

Senator Chuck Grassley
Questions for the Record

Rachel E. Barkow
Nominee, Member of the United States Sentencing Commission

- 1. Statistics compiled by the U.S. Sentencing Commission suggest that the rate of sentences imposed below the guideline range has risen post-*Booker*. (Not including government sponsored sentences below range, such as those where the defendant receives credit for substantial assistance.) For instance, according to the Commission's 2010 Annual Report, a national comparison of sentences shows that district court judges imposed sentences below the guidelines range approximately 18% of the time. That is nearly four times as many below range sentences than were reported for fiscal year 2005, when the percentage was 4.3%. *Booker* was decided in January of 2005.**

- a. Do you believe there is cause for concern over the rise in below range sentences, and the sentencing disparities that will necessarily accompany this rise?**

Response: The Commission's charge under the Sentencing Reform Act is to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). It is thus the Commission's responsibility to determine the basis for those sentences that fall outside the guideline range to determine if judges are creating unwarranted disparities in the system or if judges are giving these sentences based on factors not taken into account in the Guidelines or in accordance with their responsibilities under 18 U.S.C. § 3553.

- b. Do you believe that Congress should consider statutory reform that would create a binding but constitutional system?**

Response: I believe the Commission should continue to monitor judicial sentencing practices under the current non-binding system to determine if judicial sentencing practices are in accord with the purposes of the Sentencing Reform Act. If at any point it becomes apparent that there is a pervasive problem of unwarranted sentencing disparity, then the Commission should report its findings to Congress along with possible solutions and the costs and benefits of those solutions. A possible remedy to a finding of pervasive unwarranted disparity may include some type of binding system, as long as that system comports with the Constitution. Whether that option is the preferable one to address unwarranted disparities, however, would be for Congress to determine after evaluating the relative costs and benefits of all options.

2. According to the United States Sentencing Commission's 2010 Annual Report, the offense type with the highest within-guideline sentencing range was simple drug possession, with 94.9% of such cases resulting in a within-guidelines sentence. Manslaughter had the highest rate of above-range sentences based on *Booker*, at 10.9%. Conversely, child pornography offenses had the highest rate of below-range sentences, at 42.7%.

- a. I understand that many of these cases may have involved a government-sponsored departure, but do you think it is possible that the beliefs of judges about the nature and seriousness of particular offenses might be playing a role in the rates of above and below range sentencing, post-*Booker*?

Response: While it is possible, it also might be that government charging patterns or departure motions explain the difference. It might also be the case that judges are sentencing outside the Guideline range in order to comply with the requirements of 18 U.S.C. § 3553 or that the facts of individual cases consistently take a large number outside the heartland. I think it is the Commission's responsibility to analyze the underlying reasons for judicial patterns that are inconsistent with the Guidelines to determine the basis for the disagreements.

- b. If not, what do you think explains this variance by offense?

Response: Please see above.

3. Legal scholars generally recognize four purposes for imposing criminal sentences: retribution, incapacitation, rehabilitation and deterrence. Sometimes, these purposes may contradict one another. When such situations arise, the different purposes must be prioritized.

- a. If deterrence and rehabilitation were in conflict such that both could not be emphasized equally, which would you emphasize in determining an appropriate sentencing range?

Response: The main goal of an effective criminal justice system is promoting public safety, and therefore I believe that if there were an irreconcilable conflict between deterrence and rehabilitation, deterrence is the more important goal. Ideally, however, if it is possible to rehabilitate an offender, that goal should be pursued in the service of deterrence, because an offender who can be rehabilitated will also be deterred from future crime.

- b. If you would emphasize rehabilitation, what effect do you think that emphasis might have on potential future offenders?

Response: I would emphasize deterrence over rehabilitation if there were an irreconcilable conflict.

4. Do you believe that mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing?

Response: Based on empirical studies, I believe that how effective a regime will be in terms of deterrence depends on many factors, including the odds that a defendant will be caught, the swiftness with which the sanction is imposed, the certainty of that sanction, and the length of that sanction. So whether a mandatory minimum sentence produces greater deterrence than a discretionary or indeterminate sentence depends on the length of the mandatory sentence as compared to the discretionary or indeterminate sentence, how likely it is that the mandatory minimum will be charged in a given case, the swiftness with which either of the sentences will be imposed, and the odds that a defendant will be caught in the first place.

- 5. In your scholarly work, you have criticized the Sentencing Commission because of its susceptibility to political control by Congress and the Executive Branch and resistance to embrace the advice of experts. Do you still feel that way? If confirmed, how would you seek to counteract or reduce that influence?**

Response: I have explained in my scholarly work that, although Congress created the Commission with the goal of establishing an independent agency that would be largely insulated from politics so that it could establish sentencing guidelines based on expert information and data, the Commission has inevitably been subject to strong political oversight by Congress and the Executive Branch and the political branches have often overlooked the Commission's empirical information about sentencing. I continue to believe that is an accurate description of the Commission's relationship with the political branches. However, that descriptive account is not meant to be a criticism of political involvement in sentencing; on the contrary, I believe it is the role of the elected branches of government to set sentencing parameters. But I also believe that the purpose of having a Sentencing Commission is, as the Sentencing Reform Act explains, to provide the best available information and evidence with respect to those sentencing parameters. If the Commission's research is consistently ignored, the reasons for having a Commission are weakened. If I were confirmed, I would seek to provide Congress and the Executive Branch with data these branches need to set sound policy, including the fiscal costs of sentencing policies and whether any particular sentencing proposal would have a disproportionate impact on particular demographic groups. Ultimately, it is up to Congress and the President to enact laws that set sentencing boundaries and to decide how to use that data. But the Commission's role must be to provide the best possible information for those actors to consider and use in setting those boundaries.

- 6. You've noted that the actual makeup of the Commission since its inception has made it resolutely pro-prosecution or "tough on crime." Do you still feel that way, and if so, could you elaborate, specifically addressing how you as a commissioner would work with your colleagues on this issue?**

Response: I explained in a 2005 article in the *UCLA Law Review* that the Commission's membership has leaned toward prosecution interests. In contrast, state sentencing commissions often have a more diverse membership that includes defense lawyers, members of the community, prison officials, academics, or legislators. As I explained in that article, I believe a diverse membership is helpful to a sentencing commission because

it allows a greater consideration of viewpoints in reaching its decisions, which can enhance the quality and credibility of the final decision. I continue to believe that a commission with diverse membership is preferable to one that is dominated by a single perspective. In my view, it is valuable for people from different backgrounds and with different perspectives to explore sentencing issues to reach the best possible policies based on the empirical information. If I were confirmed, I would value the perspectives of all my colleagues and listen to their points of view with an open mind and a desire to learn from them.

7. In your opinion, who is responsible for developing national criminal policy?

Response: I believe that Congress is responsible for developing national criminal policy through statutes.

8. In your published works, you have criticized the Sentencing Commission's Guidelines as being far too complex to be practically useful. If confirmed, what steps would you take to simplify the Guidelines system? What results would you hope to achieve?

Response: I continue to believe that a more simplified guideline system, similar to systems used in many states, has much to commend it. If Congress were interested in simplifying the Guidelines, and if I were confirmed, I would work with the other Commissioners to explore various models used in the states to offer Congress a range of possibilities for simplifying the federal Guidelines. In order to achieve this result, however, Congress would likely need to reconsider what is known as the "25 percent rule," contained in 28 U.S.C. § 994(b)(2), which provides that the maximum of a sentencing guidelines range for a term of imprisonment "shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months." This law is one of the reasons for the complexity of the federal system because of the narrow ranges it creates.

9. You have previously indicated that noncapital life sentences without the possibility of parole are likely cruel and unusual punishment under the Eighth Amendment.

a. Who decides the meaning and scope of the Eighth amendment?

Response: The Supreme Court determines the meaning and scope of the Eighth Amendment. Although I have criticized the Court's decision to treat capital and noncapital cases differently for purposes of deciding whether they violate the Eighth Amendment, I have never stated that life sentences without the possibility of parole likely violate the Eighth Amendment. Nor have I questioned the Supreme Court as the final arbiter of the Eighth Amendment's meaning.

b. If confirmed, would you seek to reform the Supreme Court's existing death penalty jurisprudence?

Response: I do not believe it is the Commission's responsibility to seek to reform the Supreme Court's death penalty jurisprudence.

10. One of the strongest criticisms of the criminal justice system that you have articulated attacks the power sentencing guidelines and mandatory sentences afford federal prosecutors in their efforts to avoid trial by retaining guilty pleas. Is that a problem remediable by the Sentencing Commission? Is there a way to remediate what you describe as a problem through the powers vested in the Commission by statute, or would it venture into actual policy-making to reach your desired goals?

Response: Some prosecutors' offices have sought to create checks on the exercise of discretion within their offices. Beyond such internal procedures, however, it is for Congress to decide whether to seek to alter the power balance in the federal system and provide greater checks on the exercise of prosecutorial discretion. The Commission could assist Congress, however, by providing data on how prosecutors use the guidelines and mandatory minimums and when and under what circumstances they request substantial assistance departures (and how that varies by district or offense). It would then be up to Congress to determine whether prosecutors have too much discretion and to consider various options for cabining that discretion.

Questions for the Record
Hearing: Nominations
May 8, 2013
Submitted by Senator Amy Klobuchar

Questions for Rachel Elise Barkow, nominated to be a Member of the United States Sentencing Commission

- **Part of your role on the Sentencing Commission would be serving as a resource of information for all branches of government, criminal justice practitioners, the academic community, and the public.**
 - **What would you do to ensure that critical new research and updated information is getting to each of these different groups? How will you incorporate input from these parties into the Commission's policies?**

Response: It is a central responsibility of the Sentencing Commission to “serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices.” 28 U.S.C. § 995(1)(12)(A). Were I to be confirmed, I would work with the other members of the Commission to make sure that the Commission’s research is readily accessible to all interested groups. This would include the general practice of putting the Commission’s research on the website and responding as helpfully as possible to any specific requests for information. It is essential for the Commission to make its research public so that it can obtain feedback from interested actors and engage in a dialogue that allows it to produce the highest quality information on federal sentencing practices. The Commission’s output will be best when it takes into account the input of all interested parties.