

Response of Charles R. Breyer
Nominee to be a Member of the United States Sentencing Commission
to the Written Questions of Senator Amy Klobuchar

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: As to your first question, as you know, the Commission has in place an Office of Research and Data, which actively collects information and both reports on sentencing practices and tracks how the guidelines are actually applied. The Office also does research and analysis on various criminal justice issues, at the request not only of the Commission but of Congress, the courts and others. They produce a myriad of research publications, many of which are available to the public through the Commission's website. Of course, important research comes from many different sources, and as a member of the Commission, I would continue to gather such information and engage with the broader research community.

I think it is critically important to the Commission's mission that it serve as the nation's clearinghouse on sentencing data, policy and discussion for the groups you've mentioned. That mission dovetails with my longstanding commitment to public engagement on these issues. I frequently welcome academics, public servants, and ordinary citizens to my courtroom and chambers. I attend conferences, speak on panels, and track developments in the law through a variety of legal publications. The value of such engagements is sharing my perspective as a judge, and having the opportunity to listen and learn about how sentencing law generally, and the guidelines in particular, are affecting different constituencies on the ground.

As to your second question, 28 U.S.C. § 994(o) provides that the Commission "shall consult" with prosecutors, defense attorneys, probation officers, judges, the Federal Bureau of Prisons and others to review federal sentencing policy and revisions to that policy. The Commission's practice is also to seek out public input on proposed amendments to the guidelines. It is essential to the Commission's purpose that it not be isolated from this real world feedback, but open to it. As a judge I have daily contact with many of these stakeholders, and hear firsthand – sometimes at great volume – their thoughts on the present system. As a member of the Commission, I would work closely with the other members to see that these different perspectives are heard, thoughtfully analyzed, and central to the Commission's decision-making process.

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to the Written Questions of Senator Chuck Grassley

- 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: Yes.

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

Response: Congress should consider all avenues that would bring about uniformity, fairness, and transparency in sentencing, consistent with the Congressional dictates of 18 U.S.C. § 3553(a).

- 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: Government-sponsored departures, of course, reflect the views of the Department of Justice. Additionally, I recognize that the personal beliefs of judges have come to play a role in post-Booker sentencing. In my opinion, the personal views of judges should not drive sentences.

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

Response: Not Applicable.

- 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 the two were in conflict such that both could not be emphasized equally, would you emphasize deterrence or rehabilitation in determining an appropriate sentencing range?**

Response: Deterrence.

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

Response: Not Applicable.

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

Response: Mandatory minimum sentences certainly could serve as a deterrent to certain types of crime. The extent to which they do so has not been fully or satisfactorily addressed in the research to date. If confirmed, I would work to ensure that the issue of deterrence was central to any analysis of mandatory minimums.