JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE PAUL G. CASSELL
CHAIRMAN, COMMITTEE ON CRIMINAL LAW

BEFORE

THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

HOW JUDGES ARE PROPERLY IMPLEMENTING THE SUPREME COURT'S DECISION IN *UNITED STATES V. BOOKER*

March 16, 2006

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today on behalf of the Judicial Conference and its Criminal Law Committee to discuss developments in federal sentencing since the Supreme Court's decision in *United States v. Booker*.[1] My testimony today will explain why federal sentencing practices today remain about the same as they were before *Booker*. Accordingly, there is no need for any immediate action or "*Booker* fix" legislation. In particular, the Judicial Conference opposes a system of "topless" guidelines because it is not appropriate and would create grave risks of unsettling the system and it opposes mandatory minimum sentences. The Criminal Law Committee does, however, believe that some narrow areas may deserve consideration for possible legislation to improve the system – including restoring the traditional composition of the Sentencing Commission (a goal supported by the Conference), expanding judges' ability to impose supervised release and award restitution, eliminating unjustified mandatory minimum sentences, reducing the disparities in penalties for crack and powder cocaine, and encouraging the Sentencing Commission to undertake a comprehensive review of the current sentencing regime.

My testimony is divided into four parts. Part I reviews the data on federal sentences in the wake of *Booker*. The average sentence length before *Booker* was 57 months; the average sentence length after *Booker* was 58 months – showing, if anything, a slight increase in sentence severity. Moreover, there has not been a dramatic change in the percentage of cases falling outside the Federal Sentencing Guidelines after *Booker*. Even taking the critics own narrow view

[1] 125 S.Ct. 738 (2005).

of the appropriate measure of change – focusing narrowly on cases in which judges varied from the Guidelines – more than 90% of all cases are being resolved in the same way as they were before Booker.

Part II reviews the way in which federal appellate courts – including the United States Supreme Court – should be able to clarify important aspects of the new sentencing regime and reduce any disparities that have occurred in the immediate aftermath of *Booker*. Already the appellate courts are beginning to provide guidance on what is a "reasonable" sentence, the standard of appellate review mandated by *Booker*. As the circuits speak, it is to be expected that judge-to-judge and district-to-district variation will be reduced. And, of course, once the United States Supreme Court speaks on the subject, a clear law of the land will be set that will help bring uniformity to the system.

Part III reviews one alternative that has been urged as replacement for the current system: so-called "topless" Guidelines. Legislation adopting such a scheme would run the risk of disrupting the entire federal criminal justice system. The constitutional viability of the topless guidelines scheme hinges on the continuing validity of the Supreme Court's 5-4 decision in *Harris v. United States*[2] allowing judicial fact-finding at the bottom end of Guideline ranges. Since then, of course, the Court has handed down its opinion in *Booker (*and with several other similar earlier cases). These decisions affirm the importance of juries in criminal sentencing in ways that were not fully appreciated before. Many observers believe that *Harris* is no longer good law. If this is true, the constitutionality of any topless Guidelines scheme is certainly in

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[2] 536 U.S. 545 (2002).

question. To restructure the entire federal sentencing system on such constitutionally debatable foundations is a gigantic gamble.

Part IV explains that while there is no need for sweeping change, Congress may be able to draft narrow legislation in several specific areas that could improve the current sentencing process. In particular, Part IV presents for discussion some particular topics, including:

A. Restoring the Sentencing Commission to its traditional composition of "no less than" three federal judges;

B. Encouraging the Sentencing Commission to codify a standardized methodology for determining sentences, such as the three-step process currently recommended by the Commission;

C. Evaluating ways in which downward sentence reductions for substantial assistance are handled by judges *and* prosecutors;

D. Evaluating current procedures for appellate review;

E. Giving judges greater power to extend terms of supervised release for released offenders;

F. Authorizing judges to prevent criminals from profiting from their crimes;

G. Expanding the power of judges to award full and fair restitution to crime victims;

H. Repealing irrational mandatory minimum sentences;

I. Reducing the unsupportable disparities between the penalties for distributing crack cocaine versus powder cocaine;

J. Providing financial support for "boot camp" programs for certain non-violent, first offenders;

K. Improving community release as a way of transitioning offenders back into their communities; and

L. Encouraging the Sentencing Commission to undertake a comprehensive evaluation of the federal sentencing structure in the wake of *Booker*.

I am here today as the Chair of the Judicial Conference's Criminal Law Committee.[3] Our Committee is composed of distinguished judges from around the country, namely Judge Lance M. Africk (Louisiana Eastern), Chief Judge Donetta W. Ambrose (Pennsylvania Western), Judge Julie E. Carnes (Georgia Northern), Chief Judge William F. Downes (Wyoming), Judge Richard A. Enslen (Michigan Western), Chief Judge Jose Antonio Fuste (Puerto Rico), Judge David F. Hamilton (Indiana Southern), Judge Henry M. Herlong, Jr. (South Carolina), Judge Nora Margaret Manella (California Central), Judge Norman A. Mordue (New York Northern), Judge Wm. Fremming Nielsen (Washington Eastern), Judge William Jay Riley (Eighth Circuit), Magistrate Judge Thomas J. Rueter (Pennsylvania Eastern), and Judge Reggie B. Walton (District of Columbia).

Of course, the formal views of the judiciary on legislation must be made by the Judicial Conference. Because this hearing does not involve specific pending legislation, the Judicial Conference has not had an opportunity to give any final view on what kind of congressional action might be appropriate. Accordingly, my remarks today represent only the views of the members of the Criminal Law Committee about the general topic areas that we understand to be under general consideration. Because no specific legislation is pending, our thoughts are

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[3] I serve as a federal district court judge for the U.S. District Court for the District of Utah, having been nominated by President Bush in 2001 and confirmed by the Senate in 2002. I also continue to be a Professor of Law at the S.J. Quinney College of Law at the University of Utah, where I teach courses on crime victims' rights and criminal procedure. After graduating from law school in 1984, I clerked for then-Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia and Chief Justice Warren Burger of the U.S. Supreme Court. I then served for two years as an Associate Deputy Attorney General in the United States Department of Justice during the Reagan Administration and for three-and-a-half years as an Assistant United States Attorney in the Eastern District of Virginia.

necessarily preliminary – in the nature of thoughts for further discussion. Moreover, our Committee, whatever its views, serves only in an advisory capacity to the Judicial Conference and may not speak on its own for the judiciary. If Congress moves to consider specific legislation on sentencing practices, the Criminal Law Committee will be happy to review it and make appropriate recommendations to the Judicial Conference, which then may comment formally on the judiciary's behalf.

I. *Booker* Has Not Caused Much Change in Federal Sentences.

Since the Supreme Court's decision in *United States v. Booker*, the most notable fact about the federal system is how little things have changed. The most comprehensive data on federal sentencing practices comes from the United State Sentencing Commission, which has been carefully compiling data on *Booker*'s effects.[4] The most telling statistic is that sentences today are, on average, about the same (if not slightly longer) as compared to sentences before *Booker* (and its predecessor, *Blakely v. Washington*). Before *Blakely*, the average federal sentence was 57 months; after *Booker*, the average federal sentence was 58 months.[5] This stable pattern recurs across the four most significant categories of federal prosecutions:

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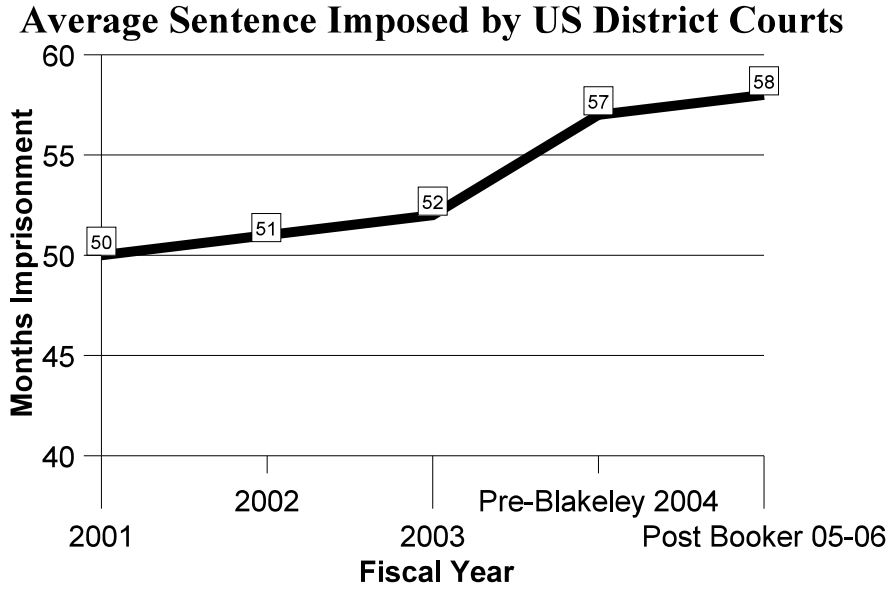
[4] U.S. SENTENCING COMMISSION, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON SENTENCING (Mar. 2006) (hereinafter *BOOKER* IMPACT REPORT).

[5] *BOOKER* IMPACT REPORT, *supra*, at 71.

AVERAGE SENTENCE IMPOSED

	Pre-*Blakely*	Post-*Booker*
Drug Trafficking	83 months	85 months
Unlawful Entry	29 months	27 months
Firearms	61 months	60 months
Theft/Fraud	20 months	23 months
ALL CASES	57 months	58 months

In sentencing, outcomes matter. Viewed from a nationwide perspective, aggregate sentencing outcomes remain basically unchanged after *Booker* (and have even increased slightly), as shown in the following chart.



Source: United States Sentencing Commission Data
Prepared by: The Administrative Office of the U.S. Courts

Apparently some observers view the issue not from the perspective of overall sentencing outcomes but rather from the perspective of the frequency of downward variances from the Guidelines. From a policy perspective, this approach can be less helpful, because each individual variance has to be judged by the facts of the particular case. Even taking this approach, however, there appears to be little need for immediate legislative action.

We understand that some observers claim that the case for congressional intervention is demonstrated by the following data collected by the Sentencing Commission:[6]

Position of Sentence Relative to Guideline Range	**FY2001**	**FY2002**	**FY2003**	**FY2004 (Pre-Blakely)**	**FY2005-06 (Booker)**
Within Range	64.0%	65.0%	69.4%	72.2%	62.2%
Upward Departures	0.6%	0.8%	0.8%	0.8%	0.3%
Otherwise Above Range	–	–	–	–	1.3%
Substantial Assistance Departure	17.1%	17.4%	15.9%	15.5%	14.4%
Other Gov't Sponsored Departures	–	–	6.3%	6.4%	9.3%
Other Downward Departure	18.3%	16.8%	7.5%	5.2%	3.2%
Otherwise Below Range	–	–	–	–	9.3%

[6] *BOOKER* IMPACT REPORT, *supra*, at D-10.

Observers critical of the current system apparently focus on the last two categories – "other downward departure" and "otherwise below range" – and contend that these are new, post-*Booker* reductions in sentences that are inappropriate.

This table reveals, if anything, that the system has not changed much after *Booker*. For starters, it is possible that at least some of the data reflecting court-initiated departures may actually include government-sponsored departures. But assuming the accuracy of the data and taking them in historical perspective, the system in 2005-06 was almost exactly the same as it was in 2001. In 2001, about 64% of sentences fell within the Guidelines; in 2005-06, about 62% of sentences fell within the Guidelines. The 2% difference is quite small and may well be attributable to the increase in government-sponsored departure motions, such as new "fast track" programs for immigration cases. (The Commission's data entry system before 2003 prevents further exploration of this possibility.)

Even taking a narrow, single-year view of the data, the system in 2005-06 was not very different than in 2004 before *Blakely* and *Booker*. In 2005-06, 62.2% of sentences were within the Guidelines, compared to 72.2% in 2004 – a difference of 10.0%. One way of viewing this difference is as follows:

Additional Upward Departures/Variances	0.8%[7]
Additional Government-Sponsored Departures	1.8%[8]
Additional Downward Departures/Variances	7.3%[9]
Total Difference after *Booker*	9.9%[10]

The critics of the current system apparently focus on the 7.3% of the cases in which there was an additional downward adjustment of the sentence. Against a backdrop of 0.8% more upward adjustments after *Booker* (and the Department's own decision to sponsor 1.8% more downward departures after *Booker*), this change does not appear significant. Put directly – even taking the critics own narrow view of the appropriate measure of change, *more than 90% of all cases are being resolved in the same way as they were before* Booker. And how much did the sentences change in the 7.3% of cases with a downward adjustment of some type? Here again, the Sentencing Commission's data suggest no basis for substantial concern. The median decrease in sentence was only 12 months.[11]

Finally, it must be remembered that in each of these cases a sentencing judge, after carefully considering all relevant sentencing information and the particular facts of the case, has

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[7] 1.3% "otherwise above the range" + 0.3% "upward departures" after *Booker*, compared to 0.8% upward departures before *Booker/Blakely*.

[8] 14.4% substantial assistance departures + 9.3% other gov't sponsored departures after *Booker*, compared to 15.5% substantial assistance departures + 6.4% other gov't sponsored departures before *Booker*/*Blakley*.

[9] 3.2% "other downward departures" + 9.3% "otherwise below range" after *Booker*, compared to 5.2% "other downward departures" before *Booker/Blakely*.

[10] Total not quite 10.0% because of rounding. For the underlying data, see *BOOKER* IMPACT REPORT, *supra*, at D-10.

[11] *BOOKER* IMPACT REPORT, *supra*, at D-25.

concluded that downward variance from the Guidelines is appropriate. The possibility that conscientious sentencing judges reached the right result in most of these cases should not be hastily dismissed. We also believe (based on anecdotal report from our colleagues around the country) that the majority of these variances have been given in cases that did not involve violent and repeat offenders. After *Blakely* and *Booker*, DOJ officials publically suggested that the toughest federal sentences should be directed toward violent and repeat offenders.[12] Similarly, Attorney General Gonzales during his confirmation hearings in January 2005 asserted that prison is best "for people who commit violent crimes and are career criminals," and he also stressed that a focus on rehabilitation for "first-time, maybe sometimes second-time offenders ... is not only smart, . . . it's the right thing to do."[13] In Attorney General Gonzales' words, "it is part of a compassionate society to give someone another chance."[14] When carefully examined, the facts of many of these variance cases seem likely to fit comfortably within the approach described by the Attorney General.

In light of all these points, it appears that there is no need for an immediate "*Booker* fix," especially if the fix carries its own substantial risks and costs.

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[12] *See* Testimony of Ass't Attorney General Chris Wray to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives at 8-9 (Feb. 10, 2005) (stressing that most federal prisoners "are in prison for violent crimes or had a prior criminal record before being incarcerated"); *see also* Letter to the Editor from Dan Bryant, Assistant Attorney General for Legal Policy at the Justice Department, WASH. POST, Dec. 24, 2005, at A25 (asserting that "[t]ough sentencing makes Americans safer by locking up repeat and violent offenders").

[13] *See* Transcript, Senate Judiciary Committee's hearings on the nomination of Alberto Gonzales, available at Professor Douglas Berman's excellent and indispensable website, http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/gonzales_hearin.html.

[14] *Id.*

II. The Appellate Process Should Be Allowed to Operate.

Even if the critics believe that the existing data demonstrate a problem in the system, it seems appropriate to wait before recommending dramatic legislative action. The data reflect the immediate attempts by trial courts around the country to put into effect *Booker*'s mandates. It would hardly be surprising to discover in the first year following a significant new Supreme Court decision invalidating important parts of the federal sentencing statute that efforts of district judges in 94 districts had produced a few rough edges. Those rough edges will disappear over time as experience develops with the new system.

Of particular importance is the ability of appellate courts – including the United States Supreme Court – to clarify important aspects of the new sentencing regime. Already the appellate courts are beginning to provide guidance to trial courts on what is a "reasonable" sentence after *Booker*.[15] As the circuits speak, it is to be expected that judge-to-judge and

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[15] *See, e.g., United States v. Cooper*, --- F.3d ---, 2006 WL 330324 (3d Cir. Feb. 14, 2006) (noting that "while [appellate courts] review for reasonableness whether a sentence lies within or outside the applicable guidelines range, . . . it is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable"); *United States v. Richardson*, --- F.3d ---, 2006 WL 318615 (6th Cir. Feb. 13, 2006) (explaining that the Sixth Circuit has established a rebuttable presumption of reasonableness where a defendant is sentenced within the appropriate Guidelines range); *United States v. Williams*, --- F.3d ---, 2006 WL 250058, at *1 (7th Cir. Feb. 3, 2006) (noting that "a sentence within the guidelines range will rarely be unreasonable"); *United States v. McMannus*, --- F.3d ---, 2006 WL 250240, at *2 (8th Cir. Feb. 3, 2006) (stating that "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling [its] justification [must be] based on the § 3553(a) factors"); *United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (vacating a sentence of probation because of concern that "the brevity of the term of imprisonment imposed by [the] sentence [did] not reflect the magnitude of the theft"); *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005) ("A discretionary sentencing ruling . . . may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence

district-to-district variation will be reduced. And, of course, once the United States Supreme Court speaks on the subject, a clear law of the land will be set that will help bring uniformity to the system. Obviously the Justice Department is in a good position to help secure that uniformity, as the Solicitor General's Office must have dozens and dozens of cases currently pending involving *Booker* issues. If the concern is clarity of existing legal standards, the Justice Department should be encouraged to ask for Supreme Court review of an appropriate case on the subject.

In the last few months, the appellate courts have been generally moving in the direction of forcing district courts into great compliance with the Guidelines. As Professor Douglas Berman has noted, "it seems all post-*Booker*-*within*-guideline sentences and nearly all above-guidelines sentences are being found reasonable, whereas many *below*-guideline sentences are being reversed as unreasonable."[16] As he catalogued the state of appellate court decisions just two weeks ago, the pattern is as follows:

Within-guideline sentences: No court of appeals has yet reversed a within-guideline sentence as unreasonable. Many courts have affirmed within-guideline sentences as reasonable; there are too many such cases to list.

Above-guideline sentences: Only one court — the Seventh Circuit, in the 2005 case of *United States v. Castro-Juarez*[17] — has reversed an above-guideline sentence as unreasonable. A number of cases, however, have affirmed above-guideline sentences as reasonable. These

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that lies outside the limited range of choice dictated by the facts of the case.").

[16]Douglas Berman, Sentencing Law and Policy: Tracking Reasonableness Review Outcomes (Mar. 3, 2006), http://sentencing.typepad.com.

[17]425 F.3d 430 (7th Cir. 2005).

include *United States v. Fairclough*,[18] *United States v. Smith*,[19] *United States v. Larrabee*,[20] *United States v. Jordan*,[21] *United States v. Winters*,[22] and *United States v. Shannon*.[23]

Below-guideline sentences: Thirteen cases involving below-guideline sentences have been reversed as unreasonable. These are: *United States v. Myers*,[24] *United States v. Gatewood*,[25] *United States v. Shafer*,[26] *United States v. Claiborne*,[27] *United States v. Eura*,[28] *United States v. Moreland*,[29] *United States v. Duhon*,[30] *United States v. McMannus*[31] (which reversed two sentences in one opinion), *United States v. Feemster*,[32] *United States v. Clark*,[33] *United States v. Pho*,[34] *United States v. Coyle*,[35] and *United States v. Saenz*.[36] By Professor Berman's tabulation, only a handful of cases where the defendants' sentences were below the guidelines ranges have been affirmed as reasonable. *United States v. Montgomery*[37] and *United States v. Williams*[38] were

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[18]— F.3d —, No. 05-2799-CR, 2006 WL 465367 (2d Cir. Feb. 17, 2006).
[19]— F.3d —, No. 05-30313, 2006 WL 367011 (5th Cir. Feb. 17, 2006).
[20]436 F.3d 890 (8th Cir. 2006).
[21]435 F.3d 693 (7th Cir. 2006).
[22]416 F.3d 856 (8th Cir. 2005).
[23]414 F.3d 921 (8th Cir. 2005).
[24]— F.3d —, No. 05-1543, 2006 WL 488411 (8th Cir. Mar. 2, 2006).
[25]— F.3d —, No. 05-1865, 2006 WL 452902 (8th Cir. Feb. 27, 2006).
[26]— F.3d —, No. 05-2049, 2006 WL 453200 (8th Cir. Feb. 27, 2006).
[27]— F.3d —, No. 05-2198, 2006 WL 452899 (8th Cir. Feb. 27, 2006).
[28]— F.3d —, No. 05-4437, 2006 WL 440099 (4th Cir. Feb. 24, 2006).
[29]— F.3d —, No. 05-4476, 2006 WL 399691 (4th Cir. Feb. 22, 2006).
[30]— F.3d —, No. 05-30387, 2006 WL 367017 (5th Cir. Feb. 17, 2006).
[31]436 F.3d 871 (8th Cir. 2006).
[32]435 F.3d 881 (8th Cir. 2006).
[33]434 F.3d 684 (4th Cir. 2006).
[34]433 F.3d 53 (1st Cir. 2006).
[35]429 F.3d 1192 (8th Cir. 2005).
[36]428 F.3d 1159 (8th Cir. 2005).
[37]No. 05-1395, 2006 WL 284205 (11th Cir. Feb. 7, 2006).
[38]435 F.3d 1350 (11th Cir. 2006).

the only two cases that Professor Berman could find after *Booker*.

Put simply, circuit courts are not showing undue deference when reviewing below-guideline sentences. Moreover, post-*Booker* cases are only now resulting in rulings that provide feedback to district courts on the meaning of reasonableness. Interestingly, the two latest post-*Booker* data runs from the United States Sentencing Commission show a slight up-tick in the number of nationwide within-guideline sentences: the total *post-Booker* within-guidelines sentences are up to 62.2% as of March, up from 61.9% in February and from 61.2% in January Although this by itself may not be a statistically significant change, one might speculate that the notable trend of appellate court reasonableness review could be leading district judges to adhere more often to the guidelines in some cases. In light of these decisions, there is every reason to expect that, over time, appellate review will produce greater compliance with the Guidelines.

We also understand critics of the current system to be concerned about whether existing appellate review will have sufficient "traction" to ensure that the congressional purposes of sentencing are achieved. Indeed, it is possible that in the hearing today, critics may point to individual sentences of individual judges as demonstrating the need for system-wide reform.

If the concern is a downward adjustment in any particular case, the appropriate remedy is obvious: the Justice Department can file an appeal. As just noted, the Justice Department has had considerable success in challenging below-Guideline sentences. On the other hand, pursuing a dramatic change such as a topless guidelines scheme poses considerable risks both of unsettling the system and requiring thousands of resentencings of in-custody defendants.

III. A System of Topless Guidelines Creates Grave Risk of Disrupting the Entire System.

If the Congress were to adopt a system of topless guidelines, it would run the risk of disrupting the entire federal criminal justice system. Observers of the current system, including the Justice Department, apparently all agree that the constitutional viability of the topless guidelines scheme hinges on the continuing validity of *Harris v. United States*.[39] In that 5-4 decision from 2002, the Supreme Court agreed that judges rather than juries could undertake fact-finding in connection with mandatory minimum sentences. Since then, of course, the Court has handed down its opinions in *Blakely* and *Booker*. These decisions affirm the importance of juries in criminal sentencing in ways that were not fully appreciated before.

In the wake of *Blakely* and *Booker*, serious questions have emerged about whether *Harris*'s doctrinal underpinnings have been so substantially eroded that it no longer remains good law. Many lower courts have pointedly noted this question, although they obviously remain bound to follow a Supreme Court decision until the Court itself says otherwise.[40] Legal

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[39] 536 U.S. 545 (2002).

[40] *See, e.g.*, *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence, but *Harris* has not been overruled. . . . We cannot question *Harris*' authority as binding precedent."); *United States v. Barragan-Sanchez*, 2006 WL 222823 at *2-3 (11th Cir. Jan. 30, 2006) ("The Supreme Court in *Booker* made no mention of *Harris*, nor has it overruled it since. Accordingly, while it is possible that *Booker*'s remedial scheme could implicate mandatory minimum sentences in the future, until the Supreme Court holds that mandatory minimums violate the Fifth and Sixth Amendments of the Constitution, we are obliged to continue following *Harris* as precedent."); *United States v. Lopez-Urbina*, 2005 WL 1940118 at *21 (5th Cir. Aug. 15, 2005) (unpublished opinion) ("We cannot hold that [cases like *Harris* have] been overruled absent express authority from the Supreme Court."); *United States v. Mackie*, 2005 WL 3263787 at *24 (2d Cir. 2005) (unpublished opinion) ("Regardless of the merits of this argument [that *Booker* undermines *Harris*], we must reject it. This court must adhere to Supreme Court precedent unless and until the Supreme Court itself overrules it."); *United States v. Malouf*, 377 F. Supp.2d 315, 326 (D. Mass. 2005) (stating that "the breadth of the holdings in *Booker* and

commentators, however, have not been as limited as courts in presenting their views on what the Supreme Court will do in the future. Many respected legal commentators have concluded that *Harris* probably does not survive the Court's decisions in *Blakely* and *Booker.*[41] As one example, it is noteworthy that Professor Frank Bowman (a former federal prosecutor and the first to opine about a topless scheme) has expressed his view that *Harris* is questionable because it creates "a strange asymmetry" in which jury fact-finding is required at the top of a guideline system but not at the bottom.[42] He concludes *Harris* "is in danger."[43]

In response to this issue, it might be argued that *Harris* is still "the law of the land" and that the Congress is entitled to rely upon it in drafting legislation. With respect, we believe that this point overlooks the equally salient fact that *Blakely* and *Booker,* too, are the law of the land. The ultimate question that the Supreme Court will have to decide, when squarely presented with

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Blakely have in fact overruled *Harris*").

[41] *See, e.g.*, Douglas A. Berman, *Tweaking* Booker: *Making Advisory Guidelines Work in the Federal System*, __ HOUS. L. REV. __ (forthcoming 2006) ("[T]he basic constitutionality of a topless guidelines system would necessarily be uncertain because it must rely upon the Supreme Court's *Harris* ruling . . . . [T]he enactment of a topless guideline system might well prompt the Court to make good on its threats to more directly police legislative definitions of crimes and applicable punishment."); Susan R. Klein, *Shifting Powers in the Federal Court: Symposium Issue: The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U.L. REV. 693, 740 (2005) ("Those who scoff at the notion of the Court overruling a constitutional decision [in *Harris*] only a few years old should stop and consider that such a decision would give federal judges, once again, primacy and discretion in sentencing."); Andrew Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 423 (2002) ("But if the Court is to remain true to the constitutional principles underlying *Apprendi*, it should eventually overrule . . . *Harris* . . . . "); Kevin R. Reitz, *Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 & n.54 (2005) ("*Harris* is a sizable hole in the constitutional Swiss cheese. . . .").

[42] Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL FORUM 149, 215.

[43] *Id.*

the question, is whether these two more recent precedents have so eroded the underpinnings of *Harris* that it is no longer good law (as many academic commentators believe).

The possibility that the Supreme Court will take a dim constitutional view of a topless guidelines scheme is enhanced by the very nature of the proposal. The scheme looks like a gimmick. It makes an end run around the Supreme Court's constitutional pronouncements that juries have an important role to play in criminal sentencings. It does this by restructuring the Guidelines so that they purportedly "recommend" the same high-end sentence of something like twenty years in prison for every federal crime from the most minor offenses to the most serious felonies. The absurdity of this open-ended recommendation is underscored by the fact that, if such a scheme were in place, the Justice Department would apparently direct its own prosecutors not to seek sentences at the high end of these very broad ranges. Unfortunately, however, the lack of meaningful tops on the Guidelines may exacerbate the problem of sentence disparity (and perhaps discourage some defendants from pleading guilty).

In the *Apprendi* decision that spawned *Booker*, the Supreme Court specifically warned legislatures against evading the constitutional protections of the Sixth Amendment by expansively extending the maximum range of all criminal sentences.[44] The topless guidelines scheme might well be the kind of legislative evasion that the Supreme Court had in mind.

In light of this uncertainty, rebuilding the entire federal criminal justice system around *Harris* is risky. Were the Supreme Court to determine that *Harris* did not survive *Blakely* and *Booker*, the topless guidelines plan would be rendered unconstitutional – creating another shock

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[44] *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000).

to a system that is still absorbing *Booker*'s effects. That shock would likely be far greater than that from *Booker*. The *Booker* remedial opinion was able to creatively preserve the federal sentencing system in a way that avoided the need to resentence most criminal defendants. But a topless guidelines scheme would likely either be constitutional or unconstitutional *in toto*. If unconstitutional, then every defendant sentenced under the scheme might have the opportunity to personally appear before the trial court for a resentencing.[45] Tens of thousands of criminal cases might be implicated in such a ruling. It is also not immediately clear how legislation could be written with any effective "fallback" or "severance" clauses to avert such a possibility. Retroactivity questions surrounding any rulings on these issues would be quite complex, with respect both to cases pending on direct appeal and on habeas. Moreover, during the time leading up to any Supreme Court ruling (a year or two, at least) extraordinary legal confusion and uncertainty could arise in the lower courts following the enactment of a constitutionally questionable structural change to the federal sentencing guidelines. These would truly be devastating consequences for a system that is just now becoming fully adjusted to *Booker.*

The case for waiting before making any dramatic changes in this area is reinforced by the Supreme Court's recent decision to grant certiorari in *Cunningham v. California*.[46] That case presents the issue of whether California's determinate sentencing scheme violates *Blakely* (the state predecessor to *Booker*). The defendant in *Cunningham* was convicted of one count of continuous sexual abuse of a minor. The statutory penalty for the crime was a sentence of either six, twelve, or sixteen years. Under California's penal code, when a statute specifies three

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[45] *See* FED. R. CRIM. P. 43(a)(3) (defendant's presence required at sentencing).
[46] 2006 WL 386377, No. 05-655 (U.S. Feb. 21, 2006).

possible sentence terms, the court must impose the middle of three possible sentences "unless there are circumstances in aggravation or mitigation of the crime." But California law requires the sentencing judge — not a jury — to determine whether aggravating or mitigating circumstances exist. On appeal, the California courts held that this determinate sentencing scheme does not violate *Blakely* or *Booker* because Cunningham's sixteen-year sentence was within the authorized range of punishment. *Cunningham* thus should clarify whether determinate sentencing schemes that specify more than one possible sentence violate the Constitution and thus provide further guidance for federal legislation in this area.

For all these reasons, for the Congress to move forward with topless guidelines, at least at this time, would be a giant gamble.

IV. Other Legislative Reforms.

A "go slow" approach for now would not imply that Congress could never do anything to improve the sentencing system after *Booker*. Some members of this Subcommittee may be interested in advancing legislation that would attempt to improve specific aspects of the current federal sentencing system. While only the Judicial Conference can speak for the judiciary, we on the Criminal Law Committee can express our willingness to review and discuss any legislation proposed by members of the Judiciary Committee and to pass along our views and recommendations to the Judicial Conference, which will determine the judiciary's official position on the legislation. In that regard, the Subcommittee may wish to examine and evaluate several areas that it might find worthy of further exploration. Again, our thoughts here must

necessarily be tentative, particularly since neither the Justice Department nor any member of this Committee has yet proposed – and the Criminal Law Committee and ultimately the Judicial Conference have not yet considered – specific "*Booker* fix" legislation. We simply indicate here some areas that might be possible starting points for discussion if legislation were to be pursued.

A. The Sentencing Commission Should Be Composed of No Less than Three Judges.

As one way of shoring up and improving the Guidelines system, the composition of the United States Sentencing Commission could be restored to the long-standing membership of "at least three" federal judges. A bit of history will demonstrate the usefulness of restoring the traditional approach.

When the Sentencing Commission was established "as an independent commission in the *judicial* branch of the United States,"[47] the Sentencing Reform Act of 1984 not surprisingly required that "[a]t least three" of the [seven voting] members shall be Federal judges."[48] This decision to require three judges on the Commission was a deliberate choice that was made by the legislative architects of the Sentencing Reform Act.[49] It also made sense to include judicial viewpoints within the Commission. Indeed, in *Mistretta v. United States*,[50] the 1989 case in

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[47] 28 U.S.C. § 991(a) (emphasis added).

[48] *Id.*

[49] *See* UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING, at http://www.ussc.gov/15_year/15year.htm. *See also* S. 1437, 95th Cong., 1st Sess. (1977) (proposing a sentencing commission whose members would be chosen entirely by the Judicial Conference of the United States).

[50] 488 U.S. 361 (1989).

which the Supreme Court upheld the constitutionality of the guidelines against a separation of powers challenge, Justice Blackmun characterized judges as "uniquely qualified on the subject of sentencing" when entering into the deliberations of the Commission.[51]

This was in place for nearly two decades from 1984 until 2003. So far as we are aware, there was no widespread criticism of this particular composition, which insured significant judicial representation on an important agency *within the Judicial Branch of government.*

Then, in 2003, the Sentencing Commission membership was suddenly changed by a provision in the "Feeney Amendment" – section 401 of the Prosecutorial Remedies and other Tools to end the Exploitation of Children Today (PROTECT) Act.[52] We agree that legislation altering the membership of the Sentencing Commission is something that Congress could reasonably evaluate. But what was particularly surprising was the hasty way in which Congress considered this significant change. On the House side, total debate on all the various provisions of the Amendment was restricted to 20 minutes.[53] On the Senate side, no hearings were held on the proposal, despite repeated and urgent requests from a number of Senators.[54] Perhaps even more surprising, Congress did not even consult with the Judiciary. Chief Justice Rehnquist articulated this concern about the process:

> The Judicial Conference believes that this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously

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[51] *Id.* at 404.

[52] Pub. L. No. 108-21, § 401 (2003).

[53] *See* H.R. REP. No. 48

[54] *See, e.g.,* 149 CONG. REC. S5113-01, S5116 (daily ed. April 10, 2003) (remarks of Sen. Kennedy) (his request for a hearing was denied); *id.* at S5133 ("This legislation overturns a unanimous Supreme Court decision, without a single day, hour, or minute of hearings.")

> impair the ability of courts to impose just and responsible sentences. Before such legislation is enacted there should, at least, be a thorough and dispassionate inquiry into the consequences of such action.[55]

Later, the Judicial Conference requested repeal of the measure, explaining: "Because the Judiciary and the U.S. Sentencing Commission were not consulted prior to enactment, the [Judicial] Conference [has] voted to support repeal of the . . . provisions of the . . . PROTECT Act limiting the number of judges who may be members."[56] In short, it seems hard to disagree with the assessment of one observer that the Feeney Amendment "was forced through the Congress with virtually no debate and without meaningful input."[57]

While the Feeney Amendment addressed many topics, the anti-judges provision was heavily criticized from the start[58] and it was never entirely clear who proposed the idea and why. To our knowledge, no one has subsequently justified in any detail the decision to reduce the number of judges. The provision to change the number of judges from "at least three" to "no more than three" was not even mentioned in the explanatory section of the Conference Committee report provided to members of Congress before they voted on the bill.[59] The only rationale we have been able to locate in the legislative record is a second-hand statement attributed to one member of Congress that "We don't want to have the Commission packed with

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[55] Letter of Chief Justice Rehnquist, *reprinted in* 149 CONG. REC. at S5120.

[56] *See* News Release, Administrative Office of the United States Courts, Sept. 23, 2003 *available at* http://www.uscourts.gov/Press_Releases/jc903.pdf.

[57] 50 CONG. REC. S8572-01, S8573 (daily ed. July 21, 2004) (remarks of Sen. Leahy).

[58] *See generally* Laurie Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J. (Aug. 6, 2003), *available at* 2003 WL-WSJ 3976244.

[59] *See* H. R. CONF REP. 108-066, *reprinted at* 149 CONG. REC. H2950, 2965 (daily ed. April 9, 2003).

Federal judges that have a genetic predisposition to hate any kind of sentencing guidelines."[60] Of course, many federal judges are, if anything, predisposed to favor the Sentencing Guidelines.[61] It may be worth recalling the originator of the very idea of federal sentencing guidelines was Judge Marvin E. Frankel of the United States District Court for the Southern District of New York.[62] In the years since the creation of the Sentencing Commission, many judges have served with distinction on the body with no evident predisposition to undercut the Commission's Guidelines.

Perhaps the reason for the Feeney Amendment change was some sort of symbolic attack on judges. But if so, this symbolism has been purchased at the price of creating a very real basis for defendants to attack the Guidelines on separation of powers grounds. As noted above, the presence of at least three judges on the Sentencing Commission may have been one reason why the Supreme Court upheld the constitutionality of the Sentencing Commission in *Mistretta*. Suggesting that this change in the composition of the Commission is serious enough to raise *Mistretta* concerns, Federal District Judge Owen M. Panner has described the situation in this way:

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[60] 149 Cong. Rec. at S5146 (Apr. 10, 2003) (statement of Sen. Leahy attributing quotation to Rep. Sessenbrenner).

[61] *See, e.g.,* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (Fall 1988); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (Spring 1990); William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63 (Winter 1993); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

[62] *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

> We are thus left with a strange creature that is nominally lodged within the Judicial Branch, and purports to be performing duties of a judicial nature, *yet need contain no judges*, does not answer to anyone in the Judicial Branch, and into which the Judicial Branch is assured no input, whether substantively or in selecting the members of the Commission.[63]

Judge Panner's conclusion led him to strike down the federal sentencing guidelines as violating the separation of powers doctrine and as therefore unconstitutional. It is noteworthy that *Detwiler* involves a serious sex offender – thus, the PROTECT Act may have, unwittingly, given ammunition to sex offenders to challenge their sentences. Judge Panner's remedy was to treat the guidelines as purely advisory.[64] Because the Supreme Court came to an equivalent conclusion in *United States v. Booker*,[65] Judge Panner's remedy was effectively mooted in that particular case. Yet his concerns and his reasoning remain a serious concern. Defense attorneys and academics have suggested that the Guidelines remain vulnerable to attack on precisely this ground.[66] As Harvard Law Professor Carol Steiker has written, "[as a result of the Feeney Amendment] the President's relationship to the Commission and its members is functionally no different than his relationship to any other independent agency within the Executive Branch."[67]

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[63] *See United States v. Detwiler*, 338 F. Supp. 2d 1166, 1173 (D. Or. 2004) (emphasis added).

[64] *Id*. at 1182.

[65] 543 U.S. 220 (2005).

[66] *See, e.g.,* Jaime Escuder, *Congressional Lack of Discretion: Why the Feeney Amendment is Unwise (and Perhaps Unconstitutional)*, 16 FED. SENTENCING REPT'R 276, 276-77 (April 2004); Memorandum of Amicus Curiae, Professor Carol Steiker, In Support of Defendant, *United States v. Dansby*, Criminal No. 03-10066-DPW (D. Mass. 2004).

[67] Memorandum of Amicus Curiae, Professor Carol Steiker, In Support of Defendant, *United States v. Dansby*, Criminal No. 03-10066-DPW (D. Mass. 2004) at 7.

And legal commentator Jaime Escuder has noted, "This new institutional arrangement is problematic because, by edging judges out of the sentencing process, the Feeney Amendment removes a critical check on the Executive's ability to design a sentencing structure that is biased in its favor. Thus, guidelines produced by a Commission dominated by the Executive would be constitutionally suspect as they would be tainted by the partiality of the Executive Branch."[68]

Even if there is not strictly speaking a constitutional requirement for restoring the judicial composition of the Sentencing Commission, good prudential reasons for doing so remain. Judges have considerable expertise on sentencing issues, as they regularly sentence defendants or review sentencing appeals in the course of their daily work. Indeed, it is hard to think of any group that, as a class, has more expertise in the area. For all these reasons, the Conference continues to urge this Subcommittee to pass legislation restoring membership of the Sentencing Commission to its traditional composition of "no less than" three judges.

B. Encourage the Sentencing Commission to Create a Standard Methodology for Determining Sentences.

The Criminal Law Committee would be interested in discussing whether ways can be found to have the Sentencing Commission promulgate a standardized methodology that district courts could use when determining an appropriate sentence. A standard methodology might be one way of minimizing unwarranted sentencing disparities.

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[68] Jaime Escuder, *Congressional Lack of Discretion: Why the Feeney Amendment is Unwise (and Perhaps Unconstitutional)*, 16 FED. SENTENCING REPT'R 276, 276-77 (April 2004).

The idea that we will be discussing and evaluating rests on clarifying whether judges should employ a three-step or two-step process in determining an appropriate sentence. The Sentencing Commission has generally recommended that sentencing judges employ a three-step method in determining an appropriate sentence: (1) determine the specific Guideline applicable, including resolving any disputed and relevant Guidelines issues; (2) determine whether any departures under the Guidelines are proper; and only then (3) determine whether some sort of "variance"[69] from the Guidelines is appropriate in light of all the sentencing factors spelled out in 18 U.S.C. § 3553(a).[70] Our understanding is that many district judges around the country have been following this general approach.

It does appear, however, that there may be a split in approach developing on this methodological issue. In *United States v. Arnaout*,[71] the Seventh Circuit held that "the concept of 'departures' has been rendered obsolete in the post-*Booker* world."[72] The Court in *Arnaout* stated, as it did in earlier in *United States v. Johnson*,[73] that "what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory."[74] In the Seventh Circuit, then, it appears that judges follow a two-step

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[69] *See United States v. Wilson*, 355 F.Supp.2d 1269, 1272 (D. Utah 2005) (explaining "departure" vs. "variance" language).

[70] See *House Judiciary Comm: Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm*., 109th Cong., 1st Sess. 14-15 (2005) (statement of Hon. Ricardo Hinojosa).

[71] 431 F.3d 994 (7th Cir. 2005).

[72] *Id.* at 1003.

[73] 427 F.3d 423, 425 (7th Cir. 2005).

[74] *Id.*

process to determine an appropriate sentence – that is, first determining the guideline and then determining whether to reduce the sentence for any appropriate reason (based on a departure or otherwise).

The Fourth Circuit has specifically disagreed with the Seventh Circuit.[75] In an opinion authored by Chief Judge William Wilkins (a former chair of the Sentencing Commission), the Circuit held: "We believe, however, that so-called 'traditional departures' – i.e., those made pursuant to specific guideline provisions or case law – remain an important part of sentencing even after *Booker*."[76] The Fourth Circuit noted that "the continuing validity of departures in post-*Booker* federal sentencing proceedings has been a subject of dispute among the circuits."[77] It explained that, in contrast to the Seventh Circuit, the Sixth Circuit had stated that consideration of a departure is part of calculating the correct guideline range[78] and that the Eighth Circuit had held that district courts must decide whether a "traditional departure" is appropriate after calculating the guideline range and before deciding whether to impose a variance sentence.[79]

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[75] Academic commentators have disagreed as well. *See, e.g.,* http://sentencing.typepad.com/sentencing_law_and_policy/2005/12/booker_discussi.html (Prof. Douglas Berman opines that "[g]iven that the U.S. Sentencing Commission has stressed that departures are not obsolete after *Booker*, and that certain kinds of departures are expressly encouraged and discouraged by the guidelines, I find the Seventh Circuit's obsolescence assertion curious and in tension with its view that a guideline sentence is presumptively reasonable.").

[76] *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir. 2006).

[77] *Id.*

[78] *Id. (citing United States v. McBride*, 434 F.3d 470, 2006 WL 89159, at *4 (6th Cir. Jan. 17, 2006)).

[79] *Id. (citing United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006)).

Our limited point here is not to criticize any of the competing approaches to current law carefully adopted by the various circuits. Instead, we simply raise for this Subcommittee the idea that, for the future, it may be desirable to develop a standardized approach to the procedural issue of how judges should go about determining sentences. One possible way of handling the matter would be to direct the Sentencing Commission to promulgate policy statements or other appropriate guidance in the Guidelines manual for how to deal with the issue. But the more basic point is that it may be a desirable step towards avoiding unwarranted sentencing disparity to have all courts following the same methodology in determining appropriate sentences.

C. Review the Consistency of Substantial Assistance Sentence Reductions Across the Country.

It may be appropriate to consider ways in which the handling of sentence reductions for "substantial assistance" to government authorities could be improved. However, that any consideration of substantial assistance could appropriately scrutinize not only judicial discretion but also *prosecutorial* discretion.

The Justice Department has been concerned about cases in which trial judges have departed downward for "substantial assistance" to government authorities, even when the government had not made such a motion. As is well known, the law before *Booker* was that a court could not depart downward on this ground (also known as § 5K1.1 departure) without a government motion.[80] After *Booker*, while courts cannot use a "departure" for substantial

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[80] *See, e.g., Wade v. United States*, 504 U.S. 181 (1992) (court could only grant assistance departure if prosecutor's refusal was based on a constitutional motive); *United States*

assistance as a basis for lowering a sentence,[81] it appears that they can use a "variance"[82] to lower a sentence without a government motion.

From a national perspective, the number of non-government-sanctioned substantial assistance departures does not appear to be significant. Data released by the United States Sentencing Commission this week suggested that such a departure apparently occurred in perhaps 258 cases over roughly the last year. Given that there were more than 65,000 sentencings during the same period of time, this means that the issue arose in only about 0.4% of all cases (roughly 1 out of every 233 cases). Moreover, the Commission's data may overstate the true extent of this issue. The Commission was able to identify 258 cases in which a substantial assistance reduction was given and the Commission was unable to *confirm* a government motion. It is entirely possible that at least some of these cases involved situations where the government made a motion for a downward adjustment (or, perhaps, acquiesced in the adjustment) but that the Commission was merely unable to confirm the government's actions based on the records available – a possibility that the Commission itself acknowledges.[83] We hope to be able to review case files to determine whether this hypothesis is correct in the near future. Finally, and most significantly, of the 258 cases, it appears that the vast bulk involve situations where other good grounds existed for a downward reduction in sentence. The Commission reports that

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v. Abuhouran, 161 F.3d 206 (3rd Cir. 1998) (rejecting argument that court could reduce sentence for substantial assistance in the absence of a prosecutor's motion).

[81] *See, e.g., United States v. Vasquez*, 433 F.3d 666, 670 (8th Cir. 2006).

[82] *See United States v. Wilson*, 355 F.Supp.2d 1269, 1272 (D. Utah 2005) (explaining "departure" vs. "variance" language).

[83] *See* *BOOKER* IMPACT REPORT, *supra* note 4, at 113.

"[o]nly 28 of the 258 cases cite one of these reasons [i.e., substantial assistance] as the *only* reason for the non-government-sponsored, below-range sentence."[84]

Moreover, given the tiny number of cases involving this issue, any inappropriate actions by district court judges should be readily correctable by government appeal. In that connection, it is interesting to learn that there are virtually no published post-*Booker* appeals on this subject. Indeed, a preliminary review of appellate court decisions on this issue was unable to produce a single published decision rejecting a government appeal of a district court's substantial assistance reduction without a government motion. If such reductions are inappropriate and creating serious problems for the government, one would expect to see regular appellate court reversals of district court sentences. Perhaps such appeals are currently in "the pipeline." If not, the government's failure to file appeals in this area may be a simple continuation of the problem identified by the PROTECT Act, where Congress manifested its desire for the Justice Department to file more appeals of downward departures.[85] Perhaps any problem here can be solved not by changing the legal framework, but simply by the government availing itself of the existing appellate process. There is every reason to believe that the appellate courts are prepared and effective at dealing with any real, case-by-case post-*Booker* problems.

To be fair to the Justice Department, their concern about substantial assistance reductions without a government motion is understandable. The Justice Department might reasonably claim

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[84] *Id.* (emphasis added).

[85] Section 401(*l*) of the PROTECT Act required the Attorney General to submit a report "which state[d] in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act . . . to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse [sentencing] decisions" as downward departures."

superior institutional capacity to evaluate assistance from cooperators. And it is plausible that evidence might show that some defendants have declined to provide full cooperation to the government because they thought they could persuade a judge to nonetheless give them a sentence reduction. It would be worthwhile to examine any evidence the Justice Department has on this point and, if a real problem exists, work with the Department to discuss appropriate corrective legislation.

Nonetheless, even if there is a modest problem with defendants who decide to take their chances with a judge, today the far more widespread problem with substantial assistance motions is the radical inconsistency with how government prosecutors handle these motions from district-to-district.[86] This point was most powerfully raised in the Sentencing Commission's 1998 report – "Substantial Assistance: an Empirical Yardstick Gauging Equity in Current Federal Policy and Practice."[87] That report reached these disconcerting conclusions:

> First, this analysis uncovered that the definition of "substantial assistance" was not being consistently applied across the federal districts. Not only were some districts considering cooperation that was not being considered by other districts, but the components of a given behavior that classified it as "substantial" were unclear.
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> Second, while the U.S. attorney offices are required to record the reason for making a substantial assistance motion, there is no provision that this

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[86] *See generally* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1344 (1993)

[87] U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE (1998). This report is available at this link: http://www.ussc.gov/publicat/5kreport.pdf.

> information be made available for review. It is exactly such a lack of review, inherent in preguideline judicial discretion, that led to charges of unwarranted sentencing disparity and passage of the SRA. . . .
>
> Third, the evidence consistently indicated that factors that were associated with either the making of a § 5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity. Expected factors (e.g., type of cooperation, benefit of cooperation, defendant culpability or function, relevant conduct, offense type) generally were found to be inadequate in explaining § 5K1.1 departures. Even more worrisome, legally irrelevant factors (e.g., gender, race, ethnicity, citizenship) were found to be statistically significant in explaining §5K1.1 departures. . . .[88]

Since this report was prepared in 1998, there is little reason for believing that substantial assistance practices have improved. Former Attorney General Ashcroft's memo addressing charging decisions of prosecutors provides no guidelines on § 5K1.1 motions, except to say that it is "not appropriate to utilize substantial assistance motions as a case management tool to secure plea agreements and avoid trials."[89] Moreover, an analysis of disparities in white-collar crime cases published in 2003 in *The Pepperdine Law Review* found widespread disparity:

> Downward departures for substantial assistance under Section 5K1.1 are a relatively significant source of white-collar sentencing disparity. . . . An analysis

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[88] *Id.* at 20-21.

[89] Memo Regarding Policy on Charging of Criminal Defendants, from John Ashcroft, Attorney General, to All Federal Prosecutors (September 22, 2003). This memorandum is available at this link: http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

of substantial assistance departures at the circuit and district level indicates the existence of disparity throughout the country.[90]

The most recent statistics from the Sentencing Commission confirm that government practices on substantial assistance motions continue to vary widely from district to district after *Booker*. To pick a few illustrations of geographically-adjacent jurisdictions with widely varying percentages of substantial assistance motions by the government:[91]

New Hampshire 27.6%	vs.	Massachusetts 9.9%
New Jersey 30.9%	vs.	Delaware 5.6%
Middle District of Pennsylvania 35.7%	vs.	Western District of Pennsylvania 11.9%
Eastern District of North Carolina 34.4%	vs.	Middle District of North Carolina 12.0%
Western District of Virginia 23.8%	vs.	Eastern District of Virginia 6.4%
Northern District of Mississippi 16.1%	vs.	Southern District of Mississippi 9.3%
Eastern District of Michigan 27.4%	vs.	Western District of Michigan 15.4%
Central District of Illinois 20.4%	vs.	Southern District of Illinois 4.2%
Eastern District of Wisconsin 13.9%	vs.	Western District of Wisconsin 3.8%
North Dakota 17.3%	vs.	South Dakota 5.0%
Eastern District of California 15.1%	vs.	Central District of California 4.8%
Middle District of Florida 22.9%	vs.	Southern District of Florida 9.4%
Idaho 30.5%	vs.	Utah 8.5%

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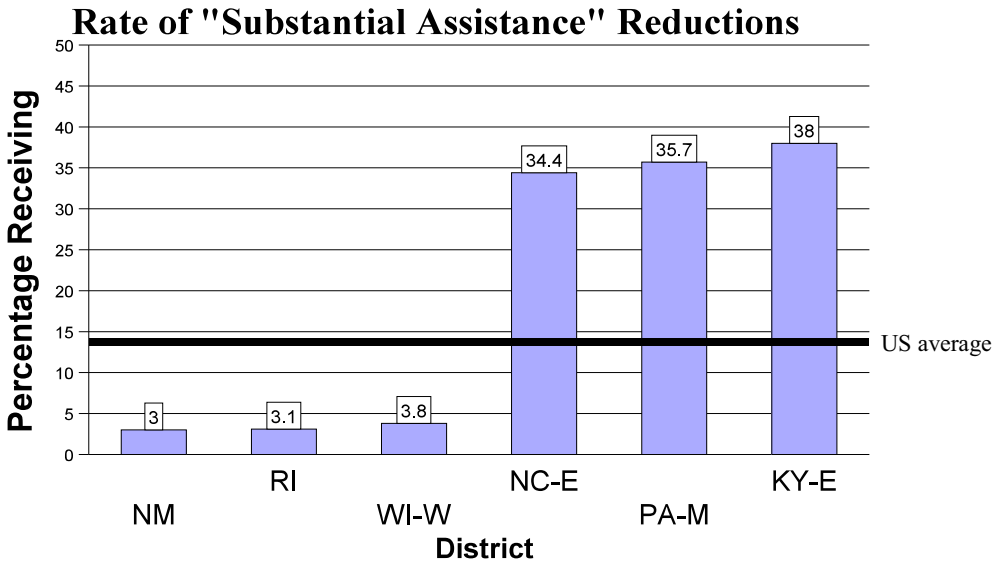
[90] Comment, Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 516 (2003).

[91] U.S. SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE CASES: DEGREE OF DEPARTURE BY SENTENCING DISTRICT (data as of February 22, 2006) (attached to this testimony as Appendix A); *see also BOOKER* IMPACT REPORT, *supra* note 4, at D-20 to 21 (reporting widely varying percentages of government-sponsored below-guidelines sentences).

To be sure, some part of the variations in these district may stem from legitimate differences in the kinds of cases being handled. But it is hard to understand, for example, why the number of government-sponsored motions for substantial assistance in my own District of Utah is *four times* lower than in the adjacent (and apparently quite comparable) District of Idaho.

The same pattern of disparity recurs if one looks not at all government-sponsored below-guidelines sentences, but government-sponsored substantial assistance sentences. Compared to a national average of 14.4% of cases in which a substantial assistance sentence is imposed, as shown in the following chart regional variations abound.



Source: United States Sentencing Commission Data
Prepared by: Administrative Office of the U.S. Courts

These data suggest tremendous disparity and unfairness in the way the Justice Department chooses to file its motions for substantial assistance reductions – indeed, the very kind of inter-district disparity that spawned the Sentencing Guidelines in the first place. Moreover, the number of defendants treated unfairly due to Justice Department disparity dwarfs the 258 cases

mentioned above in which judges may have initiated a variance for substantial assistance. Literally thousands and thousands of defendants are being treated unfairly if, as the data strongly suggests, prosecutors in different districts are using different standards for approving substantial assistance motions.[92]

In light of all these facts, the Criminal Law Committee would be interested in having a broad discussion with the Justice Department and this Subcommittee about ways in which the handling of substantial assistance issues might be improved – by both judges *and* prosecutors.

D. The Appellate Process.

Some members of this Committee may be interested in changing the standard of appellate review regarding sentencing decisions. Reasonable minds can differ on the subject of whether any change is needed, but if this Subcommittee decides to consider changes, the Criminal Law Committee would certainly be willing to discuss this subject.

The remedial opinion in *Booker* crafted the current "reasonableness" standard by excising other, unconstitutional provisions in the Sentencing Reform Act. As Justice Breyer explained, the Court was forced to "infer appropriate review standards from related statutory language, the structure of the statute, and the sound administration of justice."[93]

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[92] It also possible that similar disparity problems lurk in the way in which government prosecutors are handling "fast track" programs for illegal re-entry cases. *See generally* Comment, Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Polices Along the Southwest Border are Undermining the Sentenicng Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827; *United States v. Perez-Chavez,* No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252 (D.Utah May 16, 2005).

[93] *United States v. Booker*, 543 U.S. 220, 258 (2005) (remedial majority opinion).

The appellate court decisions on reasonableness have only recently begun to appear. Indeed, not every circuit has spoken on this subject. As the Sentencing Commission observed in its report on *Booker* released this week:

> [T]he evolution of appellate jurisprudence occurs gradually rather than overnight. Thus, issues known to be of interest to the Commission and the rest of the criminal justice community have not been answered in all circuits.[94]

And, of course, the Supreme Court has yet to weigh in on the subject of precisely what post-*Booke*r appellate review is. In light of these facts, it may well be premature to reach any firm conclusions about the *post-Booke*r standard of appellate review. The Justice Department is perfectly situated to help bring clarity to this area, by seeking certiorari from the Supreme Court in an appropriate case regarding appellate review standards. A Supreme Court decision on the subject would be an ideal way to both clarify what the current standard is and what room may constitutionally exist for corrective legislation.

If nonetheless the Subcommittee believes that some immediate change is required to the appellate review standard, the Criminal Law Committee would be glad to discuss the matter with this Subcommittee (and to refer proposed legislation to the Judicial Conference for its authoritative views on behalf of the Judiciary). Changing the appellate standard, however, is a complex enterprise. Just as "topless guidelines" may depend upon the continued viability of the *Harris* decision, so changing the appellate standard could also have constitutional implications under *Booker* itself. Moreover, members of this Subcommittee ought to be aware of two

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[94] *BOOKER* IMPACT STATEMENT, *supra*, at 35.

competing concerns when crafting such legislation: the need to recognize that trial court judges have primary, initial responsibility for imposing sentences and the need to allow appellate court panels sufficient power to insure that district judges have applied the law properly and exercised any discretion reasonably.

On the one hand, trial court judges must have primary, initial responsibility for determining criminal sentences. Judging generally, and sentencing particularly, should never become an act of bureaucratic administration. Sentencing is a quintessentially human event – a sentencing judge literally looks a defendant in the eyes when imposing a sentence. There would be a very high cost to our system of justice if responsibility for sentencing were simply shuttled off to appellate judges to be done on the basis of paper pleadings. Moreover, many sentencing decisions revolve around factual questions: Was the defendant a major player or a minor player in the criminal organization? Was a firearm used to commit the crime? Is the defendant truly remorseful for his actions? What were the physical, emotional, and financial consequences of the crime to the victims? These kinds of factual determinations are traditionally the province of the trial court, not the appellate court.

Even the Guidelines themselves recognize the fundamental fact that the most appropriate sentence cannot be calculated with mathematical precision. Each guideline range varies by 25% from the top to the bottom. Reasonable judges may, of course, differ within that range. In essence, sentencing involves the exercise of some judgment and federal district judges are in the best position to make those judgments initially, subject to appellate review to make sure they have acted properly.

On the other hand, of course trial court judges are imperfect and, on occasion, can make mistakes or idiosyncratic sentencing decisions. Sentencing decisions (no less than the manifold other decisions made by trial courts) should be subject to appropriate appellate review. Appellate review of sentences may play an important role in reducing disparities that could otherwise develop if each individual district court judge was given an unbridled, final say over what sentence should be imposed. It is no secret that different judges sometimes have different sentencing philosophies. Indeed, it was precisely this concern about disparate trial court decisions that lead Congress to pass the Sentencing Reform Act in 1984 and to create the sentencing guideline system.

The history of appellate review of sentences reflects these twin concerns. Before the Sentencing Reform Act of 1984, appellate court review of sentences was very limited. As the Supreme Court later described it, appellate review was virtually non-existent:

> For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long . . . . This led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge "sees more and senses more" than the appellate court; thus, the judge enjoyed the "superiority of his nether position," for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal.[95]

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[95] *Id.* at 363–64; *Mistretta v. United States*, 488 U.S. 361 (1989).

In 1984, Congress passed the Sentencing Reform Act. This Act "altered th[e] scheme" of virtually unreviewable sentences "in favor of a limited appellate jurisdiction to review federal sentences."[96] In particular, the Act authorized appellate review in four instances. Appellate courts were to determine whether the sentence: (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) was outside the applicable guideline range without adequate district court explanation or for impermissible reasons; or (4) was imposed for an offense for which there was no applicable sentencing guideline and was plainly unreasonable.[97]

In 1996, the U.S. Supreme Court said in *Koon v. United States*[98] that while these provisions manifested Congress's "concern[] about sentencing disparities," the Act did not, "by establishing limited appellate review, . . . vest in appellate courts wide-ranging authority over district court sentencing decisions."[99] *Koon* also quoted with approval the Supreme Court's 1992 decision in *Williams v. United States*:

> Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. . . . The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.[100]

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[96]*Koon v. United States*, 518 U.S. 81, 96 (1996).
[97]*See* 18 U.S.C. § 3742(e).
[98]518 U.S. 81 (1996).
[99]*Id.* at 97.
[100]*Id.* (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)) (quotation marks and citations omitted).

The Supreme Court in *Koon* thus held that a district court's decision to depart from the guidelines should be reviewed for abuse of discretion.[101]

The PROTECT Act of 2003 modified the *Koon* decision by requiring courts of appeals to "review de novo the district court's application of the guidelines to the facts" when reviewing certain sentences imposed outside of the applicable guideline range, a change the Conference has opposed.[102]

Then came the *Booker* decision in 2005. It excised as unconstitutional the provision in the Sentencing Reform Act that "sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range."[103] In its place, the Court in *Booker* read the Sentencing Reform Act "as implying th[e] appellate review standard [of reasonableness] — a standard," it said, that was "consistent with appellate sentencing practice during the last two decades."[104] The result is that today appellate courts review trial court sentencing decisions for "reasonableness" by examining "the factors set forth in 18 U.S.C. § 3553(a)" and "the now-advisory Guidelines."[105]

Given this history and the twin concerns of the need to individualize sentences and provide appellate review to protect against unwarranted disparities, crafting appropriate standards of appellate review is a difficult balancing act. We would hope that this Subcommittee would

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[101] *Id.* at 99–100.
[102] *See* 18 U.S.C. § 3742(e).
[103] 543 U.S. 220, 259 (2005) (citing 18 U.S.C. § 3742(e)).
[104] *Id.* at 261–62.
[105] *United States v. Kristl*, 437 F.3d 1050, 2006 WL 367848 (10th Cir. 2006).

consult with the Conference and with others interested in the subject before legislating in this area.

E. Expand Judicial Authority to Order Supervised Release.

The Criminal Law Committee would be interested in discussing and evaluating ways of expanding a judge's ability to monitor dangerous defendants by extending permissible terms of supervised release.

Current law imposes sharp limits on the length of time federal judges can supervise dangerous offenders (including some sex offenders) after they are released from prison. For example, under current law, a judge is generally only authorized to impose a five-year term of supervised release for conviction on a Class A or B felony and a three-year term of supervised release for a Class C or D felony.[106] It is noteworthy that, despite research suggesting that sex offenders are four times more likely than other violent offenders to recidivate,[107] these limits apply even in some sex offense cases. Although federal law permits a judge to impose a term of supervised release for any term of years or life in some cases, the judge may only order such lengthy terms of supervision in cases involving specifically enumerated offenses.[108]

Even when an offender is charged with multiple counts – each of which carries a term of supervised release – it is generally believed that the judge may not "stack" terms of supervised

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[106] *See* 18 U.S.C. § 3583(b) (noting time limits associated with Class A, B, C, D, and E felonies).

[107] *See* Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* at 1, available at: http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[108] *See* 18 U.S.C. § 3583(k) (identifying specified crimes that allow supervised release terms in excess of those otherwise authorized by § 3583(b)).

release (to be executed consecutively), but must impose them concurrently. A number of circuit courts have interpreted the language of 18 U.S.C. § 3624(e) as precluding the stacking of terms of supervised release.[109]

In some situations, the existing narrow limits on supervised release can restrict a judge from keeping supervision over a potential dangerous defendant after release even where additional supervision might be appropriate. For example, in *United States v. Philip Abraham Ochoa*,[110] I recently sentenced a previously-convicted felon and a documented Nortenos gang member. The defendant pleaded guilty to possession of a loaded sawed-off shotgun that he had been holding while driving in Salt Lake City traffic. He had previously been convicted of multiple felony counts over fifteen years, including Battery, False Imprisonment, Attempted Assault, Attempted Receipt of a Stolen Vehicle, Forgery, Assault, Theft, and Burglary, resulting in 19 criminal history points. With a resultant criminal history category of VI (the highest possible), and a base offense level of 17, the Guidelines recommended a range of 51-63 months in prison. Additionally, the Statutory Provisions for a supervised release term only allowed for a period of less than three years.[111] Given the defendant's criminal history, and especially given his gang membership and dangerous criminal activities, I believe that a three-year term of supervised release was much too short. Yet current law gave me no choice on the matter.

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[109] *See United States v. Danser*, 270 F.3d 451, 454 (7th Cir. 2001); *United States v. Alvarado*, 201 F.3d 379, 382 (5th Cir. 2000); *United States v. Bailey*, 76 F.3d 320, 323-24 (10th Cir. 1996); *United States v. Sanders*, 67 F.3d 855, 856 (9th Cir. 1995).

[110] Case No. 2:05-CR-594 PGC (D. Ut. Feb. 28, 2006).

[111] *See* 18 U.S.C. § 3583(b)(2).

Also worth discussing is whether an amendment to 18 U.S.C. § 3583(b), permitting judges to impose longer terms of supervised release in appropriate cases (those involving particularly dangerous defendants or aggravated crimes) would allow judges to better tailor their sentencings to the specific circumstances of the case and better protect the public from depredations by repeat offenders. For example, judges might be given the authority, if they thought it appropriate in light of all circumstances, to impose a term of supervised release twice as long as that otherwise authorized by statute in situations involving repeat criminal offenders or particularly dangerous crimes (such as sex offenses).

Another area to explore is whether longer terms of supervised release in situations where criminals have substantial restitution to pay to their victims. There may be cases in which it is appropriate to extend a term of supervised release so that the court can continue to insure that restitution is being paid. Of course, direct judicial ability to enforce a restitution order terminates when supervision terminates.

As part of the ongoing cost containment efforts endorsed by the Judicial Conference,[112] the judiciary has pursued a program that allows judges to bring an early termination to terms of supervised release when offenders have demonstrated that they no longer require supervision.[113] The concept of authorizing expanded supervised release authority to judges does not contradict this policy, but augments it. Instead of terminating all offenders' terms of supervision on an

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[112] *See* JCUS-SEP 04, pp. 6-7.

[113] *See* John Hughes, Memorandum to All Chief Probation Officers: New Criteria for Assessing Early Termination of Supervision (Oct. 30, 2002), available at: http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2002_Memos/New_Criteria_for_Assessing_Early_Termination_of_Supervision.html.

early basis (thereby compromising public safety), and instead of doubling the length of all offenders' terms (unnecessarily driving up costs), the model that the Criminal Law Committee is interested in discussing and evaluating may permit judges to better use their discretion to respond to the specifics of the case.

Supervised release is costly with meaningful budgetary effects. It costs an estimated $3,452 annually to supervise each of the offenders under federal supervision.[114] Expanding supervision terms would therefore likely require increased expenditures for probation officers. Nonetheless, given that it costs $23,205 annually to incarcerate each prisoner in Bureau of Prisons custody,[115] it is possible that this would be taxpayer money well spent, particularly when compared to the cost of prison – and the cost to crime victims if an unsupervised offender commits a new crime.

F. Give Judges Authority to Prevent Profiteering by Criminals

The Criminal Law Committee would like to explore and evaluate ways of giving judges sufficient ability insure that criminals do not profit from their crimes. The current federal law on the subject may be unconstitutional, yet neither the Justice Department nor the Congress has taken steps to correct the problem. It would be an embarrassment to the federal system of justice if criminals were able to be profit from their crimes. We believe that corrective legislation could be easily drafted, by giving judges discretionary power to prevent profiteering.

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[114] *See* John Hughes, Memorandum to All Chief Probation Officers: Cost of Incarceration and Supervision (Apr. 15, 2005), available at: http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2005_Archive/PPS41505.html.

[115] *Id*.

By way of background, the federal criminal code, like the codes of various states, contains a provision concerning forfeiture of profits of crime. This provision, found in 18 U.S.C. § 3681, allows federal prosecutors to seek a special order of forfeiture whenever a violent federal offender will receive proceeds related to the crime. Congress adopted this statute in 1984[116] and modeled it after a New York statute popularly known as the "Son of Sam" law.[117] In 1977, New York passed its law in response to the fact that mass murderer David Berkowitz received a $250,000 book deal for recounting his terrible crimes.

In 1991, the United States Supreme Court found that the New York Son of Sam law violated the First Amendment. In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*,[118] the Court explained that the New York law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[119] The New York statute that was struck down covered reenactments or depictions of crime by way of "a movie, book, magazine article, tape recording, phonograph record, radio, or television presentation, [or] live entertainment of any kind."[120]

The federal statute is widely regarded as almost certainly unconstitutional, as it contains language that is almost identical to the problematic language in the old New York statute. In particular, the federal statute targets for forfeiture depictions of a crime in "a movie, book,

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[116] Pub. L. 98-473, Oct. 12, 1984, 98 Stat. 2175.
[117] N.Y.Exec.Law § 632-a (McKinney 1982 and Supp.1991).
[118] 502 U.S. 105 (1991).
[119] *Id.* at 116.
[120] N.Y. Exec. Law § 632-a(1) (McKinney 1982), *reprinted in* 502 U.S. at 109.

newspaper, magazine, radio or television production, or live entertainment of any kind."[121] Thus, it can easily be argued by criminal defendants that the statute contains the same flaw – the targeting of protected First Amendment activity – that the Supreme Court found unconstitutional in the New York statute. Indeed, the Supreme Court in *Simon & Schuster* cited the federal statute as similar to that of New York's.[122] Moreover, current guidance from the Justice Department to its line prosecutors is that this law cannot be used.[123]

Unfortunately, neither the Department of Justice nor Congress have taken steps to revise the defective federal anti-profiteering statute in the wake of *Simon & Schuster*. Fortunately, there appears to be a relatively straightforward and constitutional solution available to Congress. As the Massachusetts Supreme Court has recognized in analyzing *Simon & Schuster*, nothing in the First Amendment forbids a judge from ordering in an appropriate case, as a condition of a sentence (including supervised release), that the defendant not profit from his crime. As *Commonwealth v. Powers*[124] explains, such conditions can be legitimate exercises of court power to insure rehabilitation of offenders and to prevent an affront to crime victims. These conditions do not tread on First Amendment rights, because they do not forbid a criminal from discussing or writing about a crime. Instead, they simply forbid any form of "profiteering."

It is worth discussing whether judges should have the power to order, in an appropriate case, that a term of supervised release be extended beyond what would otherwise be allowed for the sole purpose of insuring that a criminal not profit from his crime. In a notorious case, upon

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[121] 18 U.S.C. § 3681(a).
[122] *See* 502 U.S. at 115.
[123] *See* DOJ Criminal Resource Manual 1105.
[124] 650 N.E.2d 87 (Mass. 1995).

appropriate findings, a judge might be empowered to impose a term of supervised release of life with the single extended condition that a criminal not profit from his crime. It may also be possible to simply revise the federal anti-profiteering statute so that it complies with the Constitution and broadly forfeits all profits from a crime, not just profits from First Amendment activity. It may also be possible to redraft the federal anti-profiteering law.[125] The Criminal Law Committee would be happy to discuss these areas further.

G. Give Judges Greater Ability to Award Proper Restitution.

Also worth examining is whether judges should be given greater statutory authority to order convicted criminals to pay restitution to their victims. Current federal law authorizes judges to order restitution only in certain narrow categories, such as to compensate for damage to property or medical expenses. These narrow categories have lead to considerable litigation about whether various restitution awards were properly authorized by statute. But in the midst of resolving those disputes, a larger point has been missed: that judges should have broad authority to order defendants to make restitution to restore victims to where they would have been had no crime been committed.

The Supreme Court has held that a district court's power to order restitution must be conferred by statute.[126] The main federal restitution statutes – 18 U.S.C. §§ 3663 and 3663A –

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[125] I have offered my own tentative personal opinions on these subjects in Testimony of Paul G. Cassell Before the U.S. Sentencing Commission Regarding Protecting Crime Victims' Rights in the Sentencing Process (Mar. 15, 2006).

[126] *Hughey v. United States*, 495 U.S. 411, 415-16 (1990); *see also United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998) ("It is well-established that a federal court may not order restitution except when authorized by statute."); *United States v. Helmsley*, 941 F.2d 71, 101 (2d

permit courts to award restitution for several specific kinds of loss, including restitution for loss of property, medical expenses, physical therapy, lost income, funeral expenses, and expenses for participating in all proceedings related to the offense. The statutes contain no general authorization for restitution to crime victims, even where such restitution is indisputably just and proper.

A case I handled last week will illustrate the problem. In *United States v. Gulla*,[127] I sentenced a defendant for the crimes of bank fraud and aggravated identity theft. Ms. Gulla had pled guilty to stealing out of the mail personal information from more than ten victims, and then running up false credit charges of more than $50,000. Government search warrants recovered an expensive Rolex watch and eleven leather jackets purchased by Ms. Gulla. Following the recommendation of the government, I sentenced Ms. Gulla to a term of 57 months in prison. I also ordered her to pay restitution for the direct losses she caused.

But the victim impact statements in the case revealed that they had suffered more than just financially from these crimes. One victim wrote about the considerable time expended on straightening things out:

> I was 71 years of age when two fraudulent checks were written on courtesy checks that were stolen from my mailbox. . . . There is no way to describe the frustration and time involved in contacting the various financial institutions, to determine if there were any other fraudulent charges. We had to stop automatic withdrawals since there were not funds available to cover the checks. We are

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Cir. 1991) ("Federal court have no inherent power to order restitution. Such authority must be conferred by Congress.").

[127] 2:05-CR-634-PGC (D. Utah Mar. 8, 2006).

> grateful that we did not have to cover the checks because this would have been a problem. There was considerable time and frustration involved in getting everything straightened out. I believe that justice should be satisfied and the guilty person be held accountable for breaking the law. Even to this day we worry about someone tampering with our mail. We have investigated a locked mail box and have not made any decision as yet.

Another victim wrote that she spent a great deal of time clean up her credit:

> My husband and I are victims of Ms. Gulla's scam. We had a check stolen from our mailbox, and apparently she forged her name to it, and changed the amount. . . . Since then, it has cost us more than $200 in check fees, fees for setting up a new account, and fees for stopping payment on checks. This does not include my time (about 20 hours, and still counting) to track down outstanding checks, talking to the banks (mine and the one where she tried to cash the check), rearranging automatic deductions, talking to the sheriff and filling out appropriate paperwork.
>
> Now I am not able to put mail out in my mailbox, so I have to make special trip to the post office to mail letters. As of this date, I am still attempting to clear up the affected account.
>
> This has been a great inconvenience for us, and it makes me question my safety in my home, if someone is able to gain access to my personal mail, what is next?

Finally, one last victim wrote about losing time with her children to deal with the crime:

> We felt, and continue to feel, very vulnerable now that something has been stolen out of our mailbox, something that allows someone with dishonest, selfish intentions to access into our personal information. . . .

> [Another way the crime] impacted us was by loss of time. Ms. Gulla's selfish act caused us countless phone calls to the credit card company (and although they've been very helpful, they have not always been very speedy). We have had to spend time filling out forms and sending in paperwork to resolve this situation, which was no fault of our own. It has been extremely frustrating to do all this, especially since we are self-employed and have 3 small children. Any time we have spend on Ms. Gulla's theft is time we are not running our own livelihoods or enjoying our precious children. That has been the biggest loss of all.

In light of these victim statements, it seemed to me (as I said in court) that I should be able to order restitution beyond the direct financial losses of the phony charges run up by the defendant. In particular, I thought it would be fair to order restitution for the lost time the victims suffered in responding to the defendant's crime. Unfortunately, as the government explained at the hearing, current law does not allow this. Restitution is not permitted for consequential losses[128] or other losses too remote from the offense of conviction.[129]

The case law demonstrates that the problem I confronted is not unique. In many circumstances, courts of appeals have overturned restitution awards that district judges thought were appropriate, not because of any unfairness in the award but simply because the current restitution statutes failed to authorize them. Here are few examples:

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[128] *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996).

[129] *See, e.g.*, *United States v. Havens*, 424 F.3d 535 (7th Cir. 2005) (a victim of identify theft "takes the position that she is entitled to reimbursement for all the time she spent in this endeavor [of clearing credit], but in our view that goes too far."); *United States v. Barany,* 884 F.2d 1255, 1260 (9th Cir. 1989) (victim's attorney's fees too remote); *United States v. Kenney*, 790 F.2d 783, 784 (wages for trial witnesses too remote).

- In *United States v. Reed*,[130] the trial court ordered restitution to victims whose cars were damaged when the defendant, an armed felon, fled from police. The Ninth Circuit reversed the restitution award because the defendant was convicted of being a felon in possession of a firearm and the victims were not victimized by *that* particular offense.

- In *United States v. Romines*,[131] a defendant on supervised release absconded from his residence and employment, driving away on his employer's motorcycle and later cashing an $8,000 check from his employer's bank account. He was caught, and the district court ordered restitution of $8,000 to the employer as part of the sentence for the supervised release violation. The Eleventh Circuit reversed because the government, rather than the employer, was the victim of the defendant's the violation: "The only victim of that crime was the government, whose confidence in [the defendant's] rehabilitation seems to have been misplaced." [132] Accordingly, the Eleventh Circuit overturned the restitution order because "of the absence of textual authority to grant restitution."[133]

- In *United States v. Cutter*,[134] the defendant sold a house to his niece, then filed a fraudulent bankruptcy petition. The defendant was convicted of false statements in the petition. At sentencing, the district court ordered the defendant to pay his niece $21,000 in restitution because of her losses in a fraudulent conveyance action instituted by the bankruptcy trustee. The First Circuit overturned the order

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[130] 80 F.3d 1419, 1421 (9th Cir. 1996).
[131] 204 F.3d 1067 (11th Cir. 2000).
[132] *Id.* at 1069.
[133] *Id*.
[134] 313 F.3d 1 (1st Cir. 2002).

because the niece was not a direct victim of the defendant's criminal action of filing a fraudulent petition before the bankruptcy court.[135]

- In *United States v. Havens*,[136] the defendant pleaded guilty to various offenses relating to identity theft. The victim had earlier pursued a civil action against the defendant, receiving $30,000 in damages, and the district court ordered restitution in that amount. The Seventh Circuit reversed this restitution order, holding that it was unclear which damages and costs qualified as appropriate losses under the Mandatory Victims Rights Act.[137]

- In *United States v. Shepard*,[138] a hospital social worker drained a patient's bank account through fraud. The hospital paid the patient $165,000 to cover the loss. The social worker was later convicted of mail fraud and the district court ordered restitution of the $165,000 to the hospital. But the Seventh Circuit held that the patient was the only direct victim of fraud in the case and reversed the restitution order to the hospital.[139]

- In *United States v. Rodrigues*,[140] a defendant, an officer of a savings and loan, was convicted of numerous charges stemming from phony real estate transactions. The district court found that Mr. Rodrigues usurped the savings and loans' corporate opportunities by substituting himself for the S&L in four real estate deals and ordered him to pay $1.5 million in restitution – his profits in those deals. The Ninth Circuit reversed, holding that since the defendant's profits arose from

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[135] *Id*. at 8-9.
[136] 424 F.3d 535 (7th Cir. 2005).
[137] *Id*. at 538-39.
[138] 269 F.3d 884 (7th Cir. 2001).
[139] *Id*. at 886-87.
[140] 229 F.3d 842 (9th Cir. 2000).

the defendant taking his victim's corporate opportunities, rather than from direct losses by the S&L, restitution was improper. "Although the corporate opportunity doctrine allows recovery for a variety of interests, including mere expectancies, restitution under the VWPA is confined to direct losses."[141]

- In *United States v. Stoddard*,[142] the trial court ordered substantial restitution by the defendant, an official of a savings bank. The defendant misappropriated $30,000 from an escrow account and used the money to fund two real estate purchases. He subsequently netted $116,223 in profits from the real estate transactions. Although the trial court ordered restitution based on these profits to the savings bank, the Ninth Circuit set the order aside because that the restitution statute only allowed restitution for direct losses.

- In *Government of the Virgin Islands v. Davis*,[143] the defendant pleaded guilty to conspiracy to defraud, forgery, and related counts in connection with an attempt to defraud an estate of more than a million dollars in real and personal property. The trial judge ordered restitution that included the attorney's fees spent by the estate to recover its assets, but the Third Circuit reversed: "Although such fees might plausibly be considered part of the estate's losses, expenses generated in order to recover (or protect) property are not part of the value of the property lost (or in jeopardy), and are, therefore, too far removed from the underlying criminal conduct to form the basis of a restitution order."[144]

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[141] *Id*. at 846.
[142] 150 F.3d 1140, 1147 (9th Cir. 1998).
[143] 43 F.3d 41 (3rd Cir. 1994).
[144] *Id.* at 47.

- In *United States v. Arvanitis,*[145] the trial court awarded attorney's fees in favor of a victim which had spent considerable money investigating the defendants fraud. The Seventh Circuit reversed because the restitution statute for property offenses "limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorneys fees, unavailable."[146]

- In *United States v. Elias*,[147] the defendant forced his employees to clean out a 25,000 gallon tank filled with cyanide sludge, without any treatment facility or disposal area. He was convicted of violating the Resource Conservation and Recovery Act by disposing of hazardous wastes and placing employees in danger of bodily harm. The district court ordered the defendant to pay $ 6.3 million in restitution. The Ninth Circuit overturned the restitution order because the restitution statute only authorizes imposition of restitution for violations of Title 18 and certain other crimes, not environmental crimes.[148]

- In *United States v. Sablan*,[149] the Ninth Circuit reversed a restitution order based on consequential damages, such as expenses arising from meeting with law enforcement officers investigating the crime, because such expenses were not strictly necessary to repair damage caused by defendant's criminal conduct.

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[145] 902 F.2d 489 (7th Cir. 1990).

[146] *Id.* at 496.

[147] 292 F.3d 1003 (9th Cir. 2001).

[148] *Id*. at 1021-22; *see also United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999) (holding that the district court lacked legal authority to order restitution to the IRS for the defendant's tax liability); *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998) (holding that the VWPA does not authorize restitution for Title 26 tax offenses).

[149] 92 F.3d 865, 870 (9th Cir. 1996).

- In *United States v. Blake*,[150] the defendant was convicted of using stolen credit cards and the district court ordered restitution to victims for losses that resulted from their stolen credit cards. The Fourth Circuit reversed a restitution order reluctantly: "Although the result we are compelled to reach represents poor sentencing policy, the statute as interpreted requires the holding that the persons from whom Blake stole the credit cards do not qualify as victims of his offense of conviction, and as such he cannot be ordered to pay restitution to them . . . the factual connection between his conduct and the offense of conviction is legally irrelevant for the purpose of restitution."

- In *United States v. Hays*,[151] the defendant was convicted of possession of stolen mail, specifically three credit cards. The trial court ordered him to pay restitution to the credit card companies of $3,255 for charges to those stolen credit cards. The Eleventh Circuit reversed, because the charges were not caused by the specific conduct that was the basis of the offense of conviction (mail fraud).

The point here is not that any of these restitution awards were correctly or incorrectly made by the trial judges under the current statutory framework. Instead, the point is that a good case can be made that the judges in these cases *should* have had authority to make these awards. After all, at sentencing a trial judge has full and complete information about the nature of the offense, the impact of the crime on the victim, and the defendant's personal and financial circumstances.[152] When a judge has reviewed all of that information and determined that

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[150] 81 F.3d 498, 506 (4th Cir. 1996).

[151] 32 F.3d 171, 173-74 (11th Cir. 1995).

[152] *See* FED. R. CRIM. P. Rule 32(d)(1)(B), (2)(A)(i)-(iii) ("The presentence report must . . . calculate the defendant's offense level and criminal history category; . . . the defendant's history and characteristics, including; any prior criminal record; the defendant's financial condition; any

restitution is appropriate, it is not clear why that order should be subject to further litigation about whether it fits into some narrow statutory category. After all, the core purpose of restitution is to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[153] Indeed, the congressional mandate for restitution is "to restore the victim *to his or her prior state of well-being to the highest degree possible."*[154] Unfortunately, however, because judges must fit restitution orders within narrow pigeon holes, this congressional purpose may not be fully achieved.

The rights of criminal defendants are also important in the restitution process. Criminal defendants should have a fair opportunity to contest restitution awards and their constitutional rights should be fully protected in determining a restitution award. Within those important constraints, however, there is considerable room for expanding the kinds of restitution that district judges should have discretion to award. It is worth examining further the ways in which judicial power to award fair restitution to crime victims could be properly expanded.[155]

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circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment . . ."); *see also* Rule 32(c)(B) ("If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.").

[153] *United States v. Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002).

[154] *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (emphasis added) (citing S. REP. NO. 97-532, 97th Cong., 2d Sess. at 30, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536).

[155] I have offered my own tentative personal opinions on these subjects in Testimony of Paul G. Cassell Before the U.S. Sentencing Commission Regarding Protecting Crime Victims' Rights in the Sentencing Process (Mar. 15, 2006).

H. Modify Unjustified Mandatory Minimums.

This Subcommittee should consider repealing irrational mandatory minimum sentences, particularly the "stacking" mandatory minimums found in 18 U.S.C. § 924(c). As I have discussed, the Judicial Conference already opposes mandatory minimum sentences and has urged Congress to "reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act."[156]

Mandatory minimums are problematic for several reasons**.** As the Sentencing Commission has explained, mandatory minimums may result in the same sentence for widely divergent cases because, unlike the Guidelines, mandatory minimums typically focus only on one indicator of offense seriousness (such as drug quantity) or one indicator of criminal history (such as whether a defendant has a previous conviction).[157] Mandatory minimums can therefore lead to increased disparity in sentence length among similarly situated offenders (or, inversely, very similar sentences for defendants whose actual conduct was dramatically different).[158] And unlike the Guidelines' graduated, proportional increases in sentence length, mandatory minimums tend to result in large jumps in sentence length or "cliffs" based on small differences in offense conduct or a defendant's criminal record.

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[156] *Report of the Proceedings of the Judicial Conference of the United States*, March 13, 1990, published in United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System.*

[157] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991), at 25.

[158] *Id.* at 33.

Senator Orrin Hatch from my home state of Utah has also explained problems with mandatory minimum sentences in light of the fact the sentencing guidelines exist.[159] Perhaps more important, the mandatory minimum sentences conflict with the basic idea behind sentencing guidelines. As Senator Hatch observed:

> The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[160]

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[159] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commisison, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

[160] *Id.* at 194; *accord* Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

Today, I will highlight one particular mandatory minimum that produces embarrassing results – 18 U.S.C. § 924(c). It is hard to explain why a federal judge is required to give a longer sentence to a first offender who carried a gun to several marijuana deals than to a man who deliberately killed an elderly woman by hitting her over the head with a log. I was recently forced to do exactly this.

In *United States v. Angelos*,[161] I had to sentence a twenty-four-year-old first offender who was a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agreed that Mr. Angelos should serve about six-and-a-half years in prison. But there were three additional firearms offenses for which I also had to impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insisted that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urged me to sentence Mr. Angelos to a prison term of no less than 61½ years – six years-and-a-half years for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relied on a statute – 18 U.S.C. § 924(c) – which requires courts to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produced 55 years of additional punishment for carrying a firearm.

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[161] *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006). The *Angelos* case is no longer pending before me.

The sentence created by § 924(c) was simply irrational in the *Angelos* case. Section 924(c) imposed on Mr. Angelos a sentence 55 years or 660 months; that term was consecutive to the minimum 6 and ½ year (or 78-month) Guidelines sentence – a total sentence of 738 months. As a result, Mr. Angelos faced a prison term which more than doubled the sentence of, for example, an aircraft hijacker (293 months),[162] a terrorist who detonates a bomb in a public place (235 months),[163] a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months),[164] a second-degree murderer,[165] or a rapist.[166] The table below sets out these and other examples of shorter sentences for crimes far more serious than Mr. Angelos'.

Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. §2A5.1	Base Offense Level 38	293 Months

[162] U.S.S.G. § 2A5.1 (2003) (base offense level 38). The 2003 Guidelines are used in all calculations in this opinion. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[163] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[164] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[165] U.S.S.G. § 2A1.2 (base offense level 33).

[166] U.S.S.G. § 2A3.1 (base offense level 27).

Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old. in sexual positions U.S.S.G. § 2G2.1(a) &(b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 +2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

The irrationality of Mr. Angelos' sentence is easily demonstrated by comparing it to a sentence that I imposed in a far more serious case on the very same day. Shortly before Mr. Angelos' sentencing, I imposed sentence in *United States v. Visinaiz*, a second-degree murder case.[167] There, a jury convicted Cruz Joaquin Visinaiz of second-degree murder in the death of 68-year-old Clara Jenkins. One evening, while drinking together, the two got into an argument. Ms. Jenkins threw an empty bottle at Mr. Visinaiz, who then proceeded to beat her to death by striking her in the head at least three times with a log. Mr. Visinaiz then hid the body in a crawl space of his home, later dumping the body in a river after weighing it down with cement blocks. Following his conviction for second-degree murder, Mr. Visinaiz came before the court as a first-time offender for sentencing. The Sentencing Guidelines required a sentence for this brutal second-degree murder of between 210 to 262 months.[168] The government called this an "aggravated second-degree murder" and recommended a sentence of 262 months. I followed that recommendation. Yet on the same day, I had to impose a sentence that is several decades longer for a first-time drug dealer who carried a gun to several drug deals!? The victim's family in the *Visinaiz* case – not to mention victims of a vast array of other violent crimes – can be forgiven if they think that the federal criminal justice system minimizes their losses. No doubt § 924(c) is motivated by the best of intentions – to prevent criminal victimization. But the statute pursues that goal in a way that effectively sends a message to victims of actual criminal violence that their suffering is not fully considered by the system.

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[167] *United States v. Visinaiz*, No. 2:03-CR-701-PGC.

[168] U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

The Judicial Conference has long desired to find an approach to sentencing in which this kind of irrational result could be avoided. One possible approach that the Criminal Law Committee will discuss and evaluate is whether to "unstack" the mandatory minimum sentences in § 924(c) so that it becomes a true recidivist statute – that is, the second 924(c) conviction with its 25 year minimum would not be triggered unless the defendant had been convicted for use of a firearm, served time, and then failed to learn his lesson and committed his crime again.

I. Reduce the Crack/Power Cocaine Disparity.

The disparity between sentences for distributing crack cocaine and power cocaine also merits attention. Reducing the disparity would improve the rationality of the current system and, perhaps even more important, reduce both perceived and actual racial disparities in our federal criminal justice system.

Congress passed the Anti-Drug Abuse Act of 1986[169] – the law that established the 100-to-1 ratio of penalties – with a sense of urgency.[170] Responding to ominous claims that crack was

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[169] Pub. L. 99–570, 100 Stat. 3207 (1986).

[170] H.R. 5484, the bill which eventually became the 1986 Act, was amended well over 100 times while under consideration from September 10, 1986 to October 27, 1986. Several members of Congress were critical of the speed with which the bill was developed and considered. *See, e.g.,* 132 CONG. REC. 26,462 (daily ed. Sept. 26, 1986) (Statement Sen. Charles Mathias) ("You cannot quite get a hold of what is going to be in the bill at any given moment."); 132 CONG. REC. 26,434 (daily ed. Sept. 26, 1986) (statement of Sen. Robert Dole) ("I have been reading editorials saying we are rushing a judgment on the drug bill and I think to some extent they are probably correct."); 132 CONG. REC. 22,658 (daily ed. Sept. 10, 1986) (statement of Rep. Trent Lott) ("In our haste to patch together a drug bill – any drug bill – before we adjourn, we have run the risk of ending up with a patch-work quilt . . . that may or may not fit together in a comprehensible whole.").

extremely addictive[171] and was closely associated with violent crime,[172] Congress ratcheted up the ratio from 20-to-1 to 100-to-1. Yet, as the Sentencing Commission later observed, "The legislative history does not provide conclusive evidence of Congress's reason for doing so . . . ."[173]

As the Subcommittee is well aware, under current law, 100 times as much powder cocaine as crack cocaine is needed to trigger the same five-year and ten-year mandatory minimum penalties. Because of this, the sentencing guideline penalties for crack cocaine offenses are 1.3 to 8.3 times longer than powder sentences, depending on the amount of cocaine involved and the specific characteristics of the offender.[174] In 2000, the average prison sentence for trafficking in powder cocaine was 74 months, while the average sentence for trafficking in crack was 117 months.[175] The differential between average sentences has always been significant, but appears to be growing. In 1992, crack offenders served sentences that were 25.3% longer than powder offenders, but by 2000, the differential had increased to 55.8%.[176]

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[171] *See, e.g.,* 132 CONG. REC. 22,667 (daily ed. Sept. 10, 1986) (statement of Rep. James Traficant) ("Crack is reported by many medical experts to be the most addictive narcotic drug known to man."); 132 CONG REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) ("Crack is thought to be even more highly addictive than other forms of cocaine or heroin.").

[172] 132 CONG. REC. 31,329-30 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles) ("Our local police and our sheriffs have found themselves unable to cope with the crime . . . ." caused by crack).

[173] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002).

[174] *See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (2002), available at http://www.usdoj.gov/olp/cocaine.pdf.

[175] *Id.* at 21.

[176] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 35 (May 2002).

Ever since Congress set the 100-to-1 ratio in 1986, controversy has swirled around it. In 1997, members of the judiciary weighed in on the matter. Judge John S. Martin, Jr. and twenty-six other federal judges transmitted a letter to the House and Senate Committees on the Judiciary, arguing that the disparity results in unjust sentences:

> It is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society's interest.[177]

Members of Congress have not been blind to these concerns. Numerous legislative proposals have been suggested. Some of these would have reduced disparity by decreasing the penalties for crack;[178] others would have reduced disparity by raising the penalties for powder cocaine.[179] Other proposals would operate in both directions: not long ago, Senators Sessions and Hatch introduced the Drug Sentencing Reform Act of 2001,[180] which among other things, would have

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[177] *Statement on Powder and Crack Cocaine to the Senate and House Committees on the Judiciary,* 105th Cong. (1997) (letter from Judge John S. Martin, Jr. et al., p. 1).

[178] *See, e.g.*, H.R. 2031, 105th Cong. (1997) introduced by Rep. Charles Rangel; H.R. 939, 106th Cong. (1999) introduced by Rep. Rangel; H.R. 1241, 106th Cong. (1999) introduced by Rep. Maxine Waters; and H.R. 697, 107th Cong. (2001) introduced by Rep. Rangel. See also Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. § 1772 (2000) (proposing a 10-1 ratio by reducing the five-year powder cocaine trigger quantity from 500 grams to 50 grams).

[179] *See, e.g.*, S. 1162, 105th Cong. (1997) introduced by Sen. Wayne Allard; S. 209, 105th Cong. (1997) introduced by Sen. John Breaux; S. 1593, 105th Cong. (1998) introduced by Sen. Allard; H.R. 332, 105th Cong. (1997) introduced by Rep. Gerald Solomon; H.R. 2229, 105th Cong. (1997) introduced by Rep. William Pascrell, Jr.; and H.R. 4026, 107th Cong. (2002) introduced by Rep. Roscoe Bartlett.

[180] S. 1847 (2001). *See* 147 CONG. REC. S13,961-65 (daily ed. Dec. 20, 2001) (statements of Sens. Sessions and Hatch) (discussing the relevant legislative history for the current federal penalty scheme and the proposed changes contained in the bill).

reduced the 100-to-1 drug quantity ratio to 20-to-1 by increasing the statutory mandatory minimum penalties for powder cocaine and decreasing the statutory mandatory minimum penalties for crack cocaine.

But Congress is not the only institution to recognize the problems inherent in a crack-powder disparity. The United States Sentencing Commission – has condemned the crack-powder disparity on three different occasions: in 1995, 1997, and in 2002.

When in 1994 Congress directed the Sentencing Commission to issue a report and recommendations on cocaine and federal sentencing policy,[181] the Commission proposed amendments to the Sentencing Guidelines that would have adjusted the guideline quantity ratio so that the base offense levels would be the same for both powder cocaine and crack cocaine offenses; set the mandatory five-year minimums for both crack and powder cocaine at 500 grams; and eliminated the unique five-year mandatory minimum for simple possession of more than five grams of crack cocaine.[182]

After its 1995 guideline amendments were rejected, the Commission issued a 1997 report to Congress that did not propose amendments but did suggest the thresholds to trigger a five-year mandatory minimum should be raised for crack and reduced for powder cocaine.[183] More

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[181] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 1994).

[182] *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074 (1995). In October 1995, Congress passed and the President signed legislation rejecting these amendments. *See* Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

[183] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (April 1997).

recently, the Commission released another report on cocaine and federal sentencing policy.[184] The Commission has found:

- Current penalties exaggerate the relative harmfulness of crack cocaine;[185]
- Current penalties sweep too broadly and apply most often to lower level offenders;[186]
- Current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality;[187]
- Current penalties' severity mostly impacts minorities.[188]

Accordingly, the Sentencing Commission unanimously and firmly concluded that congressional objectives can be achieved more effectively by decreasing the 100-to-1 drug quantity ratio.[189] Specifically, the Commission has recommended that Congress revise federal cocaine sentencing by: (1) repealing the mandatory minimum for simple possession of crack cocaine and increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten-year threshold quantity to at least 250 grams; (2) encouraging the Commission to establish appropriate sentencing enhancements to the primary trafficking guideline to

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[184] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002).

[185] *Id*. at v.

[186] *Id*. at vi.

[187] *Id*. at vii.

[188] *Id*. at viii.

[189] *Id*.

specifically account for a variety of aggravating factors; and (3) maintaining the current minimum threshold quantities for powder cocaine offenses.[190] If these recommendations were adopted, the Commission estimates that the average sentence for crack offenses would decrease from 118 months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months.[191]

Of particular concern about the current 100-to-1 ratio is problem of perceived and actual ratio disparities. This point has been expressed by a number of commentators.[192] This apparent inequality in the sentencing guidelines produces actual injustice to the crack-cocaine defendant. It "'undermine[s] public confidence in the fairness of our system of justice'" and "'serves as a stimulant to race prejudice.'"[193] At a practical level, the widely perceived unfairness of the dramatic disparity between sentences for crack cocaine and sentences for powder cocaine may make it harder for the government to convict defendants, as juries may be inclined to "nullify" the charges by simply acquitting.[194]

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[190] *Id*.

[191] *Id*. at ix.

[192] For a powerful statement of the argument, *see, e.g.,* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287 (1995).

[193] *See id.* at 1316 (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

[194] *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) ("Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair." (citing Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15)); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997).

While making substantive recommendations about federal sentencing policy is not generally the purview of the Judicial Conference, the Criminal Law Committee is willing to consider and evaluate the Commission's recommendations about reducing the disparity for crack and powder penalties.

J. Community Correction at the End of Sentences.

The Criminal Law Committee would be interested in discussing way to improve the use of community corrections at the end of sentences.

In December 2002, the Bureau of Prisons (BOP) changed its practice on the important subject of community correction. Before that time, dating to approximately 1965, BOP allowed some inmates to serve significant portions of their sentences in Community Corrections Centers (CCC's) or halfway houses and for many years often assigned inmates with short sentences (less than 12 months total) to confinement in CCC's or halfway houses for the entire term. This was based on BOP's view that its facility designation authority under 18 U.S.C. § 3621(b) broadly permitted it to designate some inmates with short sentences directly to a CCC, generally upon the recommendation of a sentencing judge. In appropriate circumstances, it was common for judges to recommend such placements for defendants receiving light-end sentences. The benefits in appropriate cases, such as improved prospects for rehabilitation, better likelihood of satisfying restitution obligations, and continued family contact were clear. A 1992 legal opinion from the Department of Justice's Office of Legal Counsel affirmed BOP's designation authority under § 3621(b).

In December 2002, however, the Deputy Attorney General directed BOP to cease this "unlawful" practice of designating inmates to serve their entire sentences in a CCC. This change was based on a new opinion from new personnel in the Department of Justice's Office of Legal Counsel, reinterpreting § 3621(b) and concluding that this practice was not authorized thereunder. Accordingly, the BOP practice was changed and new regulations were issued limiting placement in a CCC to the last ten percent of a term of imprisonment not to exceed six months, and otherwise, all inmates were required to serve their sentences in BOP facilities.

There are plenty of reasons to be skeptical about this subsequent OLC opinion, which of course stood at odds with another OLC opinion. In particular, the subsequent OLC opinion relied on provisions of the U.S. Sentencing Guidelines to reinterpret the statute and declare illegal a practice widespread over 18 years.[195] OLC's new legal interpretation was based on 18 U.S.C. § 3624(c), which pertains to BOP's obligation to prepare inmates for community re-entry and reads in part:

> (c) Pre-release custody. – The Bureau of Prison shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, *not to exceed six months, of the last 10 percentum of the term to be served* under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this sub-section may be used to place a prisoner in home confinement . . . . (emphasis added).

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[195] *See, e.g.*, *Estes v. Federal Bureau of Prisons*, 273 F. Supp. 2d 1301, 1310 (S.D. Ala. 2003) (Butler, J.); *Iacaboni v. U.S.*, 251 F. Supp. 2d 1015 (D. Mass. 2003) (Ponsor, J.).

Section 3621(b), however, vests BOP with authority to determine the location of an inmate's imprisonment. Thus, by construing § 3624(c) as limiting BOP's designation authority under §3621(b), OLC took the view that for sentences of less than 60 months, the maximum term that may be spent in a CCC is limited to ten percent of the sentence or a maximum term of six months.

This new OLC interpretation was rendered during a time when "light sentences" for white-collar criminals were a focus in the national news. Some commentators had objected to persons serving sentences as long as one or two years without being imprisoned for any part of that time because they had been designated to halfway houses.

Subsequent challenges to BOP's regulations implementing this policy change has led some courts to conclude that it is unauthorized under § 3621(b) and runs afoul of Congress' intent. The First Circuit and the Eighth Circuit found that policy implemented in 2002 to be unlawful and contrary to the plain meaning of § 3621(b) because it failed to recognized BOP's discretion to transfer an inmate to a CCC at any time and that time constraints under § 3624(c) placed no limits on this discretion.[196] In response to such decisions, the BOP proposed new regulations which became effective on February 14, 2005. The 2005 BOP regulations acknowledged its general discretion under § 3621(b) to place an inmate at a CCC at any time but limited any such placement to the lesser of ten percent of the total sentence or six months, unless special statutory circumstances apply.[197] In December 2005, the Third Circuit found these new

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[196] *See Elwwod v. Jeter*, 386 F.3d 842 (8th Cir. 2004); *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004).

[197] *See* 28 C.F.R. §§ 570.20, 570.21.

regulations to be contrary Congress' directives as set out in § 3621(b).[198] In particular, the Third Circuit found that the 2005 BOP regulations fail to allow full consideration of the factors plainly enumerated in § 3621(b), which must be considered in determining an appropriate and suitable place of imprisonment.[199]

Perhaps a statutory change is needed to address the issue of community corrections. If so, the Committee would be interested in discussing whether it would be appropriate to return to the tried and true policy of judges recommendations being considered, along with other factors as provided under § 3621(b)(4)(B), in BOP's determination of an appropriate type of penal or correctional facility, including a CCC, as a place of imprisonment.

K. Restore the Bootcamp Program.

The Criminal Law Committee is interested in discussing whether there could be value in restoring the boot camp program that was terminated by the Federal Bureau of Prisons (BOP) in 2005. The federal boot camp program – sometimes referred to as the Shock Incarceration Program or the Intensive Confinement Center ("ICC") program – was established by Congress with the Crime Control Act of 1990.[200] After the necessary regulations were enacted by the BOP

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[198] *See Woodall v. Federal Bureau of Prisons*, No. 05-3657, 2005 WL 3436626 (3d Cir. Dec. 15, 2005).

[199] *Id.; see also* 18 U.S.C. § 3621(b).

[200] Pub. L. No. 101-647, § 3001, 104 Stat. 4789 (codified at 18 U.S.C. § 4046).

to establish its boot camp program,[201] the Federal Intensive Confinement Center Program began at Lewisburg Prison in January 1991.[202]

The primary goal of shock incarceration programs is to change the offenders' behavior to dissuade their involvement in criminal activity, using highly regimented and disciplined environments to effect a lasting behavioral change on participants. To qualify for participation in the boot camp program, offenders were required to meet six criteria:

- Be serving a sentence of 12 to 30 months;
- Be serving their first period of incarceration or have no lengthy periods of prior incarceration;
- Volunteer for participation in the program;
- Be a minimum security risk;
- Be 35 years old or younger when they enter the program; and
- Lack medical restrictions.[203]

Noting that "ICC programs are exceedingly costly to maintain" and that eliminating the program would save an estimated $1.2 million annually, BOP terminated its boot camp program in January 2005. The penological research on boot camps suggests some successes and some

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[201] At the time of the statute's enactment, "the Bureau of Prisons [did] not have the legal authority necessary to operate a shock incarceration program." H.R. Rep. No. 101-681(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6557, 6558. The BOP subsequently enacted the necessary regulations to implement the boot camp program. *See* Intensive Confinement Center Program, 61 Fed. Reg.18,658 (Apr. 26, 1996); Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53,690 (Oct. 15, 1997) (both codified at 28 C.F.R. §§ 524.30-.33 (2004)).

[202] *See* Jody Klein-Saffran, David A. Chapman, and Janie L. Jeffers, *Boot Camp for Prisoners*, F.B.I. LAW ENFORCEMENT BULLETIN 13, 13 (Oct. 1993).

[203] *Id*.

failures. While such programs appear to effect positive short-term changes in participants,[204] these changes do not always lead to lower recidivism rates.[205] The National Institute of Justice report on the subject concludes that the boot camps which have reduced recidivism offer more treatment services, are longer in duration, and include more post-release supervision.[206]

Boot camp programs may be expensive, but it is not clear that they cost more to operate than BOP prison facilities. The cost of incarcerating a BOP inmate for one year, after all, is $23,205.[207] While boot camps need not comprise a significant portion of BOP facilities, the Criminal Law Committee is interested in discussing whether a boot camp system – perhaps on a modest scale – would allow judges in certain specific cases to impose more effective sentences. There is some reason to believe that boot camps can, for the right offender (particularly a youthful, non-violent offender), make a real difference. Many judges believe that having any option in the system for young offenders could promote rehabilitation, thereby reducing recidivism and preventing revictimization of crime victims.

The Criminal Law Committee is interested in discussing the merits of restoring a boot camp program based on the research findings of the National Institute of Justice, and after studying the issue, hopes to convey its view to BOP. In the mean time, perhaps this

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[204] *See* National Institute of Justice, *Correctional Boot Camps: Lessons from a Decade of Research* ii, available at: http://www.ncjrs.gov/pdffiles1/nij/197018.pdf.

[205] *Id*.

[206] *Id*.

[207] *See* John Hughes, Memorandum to All Chief Probation Officers: Cost of Incarceration and Supervision (Apr. 15, 2005), available at: http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2005_Archive/PPS41505.html.

Subcommittee might also wish to study the matter, and to consider providing funding to restore the boot camp program for appropriate non-violent offenders.

L. Report from the Sentencing Commission.

The last avenue for exploration may be the most significant – that Congress look to the Sentencing Commission to provide general recommendations on how to improve our federal sentencing system.

Booker has prompted considerable interest in the proper way to structure federal criminal sentences, as this hearing amply demonstrates. In addition, a number of non-governmental groups have been studying the state of federal sentencing in the wake of *Blakely* and *Booker*. One that may merit particular mention is the Sentencing Initiative of the Constitution Project, a bipartisan group of sentencing experts co-chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann. The group includes federal district and appellate judges, among them Justice Samuel A. Alito, Jr., who was an active participant in the group's deliberations until his nomination to the Supreme Court.[208] The Constitution Project has issued a set of principles and accompanying report, The Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report*.[209]

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[208] The other federal judges participating in the Constitution Project Sentencing Initiative are Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit, Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts, and myself.

[209] (available beginning March 16, 2006 at http://www.constitutionproject.org/sentencing/index.cfm?categoryId=7).

The Constitution Project Report is critical of central features of the pre-*Booker* federal sentencing system. The group found that:

> *The federal sentencing guidelines, as applied prior to United States v. Booker, have several serious deficiencies:*
>
> *The guidelines are overly complex. They subdivide offense conduct into too many categories and require too many detailed factual findings.*
>
> *The guidelines are overly rigid. This rigidity results from the combination of a complex set of guidelines rules and significant legal strictures on judicial departures. It is exacerbated by the interaction of the guidelines with mandatory minimum sentences for some offenses.*
>
> *The guidelines place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant's role in the criminal conduct. They also place excessive emphasis on conduct not centrally related to the offense of conviction.*
>
> *The basic design of the guidelines, particularly their complexity and rigidity, has contributed to a growing imbalance among the institutions that create and enforce federal sentencing law and has inhibited the development of a more just, effective, and efficient federal sentencing system.*

These observations are particularly germane to today's hearing for at least two reasons. First, they suggest a need for a searching re-examination of the pre-*Booker* system. Second, they argue against adoption of the "topless guidelines" approach apparently favored by some critics precisely because that approach would reinstitute many of the features of the pre-*Booker* regime that the Constitution Project found to be undesirable. The Constitution Project is currently

working on a set of more particular recommendations for reforming federal sentencing. I understand that these recommendations will issue very shortly.

Other commentators have also recommended reform. For example, Professor Frank Bowman has proposed a significantly simplified federal sentencing system designed to be consistent with the Supreme Court's developing Sixth Amendment jurisprudence while retaining a role for post-conviction judicial fact-finding. This proposal elaborates on a model first suggested by James Felman, one of the witnesses in today's hearing.[210] Professor Bowman's proposal would reduce the number of factual determinations necessary for individual sentencings while incorporating the work done by Congress and the Sentencing Commission over the past two decades in identifying aggravating and mitigating factors relevant to punishment.

Our point is not specifically to endorse any of these particular suggestions, but rather to encourage Congress to consider receiving a far-ranging report from the Sentencing Commission on a whole host of issues. Congress, of course, created the Sentencing Commission as an expert agency precisely to analyze important questions of sentencing policy. The Sentencing Reform Act directs the Commission, among its many other responsibilities, to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional markers that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy."[211]

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[210] *See* James Felman, *How Should Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT. REP. 97 (2004).

[211] *See* 28 U.S.C § 995(a)(20).

The Sentencing Commission is obviously committed to making the Guideline system work as well as possible. Moreover, it is carefully assessing *Booker*'s impact, and it is well-positioned to explore the pros and cons of any proposed post-*Booker* changes. In light of all this, it might be appropriate for the Congress to consider encouraging the Sentencing Commission to undertake a comprehensive review of the current federal sentencing system. Such a review could consider the issues that we raise here and they ways in which the system could be improved. Among the the items that the Sentencing Commission might investigate are such things as:

- Developing a standardized methodology for determining sentences, such as the three-step process currently recommended by the Commission;
- Improving ways in which downward sentences reductions for substantial assistance are handled by judges *and* prosecutors;
- Confirming that a system of "topless" guidelines is not needed after *Booker*;
- Ways in which judges could be empowered to prevent criminals from profiting from their crimes;
- Expanding the power of judges to award full and fair restitution to crime victims and treating victims' fairly throughout the sentencing process;
- Ways of modifying or repealing mandatory minimum sentences;
- Reducing the unsupportable disparities between the penalties for distributing crack cocaine versus powder cocaine;
- Considering whether any of the current Guidelines need to be reconsidered, such as raising firearms penalties or changing immigration penalties;
- Whether the Guidelines should be simplified, as recommended by the Constitution Project.

No doubt there are other subjects that the Sentencing Commission could also be profitably directed to consider. The Criminal Law Committee hopes that this Subcommittee will consider taking full advantage of the considerable expertise of the Sentencing Commission by encouraging it to take a broad assessment of ways in which current federal sentencing practices can be improved.

On behalf of the Judicial Conference, I thank you for the opportunity to testify today, and I look forward to responding to your questions.