PREPARED STATEMENT
Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
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Chairman Coble, Ranking Member Scott, and distinguished Members of the Subcommittee, thank you for the invitation to testify today on behalf of the United States Sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker*[1] on federal sentencing.

I appeared before this Committee just a few weeks after the *Booker* decision in February 2005, and stated that the *Booker* decision was the most significant case affecting the federal sentencing guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta*.[2] My testimony this morning will focus on the Commission's activities since the *Booker* decision, particularly our work that culminated in our recently released report on the impact of *Booker*. The Commission remains uniquely positioned to assist all three branches of government in ensuring the continued security of the public while providing fair and just sentences. To fulfill this role, the Commission undertook a detailed review of post-*Booker* sentencing to help inform the ongoing debate about the future of federal sentencing policy. While the full impact of the *Booker* decision still cannot be ascertained from only one year's worth of data, the decision does appear to have had some initial impact on national sentencing practices.

Before I report some of the highlights of our *Booker* Report, I would like to reiterate certain principles I outlined to the Subcommittee last February that the Commission firmly believes still hold true. After *Booker* the Federal Sentencing Guidelines remain an important and essential consideration in the imposition of federal sentences. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing" subject to review by the courts of appeal for "unreasonableness."[3]

Many courts have adopted, as the Commission teaches, a three-step approach to determining federal sentences under the framework set forth by *Booker.*[4] First, pursuant to 18 U.S.C. § 3553(a)(4), a sentencing court must determine and calculate the applicable guideline sentencing range, since sentencing courts cannot consider the sentencing

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[1] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005).
[2] *Mistretta v. United States*, 488 U.S. 361 (1989).
[3] *United States v. Booker,* 543 U.S., 124 S. Ct. at 767.
[4] *See*, *e.g.*, *United States v. Haack*, 403 F.3d 997 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005); *United States v. Christenson*, 403 F.3d 1006 (8th Cir. 2005); *see also* Proposed Rules Change to Fed. R. Crim. P. 11 (Pleas)(proposing to amend Rule 11(M) to correspond to the three-step approach to sentencing).

guideline range as required by *Booker* if one has not been determined. Second, the court the court should consider any traditional departure factor that may be applicable under the sentencing guidelines, since 18 U.S.C. § 3553(a)(5), which contemplates consideration of policy statements issued by the Commission, including departure authority remains intact after *Booker*.[5] Third, after consideration of the applicable guideline sentencing range and guideline departure factors, the court should consider the other applicable sentencing factors set forth under 18 U.S.C. § 3553(a) and if the court determines that a guidelines sentence (including any applicable departures) does not meet the purposes of sentencing, it may impose a non-guidelines sentence pursuant to *Booker*.

Although the *Booker* decision makes clear that sentencing courts must consider the guidelines, it does not make clear how much weight sentencing courts should accord the guidelines. The Commission firmly believes that sentencing courts should give substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose, and that *Booker* should be read as requiring such weight. During the process of developing the initial set of guidelines and refining them throughout the ensuing years, the Commission has considered the very factors listed at section 3553(a) that were cited with approval in *Booker*. Congress in fact mandated that the Commission consider all the factors set forth in 3553(a)(2) when promulgating the guidelines,[6] and they are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a).[7]

In addition, Congress through its actions has indicated its belief that the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guideline and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and over 680 amendments, many of which where promulgated in response to congressional directives, have withstood congressional scrutiny. Such congressional approval can only be interpreted as a sign that Congress believes the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. In short, sentencing courts should give substantial weight to the Federal Sentencing Guidelines as they are the product of years of careful study[8] and represent the integration of multiple sentencing factors.[9]

I. Ongoing Commission Activities

Notably, the *Booker* decision left intact all of the Sentencing Commission's statutory obligations under the Sentencing Reform Act. The Court stated, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the

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[5] *See United States v. Hughes*, __ F.3d __ 2005 WL 147059 (4th Cir. Jan. 24, 2005) at *3.
[6] *See* 28 U.S.C. § 994(a)(2).
[7] *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).
[8] *United States v. Claiborne*, __ F.3d __, 2006 WL 452899 (8th Cir., Feb. 27, 2006).
[9] *Jimenez-Beltre*, __ F.3d __, 2006 WL 562154.

Guidelines accordingly,"[10] and the Commission has set an aggressive agenda in each of these areas.

In October 2005, the Commission promulgated two emergency amendments. The first addressed intellectual property offenses as directed by Congress in the Family Entertainment and Copyright Act of 2005. The second amendment increased penalties for obstruction of justice offenses involving domestic or international terrorism as directed by the Intelligence Reform Act of 2004. The Commission also made changes during the 2004-2005 amendment cycle to the antitrust and identity theft guidelines.

On January 27, 2006, the Commission published a notice for comment in the *Federal Register* covering fourteen substantive areas of criminal law including, immigration, steroids, intellectual property, and terrorism offenses. To better inform our decision making process, we held two regional hearings on immigration and conducted a public meeting addressing the issue of attorney-client waiver in the Chapter Eight organizational guidelines. We expect to submit amendments covering several of these areas to Congress on May 1, 2006.

The Commission also has increased its training and outreach efforts since *Booker*. In calendar year 2005, commissioners and Commission staff held training programs in all twelve judicial circuits and 61 districts, which resulted in the training of over 9,700 judges, clerks, staff attorneys, probation officers, prosecutors, and defense attorneys.

The Commission also has focused on its statutory duties with regard to data collection, analysis, and reporting. Under the Sentencing Reform Act, the Commission is statutorily charged with being the clearinghouse of federal sentencing statistics,[11] including the systematic collection and dissemination of information about sentences actually imposed.[12] Immediately after the Supreme Court's decision in *Blakely*,[13] which brought uncertainty to the federal sentencing system, the Sentencing Commission sought to refine its data collection and analysis to provide the criminal justice community with "real time" data on sentencing trends. The Commission's data collection was designed for annual reporting, not "real-time" reporting, and moving to real-time data collection continues to require significant resources.

After *Booker*, the Commission categorized sentences into eleven categories[14] designed to capture the nuances taking place in sentencing that previously had not existed. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limits, and unclear or incomplete documentation submitted to the Commission makes it even more difficult to characterize individual cases as falling into these categories. The Commission relies on documentation

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[10] *Booker* 543 U.S. at 264.
[11] 28 U.S.C. § 994(a)(12).
[12] 28 U.S.C. § 994(a)(14-16).
[13] *Blakely v. Washington*, 542 U.S. 296 (2004).
[14] For a complete description of the eleven categories developed by the Commission after *Booker*, *see* p. D-4 of the *Booker* Report, available at www.ussc.gov.

statutorily required to be sent by the courts under 28 U.S.C. § 994(w)(1): the indictment, written plea (if any), presentence report, judgment and commitment order, and statement of reasons form as the basis of its data files.[15] If the documentation is not complete or is filed untimely, our data files cannot account accurately for what is taking place at sentencing.

The Statement of Reasons is the form adopted by the Judicial Conference of the United States to report the sentencing court's reasons for imposing a particular sentence as statutorily required under 18 U.S.C. § 3553(c).[16] Unfortunately, individual courts are not bound to use the particular adopted form, and over the years the Commission has received many variations. After *Booker* it became evident that the pre-*Booker* form – in all its variations -- was not sufficient to capture sentencing practices in an advisory guidelines system. The Commission worked with the Criminal Law Committee of the Judicial Conference to revise the Statement of Reasons form so that it could capture all the nuanced aspects of sentencing in a post-*Booker* world. That document is relatively new, and as to be expected, the Commission has had some difficulty capturing some of the nuanced sentencing taking place prior to adoption of the form. This difficulty will continue until the form is used uniformly. For example, of the more than 65,000 cases reviewed by the Commission for its *Booker* report, approximately 45,000 of those cases used Statement of Reasons forms issued in December 2003 or thereafter, including the Statement of Reasons form issued in June 2005 in response to *Booker*. Of the remaining 20,000 cases, a variety of forms are being used.

The Commission applauds the advisory committee for the Federal Rules of Criminal Procedure on its efforts to impose uniformity with respect to use of the statement of reasons form.[17] Congress also has taken steps to address this documentation issue through the PATRIOT Act,[18] and the Commission looks forward to working with the Judicial Conference to devise one form to be used uniformly by all courts. More uniform completion of sentencing documentation will ensure that the Commission can continue to inform Congress, the Judiciary, the Executive branch, and the federal criminal justice community about emerging sentencing trends and practices.

II. The Booker Report

The Commission's emphasis on real-time data collection and analysis has enabled it to complete a comprehensive report on the impact of *Booker* in relatively short order. In August 2005, the Commission announced its decision to issue a report to examine

[15] *See* 28 U.S.C. § 994(w)(1) requiring the chief judge of each court to submit this documentation to the Commission within 30 days of sentencing.

[16] The PROTECT Act amended 18 U.S.C. § 3553(c) to require courts, "at the time of sentencing" to state the reasons for imposing an outside-the-range sentence "with specificity on the written order of judgment and commitment." 18 U.S.C. § 3553(c)(2) (2005).

[17] *See* Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States).

[18] *See*, Sec. 735 of H. Rep. 109-174, Pt I (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission").

whether any initial *Booker* impact could be determined and, if so, to determine the magnitude of such impact. The Commission sought to answer questions in three areas:

(1) Guideline Compliance: Has *Booker* affected the rates of imposition of sentence within and outside the applicable guideline range and, if so, how has it affected sentence type and length, including the extent of departure or variance from the guideline range?

(2) Historical Trends: Has *Booker* affected federal sentencing compared to sentencing practices occurring prior to the decision?

(3) Reasons for Sentences Imposed: In what circumstances do judges find sentences outside the guideline system more appropriate than a guideline sentence? In other words, for what reasons do judges impose non-guidelines sentences and have those reasons changed after *Booker*?

The Commission also sought to examine the appellate courts' responses to *Booker*, particularly whether they were developing case law on what constitutes a "reasonable" sentence.[19]

In compiling this "*Booker* report," the Commission reviewed three relevant time periods to ascertain historical sentencing practices and compare them with post-*Booker* practices:[20] (1) the pre-PROTECT Act period, which covers cases sentenced from October 1, 2002 to April 30, 2003, the date of the PROTECT Act's enactment;[21] (2) the post-PROTECT Act period, which covers cases sentenced between May 1, 2003 and June 24, 2004, the date of the *Blakely* decision; and (3) the post-*Booker* period, which covers cases sentenced between January 12, 2005 and January 11, 2006.

The Commission looked at national sentencing practices as well as sentencing practices for the four major offense types that comprise over 70 percent of the federal caseload: theft/fraud, drug trafficking, firearms, and immigration offenses.[22] The

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[19] *See Jimenez-Beltre*, __ F.3d__, 2006 WL 652154 (1st Cir., Mar. 9, 2006)(en banc)("We have heard this case *en banc* to provide stable guidance in this circuit for the determination and review of post-*Booker* sentences.").

[20] The Commission customarily reports data by fiscal year, which runs October 1 through September 30. The Commission concluded, however, that use of the fiscal year data for its *Booker* report would not lend itself to meaningful analysis.

[21] The Commission chose this seven-month period as representative of pre-PROTECT Act sentencing practices because it was during Fiscal Year 2003 that the Commission refined its methodologies for distinguishing government-sponsored from other downward departures. In its 2003 Departures Report, the Commission estimated the rate of government-sponsored departures for fiscal years prior to 2003. As such, for purposes of the *Booker* report, the Commission chose to report what it felt was the most reliable data available for capturing "pre-PROTECT Act" sentencing practices. *See Booker* Report at 53 n.265 (explaining methodology for determining pre-PROTECT Act period). For purposes of this testimony, other fiscal year estimates will be reported based on information prepared for the 2003 Departures Report, available at www.ussc.gov.

[22] Immigration offenses are broken into two categories: "alien smuggling offenses" sentenced pursuant to USSG §2L1.1 and "unlawful entry offenses" sentenced pursuant to USSG §2L1.2.

Commission also reviewed certain specific classes of offenders and offenses to ascertain post-*Booker* and historical sentencing practices. Because of the limitations set out above about the uniformity of sentencing documentation, some caution should be exercised in drawing certain conclusions from the post-*Booker* data,[23] but some observations can be made.

A. Guideline Conformance

One measurement of *Booker*'s impact on federal sentencing is the rate of sentences imposed in conformance with the guidelines. As indicated in *Booker*, courts must still "consider the Guidelines' sentencing range established for . . . the applicable category of offense committed by the applicable category of defender."[24] This means that the courts must continue to determine and calculate the applicable guideline range, consult the guidelines, and take them into consideration at the time of sentencing, an approach approved by a number of appellate courts.[25]

The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines after *Booker*. The national average for within-range sentences after *Booker* is 62.2 percent. By comparison, in fiscal year 2001 the within-range rate was 64.0 percent and in fiscal year 2002, it was 65.0 percent. In the pre-PROTECT Act period it was 68.3 percent, and post-PROTECT Act, the rate was 71.7 percent.

National data show that when within-range sentences and government-sponsored,[26] below-range sentences are combined, sentencing in conformance with the guidelines is 85.9 percent. This "conformance rate" remained stable throughout the year that followed *Booker*.

The post-*Booker* national conformance rate is comparable to historical sentencing trends, although the degree of comparability depends on the historical period being used for comparison. For example, based on the Commission's estimates of the rates of government-sponsored downward departures prior to 2003 combined with the rates of within-range sentences, the national conformance rate in fiscal year 2001 was 88.4 percent and in fiscal year 2002, it was 88.9 percent. In the pre-PROTECT Act period, the within-range and government-sponsored, below-range conformance rate was 90.6 percent and during the post-PROTECT Act period, it was 93.7 percent.[27]

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[23] For a discussion of the cautions associated with the *Booker* Report's data, *see Booker* Report at v-vi.
[24] *Booker*, 543 U.S. at 259.
[25] *See, e.g.*, *United States v. Vaughn*, 430 F.3d 518 (2nd Cir. 2005); *United States v. White*, 405 F.3d 208, 218 (4th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Stone*, 432 F.3d 651 (6th Cir. 2005); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041 (7th Cir. 2005); *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005); *United States v. Cantrell*, 433 F.3d 1269 (9th Cir. 2006).
[26] Government-sponsored, below-range sentences include sentences outside the range that were made for reasons such as "pursuant to plea," "deportation," and "savings to the government." *See also* discussion on page 20 of the *Booker* Report for more circuit decisions approving this approach to sentencing.
[27] For an illustration of this conformance rate over time, see Figure 3 of the *Booker* Report at 56.

During this Post-*Booker* period, 55 percent of the 94 districts (52) have compliance rates above the national average of 62.2 percent. Government-sponsored, below-range sentences still account for the highest percentage of below range sentences post-*Booker*, and these types of sentences have increased slightly since *Booker* was decided to 23.7 percent. This compares to a rate of 22.3 percent pre-PROTECT Act and 22.0 percent post-PROTECT Act. By way of comparison, the Commission estimates that the rate of government-sponsored, below range sentences in fiscal year 2001 was 24.4 percent and 23.9 percent in fiscal year 2002.[28]

In 34 districts that have a within-range compliance rate lower than the post-*Booker* national average, the reason is directly attributable to a higher percentage of government-sponsored below range sentences.

Commission data also indicate that the pattern of sentencing within-the-range has not changed after *Booker*. Approximately 60 percent of within-range sentences still are imposed at the bottom of the applicable guideline range.

The Commission conducted similar analyses for the four major offense types.[29] In post-*Booker* theft/fraud cases, the conformance rate is 83.0 percent, compared to 93.4 percent pre-PROTECT Act, and 94.0 percent post-PROTECT Act.

For post-*Booker* drug trafficking offenses, the guidelines conformance rate is 86.5 percent compared to 92.6 percent pre-PROTECT Act, and 95.1 percent post-PROTECT Act. The conformance rate for Post-*Booker* firearms offenses is 82.5 percent compared to 88.8 percent pre-PROTECT Act, and 92.3 percent post-PROTECT Act.

Alien-smuggling offenses sentenced after *Booker* demonstrate a conformance rate of 88.5 percent. This rate compares to 86.4 percent pre-PROTECT Act and 92.8 percent post-PROTECT Act. The post-*Booker* compliance rate for unlawful entry offenses is 89.5 percent compared to 88.0 percent pre-PROTECT Act and 93.3 percent post-PROTECT Act.

B. Sentence Length and Type

During the time periods reviewed by the Commission, the severity of sentences did not change. The average sentence length after *Booker* has increased nationally, including in the four major offense types with the exception of unlawful re-entry offenses.

Nationally, sentences in the pre-PROTECT Act period averaged 56 months. During the PROTECT Act period, sentences averaged 57 months. Post-*Booker*, the

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[28] This could be viewed as a continuation in the trend toward more government-sponsored below-range sentences. *See* 2003 Departures Report at 31, 67 (discussing trend in increased rates of below-range sentences granted pursuant to USSG §5K1.1 from 1991 through 2001) available at www.ussc.gov.

[29] For reference to the national conformance rates for the four major offense types across time reported in this testimony, *see Booker* Report at E-1.

national average sentence is 58 months. Theft/fraud sentences also have risen throughout these periods averaging 16, 20, and 23 months respectively. Average sentences for drug offenses have risen from 80 months, to 83 months, to 85 months post *Booker*. Average sentences for firearms offenses have held steady at 60, 61, and 60 months. Similarly, average sentences for alien smuggling offenses have held steady at 16, 17, and 17 months post-*Booker*. Only sentences for unlawful re-entry have fallen post-*Booker*. Sentences in these cases averaged 29 months pre-PROTECT Act, 29 months post-PROTECT Act, and 27 months post-*Booker*.

Related to sentence length is the rate of imposition of sentences of imprisonment. According to Commission data, this rate has not decreased since *Booker*. Courts continue to sentence defendants to a term of imprisonment at a rate consistent with trends during the previous time periods examined. Courts also continue to sentence at the bottom of the applicable guideline range in nearly 60 percent of all cases sentenced within the guideline range.

C. Non-Government-Sponsored Outside-the-Range Sentences

The Commission did detect an increase in non-government sponsored, below-range sentences following *Booker*. These are sentences that are below the applicable guideline range and the court has: 1) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission[30] ("departures"); 2) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission, and additionally mentions *Booker* or cites to 18 U.S.C. § 3553(a) ("departure + Booker")[31]; 3) cited only *Booker* or 18 U.S.C. § 3553(a) ("variance")[32]; or 4) not indicated a reason that falls into the previous three categories.[33]

Based on the Commission's best attempts to categorize sentences after *Booker*, the Commission has determined that nationally about 12.5 percent of cases have non-government sponsored, below-range sentences attributable either to guideline departures or *Booker*. By comparison, the non-government sponsored, below-range sentence rate estimated by the Commission for fiscal year 2001 was 11.1 percent and in fiscal year 2002, it was 10.3 percent. During the pre-PROTECT period the rate was 8.6 percent and during the post-PROTECT Act period the rate was 5.5 percent.

Despite this increase in below range sentences from previous time periods, the degree to which sentences are below the range is somewhat smaller than what it was previously. During the post-*Booker* period, the median reduction being granted – either through departures or under *Booker* – is 34.2 percent below the minimum of the range. In fact, since *Booker*, courts have granted sentences 9 percent or less below the minimum of the range more frequently than they did before the decision. By comparison, during

[30] *See Booker* Report at D-4 n.2 for a complete description of this category.
[31] *See Id.* at D-4 n.3.
[32] *See Id.* at D-4 n.4.
[33] *See Id.* at D-4 n.5.

the pre-PROTECT Act period the median reduction was 40.0 percent, and in the post-PROTECT Act period it was 35.1 percent.[34]

Moreover, the rate of imposition of above-range sentences after *Booker* has doubled to 1.6 percent. During fiscal year 2001, it was at 0.6 percent and in fiscal year 2002, it was 0.8 percent. It remained at 0.8 percent throughout the pre- and post-PROTECT Act period. A multivariate analysis undertaken for this report confirmed that the likelihood of receiving an above-range sentence is higher post-*Booker* than pre-*Booker*.

The Commission looked at non-government sponsored, below-range sentences for the four major offense types. For theft/fraud cases, the post-*Booker* non-government sponsored, below-range sentence imposition rate (combining guideline downward departures and sentences based on *Booker*) is 14.2 percent. This compares to a non-government sponsored, below-range sentence imposition rate of 5.8 percent pre-PROTECT Act, and 5.1 percent post-PROTECT Act.

A review of drug trafficking cases demonstrates a non-government sponsored, below-range sentence imposition rate of 12.8 percent after *Booker*. This compares to 7.3 percent pre-PROTECT Act and 4.7 percent post-PROTECT Act.

The non-government sponsored, below-range sentence imposition rate for post-*Booker* firearms cases is 15.2 percent compared to 10.2 percent pre-PROTECT Act and 6.5 percent post-PROTECT Act.

Alien smuggling cases sentenced post-*Booker* demonstrate a non-government sponsored, below-range sentence imposition rate of 9.1 percent compared to 13.1 percent pre-PROTECT Act and 6.6 percent post-PROTECT Act. Unlawful entry cases demonstrate a non-government sponsored, below-range sentence imposition rate 9.5 percent compared to 11.6 percent pre-PROTECT Act and 6.4 percent post-PROTECT Act.

The Commission undertook a review of the reasons courts were giving for the sentences they impose. The Commission's data indicate that even post-*Booker* courts rely predominantly on traditional guidelines departure reasons for imposing an outside-the-range sentence. For guidelines downward departures, courts cite criminal history, general mitigating circumstances, family ties, and aberrant behavior most often to explain a below-range sentence.

For cases in which a court relies solely on *Booker* to sentence below the range, the sentence is most often accompanied by a general citation to the *Booker* decision or factors under 18 U.S.C. § 3553(a) but also may include a citation to traditional guidelines departure reasons. Making up a significant portion of the Commission's "otherwise below the range" category, however, are those cases in which insufficient information in

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[34] *See Booker* Report at 66 (chart explaining median decreases across time for all guidelines and four major offense types).

the documentation made it impossible for the Commission to ascertain what happened at sentencing. The Commission believes that more uniform sentencing documentation will help ensure the Commission's ability to capture what is taking place in courts after *Booker*.

The Commission also undertook a series of multivariate analyses as part of its review of post-*Booker* sentencing. Multivariate analyses are included to assess whether any changes in national sentencing trends are significant after controlling for a number of relevant factors. This is one statistical method employed to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The Commission undertook this type of analysis to determine what factors may be statistically significant in post-*Booker* sentencing compared with other time periods.

D. Specific Offense and Offender Issues

The Commission undertook several analyses focused on specific sentencing issues and offender groups that are of perennial interest to the federal criminal justice community, or for which the issue of a *Booker* effect naturally arises. Specifically, the Commission examined sentencing practices regarding the use of cooperation without a government motion as a reason for the imposition of a non-government-sponsored, below-range sentence, sex offenders, crack cocaine offenders, first offenders, career offenders, and the rate of imposition of below-range sentences based on early disposition programs or other "fast track" mechanisms.

1. Cooperation Reduction without a Government Motion

The Department of Justice, in particular, has voiced concern that courts would use *Booker* authority to grant sentence reductions for defendant's cooperation absent a government motion, as outlined in 18 U.S.C. § 3553(e).[35] The Commission reviewed its data to ascertain whether these cases were occurring. The Commission's analysis suggests that these cases do occur post-*Booker*, as they did before *Booker*. The Commission cautions, however, that this data should be considered with the caveat that in many cases, the statement of reasons form may indicate that the court sentenced below the range for cooperation but does not indicate whether or not the government made a motion for substantial assistance. As such, the Commission's data may overstate the frequency with which this type of sentence is occurring.

Commission data indicate that post-*Booker* there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with the government was the only reason cited. In the remaining 230 cases, it was one of a combination of reasons for the below-range sentence. By

[35] *See* Hearing on: "Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines, before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives (Feb. 10, 2005) (Written Statement of Assistant Attorney General Christopher A. Wray at 15), available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf.

comparison, there were 17 total cases in the pre-PROTECT Act period and 29 total cases in the post-PROTECT Act period.

The Commission compared the extent of reductions below the applicable guideline range in cases where it could determine the government moved for a substantial assistance reduction and cases where there was no motion or the documentation was unclear. In cases with a government motion, the median percent decrease below the applicable range was 50 percent (or 28 months) below the minimum sentence. In cases where there was no motion, or the documentation was not clear, the median percent decrease was 35.1 percent (or 13 months).

2. Sex Offenses

A major impetus for enactment of the PROTECT Act was congressional concern that the rate of downward departures was too great to control and deter crime, particularly sex offenses against children. Since 2003, a number of legislative changes and guideline amendments have increased punishment for these offenses. In order to ascertain sentencing practices post-*Booker*, the Commission divided sex offenses into two categories: 1) criminal sexual abuse offenses, including rape, statutory rape, and inappropriate sexual contact,[36] and 2) sexual exploitation offenses, including crimes related to the production, trafficking, and possession of child pornography.[37]

The Commission notes that with respect to the analysis undertaken for this class of offenses, conclusions are cautionary. Sex offense cases make up a small portion of the national sentencing caseload, and such a small number of cases potentially distorts both the percentages and averages reported. For example, during the pre-PROTECT Act period, the total number of sex offense cases included in the two categories outlined above was 563 cases. During the post-PROTECT Act period the number was 1,206 cases. Post-*Booker* the number of cases was 1,330. Also, the recent changes in the law have resulted in substantial increases in sentences and the full impact of these changes may still be working through the system.

With these caveats, the Commission's data suggest that the average sentence length for cases sentenced pursuant to the criminal sexual abuse guidelines have remained fairly constant. Imposition of below-range sentences declined for overall criminal sexual abuse cases during the post-PROTECT Act period but increased slightly after *Booker*. The rates of imposition of below range sentences for abusive sexual contact cases and sexual abuse of a minor decreased in the post-PROTECT Act period, but increased during the post-*Booker* period. The majority of below-range sentences involving criminal sexual abuse are imposed on offenders with little or no criminal history. The rate of above-range sentences increased after *Booker* for criminal sexual

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[36] The criminal sexual abuse category includes offenses sentenced under USSG §§2A3.1 (Rape), 2A3.2 (Statutory Rape), 2A3.4 (Abusive Sexual Contact).
[37] This category of cases includes offenses sentenced under the section G guidelines covering sexual exploitation of a minor, including USSG §§2G2.1 (Production), 2G2.2 (Trafficking), 2G2.4 (Possession).

abuse and abusive sexual contact offenses, but that rate declined for offenses involving sexual abuse of a minor.

Sexual exploitation offenses, like criminal sexual abuse offenses, comprise a small number of federal cases. These cases follow the national trend of increased sentence lengths. In each of the three major classes of offenses – production, trafficking, and possession, sentence lengths have increased. For production offenses, average sentences have increased from 146 to 209 months over the three time periods. Average sentences for trafficking increased from 65 to 92 months over the same time periods, and average sentences for possession increased from 25 to 42 months.

The Commission's data suggest that the rates of below-range sentences in sexual exploitation offenses have increased following *Booker*. For production offenses, the rate of below-range sentences went from 3.8 percent pre-PROTECT Act to 1.8 percent post-PROTECT Act to 11.3 percent post-*Booker*. Similarly, rate of below-range sentences for trafficking offenses increased from 13.7 percent pre-PROTECT Act to 12.2 percent post-PROTECT Act to 19.1 percent post-*Booker*. The rate of below-range sentences for possession offenses also have increased since *Booker*. In the pre-PROTECT Act period the rate was 25 percent. During the post-PROTECT Act period the rate decreased to 12.3 percent but has increased post-*Booker* to 26.3 percent. The rate of imposition of above-range sentences has increased post-*Booker* for possession offenses, but has decreased over time for cases involving production or trafficking in child pornography.

3. Crack Cocaine Offenses

Some have speculated whether courts would use their *Booker* authority to express disapproval of the penalty structure Congress created to address crack and powder cocaine offenses, and the federal sentencing guidelines implementation of that penalty structure. Commission data do not indicate that this is occurring frequently after *Booker*. It does not appear that courts are using *Booker* or other 18 U.S.C. § 3553(a) factors to vary from the penalty structure on a frequent basis. The Commission reviewed 610 crack cocaine cases in which there was a non-government sponsored below-range sentence. In only 35 of those cases did the court indicate specific discontent with the 100-to-1 penalty structure for crack and powder offenses. Commission data indicate that the overwhelming majority of courts are not explicitly citing the crack/powder cocaine disparity as a reason to impose below-range sentences.

Sentencing practices regarding crack offenses generally have followed the same patterns exhibited nationally and within the other major drug types: powder cocaine, heroin, marijuana, and methamphetamine. Following *Booker*, 84.8 percent of crack cases were sentenced in conformance with the guidelines, including government-sponsored below-range sentences. This is comparable to the national sentencing rate of 85.9 percent. Sentence length for crack offenses also has remained fairly stable across time with post-*Booker* sentences averaging 124 months compared to 123 months pre-PROTECT Act and 127 months post-PROTECT Act.

To date, no circuit court has concluded that a policy disagreement with the crack and powder cocaine sentencing ratio is a proper basis for imposing a non-guideline sentence. The First Circuit reviewed a case in which the district court employed a 20-to-1 crack/powder ration, instead of the congressionally mandated 100-to-1 ratio.[38] The First Circuit reversed the decision noting that a district court's general disagreement with broad-based policies enunciated by Congress or the Commission, cannot serve the basis for sentencing outside the applicable guidelines range. The Fourth Circuit also came to a similar conclusion stating that "[i]n arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity that totally is at odds with the will of Congress."[39]

4. First Offenders

First offenders are defined as those with no prior contact with the criminal justice system whatsoever. The Commission's analysis suggests that the rate of imposition of below-range sentences for first offenders increased after *Booker*. During the pre-PROTECT Act period, first offenders received non-government sponsored, below-range sentences in 9.8 percent of cases. During the post-PROTECT Act period that rate was 6.1 percent. After *Booker*, the rate of non-government sponsored, below-range sentences is 15.2 percent. But the rate of above-range sentences for first offenders also has

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[38] *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006). The First Circuit has agreed to hear this case *en banc*.
[39] *United States v. Eura*, No. 05-4437, 2006 WL 440099 (4th Cir., Feb. 24, 2006).

increased after *Booker* from .7 percent pre-PROTECT Act to 1.2 percent post-*Booker*. Even though first-time offenders are more likely to receive sentences either above or below the guideline range post-*Booker*, the proportion of them receiving imposition of prison time has remained constant. Moreover, the average sentencing length for this class offenders has remained constant: 37 months pre-PROTECT Act period, 39 months post-PROTECT Act period, and 39 months post-*Booker*.

5. Career Offenders[40]

The rate of below-range sentences for career offenders increased after *Booker*, the majority of these sentences being given in drug-trafficking cases. During the pre-PROTECT Act period, the rate of imposition of non-government sponsored, below-range sentences was 10 percent. That rate decreased to 7.3 percent during the post-PROTECT Act period and has increased to 21.5 percent post-*Booker*. Sentence length for career offenders has decreased after *Booker*, which continues a trend that began before *Booker*. The average sentence for career offenders during the pre-PROTECT Act period was 190 months. That average decreased to 189 months during the post-PROTECT Act period and decreased again to 180 months post-*Booker*.

6. Early Disposition Programs

Early disposition or "fast track" programs have existed in some form for a number of years, primarily in the border districts to assist in the burgeoning caseload faced by U.S. Attorneys' offices and the courts. In 2003, as part of the PROTECT Act, Congress formalized these programs by requiring the Attorney General to authorize their existence. Congress also directed the Commission to promulgate a policy statement authorizing a sentence reduction up to four levels if the government filed a motion for such departure pursuant to an early disposition program.

Currently, the Department of Justice has authorized early disposition programs in 16 districts. Some commentators, including the Commission in its 2003 Departures Report, have speculated whether courts that do not have an authorized early disposition program would use their *Booker* authority to grant below-range sentences on par with those that would be given in an early disposition program district. The Commission's data do not reflect that these concerns generally have been realized. In districts without early disposition programs, the data do not reflect widespread use of *Booker* to grant below-range sentences in immigration cases similar to those available in approved early disposition program districts.

The Commission has not identified any reported cases in which circuit courts have upheld sentences below the guidelines range in non-Early Disposition Programs districts, because the district court cited the resulting disparity between districts that qualify for early disposition program departures and those that do not qualify. Two circuits have rejected the defendant's argument that the sentence was unreasonable because the district judge failed to consider the unwarranted disparities in sentencing

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[40] The Commission used the guideline definition of career offender for this analysis. *See* USSG §4B1.1.

created by the existence of early disposition programs in other jurisdictions. These circuits explained that the policymaking branches of government can determine that certain disparities are warranted and thus courts need not avoid the disparity created by these programs.

E. Regional and Demographic Differences in Sentencing Practices

The Commission also undertook a review of what impact *Booker* may be having on regional and demographic sentencing practices. Commission data indicate that the regional disparity that existed prior to *Booker* continues to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, however, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*, both because of an increase in government-sponsored below range sentences and non-government-sponsored, below-range sentences.

The Commission undertook a series of multivariate analyses to ascertain what factors are statistically significant in sentencing post-*Booker* as compared with sentencing in the pre-PROTECT and post-PROTECT Act periods. 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. Unmeasured factors in the analyses conducted may include, for example, violent criminal history[41] or the bail decision.[42] If these "unmeasured factors" were able to be included in the models, significance of demographic factors might change.

A detailed multivariate analysis conducted on post-*Booker* data demonstrates that male offenders continue to be associated with higher sentences than female offenders. This association was evident every year from 1999 through the post-*Booker* period.

Another multivariate analysis suggests that following *Booker*, black offenders are associated with sentences that are 4.9 percent higher than white offenders. Although this factor did not exist in the post-PROTECT Act period, it did appear in fiscal years 1999, 2000, and 2001.[43]

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[41] The presence of violent criminal history may lead the court to sentence higher in the prescribed range. The Commission's datafile does not have information on the type of criminal history behavior. In 2002, the Commission created a datafile which took a 25 percent random sample of cases sentenced in Fiscal Year 2000. This datafile looked more closely at offender's criminal conduct, including detailed information on the type of criminal history the offender had. Using this data (the Intensive Study Sample 2000, or ISS2000), it was found that 24.4 percent of white offenders had violent criminal history events, as compared to 43.7 percent of black offenders, 18.9 percent of Hispanic offenders, and 23.7 percent of "other" offenders.

[42] Offenders who are not given the opportunity to post bail, or may not be able to afford bail, are detained for the entire period before their sentencing. Thus, if an offender's final sentencing range is 6-12 months, and the offender serves 10 months in prison before the final adjudication of the sentence, the court could sentence the offender to "time served," and the sentence would be 10 months. An offender who was out on bail during this process may get a 6-month sentence for the same behavior, which the court may have wanted to impose on the first offender if the bail circumstances were similar.

[43] *See* Figure 13 of the *Booker* Report at 109.

Another multivariate analysis suggests that following *Booker*, "other" race offenders – primarily Native Americans – are associated with sentences 10.8 percent higher than white offenders. This association also was found in fiscal year 2002.[44]

F. Appellate Review

No discussion about the impact of *Booker* on federal sentencing would be complete without examining the post-*Booker* appellate court decisions interpreting and applying *Booker*. Like the data on sentencing practices, the appellate law surrounding *Booker* continues to evolve. It took the appellate courts several months to wade through the procedural issues associated with *Booker* so it has only been within the last few months that the courts have begun in earnest to develop a post-*Booker* body of case law that gives some guidance about what constitutes an "unreasonable" sentence.

As the Supreme Court specifically stated in *Booker*, district courts must continue to determine and calculate the applicable guidelines range. In doing so, the courts have concluded that determination and calculation of the applicable guideline range continues to include judicial factfinding by the court to resolve disputed issues. Circuits that have ruled on this also have concluded that the resolution of disputed sentencing issues may be done using a preponderance of the evidence burden of proof.[45] The appellate courts also have upheld the post-*Booker* use of hearsay evidence and acquitted conduct when fashioning a sentence in the advisory guidelines scheme.

Courts have concluded that once a guideline range is determined and calculated, it must be considered by the sentencing court. This consideration is part of the sentencing courts overall consideration of the sentencing factors that must be considered in imposing a sentence.[46] The record on appeal must include sufficient evidence to demonstrate affirmatively the court's consideration of these factors, including the applicable guideline sentence.

1. Reasonableness Review

In *Booker*, the Supreme Court instructed the appellate courts to "review sentencing decisions for unreasonableness."[47] The reasonableness standard of review is not particularly clear-cut, having been inferred by Justice Breyer from "statutory language, the structure of the [Sentencing Reform Act], and the 'sound administration of

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[44] *Id.*
[45] *See Booker* Report at 22 *citing United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Ledesma*, No. 05-1563, 2005 WL 3477715 (3d Cir. Dec. 20, 2005) (unpub.); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006); *United States v. Tynes*, No. 05-13035, 2005 WL 3536189 (11th Cir. Dec. 28, 2005) (unpub).
[46] *See* 18 U.S.C. § 3553(a) listing the seven factors to be considered when imposing sentence.
[47] *Booker*, 543 U.S. at 264.

justice'."[48] The appellate courts, therefore, have been somewhat cautious in developing guidance on a reasonable sentence.

Six circuits – the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth – have held that a sentence within the applicable guideline range is presumptively reasonable. These circuits declined to find a within-range sentence to be *per se* or conclusively reasonable because, in the view of some, to do so would be "inconsistent with the Supreme Court's decision in *Booker*, as such a standard would effectively re-institute mandatory adherence to the Guidelines.'"[49] This does not mean that a sentence outside the applicable guideline range is presumptively unreasonable, nor does it mean that a guidelines sentence is reasonable in the absence of evidence that a district court followed its statutory mandate to impose a sentence after having considered the applicable sentencing factors under 18 U.S.C. § 3553(a)(2). So far, only one appellate court – the Eighth Circuit -- has found a within-guideline range sentence to be unreasonable.

With respect to guideline departures, the circuit courts agree that after *Booker* they still lack jurisdiction to review a court's denial of a motion for downward departure, if it is clear that the court properly understood the authority to depart and chose not to exercise it.

2. Jurisdiction

Separate and apart from the reasonableness analysis, circuit courts also are examining issues of jurisdiction. Congress provided for limited appellate review of sentences under the Sentencing Reform Act. Prior to *Booker*, neither the government nor the defendant had the right to appeal a sentence properly calculated within the applicable guideline range.[50] *Booker* did not excise this jurisdictional limit on appellate review and some have posited that the appellate courts do not have jurisdiction to hear a post-*Booker* appeal of a within-range guideline sentence. To date, that conclusion has not found support in reported appellate cases. Three circuits – the First, Eighth and Eleventh – have specifically rejected this argument.

As a final note on appellate review, the circuit courts have reasoned that *Booker* does not apply to mandatory minimum sentences, which are driven by statutes, not by the sentencing guidelines. Similarly, the post-*Booker* appellate courts have agreed that the fact of a prior conviction is not a fact that a jury must find beyond a reasonable doubt. Courts, therefore, that have considered the Armed Career Criminal Act have agreed that *Booker* does not have an impact, although they do differ on the extent of the exception.

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[48] *Booker*, 543 U.S. at 260-61, *citing Pierce v. Underwood*, 487 U.S. 552, 559-60.

[49] *See Booker* Report at 26 (citing *United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005) citing *United States v. Crosby,* 397 F.3d 103, 115 (2d Cir. 2005). *See also United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Cunningham,* 429 F.3d 673 (7th Cir. 2005); *Mykytiuk*, 415 F.3d at 607;*Talley*, 431 F.3d at 786)).

[50] See 18 U.S.C. § 3742(a).

III. Conclusion

The *Booker* decision has had an impact on federal sentencing. The magnitude of the impact depends on to which historical period one compares post-*Booker* sentencing practices. The Commission's review of historical sentencing practices does not indicate whether the post-PROTECT Act trend toward increased conformance with the guidelines system would have continued without *Booker*. Nor does it indicate that, absent the PROTECT Act, the rate of conformance with the guidelines would have decreased.

The Commission commends the Congress and the Department of Justice for the period of time they have allowed post-*Booker* sentencing to occur before considering what, if any, legislative action should be taken in response to the decision.

After a year of collecting data, monitoring appellate court decisions, and having issued its *Booker* report, the Commission believes that it is time for serious consideration of a legislative response to *Booker*. As anticipated by the decision itself:

> Ours of course is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution that Congress judges best for the federal system of justice.[51]

The Commission strongly believes that any legislation considered should preserve the core principles of the bipartisan Sentencing Reform Act of 1984 in a constitutionally sound fashion. The Commission believes that, at the very least, a legislative response to *Booker* should include the following four adjustments, all of which can be made within the Sentencing Reform Act.

First, a legislative response should include codification of the three-step process for imposing a sentence. As outlined above, this approach ensures that the federal sentencing guidelines are afforded the appropriate consideration, determination and ultimately, the proper weight to which they are due under *Booker*. The sentencing guidelines embody all of the applicable sentencing factors for a given offense and offender. The Commission believes that the three-step approach to sentencing is consistent with the *Booker* remedy.

Second, the Commission believes that any legislative response to *Booker* should address the appellate review process and standard.

Third, as the Commission has noted throughout this testimony, timely and uniform use of sentencing documentation is imperative to the Commission's ability to accurately ascertain and report about national sentencing practices. Any legislative response should include the continued importance of proper and uniform sentencing documentation being sent to the Commission.

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[51] *Booker*, 543 U.S. at 265.

Fourth, the Commission believes that a legislative response should clarify that a sentence reduction for cooperation or substantial assistance is impermissible absent a motion from the government.

The Commission is considering holding its own *Booker* hearings.

The Commission stands ready to work with Congress, the Judiciary, the Executive branch, and all other interested parties in refining the federal sentencing system so that it preserves the core principles of the bipartisan Sentencing Reform Act in a constitutionally sound manner that would lessen the possibility of further litigation of the system itself. Such an approach would be the best for the federal criminal justice system.

Mr. Chairman, Ranking Member Scott, and Members of the Committee, thank you for holding this very important hearing. I will be glad to answer any questions you may have.