STATEMENT OF
CHIEF UNITED STATES CIRCUIT JUDGE THEODORE McKEE
COURT OF APPEALS FOR THE THIRD CIRCUIT

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES COMMITTEE ON CRIMINAL LAW

BEFORE

THE UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
FEDERAL SENTENCING OPTIONS AFTER *BOOKER*

WASHINGTON, DC
FEBRUARY 16, 2012

Introduction

Judge Saris and members of the Sentencing Commission, on behalf of the Judicial Conference Committee on Criminal Law, I appreciate the opportunity to provide our views on different sentencing schemes you may be considering to address some of the controversy that has arisen in the wake of Supreme Court decisions giving sentencing judges more discretion in determining an appropriate sentence. As you know, the Committee's jurisdictional statement includes a charge to: "[m]onitor and analyze for Judicial Conference consideration legislation affecting the administration of criminal justice," "[p]rovide oversight of the implementation of sentencing guidelines and make recommendations to the Judicial Conference with regard to proposed amendments to the guidelines, including proposals that would increase their flexibility," and "[a]ssure that working relationships are maintained and developed with the Department of Justice, Bureau of Prisons, United States Parole Commission, and United States Sentencing Commission, with respect to issues falling within the Committee's jurisdiction."

The topic of today's hearing is critically important to the Judicial Conference of the United States and judges throughout the nation and, as we have in the past, the members of the Criminal Law Committee look forward to working with the Commission and others to ensure that our sentencing system is fair, flexible, and consistent with the goals of the Sentencing Reform Act.

Judicial Conference Position on Post-*Booker* Sentencing Options

In March 2005, the Conference resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[1] It further urged Congress "to take no immediate legislative action and instead to maintain an

[1]JCUS-MAR 05, p 15.

advisory sentencing guideline system."[2] This resolution resulted in part from recommendations by the Criminal Law Committee following significant deliberation and discussion before and after the Supreme Court's decision in *United States v. Booker.*

In October 2004, in the wake of *Blakey v. Washington*[3] and in anticipation of the *Booker* decision, the Chair of the Committee established a Sentencing Alternatives Working Group, consisting of representatives from different Conference committees to examine interim sentencing legislation that Congress might consider if the Supreme Court were to declare the sentencing guidelines unconstitutional in whole or in part. The group was authorized to (1) identify a range of alternatives to the existing sentencing process; (2) evaluate these alternatives in terms of legal soundness, impact on judicial responsibilities, workload, court administration, and congressional viability; (3) obtain opinions and information from the bench, bar, and the larger legal community; and (4) develop policy recommendations for potential consideration by the Committee and, in turn, the Judicial Conference. The working group examined a number of potential legislative responses, and at its December 2004 meeting, the Committee considered several alternative recommendations made by the working group but deferred action until after the Supreme Court decided *Booker*.

In February 2005, following the *Booker* decision, the Committee convened a special meeting to consider the need to seek a Judicial Conference position on federal sentencing policy changes. The Committee concluded that there were no readily available superior alternatives to an advisory guideline system. It specifically considered a number of potential legislative

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[2] *Id*.

[3] 542 U.S. 296 (2004).

responses including the "topless guidelines" proposal, the "Blakelyization" of mandatory sentencing guidelines, and the expanded use of mandatory minimum sentences.

Topless Guidelines

This proposal would raise the top of sentencing guideline ranges to be coterminous with the statutory maximum, which would presumably allow judges to enhance sentences up to the statutory maximum. Implementation of the topless guidelines would require legislation to raise directly the upper limit of each guideline range. In its February 2005 meeting, the Committee expressed concern, however, that the validity of the topless proposal depended in large part on the continuing viability of *Harris v. United States*,[4] which allows judicial fact-finding in applying mandatory minimum (as opposed to maximum) sentences. After *Booker* many observers believe that a majority of the Court might vote to overrule *Harris*. Also, some observers believe that enacting the topless guidelines proposal might be challenged as an unconstitutional evasion of the protections afforded by Sixth Amendment.[5]

The Committee was also concerned that enacting a topless guidelines system would invite further litigation and would create more uncertainty, confusion, and delays in the courts because the higher potential penalties created by the proposal generally could not, under the *ex post facto* clause, constitutionally apply to crimes committed before implementing legislation was enacted. If the topless proposal were found to be unconstitutional, Congress would be compelled to develop, consider, and enact new sentencing legislation. Judge Paul Cassell summed up the concerns of the Committee in his testimony to the House Judiciary Committee in 2006:

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[4]236 U.S. 545 (2002) (plurality opinion).

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

"[P]ursuing 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."[6]

Expanded Use of Mandatory Minimum Sentences

The Committee also considered and rejected the expanded use of mandatory minimum sentences, which the Judicial Conference has long opposed.[7] The Conference has expressed concern that mandatory minimum sentences subvert the sentencing scheme of the Sentencing Reform Act.[8] The Conference has noted that mandatory minimums are inherently unfair because the crime covered by the mandatory minimum will always require the minimum sentence prescribed, no matter how extraordinary the circumstances of the crime or the role of the defendant. The Committee determined that comprehensive legislation establishing mandatory minimum sentences for all offenses would be an extraordinary undertaking that would further complicate an already complex system of sentencing rules, make federal sentences even harsher, and eliminate judicial discretion needed to impose individualized sentences – a stated goal of the Sentencing Reform Act.[9]

In his concurrence in *Harris* v. *United States*, Justice Breyer summarized many of the problems with mandatory minimum statutes: "[J]udges, legislators, lawyers, and commentators have criticized [mandatory minimum] statutes, arguing that they negatively affect the fair

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[6]*United States v. Booker: One Year Later. Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress (2006) (statement of Hon. Paul Cassell).

[7]See JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 7 1, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 8 1, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 9 1, pp. 45,56; and JCUS-MAR 93, p.13.

[8]JCUS-MAR 90, p. 16.

[9]In its report on the Sentencing Reform Act, the Senate Judiciary Committee suggested that the multiple goals of sentencing support individualized sentencing and retention by judges of some degree of judicial discretion. *See* S.Rep.No. 98-255, at 52-53.

administration of the criminal law, a matter of concern to judges and to legislators alike."[10] This is because mandatory minimum statutes are "fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines."[11] Unlike the sentencing guidelines, statutory mandatory minimums generally deny the judge the power to depart downward, no matter how unusual the circumstances, and they rarely reflect an effort to achieve sentencing proportionality.[12]

Moreover, mandatory minimums transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have "reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate."[13] In his address to the American Bar Association at its 2003 Annual Meeting, Justice Kennedy stated that he could "accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[14]

The Commission's own empirical research has found that mandatory minimum penalties are applied inconsistently, are often disproportionately severe, compromise the goal of certainty in sentencing, are applied more often to blacks than to whites, result in disparity that can not be accounted for by existing data and may be unwarranted, and result in the transference of sentencing power from the courts to prosecutors.[15]

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[10]*Harris* v. *United States*, 536 U.S. 545, 570-71 (2002)

[11]*Id*.

[12]*Id*.

[13]*Id*.

[14]Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9,2003; rev. Aug. 14,2003).

[15]U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, pp. 89-91. *See also*, U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal*

Advisory Sentencing Guidelines

After *Booker*, the Criminal Law Committee determined that an advisory sentencing guideline system is the option most consistent with long-standing Conference positions.[16] It considered evidence that since the Sentencing Reform Act nine states and the District of Columbia had formulated advisory guidelines and had successfully structured judicial sentencing decisions.[17] It further expressed its commitment to an advisory sentencing guideline system that is fair, workable, transparent, predictable, and flexible and its belief that it could take steps to help the advisory guidelines achieve these goals.

With the Judicial Conference's support of its recommendation to maintain the advisory guideline system, the Committee concluded that it could develop educational programs, forms, and other similar guidance for judges and probation officers. Since the procedural requirements of the Sentencing Reform Act remain in force under *Booker*, such guidance could emphasize that

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Justice System, 1991.

[16]Shortly before the Sentencing Reform Act was enacted, the Committee on the Administration of the Probation System (the predecessor to the Committee on Criminal Law) recommended, and the Conference endorsed, a draft sentencing reform bill that included proposed guidelines to be promulgated by the Judicial Conference. The stated purposes of the Conference's proposed guidelines were to (a) promote fairness and certainty in sentencing, (b) eliminate unwarranted disparity in sentencing, and (c) improve the administration of justice. *See* Report of the Committee on the Administration of Probation, March 1983, Ex. B. p. 7, §3801. Guiding the Committee in drafting sentencing guidelines was a recognition of the need for sentences imposed to: (1) ensure adequate deterrence of criminal conduct; (2) protect the public from further crimes by convicted offenders; (3) reflect the relative seriousness of different offenses; (4) promote respect for the law; (5) provide just punishment for criminal conduct; (6) provide restitution to victims of offenses; and (7) provide offenders with needed education or vocational training, medical care, and other correctional treatment in the most effective manner. *Id*. at 9-10, § 3802.

[17]After *Booker*, there were also approximately 10 states with "presumptive" guidelines systems. Professor Kevin Reitz, Reporter for the American Law Institute's revision of the Model Penal Code, wrote at the time that the new advisory guidelines in the federal system limited judicial discretion as much as any guidelines system in the states - whether labeled as "advisory" or "presumptive": "It is true that, for purposes of constitutional discourse, the post-*Booker* (or *Booker*-ized) Guidelines are now dubbed 'advisory' by the Supreme Court. This is little more than legal jargon, however...There is reason to think that the post-*Booker* Federal Sentencing Guidelines still pack as much wallop as any sentencing guidelines in the country." Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stan. L. Rev. 155, 156 (2005). Therefore, Professor Reitz wrote, no reform was needed:"No member of Congress should work to overhaul the post-*Booker* Guidelines on the theory that they herald a return to the bad old days of fully discretionary judicial sentencing or on the theory that the new 'advisory' Guidelines are extremely permissive compared with norms in guidelines sentencing systems nationwide. . . .[T]he *Booker*-ized Guidelines . . . remain as restrictive of judicial sentencing discretion as any system in the United States." *Id*. at 171.

probation officers should continue to prepare presentence investigation reports that include the guideline calculations. Judges would continue to consider the sentencing guidelines, along with all of the other sentencing factors of 18 U.S.C. § 3553(a), in imposing sentences.

The Committee also recommended that it facilitate the reporting in the Statement of Reasons form of the detailed and specific facts relied upon in determining sentences that are outside the advisory sentencing guideline system. It recognized that, in light of the *Booker* decision, accurate data collection, analysis, and reporting would be even more critical. Because some had expressed concerns that an advisory guideline system would increase disparity in sentencing,[18] the Committee believed that accurate data must be captured so the judiciary can empirically rebut anecdotal information, based on a few highly charged and widely reported cases, suggesting that judges are inappropriately sentencing outside of the advisory guidelines. The Committee discussed at length data collection, analysis, and reporting requirements needed to address congressional concerns and to meet the needs of the judiciary, the Sentencing Commission, and others. In March 2005, the Judicial Conference delegated to the Criminal Law Committee the authority to work with the Sentencing Commission to improve the Statement of Reasons form and evaluate additional methods to ensure accurate and complete reporting of sentencing decisions.[19]

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[18]*See e.g.,Federal Sentencing After Booker, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 109th Congress (2005) (statement of Assistant Attorney General Christopher Wray) ("We agree with experts who predict that a purely advisory system will undoubtedly lead to greater disparity and that, over time, this disparity is likely to increase"); *see also,* Alberto Gonzales, U.S. Att'y Gen., *Federal Sentencing Guidelines Speech* (June 21, 2005), in 17 Fed. Sent'g Rep. 325 (2005) (citing "an increasing disparity in sentences, and a drift toward lesser sentences").

[19]JCUS-MAR 05, p. 15.

An Assessment of the Advisory Guidelines System

Although the Judicial Conference has not revisited its position on advisory sentencing guidelines in recent years, the Committee is aware of a survey sponsored by the Commission in which 75 percent of the federal district judges who responded believe that the current advisory guidelines system best achieves the purposes of sentencing.[20] According to the survey, 8 percent of judges believe that "no guidelines" best achieves the purposes of sentencing, 3 percent believe that mandatory guidelines best achieve the purposes of sentencing, and 14 percent favor a system of mandatory guidelines with jury factfinding and "broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimum sentencing provisions."[21] A review of transcripts from the Commission's regional hearings in 2009 and 2010 also indicate that the majority of judges believe that the advisory guidelines strike the correct balance between uniformity and individualized sentencing.[22] To be sure, some judges have expressed a concern

[20]U.S. Sentencing Commission, *Results of Survey of the United States District Judges January 2010 Through march 2010* (2010) (response to Question 19).

[21]*Id*.

[22]District Judge Richard J. Arcara (Western District of New York) testified: "*Booker* has improved the quality of sentencing jurisprudence. On the one hand, it has provided judges with the authority necessary to impose a sentence outside the Guidelines range when the circumstances so warrant, without being limited to the more strict departure regime that existed pre-*Booke*r. On the other hand, *Booker*'s mandate that judges continue to consult the advisory range before imposing sentence serves as an important check, reminding judges that uniformity and unwarranted disparity are also important sentencing goals. In my opinion, these two elements together have led to the imposition of more reasoned and just sentences...I believe that the advisory sentencing regime strikes a more appropriate balance between judicial discretion on the one hand, and the goal of uniformity on the other, than under the prior mandatory scheme." Chief District Judge Jon P. McCalla (Western Tennessee) stated: "The advisory sentencing guideline regime in the post-*Booker* provides more balance between judicial discretion and uniformity in sentencing than existed under the prior mandatory scheme." Chief District Judge Philip Simon (Northern Indiana) asserted: "I am, in general, a proponent of the guidelines...from my perspective the result that *Booker* achieved is nothing short of a masterstroke. *Booker* wisely kept the structure of the guidelines in place, and in any federal sentencing they remain the starting point for determining the sentence. But *Booker* has given me the ability to honestly deal with those cases where the guidelines simply do not yield a sensible match." Finally, District Judge Robin J. Cauthron (Western Oklahoma) testified: "We now have the ability to vary from those Guidelines in the appropriate case, while still having a baseline, or national average, against which to compare the sentence. This results in the best of both worlds – consistency in sentencing and a clear outline of the facts and circumstances to consider, coupled with the discretion to find additional facts and circumstances suggesting a different sentence. The present system enhances the sense of fairness in sentencing from the viewpoint of all participants."

that unwarranted disparity may result when judges do not follow the guidelines.[23] However, based on survey and anecdotal data, it seems clear that the majority of judges believe that the advantages of the advisory system outweigh the possible disadvantages, particularly when compared with available alternatives.

In its recent testimony to Congress, the Commission provided an empirical overview of federal sentencing practices.[24] One of the most important conclusions was that the sentencing guidelines "continue to have a significant impact on the sentences courts impose" with the average sentence imposed for the offense increasing or decreasing, "usually in like proportion," to the minimum of the applicable guideline range.[25] This finding led the Commission to conclude that "[t]he clear linkage of the sentencing guidelines and the sentences imposed demonstrates that the guidelines have guided and continue to work to guide the sentencing decisions of federal judges."[26] It is remarkable that, regardless of time period (post-*Koon*, post-PROTECT Act, post-*Booker*, or post-*Gall*), the distance between the average guideline minimum and the average sentence length appears constant.[27]

In its congressional testimony, however, the Commission reached several other conclusions in support of its statutory suggestions to "improve sentencing in light of *Booker* and

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[23]Circuit Judge Richard C. Tallman (Ninth Circuit) stated: "Defendants who look the same on paper receive inconsistent sentences for similar crimes. Some judges fail to consider a particular factor a defendant believes is important. Others give greater weight to a prosecutor's concerns. Sometimes, the sentence surprises both sides. In short, perhaps judges now have too much discretion. "

[24]*Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris).

[25]*Id*.

[26]*Id*.

[27]*Id*.

its progeny."[28] Its major conclusion was that, "[w]hile sentencing data and case law demonstrate that the federal sentencing guidelines continue to provide gravitational pull in federal sentencing, the Commission has observed an increase in the numbers of variances from the guidelines...The most notable change in federal sentencing over time involves the rate of non-government sponsored below range sentences."[29] This increase seems less significant, however, if one examines the magnitude of the deviation from the guideline range. In fiscal year 2010, the median decrease in months for variances below the guideline range was 13 months.[30]

The Commission also stated that over the last three years, average sentence lengths have decreased, which it attributes to "the reduction in the overall severity of the aggregate offenses in the federal caseload (*i.e.*, due to the increasing portion of the federal caseload involving immigration cases, which carry lower sentences, on average, than other offenses)" and to a "decrease in the rate at which courts are imposing sentences within the applicable guideline range." If one examines non-immigration cases only, however, it appears that average sentence length has remained stable in recent years except for crack cocaine cases (where sentences have decreased) and fraud cases (where sentences have increased).[31]

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[28]*Id*.

[29]*Id*.

[30]U.S. Sentencing Commission, *Fiscal Year 2010 Sourcebook of Federal Sentencing Statistics*, Table 31C. As the Honorable William K. Sessions, III observed:

> With exceptions for child pornography and crack cocaine sentences, the average length of imprisonment for all other offenses has remained relatively constant over the past ten years, despite *Booker* and its progeny. Even when judges depart or vary from applicable guidelines ranges, the average length of those adjustments has remained consistent and relatively modest. Essentially, then, the guidelines have become accepted as part of the "culture" of the federal criminal justice system. William K. Sessions, III. *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L.& Pol. 305, 329 (2011).

[31]*Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris). *See also*, Jeffrey Ulmer,

Finally, the Commission noted that "the rate at which the sentences imposed are within the applicable guidelines has decreased significantly over the last five years. "[32] The importance of this reduction is less apparent, however, when the rate of within guideline range sentences and government sponsored sentences are considered together. For instance, in fiscal year 2010, the courts imposed sentences within the applicable advisory guideline range or below the range at the request of the government in 80.4 percent of all cases.[33]

Because the data on departures and variances do not adequately explain all of the complex factors that are considered at sentencing, it is important to carefully study the meaning behind these decisions when evaluating the effectiveness of the advisory guidelines system. Departures and variances may not reveal a problem with the advisory guidelines system but may in fact alleviate undue rigidity in individual cases. As stated in a recent letter to the Commission from the Department of Justice, a within-guideline sentence rate is not the only performance measure of a successful system, and "not every disparity is an unwelcome one."[34] Drawing

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Michael T. Light, & John Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?* 28 Justice Quarterly 6 (2011):

> Consistent with previous research, we exclude all immigration offenses because they are handled differently than other federal crimes...Since the passing of the PROTECT Act the average prison sentence has steadily increased, going from 66 months pre-PROTECT to 72 post-PROTECT, and to about 76 months in the Booker and Gall periods. Moreover, since the Booker and Gall decisions' offenders are slightly more likely to be sentenced to a term of incarceration (87% post-Booker compared to 85% in the periods prior). These trends match the increase in the average presumptive sentence, which went from 64 months to 68, then to 75 and 77 months during this time.

[32]*Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris) (noting that the rate at which courts imposed sentences that were within the applicable guideline range in fiscal year 2010 was 55 percent.)

[33]*Id.*

[34]Letter from Department of Justice to Hon. Patti B. Saris (September 2, 2011) ("We do not mean to suggest from this data...that the only performance measure of successful sentencing policy is the within-guideline sentencing rate...as the Attorney General has stated, 'we must also be prepared to accept the fact that not every disparity is an unwelcome one.'")

inferences about the success of a sentencing system from the frequency of sentences below the guideline range can be problematic because each individual sentence "has to be judged by the facts of the particular case,"[35] and the "possibility that conscientious sentencing judges reached the right result in most of these cases should not be hastily dismissed."[36]

When evaluating the current system, one must also keep in mind that an important role of judicial departures and variances is to inform the Commission when guidelines are not working for a certain category of cases. Sentences outside the guideline range provide a feedback mechanism from sentencing judges to the Commission on how to improve the guidelines system. By monitoring when courts depart or vary from the guidelines and analyzing their reasons for doing so, the Commission will be able to refine the guidelines to better meet the statutory purposes of sentencing.[37]

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[35]*United States v. Booker: One Year Later. Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress (2006) (statement of Hon. Paul Cassell).

[36]*Id*. at 9.

[37]At the regional hearings recognizing the twenty fifth anniversary of the Sentencing Reform Act, Chief District Judge James F. Holderman, Jr.(Northern Illinois) testified: "I believe... that it will be important for the Sentencing Commission to continue to use its best efforts to improve the Sentencing Guidelines so they retain credibility with judges in the advisory system...Perhaps the Commission can consider revising the Sentencing Guideline Manual to explain the continuing viability of downward departures. In that respect, the inclusion of fresher, pertinent examples in the application notes to the downward departure language could benefit the sentencing process." Circuit Judge Harris L. Hartz (Tenth Circuit) stated: "What I would recommend for consideration is an expansion of the guidelines manual to include additional commentary providing the rationale for various provisions. The Sentencing Guidelines provide a thorough, accessible compilation of the conclusions of the Sentencing Commission. Under a mandatory regime the sentencing judge, as well as the appellate tribunal, needed little more than conclusions. But now that the guidelines are only advisory, they must not only be understandable, but also persuasive. A judge who is unaware of why the Sentencing Commission determined that a factor should be disfavored, or why a particular fact should significantly increase or decrease the offense level, will be more likely than an informed judge to vary from the guidelines sentencing range. Even if the sentencing judge disagrees with the Commission's rationale, the judge may well recognize that the rationale applies to the particular case before the judge and, in the interest of evenhandedness, will impose a guidelines sentence. And an appellate judge will certainly be more likely to affirm a within guidelines sentence if that rationale applies to that case (although I realize that appellate courts have almost never overturned within-guidelines sentences). Of course, if a judge understands the rationale behind a guideline, he or she may be more likely to vary from the guidelines in cases where the rationale does not apply. But such variances are quite proper and should even be encouraged; treating unlike cases the same is not the sort of evenhandedness one should strive for."

In its testimony, the Commission also informed Congress that "[t]here are troubling trends in sentencing, including growing disparities among circuits and districts and demographic disparities."[38] As a general matter, any claim of increased geographic or demographic disparity should not lead to policy changes without being subject to close analysis and repeated study by multiple research entities. This is due to the fact that statistical research is often characterized by different methodological choices, disagreement among researchers, and the lack of necessary data.

With regard to the claim that geographic disparity has increased in the advisory guidelines period, it is important to keep in mind that there are local and regional differences in caseload and prosecutorial practices.[39] Moreover, a simple comparison of departure or variance rates of different circuits and districts may be unsound. As Justice Samuel Alito explained in 1992:

> [D]ifferent districts — generally for sound reasons — prosecute very different mixes of cases.... Consequently, no reliable inter-district comparisons can be made without controlling for differences in the mix of offenses prosecuted.... Do I mean to say that all inter-district disparities indicated by the Commission's statistics can be attributed to such differences in their case mix? Absolutely not. The "true" disparities, if I may use the term, may be smaller than those suggested by the Commission's numbers, or they may actually be even greater. The point is that we just can't tell from the Commission's statistics, and we will not be able to tell until a much more sophisticated analysis of each district's cases is performed.[40]

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[38]*Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris).

[39]As the Commission has written, "Regional differences arise not just from the exercise of judicial discretion, but also from differences in policies among U. S. attorneys and in the practices of individual prosecutors." U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. 80.

[40]Samuel A. Alito, *Reviewing the Sentencing Commission's 1991 Annual Report*, 5. Fed.Sent.R. 166 (1992).

As to the claim that demographic disparity has increased, the Commission provided an "updated and expanded analysis" of the association between sentence length and demographic factors, which was presented in its 2006 *Booker* Report and then again in 2010 with the same as well as an adjusted methodology.[41] The Commission stated that it "continues to find that sentence length is associated with some demographic factors."[42] For instance, "[b]ased on [its] analysis, and after controlling for a wide variety of factors relevant to sentencing, the data reflect that: Black male offenders received longer sentences than White male offenders," and "[t]he differences in sentence length have increased steadily since *Booker*." The Commission's findings are based on multivariate regression analysis, a tool whose "principal benefit," according to the Commission's testimony, is that it "accounts, or controls, for the effect of each factor in the analysis."[43]

While multivariate regression analysis has long been a tool used by social scientists due to its many advantages,[44] it is essential to emphasize its drawbacks each time a conclusion is reached based on this statistical technique.[45] As the Commission has stated in prior testimony to

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[41]*Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris).

[42]*Id*.

[43]*Id*.

[44]Regression analysis is a statistical method for studying the relationship between variables. It is "unquestionably the most widely used statistical technique in the social sciences." Paul D. Allison, *Multiple Regression: A Primer* 1 (1999). This method makes it possible to separate the effects of independent variables in order to examine the unique contribution of each variable. *Id*. at 3.

[45]Any tool as widely used as multivariate regression is "bound to be frequently misused." *Id.* at 49. One must therefore "cast a critical eye on the results of any [multivariate] regression." *Id*. There are numerous questions one must ask when evaluating the results of a regression analysis. The most important question is what factors are *not* included in the model. *Id.* If an important variable is omitted from the model, this produces "statistical bias," which means that the estimated effect of a particular independent variable is either too high or too low. *Id*. at 50.

the House Judiciary Committee[46] and in a report evaluating the sentencing guidelines system,[47] one must always be cautious when drawing conclusions about racial disparity based on regression analysis due to the lack of relevant data.

Different statistical methodologies, based not on available data but on researchers' choices, can also lead to different results.[48] The Commission itself developed a different methodology in its 2010 report than its 2006 report, consequently, reached a different conclusion. In a published, peer-reviewed paper, a team of researchers from Penn State University studied the same data set from the Commission's 2010 report, but reached different conclusions than the Commission based on different methodological choices.[49] They concluded that "there is

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[46]*United States v. Booker: One Year Later. Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress (2006) (statement of Ricardo Hinojosa) **(**"The conclusions from these analyses are cautionary because although they control for a number of factors associated with sentencing, there exist factors that cannot be measured...If these 'unmeasured factors' were able to be included in the models, significance of demographic factors might change.")

[47]U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. 125 ("it is possible that differences among groups in legally relevant characteristics on which we have no data may account for these findings in whole or in part. There may be differences among groups in numerous factors that judges legitimately may consider when deciding where to sentence within the guideline range or how far to depart. These could include differences in the seriousness of the offenses committed by the groups, or in their criminal histories, that are not adequately captured by the guideline offense level and criminal history score...without data on whether these disparities might be accounted for by legally relevant considerations, it seems premature to conclude that they represent *unwarranted* disparity or discrimination on the part of judges.")

[48]As the Commission has stated, "Different studies yield different answers as to whether discrimination influences sentences at all and, if so, how much. These studies also disagree on which racial and ethnic groups are discriminated against and exactly where in the criminal justice process this discrimination occurs. Some of the variation in conclusions results from differences among authors in how they define disparity and discrimination. Many of the differences, however, result from the different research methodologies employed." *Id.* at 118.

[49]Jeffrey T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity in the wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y, 1077 (2011) . The Penn State study noted that the Commission's 2010 report's analyses "made some methodological choices that differ from those of several federal sentencing studies in the literature." *Id*. at 178. For instance, the 2010 report (1) combined sentence length and incarceration into one analysis, (2) included immigration offenses, (3) equated periods of alternative confinement with periods of imprisonment, and (4) did not control for criminal history above and apart from criminal history's inclusion in the presumptive guideline minimum. Yet, "previously published USSC studies of disparity in federal sentencing, such as the USSC's 2004 report, along with several studies published in the criminology literature, often made methodological choices that differed from these four features." *Id at* 1082.

insufficient empirical support for broad-based policies...that would globally constrain federal judges' sentencing discretion as a remedy for disparity."[50] Any claim of increased disparity must therefore be subject to as much research as possible by different researchers to increase confidence in statistical conclusions.

When examining whether the voluntary guidelines system is successful, it is also important to examine the decisions, not just of sentencing judges, but of other actors within the criminal justice system such as prosecutors. As the Commission has noted, while the Sentencing Reform Act focused primarily on sentencing, Congress, the Commission, and other observers recognized that "sentencing could not be considered in isolation," and that "[d]ecisions regarding what charges to bring, decline, or dismiss, or what plea agreements to reach can all affect the fairness and uniformity of sentencing."[51] Congress has previously directed the Commission to study plea bargaining and its effects on disparity, but because fewer statistical data are available to investigate decisions made by prosecutors, "their effects are difficult for the Commission to monitor and precisely quantify."[52] However, according to the Commission's 2004 study, a variety of evidence developed throughout the mandatory guidelines era suggested that the "mechanisms and procedures designed to control disparity arising at presentencing stages [were] not all working as intended and have not been adequate to fully achieve uniformity of sentencing." The Commission concluded that "[c]harging decisions that limit the normal operation of the

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[50]*Id*. at 1109.

[51]U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. xii. *See also* Hon. Patti B. Saris. *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*. 30 Suffolk U. L. Rev. 1027, 1062 (1997)("One major source of unwarranted sentencing disparity that needs attention by both the Department of Justice and the Sentencing Commission is the substantial assistance motion, which is the essence of lawlessness from the vantage of a sentencing judge because it is unprincipled, undocumented, unreviewable, and secret. In addition, further attention should be paid to studying the claims that plea bargains have introduced an additional hidden disparity into sentencing.")

[52]*Id*. at xii.

guidelines result in sentences that are disproportionate to the seriousness of the offense and disparate among offenders who engage in similar conduct."[53]

The Commission has also noted before the Supreme Court's decision in *Booker* that "[d]isparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced."[54] Scholars and other observers have argued that a possible disadvantage of more structured guidelines systems (such as mandatory guidelines) is the displacement of discretion and disparity from the judge to the prosecutor. Conversely, a possible advantage of less structured systems (such as voluntary guidelines) is to reduce prosecutorial disparity through a more balanced apportionment of sentencing discretion between judges and prosecutors.[55]

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[53]*Id*. The Federal Judicial Center conducted a survey of chief probation officers as well as Article III judges in 1996, and found that"respondents believe much of the discretion that resided with judges before the guidelines has been shifted to prosecutors and that prosecutors [then had] an inappropriate degree of influence in the sentencing process." Federal Judicial Center. *The U.S. Sentencing Guidelines Results of the Federal Judicial Center's 1996 Survey: Report to the Committee on Criminal Law of the Judicial Conference of the United States*, 1997, p. 6.

[54]U.S. Sentencing Commission. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. 92.

[55]In a 1993 law review article, United States Senator Orrin G. Hatch wrote: "Congress should carefully study and monitor the effects of the guidelines' compulsory nature... Many of the guidelines' problems, including their perceived rigidity and their facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature. Congress must review whether these problems can be appropriately remedied within a compulsory guidelines system...Congress may need to examine whether the most effective way of addressing these problem is to return a greater degree of flexibility to the judiciary." Hon. Orrin G. Hatch. *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*. 28 Wake Forest L. Rev, 185, 197 (1993). The Sentencing Commission has also written:

> [C]oncern that charge selection and plea bargaining could limit or thwart the goals of sentencing reform surfaced early in scholarly writings (Twentieth Century Fund, 1976; Zimring, 1976) and in congressional debates (*see* Schulhofer & Nagel, 1989). Reform skeptics pointed out that prosecutors had considerable discretion to select charges and structure plea agreements, but that in the preguidelines era judges and the Parole Commission, in setting sentences and release dates, could temper the effects of prior prosecutorial decisions. Binding sentencing guidelines, without parole, could eliminate these checks, and prosecutors could conceivably exercise considerable control over sentences through the charges they bring and the facts they prove at sentencing. The result would be a shift of discretion toward prosecutors, which could perpetuate disparity and reduce the certainty of punishment. U.S. Sentencing Commission. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the*

Given the overarching impact prosecutorial decisions have on what is charged, who is charged and how they are charged, no serious review of the current sentencing scheme can be undertaken that does not also consider the impact, if any, of prosecutorial decisions on the sentencing process and on any sentencing disparity across various demographically delineated groups. It is therefore imperative that the Commission renews its efforts to study prosecutorial discretion and disparity, particularly in the advisory guidelines era, in order to understand the origins and impact of any disparity that may exist at sentencing but also at the presentencing stage. We urge the Commission to work with Congress and the Department of Justice to improve data collection to enable this type of study. As the Commission has written, Congress recognized in passing the Sentencing Reform Act that "disparity is not monolithic; it arises from multiple and discrete sources. Different components of the reformed sentencing system were designed to help control disparity arising from different sources. Evaluating the current system requires evaluating how well each source of disparity has been controlled."[56]

In sum, the available evidence seems to suggest that the advisory guideline system is working. The vast majority of district judges believe that the voluntary guidelines system is the best available alternative because it provides judges with a starting place and initial benchmark to determine the sentence, but allows sufficient flexibility to deviate from the guideline recommendation to account for individual circumstances. It remains true that the sentencing factors set forth in 18 U.S.C. § 3553(a) guide the sentencing judge's determination and assist in arriving at a sentence that fits both the offense and the offender. This is appropriate because in sentencing, one size simply does not and cannot fit all.

Goals of Sentencing Reform, 2004, p. 10.

[56]U.S. Sentencing Commission. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. 140.

Moreover, I can not overemphasize that there is no clear evidence that unwarranted disparity has increased in the advisory guidelines system, and such claims as do exist have not been subjected to sufficient research and analysis to justify any fundamental change in a system of advisory guidelines that we have after *Booker* and *Gall*. The average sentence length has closely tracked the guideline minimum for a long period of time, the average reduction in sentence is modest, and the rate of compliance with the guidelines is over 80 percent when government-sponsored departures are considered. While there is a small increase in the rate of non-government sponsored departures and variances below the guidelines, these sentences often reflect an intended goal of the Sentencing Reform Act – namely, to alleviate undue rigidity in individual cases. They also inform the Commission when a particular guideline may not be working for a category of cases. Thus, it is not appropriate to assume that the Guidelines are broken and thus must be fixed. The data simply does not support any such course of action. The partnership between district judges (subject to appellate review) and the Sentencing Commission in an advisory guidelines system appears to be the most effective structure for achieving the statutory purposes of sentencing and maintaining the appropriate balance of discretion.

Blakelyization of Mandatory Sentencing Guidelines

In February 2005, the Criminal Law Committee discussed the incorporation of the right to jury fact-finding in the sentencing guidelines system ("Blakelyization"). It concluded that it would be impossible to immediately require that all of the enhancements be alleged in the indictment and submitted to a jury. The Committee reasoned that such a requirement would pose significant legal and practical complications and would require extensive study. It, therefore, viewed Blakelyization of mandatory guidelines as, at best, a possible long-term solution that would require Congress to enact legislation, the Sentencing Commission to formulate and propose new

simplified guidelines, and the judiciary to identify necessary revisions to statutes and the Federal Rules of Evidence and Criminal Procedure.

Though the Committee has not recently addressed the Blakelyization option, it is worth noting that one of its early proponents, James Felman, recently testified before Congress on behalf of the American Bar Association and stated that sentencing guidelines with jury fact-finding is now unwarranted.[57] Mr. Felman reasoned, first, that it does not appear that a simplified system driven by jury findings would result in more uniform sentencing outcomes when compared with the present advisory system. This is because the ranges under a jury-driven system would almost certainly be significantly wider than the ranges under the present guidelines. Given that the median variance under the advisory system is roughly 12 months,[58] he reasoned, virtually all sentences that are considered variances today would be well within the guideline range under a jury-driven system. To overhaul the system in this manner could actually increase variations among sentences because the ranges would be so much wider. Starting over with an entirely new regime driven by jury fact-finding would be a significant and complex undertaking. There is no compelling reason, he concluded, "to put the federal criminal justice system through such upheaval to accomplish sentencing results that vary more widely than under the existing advisory system."[59]

Second, Felman stated, while scrapping the advisory system and substituting a new jury-driven system would be a great deal of work for little or no policy benefit, there are real potential disadvantages of such a new system. Asking juries to decide matters that were "traditionally

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[57] *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of James E. Felman).

[58] *Id*.

[59] *Id*.

thought of as sentencing considerations could change trial dynamics in ways that are difficult to foresee and that would require highly complex jury instructions and bifurcation of proceedings in some cases."[60] Moreover, like the initial guidelines, "any system of binding guidelines will risk a return to the prior systemic flaws of undue rigidity and unwarranted uniformity."[61]

Third, such a system would "introduce intractable sources of unwarranted disparity."[62] Individual prosecutors would determine the sentencing range in many cases by deciding what facts to charge and what facts to bargain away. Those decisions would not be made or explained in open court or subject to judicial review. A jury-driven system would "also prevent policy evolution based on empirical data and judicial feedback."[63] The sentencing range in each case would be set by the prosecutor's charges and the jury's factfinding or the defendant's admissions in a plea. Judges would have no role in determining the range and little ability to sentence outside the range based on individualized considerations or the purposes of sentencing.[64]

I would add that a system of jury-factfinding would inevitably elevate some facts while ignoring others. Yet, in a given situation, the circumstances of a given defendant may have peculiar facts that the sentencing judge deems important that would never be submitted to a jury. These include, an employment history, attitudes of reliable neighbors who know him/her, and a reasoned assessment of the defendant's susceptibility to treatment and/or rehabilitation.

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[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*.

The Sessions Proposal

The Honorable William K. Sessions, III, District Judge from the District of Vermont, and former Chair of the U.S. Sentencing Commission, recently set forth a proposal for "presumptive guidelines (subject to meaningful appellate review) that are simpler than the current guidelines, that afford sentencing judges meaningful discretion within broader sentencing ranges, and that are subject to few or no mandatory minimum statutes."[65] Judge Sessions recommends paring down the current sentencing grid from 258 guideline ranges to something along the lines of 30 to 50 ranges. The existing 43 offense levels would not be discarded, but would be consolidated in a simplified sentencing table. Judge Sessions also suggests that the six criminal history categories that currently exist be reduced to four categories.

Within each cell on the grid, a judge would have discretion to impose a sentence within any of three advisory sub-ranges, although the mid-range would serve as the benchmark and starting point. Before selecting a sentence within the applicable cell, the judge would first consider a series of aggravating and mitigating factors in deciding where within the applicable cell to impose a sentence. Any facts that would increase the base offense level in a manner that also would increase the maximum of the applicable cell on the grid would have to be submitted to a jury and proved beyond a reasonable doubt unless a defendant were to admit to such facts in court. In other words, this system "would be 'Blakely-ized' with respect to the larger cells but 'Booker-ized" with respect to the three sub-ranges within each cell."[66]

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[65]William K. Sessions, III. *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L.& Pol. 305, 340 (2011).

[66]*Id*. at 347.

Because the Judicial Conference has not yet had the opportunity to formally consider Judge Sessions' proposal, the Criminal Law Committee will not be offering a specific recommendation at this time; however, the Committee is prepared to review this proposal and, as necessary, make recommendations to the Judicial Conference.

Conclusion

For the reasons discussed above, the current advisory system is fair, workable, transparent, predictable, and flexible. There is no clear evidence of increased disparity and, therefore, no need for major sentencing reform. On the contrary, there is significant evidence that the advisory system is effectively meeting the goals of the Sentencing Reform Act. Because the vast majority of federal judges on the bench today have sentenced defendants under the sentencing guidelines structure, retaining the current system would minimize the disruption to the justice system that would accompany other reforms.

These hearings create an opportunity for a thoughtful, deliberate, and research-based refinement of the federal sentencing system. The Criminal Law Committee appreciates the opportunity to share our views, and we stand ready to work with the Commission.