



AMERICAN BAR ASSOCIATION

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Testimony of

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on behalf of the

AMERICAN BAR ASSOCIATION

before the

**SUBCOMMITTEE ON CRIME, TERRORISM, AND
HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY**

of the

UNITED STATES HOUSE OF REPRESENTATIVES

for the hearing on

**“The Status of Federal Sentencing and the U.S. Sentencing
Commission Six Years after U.S. v. Booker”**

**Washington, D.C.
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Mr. Chairman and Distinguished Members of the Subcommittee:

I am honored to have this opportunity to appear before you to express the views of the American Bar Association regarding the state of federal sentencing law. Since 1988, I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. Throughout my career I have taken a keen interest in federal sentencing law and in the Federal Sentencing Guidelines in particular. I am a former Co-Chair of the Practitioners' Advisory Group to the Sentencing Commission, and for 14 years I helped to organize and moderate the Annual National Seminar on the Federal Sentencing Guidelines. I am appearing today on behalf of the ABA, for which I serve as the Liaison to the Sentencing Commission and as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The ABA is the world's largest voluntary professional organization, with a membership of almost 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Wm. T. (Bill) Robinson III to present to the Subcommittee the ABA's position on the state of federal sentencing.

My testimony will cover three areas. First, I will discuss the advisory guidelines system and the reasons it best achieves the goals of the Sentencing Reform Act ("SRA"). With continued commitment by the Sentencing Commission to the promulgation and revision of guidelines based on empirical data and research, I believe advisory guidelines can best advance the purposes of sentencing and reduce both unwarranted disparity and its equally problematic inverse, unwarranted uniformity. Second, I will explain the ABA's longstanding opposition to the use of mandatory

minimum sentencing statutes, an approach I have previously described as the antithesis of rational sentencing policy. Third, I will offer some thoughts regarding an alternative overhaul of the advisory guidelines regime in favor of binding guidelines driven by jury findings. Although I previously advocated this approach, I did so before the advisory guidelines system was put in place. I do not support such an overhaul now, and instead endorse the continued use of the advisory guidelines system driven by research and experience.

I. The Status of the Advisory Guidelines System

1. The Goals of the Sentencing Reform Act

The primary goal of the SRA was the elimination of unwarranted disparity by bringing consistency and rationality to a system that had long operated without statutory guidance as to the purposes sentences should serve, the kinds of sentences available to serve those purposes, or the factors to be considered in sentencing.¹ To provide that guidance, Congress set forth the purposes of sentencing and factors to be considered in sentencing² and created the Commission to promulgate guidelines based on empirical data and national experience.³ Congress expected that defendants would be treated more consistently because the guidelines would “recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender.”⁴ Congress also expected that judges would sentence “outside the guidelines” when presented with a circumstance “not adequately considered in the formulation of the guidelines.”⁵

¹S. Rep. No. 98-225, at 38-40, 49-59, 74-75 (1983).

²18 U.S.C. § 3553(a).

³See 28 U.S.C. § 991(b)(1)(A), (b)(1)(C), (b)(2); § 994(o); § 995(a)(13)-(16).

⁴S. Rep. No. 98-225, at 51-52.

⁵*Id.* Congress expected that 18 U.S.C. § 3553(a) would guide the judge in determining whether to depart:

The goal of reducing unwarranted disparity is frequently phrased as treating similar offenders and offenses similarly. An equally important objective was to treat dissimilar offenders and offenses differently, thereby avoiding unwarranted uniformity. The Senate Report stated: “The key word in discussing unwarranted disparities is ‘unwarranted.’ The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.”⁶

Some have asserted that the SRA was intended to eliminate consideration of offender characteristics at sentencing. This is plainly incorrect. The SRA set forth in one location a comprehensive list of the factors to be considered at sentencing. The first item on the list is the “history and characteristics of the defendant.”⁷ The SRA further directed the Commission to consider a non-exhaustive list of eleven factors in establishing “categories of offenders . . . for use in the guidelines and policy statements governing . . . the nature, extent, place of service, or other incidents of an appropriate sentence:” age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood.⁸ The importance of offender characteristics was further amplified by the SRA’s

The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which guidelines and policy statements apply. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance.

Id. at 52.

⁶S. Rep. No. 98-225, at 161.

⁷18 U.S.C. § 3553(a)(1).

⁸28 U.S.C. § 994(d). The SRA further clarified that five of these factors – education, vocational skills, employment record, family ties and responsibilities, and community ties, could be used only to mitigate but not to aggravate a sentence. 28 U.S.C. § 994(e). *See also* S. Rep. No. 98-225, at 175 (1983) (“The purpose of [subsection 994(e)] is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education,

direction to the Commission to provide “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”⁹ Simply stated, Congress intended that the characteristics of the defendant would be considered by the judge at sentencing.

A subsidiary goal of the SRA was what is often phrased as “truth in sentencing” – certainty that the sentence imposed would be the sentence actually served – implemented by the elimination of parole.¹⁰ A third goal of the SRA was to “assure the availability of a full range of sentencing options,” including probation, fines, community service, and intermittent confinement. Alternative options were intended to reduce “reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment.”¹¹

The goals of the SRA remain as legitimate and important as they have ever been. For the reasons set forth below, I believe the advisory guidelines system is the best available means of achieving these goals.

2. Average Sentence Lengths

employment, and stabilizing ties.”).

⁹28 U.S.C. § 991(b)(1)(B).

¹⁰S. Rep. No. 98-225, at 39, 56.

¹¹*Id.* at 39, 50, 59.

It is important to recognize at the outset that advisory guidelines have not resulted in decreased sentence lengths.¹² The average sentence before *Booker* was roughly 46 months,¹³ and nearly 7 years later is nearly the same at 43.3 months.¹⁴ The small drop is attributable to two types of cases – unlawfully entering or remaining in the United States and crack cocaine.¹⁵ Average sentences for all other major categories of offenses are either unchanged or slightly higher today under advisory guidelines than before *Booker*,¹⁶ with two exceptions. First, sentences imposed for “white collar offenses” are significantly higher today than before *Booker*.¹⁷ Indeed, average sentences for the most serious fraud offenders have skyrocketed from 89 months pre-*Booker* to 123

¹²Of course the ABA has strong concerns regarding punishment severity for many federal crimes and has advocated for the increased availability and use of alternatives to incarceration, particularly in regard to non-violent offenses and first-time offenders. *See* Testimony of James E. Felman on behalf of the ABA before the United States Sentencing Commission regarding Alternatives to Incarceration, March 17, 2010, http://ftp.uscc.gov/AGENDAS/20100317/Felman_ABA_testimony.pdf. We are all familiar with the recent statistic that for the first time in our nation’s history, more than one in one hundred of us are imprisoned. The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe and twelve times higher than Japan. Roughly one quarter of all persons imprisoned in the entire world are imprisoned here in the United States. The Federal Sentencing scheme has contributed to these statistics. In the last 25 years since the advent of the mandatory minimum sentences for drug offenses and the Sentencing Guidelines, the average federal sentence has more than doubled in length. The Bureau of Prisons is 37% overcapacity, and costs taxpayers well over \$6 billion a year.

¹³USSC 2001-2005 Sourcebook of Federal Sentencing Statistics, Table 13 (average sentence was 46.8 months in 2001, 46.9 months in 2002, 47.9 months in 2003, 50.1 months in 2004 (pre-*Blakely*), 45 months in 2004 (post-*Blakely*), 46.3 months in 2005 (pre-*Booker*)).

¹⁴USSC Preliminary Quarterly Data Report, 3rd Quarter Release (FY 2011) (“Quarterly Data Report”) at 31, Table 19. After increasing to 51.8 months by 2007, USSC 2005-2007 Sourcebook of Federal Sentencing Statistics, Table 13 (51.1 months (2005 post-*Booker*), 51.8 months in 2006, 51.8 months in 2007)), due to increased guideline ranges for economic and drug crimes, USSC 2007 Final Quarterly Data Report, Figures C-I, average sentence length decreased to its present level.

¹⁵Average sentences for unlawful entry or remaining have fallen from 29 months before *Booker* to about 18 months due to the government’s policy of prosecuting an increasing number of less serious offenses and offenders. Quarterly Data Report at 36, Figure G; *compare* USSC FY 2005, Use of Guidelines and Specific Offense Characteristics, at 45-46 (of 10,229 illegal re-entry cases, 20.9% received no prior conviction enhancement), http://www.uscc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2005/05_glinexgline.pdf, with USSC FY 2010, Use of Guidelines and Specific Offense Characteristics, at 47 (of 19,767 illegal re-entry cases, 29% received no prior conviction enhancement). Average sentences for crack offenses have dropped from 130 months before *Booker* to 100 months, Quarterly Data Report at 38, Figure I, reflecting a deliberate policy choice by Congress and the Commission to lower penalties in light of the undue harshness of the crack cocaine guideline.

¹⁶These categories include firearms offenses, Quarterly Data Report at 34, Figure E, alien smuggling, *id.* at 35, Figure F, and drug offenses other than cocaine, *id.* at 38, Figure I.

¹⁷*Id.* at 33, Figure D.

months today.¹⁸ Second, while child pornography cases constitute only 2% of all federal cases, average sentence length has continued to escalate, from 75 months before *Booker* to 119.5 months in the first three quarters of 2011.¹⁹ With these few small exceptions, the advisory guidelines regime is a continuation of the status quo from the perspective of the bottom line result in the courtroom – average sentence lengths.

3. The Justice Brought by the Advisory Guideline System

While average sentence lengths have not materially decreased as a result of the guidelines' advisory nature, what has changed is that courts have been able to be smarter about who goes to jail for how long because of their ability to more meaningfully consider the aggravating and mitigating aspects of the offense and the individual history and characteristics of the defendant. When mandatory, the guidelines were widely and justifiably criticized for their rigidity and failure to distinguish among or take into consideration important individual circumstances.²⁰ This led to unwarranted uniformity – treating alike those offenders and offenses that are not alike.²¹

My own experience matches the consensus viewpoint. In my practice I am continually reminded that the mix of information presented by offenses and offenders is so rich that it simply cannot all be predicted, written down, and appropriately weighed in advance with unflinching success.

¹⁸USSC 2006-2010 Datafiles, USSC FY06 - USSC FY10, Figure 5 to *Sentencing Trends* distributed by USSC Vice Chair William B. Carr at ABA WCC Conference, San Diego, Cal. Mar. 3, 2011 (on file with the author).

¹⁹USSC, 2005 Sourcebook of Federal Sentencing Statistics, Table 13; Quarterly Data Report at 31, Table 19. Indeed, the penalty increases for these offenses are even greater than suggested by these figures because the Commission's pre-*Booker* data lumped child exploitation offenses in together with simple possession, receipt, and distribution offenses. See USSC, 2009 & 2010 Sourcebook of Federal Sentencing Statistics, Appendix A.

²⁰*See, e.g.*, ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>; The Constitution Project, *Principles for the Design and Reform of Sentencing Systems*, http://www.constitutionproject.org/pdf/sentencing_principles2.pdf; Kate Stith & Jose Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (Chicago 1998).

²¹*See* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 870 (1992).

This reality has long been acknowledged by the Commission,²² and was anticipated by Congress in enacting the SRA. The Senate Report stated:

[E]ach offender stands before the court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors . . . and the appropriate purposes of the sentence to be imposed in the case – cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.²³

Even the wisest guidelines, if mandatory, will yield instances of undue uniformity.

Making guidelines advisory, coupled with appellate review for reasonableness,²⁴ cured the undue rigidity of the mandatory guidelines.²⁵ At the same time, the advisory guidelines bear no resemblance to the “unbridled discretion” of the pre-guidelines era. Advisory guidelines strike the right balance between the two. Moreover, the Supreme Court has made the guidelines more prominent than the statute compels by requiring judges to treat them as “the starting point and the

²² “[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.” See U.S.S.G. § 1A1.1, editorial note, Part A(4)(b).

²³ S. Rep. No. 98-225, at 150.

²⁴ Although some have suggested more vigorous appellate review of below-range sentences, it is difficult to see how this could constitutionally be accomplished. The previous review standard was excised in *Booker* and replaced with reasonableness review of all sentences, whether inside or outside the guideline range. *United States v. Booker*, 543 U.S. 220, 259-62 (2005); *Gall v. United States*, 552 U.S. 38, 41, 51 (2007). Moreover, the government has a high success rate when it appeals. See USSC 2010 Sourcebook of Federal Sentencing Statistics, Table 58 (government raised 30 issues on appeal relating to § 3553(a) factors, and prevailed 60% of the time). Vigorous appellate review of below-range sentences was most recently illustrated by the Eleventh Circuit’s reversal of the sentence imposed on Jose Padilla. *United States v. Jayousi*, ___ F.3d ___, 2011 WL 4346322 (11th Cir. Sept. 19, 2011).

²⁵ Thus, for example, a court may now consider the circumstances that the defendant was an unemployed drug addict estranged from his family at the time of the offense but by the date of sentencing had attended college, achieved high grades, was a top employee at his job slated for promotion, re-established a relationship with his father, got married, and supported his wife’s daughter. *Pepper v. United States*, 131 S.Ct. 1229, 1242-43 (2011).

initial benchmark.”²⁶ Although district judges may not presume the guidelines to be appropriate, most begin with the assumption that they will impose a guidelines sentence unless there is good reason not to do so.²⁷

As should be expected under a system embracing meaningful consideration of the purposes of sentencing and individualized circumstances, the percentage of below-range sentences for reasons not directly sponsored by the government has modestly increased from 12.7 one year after *Booker*, when the guidelines were being enforced more strictly than was permissible, to 16.9 during the third quarter of 2011.²⁸ The third quarter statistic for 2011 demonstrates a significant decrease since the last quarter of 2010, when the rate was 18.7%.²⁹ The rate of below-range sentences sponsored by the government is substantially higher, now at 27.7%,³⁰ and has remained fairly constant. The “conformance rate” – defined by the Commission as within-range sentences and government sponsored below-range sentences – was 81.3% during the third quarter of 2011.³¹ Another 1.7% were upward departures.³²

Moreover, in evaluating the effectiveness of advisory guidelines, it is critical to avoid undue focus on the percentage of cases sentenced outside the guideline range because this obscures the need to look equally carefully at the extent of such variances. Sentences 10% and 100% below the guidelines range look the same when viewed only from the perspective of whether they are variances. As foreshadowed by the bottom line statistic of static overall sentence lengths, the extent

²⁶*Gall*, 552 U.S. at 49.

²⁷The reason for this is twofold. The first is habit – federal judges have been sentencing under the guidelines for more than two decades. They are comfortable and familiar with them. The second is practical. The guidelines have a specific number attached, whereas the other Section 3553(a) factors do not.

²⁸Quarterly Data Report at 12, Table 4.

²⁹*Id.* This decrease is likely due to the reduction in the crack guidelines and other smaller changes as the Commission reviews and revises the guidelines.

³⁰*Id.*

³¹*Id.*

of variances during the pre- and post-*Booker* periods is virtually identical. The median downward departure not sponsored by the government before *Booker* was 12 months.³³ As shown in the Appendix, the median decrease is less than 13 months, and has remained stable since *Booker*. Thus, the data suggest that the advisory guidelines permit greater individualization of sentences while still producing rough similarity of results across all offense type categories.

While some claim that inter-district and inter-judge disparity has increased under the advisory system, there is no compelling evidence of the nature or extent of this.³⁴ Indeed, there is strong evidence that “[i]f anything, there is slightly less variation between districts in sentencing lengths compared to the pre-PROTECT Act period.”³⁵ Moreover, the SRA did not seek to compel nationwide uniformity, but instead recognized the relevance of regional differences in “the community view of the gravity of the offense,” “the public concern generated by the offense,” and “the current incidence of the offense in the community.”³⁶ There have always been regional and inter-judge differences in sentencing practice, and many variations are reflections of differing case loads and prosecutorial practices rather than judicial philosophies.³⁷ In any event, even a modest increase in regional or inter-judge disparity would not outweigh the enormous benefits of the

³²*Id.*

³³USSC 2003-2004 Sourcebook of Federal Sentencing Statistics, Table 31A (12 months in 2003 and 2004). It is not possible to make accurate comparisons before 2003 because until then the Commission reported government-sponsored “fast track” departures in the same category as non-government-sponsored departures.

³⁴Unfortunately, some making this claim have exaggerated it by including government sponsored sentences based on substantial assistance and “fast track” programs in the percentage of below-range sentences cited. This is plainly misleading.

³⁵Jeffrey T. Ulmer, 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?*, Justice Quarterly (forthcoming 2011), at 18, <http://www.tandfonline.com/doi/abs/10.1080/07418825.2011.553726>. Inter-district variation in sentence length fell from 6.6% before the PROTECT Act, to 5.8% after the PROTECT Act, to 5.2% after *Booker*, to 6.3% after *Gall*. *Id.*

³⁶28 U.S.C. § 994(c)(4), (5), (7).

³⁷*See* Samuel A. Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 FED. SENT’G REP. 166 (1992).

advisory guidelines system. Moreover, for the reasons discussed below in Part III, such disparities cannot be reduced by any superior alternative to advisory guidelines driven by empirical feedback.

Some have suggested, citing a preliminary study by the Commission,³⁸ that racial disparities have increased under the advisory guidelines. As the Commission has acknowledged, however, no such conclusion is possible because its analysis did not account for many legally relevant factors that legitimately affect sentencing decisions.³⁹ Other research using the Commission’s datasets but an improved methodology has reached the opposite conclusion.⁴⁰ Moreover, unproven allegations of racial bias under advisory guidelines divert attention from proven sources of unwarranted racial disparity that cannot be corrected in a mandatory system. All defendants, regardless of race, are treated more fairly when their individual characteristics are taken into account as permitted under an advisory system.

4. The Promise of the Advisory Guidelines System

Although the big picture data show an advisory system that has improved on the mandatory regime, there is more work to be done to improve the advisory guidelines. This work falls into two rough categories – first, gathering and publishing additional data, and second, acting on the data received. The guidelines must be revised over time in light of empirical research and sentencing data, as Congress originally intended and as the Supreme Court has re-emphasized. The decreasing

³⁸USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis*, 22-23 (2010).

³⁹The Commission’s report itself states that it “should be interpreted with caution,” because it does not control for “many legal and other legitimate considerations that are not and cannot be measured” because they are “unavailable in the Commission's datasets.” *Id.* at 4. These include factors such as violence in a defendant's past, violence in the instant offense not reflected in the offense level, crimes not reflected in the criminal history score, and employment record. *Id.* at 4, 9-10 & nn.37-39.

⁴⁰Jeffery T. Ulmer, 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?*, Justice Quarterly (forthcoming 2011), at 22, <http://www.tandfonline.com/doi/abs/10.1080/07418825.2011.55326>; T. Ulmer, Michael T. Light, & John Kramer, *Racial Disparity In the Wake of the Booker/FanFan Decision: An Alternative*

percentages of non-government-sponsored below-range sentences noted above give reason to believe this process is well underway, but it is far from complete.

1. Collecting and Publishing More Data

While the Commission has done a tremendous job compiling a vast array of important post-*Booker* data, there is still a great deal we do not know. For example, we do not yet have any data by offense type on why district courts are sentencing within or below guideline ranges. I have yet to encounter a federal district judge who does not approach his or her job in general and sentencing in particular with anything other than the utmost solemnity. Frivolous people do not get appointed to the federal bench in this country. Any serious study of sentencing practices under advisory guidelines remains incomplete in the absence of data that shed light on *why* these conscientious men and women are sentencing as they are. We need to know the bases for variances by offense category and their relative rates of frequency. And we also need these data cross-referenced by extent of the variance.

The newly invigorated array of sentencing considerations in Section 3553(a) presents a valuable learning opportunity that should not be squandered. While the initial guidelines were always intended to evolve based on further knowledge,⁴¹ they suffered from structural aspects that made this difficult to accomplish. I recently heard a Vice Chair of the Commission explain it this way – under the mandatory guidelines the Commission knew that judges were sometimes

Analysis to the USSC's 2010 Report, 10 Criminology & Pub. Pol'y ____ (forthcoming November 2011), at 31-32.

⁴¹See S. Rep. No. 98-225, at 178 (Commission should not “second-guess individual judicial sentencing actions either at the trial or appellate level,” but should learn “whether the guidelines are being effectively implemented and revise them if for some reason they fail to achieve their purposes.”); *Kimbrough v. United States*, 552 U.S. 85, 107 (2007)(“ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”); *Rita v. United States*, 551 U.S. 338, 350 (2007)(“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.” The Commission will “collect and examine” sentencing data and reasons and “can revise the Guidelines accordingly.”).

dissatisfied with the result dictated by the guidelines, but there was no effective way for judges either to express their disagreements or to demonstrate how they would have resolved them via a specific sentencing outcome. Now, under advisory guidelines, we can learn not only what judges think about the considerations captured by the guidelines, but also why in some cases their evaluation of the purposes of sentencing leads to a non-guidelines sentence. The Commission has a unique and historic opportunity to gather and study data on real sentencing considerations by real judges in real cases, and to thereafter measure the effectiveness of these sentences.⁴² I strongly suspect that nearly every variance is granted for reasons that more effectively serve the purposes of sentencing. If so, this underscores both the effectiveness of advisory guidelines in achieving fairness and the need to address these considerations in the guidelines.

2. The Benefits of Acting on More Data

This leads to my second point regarding the opportunities for refinement of the advisory guidelines based on judicial feedback and other empirical efforts. There is room for disagreement regarding precise outcomes in specific cases. But no one can disagree with the proposition that sentencing should be driven by the most thoughtful consideration of all relevant factors in each case that can be accomplished. Having a laboratory in each courtroom affords us a new wealth of thought to be harnessed and put to use. The dynamic between the judiciary and the Commission is thus best viewed as a dialectic – a process of improvement through a synthesis of views based on actual practice. Where judges are consistently differing with a guideline for the same or similar reasons, this almost certainly suggests a need to improve the guideline. When this process of refinement

⁴²See James Felman, *The State of the Sentencing Union: A call for Fundamental Reexamination*, 20 FED. SENT'G. REP. 337 (2008). Most judges announce their reasons for sentencing on the court record rather than in published opinions, and the “statement of reasons” forms completed as part of the sentencing judgment are inadequate to capture these reasons in detail. It is thus critical for the Commission to fill the role of this data

improves the rationality of the guidelines, it should also lead to greater conformity with them.⁴³ In the simplest terms, if the guidelines make more sense, there will be more within-guideline sentences.⁴⁴

The Commission has begun to act on this important source of information. In 2010, the Commission took a first modest step toward smarter use of alternatives to incarceration.⁴⁵ The Commission adjusted the 16- and 12-level enhancements in the illegal re-entry guideline to differentiate prior convictions too stale to count in the criminal history score, in response to court decisions finding that inclusion of stale convictions creates unwarranted uniformity.⁴⁶ The Commission made a small change to the criminal history rules in response to variances, departures, and empirical research regarding recidivism.⁴⁷ Prompted by a high rate of variances and numerous carefully written decisions, the Commission is studying the child pornography guideline with a view to possible recommendations to Congress.⁴⁸ Recognizing a growing number of below-range sentences in cases sentenced under § 2B1.1 that involve relatively large economic loss amounts, the Commission is considering a comprehensive review of that and related guidelines.

collection and dissemination.

⁴³See Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. POL'Y REV. 93, 104 (1999); Kate Stith & José Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 172 (1998); Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT'G. REP. 165, 166 (2007).

⁴⁴See *Rita*, 551 U.S. at 382-83 (Scalia, J., concurring) (as the Commission “perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts, . . . , district courts will have less reason to depart from the Commission's recommendations, leading to more sentencing uniformity.”).

⁴⁵The Commission expanded Zones B and C by one level each, and invited a departure from Zone C to Zone B to “to accomplish a specific treatment purpose,” if the defendant is a substance abuser or suffers from a significant mental illness, and if the defendant's “criminality is related to the treatment problem to be addressed.” U.S.S.G. App. C, amend.738 (Nov.1, 2010).

⁴⁶See 76 Fed. Reg. 24960-01, 24969 (May 3, 2011).

⁴⁷See USSG App. C, amend. 742 (Nov. 1, 2010) (Reason for Amendment) (eliminating recency points in response to variances and recidivism research).

⁴⁸USSC *The History of the Child Pornography Guidelines*, at 1 n.4, 8 (October 2009); USSC *Notice of Proposed Priorities*, 76 Fed. Reg. 45,007 (July 22, 2011).

This process of guideline refinement through judicial feedback and empirical study also has implications for congressional policy. Congress wisely created the Commission as a neutral expert body, to act on the basis of research, not fleeting “political passions.”⁴⁹ With infrequent exceptions, the Congress should defer to the Commission’s institutionally superior position to conduct empirically driven research that maximizes the rationality of the guidelines as a whole. We are pleased that the number of specific directives to the Commission has declined under advisory guidelines and believe that Congress should use general directives that appropriately defer to the Commission’s expertise and structural advantages.

In sum, the advisory system is generating consistent average sentence lengths and sentences within a fairly tight cluster around the guidelines range. With greater and more targeted data collection, further use of judicial feedback and continuing empirical research, the advisory system can generate unprecedented compliance with the purposes of sentencing.

II. The Congress Should Repeal Mandatory Minimum Sentencing Statutes

In light of the overall success of the advisory system and its promise for the future, the ABA does not see a need for sentencing reform legislation focused on the advisory guidelines at present.

⁴⁹See Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance at 20-21, *Claiborne v. United States*, No. 06-5618 (Jan. 22, 2007) (“Congress created the Commission to encourage reality-based sentencing policies: i.e., policies based on objective data - not, for example, political debates ‘centering around the harsher versus more lenient punishment.’ . . . Indeed, Congress intended that the work of the Commission . . . would enable the sentencing system to evolve over time, so that its rules and policies would reflect, ‘to the extent practicable, advancement in human knowledge of human behavior as it relates to the criminal justice process.’”); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993) (Special Counsel to the Senate Judiciary Committee from 1975 through 1980, stating that Congress delegated promulgation of guidelines to Commission because it had “neither the necessary time nor expertise,” and would be “unable or unwilling to avoid the temptation to increase criminal sentences substantially” when faced with “politically volatile issues.”); Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice System*, 61 FED. PROBATION 58, 62 (1997) (“The creation of the Sentencing Commission and its placement within the judicial branch of government was intended to insulate sentencing policy . . . from the political passions of the day. As an independent, expert agency, the Commission’s role is to develop sentencing policy on the basis of research and reason.”).

We believe, however, there is a need for the more fundamental federal sentencing reform to repeal mandatory minimum sentencing laws.

Sentencing by mandatory minimums is the antithesis of rational sentencing policy. Advisory guidelines driven by judicial analysis and scrutiny permit rational and dispassionate sentencing based on a wide array of relevant considerations, including the nature and circumstances of the offense, the history and characteristics of the defendant, the defendant's role in the offense, whether the defendant has accepted responsibility for his or her criminal conduct, and the likelihood that a given sentence will further the various purposes of sentencing, such as just desserts, deterrence, protection of the public, and rehabilitation. But where advisory guidelines exalt reason and rationality, sentencing by mandatory minimums is the logical equivalent of a temper tantrum. Mandatory minimums reflect a deliberate election to jettison the entire array of undisputedly relevant considerations in favor of a single solitary fact – usually a quantity of something that may bear no relationship to the defendant's particular degree of culpability. Mandatory minimum sentencing declares that we do not care even a little about a defendant's personal circumstances. These statutes announce as a policy that we are utterly uninterested in the full nature or circumstances of the defendant's crime. Mandatory minimums blind the courts to the defendant's role in the offense and his or her acceptance of responsibility. Sentencing by mandatory minimum is uniformly indifferent to whether the result furthers all or even any of the purposes of punishment.

The critical flaws of mandatory minimums are not newly discovered and were well documented by the Commission's 1991 Report, which found that:

- The “lack of uniform application [of mandatory minimums] creates unwarranted disparity in sentencing;”

- “honesty and truth in sentencing ... is compromised [because] the charging and plea negotiation processes are neither open to public view nor generally reviewable by the courts;”
- the “disparate application of mandatory minimum sentences ... appears to be related to the race of the defendant;”
- “offenders seemingly not similar nonetheless receive similar sentences,” thus creating “unwarranted sentencing uniformity;” and
- “[s]ince the power to determine the charge of conviction rests exclusively with the prosecution for the 85 percent of the cases that do not proceed to trial [now 96%], mandatory minimums transfer sentencing power from the court to the prosecution.”⁵⁰

It is of no importance whether some of the goals sought to be achieved by mandatory minimums are themselves unobjectionable or whether the statutes were well intentioned when enacted. History now reveals that the assumptions underlying these statutes have not been borne out, and experimentation with “one size fits all” sentencing has demonstrated that there are better, smarter, more balanced, and ultimately more sensible approaches to sentencing policy.⁵¹ The ABA has opposed mandatory minimums for more than 40 years.⁵² As a matter of policy, mandatory minimums raise a myriad of troubling concerns. They frequently lead to arbitrary sentences because

⁵⁰United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at ii-iv (1991)(“USSC Special Report”).

⁵¹The lesson is one that has been learned in the past, as illustrated by the repeal in 1970 of the mandatory minimum drug penalties passed in 1956. Pub. L. No. 91-513, 84 Stat. 1236 (1970); Pub. L. No. 84-728, 70 Stat. 651 (1956).

⁵²The ABA’s most recent *Standards for Criminal Justice: Sentencing* (3d ed. 1994) state clearly that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” Standard 18-3.21(b). The current standards are consistent with the 1968 ABA *Standards Relating to Sentencing Alternatives and Procedures* § 2.1(c), as well as a further resolution of the ABA House of Delegates in 1974. Proceedings of the 1974 Mid-Year Meeting of the ABA House of Delegates, Report No. 1 of the Section of Criminal Justice, at 443-44. Additional policy on the point was generated in response to an address by Justice Kennedy at the 2003 ABA annual meeting. The ABA established a Commission to investigate the state of sentencing and corrections in the United States and to make recommendations on how to address the problems Justice Kennedy identified. One year later the ABA adopted a series of recommendations submitted by the Commission, including a resolution that urged all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.” Recommendation 121A, Annual 2004, <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>, at 9.

the considerations in sentencing shift from the traditional wide focus on both the crime itself and offender characteristics to an exclusive focus on a single fact – typically a quantity of something. As a result, persons with legitimate mitigating factors based on degree of culpability, role in the offense, personal circumstances, and background frequently receive the same punishment as kingpins and hardened criminals.⁵³ The only similarity these offenders share is the single fact that triggers the mandatory minimum sentence. Treating unlike offenders identically is as much a blow to rational sentencing policy as is treating similar offenders differently. Indeed, given the perversity that more culpable offenders are more frequently better situated to assist in the investigation and prosecution of others, mandatory minimum statutes often result in symmetrically inverse justice. The masterminds bargain out from under the mandatory minimum, leaving only the lower level defendants in the net cast by the mandatory minimum statutes.⁵⁴ In addition, women offenders – typically minor players in drug dealing and disproportionately the caretaker parents of minor children – frequently bear the brunt of mandatory minimums.

Mandatory minimum statutes also produce the very sentencing disparities that determinate sentencing was intended to eliminate. Because mandatory minimums are driven by charging decisions made by prosecutors, judges no longer have the ability to individualize sentences or impose a sentence no greater than necessary to reflect the gravity of the actual offense conduct. This is particularly the case with statutes such as 18 U.S.C. § 924(c) and 21 U.S.C. § 851, which

⁵³See Statement of the Honorable Paul G. Cassell (on behalf of the Judicial Conference) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, June 26, 2007, <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf> (“Mandatory minimum sentences produce sentences that can only be described as bizarre.”).

⁵⁴See *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992)(Easterbrook, J.) (“Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious a defendant’s crimes, the lower the sentence – because the greater his wrongs, the more information and assistance he has to offer to a prosecutor.”).

effectively apply only at the discretion of the prosecutor. Such statutes are not only poorly suited to accomplish the purposes of sentencing,⁵⁵ they actually frustrate those purposes by lending themselves as plea bargaining “chips” to be deployed by prosecutors in obtaining guilty pleas on more favorable terms.⁵⁶ These statutes are both uncertain and inconsistent in their application⁵⁷ and can easily be manipulated through prosecutorial choices that are neither visible nor subject to review. Mandatory minimums also cause sentencing “cliffs” – dramatic differences in results for those whose conduct just barely brings them within the terms of the statute. And sentencing that is driven by a single factor such as quantity is also highly susceptible to error, given the potential unreliability of informants in “historical prosecutions” and the potential for manipulation in investigations of ongoing offenses.⁵⁸ Mandatory minimums also appear to disproportionately impact Blacks and Hispanics.⁵⁹

Prosecutors sometimes claim that mandatory minimums are necessary to induce defendants to cooperate in the investigation and prosecution of others. There is no empirical basis for this claim, however, given that defendants cooperate in roughly equal or greater numbers in many types of cases, including economic crimes, where there are no mandatory minimum sentences.⁶⁰

⁵⁵See Statement of Paul G. Cassell, *supra* note 53.

⁵⁶See Stephen J. Shulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202-03 (1993); Ilene H. Nagel & Stephen J. Shulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S CAL. L. REV. 501 (1992).

⁵⁷See USSC Special Report, *supra* note 49; United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 89-90 (Nov. 2004)(“USSC Fifteen Year Review”); *see also* General Accounting Office, GAO-04-105, *Federal Drug Offenses: Departures from Federal Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001*, at 14-16, 79 (Oct. 2003).

⁵⁸See Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385 (1996).

⁵⁹See USSC Special Report, *supra* note 49; USSC Fifteen Year Review, *supra* note 57, at 91, 135.

⁶⁰Quarterly Data Report at 13-16, Table 5.

Moreover, the ABA rejects the premise that inducement of cooperation is a legitimate aim of sentencing policy.

In addition to the organized bar's objections to mandatory minimum sentencing regimes, mandatory minimum sentencing is opposed by an unusually wide ideological array of thoughtful individuals, including the late Chief Justice William Rehnquist,⁶¹ Justice Anthony M. Kennedy,⁶² Justice Stephen Breyer,⁶³ Judge William W. Wilkins, Jr.,⁶⁴ Senator Orrin Hatch,⁶⁵ Grover Norquist of Americans for Tax Reform,⁶⁶ American Civil Rights Institute President Ward Connerly,⁶⁷

⁶¹William H. Rehnquist, *Luncheon Address* (June 18, 1993), published in United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).

⁶²Justice Kennedy has been clear in the point, stating: "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences. ... In many cases, mandatory minimum sentences are unwise or unjust." Speech of Justice Anthony Kennedy, Address to the ABA (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

⁶³Justice Breyer specifically noted the fundamental inconsistency of mandatory minimums with sentencing guidelines:

[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.... Every system, after all, needs some kind of escape valve for unusual cases.... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. ... In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.

Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), reprinted at 11 FED. SENT'G. REP. 180, 184-85 (1999); see also *Harris v. United States*, 536 U.S. 545, 570-71 (2002)(Breyer, J., concurring in part and concurring in the judgment). In defense of horses, I also wish to suggest a refinement of Justice Breyer's analogy. Horses are, without doubt, potentially dangerous and unpredictable. But a horse will typically go where told and respond to changes in course. I suggest the better analogy is that with mandatory minimum statutes Congress is riding a rhinoceros.

⁶⁴See Paul J. Hofer, *The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 FED. SENT'G. REP. 2, at 63 (September 1993). This proposal was endorsed by the Judicial Conference. JCUS-SEP 93, p. 46.

⁶⁵Orrin 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 (1993).

⁶⁶Statement of Grover G. Norquist, President, Americans for Tax Reform, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 111th Cong. 34 (July 14, 2009), <http://judiciary.house.gov/hearings/pdf/Norquist090714.pdf>.

⁶⁷*State's Sentencing Laws Flood Jails and Prisons*, Sacramento Bee, Mar 7, 2010

National Rifle Association President David Keene,⁶⁸ and Justice Fellowship President Pat Nolan.⁶⁹

The Judicial Conference of the United States has consistently opposed mandatory minimum sentences for almost 60 years,⁷⁰ and the American Law Institute has opposed them for 50 years.⁷¹

Many other organizations have noted the defects of mandatory minimums, including the Federal Judicial Center,⁷² the Constitution Project's Sentencing Initiative,⁷³ the U.S. Conference of Mayors,⁷⁴ the RAND Corporation,⁷⁵ a panel of the National Academy of Sciences,⁷⁶ Families Against Mandatory Minimums,⁷⁷ and the Federal Public and Community Defenders.⁷⁸ Mandatory minimums have also been condemned by numerous judges⁷⁹ and academics,⁸⁰ religious

⁶⁸Written Testimony of David Keene submitted to the Subcommittee on Crime, Terrorism and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (July 14, 2009), http://judiciary.house.gov/hearings/printers/111th/111-48_51013.PDF.

⁶⁹Pat Nolan, President, Justice Fellowship, *Mandatory Minimums, Unjust and Unbiblical*, <http://www.justicefellowship.org/key-issues/issues-in-criminal-justice-reform/issue-2/823> (last visited Sept. 16, 2011).

⁷⁰See Statement of Paul G. Cassell, *supra* note 52 (reviewing Judicial Conference opposition to mandatory minimums in 1953, 1962, 1965, 1967, 1971, 1976, 1981, 1990, 1991, 1993, 1994, 1995, and 2006).

⁷¹See *American Law Institute, Model Penal Code: Sentencing, Tentative Draft No. 2*, § 6.06, comment d (March 25, 2011).

⁷²Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Prison Terms*, Federal Judicial Center (1994) (“evidence has accumulated indicating that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system”).

⁷³The Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005). The Constitution Project group included, in addition to me, former Attorney General Edwin Meese III (co-chair), Professor Philip B. Heymann (co-chair), Zachary Carter, then-Judge Paul Cassell, then-Judge Nancy Gertner, Isabel Gomez, Thomas Hillier II, Miriam Krinsky, Norman Maleng, Judge Jon Newman, Professor Thomas Perez, Barbara Toombs, and Professor Ron Wright. Our Reporters were Professor Frank Bowman and Dean David Yellen. Justice Alito was originally a member of the group (before he withdrew after being nominated to serve on the Supreme Court) and expressed agreement with the Principles cited above.

⁷⁴U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006).

⁷⁵RAND Corporation Drug Policy Research Center, *Mandatory Minimum Drug Sentencing: Throwing Away the Key or the Taxpayers' Money* (1997)(concluding that mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing cocaine consumption or drug-related crime).

⁷⁶See Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., *Understanding and Preventing Violence* 6 (1993)(finding that even tripling the length of punishment would result in only negligible reductions in crime).

⁷⁷Families Against Mandatory Minimums, FAMMGRAM, *The Case Against Mandatory Minimums* (Winter 2005), http://famm.org/Repository/Primer_Final.pdf.

⁷⁸Statement of Michael Nachmanoff before the USSC (May 27, 2010).

⁷⁹See, e.g., *United States v. Powell*, 404 F.3d 678 (2d Cir. 2005); *United States v. Hiveley*, 61 F.3d 1358, 1363 (8th Cir. 1995)(Bright, J., concurring); *United States v. Abbott*, 30 F.3d 71 (7th Cir. 1994); *United States v. Madkour*, 930 F.2d 234, 236, 239-40 (2d Cir. 1991); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *United States v. Redondo-Lemos*, 754 F. Supp. 1401 (D Ariz. 1990); John S.

organizations, including the National Council of Churches, and many individual denominations,⁸¹ as well as the recently formed “Right on Crime” group that includes former House Speaker Newt Gingrich, former Attorney General Ed Meese, Family Research Council President Tony Perkins, former drug czar Bill Bennett, and others.⁸² Public support for mandatory minimum sentencing has waned significantly in recent years,⁸³ as illustrated in a recent New York Times article.⁸⁴

III. Potential Systemic Revisions

As a final matter, there is no need to consider fundamentally overhauling the advisory system to make it more binding. In anticipation of *Booker*, a number of suggestions emerged regarding alternative sentencing regimes that would pass constitutional muster by triggering enhanced punishments based only on facts found by the jury. In my personal capacity, I have suggested a

Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (resigning from the bench because “[w]hile I might have stayed on despite the inadequate pay, I no longer want to be a part of our unjust criminal justice system”); Statement of Senior Judge Vincent L. Broderick (on Behalf of the Judicial Conference Committee on Criminal Law) before the House Judiciary Subcommittee on Crime and Criminal Justice, July 28, 1993 (“I firmly believe that any reasonable person who exposes himself or herself to this [mandatory minimum] system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality.”).

⁸⁰See, e.g., Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentences*, 152 U. PENN. L. REV. 33 (2003); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591 (2005); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004); William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 30 FED. B. NEWS & J. 158 (1993).

⁸¹Inter-Faith Drug Policy Initiative, *Fact Sheet on Mandatory Minimum Sentences*, http://www.idpi.us/downloads/pdf/factsheet/mm_factsheet.pdf.

⁸²Right on Crime, *The Conservative case for reform: fighting crime, prioritizing victims, and protecting taxpayers*, <http://www.rightoncrime.com/priority-issues/prisons/> (last visited September 6, 2011).

⁸³See Julian Roberts, *Public Opinion and Mandatory Sentencing*, CRIM. JUST. & BEHAVIOR, 30 (4), 483 (2003)(only one third of those polled favored mandatory minimums); Eagleton Institute of Politics Center for Public Interest Polling, *New Jersey’s Opinions on Alternatives to Mandatory Minimum Sentencing* (2004)(more than three quarters of those polled would support allowing judges to set aside mandatory sentences “if another sentence would be more appropriate”); StrategyOne/FAMM poll (2008)(finding, among other things, that 8 in 10 of those polled believe courts not Congress should determine sentences), <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>.

⁸⁴Richard Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times, Sept. 26, 2011, at A1.

simplified guideline system based on a limited set of core culpability factors to be determined by the jury.⁸⁵ Others have since discussed such an alternative at greater length.⁸⁶ I now believe such an overhaul is unwarranted.

First, 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 have to be significantly wider than the ranges under the present guidelines. Given that the median variance under the advisory system is roughly 12 months, virtually all sentences that are considered variances today would be well within the guideline range under a jury-driven system. To overhaul the system in this manner could actually increase variations among sentences because the ranges would be so much wider.⁸⁷ Starting over with an entirely new regime driven by jury fact-finding would be a significant and complex undertaking. There is no compelling reason to put the federal criminal justice system through such upheaval to accomplish sentencing results that vary more widely than under the existing advisory system.

Second, 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 thought of as sentencing considerations could change trial dynamics in ways that are difficult to foresee and that would

⁸⁵James Felman, *How Should Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT'G. REP. 97 (2004).

⁸⁶*See, e.g.*, 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 (2011) ("At the Crossroads"); Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149 (2005).

⁸⁷Judge Sessions' proposal, for example, would provide for 36 ranges varying in width from 16 months to 286 months, with two-thirds of the ranges being 80 months wide or wider. *See At the Crossroads, supra* note 86, at 341.

require highly complex jury instructions and bifurcation of proceedings in some cases. 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.

Third, such a system would introduce intractable sources of unwarranted disparity. 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. 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.

Fourth, if the only argument for replacing the advisory system with a new jury-driven system is concern about the percentage of cases sentenced outside the guidelines range, and I have heard no other argument advanced, the argument lacks force because the rate of below-range sentences is already dropping. The promise of the continued evolution of a sentencing system that can respond to empirical research and judicial feedback stands before us. We may be on the verge of true and lasting sentencing reform. We should not quit before we have seen what can be accomplished.

In closing, we appreciate the Subcommittee's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Subcommittee might find helpful. Thank you for the opportunity to address you this morning.

APPENDIX
NUMBER AND EXTENT OF DECREASE -- FY2005-2011Q3

		2005 After 1/12/05	2006	2007	2008	2009	2010	2011Q3
GOVERNMENT SPONSORED								
	Total number	11,662	17,239	17,896	19,063	18,671	19,174	15,251
5K1.1	Number & percent of all below-range	7,206 61.8%	10,134 58.8%	10,049 56.1%	10,048 52.7%	9,296 49.8%	8,974 46.8%	6,708 44%
	Median Decrease in months	34	30	29	30	30	30	30
5K3.1	Number & percent of all below-range	3,092 26.5%	5,166 30%	5,233 29.2%	5,894 30.9%	6,701 35.9%	7,205 37.6%	6,088 39.9%
	Median Decrease in months	8	8	7	7	7	7	8
Other Govt	Number & percent of all below-range	1,364 11.7%	1,939 11.2%	2,614 14.6%	3,121 16.4%	2,674 14.3%	2,995 15.6%	2,455 16.1%
	Median Decrease in months	11	12	10	10	12	15	15.3
NON-GOVERNMENT SPONSORED								
	Total number	6,199	8,507	8,433	9,972	11,925	13,809	10,013
3553(a)	Number & percent of all below-range	2,979 48.1%	4,243 49.9%	4,957 58.8%	6,678 67%	8,892 74.6%	10,590 76.7%	7,658 76.5%
	Median Decrease in months	13	12	12	12	13	13	13
Down Dep	Number & percent of all below-range	1,117 18%	1,903 22.4%	1,757 20.8%	1,544 15.5%	1,456 12.2%	1,598 11.6%	1,386 13.8%
	Median Decrease in months	11.9	10	10	10	10	10	11
Down Dep w/3553(a)	Number & percent of all below-range	464 7.5%	1,432 16.8%	1,013 12%	915 9.2%	807 6.8%	814 5.9%	638 6.4%
	Median Decrease in months	13	15	15	15	18	18	19.5
All Remaining (counted as non-government sponsored)	Number & percent of all below-range	1,639 26.4%	929 10.9%	706 8.4%	835 8.3%	770 6.4%	807 5.8%	331 3.3%
	Median Decrease in months	10	8	6	6	6	6	6

Source: USSC, 2005-2010 *Sourcebook of Federal Sentencing Statistics* tbls. 30-31D; USSC, 2011 Preliminary Quarterly Data Report, Third Quarter Release, tbls. 7-13