a problem that shows up every year in the footnotes in the annual report.

The second area--and I think this is an area that becomes more critical after Booker than it even was before--is getting a better understanding of the grounds for departures or now departures and variances. I think one of the things that emerge from the debate over the PROTECT Act is that the one weakness in the Commission's data collection was probably Tables 24 and 25 of the annual report which has grounds for downward and upward departure, because it became apparent, for example, that those tables did not capture the fast-track phenomenon because it was getting miscoded or misreported, and so that was one of the areas where there clearly was a gap.

And I understand that the Commission is aware of that problem, but that need to get a better handle on the

grounds for departures or variance will become more critical after Booker, not less so.

CHAIRMAN HINOJOSA: Commissioner Horowitz has the last question until the next Commissioner proves me a liar again.

[Laughter.]

COMMISSIONER HOROWITZ: Just following up on what Professor Saltzburg said and the data collection issue. You mentioned both in your comments, your statement and now about the extent of departure or variance being an important factor. This one question I had for the panelists is how do you measure that? What is a large, medium, small variance, given the guideline ranges cover such a wide range of sentences?

Then you also just mentioned that, and others have mentioned this also, the notion that the vast majority of judges stay within the guidelines, but a small percentage of judges are the ones who create the large percentage or may well cause the large percentage of variances, and how--should we go about measuring that, and if so, how?

MR. FEIN: I think that it is important to highlight individual judges whose sentencing may seem aberrational with regard to the majority. There has been a lot of clamor suggesting that undermines judicial independence and that putting the sunshine on judges is bad because the public may become aroused and dislike them, and

write editorials that are nasty, and Congress may get up in arms. But the whole purpose of the life tenure is to have that protection against that kind of public sentiment in a counterproductive way influencing a judge's decision. Many of the decisions that judges make here are based upon statutes, and Congress has a right to know whether it may need to change a statute because it's not being administered in a way they think is appropriate and faithful.

And I know that there was, in the aftermath of the PROTECT Act, many voices raised that this was an attack on the independence of the judiciary, which, it seems to me, is totally ill-conceived. And by focusing, if there seems to be a recurring problem amongst a handful of judges, on their particular sentencing, we may be able to understand better how the flaw can be overcome. But it may well be also a system where judicial independence makes, you know, a corrective action impossible without encroaching on the Article III protection that we wanted.

With regard to deciding, you know, what's a substantial variation as opposed to a minor one, I mean, I'm not sure whether there's any Euclidian formula. It's a sense that six months or 18 months or two years to most people wouldn't seem--the bandwidth is already a year, substantial, five years, maybe it is. I think it's more important to draw a line than exactly where the line is drawn. But I agree with Professor Saltzburg that there

ought to be some way of distinguishing between the variances instead of treating them all in one homogenized whole.

MR. SALTZBURG: It's a really good question, and I'm trying to think about this, since you asked it, I had a little time to ponder. There are two ways that most of us go about doing it, and I think probably both ways ought to be considered. One way is you look at what the guidelines call for, and then you look at the sentence, and you identify in months the actual disparity or the actual difference. And so we'd know we'd have--you'd be able to say that variances of one month, two months, and so on, there are this many. And the other way would be to look at the percentage of the sentence. And I think perhaps you need to do both because if a sentence is six months and the judge departs by two, calling that just a two-month variance might understate the significance of the change. And because we don't--because it's too early to know exactly how this advisory system will work, again, easy for me to say, I don't have to do those calculations. But my instincts would be you'd want to try the numbers both ways.

I think it's possible, by the way, without engaging in ad hominem attacks on judges, to gather this data. I didn't mean to suggest that we ought to have a Most Wanted List of judges out there who--because there is going to be a dialogue ongoing about what it is an advisory system should look like. But if, in fact, you can point to X

number of judges account for a huge number of departures, that's something I think appellate courts ought to be aware of, as well when they engage in reasonableness review. They don't need to know--they know the names, for the most part.

I remember on a different subject an appellate judge told me once that in his circuit that 95 percent of the sanctions imposed upon lawyers were imposed by 5 percent of the judges. And he said his court was fully aware of who they were and took that into account when they engaged in review. And I suspect that something like that will take place in sentencing.

As for Mr. Collins' point, the one thing that is sort of unforgivable, knowing that the judges in some of the districts are really overworked, I mean, the sentencing burden is enormous, the data has to be provided. It's really important. And I think that the Judicial Conference needs to take a more--perhaps a more active role in encouraging that and in pointing out that the absence of data and the failure--nothing inflames the Congress more than when judges in their views flout the requirements. And it's not enough of an excuse to say, "We're busy." I think it's just vital that judges understand that you're going to get a negative congressional reaction if Congress thinks they're not complying. And compliance means providing the data. And maybe you do this already now in light of the response of Mr. Collins. Maybe the Commission has already

provided guidance to judges on the fast track in those jurisdictions, that if this is a fast-track departure, say that, identify it as such. You know, we can label it so that we can have more accurate data.

It may be that if there's certain patterns that you see, a shorthand for the judge, it might very well save time and enable them to give you the data that you're required by law to accumulate.

MR. COLLINS: The Commission's statistical report already has in it one measurement that tries to assess the extent of departure as a percentage. I think you may want to consider whether or not in this--if the advisory system continues, some more, a little bit refined or reticulated assessment of range or scope of the extent of departures is warranted. And it may be that it would be too cumbersome to do for every offense, but you may find as you look at the data, that there are some that have a greater standard deviation than others, and you may want to do something in that regard.

With the Chairman's indulgence, I would like to just add--I didn't have a chance to respond to some of the points that were made on Harris before, and if I could briefly make a few points.

CHAIRMAN HINOJOSA: You can because I plan to say something, too, at the end.

[Laughter.]

MR. COLLINS: I think that--certainly I would hope that the Congress would not engage in a self-fulfilling prophecy where, out of fear or concern that Harris may not survive, it essentially declares it to be dead. It is not dead. It is still on the books. I think it is--Justice Kennedy's opinion distinguishing Apprendi is well reasoned. I think there is a difference between setting the maximum to a range and setting a minimum within that range.

I also think that to the extent that there is criticism of the Bowman fix as being form over substance, that's rather--I think it proves too much because, frankly, the Booker solution is form over substance, because the Booker solution is to eliminate the very right that the Court recognized in Justice Stevens' opinion.

The problem that created Booker is the fact that the defendant has a right to a maximum--a right to a maximum sentence below the statutory maximum, and the Court's remedy for that problem is to eliminate the right so that now you can go to the maximum under your discretion. That is form over substance. So I think it proves a little bit too much to say that the elimination of the Apprendi problem that is inherent in the Bowman fix is somehow inconsistent with the Court's rationale. And as Justice Scalia pointed out in his opinion in Blakely, it is not necessarily the case that the remedies that a legislature may adopt to comply with Apprendi will necessarily be defendant-favorable. That is

not the Court's role or mission to try and push the system in one way or the other in terms of substantive value choices. Those are ultimately for the Congress in the first instance, and I think for the Commission in implementing the directives of Congress in the second instance.

CHAIRMAN HINOJOSA: I'll now close--I've been on the district court bench I guess for almost 22 years--with a statement adding to what Professor Saltzburg said about the appellate court judges know the names. And I do have to say that the district court judges know the names of the appellate court judges.

[Laughter.]

CHAIRMAN HINOJOSA: We'll go ahead and take a short, three-minute break. That I'm sure of. And we'll go on with the next panel. Thank you all very much.

[Recess.]

CHAIRMAN HINOJOSA: Our next group presenting views on the subject are members of the defense bar: Amy Baron-Evans, who is the co-Chair of the Practitioners' Advisory Group, and she is an attorney in Boston, which is a great place; Carmen Hernandez, a well-known pest in the building--

[Laughter.]

CHAIRMAN HINOJOSA: --Second Vice President of the National Association of Criminal Defense Lawyers. That is one of the hats she wears. And Jon M. Sands, Federal Public

Defender for the District of Arizona, who is also the Chair of the Federal Defender Guideline Committee. We look forward to hearing from them, and we will start with Ms. Baron-Evans.

MS. BARON-EVANS: Why did everyone leave?

CHAIRMAN HINOJOSA: They are coming right back.

MS. BARON-EVANS: Good morning, Judge and members of the Commission. Thank you very much for inviting me to speak on behalf of the Practitioners' Advisory Group.

We strongly recommend that the Commission not support any legislation or promulgate any rules at this time that would make the guidelines even a little bit more mandatory. I thought that Professor Saltzburg put it well when he said that any defendant with a competent lawyer will be challenging that system with labels--labels of presumptive weight or even substantial weight, I think, as a return to effectively a mandatory system.

If you look at Justice Breyer's language pretty closely, it looks like he went just as far as he could go up to the line where he couldn't say any more. He said judges are not bound by the guidelines, but they must consult them and take them into account. And I think that's as far as he can go and really as far as the Congress and the Commission can safely go right now.

At the same time, I'm not sure there's that much to worry about because if you go through the analysis, I

think it's pretty obvious that the guidelines are going to have to be given primary respect in the analysis because the analysis has to start with the guidelines and it refers back to the guidelines at each step along the way. The court first has to find the facts and calculate the range, and everybody, to look at this, says that in order to consult the guidelines, they have to--judges, of course, have to find the facts and figure out what the guideline range is. The next step is obviously departures. And to do that, the courts are going to have to look at the policy statements on departure, which also depends on what the guideline range is, how--you know, whether the departure is reasonable.

Next, the court is going to have to consider whether the sentence produced by the Guidelines Manual is sufficient but not greater than necessary to reflect the seriousness of the offense, promote respect for the law, achieve just punishment, achieve deterrence, and needed training and medical care. At that point the court has to consider some facts in addition to the guidelines and the policy statements that have gotten less consideration up to this point, and that's the defendant's history and characteristics, the available types of sentences, and the need to avoid unwarranted disparities and the need to provide restitution. Restitution has always been considered.

If there is a reason for a sentence different from

the one produced by the Guidelines Manual, the reason, we think, will have to be explained in relation to the guidelines. The court will have to, as usual, state in open court the reasons for the particular sentence and state the specific reasons on the judgment and commitment if the sentence is outside the guideline range.

So at each step along the way, just as a matter of logic and habit, I think that the court is going to consider the guidelines and articulate the sentence with reference to the guidelines. This is an analysis that we think by its nature respects the guidelines' central role.

If the Commission starts receiving information indicating that judges have invented some other kind of analysis and aren't applying the framework in this way, you could communicate, we think, to the judges at that point what the proper analysis is. But I think, again, that you are going to have to need--you would need to be cautious about putting labels on the weight, the specific weight to be given the guidelines.

One thing the Commission could do right now--and it sounds like you're already doing it--is to tell the district judges that if there's a reason for a sentence outside the guidelines range that qualifies as a departure and a reason under some other factor under 3553(a), they should call it a departure. It seems to me that that will give you the best picture in your data of what judges are

really doing. It would be a shame if a judge called what was really a departure a 3553(a) factor and all of a sudden what was really a guideline sentence counted as a non-guideline sentence. So we don't see any problem in telling judges to do it that way as a matter of data collection.

Prohibited factors, we disagree with Judge Cassell that the Commission should promulgate guidelines that tell the courts not to consider things like race and gender or substantial assistance without a government motion just because that's what the guidelines already say. As to substantial assistance motions in particular, the guidelines require a motion from the government before the guideline can be applied. Whether the government makes the motion is entirely in its control, not the court's. At least in my experience, courts don't want to get involved in figuring out whether assistance was substantial. They rely on the government to do that, and we don't see a reason that that would not continue. But, again, if the Commission receives information that that is happening, maybe you could somehow reemphasize the government motion requirement.

I believe Mr. Collins suggested that certain factors could be--certain other factors could be put completely off limits. If the Commission did that, the statute would, of course, trump the guideline if you promulgated a guideline prohibiting certain factors, which I

don't think you're suggesting. I think someone suggested that Congress prohibit factors more broadly.

I think if Congress did that, that would be unconstitutional. The guidelines are advisory only because there are other things besides the guidelines that the courts have to consider. If you chop away everything else that the courts have to consider, that leaves the guidelines, and the guidelines are effectively mandatory. So you couldn't, for example, have Congress enact a law that says the guidelines already reflect all the purposes of sentencing or the guidelines--or courts cannot consider the history and characteristics of the defendant, or making all of the discouraged factors prohibited. I don't think Congress could do that without returning to mandatory guidelines.

As to appellate review, we don't think that either the Commission or Congress should get involved in appellate review. I agree it's not a model of priority. But there are three things that you can pick out of Justice Breyer's opinion.

First is that Section 3553(a) factors will guide the appellate courts in determining whether a sentence is reasonable.

Second, Justice Breyer said, "The Act continues to provide for appeals from sentencing decisions irrespective of whether the trial judge sentences within or outside the

guideline range in the exercise of his discretionary power under Section 3553(a)." This has to mean that even if the sentence was in the range, it has to be reviewed for unreasonableness. I think someone else suggested that sentences within the range that are correctly calculated can never be unreasonable as to length, and I think that's wrong. That's the way the Second Circuit interpreted it in Crosby, that a sentence within or outside the guidelines range, regardless of length, can be unreasonable in length, potentially.

At the same time, I don't think that sentences within the range, a correctly calculated range, are ever going to be reversed as a practical matter, as long as the court considers the 3553(a) factors.

The third thing the Court said was in regard to the *de novo* standard. I think there's been some suggestion that the *de novo* standard might be reinstituted. The Court could have struck down only 18 U.S.C. 3553(b), but it also struck down 18 U.S.C. 3742(e), including explicitly the *de novo* standard of review. I think we have to assume that it struck the *de novo* review standard because *de novo* review of sentences outside the guideline range certainly suggests that sentences within the guideline range are mandatory or close enough to mandatory to require jury fact finding.

In closing, I just want to say that there really is no crisis at this moment or anything that can be credibly

painted as a crisis. The PAG recommends that the Commission make sure the courts are accurately reporting what they're doing, collect the data, study what it means, and not propose legislation or promulgate guidelines in the meantime.

I think the Supreme Court was very careful in the language it used to describe the new sentencing procedures and appellate review, and any law or rule that would make the guidelines even a little bit more mandatory would be risky at the moment.

We agree with others that believe the Bowman fix or the Collins fix is on even shakier ground after Booker. It looks like the only options for the long term then are either advisory guidelines, as now, or what people are now calling the simplified Blakely-ized guidelines that Jim Felman first proposed. And I just want to note that there was some question whether those simplified guidelines would have to be codified by Congress or if they could be promulgated by the Commission, and there's a direct answer to that question in the Justice Stevens' majority, which says the Commission can promulgate even facts that are found by a jury.

We hope that the Commission will take this opportunity to study the Booker regime in action and work on simplifying and improving the guidelines based on what courts are actually doing and why they're doing it.

Thank you.

CHAIRMAN HINOJOSA: Thank you.

Ms. Hernandez?

MS. HERNANDEZ: Good afternoon, Judge and Commissioners. Thank you once again for inviting me. I usually don't read, but I want to say some things very carefully and so, therefore, the only way to control myself is to--

CHAIRMAN HINOJOSA: "You" and "careful" are not two words that...

[Laughter.]

COMMISSIONER HOROWITZ: "You" and "controlling" yourself are not...

MS. HERNANDEZ: Thank you once again for inviting me to testify before the Commission and for holding another hearing to consider the divergent views of so many thoughtful people. And I really think that's important. I'm saying that very seriously. I think both last--the November hearings and this hearing you have brought together a whole lot of different voices that you haven't always listened to or heard from, and I think it's very helpful both to those of us who follow your work and to the Congress. I already diverted from my--

[Laughter.]

CHAIRMAN HINOJOSA: The biggest laughter is coming from the blog.

MS. HERNANDEZ: Justice often looks so much different from where you're sitting, so I will try to speak on terms that we can all agree to. I admit that we will never agree on what constitutes just punishment. I fervently believe that we imprison too many people for periods of time and under circumstances that, in my opinion, are at times too harsh and at times even barbaric.

Obviously, some in the Congress and the Department of Justice and perhaps even on the bench think otherwise. Perhaps even some of our citizens also think that lengthy prison sentences are the right and just thing to do with those who violate our laws. So instead of getting into an argument over whether the increasingly harsh sentences have, in fact, reduced crime, and just so I'm not misunderstood, I don't think they have. I think there are studies that show that the drug sentences, for example, really is--there was a RAND report some years ago that talked about wasting taxpayer money on harsh drug--or long drug sentences for a certain type of drug defendant.

I would like to say that we should be able to agree on the goal of making each person in America safe in their person and home.

You didn't expect that from me, did you?

But if that is a common goal, I think we also need to agree on three things: one, we must accomplish these goals in a way that honors our bedrock constitutional

principles; two, we must find a better way to ensure that we're only imprisoning those actually guilty of the magnitude of the crime for which the law imposes such severe sentences; and, three, we must find a different way to achieve the goal of protecting the public.

I've just returned from a meeting of the National Association of Criminal Defense Lawyers in New Orleans where we hosted a delegation of criminal defense lawyers and a professor from Beijing, China. Three things struck me from that trip as we escorted the delegation to observe hearings in federal court, discussed our laws with them, and torts and prisons and juvenile facilities.

First, it is how necessary it is for us to address the root cause of crime. Lack of education, drug addiction, untreated mental health problems, poverty--we need to address these both at the front end to prevent crime and at the back end to limit recidivism.

During a visit to the prison in New Orleans Parish, the warden gave us a tour of the facility and explained three programs that she seemed quite proud of where prisoners were put through boot camp, counseling, and provided educational opportunities. Shockingly, the warden told us that she graduates more young men with GED diplomas than any high school in the entire State of Louisiana. And I think that's an indictment on our system. And I think we should have and the Commission should be a leading voice in

recommending to Congress that we add additional alternatives to imprisonment instead of reducing them. I understand the Bureau of Prisons is going to reduce boot camp at the moment.

The second point that I took away from that meeting with the Beijing lawyers was that the men in the prison that we observed--the warden took us through this tour--were sad, defeated men. Many must have been just teenagers. Most were black and other minorities. They were all someone's son, brother, husband, father. We need to do something about the disparate rate at which we imprison black and Latino men.

The Chinese lawyers were an inspiring group of men and women, hungry for information about our system of law. They know more of our history and our heroes than most of us. They're looking to emulate the best legal practices in the world. They're fairly young. They have this unique opportunity after the Cultural Revolution to reinstitute a legal system.

It must be what our Founders must have been like as they drafted the Constitution and the Bill of Rights. It is heady and inspiring to be around them.

On their last evening in town, the law professor asked me whether our system worked. He said, "Not in theory," he asked, "but in practice." He said it in English, which is more than I can say for my command of the

Chinese language.

I hesitated. The NACDL is supporting indigent defense litigation throughout the country to fix situations where defendants first meet their attorneys on the day of trial and where some attorneys meet with clients for an average of 15 minutes before advising them to plead guilty or go to trial for serious felonies. And the ABA has just published a scathing report on the state of indigent defense. We regularly release innocent persons convicted to death often because of perjured testimony by government lab technicians or other shortcomings in the system.

In the federal system, where we pride ourselves on the quality of our justice, we're struggling with whether it is necessary to provide basic due process rights to someone before we can imprison them in a cell for their rest of their natural lives--not for killing another person but for distributing marijuana or even for high-stakes thievery.

The third point that the visit with the Chinese lawyers brought home to me was how easily we allow our constitutional protections to be unrealized.

With that as background--and thank you for your indulgence--I will try to answer only a few of the questions you posed. Others have fully addressed them, and I have nothing materially to add to their statements

Number one--and I was struck by the testimony of Judge Kopf yesterday, whose opinions I have been reading for

many years. After the 1995 crack report, he held the crack guidelines unconstitutional as applied in a particular case, in a very thoughtful case. He is a Reagan appointee, a Republican.

CHAIRMAN HINOJOSA: You say that with disdain.

MS. HERNANDEZ: No, I say that--

[Laughter.]

MS. HERNANDEZ: No, I say that to show you that--

CHAIRMAN HINOJOSA: And since they are so different, I do want to know if you asked the Chinese anything about their system. But go on.

MS. HERNANDEZ: Their system is not as good as ours--

CHAIRMAN HINOJOSA: I didn't mean to add any more time to this.

MS. HERNANDEZ: I believe you don't need to make any changes to assure that the Booker remedy is implemented. The lower federal courts are taking care of implementing the Booker decision, and I think Judge Kopf's admonition that any changes you make, particularly in rushed fashion, just create confusion is wise.

I also think there is no need to clarify through legislation or through a guideline what weight courts should give to the guidelines. The courts of appeals will soon have resolved that issue as a matter of statutory construction on a *de novo* standard of review. The wisdom of

the many district court judges who are writing on this topic will certainly inform those decisions, and I am not sure, frankly, that the Commission's--this isn't like an administrative act issue where the Commission's learned view on how courts should apply 3553(a) is going to carry weight, I don't believe.

Indeed, with all due respect to Judge Cassell, who has once again, I believe, served a very necessary and important function by explaining his views and providing a jumping-off point for discussion, giving strong weight to the guidelines is not appropriate and runs the risk that Justice Scalia warned of in his dissent in Booker and in his majority opinion in Blakely.

Justice Scalia, another Republican appointee, who can at times be uncannily accurate in his understanding of how things really work, warned, "As I have suggested earlier, any system which held it per se unreasonable and, hence, reversible for a sentencing judge to reject the guidelines is indistinguishable from the mandatory guideline system that the Court today holds unconstitutional. How strongly does one have to follow the guidelines before that line is crossed once again is unclear, but I think if that's how courts are directed to apply the guidelines, you're going to be running afoul of the very strange, tenuous opinion that Booker is."

To understand why this is so, one must understand

that the remedial majority's opinion really rests on the slim read of Williams v. New York and even the--of Williams v. New York for the proposition that the court has never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Williams upheld the imposition of a death sentence by the judge based on information contained in the presentence report prepared by a probation officer. The jury, which had found the defendant guilty of first-degree murder, had unanimously recommended a sentence of life imprisonment.

In the post-Booker world, however, it's important to understand that although Williams affirmed the imposition of a sentence based on non-trial information, in Gardner v. Florida, a 1977 case, the Supreme Court expressly distinguished Williams on the basis that the defendant had not challenged the accuracy of information relied upon by the sentencing court. So you already have an opinion that is expressly and explicitly distinguished by the Supreme Court on the basis that the reason it's okay for a judge to impose a discretionary sentence based on a probation officer's report is that the accuracy of the information was not challenged. I think you know where that's going.

Accordingly, Williams and the notion that discretion in the hands of a judge can avoid violations of the Sixth Amendment goes only so far. We know that the procedure in Williams has also been held unconstitutional in

Ring. No longer can a district court judge impose a death sentence.

While Williams did not address the standard for accurate information in sentencing, U.S. v. Tucker, a 1972 case, held that a defendant has a due process right not to be sentenced on the basis of materially false or inaccurate information. So you have Williams and two strikes at this point, in my opinion.

Tucker said a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited, either as to the kind of information he may consider or the source from which it may come. But these general propositions do not decide the case before us, for we deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded, at least in part, upon misinformation of constitutional magnitude.

Is hearsay unreliable? Of course it is. Is co-conspirator testimony suspect? Yes. That's why we instruct juries to consider such testimony with caution and great care because such witnesses may have reason to make up stories or exaggerate what others did or may be prejudiced against a defendant. Similarly, a cautionary instruction regarding the testimony of drug users is given to juries.

You should expect that continued use of such unreliable information as the basis for a guideline calculation will be challenged, both on Sixth Amendment confrontation grounds and on Fifth America due process grounds. And I don't say that as a challenge. As Professor Saltzburg told us, criminal defense attorneys fully representing their clients will be challenging the standard of proof used at sentencing, particularly if the guidelines continue to be adhered to, and the closer they become mandatory, the more you're going to get these challenges. And I think you can't control the lower federal courts or the Supreme Court.

If we can learn anything from the Apprendi line of cases, it is that the court is prepared to reexamine its precedents to preserve constitutional rights in light of new circumstances, and it said so explicitly in the merits majority in Booker. "As it thus became clear that sentencing was no longer taking place in the tradition that Justice Breyer invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the

answer first considered in Jones and developed in Apprendi and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."

While the use of a beyond a reasonable doubt standard is intended to reduce or eliminate factual errors, the Sentencing Reform Act is silent on what standard to use. The guidelines require only that information used to calculate a range have "sufficient indicia of reliability." In a law review article written by then-Sentencing Commission Chair Chief Judge--Circuit Judge William Wilkins--he wasn't the chief judge at the time--and then-USSC Counsel John Steer about the compromises made, they explained that the Commission adopted a preponderance standard on the basis of the authority of McMillan v. Pennsylvania, a case that has had its validity challenged, most recently in Harris v. U.S., and we've all discussed Harris earlier. But Harris is the result of a very fractured court. I won't belabor the point because I think the previous panel discussed it. But it isn't merely that it was a fractured court. It isn't merely that it was a 4-1-4 plurality, but that Justice Breyer himself said it was illogical for him to do what he was doing, but because he disbelieves Apprendi, he went ahead and did it. And I must say that two of the members of the Court that were in the majority, Justice O'Connor and Justice Rehnquist, I think

have clearly expressed their desire to leave the bench. And as you know, this is not a liberal issue. You know, this Apprendi line of cases is led by Scalia and Thomas. So unless there's going to be a new litmus test for the Republican appointees, I think Harris may be in trouble for those additional reasons.

I want to say that I think there is no quick fix in light of the constitutional cases and in light of the policy decisions that I think what DOJ wants. In the end I believe that the only system that will work and will withstand constitutional scrutiny is one that provides greater procedural protections in the form of jury fact finding. I know that the Department of Justice would like to avoid jury fact finding of all the sentencing enhancers. And I know that the judiciary doesn't particularly want to be just imposing sentences with all facts resolved. But I think that's the only system that will withstand constitutional scrutiny, and it may require, probably does require a simplified guideline system. So I would recommend to the Commission that between now and whatever time you have, you do work on that remedy.

In the meantime, I think the Commission should start to collect accurate information, not merely of the fact of departures or what I like to refer to as just-punishment sentences--those would be the Booker sentences--but the reasons why the district judge felt

compelled by the mandate in 3553(a) to sentence as he or she did. I don't believe we should or will be allowed to return to the system of completely discretionary sentencing that was in effect before the Sentencing Reform Act passed. But I think we should know from what happened with the PROTECT Act that numbers alone don't tell the story.

We knew--I think everyone who was familiar with the guidelines knew that the departure rates in immigration cases explained--was telling us that there was a problem in immigration cases, so that if you start to find a lot of departures in an area of the law, I think we should give a little more credence to sort of the integrity of the judiciary to do what the law requires. And so if you're getting a lot of departures, it's because there's something wrong in that area of the law.

I think a very difficult issue--and I know the Commission has tried over and over again to address it--is the crack cocaine guidelines. You have statutory mandatory minimums at a very low floor, so you're not going to have too many very low sentences. But in an area where the Commission itself has more than once stated that that statute or that ratio is wrong and where you've got such a disparate impact on minority population and where a lot of the defendants being sentenced in places like D.C. are low-level, street-level dealers, judges are going to be faced with a very, very difficult task when they have a

defendant appear before them in a crack case where they are looking at a huge sentence.

I have been to panel presentations in the D.C. Circuit where judges are expressing a real concern for that issue, and I think it's an issue that Congress needs to address, the Commission needs to address, the Department of Justice needs to address. And I understand it's a very controversial issue and there are lots of reasons why we are where we are on there, but it's just a problem that's in the wings.

I will try to be--I just have a few more points. I do agree with Judge Cassell that I think the Commission needs to explain why it's taken some--why it precluded lack of meaningful guidance as a downward departure. It's a policy decision the Commission made, but you need to explain why you did it so that a judge coming along can say, Oh, that's why they did it, and can agree or disagree and can explain why they are agreeing or disagreeing.

I have often spoken about the brief and casual sentencing hearing, and my comments about the problems with Williams talk about that. Judge Posner in the Seventh Circuit, again, not a liberal, has a very eloquent statement in a case called U.S. v. Rodriguez, where a defendant got life without parole in a marijuana case where the proof at trial was ounces of marijuana and where there were two Allen charges because a jury would not convict, where the jury

acquitted of all substantive counts, convicted of a conspiracy count, and based on the quantity of evidence--quantity of information produced at sentencing of a historical nature, the defendant was sentenced to life without parole because he had two prior drug offenses. And he talks about--and that case, by the way, was cited by the majority opinion in--the merits opinion in Booker.

I think I'll leave it at that. I just want to tell you the defense bar is not necessarily happy with Booker. It's not like we're--but I appear here on behalf of the NACDL. We just adopted a resolution in which we said Congress should do nothing, let Booker play out, consider the sentencing system and try to come up with a proposal that meets our constitutional requirements. And we're taking that stance, as I say, not because anybody's particularly happy. I mean, your statistics are reflecting that sentences are going up and that downward departures are fewer than before. We're taking that position, I think responsibly, because there's no alternative at this moment and it's a workable alternative.

And, lastly, I want to take some credit, because the last time I was here, I told you there were three short-term proposals that were possible; one was advisory guidelines; two was a sentence pursuant to 3553(a); and three was Blakely. So I think on the first two, I'm as close as anybody got to what--

CHAIRMAN HINOJOSA: Maybe you talked so long last time, we didn't really--weren't able to figure out--

[Laughter.]

MS. HERNANDEZ: Well, I have the testimony here if you'd like to see it.

CHAIRMAN HINOJOSA: I take it you're done now?

MS. HERNANDEZ: Yes, sir.

CHAIRMAN HINOJOSA: Okay. Thank you, Ms. Hernandez.

Mr. Sands?

MR. SANDS: Judge, I'm sure you watched the Westminster Dog Show last night where the--

CHAIRMAN HINOJOSA: No, but a German short-haired pointer won.

MR. SANDS: I know. It was unreasonable that it should win over your Labs.

CHAIRMAN HINOJOSA: No question about it. I thought that myself.

MR. SANDS: Nonetheless, I was struck by the groups that they were organized in and the panels that you've set us in, and I think that you have the working group here. I will leave the designations to the other groups.

CHAIRMAN HINOJOSA: I think the Lab losing is what happens when you have a jury deciding things.

[Laughter.]

CHAIRMAN HINOJOSA: And that was a joke, okay?

Go ahead.

MR. SANDS: One of the earliest forms of poetry was discovered in ancient Greece, along with the Delphic guidelines. There was a snatch saying the hedgehog sees one big thing, but a fox sees many little things. Over the past two days, many have talked about the huge picture, changes that should be done. I'm here for the Federal Defenders to talk fox-like about a few things that the Commission can do in the short term, especially from the foxes' perspective since there are the baying of the hounds from other areas.

These things, these steps are procedural steps. They will have the effect of bolstering the guidelines, making judges more comfortable in using the guidelines, and using the Commission's suasion, power of logic and reason to ensure that the judges impose fair and just sentences that happen to coincide with the guidelines. These steps will also frame the debate.

First, the Commission through policy statements can urge early discovery of facts. This is done in many districts. This is done in fast-track systems. Indeed, it is a requirement of fast-track systems. And it was done by the government during the summer of Blakely, in which the government, when they were indicting on elements, were giving--or sentencing factors, were giving the discovery. The purpose of discovery is so each side knows what he is

facing when they come in front of the court. The government will agree that a sentence should not be a surprise. Courts would agree that a person standing in front of them should know what he is facing. This will allow more confidence in pleas and in the guidelines.

Second is notice, notice of enhancers, notice of mitigators. Both sides would agree that allowing the other side to know that you're asking for a reduction for minimal role or that you're asking for an adjustment for role in the offense or for use of a minor would be fair. Once again, it narrows the issues, and it allows the courts to make decisions within the guideline arena. So you are, in a way, allowing the court, in using advisory guidelines, to play on your field in a fair manner. Once again, it goes to notice.

Third--and this is probably the most difficult and controversial--is revisiting relevant conduct. We have in the past questioned relevant conduct, and I know that many have wondered whether this has been the Achilles' heel of the guidelines. It is a keystone, as one of you has written about, and is still an important factor.

There has been criticism of the preponderance standard of evidence. The Commission could consider as a policy statement using a continuum, where a preponderance standard, when the adjustments are within a few levels, a clear and convincing standard of--as the Ninth Circuit has found, four levels or more, or even a reasonable doubt when

there's a cross-reference to a different offense. This goes once again to addressing the concerns of many on the bench and from the defense bar and some from academe that relevant conduct shouldn't be an expansive concept that a person pleads to a small amount of drugs or is charged with a small amount, but his or her sentence is huge through a standard that is quite minimal. This would show that the Commission is addressing the concerns and it is workable. The Third Circuit, the Ninth Circuit, even the Second Circuit had developed a judicial test as something that the Commission should look at.

Fourth is judicial notice when there is, dare I say it, a departure or a variance from a guideline range. Once again, as a previous panelist has stated, many of the parties know what's happening is good policy and will give confidence.

Fifth, is to change or to alter the presentence report. Form follows function. The presentence report lists the guidelines, the departures in the guideline-speak the 5K, the 5H--and then a section on variants or sentencing factors under 3553. This will allow the court to proceed in an orderly manner. It will by its very nature for the court to consider, seriously consider with the utmost of respect the guidelines, and allow the court to identify what is a 5K, what is a 5H. It is a way of structuring the outcome and will allow the statements for the sentence to be there.

This is a form that the District of Arizona is going to be implementing in the next several weeks because the probation office met with the judges and came up with this after their reading of Booker.

These procedural steps that can be done quickly would have--would force judges to give meaning to what Booker said, which is to consider, to weigh, to give respect to the guidelines. It would also advance the goals of 3553, which is to eliminate unwanted disparity, to promote fairness, to deal with proportionality, and to factor in the deterrence and rehabilitation. You can build on the respect that the guidelines have garnered for 15 years. You can make the system all that it should be, and it is an important step.

Finally, we have heard a lot here about other systems, the topless or Bowman or Collins guidelines, legislative changes. I'm reminded--

CHAIRMAN HINOJOSA: Don't forget the Chinese.

MR. SANDS: I'm reminded of Humpty Dumpty who, when they asked him what the meaning of a word was, gave a contrary definition. And Alice questioned him, and Humpty Dumpty humphed and said, "Well, what's important is who's in control of the words." Well, that's the wrong approach when dealing with reasonableness and mandatory guidelines. We need to read Booker carefully and seriously and see what the Supreme Court is saying, which is that judicial fact finding

by any means is unconstitutional, and we know what happened to Humpty Dumpty.

Thank you.

CHAIRMAN HINOJOSA: I guess I'll start with the first question, and it's to Mr. Sands. When you talk about notice, you don't read Booker to have done away with the rules that presently require notice on the part of district courts with regards to enhancements that are not identified in the presentence report already. One can certainly argue that that notice requirement is already there.

MR. SANDS: Yes, and what I'm--

CHAIRMAN HINOJOSA: And that would include any kind of factors that the court is considering certainly within the guidelines and/or departures within the guidelines.

MR. SANDS: Yes, and what I am saying, though, is that the Commission can give a renewed emphasis to the duty of the court to give judicial notice that if it's going to vary the sentence or depart. But part and parcel with discovery, the Commission can say it favors discovery and that discovery advances the goals of the guidelines, because in many districts that is not the case.

CHAIRMAN HINOJOSA: But wouldn't that run afoul of the discovery rules that are presently in the Federal Rules of Criminal Procedure? I mean, isn't that the vehicle that should be changed with regards to discovery rather than a

policy statement in the guidelines?

MR. SANDS: No, because the Commission has policy statements on plea bargaining and plea agreements. And what the Commission says carries great weight. The Commission can be ahead of the curve, can frame the debate, that if you are going to have a guideline system and if the government wants a guideline sentence, then discovery is in its interest. It does so in fast track. It can do so in other cases, especially in drug cases where relevant conduct is the most troublesome.

CHAIRMAN HINOJOSA: Commissioner Sessions?

COMMISSIONER SESSIONS: I'd like to address in a sense the recommendation that you made to us that we do nothing. I have no doubt that you are fully aware that there is a national debate over sentencing policy. The debate clearly has been raised in Congress. There's all kinds of possibilities of solutions. This body has an expertise in sentencing and hopefully a sensitivity to all of the issues that are before Congress, concerns of the Department of Justice, concerns of the defense bar as well.

Are you really, in light of today's world, suggesting that we sit on our hands while all of this debate goes on within the larger community and decisions could be made in the larger community for which we have had little or no input?

MS. BARON-EVANS: I guess I should clarify, Judge.

What I'm saying is if you have a choice to collect the data and study what it means now--which at least my reading of Booker seems to give us that. I mean, you know, before it was decided, everybody thought, oh, it's going to be either all jury fact finding or no guidance whatsoever. And neither of those are going to fly, either politically or for whatever reason. But this is a sort of--this is a solution. It isn't terrible. It's got some guidance built into it. So I think it's, you know, something you could live with.

I think that as far as I know--there may be others--the actual real contenders--the real contender, the only real contender being proposed by--well, I suppose it's not the DOJ just yet, but by Mr. Collins--is the Bowman fix. I think the Bowman fix has got real problems that we have all talked about at length, and that those problems have gotten even worse. That gets it down to two solutions, as far as I know, for a long-term system and it's either advisory guidelines with guidance built in, like the Booker remedy or similar to it, or the Felman fix, where some factors would be charged and proved to a jury and the others would be left to the judge.

What I am saying is, right now if the Commission supports legislation or proposes legislation or issues guidelines that make the guidelines mandatory, it seems to me, (A) it's not necessary because the judges are going to follow them in the vast majority of cases, and (B) that it's

really constitutionally risky, that people are going to challenge it. If you put labels on like, you know, "presumptively unreasonable outside the range," or "de novo review of sentences outside the range," that it's going to cause problems.

I hope the Commission joins in the debate and collects data so that you can contribute that to the debate. I'm just saying we advise not to rush into anything that could cause more problems.

CHAIRMAN HINOJOSA: As individuals who are involved at the national level in the defense bar, as each one of you is, do you have any concern or any views on the fact that some courts across the country, sentencing courts might say that the guidelines are entitled to heavy weight, and you should depart from them and/or vary from them in very, very rare circumstances. Others might say they're just a factor like everything else and we can just consider them. Are you concerned that some appellate courts, some circuits might say a sentence within the guidelines we will take to be reasonable for the following reasons. The Commission has already considered these. Congress has let them become approved, and therefore they knew the Sentencing Reform Act, and they've considered these factors already. And other factors might take the viewpoint, no, we don't necessarily think that just because it's a sentence within the guidelines it's reasonable, and it isn't entitled to any

kind of viewpoint that there would be any presumption to it.

Does that, as someone who is involved at the national level, lead to any concern, and if it does, what do you think should be done to lessen any concern if there is any concern? Anybody who wants to answer this question?

MS. HERNANDEZ: Judge, I don't think the Circuit Courts are as far, at such polar ends as the District Courts.

CHAIRMAN HINOJOSA: We haven't heard from most of them, but let's say that were to happen, would that be of concern to any of you?

MR. SANDS: It is a working out of the common law of sentencing that Stith and Cabranes wrote about in Fear of Judging some time ago. It is also an opportunity for the Supreme Court to deal with what's reasonableness. Another way--

CHAIRMAN HINOJOSA: Would it concern you that this might take a while? I mean and that we might go through this period of differences by circuits for a period of time till if and when the Supreme Court decided that they wanted to hear a case?

MR. SANDS: It is a situation in which defense counsel will be dealing with individual clients. I don't think this Commission can unilaterally impose what is reasonable, what is not reasonable--

CHAIRMAN HINOJOSA: I'm not saying the Commission.

I'm just saying what if any action anyone should take, whether it's Congress or anybody else?

MR. SANDS: Then you're running into that uncertainty that Professor Saltzburg warned against. What would be best is for the Commission to work on the guidelines on some of the steps I mentioned to allow courts to have the confidence in the guidelines that they've had in the past and the that they do now, and they will in the future to follow it. There will be some outlying judges that sentence one way or another, but most judges will follow the guidelines, and it's incumbent upon the Commission to explain what it is doing I think to a better extent than it has in the past, and that will engender more confidence.

CHAIRMAN HINOJOSA: And you quote Professor Saltzburg in, I gather, the ABA recommendation.

MR. SANDS: Yes.

CHAIRMAN HINOJOSA: And so the question is, in order for this recommendation to be able to work and be a proper experiment, does there need to be any action taken by anyone, whether Congress or the Commission or anyone else to make sure that all the sentencing courts, in making these determinations, are considering the guidelines and then the policy statements including departure and then varying, if that's what they're going to do, or should we just let it happen, and then at the end of 12 months or 6 months or 18

months or whatever, we will be comparing some courts having done it a certain way, some sentencing courts, and other sentencing courts having done it another way, and would we at that stage be in a good situation to compare that period of time with what might have been happening before Booker?

MR. SANDS: Yes.

MS. BARON-EVANS: Judge, I think you could send--well, similar to the letter that you sent out with the Criminal Law Committee to all judges, explaining in terms--not so much in terms of this is how you must proceed, but this is what we want to know, and you know, like Jon said, form follows function or function follows form, whatever, if judges would need to explain why they were imposing sentence either within the guideline range--well, I guess they wouldn't really have to explain that--for a departure reason or for another reason under 3553(a), it seems that that would sort of get--if it isn't obvious already that that's what you have to do, that that would indicate how they should proceed.

MR. SANDS: Judge, this is an opportunity in Chapter 2 in the drug conversion thing with the weights just to do a new chart with how you would do the weights of facts you're finding. Imagine what your working groups could do on that.

MS. HERNANDEZ: I think it's a concern that is probably overblown. I'm fairly certain that the Circuit

Courts are going to be addressing, and the cases are going up every day. They're going to have to address what 3553(a) is and what it requires. I don't see how--I think it's fairly clear that the guidelines must be--I mean consider means you have to look at them, and I don't think it means that you can say, "Oh, there they are. I considered them." I mean I think the courts--it's fairly clear that that's how the courts are going to come out. Now, whether they say heavy weight or less weight or some weight or only weight when the Commission explained itself, perhaps.

I do think the one thing you can do and should do, as I said--two things. I'll take the blogger, Professor Berman suggested to you that you put our reports every 3 months. He may have had some self-interest in that proposal, but I think it's--I mean we know from the PROTECT Act that there was a lot of misinformation floating around, and so I think that's one thing the Commission absolutely positively must do is publish, as I say, not just--and I think this is very important--not just that there were 10 departures up or down, but why the Court decided what it did. Because if you continue to be a viable entity, which I believe you are, you're still directed to look at how courts are sentencing for what it tells you about whether the guidelines are accurate or not. So you still ought to be saying, why are the courts departing or not imposing upward adjustments, or finding the circumstances of the defendant

led the court to sentence in this way or the other way?

I also absolutely think that given 3661 you have to explain why you have prohibited any factor that is not, per se, unconstitutional. I mean I don't think you have to explain why you've prohibited race as a basis for a departure, but why have you prohibited the things you have? I'm not challenging that you should have or might have or could have made that policy decision. What Judge Cassell said was very good on that point. We shouldn't have to--I mean it should be pretty clean in the guidelines manual why a particular departure ground is prohibited all together, and you shouldn't have to be searching for law review articles to tell you why it is or it isn't.

The fact of useful guidance, I can't imagine why you would want to eliminate that, but I also--in a given case your reason for eliminating that may not hold, and so if a Court under its discretionary authority says, "Well, if the Commission decided to eliminate that for this ground, but that's not the reason or that's not what's present in my case," then it's a reasonable sentence and I think you're going to get more compliance with a guideline sentence if there is logic and reason stated for why the Commission has done what it's done.

Can I say one thing about substantial assistance, which I know is a big concern to the government? I think one of the problems with substantial assistance, which I

think the government could help, and frankly, I believe that it's fairly possible that the courts are going to continue to require a government motion for substantial assistance. I know the courts will be--there will be different decisions, but I think it's fairly possible they'll require it.

I think part of the problem with substantial assistance--

CHAIRMAN HINOJOSA: Does it bother you at all that some courts might say you don't need one and some courts will?

MS. HERNANDEZ: No, because I think it will all play out. I think the Courts of Appeals--I think that's what courts are for, frankly, to resolve these kind of disputes.

CHAIRMAN HINOJOSA: But does it bother you that then some Courts of Appeals might have a different standard for--depending on the circuit. I mean does that in any way play any concern on any of the parts of--as I asked that question before you went off on factors that should be or not considered, that's the question here. Are any of you bothered by the fact that we might end up with circuits interpreting what weight and/or how to proceed with the--

MR. SANDS: We have that now, Judge, with the Ninth Circuit and the Fifth Circuit on relevant conduct, things like--

MS. HERNANDEZ: We have it on fast-track. I mean we haven't--

MR. SANDS: It has a way of working out.

CHAIRMAN HINOJOSA: Commissioner Steer is going to save us all here. Commissioner Steer has a question.

COMMISSIONER STEER: Actually I have more of a comment than a question. My question is very simple. Mr. Sands, would you get us a copy of the Arizona form as a request?

MR. SANDS: Yes.

COMMISSIONER STEER: As soon as possible.

MR. SANDS: Maggie Jensen, who was here, will give it to you.

COMMISSIONER STEER: Just a couple of comments, observations. Ms. Hernandez, I agree with you that we should more fully explain our reasons for policy decisions than the Commission may have done in the past, but with all due respect, the lack of explanation for lack of youthful guidance, you know, it's not hard to find. You can just go and read a case, United States v. Floyd, and it's clear that the Commission responded to that case.

As the two of you are representatives of the defense bar, the three of you, I hope that, frankly, there are challenges early on made to court decisions such as those of Judge Cassell that say that there must be substantial weight given to the guidelines because I'm

pretty darn confident that you're wrong in your analysis, and I think I would like to get that settled as quickly as possible. I don't think that that is a constitutional problem at all vis-a-vis Booker, but since we disagree about that, you know, I say, let's get the courts to address that as quickly as possible so that we can be clear going forward, and I think it will help us get the system straightened out.

MS. BARON-EVANS: I actually, Commissioner Steer, agree with you that it's not probably unconstitutional for a judge to look at it that way, but I think it would be unconstitutional for a legislature to--for Congress to enact a statute that said essentially the same thing.

COMMISSIONER STEER: And the distinction being? That a circuit or the Supreme Court can consider it that way and state so, but the Congress cannot?

MS. BARON-EVANS: The statute would have to say you must give strong weight to the guidelines. I think that's the word or something similar, strong weight, presumptive weight, whatever it would be. That would mean that every court in the nation would have to follow that. If Judge Cassell, for his reasons which he lays out, and I may disagree or agree with any of them, want to follow that in his courtroom for those reasons, that's his discretionary--that's part of his--

CHAIRMAN HINOJOSA: Well, let's say the Supreme

Court--if the Supreme Court says it can they say it?

MS. BARON-EVANS: If the Supreme Court says?

CHAIRMAN HINOJOSA: That you should give substantial weight or heavy weight--

MS. BARON-EVANS: Sure. I don't think they're going to say that. I think they could have said that and they didn't.

MR. SANDS: They said "consider."

CHAIRMAN HINOJOSA: But let's say when this case finally gets up there, at some point somebody's going to review Judge Cassell and Judge Adelman and any other sentencing court that just said something, and it just seems odd to me to make the comment that a court can do something and that that's okay, but that Congress cannot do exactly the same thing. It seems strange.

COMMISSIONER SESSIONS: Why isn't this as applied? In Judge Cassell's courtroom they're a mandatory system under what you're just saying, so therefore as applied, I would think logically your position would be the guidelines are unconstitutional as he applies them.

MS. BARON-EVANS: Judge Cassell himself left the guidelines system and sentenced outside the guidelines for something that is sort of indistinguishable from disadvantaged background in the Croxford case. He said, "Now that the guidelines are advisory I can consider things that aren't ordinarily relevant under the guidelines or that

the guidelines make irrelevant, and I'm going to consider that this defendant was sexually abused as a child."

So I think that Judge Cassell is going to encounter times when he's not going to follow the guidelines for some reason that's present in the case and that, you know, makes--it means that the goals of sentencing are better achieved some other way.

You know, he says in general, "I think the guidelines capture the purposes of sentencing," but that doesn't mean that even he is never going to sentence outside the guidelines, he obviously is.

If Congress said, "You have to give the guidelines strong weight in every case," I think that that's too mandatory. It's not reasoned. It's a flat requirement.

CHAIRMAN HINOJOSA: We have time for two last questions here. Commissioner Horowitz and then Commissioner Rhodes.

COMMISSIONER HOROWITZ: Let me ask you, given--I think based on your testimony that each of you want to see the advisory system not only remain short term but longer term. If that's the case, we've had a lot of discussion in the last day or so of our hearings about what the dangers are to the continued viability of that system, whether because of the issues that it causes the system or whether it would cause Congress to act and change the system.

Let me ask each of you what do you perceive to be

the greatest threat to the continued viability of an advisory system, and should we do anything to try and deal with that danger, or should we do nothing?

MR. SANDS: I believe the greatest danger is to piecemeal it, so you may have the Department of Justice or other players coming in and cabining off huge sections that would limit the true advisory nature. Going to have an advisory system, let it work.

Some of us though favor a Felman approach which would be a "Blakelylization" with a simplified guideline. But if we live in an advisory world that could be worse.

MS. HERNANDEZ: I think the greatest danger probably is a case that hits the newspapers and that appears to be a real deviation from what Congress believes is the appropriate sentence of a given case, which is why I think the Commission has such a burden in trying to explain, because, frankly, I don't think the overwhelming majority of judges are that off from what society believes is the appropriate sentence in any case. And I think that's what we found time and again every time you've looked at these cases that appear at first blush to say a judge is way out there, sentencing too low, there are good reasons why that judge found that to be the case.

So I do think the Commission has to be in front of these, has to require the information to be produced to you so that you can summarize it so that that's not out there.

I also think that with the government there will be--the Department of Justice, how much pressure the Department of Justice places on the Congress, and I think the biggest danger is in the substantial assistance area for the reasons that they at least believe they need such a tight hold on substantial assistance.

I think--and I started to say this earlier--I think Department of Justice can help in two ways in substantial assistance, if they were a little more public in explaining what they want from a defendant. I mean, you know, each Assistant U.S. Attorney is different. Each office is slightly different, but a lot of times in substantial assistance cases it's a blind promise to provide a substantial assistance motion and no one really knows what the government is seeking in that particular case. If they were to spell out a little more in a plea agreement what they want, what you'll get, I think that would help. I think judges would be more willing to not go off and grant substantial assistance departures if a motion is not filed by the government.

I also think that they have misread the substantial assistance statute in 5(k)(1). It talks about the investigation or prosecution of another person, and you rarely get a substantial assistance motion unless there's an actual prosecution, not merely an investigation.

And I also think the Department of Justice needs

to address issues--and I know it cuts both ways--but in places like D.C. where often a defendant stops cooperating because they're in fear of their life, you know? Somebody gets killed. There has to be a compromise in that area.

COMMISSIONER HOROWITZ: How about for the Commission? The focus was anything for the Commission to do as opposed to Department of Justice?

MS. HERNANDEZ: Reporting.

MS. BARON-EVANS: I agree that the biggest danger to letting this play out--and I should also say, you know, I'm not crazy about judges who are sentencing above the guidelines because they think they can now. I mean that's not good for defendants certainly. And I don't know if that's really happening or what the meaning of the data is. But the biggest danger of course is not that. The biggest danger is if the data shows the judges are going down at some significant rate more than they did before, and you want to do know what do you do, or how do you prevent that?

COMMISSIONER HOROWITZ: Right, any suggestions?

MS. BARON-EVANS: Well, my only suggestion that is really safe right now is a letter about how they should--

COMMISSIONER HOROWITZ: Stay within the guidelines?

[Laughter.]

MS. BARON-EVANS: The guidelines are mandatory. Just say it by letter and it won't be a problem.

MR. SANDS: I think the Commission needs to continue its work, and the more it convinces and shows that the guidelines are worthy of being followed, they will be. There are problems that need to be addressed, immigration.

CHAIRMAN HINOJOSA: Do we really need one more question?

MS. BARON-EVANS: I would just add that I think the form itself, the forms themselves that collect the data can sort of dictate the weight, if you will, or at least the guidelines' place in the analysis.

CHAIRMAN HINOJOSA: Thank you all very much.

We are down to our last witness. The most patient person in the entire room is next, Mr. Robert McCampbell, who is a United States Attorney for the Western District of Oklahoma. He is the Chair of the Attorney General Advisory Subcommittee on Sentencing with the U.S. Department of Justice, obviously. Mr. McCampbell.

MR. McCAMPBELL: Thank you. I do appreciate the opportunity to be here today.

When Booker first came out it appeared to be confusing. You have Justice Stevens in his majority opinion, says that the guidelines are unconstitutional, and then Justice Breyer turns around in his majority opinion that says, well, we have to consult them anyway.

When I read those two opinions back to back, I have to say I was reminded of the old country-western song,

"How Can I Miss You if You Won't Go Away?"

[Laughter.]

MR. McCAMPBELL: Having had an opportunity to read Booker and consider it, it's apparent that the guidelines, although not as mandatory as they were before Booker, indeed have not gone away.

I have submitted written testimony for you. That testimony, much of it comes from Chris Wray's testimony before the House of Representatives last week. I've added sections to that to make it additionally responsive to some of the specific questions this Commission has posed for these hearings.

I will not go through that testimony and read it. You will see in there there are certain problems which have arisen from Booker. Some procedural problems could be ameliorated by having courts using common procedures as they go through sentencing decisions. There are other problems inherent in any advisory guideline scheme, and addressing those issues will require congressional intervention.

What I would like to do with my time today is just spend a few minutes talking about some of the particular issues that have come up over the last couple of days. One of the question, what does it mean to consider the guidelines? What that means is to consider the actual range for the defendant before the court. Section 3553(a)(4) provides that the range has to be calculated. Rule 32 makes

that provision, and nothing in Booker undermines that.

As a matter of fact, when you look at Justice Breyer's majority opinion, his language, when he says, "Consider the guidelines," what he says is, "Consider the guidelines' range." And as the Chairman pointed out yesterday, in considering the guidelines' range, you have to know what it is. There has to be a three-step analysis:

First, consider what the guidelines' range is;

Second, consider whether there are valid reasons to depart under the guidelines;

Third, and only third, the Court needs to consider whether, under Booker, it should use its discretion to have a variance from the guidelines.

In considering the variance, the purposes of sentencing in Section 3553 need to be considered. They do not, and should not be, independently reevaluated, all of them being equal, by the sentencing judge. And the reason for that is this Commission has already taken all of those factors into account in formulating the guidelines.

If you look at 28 USC Section 991(b) and Section 994(n), this Commission was specifically charged, in formulating the guidelines, with taking into account those other factors, and so it is appropriate that the guidelines be given substantial weight in making sentencing decisions.

Standard of review will be a very serious decision and a serious issue for all of us. The review for

unreasonableness has to have some meaning, and the further away from the guidelines a sentence is, the more serious that review has to be. Doug Berman, who testified yesterday, wrote an interesting article in Notre Dame Law Review in 2000, and he makes that point. Listen to what Doug says. "Of critical importance, the larger the departure, the better must be the justification. Such an approach certainly seems to resonate with Section 3742, which instructs appellate courts to review departures to determine if a sentence outside the guidelines is unreasonable."

Well, he's got it right. There does need to be more search and review the further a sentence gets away from the guidelines.

With respect to sentences within the range, I think they are presumptively reasonable, and I would certainly agree with Paul Rosenzweig and Dan Collins that Section 3742(a), which was not excised in Booker, and 3742(b), those sections do not create a right of appeal for sentences within the range, and that applies to the government and defendants both.

In reacting to Booker, unnecessary delay does not serve us well. I am not suggesting there should be a rush to judgment. All of us, we need to take the time to get it right, but we should not unnecessarily delay.

There's been a lot of dislocation in federal

sentencing dating back not to January 12th, but to June 24th. As Commissioner Sessions points out, the debate in the larger community is going on right now. And as I've outlined in my written testimony, there are inherent problems in an advisory guideline scheme, and those problems are not going to change over time. If you think back to the hearings you had in November, what was really striking about those hearings is the number of witnesses from a lot of different viewpoints all agreeing that advisory guidelines are not workable in the federal system.

I'd like to spend a minute on 5K1.1 departures. It's a very serious consideration for the government, and there's really two problems that Booker has created with respect to substantial assistance departures.

One is, before Booker, in order to have a substantial assistance departure, you had to have all three actors in the system all working together. You have to have the defendant, the prosecutor and the Court all in agreement if a defendant is going to get downward departure for substantial assistance.

Post-Booker, it's possible that a defendant could get a downward variance for cooperation without the government's acquiescence, and that critically changes the dynamic of that relationship. As a prosecutor, what I want to be able to say to a defendant is, if you want a downward departure motion, I am going to have to make it. And if

you're untruthful, I'm not going to make the motion, and that's critical leverage. Now, that leverage is taken away because the government doesn't have to necessarily be in on the calculation.

The second problem created is that there are other alternatives for defendants. A defendant naturally wants a more lenient sentence. Before Booker, about the only way to get there was to make a substantial assistance agreement. After Booker, there's now other alternatives for a defendant to get a more lenient sentence, and so the incentives to make substantial assistance agreements are reduced.

There's been some discussion this morning, a whole new topic, on the issue of gathering statistics and whether we should be gathering or try to find those judges who are disproportionately sentencing outside the guidelines. I think trying to tie that to the name of the judge is distracting and unnecessary. We will be collecting data within the Department of Justice, who circulated a form for AUSAs to use. The form does not include a way to report the name of the judge, and I don't think that's important.

Gathering the statistics, that's one of the pieces of information we'll want to consider that will be interesting. The individual name of the judge won't help all of us in this room make the policy decisions we need to make.

To conclude my prepared remarks, let me say I

really appreciate the Commission rolling up its sleeves and taking these issues on, hearing from a lot of different people. It's important work. I appreciate your doing that.

Lastly, I'd like to say that whatever system we have or whatever system we may have, all of us at the Department of Justice, we're ready to work, and we're ready to work as lawyers and litigants, courts, Congress, and this Commission to make that system of justice the best system it can possibly be.

Thank you and glad to take any questions.

CHAIRMAN HINOJOSA: Thank you, Mr. McCampell.

Who has got the first question? And it cannot be the Department itself.

[Laughter.]

CHAIRMAN HINOJOSA: And I guess this is an unfair question to you because you're not actually in the Department. If it's something you cannot answer, that would be fine.

Do you anticipate that the Department will be coming up with any specific suggestion, whether it's on 5K or any other of these concerns that you have expressed? I know you're not in the Department, exactly.

MR. McCAMPBELL: Yes, I do anticipate that. I am certainly working closely with people at the Department, and we are considering our options. It's still premature to say exactly what that might be or exactly what form that will

take, but not a secret this is of great concern to us, and we are thinking about it and thinking about it every day, particularly after we've gotten through the first couple of weeks post-Booker, all of us, like me, who are thinking about real cases and real courtrooms, were more focused on what's going to happen with this defendant in this courtroom tomorrow than some of the longer-term implications. But we are turning to those, and I do anticipate the Department will want to weigh in.

CHAIRMAN HINOJOSA: This, also, may be an unfair question, but do you anticipate and/or is the Department taking the position on any appeals that are being taken in briefing that if it is a sentence within the guidelines, where there is no claim that there is an error in law, that you will be making the argument in the circuit courts that that is not, under the law, an appealable case?

MR. McCAMPBELL: I, certainly, believe that is the law, and I believe that is the way Section 3742 reads, even post-Booker. I am unaware of a case on appeal where that issue has arisen, and I am reluctant to say, on some future case, what the Solicitor General's Office, what position they will take.

CHAIRMAN HINOJOSA: Commissioner Horowitz?

COMMISSIONER HOROWITZ: In terms of experience, and I imagine it's obviously too early to give any definitive views, but I'm wondering if there are any

experiences, for example, with fast track programs or 5Ks, with cooperation, where you've experienced any systemic problems to date already in the month since the decision that the Department is having to think about and deal with?

I could foresee, for example, in fast-track border districts where the number of defendants willing to jump into a fast track program might have been affected by the notion the guidelines are voluntary and have other ways of getting out from under the guideline ranges and the immigration guideline. I am just wondering if there's been any reaction yet, any sense of that yet.

MR. McCAMPBELL: With respect to fast track and the border districts, there hasn't been a noticeable effect thus far. The people I've talked to all say too soon to tell, not a material impact that we noticed thus far.

With respect to plea agreements and acceptance of responsibility points, there have been anecdotal situations arising already, where some defendants are saying, particularly the third point for early acceptance of responsibility, that third point is viewed by some defendants and defense lawyers as less important than it used to be. And that third point is important to us, of course, for managing workload and managing resources.

The same is true with 5K1.1, already anecdotal situations arising, particularly in white-color cases, where white-color defendants are thinking maybe there's another

opportunity for a lenient sentence besides striking a substantial assistance agreement. And substantial assistance, it can be hard. It's a tough road to take sometimes.

CHAIRMAN HINOJOSA: On the extra point, the Department is taking the position, I gather, that if you do not make the motion for the extra point and the judge grants that, that that is a sentence outside of the guideline range.

MR. McCAMPBELL: Absolutely, because the third point requires the government's motion. The question is, is the judge, in its Booker discretion, going to essentially give you that.

CHAIRMAN HINOJOSA: But that would be a variance from the guidelines.

MR. McCAMPBELL: It would be a variance, absolutely.

CHAIRMAN HINOJOSA: Just one other question. Judge Cassell, as you heard yesterday and probably saw his testimony, lays out a whole series of thoughts and ideas about what steps we can take as a Commission. One of the areas he touches on is the Victim's Rights Act and what we should consider doing. I was wondering if the Department had any thoughts at this point on what the appropriate steps are to implement the Victim's Rights Act with regard to sentencing procedures.

MR. McCAMPBELL: I'm afraid you've exceeded me. I mean, I know we're all aware of the Victim's Rights Act, and it's important that they have all of those rights. And I'm sorry, I just didn't--

CHAIRMAN HINOJOSA: That's okay. I was curious, given Judge Cassell's comments.

Commissioner Reilly?

COMMISSIONER REILLY: Mr. Mccampbell, we have repeatedly heard that we should move cautiously, I guess, in terms of recommending a quick fix to obviously what is a great opportunity to do a great deal of revising, if you will, of the guideline system, however it comes down.

I suppose that, as I have sat and listened to a couple of days of the hearings, that one of the things we, at least those of us who had the chance to serve in legislative bodies realize, is that sometimes a lack of response will get you something you really don't want in terms of what can be cooked up by legislative bodies. I think that's obviously of concern to the Department, as well as to the Commission.

I guess, what I am suggesting is do we have the luxury of, as it's been advocated here, waiting, without the Department either reacting dramatically to recommending anything, but having the chance to wait for whatever the period is, 12 months, as some have suggested, so that we can accumulate what's going on out there post-Booker and then

make some wise decisions, in collaboration, if you will, with the judges, whether it's a standard form that we know we need and so on and all of this, but really working urgently with them to try to come up with what could be a collaborative effort that might bring about a cooling down of the waters even between the Legislative Branch and the Judicial Branch, which has been going on for as long as I've been around.

And it seems that this is the great opportunity we have, as a Commission working with the Department and trying to bring about a greater compromise with the Hill.

So, I guess, one of my questions is do we really have the luxury and is everybody willing to wait and take their time to try to develop and get the facts that we need in order to, whatever we do, make the right decisions because everybody keeps saying, you know, we all know that have been around, that Congress can come back and do whatever they want whenever they want.

But the point is, if you come up with a system that obviously is compatible with just about everybody--it's not going to be with everybody, but with the majority--that we might be able to fix a lot of the ills that a lot of people have been complaining about for a long time.

MR. McCAMPBELL: I don't think we have the luxury to wait. Problems have already arisen post-Booker. There are certain problems with advisory guidelines that are

always going to exist. Waiting will not make any of those problems go away.

We're not writing on a clean slate. Since Blakely, all of us have been seriously reexamining where sentencing law and policy is in the United States. So it's not like we've just started to think about it. And the rest of the world, the public, the world at-large, Congress, will not necessarily wait on us. The House of Representatives had a hearing last week on this issue.

And so, like you, I would view it as an opportunity to take part in this debate and try to shape the debate going forward to reach the policy that is best for the United States.

MR. FEIN: In that process, you can actually be considering or thinking about relatively concentrated changes to the advisory system to make it more palatable to all sides, including the Department, or you could be thinking about the global changes at this particular point. Without getting into attorney-client privilege and internal debates among members of the Department, are you looking at major changes to the guideline structure or system or are you looking at temporary, small solutions to make, at least at this particular point, the advisory system more palatable?

MR. McCAMPBELL: We haven't reached a decision on that. There's a lot of options on the table. There are a

lot of voices within the Department, a lot of people that need to be consulted, want to be consulted, and it's just too soon for us to chart out a course in one particular direction. As I mentioned, it is something we are very concerned about and something we're working on every day.

CHAIRMAN HINOJOSA: Thank you very much, Mr. McCampbell. You have been the most patient witness. We have received your testimony, and you were most gracious in being brief in your description of it. We will read it and pay close attention to it.

MR. McCAMPBELL: Thank you.

[Whereupon, at 1:33 p.m., the proceedings were adjourned.]