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Ketanji Brown Jackson

Nominee to be Associate Justice
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Judging A Book: Jackson Reviews 'When Should Law Forgive?'

By **U.S. District Judge Ketanji Brown Jackson** (September 24, 2019, 4:41 PM EDT)

*This article is part of an E pert Analysis **series** of book reviews from judges.*

If law is the mechanism through which a just society resolves the inevitable conflicts that arise between individuals in a variety of contexts, Harvard Law School professor and former Dean Martha Minow's new book thoroughly explores one enduring means of conflict resolution that is far too often overlooked: forgiveness.

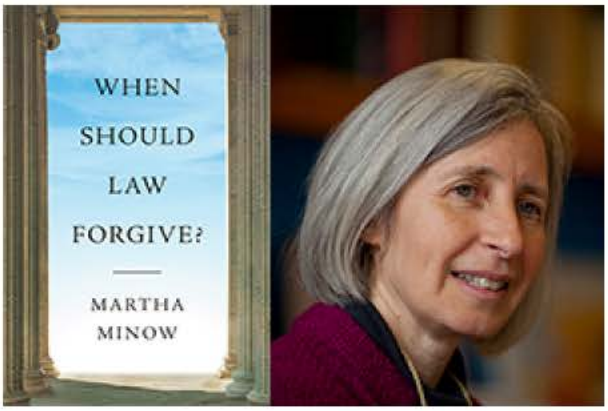


Judge Ketanji Brown Jackson (photo credit: Jason Putsche Photography)

In "When Should Law Forgive?," Minow dabbles in legal theory, philosophy, history, sociology and psychology to ask insightful questions, such as "[w]hen can and should legal officials and institutions promote forgiveness between individuals?" and "[w]hen can law itself be forgiving?"

Minow's provocative juxtaposition of child soldiers with drug-dealing youths and established bankruptcy procedures with the treatment of student-loan debtors suggests that forgiveness is already currently employed in modern legal settings, but unevenly so.

And, while the book acknowledges that forgiveness and the law inhabit different domains — "forgiveness operates in the interpersonal realm; the legal system depends on impersonal processes" — it also effectively highlights numerous examples in which legal structures presently provide absolution for some individuals in some circumstances and not for similarly situated others. Along the way, Minow's readers are exposed to a refreshingly robust vision of justice that transcends myopic perspectives of wrongdoing and punishment.



"When Should Law Forgive?," by Martha Minow, W. W. Norton & Company, 256 pages.

One of the most interesting aspects of Minow's treatment of the subject of forgiveness is the framing. From the outset, Minow makes quite clear what forgiveness is and what it is not, and in so doing, skillfully introduces readers to many paradoxes that appear throughout her somewhat ambivalent analysis of the benefits and drawbacks of forgiveness under law. As Minow sees it, forgiveness is "a

conscious, deliberate decision to forgo rightful grounds for grievance against those who have committed a wrong or harm."

The rightfulness of the claim of wrongdoing is key, i.e., forgiveness is properly provided only when there is an acknowledgment of wrongful behavior. But, of course, acknowledgments of wrongdoing often stir up calls for vengeance and punitive consequences, which ultimately makes forgiveness far less likely. Similarly, Minow notes that forgiveness "creates the opportunity for moral self-improvement" precisely because wrongdoers do not get what they deserve; however, such forbearance (the decision not to give wrongdoers what they deserve) undercuts deterrence, which can pave the way for more wrongful behavior.

Thus, Minow seems acutely aware that, quite paradoxically, forgiveness in law creates opportunities for both moral self-improvement and moral degradation.

While exploring these and other conundrums, Minow takes readers across the globe and through the ages. She explains that "[f]orgiveness, tolerance, mercy, and kindness figure prominently in philosophical and religious traditions, including humanism, Christianity, Judaism, Islam, Buddhism, Baha'i, Hinduism and Confucianism," as well as "in ancient practices of native peoples in Hawai'i, Canada, New Zealand, Sierra Leone and elsewhere."

Debt-forgiveness was apparently featured in Hammarabi's Code, and places as distinct and as far flung as 14th century England, 20th century Cambodia and 21st century Tajikistan have, at times, adopted forms of amnesty rooted in the divine right of kings to counter the rigidity of law. Minow also spots the relinquishment of justified grievances in popular cross-cultural touchstones, such as Victor Hugo's mid-19th century novel "Les Miserables" and its 1980 musical adaption.

South Africa's Truth and Reconciliation Commission, or TRC, is one prominent example of forgiveness codified by law that Minow draws upon repeatedly throughout the book. According to Minow, "[o]ver the three years of its operation, the TRC invited victims" of wrongs perpetrated during the apartheid era "to tell their stories" and also "invited perpetrators to apply for [conditional] amnesty." The attendant hearings received mixed reviews, but Minow touts the public reconciliation process that President Nelson Mandela and Archbishop Desmond Tutu sponsored as "offering inspiring narratives and images to communities thirsty for hope."

The book contains other significant examples of legally endorsed forgiveness mechanisms that countries have occasionally adopted to end cycles of revenge and violence, such as the peace agreement that the Colombian government recently negotiated with the guerrilla movement known as the FARC.

But Minow also thoughtfully examines at least one international circumstance in which forgiveness could be, but has not been, employed to generate hope for humanity: the treatment of governmental debt by foreign creditors. When countries are struggling to repay debts that far outpace their national economies, why is it, Minow asks, that "debt forgiveness is often unavailable for governmental debts," which are treated like "consumer and student debts" and are not made eligible for the restructuring plans that some countries provide for private debtors in bankruptcy?

Closer to home, Minow focuses on standard bankruptcy procedures as one accepted means of forgiveness under law, and she helpfully observes that "bankruptcy law acknowledges that debt has a societal dimension beyond the lender-borrower relationship" and "looks to the future of the broader community, not just at a specific past problem."

Minow characterizes executive pardons and clemency proceedings, the immigration amnesty orders of the Reagan and Obama administrations, and the expungement and/or sealing of criminal records as other prime examples of forgiveness that has been incorporated into the laws of the United States.

By contrast, Minow ably asserts that, somehow, forgiveness has not been afforded to indebted consumers, students with loans and most criminal defendants, even though the choices and circumstances of many youths on rough inner-city streets resemble those of the child soldiers who receive conditional amnesty in the postwar aftermath of modern armed conflicts.

Minow points to other contrasting examples from different contexts, and discusses them in rapid succession, leading readers not only to compare the different legal structures and consequences, but also to think both about the appropriateness of forgiveness where it has been employed and about the policy choices that underlie the decision not to forgive, as a matter of law.

To be sure, Minow does not suggest that the law that is applied to child soldiers versus gang members, or private debtors versus indebted governments, was developed intentionally or linearly, or with these similar circumstances in mind. And that is precisely why the perspective that Minow's book offers is so valuable. Her queries force readers to grapple with the difficult and seemingly unanswerable questions of who is worthy of forgiveness, for what conduct and under which circumstances should the law provide it?

Minow's book is also quite candid about the limits of the forgiveness paradigm that she appears to champion. Beyond the philosophical hurdles, practical challenges abound, and she identifies them. Pardons might offer the cleansing benefit of second chances and a fresh start for criminal defendants, for example, but how does a society that provides forgiveness in this fashion prevent the corrupting influence of quid-pro-quo exchanges or self-dealing, and is the risk of encouraging subsequent wrongdoing too great?

Minow also homes in on the persistent problem of a legal scheme that puts pressure on victims who are not ready to forgive. To her credit, Minow recognizes that vengeance is an innately human desire, and that many people who have been wrongfully harmed find it extraordinarily difficult to set those feelings aside. In this regard, she insightfully notes that "[f]or some, choosing not to forgive is a source of strength and integrity." Still, the book is replete with examples of victims who "express their faith and reclaim their dignity and power over the burdens of grief and victimhood" through forgiveness.

In one such example, Minow discusses the varied victim responses to the horrific massacre of nine black parishioners during a prayer meeting in a church in Charleston, South Carolina, in 2015. Some family members were reluctant to express forgiveness for the unrepentant white supremacist who had murdered their loved ones, while others spoke to him directly, saying that "God forgives you" so "I forgive you," and "[w]e have no room for hating, so we have to forgive."

Minow appears to conclude that "[m]aking legal room for individuals to forgive those who have harmed them should not mean pressuring them to forgive," and that, on balance, modern legal systems should "create space for wronged individuals to consider whether and when to forgive," by incorporating restorative justice mechanisms and other forgiveness options, and by encouraging personal absolution, to coincide with punishment, as another lever for influencing human behavior.

Minow's effort to examine forgiveness under law in all of its various forms is ambitious and generally successful, although, at times, the book has the stream of consciousness quality of a thought piece, rather than a carefully crafted, well-organized exposition. Similarly, Minow presents and then reiterates many of the same examples to illustrate different points in different contexts (South Africa's experience is one that is relentlessly re-referenced), and at each mention, the primary plot points are reintroduced anew, without any acknowledgement that the reader has heard this one before.

Thus, it sometimes feels like just at a moment of full engagement, just when the book's analysis is starting to gather steam, the narrative sputters and gets bogged down with repetition — like a catchy song that persistently returns to a rhyming refrain — and when this happens, it takes effort to find one's place again.

Ultimately, however, Minow's readers will be glad they stayed the course. To read this book from beginning to end is to discover the answer to her tome's title question; in Minow's view, the law should offer opportunities for forgiveness whenever the wronged individual or group feels the need to relinquish their pain and/or whenever the broader societal goal of complete restoration outweighs the short-term benefit of imposing and maintaining isolating sanctions.

Consequently, Minow's statements and examples consistently emphasize that "[f]orgiveness encourages people to take the perspectives of others, to understand the larger pressures and structures affecting others' actions, and to prioritize creating a shared future over holding on to

resentments from the past." And Minow demonstrates that such a release permits transformational healing for victims. As one reflector, Ishmael Beah, puts it: "you forgive and forget so you can transform your experiences, not necessarily forget them but transform them, so that they don't haunt you or handicap you or kill you."

Another, Jodi Picoult, memorably remarks that "[f]orgiving isn't something you do for someone else. It's something you do for yourself. It's saying, 'You're not important enough to have a stranglehold on me.' It's saying, 'You don't get to trap me in the past. I am worthy of a future.'"

To Minow, the benefits of forgiveness appear to extend well beyond the "physical, emotional, and spiritual well-being" of the person who forgives; indeed, they radiate outward, to the forgiver's community and to society at large. And, in a closing passage, she eloquently summarizes these broader hopes and aims: "Making more opportunities for forgiveness within law might help law grow toward justice; it might also nudge individuals and societies toward the respect and generosity expressed through apology, restitution, and forbearance from law's most stringent demands." Accordingly, Minow strongly urges "designers and agents of the law" to "consider how and when law can usefully express forgiveness and let go of grievances."

"When Should Law Forgive?" thus reminds us that "[l]aw, in one way or another, affects emotions," and that it can "support forgiveness as much as it can support revenge." Minow suggests that systems of justice that are truly future-facing and that seek to help their members live life freely, released from the bondage of past hurts, offer means of providing forgiveness.

Thus, from a bird's-eye view, the book's real revelation is that forgiveness in law is not simply emblematic of a society's treatment of wrongdoers; instead, it reflects a society's own broader vision of itself. And in the end, Minow teaches what many who have suffered wrongfully eventually come to learn: that for one's own sake, one must let go of the past in order to be able to turn fully and embrace the future.

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"Carrot and Stick" Philosophy: The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs

By Ketanji Brown Jackson and Kathleen Cooper Grilli[1]

On November 1, 1991, the Federal Sentencing Guidelines for Organizations (found in Chapter Eight of the *Guidelines Manual*) went into effect. The United States Sentencing Commission (hereinafter referred to as the Commission) promulgated the original set of organizational guidelines after several years of study, and the organizational guidelines have been amended comprehensively only twice in their 20-year history. [2]

This paper traces the historical development of the organizational guidelines, with particular emphasis on the development of organizational sentencing policy relating to effective compliance and ethics programs. The "carrot and stick" philosophy that undergirds the organizational guidelines rests on the realization that corporations can, and should, be incentivized to self-police, and with respect to compliance and ethics, the organizational guidelines have ushered in an unprecedented era of corporate responsibility. Moreover, over time, compliance programs have had an impact that extends well beyond the criminal justice arena. A fundamental understanding of the historical development of the organizational guidelines not only provides a foundation for the consideration of future changes to those guidelines, it also aids organizations in the adoption of standards for effective compliance and ethics programs.

Part I of this paper provides a brief discussion of the events leading to the creation of the Commission and its statutory mandates from Congress. Parts II, III, and IV document three distinct stages in the Commission's efforts to promulgate the initial set of organizational guidelines. Part V discusses the events leading to the comprehensive guideline changes made to Chapter Eight in 2004, including the elevation of the criteria for an effective compliance and ethics program from the commentary into a separate guideline. Part VI discusses the next set of comprehensive changes made in 2010. Finally, Part VII summarizes the organizational guidelines' impact outside the criminal justice arena.

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[1] **Ketanji Brown Jackson, Esq.** is the Vice Chair of the United States Sentencing Commission (hereinafter referred to as the Commission) and **Kathleen Cooper Grilli, Esq.** is the Deputy General Counsel. The views expressed herein are the authors' own and do not necessarily represent the official position of the Commission. The authors gratefully acknowledge the assistance of Linda Baltrusch, James Strawley and Tobias Dorsey. Any Commission materials cited herein are available to the public according to the terms of the Commission's public access policy. *See* http://www.ussc.gov/Publications/19891213_Public_Access_Documents_Data.pdf.

[2] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004); amend. 744 (eff. Nov. 1, 2010).

I. Enactment of the Sentencing Reform Act and Creation of the Commission

The Commission authored the original organizational guidelines amidst calls for general sentencing reform and in the wake of significant statutory changes regarding the manner in which federal judges sentence defendants in criminal cases. Prior to the Sentencing Reform Act of 1984,[3] federal district court judges possessed almost unlimited authority to fashion a sentence within a broad statutorily prescribed range. In each case, sentencing was limited only by the statutory minimum and maximum, and each individual district court judge exercised discretion to determine "the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence."[4] Because each judge was "left to apply his own notions of the purposes of sentencing," sentences for similar criminal conduct varied dramatically, and it was widely believed that the federal sentencing system exhibited "an unjustifiably wide range of sentences [for] offenders convicted of similar crimes."[5]

The Sentencing Reform Act of 1984 (hereinafter referred to as the Act), which was the culmination of lengthy bipartisan efforts, sought to eliminate unwarranted disparity in sentencing and to address the inequalities that unregulated sentencing had created.[6] To this end, as part of the Act, Congress created the Commission as an independent agency within the judicial branch of the federal government and tasked it with the responsibility of developing federal sentencing policy.[7] By statute, the Commission is comprised of seven voting members (including the Chair) that the President appoints "by and with the advice and consent of the Senate."[8] The Act provides that "[a]t least three of the [Commission's] members shall be Federal judges" and that no more than four members of the Commission can be members of

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[3] Chapter II of the *Comprehensive Crime Control Act of 1984*, Pub. L. 98–473, Title II (Oct. 12, 1984).

[4] U.S. Sent'g Comm'n, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*, at 9 (1991).

[5] S. Rep. NO. 97–307, at 955 (1981); *See also* S. Rep. NO. 97–307, at 956 (1981) ("glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence); H.R. Rep. NO. 98–1017, at 34 (1984) ("The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.").

[6] *See* S. Rep. NO. 97–307 (1981); H.R. Rep. No. 98–1017 (1984); 28 U.S.C. §§ 991(b)(1)(B), 994(f).

[7] The purposes of sentencing were set forth in the Act and served as the Commission's north star. Congress expressly determined that federal sentencing should be tailored:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2).

[8] *See* 28 U.S.C. § 991(a).

the same political party.[9] Moreover, the Attorney General (or his designee)[10] and the Chair of the United States Parole Commission[11] are designated as *ex officio* non-voting members of the Commission.

In addition to establishing the Commission itself, the Act directed the Commission to promulgate guidelines that federal judges would use for selecting sentences within the prescribed statutory range.[12] The statutory purposes of the Commission, among others, are to

> establish sentencing policies and practices for the Federal criminal justice system that –
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding 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; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.[13]

Although enactment of the Act appears to have been largely motivated by concerns about disparities in the sentencing of *individual* defendants, the Act also made changes that impacted the sentencing of organizations.[14] The Act specified that an organization may be sentenced to a term of probation or a fine, or a combination of these sanctions,[15] and required that "[a]t least one of such sentences must be imposed."[16] Additionally, the Act made clear that an organization could "be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution."[17]

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[9] *See* id.

[10] *See* id.

[11] *See* Pub. L. 98-473, § 235(5) (Oct. 12, 1984), as amended by Pub. L. 112-44, § 2 (Oct. 21, 2011).

[12] *See* 28 U.S.C. §§ 991, 994, and 995(a)(1).

[13] *See* 28 U.S.C. § 991(b)(1).

[14] For purposes of Title 18, United States Code, the term "organization" means "a person other than an individual." See 18 U.S.C. § 18.

[15] 18 U.S.C. § 3551(c).

[16] *See* S. Rep. No. 98–225, at 68 (1984).

[17] *See id.*; 18 U.S.C. §§ 3551(c), 3554, 3555, 3556.

The Senate report accompanying the Act explained Congress's intent regarding the sentencing of organizations. It stated that "[c]urrent law . . . rarely distinguishes between individuals and organizations for sentencing purposes[; t]hus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations."[18] The report also noted concerns that white collar criminals were being sentenced to minimal fines, creating "the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business."[19]

In its statutory direction to the Commission, Congress placed no limitations on the Commission's authority to act in the arena of organizational sentencing. Indeed, Congress expected that the Commission would "include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing."[20]

II. The Commission's Early Efforts to Develop Organizational Sentencing Policy

1986 Public Hearing on Organizational Sanctions

Although the primary focus of the Commission's early work was the development of guidelines to be used in sentencing individual offenders, the Commission nevertheless included consideration of appropriate organizational sanctions in its deliberations. On June 10, 1986, one year after the appointment of the first members of the Commission, the Commission held a public hearing devoted exclusively to consideration of organizational sanctions.[21] Witnesses included representatives from the Department of Justice and the American Bar Association, corporate defense attorneys specializing in tax and antitrust offenses, and a law professor.[22] The institution of compliance programs was not the subject of this hearing. Rather, the testimony at the hearing "focus[ed] on the sanctions available and appropriate for the corporation, business, union or other organization convicted of a federal crime."[23] Notably, the witnesses recognized the significance of "tone from the top," and many specifically asserted that criminal misconduct manifested itself in organizations where "[the

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[18] *See* S. Rep. NO. 98–225, at 66-7 (1984).

[19] *See id.* at 76.

[20] *See id.* at 169.

[21] *See* Notice of Hearing, 51 Fed. Reg. 19918 (June 3, 1986).

[22] For a complete list of the witnesses, *see* U.S. Sent'g Comm'n , *Supplementary Report On Sentencing Guidelines For Organizations, App. B* (Aug. 1991).

[23] 51 Fed. Reg. 19918. A transcript of the hearing is on file with the Commission.

upper management] created an atmosphere in which they encouraged this type of behavior, and they absolutely looked the other way when it was going on."[24]
Witnesses raised the subject of compliance programs only in the context of the role of probation as an organizational sanction. Several witnesses mentioned the institution of compliance programs as a condition of probation for an organization convicted of an antitrust violation.[25] Another expressed his "tremendous respect" for antitrust compliance programs and the belief that such programs have an impact on deterring future violations.[26] No one yet expressed the view that compliance programs should be adopted as a prospective means of preventing criminal misconduct by organizations. Nor did anyone identify the presence of a pre-existing compliance program as a factor to consider in mitigation of punishment.

Following the June 1986 hearing, the Commission continued to receive and consider public comment about the guidelines generally, including organizational sanctions. The Commission also established advisory and working groups to assist in the development of sentencing guidelines.[27] The Commission invited representatives of each group to participate in working sessions with commissioners and staff to examine early drafts of guidelines and air many of the important issues facing the Commission. In addition, the Commission received written comments and critiques from the members of these groups.[28]

The Commission obtained feedback about the guidelines as a whole—including organizational sanctions—from other sources as well. The Commission solicited information from federal agencies about the specific nature and number of offenses occurring within their areas of responsibility.[29] Commissioners and staff traveled across the country to obtain information relevant to development of the guidelines and also to give presentations regarding the efforts

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[24] *See* Testimony of Stephen S. Trott, Assistant Attorney General, Criminal Division, Department of Justice, to the Commission, at 62 (June 10, 1986) (on behalf of the U.S. Department of Justice).

[25] *See, e.g.*, Testimony of William M. Brodsky, American Bar Association, to the Commission, at 30 (June 10, 1986); Testimony of Mark Crane, Corporate Defense Attorney, Antitrust, to the Commission, at 77 (June 10, 1986).

[26] *See* Testimony of John C. Coffee, Jr., Columbia University School of Law, to the Commission, at 90 (June 10, 1986). Professor Coffee did not offer any details about the elements of an antitrust compliance program.

[27] These groups included United States Attorneys, state district attorneys, federal probation officers, defense attorneys, researchers, and federal judges. *See Preliminary Draft of Sentencing Guidelines for United States Courts*, 51 Fed. Reg. 35080, 35082 (Oct. 1, 1986). The work of these advisory groups was not limited to organizational sanctions. For a discussion of those advisory groups focused exclusively on organizational sanctions, *see* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

[28] *See* 51 Fed. Reg. at 35082 .

[29] The Department of Justice, the Department of the Treasury, the Departments of Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, the Postal Service, and the Securities and Exchange Commission provided information to the Commission. *Id.* at 35083.

of the Commission.[30] For example, commission representatives met with United States probation officers at ten regional seminars and district-wide staff meetings. Through these meetings, the Commission received input and advice from officers in the majority of federal judicial districts.[31]

The Commission also conducted regular meetings about guideline development, which were open to the public. "Although most of the work involved in drafting the preliminary guidelines necessarily was accomplished in informal working groups, the Commission . . . used its meetings to set an overall agenda and direction for the development of the guidelines, as well as to discuss, revise, and approve working group drafts."[32] The Commission established a research program to assist in the development of the guidelines, including organizational sanctions, and the research staff collected detailed information on past sentencing and correctional practices and conducted empirical research. In addition, the research staff reviewed criminal justice research and advised the Commission about the application of scientific theory and knowledge to sentencing practices.[33]

Commission staff also visited a number of states and communities in which a variety of sentencing options other than imprisonment were being used. The Commission studied the fine collection and community service programs of a number of state probation departments. Moreover, "[i]n its efforts to establish reasonable and collectable fines and to determine an offender's likelihood and ability to pay fines, Commission staff met with officials of several banking and financial institutions."[34]

1986 Release of the Preliminary Draft

On October 1, 1986, the Commission published in the Federal Register the *Preliminary Draft of the Sentencing Guidelines.*[35] In the *Preliminary Draft*, which contained guidelines for the sentencing

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 35082-83.

[33] *Id.* at 35083.

[34] *Id.*.

[35] *Id.* at 35080. The draft presented "an approach currently being considered by the U.S. Sentencing Commission in developing guidelines and policy statements for use by the federal courts in determining the sentences to be imposed in criminal cases." *Id.* The Commission made clear that "[t]he preliminary draft published for public comment seeks to accomplish several goals. The first is to focus public attention on a proposed format, a possible structure and suggested sentencing ranges. The format, structure, and suggested terms of imprisonment will all be reconsidered by the Commission before the final draft is written in light of further deliberation, continued empirical research, and the receipt of written and oral comment."

of individual defendants, the Commission specifically requested "comment on the appropriate sentencing of organizational offenders." The Commission identified for public comment "key questions it has yet to resolve in this area." The first was the "appropriate role of fines as organizational sanctions." The Commission noted the competing concerns raised by two of the statutory purposes of sentencing: just punishment and deterrence.[36] Just punishment concerns might compel imposition of a fine based on a percentage of the organization's wealth or income, thereby possibly leading to different fine amounts for organizations of differing sizes and income who committed similar offenses. By contrast, deterrence concerns might result in a fine being calculated based upon the injury resulting from the criminal offense and the difficulty in discovering the crime. The Commission sought public comments on "whether its approach to fines should emphasize the organization's culpability and ability to pay, or the harmfulness of its conduct and the likelihood of detection."[37] The Commission also asked for the public to comment on how the "size of an organization" should be considered in sentencing.[38]

The second key question raised in the Commission's early deliberations about organizational sanctions related to the proper use of a term of probation as part of an organizational sentence. The Commission sought public input on the circumstances justifying the use of a term of probation in lieu of a fine and those justifying imposition of both types of sanctions. The Commission also identified the mandatory and discretionary conditions of probation authorized by statute,[39] and it sought comment about the types of probation conditions that might be imposed on an organization and the circumstances justifying their imposition. The early list of possible conditions of probation did not specifically include development of a compliance program; rather, the identified conditions included "the use of internal audits and disciplinary actions; the appointment of outside directors or supervisors; recommendations for

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"The publication also highlights a series of difficult policy issues that remain unresolved. The Commission underscores these policy issues for public comment because their resolution will determine, to a great extent, the final guidelines." *Id.* at 35081.

[36] The Commission grappled with the "differing perceptions of the purposes of criminal punishment" as it drafted both the individual and organizational guidelines. *See* U.S. Sent'g Comm'n, *Guidelines Manual.* Ch.1, Pt.A, intro. comment. (Nov. 2011). The Commission ultimately resolved the philosophical dilemma by "dr[awing] especially strong guidance" from the statutory purposes of sentencing set out in 18 U.S.C. § 3553. U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 5 (Aug. 1991).

[37] 51 Fed. Reg. at 35128.

[38] That term is used in 18 U.S.C. § 3572(a)(8).

[39] The mandatory conditions of probation that court must impose on an organizational offender are: (1) the organization must not commit another federal, state, or local crime while on probation; and (2) the organization must either pay a fine, make restitution, or perform community service. *See* 18 U.S.C. § 3563(a). The only mandatory condition imposed upon probationers convicted of a misdemeanor or an infraction is the requirement that they commit no further crimes while on probation. Discretionary conditions of probation are listed in 18 U.S.C. § 3563(b).

debarment or ineligibility for federal contracts, grants, or subsidies; charitable contributions; community service; and publicity about the organization's misdeeds and subsequent corrective action."[40]

The *Preliminary Draft* then laid out two possible approaches to the development of organizational sanctions based on the just punishment and deterrence philosophies. The just punishment approach emphasized an organization's culpability[41] and its ability to pay a fine, while the deterrence approach focused on the harmfulness of an organization's conduct and the likelihood of detection of the crime. Although neither approach specifically identified the existence of a compliance program as a possible mitigating factor to be considered in fashioning punishment, each seemed to recognize that steps taken by an organization in response to a criminal offense might lead to mitigation of punishment. For example, the just punishment approach provided that adjustments to the established offense value could be made if "the organization took steps to discipline responsible employees prior to indictment."[42] The deterrence approach also permitted for the lowering of any applicable fine if "the organization notified authorities immediately upon learning of the crime," and if "the responsible employees had been identified and punished."[43]

The complexity of the subject matter and tight deadlines imposed by the Act[44] led the Commission to decide "in 1986 to defer the drafting of organizational guidelines for offenses . . . until after it had developed and implemented the first iteration of guidelines for individual defendants."[45] Although the public discussion of organizational sanctions ceased until 1988, the Commission continued to work behind the scenes on the issue, by "conducting empirical research and analysis on organizational sentencing practices."[46]

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[40] 51 Fed. Reg. at 35128-29.

[41] Culpability would be measured by factors, such as "whether the crime resulted from a conscious plan of top management or by the independent actions of lower echelon employees or whether the organization took steps to discipline responsible employees prior to indictment." *Id.* at 35129.

[42] *Id.* at 35128.

[43] *Id.* at 35129.

[44] The Commission was required to deliver the first set of guidelines for individual defendants to Congress by April, 1987. *See* Pub L. 98–473, § 235 (Oct. 12, 1984), *as amended by* Pub. L. 99–217 (Dec. 26, 1985) ("[T]he United States Sentencing Commission shall submit the initial sentencing guidelines promulgated under section 994(a)(1) of title 28 to the Congress within 30 months of the [date of enactment of this Act].").

[45] U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 1 (Aug. 1991). The one exception was offenses involving antitrust violations. Section 2R1.1 of the initial guidelines included a special instruction for computing fines for organizations. *See* USSG §2R1.1 (Nov. 1987) ("The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than $100,000.").

[46] U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 1 (Aug. 1991). Notably, when conducting its early research, the Commission considered the existence of a compliance program to be a relevant factor in evaluating organizational sanctions, but it classified a compliance program as effective based on only two

III. The Commission's Renewed Focus on Organizational Sentencing Policy

On April 13, 1987, the Commission submitted the initial Sentencing Guidelines and Policy Statements for individual defendants to Congress.[47] In early 1988, the Commission once again turned its attention to corporate sanctions. The Commission "'generally agreed that the staff should collect data and report on areas of difficulty," and that those reports "should include public comment, actual cases and background law."[48] The Commission directed the staff not to present revised guideline proposals "until an adequate amount of information has been collected,"[49] and in the following months, the Commission decided to devote additional time to the consideration of the theories and principles underlying a staff draft proposal. The Commission ultimately decided to release the proposals regarding organizational sanctions to the public and to set hearings on the proposals. Thereafter, Commission staff continued developing a staff working paper on sentencing policy for organizations, a report on current organizational sentencing practices, and a simplified proposal for organizational guidelines. In addition, one commissioner was working to develop an alternative proposal for probation, with the assistance of a law professor with an expertise in corporate governance.[50]

Public Release of Discussion Materials on Organizational Sanctions

The Commission continued its consideration of an internal working draft of guidelines for organizational defendants in the summer of 1988.[51] The Commission also debated "the appropriate length of the guidelines for organizational defendants."[52]

In July 1988, the Commission publicly released the *Discussion Materials on Organizational Sanctions* "to encourage public analysis and comment on the development of sentencing standards for organizations convicted of federal crimes."[53] The Commission explained that it had not yet

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criteria: if "1) high-level management was not involved in the offense; and 2) the organization did not obstruction justice during the investigation." *Id.* at D-7.

[47] *See* U.S. Sent'g Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, at i (June 18, 1987).

[48] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Jan. 5, 1988) (on file with the Commission).

[49] *Id.*

[50] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (May 19, 1988) (on file with the Commission).

[51] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (June 13, 1988) (on file with the Commission) (reflecting the Commission's agreement to review the staff's newest draft and make comments and suggestions thereon).

[52] *Id.*

[53] *See* Introductory Letter from the Commission, U.S. Sent'g Comm'n, *Discussion Materials on Organizational Sanctions* (July 1988). *See also* Notice of Public Hearings on Organizational Sanctions and Request for Public Comment on Discussion Materials, 53 Fed. Reg.32815 (Aug. 26, 1988). Working groups of scholars and experts from various government agencies helped shape these materials. *See* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

had a detailed discussion of any particular approach to the sentencing of organizations, including those suggested by the materials, nor had it arrived at any agreement upon a particular approach. Rather, the Commission intended to "provide a vehicle for stimulating the broadest range of public input" with the release of these materials.[54] The Commission noted that its work had "benefitted greatly from extensive public input" up to that point, and it "look[ed] forward to a continuation of that tradition as the Commission move[d] ahead with its deliberations on the important subject of organizational sanctions."[55] The discussion materials included a discussion draft of sentencing guidelines and policy statements for organizations, a draft proposal on standards for organizational probation, a preliminary report to the Commission on sentencing of organizations in the federal courts from 1984-1987, and a Commission staff working paper on criminal sentencing policy for organizations.

Approaches to Organizational Sentences Set Forth in the Discussion Materials on Organizational Sanctions

The discussion draft of sentencing guidelines and policy statements for organizations computed applicable fines based upon the "offense loss" (or total harm) caused by the offense multiplied by the "offense multiple," which was intended to approximate the "difficulty of detecting and punishing the offender."[56] Although this approach did not identify the existence of a compliance program as a mitigating factor to reduce the monetary sanction, the "reasonable, good faith efforts by the organization's management to prevent an occurrence of the type of offense involved" was an offense characteristic that would decrease the "offense multiple."[57]

Unlike the Preliminary Draft of the Guidelines released in 1986, the discussion draft included a compliance plan as a condition of probation. Development of a compliance plan was a required condition of probation for certain felony offenses if "the senior management of the organization participated in or encouraged the offenses," and "the organization or its senior management had a criminal history of one or more felony convictions of the same or similar type" and "the organization was unlikely to avoid a recurrence of the criminal conduct despite imposition of a fine."[58] In such an instance, the organization would be required "to develop and submit for approval by the court a plan for avoiding a recurrence of the type of felony offense or offenses of which it was convicted in the instant case or appearing in the criminal

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[54] *See* Introductory Letter from the Commission, U.S. Sent'g Comm'n, *Discussion Materials on Organizational Sanctions* (July 1988).

[55] *Id.*

[56] *See* "Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations," U.S. Sent'g Comm'n, *Discussion Materials on Organizational Sanctions, Pt. I*, at 8.2 (July 1988).

[57] *Id.* at 8.27.

[58] *Id.* at 8.43, 8.46.

history of the organization or its senior management."[59] Thus, to a limited extent, this discussion draft recognized compliance programs as a possible measure to prevent additional criminal misconduct by organizations. However, the draft also suggested that such preventative probation "must be approached with caution" and that the court should determine that "the preventative benefits of the sentence outweigh the obvious costs of judicial oversight of private business operations."[60]

The draft proposal on standards for organizational probation suggested that probation should be used "to minimize the prospect of a repetition of the same or similar criminal behavior."[61] In advocating for this role for probation, the drafters recognized that the organization, rather than the court, would be better positioned to identify the necessary internal controls to prevent criminal behavior. They explained that:

> The central aim of these guidelines is to improve the corporation's own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior. Voluntary compliance is encouraged, and it is anticipated that the corporation will normally take a leading role in proposing the probation conditions and internal controls that should be imposed.[62]

This draft proposal authorized imposition of a term of probation in several instances, including where the "management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, and such policies or practices have not been corrected in a manner that makes repetition of the same or similar criminal behavior highly unlikely."[63] If probation was imposed under such circumstances, this approach also provided that, as a special condition of probation, the court could order the organization to develop a compliance plan. That plan might require:

> (A) The conduct of a special audit or other internal investigation or inspections, which may be required periodically during the term of probation;

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[59] *Id.* at 8.46.

[60] *Id.* at 8.5.

[61] *See* John C. Coffee, Jr, Richard Gruner, and Christopher Stone, "Draft Proposal on Standards for Organizational Probation," U.S. Sent'g Comm'n, *Discussion Materials on Organizational Sanctions, Pt. II*, at 4 (July 1988).

[62] *Id.* at 7.

[63] *Id.* at 10.

(B) The appointment of independent counsel or the use, if available, of a special committee of independent directors;

(C) The hiring and use of special consultants;

(D) The adoption of new or revised information gathering procedures and the preservation and centralization of such records or of any other information gathered by the organization;

(E) The designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offenses;

(F) The revision or adoption of formal corporate policies, including those expressed in employee manuals and other written procedures, including notification procedures for the reporting of specific transactions or events to specified personnel with the organization, including board of directors.[64]

This draft proposal also required that any proposed compliance plan identify "the names of the organizational officers responsible for its preparation and describe the investigation or other procedures employed in its development."[65] The plan should also "be signed by the chief executive, the chief legal officer, and the appropriate vice-president of the organization, who should undertake to disseminate [its terms] to all organizational members whose conduct is affected thereby."[66] Finally, the plan should be presented to the board of directors.[67]

The Commission's staff working paper on criminal sentencing policy for organizations recognized that internal organizational controls on employee behavior are crucial because of the unique nature of the organizational crime (which involves a principal-agent relationship).[68] Thus, the paper maintained that the penalty system needed to "provide organizations with

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[64] *Id.* at 24-5.

[65] *Id.* at 35.

[66] *Id.* at 35-36.

[67] *Id.* at 36.

[68] Under U.S. law, a corporation can be held criminally responsible for the illegal conduct of its employees. Corporate criminal responsibility arises when an employee or agent commits a crime while acting within the scope of his employment. *See generally* Sarah Kelly-Kilgore & Emily M. Smith, *Corporate Criminal Liability*, 48 Am. Crim. L. Rev. 421, 422 (2011) ("The nature of incorporeal legal entities requires courts to look to employees of the corporation as a means of imputing intent, or *mens rea*, as well as the guilty act, or *actus reus*, to the corporation). Because an organization can be held liable even for actions undertaken without management's knowledge or participation, an organization has an inherent incentive to monitor and prevent corporate wrongdoing. To be effective, organizational sentencing policy needed to further incentivize self-policing by rewarding such efforts.

incentives for compliance expenditures."[69] Accordingly, the paper put forward the premise that "[t]he key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts."[70]

1988 Public Hearings on Organizational Sanctions

Following the public release of the *Discussion Materials*, the Commission conducted two public hearings. The first was held on October 11, 1988 in New York City.[71] At the hearing, the Commission announced that it was in "the very preliminary stages of debating, working out, and discussing the appropriate approach to organizational sanctions, and that [it] intend[ed] to follow the same process . . . [as] in the past and that is to receive as much public input as is possible on each issue we must resolve before we promulgate the guideline for organizations and submit them to Congress."[72] The witnesses at the hearing included representatives from the President's Council of Economic Advisors, staff from the Securities and Exchange Commission, academics, and others.[73]

During this hearing, an underlying theme developed through the witnesses' testimony: the importance of internal corporate monitoring as a means of deterring organizational crime. One witness opined that "there is a strong argument for prosecuting a corporation because the organization can best monitor its own agents than can the state, at lower cost."[74] Others agreed that internal corporate monitoring could be an effective means to prevent criminal behavior by employees.[75] Yet another agreed that internal controls were important because "deterrence in a corporate environment comes more from making the environment at the top one that calls out for law enforcement rather than, as in some corporations recently, creating an atmosphere where low-level employees feel that it would be welcome by its higher-ups to cheat or bribe or get extra percentage points by kiting money, things of that sort."[76]

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[69] *See* Jeffrey A. Parker, "Staff Working Paper on Criminal Sentencing Policy for Organizations" (May 1988), U.S. Sent'g Comm'n, *Discussion Materials on Organizational Sanctions, Pt. IV*, at 9 (July 1988).

[70] *Id.*

[71] *See* Notice of Public Hearing on Organizational Sanctions, 53 Fed. Reg. 35407 (Sept. 13, 1988).

[72] *See* Opening Statement of William Wilkins, Chair, at 2 (Oct. 11, 1988). A transcript of the hearing is on file with the Commission.

[73] For a complete list of the witnesses, *see* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991).

[74] *See* Testimony of John Coffee, Jr., Columbia University School of Law, to the Commission, at 161 (Oct. 11, 1988).

[75] *See* Testimony of Thomas Moore, President's Council of Economic Advisors, to the Commission, at 16 (Oct. 11, 1988); Testimony of Samuel J. Buffone at 70-71 (Oct. 11, 1988); Testimony of Professor Jonathan Baker, Dartmouth University, to the Commission, at 245 (Oct. 11, 1988).

[76] *See* Testimony of Samuel J. Buffone, Asbill, Junkin, Myers & Buffone, to the Commission, at 69 (Oct. 11, 1988).

The Commission continued the public discussion about the development of guidelines for sentencing organizations with another public hearing in Pasadena, California on December 2, 1988.[77] The witnesses at this hearing represented a broad spectrum of stakeholders interested in organizational sentencing policy, including federal and state agencies, probation officers, academics, the corporate sector, and special interest groups.[78] Compliance programs in the context of probation continued to be a topic of discussion at this hearing.[79] For the most part, the witnesses favored involving the organization in the development of a compliance plan. At least one expressed doubts, however, about the utility of such involvement: "[o]ne of the central aims of the guidelines is to encourage voluntary compliance and you indicate it is anticipated that the corporation will normally take a leading role in proposing the conditions and internal controls that should be imposed. In my opinion, this is an overly optimistic view."[80]

This hearing marked the first public discussion of compliance programs as a factor that should be considered in mitigation of punishment. One witness suggested that in considering sentences "there should be taken into account the extent to which a corporation through its internal governance processes has taken on the responsibility at the highest level to forestall criminal activity."[81] This witness also talked about creating "a value system within the corporation that says it is more important to stop criminal activity than it is to maximize profits."[82] The commissioners' comments and follow up questions in response to this testimony indicated considerable interest in these ideas.[83] Another witness agreed that there should be a difference in the sanction for a corporation who instituted a compliance program

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[77] *See* Notice of Public Hearing on Organizational Sanctions and Request for public Comment on Discussion Materials, 53 Fed. Reg. 41644 (Oct. 24, 1988).

[78] For a complete list of the witnesses, *see* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991).

[79] *See* Testimony of Jan Chatten-Brown, Special Assistant to the District Attorney, Los Angeles County, to the Commission, at 43 (Dec. 2, 1988); Testimony of Christopher Stone, University of Southern California Law Center, to the Commission, at 100 (Dec. 2, 1988). A transcript of the hearing is on file with the Commission.

[80] *See* Testimony of Robert M. Latta, Chief U.S. Probation Officer, Central District of California, to the Commission, at 60 (Dec. 2, 1988).

[81] *See* Testimony of Robert A.G. Monks, President, Institutional Shareholders Services, to the Commission, at 71 (Dec. 2, 1988).

[82] *Id.* at 74.

[83] *See* U.S. Sent'g Comm'n, Transcript of Public Hearing on Organizational Sanctions, Pasadena, CA at 73, 83-91 (Dec. 2, 1988) (on file with the Commission). *See, e.g.,* Statement by Hon. William W. Wilkins, Jr., at 73 ("The points you make are very interesting."); Statement by Hon. Stephen G. Breyer, at 83 ("[I]t's a very interesting proposal, and I think perhaps practical."); Statement by Commissioner Helen G. Corrothers, at 83 ("I think the idea is a marvelous one, and I would like to encourage you and do anything I can to help promote it, too.").

with internal audits and internal accounting procedures that were state of the art, conducted surprise audits and inspections to ensure that the procedures were followed, and had no reason to believe that they were not, compared to the sanction for a corporation that did none of those things.[84] This witness also thought that penalties should distinguish between a situation where an employee covered his criminal activity to avoid discipline versus one where the employee acted pursuant to company policy and practice.[85]

Another witness agreed with the notion that having instituted a compliance program should be recognized in the sentencing process, and he testified that such recognition would provide an incentive for organizations to adopt compliance programs.[86] This witness's written statement went even further, providing a framework for analyzing the key objectives and elements of a compliance program (factors that would render such a program *effective* and thus, in his view, worthy of mitigation credit). He laid out four program objectives: (1) regular, timely and uniform reporting from the operating line through senior management to the board of directors; (2) prompt identification and resolution of environmental issues; (3) establishment of preventive programs and procedures; and (4) identification of developing issues or trends.[87]

Public Comment and Working Group Materials

The Commission continued to receive public comment on the issue of compliance programs in the months following publication of the *Discussion Materials*. One of the witnesses from the December 2, 1988 public hearing submitted two proposals for incorporating "affirmative governance" factors into the guidelines:

> [The first] would entitle a convicted corporation to a one-level reduction in the applicable fine range for having had an affirmative governance program and internal controls in place at the time of the criminal conduct at issue. The second proposal would permit the court to impose strict conditions of probation on a corporation whose criminal conduct was found to have been encouraged or facilitated by the lack of a compliance program and internal controls.[88]

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[84] *See* Testimony of Charles B. Renfrew, President, Chevron, to the Commission, at 166 (Dec. 2, 1988).

[85] *Id.* at 150-51.

[86] *See* Testimony of Jerome Wilkenfeld, Health, Environmental & Safety Department, Occidental Petroleum, to the Commission, at 172 (Dec. 2, 1988).

[87] *See* Written Statement of Jerome Wilkenfeld to the Commission at 2 (Dec. 2, 1988) (on file with the Commission). In addition, the key elements of an effective program were identified as: a computerized information and issue management system; a facility assessment program; an internal planning document and timetable; a capital expenditure review system and a legislative and regulatory action program. *Id.*

[88] *See* Letter from Robert A.G. Monks, President, Institutional Shareholders Services to Hon. William W. Wilkins, Jr., App. B (February 22, 1989) (on file with the Commission).

Additional public comment agreed with the idea that corporate compliance efforts should operate to mitigate punishment.[89] At least one commentator contended that "[s]ubstantial mitigation should be provided for a corporation that has a meaningful compliance program."[90] Others suggested that probation should be readily available as a sentencing option in cases where "a corporate culture . . . encourages the maximization of profits through the payment of bonuses without establishing legally acceptable guidelines for obtaining such profits,"[91] and that such probation should include a requirement to institute a system of "management controls" designed to promote high standards.[92]

Late in 1988, the Commission formed a working group of private defense attorneys "to develop for the Commission's consideration a set of practical principles for sentencing organizations."[93] This attorney working group met biweekly and attended commission meetings and briefings.[94] In May of 1989, the attorney working group "submitted to the

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[89] *See* Letter from John D. Ong, Chairman, Business Roundtable Antitrust and Government Regulation Task Force, to the Commission (November 30, 1988); Preliminary Comments of General Electric Company on the United States Sentencing Commission's Proposed Organizational Sanctions (Sept. 11, 1989) (on file with the Commission) (stating that the Commission "should, in the end, encourage and reward good corporate governance, not penalize or ignore it.").

[90] *See* Preliminary Comments of General Electric Company on the United States Sentencing Commission's Proposed Organizational Sanctions, at 12 (Sept. 11, 1989) (on file with the Commission). General Electric Company's comments also identified three steps toward developing a meaningful compliance program: "[develop] company policies defining and discussing the standards, rules and procedures to be followed by employees," "communicate[policy] to its employees through training, publication or other effective means," and have "internal audits, disciplinary mechanisms and some other effective means to report possible wrongdoing, such as ombudspersons or hotlines." *Id.*

[91] *See* Letter from Morris B. Silverstein, Assistant Inspector General for Criminal Investigations Policy and Oversight, Department of Defense, to Paul K. Martin, Communications Director, Commission, at 4 (Dec. 29, 1988) (on file with the Commission).

[92] The management controls were described as a written code of business ethics and conduct and an ethics training program for all employees; periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of government contracting; a mechanism, such as a hotline, by which employees may report suspected instance of improper conduct, and instructions that encourage employees to make such reports; internal and/or external audits, as appropriate; disciplinary action for improper conduct; timely reporting to appropriate government official of any suspected or possible violations of law in connection with government contracts or other irregularities in connection with such contracts; and full cooperation with any government agencies responsible for either investigation or corrective actions.

[93] *See* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

[94] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Dec. 13, 1988) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (May 23, 1989) (on file with the Commission).

Commission its '*Recommendations Regarding Criminal Penalties for Organizations.*'"[95] The working group asserted that "organizational sanctions should serve dual purposes": "to punish for violations of societal norms" and to "serve a deterrence purpose . . . [by] provid[ing] incentives for organizations to take optimal steps to prevent crimes."[96] As a result, the working group identified a number of factors that should ameliorate the criminal fine amount, including "if an organization maintained and enforced effective policies and practices reasonably designed to prevent crimes and if the illegal conduct was unknown (and reasonably unknown) by high-level management."[97]

The 1989 Draft of Proposed Organizational Guidelines

The Commission's work on organizational sanctions continued throughout 1989. The Commission received several briefings from the Department of Justice[98] and its internal staff working group.[99] Informed by these briefings, public comment, and its empirical research, the Commission continued to debate the underlying principles while generating another draft of proposed guidelines for organizations.[100] In October, the Commission unanimously agreed to "distribute the revised organizational sanctions draft to judges and other interested parties" and to publish the draft in the Federal Register with a minimum of sixty days for public comment.[101]

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[95] *See* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, at 2 (Aug. 1991).

[96] *See Working Group Recommendations Regarding Criminal Penalties for Organizations to the Commission*, at 2 (May 19, 1989) (on file with the Commission). Notably, the group recommended that the Commission limit itself to the promulgation of "flexible policy statements rather than rigid and binding guidelines." *Id.* at 4.

[97] *Id.* at 3. Other reductions suggested by the Working Group included steps taken by the organization "to discipline the responsible individuals" and to "make it easier for the criminal justice system to identify and punish responsible individuals," or "if an organization takes appropriate steps to prevent a recurrence of similar offenses." *Id.*

[98] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Dec. 13, 1988) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (June 27, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (July, 11, 1989) (on file with the Commission).

[99] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (June 14, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (June 26, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (July 10, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (July 18, 1989) (on file with the Commission).

[100] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (June 26 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (July 18, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (July 25, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 1 (Aug. 1, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 22, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (Sept. 12, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (Sept. 26, 1989) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (Oct. 19, 1989) (on file with the Commission).

[101] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 2-3 (Oct. 19, 1989) (on file with the Commission).

On November 8, 1989, the Commission published the proposed guidelines, policy statements, and accompanying commentary and requested public comment "on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations."[102] The Federal Register notice indicated that the Commission was considering the submission of these amendments to Congress on or before May 1, 1990, and explained that the proposal was "the culmination of an extended period of analysis, consultation, and public comment."[103] The proposed guidelines were "presented as a new chapter to the *United States Sentencing Commission Guidelines Manual: Chapter Eight—Sentencing of Organizations*" and included two options for the guideline section that would determine the guideline fine range for most organizational defendants (§8C2.1).[104]

"Option I would base the guideline fine range on the greater of loss, gain, or an amount specified based upon the applicable offense level, with percentage adjustments based upon applicable aggravating or mitigating factors."[105] Option I also provided for specified fine reductions for compliance efforts under one of the following two circumstances. "If the offense represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense," then the sentencing judge was directed to "subtract 20%" of the previously determined fine amount." Alternatively, the proposed guideline required the judge to "subtract 10%" "[i]f the organization has taken substantial steps to prevent a recurrence of similar offenses, such as, implementing appropriate monitoring procedures or disciplining any officer, director, employee, or agent of the organization responsible for the offense."[106] Option I did not include any commentary defining the types of policies or procedures that would qualify for these reductions.

Option II proposed that the guideline fine range be based "entirely upon the applicable offense level, with offense level adjustments based upon applicable aggravating or mitigating factors."[107] Option II provided for fine reductions based upon the same two compliance effort criteria set out for Option I, with the judge directed to "subtract 1 level" in either event.[108]

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[102] *See* Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary and Request for Public Comment, 54 Fed. Reg. 47056 (Nov. 8, 1989) (hereinafter referred to as the 1989 *Draft of Proposed Organizational Guidelines).*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 47059.

[107] *Id.* at 47056.

[108] *Id.* at 47060.

Option II also did not include any commentary defining the types of policies or procedures that would qualify for these reductions. The Commission noted that "the two options may result in substantially different fine levels" and encouraged commentators "to evaluate and comment upon these two options or to suggest an alternative."[109]

Similar to provisions in the earlier discussion materials, the 1989 *Draft of Proposed Organizational Guidelines* also mentioned compliance programs in the context of conditions of probation. One proposed guideline required a sentence of probation if the offense occurred after "the organization or a member of its high-level management had a criminal conviction within the previous five years for [similar mis]conduct" or "the offense indicated a significant problem with the organization's policies or procedures for preventing crimes."[110] The proposed guideline also stated that problems with the organization's policies and procedures might be evidenced by "(A) high-level management involvement in, or encouragement or countenance of, the offense; (B) inadequate internal accounting or monitoring controls; or (C) a sustained or pervasive pattern of criminal behavior."[111]

If the court decided to impose a term of probation under such circumstances, then the proposed guideline recommended that the court impose special conditions requiring the organization to "develop and submit for approval by the court a compliance plan for avoiding a recurrence of the criminal behavior for which it was convicted,"[112] and upon approval of such compliance plan, to "notify its employees and shareholders of the criminal behavior and the compliance plan."[113] The proposed guideline authorized the court to "employ appropriate experts to assess the efficacy of a submitted plan, if necessary," and required approval of "any plan that appears reasonably calculated to avoid recurrence of the criminal behavior."[114] The proposed guideline further provided that "[t]he organization shall not be required to adopt any compliance measure unless such measure is reasonably necessary to avoid a recurrence of the type of criminal behavior involved in the offense."[115] This proposed guideline did not include any commentary identifying the elements of an effective compliance program.

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[109] *Id.* at 47056. The difference between the two options is best illustrated by an example. Assuming an offense level of 27, the fine range under Option I would be $2,000,000 - $3,000,000. This fine range would be reduced by 20% if the organization had a compliance program, resulting in a fine range of $1,600,000 - $2,400,000. By contrast, under Option II, the existence of a program would lead to a one-level reduction in the offense level of 27. The resulting offense level of 26 yielded a fine range of $80,000,000 - $170,000,000.

[110] *Id.* at 47062.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 47062-63.

[114] *Id.* at 47062.

[115] *Id.*

February 14, 1990 Public Hearing

The Commission continued to seek public input to inform the development of the organizational sentencing guidelines. On February 14, 1990, the Commission conducted a public hearing on "the proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations."[116] Seventeen witnesses, with a diversity of backgrounds and interests, testified before the Commission about organizational sentencing policy.[117] Among the special interest groups represented were the National Association of Manufacturers, the American Corporate Council Association, the U.S. Chamber of Commerce, and the American Bar Association. Representatives from several federal agencies, academics, and the general counsels of various private businesses also appeared. The chair of the Commission's attorney working group presented testimony on behalf of the working group.

The testimony covered many topics, including compliance programs. Many witnesses urged the Commission to postpone issuing organizational guidelines, and instead issue non-binding policy statements.[118] At least one described probation as a "death sentence" for small to medium organizations.[119] Nevertheless, even witnesses opposing the issuance of organizational guidelines expressed the opinion that organizational sanctions should account for corporate compliance programs by providing for a substantial decrease in the fine amount imposed on an organization with an effective compliance program.[120] One witness thought that by striking the proper balance in the guidelines to account for such programs, the Commission could

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[116] *See* Notice of Public Hearing, 55 Fed. Reg. 4045 (Feb. 6, 1990). A transcript of the hearing is on file with the Commission.

[117] For a complete list of the witnesses, *see* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991).

[118] *See, e.g.,* Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 33 (Feb. 14, 1990); Joseph E. diGenova, Defense Attorney Advisory Group on Organizational Sanctions, to the Commission, at 71 (Feb. 14, 1990); Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 164 (Feb. 14, 1990). At the time, guidelines issued by the Commission were binding on the courts pursuant to 18 U.S.C. § 3553(b). By contrast, the courts were only required to "consider" the Commission's policy statements. *See* 18 U.S.C. § 3553(a)(5).

[119] *See* Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers), to the Commission, at 33 (Feb. 14, 1990).

[120] *See* Testimony of Earlyn Church, Superior Technical Ceramic Corporation (representing National Association of Manufacturers, to the Commission, at 38 (Feb. 14, 1990) ("A substantial program should receive a substantial reduction in fines"); Joseph E. diGenova, Attorney Working Group on Organizational Sanctions, to the Commission, at 86 (Feb. 14, 1990) (stating that the guidelines should account for compliance programs); Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 170-71 (Feb. 14, 1990) (arguing that the guidelines should provide for more than a 20 percent reduction in the applicable fine amount for aggressive compliance programs).

incentivize corporations to develop meaningful compliance programs.[121] He reasoned that "corporations themselves are probably better equipped to deal with wrongdoing if in fact they have the proper incentives to do so."[122] The testimony also touched on various elements that should be included in a successful compliance program, such as the audit function, an ombudsman or other program to protect employees who report corporation wrongdoing, support of upper management[123] and managers to monitor and execute the program.[124]

Immediately following the February 14, 1990 public hearing, the Commission conducted a business meeting and discussed the organizational guidelines.[125] Members of the attorney working group were present and expressed their views and concerns about organizational sanctions. "The Commission questioned the working group on how to structure the guidelines to provide incentives for corporations to cooperate."[126] After hearing the group's views, the chair of the Commission announced that the "first goal of the guidelines should be to provide sufficient incentives so that self-policing becomes a reality," and suggested that "the Commission investigate the possibility of beginning with a presumptively high fine range and work downward to zero for a 'good citizen' corporation."[127] The Commission then came to the consensus that "staff should develop draft guidelines to reflect self-policing through economic incentives as a possible alternative to the current options."[128]

Unforeseen Delay in Implementation of Organizational Guidelines

Throughout the 1989-90 amendment cycle, the Commission had publicly indicated that it would likely deliver the organizational guidelines, policy statements and accompanying

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[121] *See* Testimony of Frank H. Menaker, Jr., Vice President, General Counsel, Martin Marietta Corporation, to the Commission, at 114 (Feb. 14, 1990).

[122] *Id.*

[123] *Id.* at 116-17, 120; Testimony of Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 171 (Feb. 14, 1990).

[124] *See* Testimony of Frank McFadden, Senior Vice President, General Counsel, Blount, Inc. (representing American Corporate Council Association), to the Commission, at 171 (Feb. 14, 1990).

[125] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Feb. 15, 1990) (on file with the Commission).

[126] *Id.*

[127] *Id.* In the 1989 Draft, the fine amounts in the fine table started relatively low, at either $250 or $500, respectively. *See* 54 Fed. Reg. at 47058, 47060. By contrast, in the draft proposed guidelines released in 1990, the starting fines were higher (the three published options started at $3300, $4150 or $5000). *See* Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary Relating to Sentencing of Organizations, Request for Public Comment and Notice of Public Hearing, 55 Fed. Reg. 46600, 46603 (Nov. 5, 1990). The Attorney Working Group also advocated for use of a high presumptive fine. *See* Working Group Recommendations Regarding Criminal Penalties for Organizations to the Commission, at 3 (May 19, 1989) (on file with the Commission).

[128] *Id.*

commentary to Congress by May 1, 1990,[129] and it diligently worked toward that deadline.[130] Ultimately, however, a series of unrelated events transpired to derail the planned delivery of the organizational guidelines.

First, two of the seven original commissioners resigned before the end of their terms.[131] Additionally, the four-year term of a third expired in October of 1989.[132] Consequently, as of November of 1989, the Commission had only four voting members remaining and, by statute, all four had to vote in favor of any guidelines submitted to Congress.[133] Nevertheless, the Commission continued to work on the organizational guidelines, as evidenced by release of the draft guidelines in November, 1989 and the public hearing held in February of 1990.

Shortly after the February public hearing, representatives of the Business Round Table publicly urged the Commission to "take more time to consider the draft guidelines because of the potential impact on the corporate sector" and to adopt policy statements instead of binding guidelines.[134] In addition to these public statements to the Commission, members of the Business Round Table were allegedly exerting pressure behind the scenes to delay implementation of the organizational guidelines.[135]

The Commission met on April 10, 1990, to vote on new amendments to the *Guidelines Manual*, including the potential inclusion of organizational guidelines. No new commissioners had been confirmed by the Senate at that point, leaving only four commissioners to promulgate the

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[129] *See, e.g.,* 54 Fed. Reg. 47056; 55 Fed. Reg. 4045.

[130] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 26, 1989) (outlining the process for delivery of the organizational guidelines, which included "adoption of guidelines for presentation to Congress in the spring.") (on file with the Commission).

[131] *See* Former Commissioner Information, available on the Commission's website at http://www.ussc.gov/About_the_Commission/About_the_Commissioners/Former_Commissioners.cfm. Commissioner Paul Robinson resigned on February 1, 1988, and Commissioner Michael K. Block resigned on September 1, 1989. Their terms ended October 31, 1989.

[132] *See id.* Judge (later Justice) Stephen G. Breyer's term expired in October, 1989.

[133] *See* 28 U.S.C. § 994(a); *see also* Rule 2.2 of the Commission's Rules of Practice and Procedure ("Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting.").

[134] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Feb. 27, 1990) (on file with the Commission). The Commission received much public comment urging it to refrain from promulgating guidelines for organizations, and suggesting that the Commission had no statutory authority to do so. For further discussion of this issue, *see* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future,* 71 Wash. U. L. Q. 205, 212-14 (Summer, 1993).

[135] *See Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearing before the Subcomm. On Criminal Justice of the House Comm. On the Judiciary,* 101st Cong. 173 (May 24, 1990) (Opening statement of Hon. John Conyers, Jr.).

organizational guidelines if the May 1, 1990, delivery to Congress was to be met. At the April 10 meeting, one of the four voting commissioners, Judge George E. MacKinnon, announced that he would "not vote to adopt organizational sanction guidelines during this amendment cycle."[136] Judge MacKinnon explained this decision as follows:

> The issuance of Organizational Sanctions is our most difficult task. It requires the Commission with no precedent to write guidelines on a completely new slate for every corporation in the nation. In my opinion such sentencing guidelines are much too important and far reaching to be adopted while there are three vacancies on our seven member Commission. I expressed this concern some weeks ago to representatives of the Department of Justice and had hoped that the vacancies would be filled by now. However, this has not occurred.
>
> Accordingly, because of the extraordinary nationwide importance of the matter, and the three vacancies in the Commission, I will not vote to adopt any proposal for corporate sentences during this current amendment cycle.[137]

After the May 1 deadline passed, the Subcommittee on Criminal Justice of the Judiciary Committee of the House of Representatives conducted an oversight hearing regarding guidelines for organizations. At the hearing, several congressmen made statements evidencing their support for promulgation of organizational guidelines. For example, the chairman of the subcommittee conducting the hearing stated that "[t]he evidence of corporate fraud and abuse that continues to [mount] in the S&L industry most notably in the last several months, makes the establishment of new sentencing guidelines imperative."[138] Another congressman echoed these concerns, noting that when the "Sentencing Reform Act was passed a number of years ago, the intent of Congress was to send a message that corporate criminality would be attacked more vigorously than it ever [w]as before;" however, events that had transpired in the preceding months, including the Commission's decision not to promulgate organizational guidelines, "[raise] the appearance of the Justice Department caving in to the big business

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[136] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (April 10 and 11, 1990) (on file with the Commission).

[137] *Id.* The Commission is required to deliver guideline amendments to Congress no later than May 1, in order for such guideline amendments to take effect by November 1, *see* 28 U.S.C, § 994(p), and their promulgation requires an "affirmative vote of at least four members of the Commission." *See* 28 U.S.C, § 994(a). In light of Judge McKinnon's announcement, the chair did not call for a vote at the April 10, 1990 meeting. *See* U.S. Sent'g Comm'n, Public Meeting Minutes (April 10 and 11, 1990).

[138] *See Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearing before the Subcomm. On Criminal Justice of the House Comm. On the Judiciary,* 101st Cong. 172 (May 24, 1990) (opening statement of Hon. Charles E. Schumer).

demands at the expense of Congress' clear mandate to issue guidelines that bring corporate criminals to justice."[139]

Judge William W. Wilkins, Jr., a judge on Fourth Circuit Court of Appeals and then chairman of the Commission, testified on behalf of the Commission at the hearing. He reported that the President had nominated three individuals to fill the vacancies on the Commission.[140] He briefed the subcommittee on the work that the Commission had already undertaken to develop the organizational guidelines.[141] He also reported that there was "general agreement among the four Commissioners who have been debating and working on this area on many of the issues that have to be resolved."[142] According to his testimony, the issues upon which there was agreement included that the individual actors responsible for the criminal act should be prosecuted and sentenced along with the organization, that criminal purpose organizations should forfeit all of their assets, that the guidelines should require full restitution to any victim of organizational crime, and that any sanction on organizations should include complete disgorgement of any illegal gain.[143] Judge Wilkins noted, however, that "there are other important issues yet to be resolved."[144] One example of such an issue was whether "a distinction [should] be made between a corporation that had a strong and meaningful compliance program prior to an employee committing a crime in the name of the corporation . . . and a corporation that has no such compliance program."[145] Judge Wilkins concluded his remarks by assuring the subcommittee members that he was confident that the Commission would promulgate organizational guidelines and that those guidelines "[would] fairly and adequately and appropriately punish organizations which violate our Federal law."[146]

During the question and answer period following Judge Wilkins' testimony, two commissioners (Judge Wilkins and Judge MacKinnon) discussed concerns about public acceptance of the organizational guidelines.[147] Judge MacKinnon explained that the Commission's consideration of corporate guidelines has been "vigorously, if not viscously (sic), opposed by the corporations at practically every meeting we had."[148] In light of that

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[139] *Id.* at 173 (Opening statement of Hon. John Conyers, Jr.).

[140] *Id.* at. 174 (Testimony of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

[141] *Id.* at 175.

[142] *Id.* at 176.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 177.

[146] *Id.*.

[147] *Id.* at 197-98. Judge MacKinnon did not testify at the hearing but was asked by Congressman Schumer to come forward and explain his decision. *Id.* at 198.

[148] *Id.*.

opposition, it was his view that guidelines passed "by a minimal Commission that was 57 percent at strength" would be subject to attack.[149] Judge MacKinnon assured the congressmen that it was this concern, and not any external pressure brought to bear, that motivated his decision to abstain from a vote on the organizational guidelines until the new commissioners assumed office.[150]

Judge Wilkins also advised the subcommittee that the Commission had been moving in the direction of a vote on the organizational guidelines and had been engaged in ongoing discussions of the topic. He described the process involved in developing those guidelines:

> [V]arious drafts were being prepared by staff. The Commission had met, for example, and talked about some issues we had learned from the recent public hearing and a draft had been put together, combining generally the thoughts of the four Commissioners that had been discussed at that session.
>
> Other staff members with ideas were working with the staff director to develop various approaches. This thing is a fluid process. You write and draft. You study and you move and reject and move to a different [draft]. [S]o I don't know what the draft would have looked like, but we were moving forward with the documents that had been disseminated, as well as those that were being generated internally by the staff.[151]

Judge Wilkins assured the subcommittee members that the Commission would "not [defer] readying itself so that once the new Commissioners are on board it may efficiently renew deliberations. . . when we have our vacancies filled we will be in a position to move expeditiously."[152]

IV. The Commission's Promulgation of Organizational Guidelines

General Drafting Principles of Proposed Organizational Guidelines

At the Commission's direction, the staff working group on organizational sanctions continued its work, and received feedback from the Commission, along with a renewed commitment to

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[149] *Id.*

[150] *Id.* at 203.

[151] *Id.* at 201.

[152] *Id.* at 186 (Written Statement of Hon. William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

schedule another public hearing once new commissioners were appointed.[153] Three new commissioners were sworn in on July 24, 1990. At the first meeting attended by all members of the now fully constituted Commission, the Commission agreed on a set of general principles to be used in drafting guidelines on organizational sanctions.[154] These principles included a provision that "mitigating factors should be designed to provide incentives for organizations to take steps to minimize the likelihood of criminal behavior and to assure that when such conduct does occur, it is detected and reported by the organizations."[155] The Commission also discussed agenda items during this meeting, including the "weight to be given such mitigating factors as compliance program and . . . incentives to corporations. . ."[156]

In addition to drafting the organizational guidelines in accordance with the newly established principles, the Commission's staff continued to conduct empirical research concerning organizational sanctions during this period.[157] The Commission also decided to create a working group of judges to advise the agency on the development of organizational sanctions.[158] After making various changes to a set of draft guidelines, the Commission agreed to publish both the Commission's draft and a proposal from the Department of Justice.[159]

November 1990 Draft of Proposed Organizational Guidelines

On November 5, 1990, the Commission published guidelines, policy statements, and accompanying commentary relating to the sentencing of organizations and sought public comment "on these proposals and any other aspect of the sentencing guidelines, policy statements, and commentary as they apply to the sentencing of organizations."[160] The Commission also solicited public comment on "the suggested organizational guidelines prepared by the U.S. Department of Justice."[161]

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[153] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (June 14, 1990) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (July 10, 1990) (on file with the Commission).

[154] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission).

[155] *See* U.S. Sent'g Comm'n, *Supplementary Report on Sentencing Guidelines for Organizations*, App. A (Aug. 1991).

[156] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission).

[157] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 1990) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 11, 1990) (on file with the Commission).

[158] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 25, 1990) (on file with the Commission).

[159] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (Oct. 23, 1990) (on file with the Commission).

[160] *See* Notice of Proposed Additions to Sentencing Guidelines, Policy Statements and Commentary Relating to Sentencing of Organizations, Request for Public Comment and Notice of Public Hearing, 55 Fed. Reg. 46600, 46601 (Nov. 5, 1990).

[161] *Id.* The Department of Justice's proposal included both aggravating and mitigating factors that would increase or decrease the offense level used for determining the fine level. Notably, the Department's proposal did not identify the existence of an effective program to prevent and detect violations of law as a mitigating factor but allowed for a one level reduction in the offense level if "the offense represented an isolated incident of criminal

In the published Commission draft, compliance programs were recognized as a mitigating factor that should lead to a reduction of the applicable fine range. Two options were included in the Commission's proposal with respect to the compliance program mitigator. Under the first, having "an effective program to prevent and detect violations of law" added three points to the mitigation score.[162] The second option added two points to the mitigation score if

> the organization prior to the offense had, and after the offense continues to maintain, an effective program to prevent and detect violations of law, and no policy-setting or legal compliance official within the organization or other person who exercised substantial managerial authority in carrying out the policies of the organization had knowledge of the offense, or would have had such knowledge had such person performed his or her responsibilities as contemplated by the compliance plan[.][163]

With respect to both options, the published commentary defined "an effective program to prevent and detect violations of law" as "a program that has been reasonably designed, implemented, and enforced so that it will generally be effective in preventing and detecting criminal conduct" and further provided that "[f]ailure to prevent or to detect the instant offense does not, by itself, mean that the program was not effective."[164] It also made clear that "[t]he hallmark of [such a program] is that the organization exercised, prior to the offense, and continues to exercise due diligence in seeking to prevent and detect criminal conduct by its agents. Due diligence requires at a minimum that the organization has taken at least seven general types of steps to assure compliance with the law."[165] Those steps were:

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activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense" or "the organization substantially cooperated in the investigation, or if the organization has taken substantial steps to prevent a recurrence of similar offenses, such as implementing appropriate monitoring procedures." *Id.* at 46612. The Department's proposed commentary did not contain language explaining any of the terms used, such as "bona fide policies and programs" or "substantial steps to prevent recurrence."

[162] *Id.* at 46604. In the published Commission draft, this mitigation score was used to determine the minimum and maximum multipliers used to compute the applicable guideline fine range. It operated much like the culpability score in the current version of the guidelines. *See* USSG §8C2.5. Unlike the culpability score, however, the Commission's draft proposals did not include increases in the multipliers based upon aggravating factors.

[163] *Id.* at 46606.

[164] *Id.* at 46605.

[165] *Id.*

1) "[T]he organization must have had policies defining the standards and procedures to be followed by its agents and employees;"[166]
2) "[A] specific high-level person within the organization must have been designated and assigned ultimate responsibility to ensure compliance with those standards and procedures;"[167]
3) "[T]he organization must have used due care not to delegate significant discretionary authority to persons whom the organization knew, or should have known, had a propensity to engage in illegal activities;"[168]
4) "[T]he organization must have effectively communicated its standards and procedures to agents and employees, e.g., by requiring participation in training programs and by the dissemination of publications;"[169]
5) "[T]he organization must have taken reasonable steps to achieve compliance with its standards, *e.g.*, by utilizing monitoring and auditing systems reasonably designed to ferret out criminal conduct by its agents and employees and by having in place and publicizing a reporting system whereby agents and employees can report criminal conduct within the organization without fear of retribution;" [170]
6) "[T]he standards must have been consistently enforced through appropriate disciplinary mechanisms;"[171] and
7) "[A]fter an offense has been detected, the organization must have taken all reasonable steps to prevent further similar offenses."[172]

The published commentary also stated that an organization would not "ordinarily qualify" for the effective compliance program mitigating factor unless it also qualified for the mitigating factor requiring that no compliance personnel or person with "substantial managerial authority" knew about the violation.[173] Credit for the "no knowledge" mitigating factor would be disallowed "if any person who held a policy-setting or legal compliance position within the organization or who exercised substantial managerial authority in carrying out the policies of the organization became aware of the offense [or through the exercise of due diligence should have known about the offense] and the organization subsequently failed to make a timely report of the offense to appropriate government authorities."[174] Persons holding legal

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166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.* at 46604.

174 *Id.*.

compliance positions were broadly defined to include "inside counsel and any other person who has significant responsibility for ensuring that the organization complies with requirements imposed by law."[175]

As in earlier drafts, the November 5, 1990 draft also included implementation of a compliance plan as a possible condition of probation.[176] The Commission requested that public comment on the draft be received no later than December 10, 1990, and announced that it would conduct a public hearing on organizational sanctions on December 13, 1990, in Washington, D.C.[177] On December 3, 1990, the Commission extended the public comment period through January 10, 1991.[178]

December 13, 1990 Public Hearing

The Commission held the final hearing on the organizational guidelines, as planned, on December 13, 1990, in Washington, D.C. Thirteen witnesses with varied backgrounds offered testimony.[179] The witnesses, including those who opposed promulgation of guidelines, generally favored including an effective compliance program as one of the mitigating factors. One witness told the Commission that "[e]ncouraging corporations to have effective compliance programs should be the highest priority of this Commission."[180] Witnesses expressed the view that giving credit for an effective compliance program would deter future criminal activity [181] and would lead to widespread acceptance of compliance programs.[182] Others agreed, but expressed concerns that compliance programs were not receiving sufficient credit under the proposed guidelines as drafted.[183] Still others expressed the view that an

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[175] *Id.* at 46605.

[176] *Id.* at 46610.

[177] *Id.* at 46600.

[178] *See* Notice of Extension of Public Comment Period for Draft Sentencing Guidelines for Organizational Defendants, 55 Fed. Reg. 49971 (Dec. 3, 1990).

[179] For a complete list of the witnesses, *see* Commission, *Supplementary Report on Sentencing Guidelines for Organizations*, App. B (Aug. 1991). A transcript of the hearing is on file at the Commission.

[180] *See* Testimony of Griffin Bell, King & Spaulding, to the Commission, at 7 (Dec. 13, 1990).

[181] *Id.* at 17.

[182] *See* Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 131 (Dec. 13, 1990) (if the guidelines give credit for compliance programs every "major or minor corporation in the country will adopt every one of these points.").

[183] *See* Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 69-71 (Dec. 13, 1990); Richard R. Rogers, Associate Counsel, Ford Motor Credit Company (on behalf of National Association of Manufacturers), to the Commission, at 90 (Dec. 13, 1990); Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 245 (Dec. 13, 1990).

effective program and voluntary disclosure to authorities should not be linked, but rather each should be given separate credit.[184]

Several witnesses thought that the Commission correctly identified the essential elements of an effective compliance program in the published commentary.[185] A few offered suggestions for strengthening the definition: programs should be adequately funded; should have enough teeth to be enforced; should have widespread publication within an organization; should not be simply paid lip service;[186] and should develop and publicize a system for reporting criminal conduct without retribution.[187] At least one witness expressed some concern that the definitions in the commentary regarding "persons holding legal compliance positions" might include corporate counsel, thereby having a possible impact on the attorney–client privilege.[188]

Final Efforts to Refine the Organizational Guidelines Draft Proposal

Following the public hearing, the Commission continued to meet to discuss the organizational guidelines. On December 17, 1990, the Commission met with the judges' working group on organizational sanctions to solicit their input on the draft proposals.[189] The Commission directed its staff to meet with representatives of the Department of Justice "to discuss issues and rationales" in the respective drafts.[190] Following those meetings, the Commission considered and discussed a revised draft prepared by its staff, after which it directed the staff "to take the most recent draft and make every effort to simplify from an application perspective."[191] The Commission also agreed to have a group of federal probation officers apply the draft guidelines and submit written comments on their application.[192]

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[184] *See* Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 133-34 (Dec. 13, 1990); Testimony of Andrew L. Frey, Mayer, Brown & Platt, to the Commission,,at 194 (Dec. 13, 1990); Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 245 (Dec. 13, 1990).

[185] *See* Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 78-79 (Dec. 13, 1990); Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 130 (Dec. 13, 1990); Richard R. Rogers, Associate Counsel, Ford Motor Credit Company (on behalf of National Association of Manufacturers), to the Commission, at 99 (Dec. 13, 1990).

[186] *See* Testimony of Stephen S. Cowen, Steptoe & Johnson, to the Commission, at 79-80 (Dec. 13, 1990).

[187] *See* Testimony of Roger W. Langsdorf, Senior Counsel, Director of Antitrust Compliance, ITT Corporation, to the Commission, at 130 (Dec. 13, 1990).

[188] *See* Testimony of Jonathan C. Waller, Assistant General Counsel, Sun Company (on behalf of American Corporate Counsel Association), to the Commission, at 249 (Dec. 13, 1990).

[189] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Nov. 27, 1990) (announcing meeting with judges' working group) (on file with the Commission).

[190] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 5 (Jan. 3, 1991) (on file with the Commission).

[191] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (Mar. 12, 1991) (on file with the Commission).

[192] *Id.*

The Commission also continued to receive and consider public comment on the draft guidelines. Some public comment echoed the concerns expressed at the public hearing about the weight given to compliance programs and the linkage to voluntary disclosure.[193] While receiving and considering the public comment, the Commission continued to refine the proposed guidelines.[194]

Vote to Promulgate Organizational Guidelines and Resulting Guideline Provisions

On April 26, 1991, the Commission resumed its consideration of proposed organizational guidelines. At this meeting, Judge MacKinnon highlighted a piece of public comment received from the National Association of Manufacturers recognizing "that a statutory imperative for mandatory guidelines exists in 28 U.S.C. § 994(b)(1)."[195] Judge Wilkins briefed the Commission on an inquiry from the House Committee on the Judiciary about the organizational guidelines.[196] He advised the Commission that in his response to the inquiry, he had noted that "the Commission's efforts in this area have been deliberate and thorough: requesting and receiving input from interested members of the business community, government and academia, holding public hearings and conducting extensive empirical research."[197] His response to the inquiry also had mentioned "the pledge from the Commission to promulgate organizational guidelines during the 1991 cycle and the Commission's intent to adhere to this schedule."[198]

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[193] *See, e.g.* Letter from James W. Crowley, Vice President, Secretary and General Counsel, and Gary L Hopkins, Deputy General Counsel, E-Systems, to the United States Sentencing Commission (Dec. 7, 1990); Letter from Paul A. Rancour, Senior Vice-President and General Counsel, American Brands Inc. to Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission (April 23, 1991); Letter from Charles A. Tausche, Sears, Roebuck and Co., to Hon. William W. Wilkins, Jr., Chairman, and Members of the U.S. Sentencing Commission (April 25, 1991); Letter from Arthur Levine, Department of Health and Human Services, to the Commission (undated); Letter from David R. Bergerson, Vice President and General Counsel, Honeywell Inc. to the Commission (April 23, 1991); Letter from J. Bruce Ipe, Vice President and General Counsel, First Brands Corporation, to Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission (April 20, 1991).

[194] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (April 9, 1991) (reflecting discussion of a revised senior staff draft on organizational sanctions) (on file with the Commission); U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (Apr. 16, 1991) (reflecting discussion of an April 12 draft on organizational sanctions and approval of wording changes) (on file with the Commission).

[195] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (April 26, 1991) (on file with the Commission). As previously noted, the Commission had received public comment suggesting that it lacked the authority to issue guidelines for organizational offenses. *See* Ilene H. Nagel & Winthrop M. Swenson, *supra* note 134.

[196] The House Committee on the Judiciary requested consultation with the Commission prior to Commission action on the organizational guidelines.

[197] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (Apr. 26, 1991) (on file with the Commission).

[198] *Id.*

Following this discussion, the Commission resumed deliberations about the proposed guidelines. The Commission voted on language changes, additions, and deletions to various sections of Chapter Eight. Judge Wilkins then moved to promulgate "the Organizational Sanction guidelines as amended and submit to Congress."[199] The motion passed unanimously.[200] Judge Wilkins concluded the meeting by expressing "appreciation to the staff and all outside parties who contributed to the production of these guidelines."[201]

The newly promulgated Chapter Eight, titled "Sentencing of Organizations," took effect on November 1, 1991. The guidelines reflected the general principles and approach that the Commission had settled on over many months of deliberation. Among other things, the fine range would be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally would be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table and culpability generally would be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed.[202] Additionally, based upon the feedback and discussion regarding the impact of an effective compliance program, the guidelines also authorized a three point reduction in the culpability score, resulting in a reduced final fine range, if "the offense occurred despite an effective program to prevent and detect violations of law."[203]

The commentary in Chapter Eight defined an effective program to prevent and detect violations of law as "a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct."[204] The commentary further noted that the "[f]ailure to prevent or detect the instant offense, by itself, does not mean that the program was not effective."[205] The commentary described the "hallmark of an effective program to prevent and detect violations of law" as the organization's exercise of "due diligence in seeking to prevent and detect criminal conduct by its employees and other agents."[206] The commentary further provided:

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[199] *Id.* at 6.

[200] *Id.* Although the motion passed unanimously, two commissioners made statements following the vote indicating disagreement with certain policy decisions reflected in Chapter Eight. Nevertheless, "the corporate sanctions draft was the workproduct of all Commissioners." *See id.* (reflecting comments by Commissioners MacKinnon, Nagel and Mazzone) (on file with the Commission).

[201] *Id.* at 7.

[202] *See* USSG, Ch. 8, intro. comment. (Nov. 1, 1991).

[203] *See* USSG §8C2.5(f) (Nov. 1991).

[204] *See* USSG §8A1.2, comment (n.3(k)) (Nov. 1991).

[205] *Id.*

[206] *Id.*

Due diligence requires at a minimum that the organization must have taken the following types of steps:

(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.

(2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.

(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.,* by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.

(5) The organization must have taken reasonable steps to achieve compliance with its standards, *e.g.,* by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.

(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses — including any necessary modifications to its program to prevent and detect violations of law.[207]

Because of the wide variety of organizations potentially covered by the guidelines, both in size and type, the Commission recognized that a determination of whether a particular organization had an effective program to prevent and detect violations of law would depend on certain factors, including "the size of the organization," "the likelihood that certain offenses may occur because of the nature of its business," and the organization's prior history.[208] The Commission also accounted for the existence of applicable industry practices or standards called for by any applicable governmental regulation.[209] The failure to incorporate or follow such practices or standards would "[weigh] against a finding of an effective program to prevent and detect violations of law."[210]

The guidelines further recognized the importance of an effective program to prevent and detect violations of law by requiring the court to impose a term of probation "if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law."[211] Finally, the guidelines provided that development and implementation of such a program could also be ordered as a condition of probation.[212]

Under the promulgated guideline scheme, even if an organization had instituted an effective program to prevent and detect violations of law, it would nevertheless be ineligible for the culpability score reduction if

> an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or

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[207] *Id.* The Commission retained the seven steps reflected in the November 5, 1990 draft, but refined and added language to the descriptions of those steps.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *See* USSG §8D1.1(a)(3) (Nov. 1991).

[212] *See* USSG §8D1.4(c)(1) (Nov. 1991).

> enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense.[213]

In addition to this automatic bar for the involvement of high-level personnel, the guidelines provided that "[p]articipation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law."[214] An unreasonable delay in reporting the offense to appropriate governmental authorities once the organization became aware of it would also bar application of the culpability score reduction for having an effective program to prevent and detect violations of law.[215]

The Commission expressed the aspiration that "organizations would come to view this guideline scheme as a powerful financial reason for instituting effective internal compliance programs that, in turn, would minimize the likelihood that the organization would run afoul of the law in the first instance." [216] Moreover, if a corporate crime was committed, "the sentencing guideline incentives would drive the corporate actor toward swift and effective disclosure and other remedial actions."[217] The Commission also "hoped this punishment

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[213] *See* USSG §8C2.5(f) (Nov. 1991). The term "high-level personnel" was defined as "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization," and specifically included "a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest." *See* USSG §8A1.2, comment (n.3(b)). "High-level personnel of the unit of the organization" was defined as "agents within the unit who set the policy for or control that unit. For example, if the *managing agent of a unit with 200 employees participated in an offense, three points would be added* under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high level personnel of the entire organization, four points (rather than three) would be added under subsection (b)(2)." *See* USSG §8C2.5, comment. (n.3) (Nov. 1991).

[214] *See* USSG §8C2.5(f) (Nov. 1991). The term "substantial authority personnel" was defined as "individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. It includes high-level personnel, individuals who exercise substantial supervisory authority (*e.g.*, a *plant manager, a sales manager*), and *any other individuals who, although not a part of an organization's* management, nevertheless exercise substantial discretion when acting within the scope of their authority (*e.g.*, an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). The Commission concluded that whether "an individual falls within this category must be determined on a case-by-case basis." *See* USSG §8A1.2, comment (n.3(c)).

[215] *See* USSG §8C2.5(f) (Nov. 1991).

[216] *See* John R. Steer, *Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit* (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma, at 8 (April 26, 2001)), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Selected_Articles/corpbehavior2.pdf.

[217] *Id.*

scheme initiative would help contribute over time, to a more healthy, values-based way of doing business in America."[218]

V. The 2004 Amendments to the Organizational Guidelines

A Decade of Post-Promulgation Activities Relating to the Organizational Guidelines

Following promulgation of the organizational guidelines in 1991, the Commission continued to consider the issue of guideline fine provisions for organizations with respect to food and drug[219] and environmental offenses.[220] Although the Commission had previously agreed to publish the proposal submitted by the advisory group on environmental sanctions,[221] in 1994, it deferred further action on organizational guidelines for both food and drug and environmental offenses until after the appointment of new commissioners.[222] To inform further consideration of the organizational guidelines, the Commission voted to hold a symposium on corporate crime, which would be designed to focus on four major issue areas: "(i) how companies and industries are responding to [Commission] incentives to establish compliance programs; (ii) how collateral penalties can affect guideline incentives; (iii) complementary government policies that can strengthen good corporation citizenship; and (iv) different models demonstrating how government can be helpful."[223]

In late 1994, four new commissioners joined the Commission.[224] Thereafter, the Commission decided to "[engage] in a [two year]comprehensive guideline assessment and simplification effort."[225] In light of these efforts, the Commission opted to forego promulgating any new

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[218] *Id.* at 8-9.

[219] *See, e.g.*, Food and Drug Working Group Final Report, available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/food.htm.

[220] *See* Report from Advisory Group on Environmental Sanctions, available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/ENVIRON.pdf.

[221] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (Nov. 30, 1993), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19931130/cnov293.htm.

[222] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (May 3, 1994), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19940503/cmay94.htm. The terms of Judge William W. Wilkins, Jr. and Ilene H. Nagel expired that year and there were two additional vacancies.

[223] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (July 26, 1994), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19940726/cjul94.htm.

[224] In November, 1994, Judge Richard P. Conaboy assumed the chairmanship of the Commission, joined by three other new commissioners: Judge Deanell R. Tacha, Michael Goldsmith, and Wayne A. Budd.

[225] *See* Notice of Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Commentary, and Request for Public Comment, 61 Fed. Reg. 79 (Jan. 2, 1996).

guideline amendments for one year,[226] and it also tabled any discussion of the organizational guidelines.[227] The Commission nevertheless continued with plans to conduct the corporate crime symposium, which was held in September of 1995.[228]

At the symposium, the Commission explained that the organizational guidelines embodied a "carrot and stick" approach that had emerged from the Commission's acceptance of three facts: 1) vicarious liability means not all corporate defendants are alike; 2) responsible corporate actions can foster crime control; and 3) sentencing guidelines are rules that can incentivize good conduct. Moreover, the Commission's stated objectives for structuring the guidelines as it did were not only to define a model for good corporate citizenship but also to use the model to make corporate sentencing fair and to create incentives for companies to take crime controlling action.[229]

Senator Edward M. Kennedy, a keynote speaker at the symposium, noted the significance of the organizational guidelines. Although asserting that the "guidelines are largely untested," he agreed that "commendable efforts are underway to help ensure that companies doing business in this country are, in fact, good corporate citizens."[230] Other panelists discussed various

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[226] *Id.*

[227] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 2 (May 8, 1995) (reflecting request to give environmental organizational guidelines lower priority because of guideline simplification efforts), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19950508/cmay95.htm; *see also* U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation* (Sept. 1995), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympb.pdf.

[228] The Commission held the symposium in Washington, D.C., and 450 participants attended, including "a wide range of federal enforcement officials, representatives of Fortune 500 as well as smaller corporations, private attorneys and other consultants who advise organizations, and academics who focus on business ethics and crime." *see* U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, at i (Sept. 1995). The agenda included panels discussing corporate experiences in developing "effective" compliance programs, "best practices," and evolving compliance standards.

[229] *See* Win Swenson (Moderator), *The Organizational Guidelines' "Carrot and Stick" Philosophy, and Their Focus on "Effective" Compliance,* U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, at 33-34 (Sept. 1995) , available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf.

[230] *See* Edward M. Kennedy, *Keynote Address,* U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, at 119 (Sept. 1995).

survey results, which suggested that the guidelines were beginning to impact organizations' efforts to prevent and detect violations of law.[231]

Among other things, the symposium included a discussion of the role of ethics as a component of effective compliance programs.[232] The discussions at the symposium led to various suggestions for future commission action in this area.[233] In light of other policy priorities, however, the Commission did not immediately promulgate amendments to Chapter Eight of the *Guidelines Manual* in response to those suggestions.[234]

Rekindled Interest in Possible Amendments to the Organizational Guidelines

Between 1996 and 1998, the terms of three commissioners expired and two others resigned, leaving the agency to operate without commissioners for a period of 13 months. The President nominated seven new commissioners to serve staggered terms, and the slate was confirmed by the Senate on November 10, 1999. Judge Diana E. Murphy, the new chair of the Commission, and the other commissioners "became aware of the wide impact the [organizational] Guidelines have on organizations ...extend[ing] far beyond their use in the context of criminal cases."[235] Not only did the organizational guidelines influence the prosecutorial policy of the

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[231] *See generally,* Cameron Counters (Moderator), *A Presentation of Empirical Research on Compliance Practices: What Companies Say they Are Doing – What Employees Hear,* U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation,* at 123-191 (Sept. 1995).

[232] *See* Mary E. Didier (Moderator), *Bringing Carrots and Sticks in House: The Role of Ethics, Incentives, and Private "Inspectors General" in Achieving "Effective" Compliance,* in U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation* , at 217-240 (1995) (transcript of panelists' discussion on the role of ethics in compliance programs); Win Swenson (Moderator), *Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference,* in U.S. Sent'g Comm'n, *Proceedings of the Second Symposium on Crime and Punishment in the United States, Corporate Crime in America: Strengthening the "Good Citizen" Corporation,* at 417-436 (Sept. 1995) (transcript of panelists' discussion on role of ethics in compliance programs).

[233] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Oct. 11, 1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19951011/coct95.htm.

[234] The symposium did lead to increased training efforts. *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 1 (Nov. 21, 2000) ("Commissioner Steer stated that the previous Commission had entered into a partnership with the [Ethics Officer Association] to hold a series of regional program featuring the organizational guidelines."), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20001121/11-21-00.htm Moreover, the Commission continued to collect and report on organizational sentencing data. *See, e.g.,* U.S. Sent'g Comm'n, *1996-2001 Sourcebook of Federal Sentencing Statistics,* available at http://www.ussc.gov/Data_and_Statistics/archives.cfm.

[235] *See* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics,* 87 Iowa L. Rev. 697, 698 (2002). *See also In re Caremark International Inc. Derivative Litigation,* Del. Chancery C.A. 13670, 698 A.2d 959, 969 (Sept. 25, 1996) (noting that "[t]he Guidelines offer powerful incentives for

Department of Justice, they also influenced the policies of other regulatory agencies.[236] In addition, the organizational guidelines were "credited with helping to create an entirely new job description: the Ethics and Compliance Officer."[237]

The Commission began to consider whether ethics was "an *implicit* component of effective compliance programs, or whether ethics should now *explicitly* be incorporated into the compliance program criteria in the organizational guidelines."[238] Commentators offered the new commissioners additional suggestions for amendments to Chapter Eight.[239]

Shortly after the tenth anniversary of the organizational guidelines and in response to feedback on the operation of the guidelines,[240] the Commission solicited public input on the scope, potential membership, and possible formation of an ad hoc advisory group to consider any "viable methods to improve the operation of these guidelines."[241] At the time, one commissioner remarked that although the organizational guidelines had been an "overwhelming success," they could still be improved.[242]

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corporations today to have in place compliance programs to detect violations of law promptly and to report violations to appropriate public officials when discovered, and to take voluntary remedial efforts.").

[236] *See* Diana E. Murphy, *supra* note 235, at 712 (internal citations omitted).

[237] *Id.* at 713 (internal citations omitted).

[238] *Id.* at 714 (emphasis supplied). Judge Murphy cited authorities that defined a good compliance program as one that "emphasizes values and moral responsibility" while a good ethics program "must help employees to know and obey the law." *Id.* at 714 (internal citations omitted). *See also* Win Swenson (Moderator), *Symposium Wrap-Up: Commentary on Ideas and Issues Raised During the Conference*, in U.S. Sent'g Comm'n, PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION, at 425 (Sept. 1995) ("A compliance program sets basic rules and procedures and can be summed up in a checklist. An ethics program addresses values and decisions in grey areas.")

[239] Commentators included the Health Care Compliance Association, the Practising Law Institute, and the Alliance for Health Care Integrity, among others. Comments were made in writing and orally to the Commission For a more detailed discussion of these suggestions, *see* Diana E. Murphy, *supra note* 235, at 716-18.

[240] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Nov. 21, 2000), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20001121/11-21-00.htm; U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 28, 2001), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20010828/8_28_01.htm. *See also* Diana E. Murphy, *supra* note 235, at 716-718.

[241] *See* Notice of Policy Priorities for Amendment Cycle Ending May 1, 2002; Request for Public Comment on the Possible Formation of an Ad Hoc Advisory Group on Organizational Guidelines; and Request for Public Comment on the Possible Formation of an Ad Hoc Advisory Group on Issues Related to the Impact of the Sentencing Guidelines on Native Americans in Indian Country, 66 Fed. Reg. 48306 (Sept. 19, 2001).

[242] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 10, 2001) (reflecting statement made by Judge Ruben Castillo), available at

On February 21, 2002, the Commission announced "the formation of an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations," and it asked the group to "place particular emphasis on examining the criteria for an effective program to ensure an organization's compliance with the law."[243] The fifteen member group was "composed of industry representatives, scholars, and experts in compliance and business ethics."[244] The Commission formed the advisory group for a term of 18 months "to foster dialogue about possible refinements to the organizational guidelines."[245]

The Commission's decision to form this advisory group turned out to be a prescient one. Five months after the formation of the advisory group, Congress passed the Sarbanes-Oxley Act of 2002.[246] Section 805 of the Sarbanes-Oxley Act directed the Commission to "review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that . . . the guidelines that apply to organizations in United States Sentencing Guidelines, [C]hapter 8, are sufficient to deter and punish organizational criminal misconduct." The Commission used the advisory group's work, as discussed below, to inform its response to that directive.

The Work of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines

The advisory group immediately convened and decided, among other things, to solicit public comment "on the nature and scope of issues which [it] might wish to address during its (18) eighteen-month term."[247] The advisory group informed the public that it did "not intend to consider fines for environmental crimes committed by organizations, nor the structure of the

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http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20010910/meeting_minutes.htm.

[243] *See* U.S. Sent'g Comm'n, News Release (Feb. 21, 2002), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020221_Press_Release.htm.

[244] *See* U.S. Sent'g Comm'n, News Release (Feb. 21, 2002), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020221_Press_Release.htm. The chair of that advisory group, B. Todd Jones, Esq., currently serves as both the United States Attorney for the District of Minnesota and the Acting Director of the Bureau of Alcohol, Tobacco and Firearms. The other members of the advisory group included both the current Attorney General, Eric Holder, Esq., and the current Inspector General for the Department of Justice, Michael Horowitz, Esq. For a complete list of Advisory Group members and relevant backgrounds, *see* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, App. A (Oct. 7, 2003), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/advgrprpt/AppA.pdf.

[245] *See* U.S. Sent'g Comm'n, News Release (Feb. 21, 2002), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20020221_Press_Release.htm.

246 Pub. L. 107–204, 116 Stat. 745 (July 30, 2002).

[247] *See* Advisory Group for Organizational Sentencing Guidelines, Request for Public Comment (March 19, 2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/RPC_3_02.htm.

fine tables generally."[248] Rather, its primary focus would be "on the application of the criteria for an effective compliance program, as listed in Application Note 3(k) to §8A1.2 of the Sentencing Guidelines, and the ways in which those criteria affect the operation of Chapter Eight as a whole."[249] Nonetheless, the advisory group made clear that it would "also consider whether there are other features of the organizational guidelines that merit review or change."[250]

In response to this inquiry, the advisory group received public comment from a variety of sources.[251] This public comment and "its own initial evaluation of both the terminology and the application of Chapter Eight of the Guidelines" led the advisory group to issue an additional request for public comment.[252] The advisory group explained that it had "identified several specific areas of concern and generated a list of key questions in an effort to focus and stimulate additional public comment prior to preparing its report to the United States Sentencing Commission." Among the specific questions asked was:

> Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that *can potentially circumvent the purpose of the law or regulation*? If so, how would an organization's performance in this regard be measured or evaluated? How would that be incorporated into the structure of Chapter Eight? [253]

The advisory group received a robust response to the request for additional public comment.[254] At a full day public hearing held on November 14, 2002, "invited representatives with a broad range of perspectives submitted oral and written testimony,"[255] which further

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[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *See* Public Comment Received by Advisory Group for Organizational Sentencing Guidelines in Response to Request for Public Comment (March 19, 2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom_302/PC_302.htm.

[252] *See* Advisory Group for Organizational Sentencing Guidelines, Request for Additional Public Comment Regarding the U.S. Sentencing Guidelines for Organizations (August 21, 2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom8_02.pdf.

[253] *Id.*, Question 6.

[254] *See* Public Comment Received in Response to Additional Public Comment Requested (Oct. 15, 2002), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/pubcom_1002/PC_1002.htm.

[255] *See* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 1 (Oct. 7, 2003). The written testimony submitted and a transcript of the hearing is available at

informed the advisory group's work. The advisory group announced that the public comment period would close on December 1, 2002, after which it would begin work on deciding what, if anything, should be amended in Chapter Eight.[256] The advisory group's work also involved "extensively canvass[ing] the practice commentary and scholarly literature, survey[ing] current representatives of the U.S. Department of Justice regarding prosecutorial decision making, and familiariz[ing] itself with the policies of a variety of other governmental agencies and departments."[257] The advisory group "continuously kept abreast of Congress's response to [high-profile] corporate scandals, most notably in the Sarbanes-Oxley Act of 2002, as well as the relevant output of public and private regulators."[258]

On October 7, 2003, the advisory group presented a comprehensive report to the Commission "intended to assist the [Commission] in its future consideration of potential amendments to Chapter Eight of the federal sentencing guidelines."[259] The report concluded that "the organizational sentencing guidelines have been successful in inducing many organizations, both directly and indirectly, to focus on compliance and to create programs to prevent and detect violations of law."[260] Notwithstanding this success, the advisory group also maintained that "changes can and should be made to give organizations greater guidance regarding the factors that are likely to result in *effective* programs to prevent and detect violations of law."[261] Among other things, the advisory group believed that the organizational guidelines should "better address the role of organizational leadership in ensuring that compliance programs are valued, supported, periodically re-evaluated, and operate for their intended purpose," and should be updated to reflect the "best practices" in the compliance field.[262]

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http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/Advisory_Group_Organizational_Guidelines.cfm.

[256] Transcript, Public Hearing held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines, Plenary Session I, at 6-7 (Nov. 14, 2002) (Opening Remarks by B. Todd Jones, Chair), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/ph11_02/plenary1.pdf.

[257] *See* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 1 (Oct. 7, 2003).

[258] *See* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 2 (Oct. 7, 2003). During the period in which the advisory group was evaluating the efficacy of the organizational guidelines, financial scandals erupted at large public companies such as Enron, WorldCom, Tyco International, and Adelphia Communications. *Id.* at 35-7 (internal citations omitted). The Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745, was enacted partly in response to such events.

[259] *See* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 2 (Oct. 7, 2003). The presentation took place at a public hearing. A transcript of the proceedings is available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/advgrprpt/1007_Brief.pdf.

[260] *See* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 3 (Oct. 7, 2003).

[261] *Id.* (emphasis in original).

[262] *Id.*

The report made several suggestions relating to compliance programs. First, the advisory group recommended that the Commission "promulgate a stand-alone guideline at §8B2.1 defining an 'effective program to prevent and detect violations of law.'"[263] The advisory group also recommended that, when promulgating the suggested standalone guideline, the Commission make the following modifications and additions to the definition of "effective program to prevent and detect violations of law":

- Emphasize the importance within the guidelines of an organizational culture that encourages a commitment to compliance with the law
- Provide a definition of "compliance standards and procedures"
- Specify the responsibilities of an organization's governing authority and organizational leadership for compliance
- Emphasize the importance of adequate resources and authority for individuals within organizations with the responsibility for the implementation of the effective program
- Replace the current terminology of "propensity to engage in violations of law" with language that defines the nature of an organization's efforts to determine when an individual has a reason to know, or history of engaging in, violations of law
- Include training and the dissemination of training materials and information within the definition of an "effective program"
- Add "periodic evaluation of the effectiveness of a program" to the requirement for monitoring and auditing systems
- Require a mechanism for anonymous reporting
- Include the phrase "seek guidance about potential or actual violations of law" within the criteria in order to more specifically encourage prevention and deterrence of violations of law as part of compliance programs
- Provide for the conduct of ongoing risk assessments as part of the implementation of an "effective program"[264]

Notable, the advisory group recommended against an increase in the culpability score of sentenced organizations for the *absence* of an "effective program," reasoning that such an increase might have a disparate impact on small organizations.[265]

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[263] *Id.* at 3-5.

[264] *Id.* at 4.

[265] *Id.* at 7.

The advisory group proposed specific changes to the language of the guidelines regarding compliance programs, in light of its conclusions. These suggested changes were set out in a proposed amendment, which was included in an appendix to the report.[266] The report also included other proposed changes to Chapter Eight.[267]

Commission's Response to the Ad Hoc Advisory Group's Report on the Organizational Sentencing Guidelines

Upon receipt of the advisory group's report, the Commission immediately began to consider the conclusions and proposed amendments set out in the report.[268] The Commission placed the report on its website and made it available to the public through its Public information Office.[269] On November 5, 2003, one month after receiving the advisory group's report, the Commission unanimously voted to "publish for comment a proposed amendment to Chapter 8 to provide greater guidance, emphasis, and clarity regarding effective compliance programs."[270] The published proposed amendment "would move the seven minimum steps for a compliance program from their present location in an application note to a new guideline" to emphasize the importance of compliance programs.[271] In addition, the proposed guideline "would define the obligations and purposes of such programs, add more detail to the seven minimum requirements, and provide definitions throughout the associated commentary."[272]

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[266] *Id.* at App. B.

[267] The advisory group's other recommendations to the Commission—which included a recommendation that the Commission add clarifying language regarding the role of waiver of attorney-client privilege and work product protection for purposes of receiving sentencing credit based on cooperation with the government during the investigation and prosecution of an organization, *id.* at 5—are generally beyond the scope of this paper. Notably, although the Commission adopted the attorney-client privilege recommendation when it promulgated the 2004 amendments to Chapter Eight, *see* USSG, App. C, amend. 673 (eff. Nov. 1, 2004), the Commission later deleted the commentary relating to waiver of attorney-client privilege and work product protection. *See* USSG, App. C, amend. 695 (eff. Nov. 1, 2006).

[268] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (October 8, 2003), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031007-08/10_8_03.htm.

[269] *Id.*

[270] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 5 (November 5, 2003), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031104-5/11_05_03.htm.

[271] *Id.*

[272] *Id.*

The proposed amendment was published on December 30, 2003.[273] Although the substance of the proposed amendment essentially incorporated the guideline language that the advisory group had suggested, the Commission formulated several issues for comment to accompany the published proposed amendment.[274] Among other things, the Commission asked whether there were "factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly §8C1.2, to encourage small and mid-size organizations to develop and maintain compliance programs."[275] The Federal Register notice publishing the proposed amendment also announced that the advisory group's report was available on the Commission's website.[276]

Following publication of the proposed amendment, the Commission followed its usual process for promulgating amendments, which included studying relevant data and information that the Commission staff compiled and reviewing the formal public comment.[277] In addition, the Commission held a public hearing in March, 2004, at which two panels of subject matter experts testified about the proposed amendment to Chapter Eight.[278] The witnesses agreed with the advisory group's conclusion that the organizational guidelines had been successful in focusing attention on compliance.[279] One described the Commission's "profound influence on corporate behavior," asserting that the guidelines had been "incredibly successful in galvanizing [and] inspiring companies to . . . put programs in place."[280] Many agreed, however,

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[273] *See* Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary; Request for Public Comment, including Public Comment Regarding Retroactive Application of any the Proposed Amendments, 68 Fed. Reg. 75340, 75354 (December 30, 2003).

[274] *Id* at 75360. *See also* U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (November 5, 2003), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20031104-5/11_05_03.htm.

[275] *See* 68 Fed. Reg. 75340, 75360.

[276] *See id.* at 75354.

[277] For a more detailed discussion of the Commission' amendment process, *see* U.S. Sent'g Comm'n, *The History of the Child Pornography Guidelines* at 4-5 (Oct. 2009).

[278] The hearing agenda, written statements submitted by the witnesses and the hearing transcript are available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040317_19/3_17_04.htm.

[279] *See, e.g.,* Testimony of Kenneth Johnson, Director, Ethics and Policy Integration Centre, to the Commission, at 38 (March 17, 2004); Testimony of Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Chair, Attorney General's Advisory Committee, to the Commission, at 59 (March 17, 2004) (on behalf of the Department of Justice); Linda A. Madrid, Managing Director, General Counsel and Corporate Secretary, CarrAmerica Realty, and Member, Board of Directors of the Association of Corporate Counsel, to the Commission, at 93 (March 17, 2004).

[280] *See* Testimony of Dov L. Seidman, Chairman and Chief Executive Officer, LRN, to the Commission, at 24, 39 (March 17, 2004).

that "there is still room for improvement"[281] and supported the advisory group's focus on organizational culture and ethics.[282]

The Commission received public comment or written testimony from approximately thirty sources, representing a broad spectrum of interests.[283] After close of the public comment period, the Commission refined the proposed amendment in light of the comments and testimony it received. On April 8, 2004, the Commission unanimously voted to promulgate the proposed amendment, making changes to various parts of Chapter Eight of the *Guidelines Manual*.[284]

In its Reason for Amendment, the Commission explained that the change to Chapter Eight was the "culmination of a multi-year review of the organizational guidelines [that] implements several recommendations issued on October 7, 2003, by the Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Advisory Group), and responds to the Sarbanes-Oxley Act."[285] The amendment elevated the criteria for an effective compliance program from the commentary into a separate guideline, USSG §8B2.1 (Effective Compliance and Ethics Program), which was done "[i]n order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program."[286] In addition to the existing requirement that an organization exercise due diligence to prevent and detect criminal conduct, the new guideline added a requirement that an organization "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[287] The Commission "intended [this

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[281] *See* Testimony of Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Chair, Attorney General's Advisory Committee, to the Commission, at 65-66 (March 17, 2004) (on behalf of the Department of Justice).

[282] *See, e.g.,* Testimony of Kenneth Johnson, Director, Ethics and Policy Integration Centre, to the Commission, at 39 (March 17, 2004) (The focus on culture is "very very important."); Testimony of Dov L. Seidman, Chairman and Chief Executive Officer, LRN, to the Commission, at 28-9 (March 17, 2004) ("[C]ompanies are increasingly focused on protecting and strengthening their reputation, which in turn focused them on ethics, not just compliance.").

[283] Commentators included the Department of Justice, the Commission's Practitioners Advisory Group, academics, corporations, compliance professionals, and various professional organizations, such as the Health Care Compliance Association, the Business Roundtable, and the Association of Corporate Counsel. Some of these commentators had actively participated in the promulgation of the original set of organizational guidelines. The public comment is on file with the Commission.

[284] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (April 8, 2004), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

[285] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

[286] *See id.*.

[287] *See* USSG, §8B2.1(a)(2) (Nov. 1, 2004).

requirement] to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms."[288]

The Commission explained that the amendment also provided "significant additional guidance" about the seven requirements that "are the hallmarks of an effective program that encourages compliance with the law and ethical conduct."[289] The amendment "elaborate[d] upon [these seven requirements], introducing additional rigor generally and imposing significantly greater responsibilities on the organization's governing authority and executive leadership."[290] As amended, those requirements provided as follows:

> (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
>
> (2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
>
> (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
>
> (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the

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[288] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004). For a discussion of these legislative and regulatory reforms, *see* U.S. Sent'g Comm'n, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, at 35-47 (Oct. 7, 2003).

[289] See USSG, App. C, amend. 673 (eff. Nov. 1, 2004). The Commission moved those seven requirements from the commentary in USSG, §8A1.2, comment. (n.3(k)) into the new guideline, USSG §8B2.1.

[290] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision

(B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(C) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the

> criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.[291]

In addition to the changes made to the seven requirements for an effective compliance and ethics program, the Commission added a new provision requiring that "as an essential component of the design, implementation, and modification of an effective program, an organization must periodically assess the risk of the occurrence of criminal conduct."[292] The commentary lists factors that should be considered when making the required risk assessment.[293] The Commission explained that "organizations should evaluate the nature and seriousness of potential criminal conduct, the likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization."[294] Moreover, the guideline commentary establishes that "[t]o be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified."[295]

The Commission further highlighted the role of ethics by amending the introductory commentary to Chapter Eight. Among other things, the amended commentary stated that:

> These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance *and ethics* program, will assist an organization in *encouraging ethical conduct* and in complying fully with all applicable laws.[296]

The Commission also took several additional steps to address concerns regarding the lack of incentives for small organizations[297] to develop compliance programs. First, through

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[291] *See* USSG, §8B2.1(b)(1)-(7) (Nov. 1, 2004).

[292] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004); *see also* USSG §8B2.1(c) (eff. Nov. 1, 2004).

[293] *See* USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

[294] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004); USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

[295] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004); USSG, §8B2.1, comment. (n.6) (Nov. 1, 2004).

[296] *See* USSG, Chapter Eight, intro. comment (Nov. 1, 2004) (emphasis supplied). *See also* USSG, App. C, amend. 673 (eff. Nov 1, 2004).

[297] The Commission defined small organization as an organization having fewer than 200 employees. *See* USSG, §8C2.5, comment. (n.1) (Nov. 1, 2004).

commentary and illustrations, the Commission "provide[d] additional guidance with respect to the implementation of compliance and ethics programs by small organizations."[298] Next, the commentary encouraged "larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those with which they conduct or seek to conduct business."[299] Finally, the Commission changed "the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score)," so as to "assist smaller organizations that previously may have been automatically precluded, because of their size [and the involvement of high level personnel], from arguing for a culpability score reduction based upon an effective compliance and ethics program that fulfills all of the guideline requirements."[300] The amendment replaced the automatic preclusion with a rebuttable presumption, allowing a small organization to rebut the presumption in order to receive credit for having an effective compliance and ethics program.[301]

Finally, just as with the original implementation of the organizational guidelines, the Commission again deliberately decided not to offer precise details for implementation of an effective compliance and ethics program "in order to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances."[302] The Commission expected, however, that the amended organizational guidelines would "provide an important roadmap for compliance officers and corporate officials throughout the country" and "encourage compliance among corporations."[303] By promulgating these changes to Chapter Eight, the Commission intended to send the clear message that "good corporate conduct means above all else ethical conduct."[304]

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[298] *See* USSG, App. C, amend. 673 (eff. Nov. 1, 2004).

[299] *Id.*

[300] *Id.*

[301] *Id. See also* USSG, §8C2.5(f)(3)(B). A motion to allow the rebuttable presumption to extend to all organizations, both large and small, failed by vote of 2 to 4. *See* U.S. Sent'g Comm'n, Public Meeting Minutes (April 4, 2008), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

[302] *See* Paula Desio, *An Overview of the Organizational Guidelines*, available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/ORGOVERVIEW.pdf.

[303] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (April 8, 2004) (reflecting statement made by Commissioner Michael Horowitz), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

[304] *Id.* (reflecting statement made by Judge Ruben Castillo).

VI. The 2010 Amendments to the Organizational Guidelines

Changes in the Federal Sentencing Landscape

Two months after the Commission voted to promulgate the 2004 amendments to Chapter Eight of the *Guidelines Manual*, the United States Supreme Court decided *Blakely v. Washington*,[305] holding that the State of Washington's sentencing guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines,[306] the decision had an immediate impact on the federal criminal justice system."[307] "[C]ourts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the guidelines."[308] Assuming a central role in the debate concerning the validity of the federal guideline system, the Commission "worked intensively with Congress, the Department of Justice, representatives of the federal judiciary, and other interested persons to analyze the impact of the Supreme Court's decision and help guide the discussion concerning the future of the federal sentencing guidelines system."[309]

On January 12, 2005, the Supreme Court decided *United States v. Booker*,[310] which held that mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. "The Court remedied the violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that existed for almost 20 years into an advisory one."[311] The *Booker* opinion "maintain[ed] *all* of the Sentencing Commission's statutory obligations under

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[305] 542 U.S. 296 (2004).

[306] *Id.* at 305, n.9.

[307] U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at iv (March 2006), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

[308] *Id.*

[309] *See* Testimony of Commissioner John R. Steer and Judge William K. Sessions, III, before the Senate Committee on the Judiciary, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines* (July 13, 2004) at 1, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20040716_Sessions_Steer_Testimony.pdf.

[310] 543 U.S. 220 (2005).

[311] *See* U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at iv (March 2006), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

the Act,"[312] stating specifically that "the Sentencing Commission remains in place, writing Guidelines, collecting information and actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[313]

Following *Booker*, "[t]he Commission and other actors in the criminal justice system took immediate steps to implement the advisory system."[314] As far as the organizational guidelines were concerned, the Commission continued to conduct training programs with respect to Chapter Eight[315] and to report on organizational data[316] without substantially revisiting the 2004 amendment.[317] This continued until the Commission's 2009-2010 amendment cycle.[318]

The Evolution of a Miscellaneous Policy Priority

On September 9, 2009, the Commission published a notice of final priorities for the amendment cycle ending May 1, 2010.[319] The Commission did not specifically identify

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[312] *See* Prepared Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Feb.10, 2005) at 1, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20050210_Hinojosa_Testimony.pdf (emphasis in original).

[313] 543 U.S. at 264.

[314] *See* , U.S. Sent'g Comm'n *Final Report on the Impact of United States v. Booker on Federal Sentencing*, at 37 (March 2006), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

[315] Commissioners and staff lectured on the organizational guidelines at conferences sponsored by the Society of Corporate Compliance and Ethics, the Ethics and Compliance Officers Association, and the Practising Law Institute, among others. In addition, national seminars sponsored by the Commission included at least one session on the organizational guidelines. *See, e.g.* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2009/2009_Agenda_Annual_National_Seminar.pdf .

[316] *See* U.S. Sent'g Comm'n, 2004-2011 SOURCEBOOKS ON FEDERAL SENTENCING STATISTICS, available at http://www.ussc.gov/Data_and_Statistics/Archives.cfm.

[317] As noted, *supra* note 267, the Commission did strike language about the waiver of attorney client privilege from the commentary in USSG §8C2.5. *See* USSG, App. C, amend. 695 (eff. Nov. 1, 2006). In the Reason for Amendment, the Commission explained its decision to strike the last sentence of Application Note 12 to §8C2.5 (Culpability Score). "The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that '[t]he Commission expects that such waivers will be required on a limited basis.' *See* Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers."

[318] On October 21, 2009, the Senate confirmed Chief Judge William K. Sessions, III as chair of the Commission. *See* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20091021_Press_Release.htm.

[319] *See* Notice of Final Priorities, 74 Fed. Reg. 46478 (Sept. 9, 2009).

consideration of changes to Chapter Eight as a possible priority. However, the priorities list included a provision allowing for consideration of "miscellaneous guideline application issues, including . . . (C) other miscellaneous issues coming to the Commission's attention from case law and other sources."[320] As the amendment cycle progressed, consideration of certain changes to Chapter Eight evolved as one of the "miscellaneous" issues under consideration. The commissioner who spearheaded this endeavor explained that "Chapter Eight is an important deterrent to criminal activity, and. . . the Commission must remain abreast of current industry practice in order to ensure that this deterrent effect continues."[321]

On January 12, 2010, the Commission voted to publish proposed guidelines changes,[322] including a proposed amendment that made "several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations."[323] Several of the proposed changes related to effective compliance and ethics programs, as discussed in §8B2.1 (Effective Compliance and Ethics Program). First, the proposed amendment added a new application note to that guideline describing the reasonable steps that an organization should take to respond appropriately after criminal conduct is detected. The note provided as follows:

> The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the additional

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[320] *Id.* at 46479.

[321] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 4 (Jan. 12, 2010) (reflecting statement made by Commissioner Beryl A. Howell), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100112/20100112_Minutes.pdf.

[322] *Id.* at 3-4.

[323] *See* Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary; Request for Public Comment, including Public Comment Regarding Retroactive Application of any the Proposed Amendments; and Notice of Public Hearing, 75 Fed. Reg. 3525, 3534 (Jan. 21, 2010).

step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.[324]

The proposed amendment also bracketed two proposed additions to the commentary of §8B2.1. The first bracketed addition proposed to amend Application Note 3 to include a new paragraph requiring high-level and substantial authority personnel to be "aware of the organization's document retention policies" and conform those policies "to meet the goals of an effective compliance program."[325] The second bracketed addition proposed to amend Application Note 6 to provide more guidance on the requirement relating to periodic risk assessment. As proposed, the matters assessed in a periodic risk assessment should include the "nature and operations of the organization with regard to particular ethics and compliance functions" and identified the organization's document retention policies as an example of the operations to be included in such assessment.[326]

Finally, the Commission decided to reconsider the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score) when high-level personnel are involved in the criminal conduct.[327] Accordingly, the Commission included an issue for comment, asking whether the Commission should "amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense" if certain conditions were met.[328] The first potential condition was that "the individual(s) with operational responsibility for compliance in the organization [must] have direct reporting authority to the board level (e.g. an audit committee of the board)."[329] Second, "the compliance program [must have been] successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization."[330] Finally, "the organization [must have] promptly reported the violation to the appropriate authorities."[331]

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[324] *Id.* at 3535.

[325] *Id.* at 3534-35.

[326] *Id* at 3535.

[327] As amended in 2004, USSG §8C2.5 included a rebuttable presumption allowing small organizations to receive credit for having an effective compliance and ethics program under specified circumstances. *See supra* notes 300-301 and accompanying text. During the discussions of potential changes to the organizational guidelines in 2004, two commissioners sought to extend this rebuttable presumption to *all* organizations, regardless of size. Those efforts were unsuccessful. *See* U.S. Sent'g Comm'n, Public Meeting Minutes (April 8, 2004), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20040408/4_08_04.htm.

[328] *See* 75 Fed. Reg. 3525, 3535.

[329] *Id.*

[330] *Id.*

[331] *Id.*

Mindful of the fact that "even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities in virtually every organization,"[332] the Commission actively solicited input on the proposed amendment from groups known to have an interest in Chapter Eight. As a result of these efforts, the Chapter Eight proposed amendment received more public comment than any other proposed amendment in 2010.[333] Commentators included several government agencies,[334] the Commission's standing advisory groups,[335] ethics and compliance industry professionals,[336] and non-profit research organizations.[337]

In March, 2010, the Commission conducted a public hearing on all of the guideline amendments that were being considered that year. Two panels at that hearing were devoted to a discussion of the proposed Chapter Eight amendments.[338] The witnesses unanimously favored expanding the culpability score reduction,[339] while offering suggestions on refinement

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[332] *See* Letter from Daniel R. Roach, Co-Chair, Society of Corporate Compliance and Ethics, to the Commission (March 19, 2010), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/SCCE.pdf.

[333] All public comment received on the 2010 proposed amendments is available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

[334] The Department of Justice, the Department of Health and Human Services, the Department of Commerce, National Oceanic and Atmospheric Administration, and the Environmental Protection Agency submitted comment.

[335] Those standing advisory groups are the Probation Officers Advisory Group, the Practitioners Advisory Group and the Victims Advisory Group.

[336] The Society of Corporate Compliance and Ethics, the Ethics and Compliance Officers Association, Ethisphere Institute, the Defense Industry Initiative on Business Ethics and Conduct. the Association of Corporate Counsel, and the Open Compliance and Ethics Group were among those commentators. In addition, a former Vice Chair of the Commission, John Steer, and a member of the ad hoc advisory group, Win Swenson, also submitted public comment. Both of these commentators were Commission staff members when the organizational guidelines were promulgated in 1991.

[337] The Ethics Resource Center, the RAND Center for Corporate Ethics and Governance, and the Washington Legal Foundation commented on the proposed amendment.

[338] The hearing agenda and witness statements are available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Agenda.htm. The transcript of the hearing is available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Hearing_Transcript.pdf.

[339] *See* Testimony of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 257 (March 17, 2010) ("We applaud the Commission for its efforts to make this three-point reduction in the culpability score available in more cases."); Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 275 (March 17, 2010) ("ACC supports efforts by the Commission to make the three-level mitigation more available in more cases."); Testimony of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 290 (March 17, 2010) ("We support the idea of allowing sentence mitigation in these types of cases."); Testimony of

to the language proposed by the Commission.[340] Likewise, the witnesses generally favored the addition of commentary describing remediation, but expressed concerns about the published language.[341] Finally, most of the witnesses voiced objections to the proposed commentary mentioning document retention policies.[342]

After considering the comments and testimony it received, the Commission made refinements to the language that had been published. Additionally, the Commission struck certain provisions from the proposed amendment and added new language.

Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 212 (March 17, 2010) (indicating ECOA members "overwhelmingly support" expansion of the culpability score reduction); Testimony of Patricia J. Harned, President, Ethics Resource Center, to the Commission, at 321-23 (March 17, 2010) (suggesting language changes to the proposed three-point mitigation for an effective program when high-level personnel are involved); Testimony of Joseph E. Murphy, Director of Public Policy, Society of Corporate Compliance and Ethics, to the Commission, at 326 (March 17, 2010) (stating that the proposed culpability score amendment is "an excellent and important change.").

[340] *See, e.g.,* Testimony of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 261 (March 17, 2010) (suggesting language changes to the proposal); Testimony of Patricia J. Harned, President, Ethics Resource Center, to the Commission, at 321-23 (March 17, 2010) (same); Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 275 (March 17, 2010) ("The term 'directing reporting relationship' is not well defined and is subject to broad misinterpretation in the corporate context..."); Testimony of Joseph E. Murphy, Director of Public Policy, Society of Corporate Compliance and Ethics, to the Commission, at 327 (March 17, 2010) ("[T]he reference to the compliance officer's reporting authority to the highest governing authority needs to be clarified and enhanced.").

[341] *See, e.g.,* Testimony of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 269-270 (March 17, 2010) (suggesting that the Commission add language indicating that the need for and extent of remedial measures will vary according to the circumstances, and also suggesting that the Commission strike the language about retaining an independent monitor); Testimony of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 285-86 (March 17, 2010) (expressing concerns that additional language would undermine the existing flexibility to adopt an appropriate response to potential violations); Testimony of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 310 (March 17, 2010) (opposing language regarding monitors).

[342] *See, e.g.* Statement of David Debold, Chair, Practitioners Advisory Group, to the Commission, at 3-4; Statement of Susan Hackett, Senior Vice-President and General Counsel, Association of Corporate Counsel, to the Commission, at 3-4; Statement of Karen Harned, Executive Director of the Small Business Legal Center, National Federation of Independent Business, to the Commission, at 2-4; Statement of Tim C. Mazur, Chief Operating Officer, Ethics & Compliance Officer Association, to the Commission, at 2-3. Much of the public comment that the Commission received voiced similar opinions about the Commission's proposed amendments. *See generally* Public Comment Letters Received by the United States Sentencing Commission in Response to Request for Public Comment (*see* 75 Fed. Reg. 3525), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

Promulgated Changes to Chapter Eight

On April 7, 2010, the Commission voted to promulgate an amendment making changes to Chapter Eight.[343] First, the amendment added a new application note to the commentary to USSG §8B2.1 (Effective Compliance and Ethics Program). The application note clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) has two aspects:

> First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.
>
> Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.[344]

The Commission explained that "[t]his application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps upon discovery of criminal conduct."[345] The Commission also noted that "[t]he steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices."[346]

The Commission also amended "subsection (f) of USSG §8C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an

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[343] *See* U.S. Sent'g Comm'n, Public Meeting Minutes, at 3 (Apr. 7, 2010), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minutes.pdf.

[344] *See* USSG §8B2.1, comment. (n.6) (Nov. 1, 2010).

[345] *See* USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

[346] *See id.*

effective compliance and ethics program when an organization's high-level or substantial authority personnel are involved in the offense."[347] An organization may receive the decrease for having and effective compliance and ethics program, if the organization meets four criteria:

> (1) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization's governing authority or appropriate subgroup thereof;
> (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
> (3) the organization promptly reported the offense to the appropriate governmental authorities; and
> (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.[348]

This change responded to "concerns expressed in public comment and testimony that the general prohibition in §8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases."[349]

The Commission added an application note that describes the "direct reporting obligations" necessary to meet the first criterion under §8C2.5(f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has "express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program."[350] The Commission added this application note in response to "public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and

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[347] *See id.*

[348] *See* USSG §8C2.5(f)(3)(C) (Nov. 1, 2010).

[349] *See* USSG, App. C, amend. 744 (eff. Nov. 1, 2010). Commission data indicates that only five of the 3,593 organizations sentenced under the organizational guidelines since inception have received the culpability score reduction for having an effective compliance and ethics program from the effective date of the organizational guidelines through the most recent fiscal year (FY2011). *See* U.S. Sentencing Commission, 1992-2011 Datafiles, USSCFY92-USSCFY12.

[350] *See* USSG §8C2.5, comment. (n.11) (Nov.1, 2010).

encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary."[351]

Finally, the Commission amended USSG §8D1.4 (Recommended Conditions of Probation – Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. Notably, the Commission retained the condition that would require an organization to "develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program)."[352] As noted in the Reason for Amendment, the "amendment remove[d] the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence."[353] The Commission expected the amendment would further incentivize corporate self-policing by "[promoting] compliance by organizations, [encouraging] early reporting when criminal activity is detected, and [encouraging] the remediation of harm caused by criminal activity."[354]

VII. Conclusion

The organizational guidelines have now celebrated their 20th anniversary and have been credited with "achiev[ing] significant success in reducing workplace misconduct by nurturing a vast compliance and ethics movement and enlisting business organizations in a self-policing effort to deter law-breaking at every level of their business."[355] Since the promulgation of the organizational guidelines in 1991, "the development of comprehensive ethics and compliance management practices has mushroomed" and the seven minimal steps for an effective compliance and ethics program "have become the de facto framework used to design such programs in the United States — and to some extent around the world."[356]

Although lauded as "one of the indisputable success stories of the Commission,"[357] the Commission has a continuing duty to review and revise the guidelines, in consideration of

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[351] *See* USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

[352] *See* USSG §8D1.4(b)(1).

[353] *See* USSG, App. C, amend. 744 (eff. Nov. 1, 2010).

[354] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 7, 2010), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100407/20100407_Minutes.pdf.

[355] *See* Ethics Res. Ctr, The Federal Sentencing Guidelines for Organizations at Twenty Years: a Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs, at i (May 2012).

[356] *Id.* at 29-30.

[357] *See* U.S. Sent'g Comm'n, Public Meeting Minutes (Jan. 10, 2012) (reflecting statement made by Judge Beryl A. Howell), available at

comments and data coming to its attention[358] and to reflect "advancement in the knowledge of human behavior."[359] As the best practices for the compliance and ethics profession continue to evolve, the Commission will give careful consideration to the need for guideline changes in light of the input received from industry professionals. Consequently, new chapters in the history of the organizational guidelines remain to be written.

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http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120110/Meeting_Minutes.pdf.

[358] *See* 28 U.S.C. § 994(o).

[359] *See* 28 U.S.C. § 991.

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors

By Ketanji Brown Jackson and Karen Escalante

In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Supreme Court reaffirmed its prior holding that, while secondary actors in securities markets (e.g., attorneys, accountants, and underwriters) cannot be held liable in a private action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934, such actors *can* be subject to liability for their own primary violations of the Act. *See* 128 S. Ct. 761, 773-774 (2008). The Court has recognized such secondary actor liability for primary violations of Section 10(b) and Rule 10b-5 for the past 15 years. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

No single standard for determining the scope of conduct for which a secondary actor may be held primarily liable, however, has emerged among the lower courts. The federal courts of appeals have established distinctly different tests, including a new standard that the Tenth Circuit has applied in the context of an SEC enforcement action.

Counsel for secondary actors in securities fraud cases should be aware of the federal courts' different legal tests of secondary actor liability under Section 10(b). The different tests increase the potential that liability for secondary actors will vary based on where the securities fraud action is litigated and whether the action brought is a private suit or an SEC enforcement action.

THE "BRIGHT-LINE" AND "SUBSTANTIAL PARTICIPATION" TESTS

The different tests that the circuits employ are primarily based on different views as to whether the secondary actor

Counsel for secondary actors in securities fraud cases should be aware of the federal courts' different legal tests of secondary actor liability under Section 10(b).

"must *make* the material misstatement or omission in order to be a primary violator." *Wright v. Ernst & Young*, 152 F.3d 169, 174 (2d Cir. 1998).

The "bright-line" test adopted by the Second and Eleventh Circuits requires that, "in order for the defendant to be primarily liable under [Section] 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *see also Wright*, 152 F.3d at 175 (finding that accounting firm was not primarily liable because it merely reviewed and approved material misstatements and did not communicate a misstatement to investors).

In essence, the bright-line test requires a plaintiff to demonstrate that (1) the secondary actor actually made a false or misleading statement or omission, and (2) the statement or omission has been publicly attributed to that specific actor. Public attribution is a key component of the "bright-line" test because a plaintiff in a private Section 10(b) action can claim detrimental reliance on a material misstatement made

Continued on Page 11

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors

Continued from page 10

by a secondary actor only if such a statement was known to have been made by that actor when the investment was made. *Wright*, 152 F.3d at 175.

In contrast to the "bright-line" test applied in the Second and Eleventh Circuits, the Ninth Circuit permits secondary actor liability even if the secondary actor did not make the statement. Under the Ninth Circuit's "substantial participation" test, a plaintiff must demonstrate only that the secondary actor substantially participated or was intricately involved in the making of the fraudulent statement. *See Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000) ("[W]e have held that substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might not lead to the actor's actual making of the statements."); *accord In re Software Toolworks, Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (holding that an accounting firm may be primarily liable for its "significant role in drafting and editing" a fraudulent letter sent to the SEC).

To the extent that the "substantial participation" test permits a secondary actor, who has not actually made a fraudulent statement or omission, to be held liable as a primary violator of Section 10(b) based solely on his assistance with the preparation of such a statement, "the substantial participation test has been criticized as inconsistent with [the Supreme Court's] prohibition of private aiding and abetting." *SEC v. Tambone*, 550 F.3d 106, 139 (1st Cir. 2008).

THE "CAUSATION" STANDARD FOR SEC ENFORCEMENT ACTIONS

The Tenth Circuit recently rejected both the "bright-line" and "substantial participation" tests in the context of an SEC enforcement action. *See SEC v. Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008). The First Circuit, too, has rejected both the "bright-line" test and the "substantial participation" test when a Section 10(b) action is brought by the government. *See Tambone*, 550 F.3d at 138-140 (critiquing the tests as "irrelevant" in the SEC enforcement context). In private Section 10(b) actions, the Tenth Circuit has required a plaintiff to demonstrate that the secondary actor actually made a false or misleading statement that he or she knew or should have known would reach potential investors, *see Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1227 (10th Cir. 1996), but that court has promulgated a different standard for establishing the primary liability of secondary actors under Section 10(b) in government suits.

Under the Tenth Circuit's new test, a secondary actor is primarily liable in an SEC enforcement action when it "can fairly be said" that he or she "*caused*" the company "to make the relevant statements, and . . . knew or should have known that the statements would reach investors." *Wolfson*, 539 F.3d at 1261 (emphasis added). The Tenth Circuit reasoned that a consultant who had drafted the relevant filings on behalf of the company "made" the statements for Section 10(b) purposes, and thus should be treated as a primary violator of the securities laws, despite the fact that the misstatements appeared without attribution to the consultant in documents filed by the company.

The Tenth Circuit rejected the conclusion that the "bright-line" test should be applied in the SEC enforcement context because, in its view, the requirement that the statement be publicly attributed to the secondary actor was derived from

Continued on Page 12

Section 10(b) and Rule 10b-5: The U.S. Courts of Appeals Apply Different Legal Tests for Assessing the Primary Liability of Secondary Actors

Continued from page 11

the reliance element that must be proved only in private actions. *Id.* at 1259-1260. The Tenth Circuit also distinguished its new rule from the Ninth Circuit's "substantial participation" test by making clear that, "[u]nder the rule articulated today, a defendant must do more than substantially participate in creating an actionable misstatement (or omission)"; rather, he or she must "be so involved in creating or communicating the offending misstatement (or omission) that he or she can fairly be said to have caused it to be made." *Id.* at 1261 n.18.

The Tenth Circuit's "causation" test expands secondary actor liability beyond what is allowed in the Second, Ninth, and Eleventh Circuits. While it appears to hinge primarily on the distinction between private actions and civil actions brought by the SEC, the Tenth Circuit's standard for government enforcement actions is nonetheless important to consider when an action for violations of Section 10(b) is brought against a secondary actor. ■

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COSMOS
Navigate the Compliance Universe

Complete Healthcare Compliance Manual
Healthcare Compliance Programs: From Murky Beginnings to Established Expectation

By Seth Whitelaw, JD, LLM, SJD;[1] Michael Josephson, JD; Ketanji Brown Jackson, Esq.;[2] and Kathleen Cooper Grilli, Esq.[3]

> "If you don't know where you've come from, you don't know where you're going."[4] —*Maya Angelou*

Understanding the expectations and operation of current healthcare compliance programs is very difficult without a fundamental grounding in how these programs have evolved over the past three decades. Like many things in life, the history of healthcare compliance is both complex and convoluted, involving multiple stakeholders with differing interests. Although healthcare compliance began as a response to the corporate and healthcare environment and rampant, unchecked fraud, healthcare compliance programs have emerged to become a societal expectation that also gave rise to an entirely new profession.

The Murky Origins of Healthcare Compliance

Pinpointing an exact date compliance programs and the profession came into existence is difficult. Some scholars and practitioners believe the true origin of the compliance program is traceable to the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977.[5][6] However, the consensus is that the origins of compliance programs date to a series of procurement scandals in the mid-1980s involving the Department of Defense, the Pentagon, and various defense contractors.

Of the various procurement defense department scandals in 1980s, the so-called "spare parts scandal" in 1985 became the major driving force for reform. It was a scandal that captured the attention of both Congress and the public with the revelation of the incredible prices the Pentagon often paid for basic equipment, such as a $435 hammer and the infamous $600 toilet seat.[7] In response to growing public outrage over the abuse of taxpayer funds, President Ronald Reagan appointed the President's Blue Ribbon Commission on Defense Management to review the situation and recommend reforms.[8]

The Packard Commission, as the group was more informally known, issued an interim report in February 1986.[9] For compliance history, the crucial recommendation by the Blue Ribbon Commission was that:

> To assure that their houses are in order, defense contractors must promulgate and vigilantly enforce **codes of ethics** that address the unique problems and procedures incident to defense procurement. They must also **develop and implement internal controls to monitor** these codes of ethics and sensitive aspects of contract compliance. [emphasis added][10]

The Blue Ribbon Commission also stressed that "[g]overnment actions should foster contractor self-governance," urging the Defense Department not to routinely subpoena internal audit materials to avoid

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discouraging "aggressive self-review."[11]

In response to the interim report, 18 of the country's top defense contractors formed the Defense Industry Initiative on Business Ethics and Conduct (DII).[12] Under the leadership of Jack Welch, then-CEO of General Electric, the DII developed five core principles, which 32 defense contractors signed onto by July 1986.

The central tenet of the principles, which still exist, is a commitment to "act honestly in all business dealings with the U.S. government."[13] To achieve this objective, DII members agreed to:

- Establish written codes of business conduct.
- Reinforce an ethical culture through communications and training.
- Encourage employee reporting of suspected misconduct and prohibit retaliation against reporters.
- Share business ethics and compliance best practices.
- Transparently and publicly report on individual company progress to establish an ethical culture.[14]

It was the formation of the DII and its principles that set the stage for the next major leap in the evolution of compliance programs.

In the Beginning—The U.S. Federal Sentencing Commission

Prior to the Sentencing Reform Act of 1984, federal district court judges possessed almost unlimited authority to fashion a sentence for criminal defendants within a broad statutorily prescribed minimum and maximum range.[15] Thus, individual judges exercised broad discretion to determine "the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence."[16] As a result of this unregulated discretion, the sentences for similar criminal conduct varied dramatically, creating the justifiable perception that the federal sentencing system resulted in "an unjustifiably wide range of sentences [for] offenders convicted of similar crimes."[17]

With the enactment of the Sentencing Reform Act of 1984, Congress sought to address the apparent inequities caused by discretionary judicial sentencing.[18] Rather than remove all judicial discretion, Congress chose instead to create the independent U.S. Sentencing Commission (the Commission) tasked with establishing "sentencing policies and practices for the Federal criminal justice system."[19] However, Congress also tasked the Commission with maintaining "sufficient flexibility to permit individualized sentences when warranted by [evaluating individual] mitigating or aggravating factors."[20] Thus, Congress expressly charged the Commission to pay "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities."[21]

To accomplish this purpose, Congress directed the Commission to establish a set of guidelines that federal judges must use for selecting sentences within the prescribed statutory ranges.[22]

As laid out by the Sentencing Reform Act, the Commission's guidelines needed to consider:

- The seriousness of the offense while promoting respect for the law and providing a just punishment.
- Whether the punishment would create an adequate deterrence of criminal conduct and protect the public

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from further crimes of the criminal defendant.

- Whether the punishment provides the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.[23]

The primary focus of the Sentencing Reform Act involved sentencing disparities for individual criminal defendants. For example, Congress noted that:

> Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business. [24]

However, Congress also granted the Commission broad latitude to "include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing."[25] Thus, the Sentencing Reform Act also addressed the sentencing of organizations, which are defined as "a person other than an individual."[26] As the Senate Report outlining the legislative history of the Sentencing Reform Act stated:

> Current law...rarely distinguishes between individuals and organizations for sentencing purposes. Thus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations.[27]

Therefore, it is not surprising that the Commission ultimately addressed the sentencing of organizations, as well as individuals, in its set of guidelines.

Compliance Programs and the Federal Sentencing Guidelines

Although the Commission was organized in late 1985 and published its initial set of guidelines in November 1987, it took until 1991 for the Commission to publish chapter eight of its guidelines—the Federal Sentencing Guidelines for Organizations (FSGO).[28] With the publication of the organizational guidelines and its seven elements of an effective compliance program, healthcare compliance programs were born.[29]

As conceived by the Commission, the new chapter eight was intended as a "mechanical structure [that] determines an appropriate monetary fine through means of a mathematical formula: assigning a dollar figure to the seriousness of the offense and multiplying that number by a figure representing the culpability level of the organization."[30]

Thus, the Commission employed a carrot-and-stick approach allowing judges to consider a series of aggravating and mitigating factors that they could use to determine the final sentence for an organization (i.e., the culpability score).

Calculating Culpability

Under the FSGO, an organization's final penalty is calculated using this formula:

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Statutory Base Fine x (Aggravating Factors - Mitigating Factors) = Final Fine

Consequently, the intent of the FSGO was not only to "encourage corporations to exemplify 'good corporate citizenship' but also provide a means to 'rehabilitate' corporations that have engaged in criminal conduct."[31] The Commission hoped that:

> [O]rganizations would come to view this guideline scheme as a powerful financial reason for instituting effective internal compliance programs that, in turn, would minimize the likelihood that the organization would run afoul of the law in the first instance."[32]

In other words, organizations would implement compliance programs proactively before any illegal activities occurred.

Where an organization could prove it had an effective compliance program in place, the FSGO allowed a three-point reduction in the culpability score if "the offense occurred despite an effective program to prevent and detect violations of law."[33] Therefore, according to the Commission, "[t]he hallmark of an effective [compliance] program…is that the organization exercises due diligence in seeking to prevent and detect criminal conduct by its employees and other agents."[34] This statement by the Commission, however, makes clear that compliance programs were never intended as an absolute guarantee that criminal conduct would not occur.

To guide organizations wishing to implement a compliance program, the Commission defined within an application section comment the seven criteria for a compliance program to qualify as "effective" and receive mitigation credits. This comment launched the now famous seven elements of an effective compliance program.[35]

Summarizing the application comment, an effective compliance program requires that an organization:

- Appoint someone with sufficient authority in the organization to oversee the compliance program (e.g., a compliance officer).
- Develop compliance standards that employees and others working on behalf of the organization can follow to reduce the likelihood of breaking the law (e.g., policies and procedures).
- Communicate those compliance standards to employees and others working on behalf of the organization (e.g., training or publications).
- Create steps to ensure compliance standards are working as intended (e.g., monitoring and auditing).
- Create a mechanism for anyone to report suspected misconduct without retribution (e.g., the hotline) and enforce compliance standards with appropriate sanctions (e.g., discipline).
- Avoid granting substantial discretionary authority to anyone the organization knew or should have known would commit illegal activities (e.g., bad actors).
- Take the necessary steps to correct any misconduct detected to prevent it from reoccurring (e.g., corrective actions).[36]

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These elements, however, were not industry specific, but were intended to apply to all organizations across industries.[37] As the Commission explicitly recognized, any determination of whether an organization's compliance program was effective required considering several factors, including "the size of the organization," "the likelihood that certain offenses may occur because of the nature of its business," and the organization's prior history.[38]

The mere existence of a program that on paper contains the seven elements does not automatically guarantee that an organization will receive the mitigation credits. Various actions, or inactions, by the organization can invalidate any potential benefits of having a compliance program. For example, the Commission also recognized the importance of industry practices or standards and determined that the failure to apply those practices and standards would weigh against "a finding of an effective program to prevent and detect violations of law."[39] Other factors that could invalidate the possibility of receiving credit for the compliance program included the participation of high-level company personnel in the misconduct or their willful blindless to its existence.[40]

Defining High-Level Personnel

According to the 1991 version of the FSGO, "high-level personnel" meant "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization." Therefore, the term specifically included "a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest." It also included agents within a business unit who set the policy for or control that business unit.[41]

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Section: Editorial

Letters: 'Til death do them part?; Feder's as racist as those he condemns; 'Life is fragile, handle with prayer'; Mass. state colleges mold model citizens; Playing politics with hypocrisy; Preserve judiciary: Justice for Amiraults

I read with disgust on April 8 about the Catholic Church's decision to grant Rep. Joe Kennedy an annulment ("Joe K's ex to pursue appeal of annulment").

A man and woman who engage in a marriage for more than 12 years and have two children fulfill all the church's qualifications of a marriage and therefore an annulment can't be allowed.

This is just another example of how the church treats regular lay people and how it treats the Kennedys.

There is a reason why church attendance is dreadful and the number of priests and nuns has fallen dramatically in the last 10 to 15 years: It's because of the incompetent, pompous church leadership.

The church's granting to Kennedy an annulment is an insult to all married couples who stood before God and vowed to each other to be as one until death do them part.

Stephen J. Irons, Quincy

Feder's as racist as those he condemns

For someone who claims not to consider certain groups morally or intellectually inferior to his own, Don Feder spends much of his column, "Despite liberals race does matter" (March 31), spewing out disagreeable facts about the high-crime rate in the black community and denouncing black voters for selecting incompetent, incorrigible or inebriated leaders.

By his own definition, Feder is a racist.

To my mind, he's also like the liberal's purported view of American history - irredeemably evil.

Ketanji Brown Jackson, Boston

'Life is fragile, handle with prayer'

The Boston Herald is to be commended for featuring columnists Joe Fitzgerald and Don Feder. Both of them bring a positive moral dimension to the paper.

NewsRoom

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March 31, 1997

Section: Editorial

Despite liberals race does matter

Don Feder

What is the liberal's favorite ad hominem, a smear to which they are deeply addicted? Racist. But ask one for a definition, and nine times out of 10 he'll be reduced to babbling incoherence.

In a column on immigration, I suggested the fact that our open-borders policy would take this nation's white population from 74 percent today to 53 percent by the middle of the next century to be a cause for concern. This elicited the usual cries of xenophobia and comparisons to the CEO of the Third Reich.

Typical was an encounter with Pat Lamarche on WGAN in Portland, Maine. Fifteen seconds into her show, Pat informed me that I am the kosher equivalent of the imperial grand wizard.

"Could you define 'racist?' " I inquired. Lamarche was evasive. ("What do you think it means?") I told her that was irrelevant, since I wasn't calling her one. She changed the subject.

To my understanding, a racist is one who either: automatically hates members of a given race, or assumes that certain groups are morally or intellectually inferior to his own. I do neither.

Would that in the 30-odd years since his death, Dr. Martin Luther King's vision of a colorblind America had become a reality. That it has not is the fault of liberals intent on sowing division and race-hustlers intent on exploitation.

Would that America hadn't become a place where justice is colorized and juries can free vicious killers and would-be killers (O.J., Lemrick Nelson, Damien Williams) as a show of racial solidarity.

I'd sleep a bit easier if Louis Farrakhan wasn't the most admired man in the black community. I wish minority voters didn't feel compelled to elect a gonif (the late Harold Washington), a total incompetent (David Dinkins) or a coke-head (Marion Barry) to high public office because he's a brother.

These are all realities of an increasingly race-conscious America.

Here are a few more disagreeable facts: Blacks constitute 12 percent of the population but comprise 39 percent of those arrested for aggravated assault, 55 percent of arrests for murder and 61 percent of arrests for armed robbery.

According to figures published in U.S. News in 1989, when whites are violent, they target blacks 2.4 percent of the time. When blacks are violent, they target whites more than half the time. In New York, initiation in the Bloods street gang entails slashing a Caucasian's face with a straight razor.

Of course, the coin has another side. There are blacks who also agonize over this situation - some lead lives of quiet decency, others of noblility. There are black writers, ministers and politicians who are making significant contributions to the reclamation of our civilization. On the day when the community looks to them for leadership - and not an Al Sharpton or a Jesse Jackson - race will no longer matter.

Still, in light of the afore-cited statistics, should we view America's declining white population with indifference, optimism or elation?

The vast majority of white liberals who declare that race is irrelevant somehow end up not living in black neighborhoods or sending their children to predominantly black schools. Apparently, it's all right to act on racial assumptions as long as they are left unspoken.

Why must we exacerbate these social ills through unrestrained immigration? Is racial strife, crime and poverty in such short supply that we must import more? With 5 percent of the world's population, why must we take half of all immigration to industrialized nations?

If the alien inundation is as good for America as utopians insist, why then the more the merrier. Why stop at 1 million legal immigrants and another 500,000 illegals each year? Why not immediately open our doors to 20 million or 30 million? Why opt for slow suicide when we could go out with a glorious bang?

Why is it that of all peoples on earth, only Americans are not entitled to preserve their culture and national identity?

Let's say that the United Nations proposed to transfer 10 million war refugees from Albania to Rwanda. If Rwandans objected, would that mark them as racists and xenophobes? Might not a Rwandan reasonably observe that while he bears no animus toward Albanians, let enough of them in and Rwanda will cease to be Rwanda?

At last we arrive at liberalism's ugliest secret - liberals hate America (our history and heritage, which they deem irredeemably evil) and long for the day when our nation will sink into a great multicultural ooze.

Race and immigration are their tools for achieving those ends. Which is why skeptics are attacked with such fury.

Don Feder is a member of the Herald staff. His column appears Monday and Wednesday.

---- Index References ----

News Subject: (Violent Crime (1VI27); Crime (1CR87); Race Relations (1RA49); Social Issues (1SO05); Forecasts (1FO11); Population Demographics (1PO77); Minority & Ethnic Groups (1MI43))

Region: (Albania (1AL95); Europe (1EU83); Africa (1AF90); USA (1US73); Americas (1AM92); Eastern Europe (1EA48); East Africa (1EA80); North America (1NO39); Rwanda (1RW02))

Language: EN

Other Indexing: (CAUCASIAN; DAMIEN; DAVID; FEDER; JESSE JACKSON; LAMARCHE; LOUIS FARRAKHAN; PAT; PAT LAMARCHE; RWANDANS; UNITED NATIONS; WGAN; WILLIAMS) (Al Sharpton; Apparently; Fifteen; Martin Luther; O.J., Lemrick Nelson; Typical)

KETANJI O. BROWN

NOTE

PREVENTION VERSUS PUNISHMENT: TOWARD A PRINCIPLED DISTINCTION IN THE RESTRAINT OF RELEASED SEX OFFENDERS

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PREVENTION VERSUS PUNISHMENT: TOWARD A PRINCIPLED DISTINCTION IN THE RESTRAINT OF RELEASED SEX OFFENDERS

The American criminal justice system has two dichotomous objectives — to punish wrongdoers and to prevent future harm.[1] Because the Constitution assumes that the exercise of legislative power in pursuit of punishment represents a greater threat to individual liberty than does preventive state regulation,[2] courts must determine which statutes serve each goal. In theory, the distinction is easily drawn.[3] In practice, however, innovative statutory responses to the burgeoning crime problem have "reopened the complex and often times highly emotional debate as to the correct boundary between legislative regulation and punishment."[4]

A recent spate of legislation purports to regulate released sex offenders by requiring them to register with local law enforcement officials,[5] notify community members of their presence,[6] undergo DNA testing,[7] and submit to civil commitment for an indefinite term.[8] Although many courts and commentators herald these laws as valid regulatory measures,[9] others reject them as punitive enactments that violate the rights of individuals who already have been sanctioned for

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[1] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9 (1968); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1332 (1991).

[2] *See* Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the* Lovett, Trop, Perez, *and* Speiser *Cases*, 34 IND. L.J. 231, 237 (1959) [hereinafter *Punishment*].

[3] *Cf.* Cheh, *supra* note 1, at 1536 n.170 ("Government's capacity to punish is thought to be distinct from its efforts to treat illness, provide compensation, or administer regulatory programs.").

[4] *Punishment*, *supra* note 2, at 231. "Countless examples could be given in which a major question . . . is whether what is being done is punishment or something else." PACKER, *supra* note 1, at 20; *see, e.g.*, De Veau v. Braisted, 363 U.S. 144, 160 (1960) (finding that a state law prohibiting convicted felons from holding union offices is not punitive); Barsky v. Board of Regents, 347 U.S. 442, 449 (1954) (rendering a state's suspension of a physician's medical license as a result of his misdemeanor conviction regulatory); Allen v. Attorney Gen., No. 95-2057, 1996 WL 124668, at *3 (1st Cir. Mar. 26, 1996) (holding that a state's suspension of an intoxicated driver's license "furthers a quintessentially remedial goal (public safety)").

[5] *See, e.g.*, N.J. STAT. ANN. §§ 2C:7-1 to -5 (West 1995); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1996).

[6] *See, e.g.*, LA. REV. STAT. ANN. § 15:542(B)(1) (West Supp. 1996).

[7] *See, e.g.*, 1995 Me. Legis. Serv. 1391 (West); 46 PA. CONS. STAT. ANN. § 7651.306 (1995).

[8] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4606 (Supp. 1995); ILL. ANN. STAT. ch. 725, para. 205/1.01–/3.01 (Smith-Hurd 1993); WASH. REV. CODE ANN. § 71.09.060 (West 1992 & Supp. 1996).

[9] *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 372–73 (N.J. 1995) (asserting that New Jersey's community notification law is a reasonable, regulatory option); Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 225 (1995).

their crimes.[10] Under existing doctrine, the constitutionality of sex offender statutes depends upon their characterization as essentially "preventive" rather than "punitive,"[11] yet courts have been unable to devise a consistent, coherent, and principled means of making this determination.

This Note critiques current judicial approaches to characterizing sex offender statutes and suggests a more principled framework for making the distinction between prevention and punishment. Part I outlines the range of sex offender statutes currently in force in several states. Part II examines the prevention/punishment jurisprudence that has developed both in general and in relation to specific sex offender laws. Part III argues that current attempts at differentiation in the context of sex offender legislation are misguided. Finally, Part IV offers a more principled basis for determining how sex offender statutes should be characterized. This Note maintains that, even in the face of understandable public outrage over repeat sexual predators, a principled prevention/punishment analysis evaluates the effect of the challenged legislation in a manner that reinforces constitutional safeguards against unfair and unnecessarily burdensome legislative action.

I. Sex Offender Statutes

A. *The Laws*

State legislators[12] these days have little tolerance for sex convicts. In the wake of several widely-publicized crimes at the hands of serial sex offenders, states have enacted numerous measures that burden released sex criminals for the good of society.[13] A convicted sex offender

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[10] *See, e.g.*, Doe v. Pataki, No. 96 CIV.1657(DC), 1996 WL 131859, at *9–*11 (S.D.N.Y. Mar. 21, 1996); Artway v. Attorney Gen., 876 F. Supp. 666, 688–92 (D.N.J. 1995); Michelle P. Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 Vand. L. Rev 219, 245–50 (1995).

[11] The framework for analyzing challenges under the Eighth Amendment, Ex Post Facto Clause, Double Jeopardy Clause, and Bill of Attainder Clause requires courts to determine whether such laws impose "punishment" within the meaning of the Constitution. *See, e.g.*, United States v. Halper, 490 U.S. 435, 440 (1980) (Double Jeopardy Clause); Trop v. Dulles, 356 U.S. 86, 95–96, 98–99 (1958) (Eighth Amendment and Ex Post Facto Clause); U.S. v. Lovett, 328 U.S. 303, 315 (1946) (Bill of Attainder Clause). If sex offender statutes are regulations, then these constitutional provisions present no bar to their enactment or enforcement.

[12] This Note focuses on state legislation. For a discussion of federal laws that affect released sex offenders, see Tracy L. Silva, *Dial "1-900-PERVERT" and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 SMU L. Rev. 1961, 1969 (1995); and Boland, cited above in note 9, at 188, 196–97.

[13] Seven year-old Megan Kanka's rape and murder, which was committed by her twice-convicted pedophile neighbor, sparked campaigns to enact community notification statutes in her home state of New Jersey and elsewhere. *See* Lisa Anderson, *Demand Grows to ID Molesters*, Chi. Trib., Aug. 15, 1994, at 1; *A Rush to Respond*, Phila. Inquirer, Sept. 2, 1994, at A26. Other heinous crimes were the impetus for other state sex offender statutes. *See, e.g.*, Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 Ga. L. Rev. 729, 735 (1994) (Washington statute); Clayton C. Skaggs, Note, *Kansas' Sexual*

today can expect to encounter four major restraints upon release from prison or parole: registration, community notification, DNA testing, and civil commitment.[14]

State registration statutes, which have been enacted in forty-seven states,[15] oblige convicted sex criminals to provide local law enforcement officials with photographs, fingerprints, and such information as their home addresses, social security numbers, dates and places of birth, crimes, and dates and places of conviction.[16] Armed with this valuable information, officials can "create a list of potential suspects . . . to pursue whenever a child [is] harmed or missing."[17]

Community notification statutes, which have been enacted in twenty states,[18] authorize law enforcement agents to distribute registration information to the general public.[19] Supporters of the public's right to know argue that notification "help[s] deter sex offenders from repeating their crimes by keeping a spotlight on them and by giving nearby residents the ability to warn and protect their families."[20]

Several states also require sex offenders to provide blood samples that are subsequently DNA tested, screened, and filed in the state's criminal justice data bank.[21] Because "investigations of murders and

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Predator Act and the Impact of Expert Predictions: Psyched Out by the Daubert *Test*, 34 WASHBURN L.J. 320, 320 (1995) (Kansas statute).

14 Sex offender statutes vary widely across jurisdictions. For a detailed analysis, see Silva, cited above in note 12, at 1970–73; Boland, cited above in note 9, at 189–98; and Houston, cited above in note 13, at 734–46.

15 *See* Don Van Natta Jr., *U.S. Judge Blocks State's Plan to Release Names and Addresses of Sex Offenders*, N.Y. TIMES, Mar. 8, 1996, at B6.

16 *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.130(2) (West Supp. 1996); *see also* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 890–91 (1995) (describing the typical registration statute). In some states, sex offenders are required to update this information annually for a number of years after conviction or release. *See, e.g.*, N.J. STAT. ANN. §§ 2C:7-2e, :7-2f (West 1995); N.H. REV. STAT. ANN. § 632-A:14 (Supp. 1994).

17 Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 795 (1996).

18 *See* Van Natta, *supra* note 15, at B6.

19 *See, e.g.*, FLA. STAT. ch. 775.225 (1995). Although the form and content of community notification laws vary, several notification provisions are modeled after New Jersey's "Megan's Law," which requires authorities to publicize registration data to particular segments of the community based on a given offender's risk of recidivism. *See* N.J. STAT. ANN. §§ 2C:7-6 to -11 (West 1995). Under this law, three tiers of notification correspond to three levels of risk: if the prosecutor finds that the individual offender's risk of recidivism is low, the law enforcement agencies that are likely to come into contact with the offender are notified; if the risk is moderate, community organizations such as schools, youth groups, and religious groups are given notice; and if the risk is high, everyone who is likely to encounter the offender is made aware of the registration information. *See id.* at § 2C:7-8(c)–(d).

20 Robin Schimminger, *Law Would Publicize Sex Predators*, BUFFALO NEWS, Sept. 16, 1994, at 2 (statement by New York state legislator Schimminger seeking support for a proposed bill); *accord* Recent Legislation, 108 HARV. L. REV. 787, 787, 791 (1995).

21 *See, e.g.*, CONN. GEN. STAT. § 54-102g (1995); OR. REV. STAT. §§ 137.076, 181.085 (Supp. 1994); VA. CODE ANN. § 19.2-310.2 (Michie 1995) .

sexual offenses are . . . likely to yield the type of evidence from which DNA information can be derived,"[22] DNA fingerprinting laws purportedly aid in the identification, apprehension, and prosecution of repeat sex predators.[23] In addition, because "sex offenders will be reluctant to commit other offenses out of fear that they will leave behind incriminating evidence that could be linked back to them," a DNA data bank may serve as a specific deterrent to the commission of future sex crimes.[24]

Finally, civil commitment statutes allow state officials to identify potentially dangerous sex offenders — whether they are in prison or in the community — and to commence proceedings to have them involuntarily and indefinitely confined.[25] By "permit[ting] child molesters and rapists to be held after their prison terms [expire] under civil court procedures like those used to commit the insane,"[26] commitment legislation literally immobilizes dangerous sexual deviants and, thus, presumably promotes both immediate and long-term public safety.

B. The Critics

Despite the potential public safety benefits of restrictive sex offender statutes, opponents argue that these laws are more punitive than preventive. In jurisdictions that have registration or DNA statutes, sex offenders have an affirmative obligation to surrender personal information to the state for years after they have been convicted, sentenced, and released.[27] Community notification subjects ex-convicts to stigmatization and ostracism, and puts them at the mercy of a public that is outraged by sex crimes.[28] Civil commitment sacrifices a funda-

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[22] Rise v. Oregon, 59 F.3d 1556, 1561 (9th Cir. 1995).

[23] *See* James P. O'Brien, Jr., Note, *DNA Fingerprinting: The Virginia Approach*, 35 WM. & MARY L. REV. 767, 796–98 (1994).

[24] *Rise*, 59 F.3d at 1561.

[25] *See, e.g.*, WASH. REV. CODE ANN. §§ 71.09.030–.060 (West 1992 & Supp. 1996). In several states, officials file a petition of commitment at the conclusion of an offender's sentence and, if "dangerousness" is found at a separate hearing or trial, a court may order a convicted sex offender to be re-confined as a "sexually violent predator." *Id.*; *see, e.g.*, TENN. CODE ANN. § 33-6-305 (1984 & Supp. 1995); WIS. STAT. §§ 980.02–.06 (1993 -1994).

[26] Barry Meier, *"Sexual Predators" Finding Sentence May Last Past Jail*, N.Y. TIMES, Feb. 27, 1995, at B8.

[27] The intrusion extends beyond the state's initial acquisition of data: on the basis of registration information, sex offenders are "continuous[ly] subject[ ] to questioning and 'command performances at lineups.'" Earl-Hubbard, *supra* note 17, at 818 (quoting *In re* Reed, 663 P.2d 216, 218 (Cal. 1983)).

[28] *See* Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (asserting that "arson, death threats, slashed tires and loss of employment" are "inevitable and unavoidable" consequences of community notification); G. Scott Rafshoon, Note, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1658–59 (1995); Monte Williams, *Sex Offenders Law Prompts Privacy Debate in New York*, N.Y. TIMES, Feb. 24, 1996, at A1 *passim*.

mental right — freedom — *indefinitely*, based solely upon unreliable assessments of the convict's predilection to commit future sex crimes.[29]

The controversy over the characterization of sex offender statutes has enormous constitutional implications.[30] "Although pragmatically a detainee may care little whether he is [restrained] for punishment or to prevent future harm, jurisprudentially the difference is profound."[31] The next Part considers the profound jurisprudential difference between regulatory and punitive legislation and examines lower courts' specific attempts to distinguish prevention and punishment when reviewing sex offender statutes.

II. PREVENTION/PUNISHMENT DISTINCTION

A. *"The Jurisprudence of Prevention"*[32]

States have long been considered the primary promoters of the general health, safety, and welfare of American citizens.[33] A state legislature's prerogatives unquestionably extend to enacting laws that seek to prevent harm to the general public, even if such statutes effectively restrict individual liberty.[34] Because states often exercise their "police power" in pursuit of public safety, courts "have developed consistent standards for what is an acceptable exercise of public health authority":[35] a state is generally free to impose restrictions that are rationally related to the public safety goal.[36]

Recently, states have begun to enact and enforce public-safety measures that seek to prevent *crime* by "regulating" criminal defendants. Employing traditional public health analysis, the Supreme Court has established the "jurisprudence of prevention" — a deferential view of quasi-criminal efforts to restrain potentially dangerous individuals for

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29 The touchstone of civil commitment is a prediction of "dangerousness," a judgment that is scientifically unreliable, *see* Robert C. Boruchowitz, *Sexual Predator Law—The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 835–36 (1992); Skaggs, *supra* note 13, at 330–31, and grounded in an assertion of abnormal behavior as evidenced by the convict's prior misconduct, *see* James D. Reardon, M.D., *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 852 (1992).

30 *See infra* pp. 1716–17.

31 Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 330 (1989).

32 *Id.* at 329.

33 *See In re* Slaughterhouse, 83 U.S. 36, 62 (1872); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 203 (1824).

34 *See* Robinson v. California, 370 U.S. 660, 666 (1962) (asserting that a state may impose "a compulsory treatment, involving quarantine, confinement, or sequestration" to promote the general welfare); Barsky v. Board of Regents of the Univ. of State of N.Y., 347 U.S. 442, 449 (1954); Whipple v. Martinson, 256 U.S. 41, 45 (1921).

35 Richards, *supra* note 31, at 338.

36 *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 486–88 (1955); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 582 (2d. ed. 1988) (describing the Court's deferential approach to regulatory enactments "in furtherance of public goals").

the good of society.[37] In *Schall v. Martin*,[38] for example, the Court upheld a New York law authorizing pretrial detention for juveniles when there is a "'serious risk' that the juvenile, if released, would commit a crime prior to his next court appearance."[39] Similarly, in *United States v. Salerno*,[40] the Court upheld a federal law allowing judges to deny pre-trial bail to incarcerated suspects when "no release conditions will reasonably assure . . . the safety of . . . the community."[41] Rejecting the notion that detention is necessarily punitive,[42] the Supreme Court has adopted the view that liberty restrictions based on predictions of future dangerousness may "fall[ ] on the regulatory side of the dichotomy" between prevention and punishment.[43]

B. The Prevailing View of Punishment

Although states generally may regulate individuals (even criminally culpable ones) for the good of society, the U.S. Constitution places formidable constraints on each state's ability to *punish* its citizens. For example, the constitutional prohibition against bills of attainder[44] prevents state legislatures from acting adjudicatively by passing laws that punish specified individuals.[45] Similarly, the Constitution prohibits ex post facto legislation,[46] including legislative enactments that impose new punishments for old crimes.[47] Moreover, the Fifth and Sixth Amendments catalog a number of procedural hurdles that states must overcome before they may punish culpable persons,[48] and the Eighth Amendment protects individuals from punishments that, although im-

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[37] Richards, *supra* note 31, at 330.

[38] 467 U.S. 253 (1983).

[39] *Id.* at 278.

[40] 481 U.S. 739 (1987).

[41] *Id.* at 741.

[42] *See id.* at 745.

[43] *Id.* at 747. "Central to all the prevention decisions is the unbundling of punishment and deprivation of liberty in ostensibly criminal law cases." Richards, *supra* note 31, at 338. Although "the Supreme Court has allowed the disassociation of punishment and prevention in criminal law," *id.* at 331, it has not developed clear criteria by which to determine in the first instance whether a particular law should be characterized as "punitive" or "preventive."

[44] *See* U.S. CONST. art. I, § 10, cl. 1.

[45] *See Punishment*, *supra* note 2, at 236.

[46] *See* U.S. CONST. art. I, § 10, cl. 1.

[47] In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court established that a law violates the Ex Post Facto Clause when it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390. Thus, if sex offender statutes are deemed "punitive," their application to previously-convicted offenders violates the Ex Post Facto Clause.

[48] The Fifth and Sixth Amendments apply to "criminal" cases. *See* U.S. CONST. amends. V, VI. Although the nature of the proceeding cannot be ascertained solely from an evaluation of the sanction, *see* U.S. v. Halper, 490 U.S. 435, 447–448 (1989), the Supreme Court has established that at least in the Fifth Amendment context, a constitutional violation "can be identified [solely] by assessing the character of the actual sanctions imposed." *id.* at 447.

posed by the judiciary in accordance with due process, are nonetheless "cruel and unusual."[49]

Because "[t]he state may not punish a person under its public health police powers,"[50] courts must determine whether challenged legislation imposes "punishment" within the meaning of the Constitution. The prevailing method of making the prevention/punishment determination derives from the Supreme Court's opinion in *Kennedy v. Mendoza-Martinez*.[51] In *Kennedy*, the Court held that federal statutes that divested draft-dodgers of national citizenship for departing the United States during a time of war were unconstitutionally punitive.[52] Writing for the majority, Justice Goldberg reasoned that "[t]he punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character."[53] The tests traditionally applied were:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[54]

Although many lower courts use the *Kennedy* factors, great disagreement persists about when and how to apply them in evaluating laws that burden released sex offenders.[55] Several courts have chosen to use means other than the *Kennedy* analysis to characterize such legislation.

C. *Sex Offender Statutes: Prevention or Punishment?*

The growing demand for more stringent sex offender regulation challenges both lawmakers and courts: legislatures must "devise a solu-

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[49] U.S. CONST. amend. VIII.

[50] Richards, *supra* note 31, at 338.

[51] 372 U.S. 144 (1963).

[52] *See id.* at 165–66.

[53] *Id.* at 168.

[54] *Id.* at 168–69 (citations omitted). The *Kennedy* Court did not rely on these factors in reaching its decision. Instead, the Court found, "[the] objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive," and concluded that a "detailed examination" of the factors was unnecessary. *Id.* at 169. Thus, although the *Kennedy* Court set forth criteria for distinguishing punitive from regulatory enactments, it also established that they need only be considered "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute." *Id.*

[55] In the absence of a clear legislative admission that a law punishes, there is considerable judicial discord over how to make the prevention-or-punishment determination. *See infra* part II.C; *cf.* Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1667, 1670–78 (1980) (examining the various ways that courts have sought "to determine what punishment is").

tion generally designed to remedy the [sex crime] problem without unnecessarily penalizing those who are its source,"[56] and courts must review that legislative response, necessarily deciding how to differentiate punitive and regulatory enactments.[57] The few courts that have characterized sex offender laws have taken different approaches and, not surprisingly, have reached different conclusions. Consider the following examples.

In *Rise v. Oregon*,[58] the Ninth Circuit upheld an Oregon law requiring convicted murderers and sex offenders to surrender blood samples for the state's DNA data bank.[59] Felons subject to the law brought a lawsuit alleging that the forced blood submissions violated, inter alia, the constitutional prohibition against ex post facto punishments.[60] In determining whether the statute was punitive or preventive, the federal court focused only on the legislature's regulatory intent[61] and concluded that, because the "obvious purpose" of the Oregon statute was to aid law enforcement officials, the statute was constitutional.[62]

In *Artway v. Attorney General*,[63] a federal district court assessed several constitutional challenges to New Jersey's registration and community notification statute.[64] Artway argued that the statute violated the Constitution's prohibitions against cruel and unusual punishment, ex post facto laws, and bills of attainder, among others.[65] Although the legislature claimed a regulatory purpose for the act, the court found that judges should "reach an independent conclusion as to its true nature"[66] by engaging in an "analysis . . . in the manner prescribed by the Supreme Court in *Kennedy*."[67] Applying the *Kennedy*

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[56] Doe v. Poritz, 662 A.2d 367, 387 (N.J. 1995).

[57] *See supra* note 11 and accompanying text. Courts may also seek to determine whether sex offender legislation comports with constitutional provisions that do not rely on a "punitive" or "regulatory" characterization, such as the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *In re* Hendricks, No. 73,039, 1996 WL 87472, at *5 (Kan. Mar. 1, 1996).

[58] 59 F.3d 1556 (9th Cir. 1995).

[59] *See id.* at 1564.

[60] *See id.* at 1558.

[61] *See id.* at 1562 ("Legislation may lawfully impose new requirements on convicted persons if the statute's 'overall design and effect' indicates a 'non-punitive intent.'" (quoting United States v. Huss, 7 F.3d 1444, 1447 (9th Cir. 1993))).

[62] *Id.* It is unclear from the opinion whether the court looked at the text of the statute, legislative history, or some other source in making its determination that the law's purpose is "to assist in the identification, arrest, and prosecution of criminals, not to punish." *Id.*

[63] 876 F. Supp. 666 (D.N.J. 1995).

[64] *See id.* at 668.

[65] *See id.*

[66] *Id.* at 673.

[67] *Id.*

factors, the court concluded that the public notification provisions of the statute were unconstitutional.[68]

The Supreme Court of New Jersey examined the same registration and community notification law in *Doe v. Poritz*.[69] Instead of deferring to legislative intent or employing the *Kennedy* factors,[70] however, the court set forth yet another test for determining whether the statute was punitive. Under the *Poritz* court's reasoning, "a statute that can fairly be characterized as remedial"[71] only constitutes punishment if the punitive impact of the law is "excessive."[72] Though the statute may "affect, potentially severely, some of those subject to its provisions,"[73] only if the law contains provisions that "cannot be justified as regulatory" will it be deemed punishment for the purpose of the constitutional inquiry.[74] Applying its regulatory-unless-excessively-punitive test to Megan's Law, the *Poritz* court upheld the statute as a valid exercise of the state's power to prevent public harm.[75]

III. The Distinction Dissected

The *Rise*, *Artway*, and *Poritz* opinions are generally representative of the analyses of the few courts that have evaluated sex offender laws.[76] Although each approach squarely confronts the prevention/punishment dilemma, the analyses offer incoherent and unprincipled explanations for the courts' conclusions. Courts have relied too heavily on the legislatures' intent, have mistakenly applied the *Kennedy* factors, and have erroneously emphasized "excessiveness" in assessing the nature of sex offender statutes for constitutional purposes.

A. *The* Rise *Rationale: Relying on Legislative Intent*

In *Rise*, the Ninth Circuit suggested that a "non-punitive intent" is the benchmark for determining whether a legislature seeking to estab-

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[68] *See id.* at 692. The court found that public notification involves an affirmative disability, has historically been regarded as punishment, and furthers one of the traditional aims of punishment. *See id.* at 688–91. Even though in the court's opinion the scienter factor "weighs in favor" of a regulatory characterization, *id.* at 690, the court reasoned that the law applies only to behavior that constitutes a crime, does not further regulatory objectives, and appears excessive in relation to its stated goals, *see id.* at 691–92.

[69] 662 A.2d 367 (N.J. 1995).

[70] The court rejected the *Kennedy* factors as inapposite because they are "useful only in determining the underlying nature of the proceeding, not the question of whether punishment is imposed by a civil sanction." *Id.* at 402.

[71] *Id.* at 388.

[72] *See id.* at 390.

[73] *Id.* at 388.

[74] *Id.* at 390.

[75] *See id.* at 422–23.

[76] *See, e.g.*, Rowe v. Burton, 884 F. Supp. 1372, 1378–79 (D. Alaska 1994) (applying the *Kennedy* factors); State v. Carpenter, 541 N.W.2d 105, 112–13 (Wis. 1995) (looking for extraneous, punitive effects); State v. Costello, 643 A.2d 531, 533 (N.H. 1994) (relying on legislative intent).

lish a DNA data bank can act to "impose new requirements on convicted persons."[77] Other jurists have also found the purported purpose of a sex offender statute dispositive of its nature. For example, in *People v. Adams*,[78] the Illinois Supreme Court decided that a detailed analysis of the "severity of the disability" imposed by the registration statute is necessary only "when conclusive evidence of legislative intent is unavailable."[79]

Fastidiously focusing on legislative intent when characterizing sex offender statutes is problematic for two primary reasons. First, it may not be possible to discern the true intentions of a legislative body.[80] Although the legislature may announce that its intent is merely to protect the community, the actual motivations of elected officials who enact burdensome provisions may be difficult to ascertain.[81] Moreover, the legislative history of a statute is often indeterminate,[82] and savvy politicians may "inject statements intended solely to influence later interpretations of the statute."[83]

Second, even if the statements accompanying the passage of a sex offender law express the lawmakers' true motivations, making those intentions dispositive "encourage[s] hypocrisy and unconscious self-deception."[84] The prevention/punishment dilemma is a constitutional conflict between the state and the burdened individual. "A definition of punishment that render[s] an individual's constitutional rights dependent on the subjective motive of his punisher [is] inconsistent with the function of the Constitution in protecting individual rights."[85] It makes little sense for a court to fixate on the state's interest in regulating sex convicts when the real issue is whether a particular provision can rightly be deemed "regulation" at all.

B. The Artway *Approach: Overvaluing the Kennedy Factors*

Some judges eschew in depth examinations of the legislature's intent and instead purport to "focus on the practical purpose and effect of the statute"[86] by applying the factors that the Supreme Court identified in *Kennedy*.[87] Although the attempt to focus on effects is com-

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77 Rise v. Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995) (internal quotation marks omitted).

78 581 N.E.2d 637 (Ill. 1991).

79 *Id.* at 640–41; *accord Costello*, 643 A.2d at 533.

80 *See* Foscarinis, *supra* note 55, at 1672.

81 *See* Bedarf, *supra* note 16, at 923.

82 Various legislators may express different intentions with respect to the proposed legislation. *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1019 (1992).

83 *Id.* at 1016.

84 PACKER, *supra* note 1, at 33.

85 Foscarinis, *supra* note 55, at 1673.

86 Artway v. Attorney Gen., 876 F. Supp. 666, 673 (D.N.J. 1995).

87 For a listing of the *Kennedy* factors, see page 1717 above.

mendable,[88] courts have attached far too much significance to the *Kennedy* factors in assessing sex offender laws.

In the first place, there is little evidence in the *Kennedy* opinion that the Supreme Court intended the factors to be applied as a litmus test by which to characterize legislation. In *Kennedy*, the Court:

> simply listed various factors, the tests, each of which had been used by itself in reaching a determination of whether a statute was penal (criminal) or regulatory (civil), and each of which therefore might be relevant in the future in making that determination, whether alone or in conjunction with the others.[89]

Moreover, the Supreme Court's post-*Kennedy* opinions indicate that the Justices did not view *Kennedy* as a means of determining the punitive or regulatory nature of a law.[90]

Second, even if *Kennedy* sets forth the seven elements of a punitive enactment, the list is far too open-ended to yield consistent results, especially as applied to sex offender statutes.[91] For example, the Supreme Court of Arizona used the *Kennedy* factors to uphold Arizona's registration provision as regulatory,[92] while the Supreme Court of California employed the same criteria to strike down a substantially similar version of the California registration statute as unconstitutionally punitive.[93] Further, using the *Kennedy* factors, federal courts in Alaska and New Jersey have found that community notification laws

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[88] *See infra* part IV.

[89] Doe v. Poritz, 662 A.2d 367, 399 (N.J. 1995).

[90] Cases subsequent to *Kennedy* reveal that the Court views the seven-factor analysis as applicable only when the nature of the *proceeding* (i.e., criminal versus civil) is at issue, and not when the nature of the *sanction* (i.e., punitive or regulatory) is in question. *See e.g.*, Austin v. United States, 113 S. Ct. 2801, 2806 n.6 (1993) (considering the criminal or civil nature of forfeiture proceedings and finding that "[i]n addressing the separate question whether punishment is being imposed, the Court has *not* employed the tests articulated in [*Kennedy*]") (emphasis added); *see also* Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 132 (1995) (arguing that "the bulk of recent case law suggests" that application of the *Kennedy* criteria to determine whether community notification constitutes punishment would be "inappropriate"). Because the criminal/civil distinction is different from the punitive/regulatory determination, *see* United States v. Halper, 490 U.S. 435, 447–48 (1989), *Kennedy*'s significance in making the former determination does not ensure its appropriateness in making the latter.

[91] The *Kennedy* Court itself admitted that the factors "may often point in differing directions," *Kennedy*, 372 U.S. at 169, and comparative analysis of court evaluations suggests that, in the context of sex offender statutes, they most certainly have. *See* Bedarf, *supra* note 16, at 913–14 (finding that "despite [judges'] use of the same seven-factor test, courts are split fairly evenly in the conclusions they reach").

[92] *See* State v. Noble, 829 P.2d 1217, 1221–24 (Ariz. 1992).

[93] *See In re* Reed, 663 P.2d 216, 218–20 (Cal. 1983). Although the California Supreme Court invalidated the registration law only as applied to sex offenders convicted of misdemeanor disorderly conduct, *see id.* at 222–23, it used the *Kennedy* analysis to conclude that the general practice of registering sex offenders constitutes punishment, *see id.* at 218–20.

constitute "punishment,"[94] while the Supreme Court of Washington has found that the Washington registration and notification statute is a regulation.[95] Whatever the reason for the disparate outcomes when various courts apply the same *Kennedy* factors to similar sex offender laws,[96] such differences suggest that the test does not provide a consistent means of making the prevention/punishment determination.

Finally, because some of the *Kennedy* concerns are patently inapplicable to sex offender laws, the *Kennedy* "test" is not well-suited to the evaluation of sex offender statutes. For example, *Kennedy* requires an evaluation of "whether [the sanction] comes into play only on a finding of scienter."[97] Scienter is ambiguous in the context of sex offender statutes, however, because although the sex offender laws themselves do not require criminal culpability, they apply only to individuals who have been found criminally culpable for sexual misconduct.[98] Considering "whether the behavior to which [the sanction] applies is already a crime"[99] presents a similar difficulty. Although the underlying sexual offense is certainly criminal, "one could argue that the . . . statutes only relate to the behavior of moving from place to place and entering a city's borders, behavior that is *not* a crime for most individuals."[100] Such ambiguities should preclude casual reliance on the *Kennedy* factors in evaluating sex offender statutes.

C. *The* Poritz *Position: Erroneously Emphasizing "Excessive" Effects*

The New Jersey Supreme Court has found that the proper inquiry in determining whether Megan's Law should be deemed "punitive" is whether the statute's "punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes."[101] The *Poritz* ra-

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[94] *See* Artway v. Attorney Gen., 876 F. Supp 666, 688–92 (D.N.J. 1995); Rowe v. Burton, 884 F. Supp. 1372, 1377–80 (D. Alaska 1994).

[95] *See* State v. Ward, 869 P.2d 1062, 1069 (Wash. 1994).

[96] Some of the discrepancy is substantive. *Compare Reed*, 663 P.2d at 218, 219–20 (finding that sex offender registration imposes an affirmative disability, that it has not been historically regarded as punishment, and that it is excessive vis-à-vis its nonpunitive purposes) *with Noble*, 829 P.2d at 1222, 1224 (concluding that sex offender registration does not impose a disability, has been traditionally regarded as punishment, and is not excessive). The remainder may be the result of differences in the application of the factors. *Compare Noble*, 829 P.2d at 1224 (asserting that "our task is not simply to count the factors on each side, but to weigh them" based on their significance) *with Artway*, 876 F. Supp. at 692 (finding that most of the factors lead toward a punitive characterization).

[97] *Kennedy*, 372 U.S. at 168 (emphasis omitted).

[98] In applying the *Kennedy* criteria, some courts simply ignore the scienter criteria, *see, e.g.*, *Noble*, 829 P.2d at 1221–24, while others attempt to make sense of it, *see, e.g.*, *Artway*, 876 F. Supp. at 689–90.

[99] *Kennedy*, 372 U.S. at 168.

[100] Earl-Hubbard, *supra* note 17, at 819–20.

[101] Doe v. Poritz, 662 A.2d 367, 390 (N.J. 1995). This approach follows the Supreme Court's analysis in cases such as United States v. Salerno, 481 U.S. 739 (1987), which collapses the multi-

tionale requires the judge to find a regulatory purpose, to discern the law's punitive effects, and to evaluate the "excessiveness" of the punitive effects of the sex offender statute in relation to the statute's remedial goals.[102] Although the *Poritz* position attempts to balance the punitive and preventive aspects of sex offender statutes, it also invites unwarranted and illogical deference to legislative desires, is difficult to apply in the sex offender context, and ignores the crux of the prevention/punishment determination.

Like the prevention/punishment analysis that considers legislative intent dispositive, the excessive-punitive-effects rationale maintains that "the purpose and the intent of the . . . sanction is the touchstone that determines the sanction's characterization."[103] In the *Poritz* court's view, if the state has a legitimate regulatory purpose for its sex offender statute and the statutory burden bears some reasonable relationship to that purpose, then its effects are not excessive, and the law should be characterized as a "regulation." This reliance on regulatory intent not only unwisely assumes that a clear legislative purpose is ascertainable,[104] but also allows the legislature to justify arguably punitive statutory provisions by selecting sweeping regulatory goals.[105] Because "[a]lmost *any* restriction on a [convict's] liberty interests can be found to have some rational relation to the legislative interest in promoting community safety,"[106] the excessive-punitive-effects rationale is a "toothless standard" that defers almost entirely to the will of the legislature and "provid[es] the [sex convict] with virtually no protection against the 'punitive effect[s]'" of the legislation.[107]

Even if one overlooks the problems associated with relying on legislative intent, the "excessiveness" rationale is difficult to apply when

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factor *Kennedy* analysis into two considerations: "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 747 (quoting *Kennedy*, 372 U.S. at 168–69) (alterations in original) (internal quotation marks omitted).

[102] *See Poritz*, 662 A.2d at 390.

[103] *Id.* at 394.

[104] *See supra* part III.A.

[105] Consider Justice Marshall's hypothetical example which posits a congressional intent to reduce violent crime:

> After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute . . . .

Salerno, 481 U.S. at 760 (Marshall, J., dissenting).

[106] Thomas C. French, Note, *Is It Punitive or Is It Regulatory?* United States v. Salerno, 20 U. TOL. L. REV. 189, 225 (1988) (emphasis added).

[107] *Id.*

the challenged statute imposes a nonpecuniary burden. "Excessiveness" evaluations most effectively assess the character of statutes that impose monetary compensation for past harms.[108] To the extent that sex offender statutes are not compensatory, and the burden they impose is not quantifiable, the attempt to evaluate the "excessiveness" of the punitive effects of such statutes is both unavailing and misleading.[109]

Most importantly, by focusing on the extent to which the punitive effects of the statute exceed the state's regulatory purpose, the excessive-effects rationale ignores the fact that, at its core, the prevention/punishment evaluation considers whether sex offender laws are a constitutionally appropriate means of pursuing concededly legitimate state ends. The "excessive burden" analysis characterizes statutes based on the *fit* between means and end,[110] rather than on the properties of legislation that should be deemed to make it more or less "punitive" within the meaning of the Constitution. Whether the state is doing what it must (and thus the punitive effects are not "excessive" in relation to the law's purpose) simply does not address whether what the state is doing should be deemed "punishment."[111] In making the prevention/punishment determination, judges must ask whether the law should be characterized as "punitive," not whether the state must act punitively to accomplish its regulatory goals.

A critical examination of sex offender statute jurisprudence "illustrate[s] the complexities, intricacies, and contradictions involved when courts attempt to set standards or evolve a formula to differentiate between punishment and regulation."[112] Admittedly, "[t]he distinction between unconstitutional punishment and permissible state regulatory actions is a fine one."[113] Nevertheless, courts should recognize the

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108 *See* Cheh, *supra* note 1, at 1378 (concluding that "[f]or monetary penalties" the excessive effects approach "gives us a useful albeit broad formula: the government is entitled to rough remedial justice" and "[a]nything beyond this generously phrased allowance will be equivalent to [punishment]").

109 *See id.* (suggesting that applying "excessiveness" analysis to "adverse actions that are not measured in currency" is problematic).

110 The *Poritz* court upheld Megan's Law because "that which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public." Doe v. Poritz, 662 A.2d 367, 404 (N.J. 1995).

111 An evaluation of the state's *need* for a particular course of action is fundamentally different from a determination of the *character* of its conduct. Consider the constitutional prohibition against unreasonable searches and seizures. *See* U.S. CONST. amend. IV. Whether the police have affected a "seizure" within the meaning of the Constitution is assessed without regard to the state's interest in detaining the individual. *See, e.g.*, California v. Hodari D., 499 U.S. 621, 626 (1991); Michigan v. Chesternut, 486 U.S. 567, 573 (1988). Similarly, whether a law imposes "punishment" should not be determined by focusing on the state's interest in burdening the individual. Although constitutional analysis may ultimately reveal that the state's end justifies the means, the character of the means cannot be ascertained with reference to the legitimacy of the end.

112 *Punishment*, *supra* note 2, at 287.

113 French, *supra* note 106, at 218.

flaws in the current analytic framework and move toward developing a more principled means of distinguishing prevention and punishment when evaluating sex offender laws.

IV. Toward a More Principled Position

Two major premises underlie a more principled approach to making the prevention/punishment determination. First, a principled analysis recognizes that there is no *inherent* property that makes a statute, by nature, "punitive" or "preventive." Unquestionably punitive statutes share traits with laws that are universally accepted as regulatory.[114] A particular statute may have both punitive and nonpunitive attributes;[115] and, to some extent, whether a law is "punitive" or "regulatory" depends upon one's vantage point.[116] Rather than adhering to the notion that punishments and regulations are inherently distinguishable in any meaningful sense, the principled judiciary thus seeks to identify statutory traits that *should* serve as the basis for classification within the meaning of the Constitution.[117]

Second, the principled approach postulates that the normative determination of which characteristics should make a statute "punitive" within the meaning of the Constitution should be tied to the constitutional foundations that give rise to the prevention/punishment problem. The current analyses of sex offender statutes are unprincipled precisely because the statutory criteria selected — legislative intent, the state's prevailing interest in enacting the law, and to a lesser extent, the *Kennedy* factors — are unrelated to the interests that the Constitution is designed to protect. Courts determine the "punitive" or "regulatory" nature of a statute, not as an isolated inquiry, but against the backdrop of a system of government in which state interests are subordinate to individual rights. Because the Constitution stands as a bulwark against government encroachment on individual liberty, courts should employ a classification standard that "safeguards the humane interests for the protection of which the [Constitution] was written."[118] This Note argues that "[i]n a democracy, where safeguards are

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114 For example, both imprisonment and quarantine statutes involve forced restraint of the targeted individuals.

115 *See* Trop v. Dulles, 356 U.S. 86, 96 (1958); Rafshoon, *supra* note 28, at 1667.

116 *See* United States v. Halper, 490 U.S. 435, 447 n.7 (1989) ("[F]or the defendant even remedial sanctions carry the sting of punishment.").

117 The courts' task is normative rather than descriptive. For example, instead of finding as a descriptive matter that "punitive" laws impose burdens and "regulatory" ones do not, courts must determine whether, given the existence of a burden, a particular law *should* be deemed "punitive" for the purpose of constitutional analysis.

118 Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

built in to protect human dignity, the *effect* of the sanction rather than the reason for imposing it must necessarily be [that] criterion."[119]

Once it is established that the courts' function is to make a normative assessment of the "punitive" or "regulatory" character of the legislation, and that "the relevant criteria . . . should be the concerns of individuals threatened with criminal sanctions" rather than the purpose or intentions of the state,[120] judicial classification of sex offender laws will turn in a more principled direction: toward evaluating the *impact* of the challenged legislation in a manner that is consistent with constitutional protections against government encroachment on individual rights. Although courts will have to develop precise, objective criteria by which to evaluate the effects of sex offender laws over time, this Note suggests that judges focus, first, on the nature of the disability imposed, and second, on whether the statute has retributive or general deterrent effects. Simply stated, if a sex offender statute deprives an offender of an otherwise-established legal right and primarily operates to affect retribution or general deterrence, it should be deemed "punitive" for constitutional purposes.

Focusing on the nature of the disability — and reserving the "punitive" classification for burdens that amount to "a deprivation or suspension of civil or political rights"[121] — emphasizes the effect of sex offender legislation as the constitutional touchstone for the characterization of such statutes. Because citizens face myriad civil disabilities imposed by the states (many of which undoubtedly seem punitive to those who must endure them), requiring that "punitive" statutes amount to a deprivation of rights promotes consistency by giving judges a "standard for determining the degree of hardship necessary to render an action punitive."[122] Moreover, because only statutes that infringe upon the rights of citizens implicate constitutional provisions, only a deprivation of such rights should give rise to the constitutional protections associated with a "punitive" characterization.

The second inquiry — whether the sex offender statute has retributive[123] or general-deterrent effects — requires judges to consider the

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119 Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 217–2[illegible] (1959) (emphasis added); *see also* Doe v. Pataki, No. 96 CIV.1657(DC), 1996 WL 131859, at [illegible] (S.D.N.Y. Mar. 21, 1996) ("[N]o matter how compelling the reasons, no matter how pure the motive, constitutional protections for individuals — even unsympathetic ones — cannot be cast aside in the name of the greater good.").

120 Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at* Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290, 299 (1965).

121 Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322 (1867). The *Cummings* Court found that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment." *Id.* at 322.

122 Foscarinis, *supra* note 55, at 1675.

123 Properly conceived, retribution is both "naked vengeance," *Kennedy*, 372 U.S. at 189 (Brennan, J., concurring), and "a moral condemnation by society of an offender's behavior," Bedau, *supra* note 16, at 925. It should be noted that a statute may be retributive in spite of — rather

impact of the statute on the targeted individuals and society. Acknowledging that sex offender statutes are likely both to influence individual behavior *and* to promote societal interests in retribution and general deterrence, the judge would determine whether the legislation serves *primarily* to facilitate individual reformation or rehabilitation, on the one hand, or to display moral opprobrium or make an example of the offender, on the other. Of course, the question of which effects predominate "is not ordinarily answered through an analysis that suggests precision and consequently that results in certainty."[124] Nevertheless, because individuals need constitutional protection far more when state actions achieve retribution or general deterrence than when its acts accomplish individual reformation or rehabilitation, an analysis that classifies sex offender statutes accordingly is a principled means of evaluating these laws.[125]

The characterization of any particular sex offender law depends upon the statute's particular provisions and, thus, is beyond the scope of this Note. Nevertheless, illustrating the application of the proposed principles in the context for which they are offered is informative. Thus, in a jurisdiction in which sex offenders have no privacy right in registration information or blood samples, and therefore, no political or civil right is infringed by the state's registration or DNA data bank requirements, a court would find that sex offender registration and DNA data bank laws are "regulations" for constitutional purposes. If, on the other hand, a community notification statute deprives the offender of his right to mobility or bodily integrity, and if it makes him the "target of widespread community rejection, antipathy, and scorn"[126] in a manner that is more retributive than rehabilitative, then it should be considered "punishment." Commitment legislation must be examined carefully, for although it clearly sacrifices the offender's fundamental right to freedom, courts must determine whether its primary effect is treatment of the affected individual, or satisfaction of the societal interest in locking sex offenders up and throwing away the key.[127]

In each case, "the Court's task is to predict fairly the actual effect of the statutory requirements"[128] in terms of the nature and severity of

than because of — the legislature's purpose in enacting it. *See Kennedy*, 372 U.S. at 189 (Brennan, J., concurring) (arguing that "an exaction of retribution would not lose that quality because it was undertaken" for regulatory reasons).

124 Doe v. Poritz, 662 A.2d 367, 398 (N.J. 1995).

125 When legislation primarily satisfies societal interests in retributive or deterrent "justice," individual rights are most in jeopardy, and a "punitive" characterization is most warranted.

126 *Poritz*, 662 A.2d at 439–40 (Stein, J., dissenting). Although individual retaliation may not be considered government action for the purpose of the Constitution, notification "exposes [offenders] to society's disapprobation," and the resulting stigma may amount to "state-induced condemnation," which is a significant retributive effect. Bedarf, *supra* note 16, at 925.

127 *See, e.g.*, Young v. Weston, 898 F. Supp. 744, 753 (W.D. Wash. 1995).

128 *Poritz*, 662 A.2d at 438.

the deprivation and the impact on the individual and the society at large. Though far from perfect, this approach to making the prevention/punishment distinction is principled because it "places primary emphasis on the 'punished' individuals"[129] and stresses the constitutional safeguards that should be the basis for judicial judgments about the "punitive" or "regulatory" nature of state sex offender laws.

V. CONCLUSION

In the current climate of fear, hatred, and revenge associated with the release of convicted sex criminals, courts must be especially attentive to legislative enactments that "use[ ] public health and safety rhetoric to justify procedures that are, in essence, punishment and detention."[130] Judges should abandon the prevention/punishment analyses that rely on legislative intent, that routinely apply the *Kennedy* factors, and that assess the "excessiveness" of a sex offender statute's punitive effects in favor of a more principled approach to characterization. Although "[a precise] analytical solution is almost impossible to construct,"[131] this Note suggests that such a principled approach involves assessing the impact of sex offender statutes and deeming the laws "punitive" to the extent that they operate to deprive sex criminals of a legal right in a manner that primarily has retributive or general-deterrent effects.

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129 Foscarinis, *supra* note 55, at 1682.

130 Richards, *supra* note 31, at 386.

131 *Punishment*, *supra* note 2, at 273.

RECENT CASE

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) — SCOPE OF LIABILITY AFTER *Reves v. Ernst & Young* — Second Circuit Holds Liable Only Those Who Operate or Manage the Enterprise; First Circuit Extends Liability to All in Chain of Command — *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994).

The Racketeer Influenced and Corrupt Organizations Act (RICO)[1] is not just for racketeer-influenced and corrupt organizations anymore. Section 1962(c), which makes it unlawful for "any person employed by or associated with any enterprise" to "conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity,"[2] lately has been used against the accountants,[3] attorneys,[4] and affiliates of prohibited establishments, exposing these "deep pockets" to severe statutory penalties.[5] In *Reves v. Ernst & Young*,[6] the Supreme Court recently narrowed the scope of section 1962(c) liability. Asserting that Congress did not intend RICO to be used to penalize parties with minimal involvement in racketeering activities, the Court held that only those who take part in the "operation or management" of an enterprise "conduct or participate . . . in the conduct of such enterprise's affairs" for the purpose of section 1962(c).[7]

Although *Reves* limits enterprise affiliate liability under RICO, the circuits disagree about the nature and extent of that limitation.[8] Last

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[1] 18 U.S.C. §§ 1961–1968 (1988 & Supp. IV 1992).

[2] *Id.* § 1962(c).

[3] *See, e.g.*, Bank of America v. Touche Ross & Co., 782 F.2d 966, 968 (11th Cir. 1986); Gilmore v. Berg, 761 F. Supp. 358, 361 (D.N.J. 1991).

[4] *See, e.g.*, Blake v. Dierdorff, 856 F.2d 1365, 1371–72 (9th Cir. 1988); Odesser v. Continental Bank, 676 F. Supp. 1305, 1308, 1311 (E.D. Pa. 1987).

[5] *See* 18 U.S.C. § 1964 (allowing a person who is injured by a § 1962 violation to recover treble damages and attorney's fees).

[6] 113 S. Ct. 1163 (1993).

[7] *Id.* at 1172–73; *see also* S. REP. NO. 269, 101st Cong., 2d Sess. 2 (1990) ("The use of civil RICO in sexual harassment cases, landlord-tenant disputes, wrongful discharge cases, against unions in labor disputes, and in contract and commercial disputes is not what Congress had in mind when it was debating RICO as a tool to fight organized crime.").

[8] Lower courts have found it difficult to reconcile the narrow interpretation of § 1962(c) liability in *Reves* with Congress's instruction that the statute be "liberally construed to effectuate its remedial purposes." 18 U.S.C. § 1961 note (1988). Because the same § 1962 violation gives rise to both criminal (§ 1963) and civil (§ 1964) liability, courts that wish to interpret § 1962's prohibitions narrowly in civil cases (in order to curb expansion of the RICO statute) yet broadly in criminal cases (in order to effectuate RICO's purposes) are on the horns of a dilemma. *See* David O. Stewart, *RICO's Reach: Supreme Court Identifies Limit to Statute's Application*, A.B.A. J., May 1993, at 48, 50. *But see* Brian T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61, 81 (1994) ("Courts should not hesitate to interpret the same language strictly in some cases and liberally in others.").

HeinOnline -- 108 Harv. L. Rev 1405 1994-1995

year, in *United States v. Viola*,[9] the Second Circuit ruled that *Reves* prohibits the prosecution of low-level employees who are not involved in the management of the enterprise.[10] In *United States v. Oreto*,[11] however, the First Circuit held that under *Reves*, every enterprise employee who is within the "chain of command" — either making management decisions or knowingly implementing them — can be prosecuted under section 1962(c).[12] Although *Oreto* arguably implements legislative intent regarding the use of RICO in criminal cases, the First Circuit's analysis contravenes the structure of section 1962(c) and establishes an unworkable double standard of liability. *Viola*'s strict application of *Reves*'s narrow construction, on the other hand, highlights RICO's structural defects in a manner that, if adopted by other circuits, is likely to precipitate long-awaited congressional clarification of the RICO statute.[13]

Anthony Viola, owner of Blue Chip Coffee company, headed a drug and contraband trafficking operation.[14] Michael Formisano, Viola's maintenance person, was among seventeen Blue Chip affiliates who were indicted in 1991 after the government uncovered the illegal scheme.[15] After the trial judge instructed the jury that "[a] person may participate in the conduct of an enterprise even though he had no part in the management or control of the enterprise and no share in any profits,"[16] Viola, Formisano, and two of the other defendants were convicted under RICO.[17] On appeal, Formisano challenged the district court's jury instruction and argued that under *Reves*, his performance of "light clean-up and maintenance work"[18] for the enterprise did not amount to "operation or management" as required for section 1962(c) liability.[19]

The Court of Appeals for the Second Circuit agreed. Writing for a unanimous panel, Judge Walker held that *Reves* invalidated the Second Circuit's previous rule that "a defendant did not have to operate

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[9] 35 F.3d 37 (2d Cir. 1994).

[10] *See id.* at 41.

[11] 37 F.3d 739 (1st Cir. 1994).

[12] *Id.* at 750.

[13] Advocates of RICO reform have argued that Congress has done little to guide the statute's application. Because of the current controversy in the wake of *Reves*, the legislature may finally reform RICO. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 44 n.71 (1994) ("If the Court interprets a statute in a constricted fashion, Congress may be institutionally offended at the defiling of the statute . . . . That is the lesson of the override of the 1989 Supreme Court decisions in the Civil Rights Act of 1991.").

[14] *See Viola*, 35 F.3d at 39.

[15] *See id.* at 39–40.

[16] *Id.* at 41 (internal quotation marks omitted).

[17] *See id.* at 40.

[18] *Id.* at 39.

[19] *See id.* at 40.

HeinOnline -- 108 Harv. L. Rev 1406 1994-1995

or manage a RICO enterprise" to be liable under section 1962(c).[20] Though the Supreme Court had declined to determine "'how far § 1962 extends down the ladder of operation,'"[21] the circuit court reasoned that under *Reves*, "the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)."[22] The court concluded that Formisano's RICO conviction should be reversed because "the district court's instruction . . . cannot be reconciled with the *Reves* requirement that the defendant have '*some* part in directing the enterprise's affairs.'"[23]

In *Oreto*, the First Circuit characterized the *Reves* requirement differently. Frank Oreto, Sr. was the head of a lucrative loansharking enterprise that made loans to over three hundred borrowers at annual interest rates of 156 to 364%.[24] Frank Oreto, Jr. and Dennis Petrosino, collectors for the enterprise, allegedly used threats and violence to intimidate the borrowers into repayment.[25] Oreto Sr., Oreto Jr., and Petrosino stood trial as joint defendants. The district court instructed the jury that a criminal defendant may be liable under RICO section 1962(c) "even though he is a mere employee having no part in the management or control of the enterprise and no share in the profits";[26] the three defendants were convicted and sentenced to lengthy prison terms. On appeal, Oreto Jr. and Petrosino argued that, in light of *Reves*, the trial court's instruction regarding the scope of section 1962(c) liability constituted reversible error.[27]

The First Circuit disagreed.[28] Writing for a unanimous court, Judge Boudin recognized that *Reves* bars section 1962(c) liability unless the defendant "participate[d] in the operation or management of the enterprise itself."[29] The court argued, however, that "[s]pecial care is required in translating *Reves*' concern with 'horizontal' connections — focusing on the liability of an *outside* adviser — into the 'vertical' question of how far RICO liability may extend *within* the enterprise

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[20] *Id.* at 40. Overruling *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), the court held that the "operation or management" standard is the proper gauge of "whether a defendant had a sufficient connection to the enterprise to warrant imposing liability under § 1962(c)." *Viola*, 35 F.3d at 40.

[21] *Viola*, 35 F.3d at 41 (quoting *Reves*, 113 S. Ct. at 1173 & n.9).

[22] *Id.*

[23] *Id.* (quoting *Reves*, 113 S. Ct. at 1170).

[24] *See Oreto*, 37 F.2d at 743. Twenty percent was the maximum legal rate in the state. *See id.*

[25] *See id.*

[26] *Id.* at 750 (internal quotation marks omitted).

[27] *See id.*

[28] It is unclear from the opinion whether the First Circuit thought that the jury instruction was legally sufficient or whether it found that any irregularities in the charge were harmless error.

[29] *Oreto*, 37 F.3d at 750 (quoting *Reves*, 113 S. Ct. at 1173) (internal quotation marks omitted).

HeinOnline -- 108 Harv. L. Rev 1407 1994-1995

but down the organizational ladder."[30] In order to be deemed a participant in the "operation or management" of the enterprise, the court reasoned, a defendant must be within "the chain of command through which the enterprise's affairs [are] conducted."[31] The court concluded that low-level enterprise employees like Oreto Jr. and Petrosino could be convicted under section 1962(c) because one can operate or manage an enterprise "by knowingly implementing decisions, as well as by making them. . . . We think that Congress intended to reach all who participate in the conduct of [an] enterprise, whether they are generals or foot soldiers."[32]

The *Viola* court took *Reves*'s operation or management standard literally; the *Oreto* court, by contrast, redefined the standard in order to allow RICO prosecution of non-managerial employees who are within the enterprise.[33] One reason for the First Circuit's reluctance to apply *Reves*'s liability limitation strictly may be that the Supreme Court adopted the operation or management standard in a case that raised the specter of expansive *civil* RICO abuse.[34] Yet, because "the same provisions and terms that form the basis of criminal liability [under RICO] also form the basis for civil suits,"[35] *Reves* limits not only a private plaintiff's ability to target "deep-pocket" defendants, but also the government's power to punish low-level enterprise employees. Although the First Circuit's impulse to uphold the convictions of loansharks under RICO is understandable,[36] *Oreto*'s horizontal-vertical ("chain of command") dichotomy is an implausible reading of section 1962(c) and an indeterminate double standard. The best way to confront "the forest of thorny RICO issues that remain" after *Reves*[37] is to await the congressional guidance that may result from widespread *Vi-*

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[30] *Id.* (emphasis added).

[31] *Id.*

[32] *Id.* at 750–51. This analysis is grounded in the Supreme Court's acknowledgement that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants . . . under the direction of upper management." *Reves*, 113 S. Ct. at 1173.

[33] Of course, factual differences may have affected *Reves*'s application in each of the cases. The Second Circuit might not have required decision-making authority had it been reviewing the prosecution of *Oreto*'s thugs. Similarly, the First Circuit might not have found the maintenance person in *Viola* to be within the "chain of command" for § 1962(c) liability.

[34] The plaintiffs in *Reves* sued to extract civil damages from an accounting firm that allegedly participated in the affairs of a fraudulent enterprise. *See Reves*, 113 S. Ct. at 1168.

[35] Camp, *supra* note 8, at 63.

[36] The First Circuit's redefinition of "operation or management" suggests a concern that liability limitations in civil RICO cases will also exculpate guilty criminal defendants. *See* Stewart, *supra* note 8, at 50 (noting that courts "have had a hard time narrowing the gates for civil RICO without doing it for criminal cases as well" (internal quotation marks omitted)). Although the *Oreto* court does not make an explicit criminal-civil distinction, it is plausible that the opinion was fueled by a desire to extend § 1962(c) criminal liability to all undisputed members of an unlawful enterprise.

[37] Camp, *supra* note 8, at 62.

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ola-like application of the "operation and management" standard in criminal cases.

Oreto's solution is problematic, in the first place, because it is not easily derived from RICO's language. Section 1962(c) makes it unlawful for *both* employees and associates of an enterprise to "conduct or participate" in the enterprise's racketeering affairs.[38] To the extent that the Supreme Court has interpreted "conduct or participate" to mean that one has "*some* part in directing the enterprise's affairs,"[39] there is no statutory basis for *Oreto*'s assertion that employees (as vertical links) do not have to be involved in the direction of the enterprise to be liable but that associates (as horizontal consultants) do. Because the statute does not distinguish between the level of involvement required of employees and the level required of associates — the two relationships are seemingly interchangeable — *Oreto*'s horizontal-vertical analysis is a spurious reading of the RICO statute.

Second, because *Oreto* suggests that a different level of conduct is required for those "inside" and those "outside" the chain of command, the decision "creates the spectre of a double standard."[40] Under *Oreto*, though an associate and an employee of an enterprise may perform the same necessary (but non-managerial) tasks, only the employee is liable under section 1962(c). This liability distinction "can prove pernicious,"[41] not only when there is a punishment differential between high-priced consultants and low-level employees, but also when there is a distinction between professional employees and professional affiliates.[42] Moreover, to the extent that *Oreto*'s horizontal-vertical distinction bases liability on one's legal relationship to the enterprise rather than on one's conduct, it disregards notions of equal treatment and fundamental tenets of just criminal punishment.[43]

Finally, *Oreto*'s horizontal-vertical dichotomy is flawed because it may not be possible legitimately to distinguish between "outsiders" and those who work "within" the enterprise. The modern racketeering enterprise is such a structurally complex establishment that merely iden-

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[38] *See* 18 U.S.C. § 1962(c).

[39] *Reves*, 113 S. Ct. at 1170.

[40] Harvey L. Pitt & Dixie L. Johnson, *Freeing Corporate Professional Advisers From the Threat of RICO Liability*, N.Y. L.J., Mar. 15, 1993, at 1, 33.

[41] *Id.* at 33.

[42] *See id.* ("There is little justification in law or policy to treat an auditor or attorney differently merely because he or she performed a professional function from within, rather than from without, the enterprise.").

[43] It is unconstitutional (and unfair) to punish individuals because of their "status." *See, e.g.*, Robinson v. California, 370 U.S. 660, 666–68 (1962). Although RICO has survived constitutional scrutiny, its application often implicates the status doctrine in that liability "demand[s] a . . . global judgment about a defendant's character and loyalties." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 945 (1987). Under *Oreto*'s analysis, for example, the consequences of engaging in similar activities may differ solely because of the actor's legal relationship to the enterprise.

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tifying a recognizable "chain of command" may prove difficult.[44] In *Oreto*, the First Circuit asserted that, although the accountants in *Reves* were "undeniably involved in the enterprise's decisions," they were "outside the chain of command through which the enterprise's affairs were conducted."[45] It is possible, however, to have construed the *Reves* accountants' participation as an integral part of the overall structure of racketeering affairs.[46] Technical outsiders often "knowingly implement[] decisions" of management.[47] Nominal insiders sometimes "neither [make] those decisions nor [carry] them out."[48] Because the "insider" and "outsider" labels are indeterminate, an analysis of section 1962(c) liability that depends upon these constructs can be easily manipulated to achieve the desired outcome.[49]

Rather than attempting to use *Oreto*'s precarious "chain of command" analysis to circumvent *Reves*'s narrow construction of section 1962(c) liability, lower courts deciding criminal RICO cases should follow *Viola* and require that all section 1962(c) defendants have some part in the direction of the enterprise. If severely limited RICO liability becomes the norm in criminal cases, Congress may be forced to address the statutory defect that results in "the inability of the courts to limit the private civil side without also limiting the criminal side."[50] At long last, a legislature whose original aim was to "seek the eradication of organized crime"[51] may seize the opportunity to clarify RICO's intended target.

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[44] *See, e.g.*, United States v. Elliot, 571 F.2d 880, 884 (1978); *see also* MODEL PENAL CODE § 5.03 cmt. 3 (1985) ("Much of the most perplexing litigation . . . has been concerned . . . with the scope to be accorded to a combination, i.e., the singleness or multiplicity of the conspiratorial relationships in a large, complex, and sprawling network of crime.").

[45] *Oreto*, 37 F.3d at 750.

[46] *See Reves*, 113 S. Ct. at 1175–76 (Souter, J., dissenting).

[47] *Oreto*, 37 F.3d at 750.

[48] *Id.*

[49] Judicial discretion arguably could resolve the problem of insiders being held to a different standard of liability than outsiders. However, ad hoc application of vague criminal laws is an unacceptable approach to criminal adjudication. *See* United States v. Reese, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained . . . ."). In its application, "RICO . . . must 'possess the degree of certainty required for criminal laws.'" Yellow Bus Lines, Inc. v. Drivers Local Union 639, 913 F.2d 948, 956 (D.C. Cir. 1990) (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring)).

[50] Camp, *supra* note 8, at 72. RICO's peculiar construction, *see supra* note 8, may make it necessary (if not desirable) to await legislative clarification rather than resorting to new judicial interpretations.

[51] 18 U.S.C. § 1961 note (1988).

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Harvard Law RECORD

America's Oldest Law School Newspaper

35 CENTS

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1Ls Spur Major Changes in WLA Structure

By Victoria Kuohung

The Women's Law Association this week dramatically revamped this year's two-chair system into a governing board of about 20 members, following a proposal initiated by several 1L women.

The board, which oversees WLA's eight new committees, replaces outgoing Co-chairs Tamara Jones '95 and Cindy Chandler '95.

The committees include Academic Affairs, Alumnae and Professional Relations, Social Programming, Outreach, Political Action, RECORD Liaison, 1L Coordinators, and Administrative Coordinators. 1L representatives drawn from each section of the incoming class will also join the board next fall.

According to Elizabeth Brown '96 — one of three chairs of Alumnae and Professional Relations Committee — about 15 to 20 1L women helped plan WLA's new structure. She said those involved in reorganizing WLA were motivated by the alienation they felt from the group this year, and thought a committee system would increase participation in WLA.

"[We] wanted women to feel more comfortable in the school," she said. "[The reorganization] wasn't meant to be an attack on WLA. For 1Ls, WLA didn't seem like it played a part in our lives as much as we wanted it to.

"The main way to change the administrative structure

please see WLA, page 10



Photo Courtesy of The Crimson

University of Pennsylvania Law Professor Lani Guinier gave the keynote address at BLSA's spring conference last Friday.

Guinier: "The First Lesson of Democracy is Dialogue"

By Ketanji O. Brown

The woman whose heavily criticized writings cost her a job as the assistant attorney general for civil rights finally had a chance to speak last Friday. Lani Guinier, professor at the University of Pennsylvania Law School, addressed a crowd of nearly 600 in a Kennedy School Forum as the keynote speaker of BLSA's Eleventh Annual Spring Conference.

"I was explicitly admonished not to speak as a courtesy to the Senate prior to the confirmation hearings," the former nominee said. "While I remained silent, the media and those who opposed my nomination took control over my image. Like the welfare queen, the 'quota queen' was a racial stereotype and an easy headline looking for a person."

Guinier, whose nomination was made and then withdrawn by President Clinton in the spring of 1993, is a graduate of Yale Law School who has worked as special counsel for both the Civil Rights Division of the Justice Department and the NAACP Legal Defense & Education Fund. As a tenured law professor, she has written several articles that challenge the electoral system and advocate restructuring voting rights.

Guinier said her seemingly "radical" ideas about proportional representation in a democracy are actually rooted in a traditional, Madisonian fear of tyranny of the majority. The current system of winner-take-all majority rule is "a zero sum solution," she said, that discourages participation by minority groups and turns government into a self-interested and unaccountable monopoly. The underlying principle, Guinier said, is that "fair play in a multiracial democ-

please see GUINIER, page 11

Wolfson Wins $201 in Suit Against LSC

By April Rockstead

The Law School Council owes Tina Wolfson '94 $201 for books it failed to return to her and $14 in court costs, according to a ruling issued last week by a small claims court magistrate.

Although Wolfson originally filed suit for $500, she used that amount because she wanted to file quickly and it was the maximum she could ask for in her small claims suit, she said. After first revising the claim to a "rough estimate" of $363, Wolfson said she agreed with a final LSC evaluation of a list she presented them in the fall that valued the books at about $280.

"They're still $80 up on me," Wolfson said of the judgment for $201, but she added she was pleased with the outcome for the most part.

"It's a triumph of truth and justice over the forces of evil," she said, adding, "I still have to enforce the judgment, though."

The Law School Council voted this week to investigate appealing the judgment, said John Bates '95, a council representative.

"We didn't find a valid basis for the magistrate's decision," he said.

The council is also concerned that if the outcome is not challenged, it will "set bad precedent," Bates said.

"Too many judgments like this, and we couldn't afford to have a book exchange," he said. "Anyone could walk up and say, 'I gave you $500 worth of books.'"

No decision has been made to discontinue the book sale, Bates said, but the council has discussed having the sale run by a professional used-book company that would buy books from students at the outset and then resell them.

"The Law School Council wouldn't make as much money, nor would students," Bates said. "I think we're going to be looking into that, but it's too soon to say we're going to be looking into it for the fall."

Wolfson said she knew the magistrate was going to rule for her when he asked council representatives whether they had attempted to negotiate with her.

"I would have been amenable to looking for my books, but they blew me off," she said.

The council's argument to the magistrate relied on Adviser notices instructing those who dropped off books for the sale to pick up their books or cede ownership to the council, Wolfson said.

"There weren't any surprises," she said. "Their theory was because they published the notices, they could keep the books."

There was initially some confusion as to whether Enu Mainigi '94, the former LSC president, had been named personally in the suit, but Wolfson said Mainigi's name only appeared because the clerk had originally asked her to list a contact person for the organization.

The magistrate entered judgment against the Law School Council as an entity, even though it is not a corporation, Bates said.

"We have a bank account in the name of the council, so it's a rational assumption we could be sued as an entity," he said.

Wolfson said she welcomed an appeal by the council.

"If they appeal, it goes to a jury," she said. "I'd love to get some jury experience."

Faculty Recommends Tenure for White; HLS Offers Post to '93 Grad

By Greg Stohr

The HLS faculty has voted to extend a tenure offer to Visiting Prof. Lucie White '81, and an associate professorship offer to another woman, Christine Jolls '93, has received final University approval.



Lucie E. White '81

The offer to White, currently a tenured professor at UCLA Law School, awaits final approval by the University's governing board. That process is usually a formality, although on occasion the University has failed to extend offers to candidates approved by school faculty. Sources predicted that White's candidacy would face few if any difficulties in securing board approval. The sources added that White easily received the necessary two-thirds faculty vote.

Dean Clark '72 would not confirm the faculty vote on White, citing his "longstanding rule" not to discuss appointments until they have been formally extended.

White said Wednesday that she had not yet decided whether she would accept an official offer. She said she would decide in the next few days whether to stay at HLS for an additional year, possibly retaining her status as a visiting professor.

"I would certainly enjoy being here another year," she said.

White said she was torn between remaining at her alma mater and returning to Los Angeles, where she said the opportunities in her field of expertise, poverty law, are particularly appealing.

"I feel very loyal to Harvard," she said. "I feel a real institutional loyalty to this school, which is almost surprising.

"If UCLA weren't such a great school, it wouldn't be so hard for me personally," she

please see FACULTY, page 3

Temporary Fiscal Trouble Hits Basketball League

By Ray Kahler and Greg Stohr

A cash-flow snafu threatened to derail the HLS intramural basketball playoffs this week, but student leaders say the administrative difficulties that held up the distribution of funds have now been resolved.



Kirby Lewis '94

"Paperwork" problems delayed the distribution of funds allocated by the Dormitory and Student Affairs Council, according to outgoing DSAC Vice President Heather White '95. Student leaders, including league organizer Kirby Lewis '94, met with Law School officials throughout the week to ensure that the money would be available for playoff games. Late Wednesday, White said the group had resolved the difficulties, and that the games should proceed on schedule.

"All's well in basketball-land, at least for now," she said.

The Law School implemented a new administrative system for distributing DSAC funds this year, and the funds allocated for intramural basketball had not yet reached the league as of the early part of

please see LEAGUE, page 10

Guinier Gives Lecture

continued from ***GUINIER,*** *page 1*

racy" cannot be achieved in a system in which "51 percent of the people always enjoy 100 percent of the power."

"I am a democratic idealist," she said. "I think that politics need not be seen exclusively as 'I win, you lose.' We all can win something. We can learn to take turns."

One of Guinier's major proposals for an alternative to majority rule is cumulative voting, a system in which an individual voter gets a number of votes that he can "cumulate in any combination to express the intensity of his preferences." Under a cumulative voting system, she said, minority groups that are now consistently shut out of majority-rule political contests would have the chance to elect officials who represent their interests.

"We are facing the problems of a democracy in which people of color have a vote but no voice," Guinier said. "No one should be consistently silenced. Everyone should enjoy some access to the forum."

According to Guinier, cumulative voting is a race-neutral system that is not anti-democratic because all voters get the same number of votes and "it emphasizes the importance of voter choice." The system, she said, is also not particularly liberal. It has helped the Republican minority gain seats in local elections throughout the Democrat-dominated South and has been utilized by corporations in 38 states to elect boards of directors while protecting the interests of minority shareholders.

"I have tried to explore decision-making rules that might work in a multiracial society to ensure that majority rule does not become majority tyranny," she said. "Real democracy is strengthened by including those who have been left out. Our gift is to turn silence into insight and to make a chorus of many voices contending."

Guinier gave no direct response to a plea by BLSA President Linda Dunn '94 that she accept the Law School's invitation to become a visiting professor. She did note, however, that she had rejected an invitation extended by Dean Clark '72 two years ago because, given the controversy surrounding Harvard in recent years with regard to its lack of women professors of color, she was "not ready to become a martyr."

Despite probing questions from some skeptical audience members, Guinier defended her proposed solutions, calling them just a few of many possible ways of addressing the dilemma of majority rule in a multicultural society. She emphasized the need for an open dialogue and challenged her critics to join in the discussion.

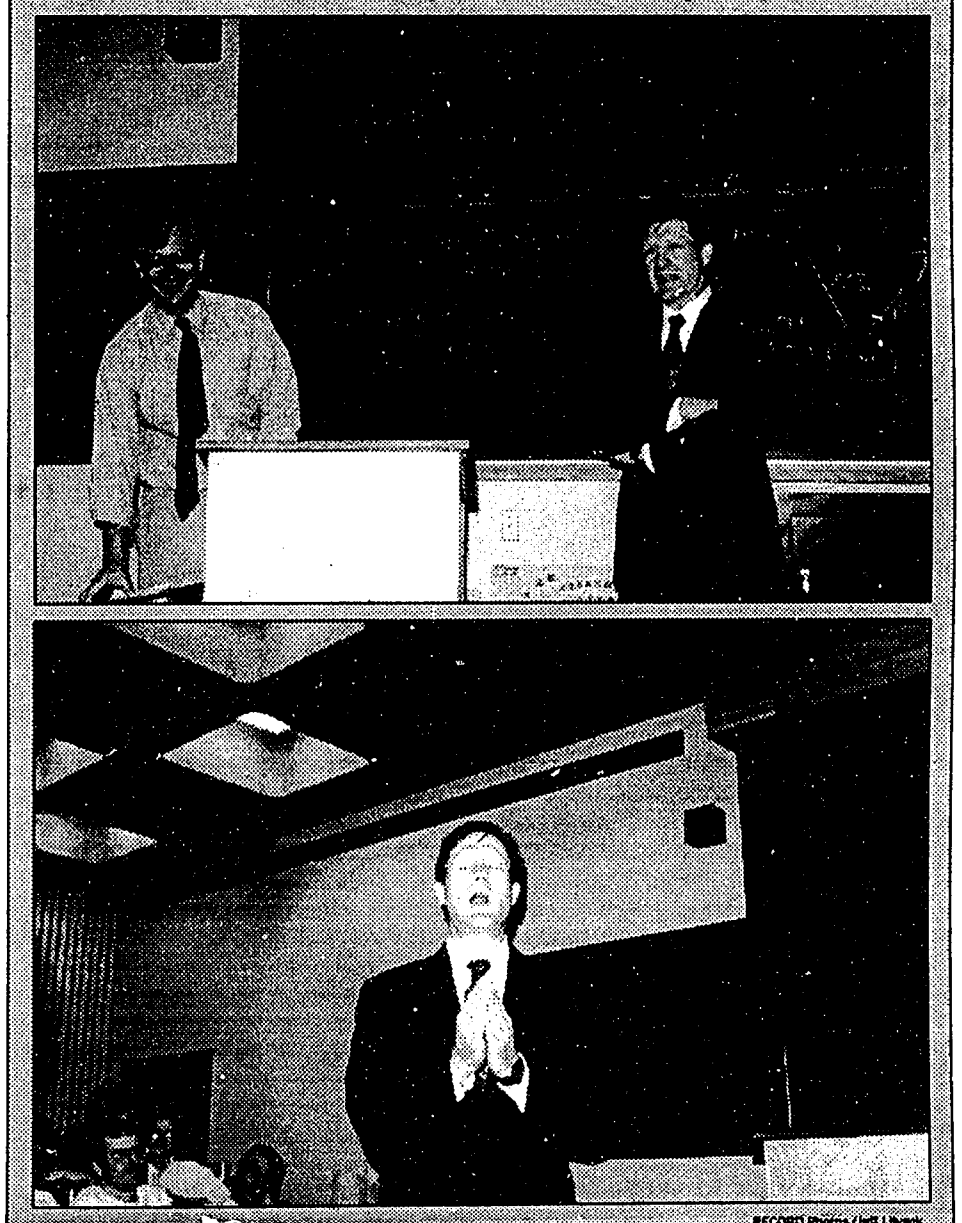
"Let us lead knowing that it is better to be vaguely right than precisely wrong," she said. "The first lesson of democracy is dialogue. We shall speak until all people gain a voice."

Guinier's address, which was also sponsored by the Program on Ethics and the Legal Profession, Reconstruction Magazine and the WEB DuBois Institute, was entitled, "The New Civil Rights: What I Would Have Said."

Guinier was one of several African-American leaders who participated in BLSA's spring conference this year. The discussions focused on the future of African-Americans in education in the wake of the 40-year-old landmark desegregation case *Brown v. Board of Education*. Other prominent speakers and alumni in attendance included the Rev. Dr. Joseph E. Lowery, co-founder of the Southern Christian Leadership Conference; Dr. Franklyn Jenifer, president of Howard University; and Deval Patrick '82, the recently confirmed assistant attorney general for civil rights.

No, This Is Not the School Play...

Dean Clark, Opera Man



RECORD Photos / Jeff Litvack

Dean Clark '72 displayed his creativity and musical talents when he performed in Prof. Kraakman's corporations class last Thursday. Clark's repertoire included a little ditty about proxy rules sung to the tune of "Onward Christian Soldiers."

Pornography Opposed

continued from ***PORN,*** *page 2*

law."

The question-and-answer session that followed the presentations was often boisterous and confrontational. When a student implied that the anti-porn speakers might have done better to engage the other side face-to-face, Giobbe responded angrily, labeling the earlier panel "sexually exploitative," and adding, "People went to get the porn queen's autograph, not to listen.

"I don't think it's debatable," said Giobbe. "I'm not some ACLU groupie. I wouldn't debate with Nazis or Holocaust 'revisionists,' and I'm not going to debate with pornographers."



Catherine Caporusso '95

Later, when a student wondered whether the "chilling effect" that would flow from the MacKinnon/Dworkin ordinance would approximate censorship, Giobbe's answer was harsh and bitter. "Prostitution and pornography are not going to go away in this lifetime," she said. "You're going to have a bazillion pictures to jerk off to, so give us a break."

Catherine Caporusso '95, who helped organize the event for WLA, said she was "very glad Giobbe could be there as a sort of counterweight to Nina Hartley [the anti-censorship porn actress who appeared on the Feb. 18 panel]."

Caporusso acknowledged the panelists "used a lot of Marxist language, which might have spoken to some people." "In any event," she added, "it shows they're not working for Pat Robertson, which they sometimes get accused of."

Although pleased with the event, Caporusso was "upset that we didn't arrive at any common ground. A lot of the students really wanted to see both sides together, and it's hard for me to think that there couldn't be some middle ground."

Caporusso echoed the views of many students by recognizing that "the panelists weren't really there to persuade people," and attributed the speakers' confrontational tone to "ten years of warfare. For someone who's been abused as a prostitute, it's enough to say what happened, and it's understandably very difficult to talk calmly about chilling effects."

Still, alluding to the contentious discussion regarding an example offered by Giobbe, Caporusso admitted to being "frustrated" that "people couldn't even agree on a presumption that it's not consensual when a black woman gets tied up by a white cop who violates her with a gun."

Outgoing WLA co-chair Cindy Chandler '95 agreed that the panel failed to hammer out a compromise solution. "Neither panel was persuasive," she said, "because neither speaks to each other and actually tries to convince the other side."

Chandler said "the speakers were really hostile to sympathetic people asking questions in good faith, which could be enough to turn people away." She said that the two sides "have to start talking to each other" instead of setting up "straw men" for their opponents.

"The anti-porn people say that the opposition denies the fact that women are victimized, which isn't true," according to Chandler, "and the anti-anti-porn people accuse their opponents of not liking men or sex, which is very insulting and alienates them."

Norma Ramos, an attorney and activist scheduled to appear on the panel, canceled because of illness.

The panel was titled "Pornography, Inequality, and Civil Rights: The Racism and Sexism of Pornography."

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"THE HAND OF OPPRESSION":

PLEA BARGAINING PROCESSES AND THE COERCION OF CRIMINAL DEFENDANTS

A thesis presented

by

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CONTENTS

CHAPTER ONE: INTRODUCTION *1*

CHAPTER TWO: "WITHOUT MEANING"
UNDERSTANDING PLEA BARGAINING *7*

CHAPTER THREE: "NOTHING NEGOTIABLE"
IDENTIFYING PRESSURES *24*

CHAPTER FOUR: "HIDDEN AGENDA"
EXAMINING INTENT *51*

CHAPTER FIVE: "FUNDAMENTAL EVIL"
ASSESSING COERCIVENESS *73*

CHAPTER SIX: "INDISCRIMINATE MANIPULATION"
EVALUATING ACCEPTABILITY *92*

CHAPTER SEVEN: CONCLUSION *120*

CASES

Bordenkircher v. Hayes (1978)--pp. 56, 88, 96,97, 98,110

Brady v. United States (1969)--pp. 27, 56, 76, 94, 96, 97

Frost & Frost Trucking Co. v. Railroad Commissioner (1920)--p. 111

Garrity v. New Jersey (1967)--pp. 112, 113

Korematsu v. United States (1944)--pp. 104, 105

Machibroda v. United States (1962)--p. 94

North Carolina v. Alford (1970)--pp. 96, 97

North Carolina v. Pearce (1969)--pp. 55, 97

Roe v. Wade (1973)--p. 105

Santobello v. New York (1971)--pp. 18, 56, 95

State v. Byrd (1973)--pp. 31, 32

United States v. Jackson (1968)--pp. 82, 83, 96

United States v. O'Brien (1968)--p. 52

Von Moltke v. Gilles (1948)--p. 94

"The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."

Sir. Winston Churchill

CHAPTER ONE

INTRODUCTION

We have the right to remain silent. We have the right to an attorney. We have the rights to due process and a speedy trial, and the privileges against forced confession and self-incrimination. Because of the numerous Fourth, Fifth and Sixth Amendment protections granted by the United States Constitution, "American citizens tend to . . . assume that throughout history the law has afforded *increasing* dignity to persons who are accused of crimes."[1] Certainly, over the last two hundred years, "the lash, the rack, and the thumbscrew have given way to *Miranda* warnings, and lynchings and blood feuds have become rare."[2] Nevertheless, our historical progression into the twentieth century has failed to bring criminal defendants significantly greater protection against certain forms of government compulsion than they had during the earliest stages of American history. While the devices may have changed, "the mounting pressure for self-incrimination" remains the same. [3]

Plea bargaining. In 1974, approximately 85 percent of all persons accused of crimes in the United States pled guilty in exchange for some form of concession from the government.[4] By 1991, that number had risen to 95 percent in some areas, and there is reason to believe that by the turn of the century less than three percent of all the arrests that take place annually in this country will result in a jury trial.[5] While some may argue that guilty plea negotiations are an innocuous form of criminal case disposition and are "beneficial to all concerned,"[6] it is possible that defendants are being coerced into relinquishing their constitutional rights as a prerequisite for sentencing consideration. There is a chance that the very institution

which is designed to dispense justice and to protect individual rights could be the most guilty of creating injustices in its effort to make criminal adjudication economical and efficient. This thesis will examine guilty plea negotiations in modern criminal courts in the United States, and will argue that, as they currently operate, plea bargaining processes are both coercive and unacceptable.

It is no easy task to attempt to *understand* modern criminal case disposition, not to mention to *argue* that plea bargaining processes as they are currently being administered are unacceptably coercive. It is important to keep in mind that "given the complexity of the controversy, no single study is likely to address all the issues involved or even be definitive on a sample of issues."[7] Rather, in inquiring, first, whether criminal defendants are being coerced into waiving their constitutional rights, and secondly, whether this coercion is unacceptable, we must

> content [ourselves] with the nonillustrious task of retracing old paths . . .. [Our] joy must be the muted satisfaction of confirming or challenging established truths; revising some beliefs; extending others; and occasionally adding new insights, clarifications, and perspectives. [8]

To this end, **Chapter Two** gives background information, definitions and descriptions of various plea bargaining systems. It briefly traces the origins and history of plea negotiations, and reviews the major arguments put forth by legal theorists on all sides of the general debate over the legitimacy of plea bargaining practices. **Chapter Three** begins to address the issue of coercion more specifically by looking at the ways in which defendants are typically pressured into waiving their Fifth and Sixth Amendment Rights. Through an analysis of judicial participation, prosecutorial discretion and defense attorney manipulation, we are able to assess the type and extent of the pressures that are placed upon the accused. **Chapter Four** examines the interests of the state and the reasons why court officials often feel the

need to pressure defendants into pleading guilty. In this chapter, we are primarily concerned with exploring the intentions of court administrators and with identifying their motivations for engaging in plea bargaining pressures.

Chapters Five and **Six**--the main argument--evaluate the extent to which the state's interests justify the government's use of pressure within the plea bargaining process. Dealing specifically with the issue of coercion, Chapter Five is primarily a theoretical analysis of plea bargains as coercive forces. Chapter Six completes our initial inquiry by assuming that plea bargains are a manifestation of the state's coercive power, and by determining the extent to which the use of coercion is improper under our system of legal rules and our standards for moral justification.

Most of the arguments that are contained within this thesis are the result of both literary research and empirical observation. During the summer of 1991, I interned at the Neighborhood Defender Service of Harlem, a public defender's office which serves the residents of the Harlem community. I gained valuable insight into the workings of the Manhattan criminal justice system by accompanying the attorneys to court, interviewing clients and witnesses, and conducting investigations. It was through this experience that I was first alerted to the problems and complexities of plea bargaining in America's criminal courts.

As will soon become apparent, much of the argument that defendants are being coerced into relinquishing their rights and that this coercion is improper depends upon knowledge of the perspectives of defendants. Any study that purports to look at coercion but which fails to adequately address the viewpoint of the coerced is problematic. Unfortunately, I was unable to speak with any defendants regarding their experiences in the criminal justice system, primarily for legal reasons. I concede that this is an unfortunate, if necessary, omission. Some of the studies of defendants which have been conducted by political scientists in the

field will serve our purposes here, and my personal knowledge of the accused persons with whom I came into contact during my summer experience may lend credibility to the assertions of coerciveness.

With regard to this research project, I interviewed twenty-five judges, prosecutors and defense attorneys who work in the Boston, Miami and Manhattan criminal justice jurisdictions.[9] I chose these areas partly for convenience, but primarily because these cities are presently experiencing the types of legal and ethical difficulties regarding plea bargaining that are occurring in most major metropolitan areas throughout the United States. I was pleasantly surprised at how willing court professionals were to speak with me about their perspectives of the plea bargaining process. Judges managed to fit me into otherwise hectic schedules, and both defense attorneys and prosecutors alike allotted time between court appointments. I was even asked on two separate occasions to accompany judges as they sat on the bench, and as a result, I was able to listen in on bench conference negotiations and to speak privately with the magistrates about their personal views of the issues at hand. When the expected half hour interview expired, several of the court professionals even asked if I had the time to stay longer because, as Miami defense attorney Yale Freeman disclosed, "plea bargaining is something that I think about regularly." Indeed, guilty plea negotiations are such a prevalent part of the modern criminal process that I would be surprised if, in the course of their work day, criminal court professionals thought of anything else.

It is about time that American citizens in general (not only those who work within the justice system) begin to think regularly about criminal case disposition, if for no other reason than as a measure of our society's "commitment to limits in the state's authority over the citizen."[10] It has long been established that a fundamental tenet of democracy is that the government is largely restricted from using its powers to force its citizens to act against their will. In On Liberty, John Stewart Mill asserts

that the concept of liberty itself is inextricably tied to "the nature and limits of the power which can be legitimately exercised by society over the individual."[11] The Fourth, Fifth and Sixth Amendments of the United States Constitution speak specifically to state limitations when dealing with the accused, and it is this very notion of restricting the state's coercive power through the implementation of jury trials that both federalists and anti-federalists alike agreed upon and advocated over two hundred years ago. Patrick Henry, a staunch anti-federalist who is best known for his oratorical aphorism "give me liberty or give me death!", frequently gave speeches about individual protection from government intrusion. "Why do we love this trial by jury?" he once asked rhetorically. And then answered: "it prevents the hand of oppression from cutting you off." [12]

Of course, in modern times, there are those who support liberty and democracy, and yet whose immediate response is indifference to the rights of the accused. As Diana Gordon asserts in The Justice Juggernaut: Fighting Street Crime and Controlling Citizens,

> [m]any will undoubtedly argue that we have little reason to care about the repression of those who have already proved themselves to be bad apples infecting others in the barrel, that they have given up their civil liberties by their own depravations. But a harsh, expansive criminal justice system tars many who are not the criminals we fear. [13]

It is most important, when considering defendant's rights, that we keep in mind that the people who are faced with the coercive pressures of the criminal justice system in terms of plea bargaining *have not yet been convicted of any crime* . It is entirely possible that, as the criminal justice system is currently operating, innocent people are being gripped in the vise of state power when they are involved in plea negotiations. Nevertheless, even if every criminal defendant were guilty, *all*

persons --whether guilty of a crime or not--have the right to certain procedural protections from government abuse. We must refrain from mentally separating the accused from every other citizen when contemplating constitutional rights, for if we insist upon drawing a distinction between those citizens who are accused of wrong doing and those who are not, we leave the power to confer or deny rights entirely in the hands of the very institutions that rights exist to protect us from. Since the government determines who to accuse, it would also necessarily determine who to oppress. Ms. Gordon continues:

> [The] fundamental significance of due process lies in the protection provided to *all of us* , *innocent or guilty* , when our interests do not coincide with those of the majority. In that sense, the rights of the accused are also the rights of students, employees, tenants, and everyone else who is ever in a position to be coerced by the exercise of government power over individuals. [14]

We must commit ourselves, as free citizens of a democratic government, to insisting that the criminal justice system be as fair as possible--for all of our sakes. And fairness necessarily means ridding the system of unnecessary and unacceptable forms of coercion, at almost all cost. "The trouble about fighting for human freedom," H.L. Mencken is quoted as saying, "is that you have to spend much of your life defending [criminals]; for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all."[15] As concerned American citizens, we have the power to stop "the hand of oppression" from stripping our society (via the accused) of its fundamental liberties. This thesis will hopefully engage the interests of those of us who are willing to try.

CHAPTER TWO

"WITHOUT MEANING": *UNDERSTANDING PLEA BARGAINING*

> The average citizen knows very little about the criminal justice system generally, and less about plea bargaining specifically. To most people, plea bargaining is a controversy without much substantive meaning.. . . [It] has come to resemble a candidate running for public office--one public official says it is good while another says it is bad. Who's right?
>
> David A. Jones, Crime Without Punishment

For years, plea bargaining "escaped scrutiny" because it was a process practiced clandestinely--"carried on by professionals in their offices, in hallways, and over the telephone."[1] Over the past half century, however, guilty plea negotiations have emerged from being strictly "off of the record," and now take place frequently in courtrooms nationwide. Although the public still knows relatively little about the intricacies of guilty plea negotiations, a debate over the legitimacy of plea bargaining practices currently rages in legal and academic arenas throughout the United States. Points of contention among scholars range anywhere from the definition of the process to its application to its effects. In order to address the specific concern of plea bargaining processes as coercive forces, we must first understand the debate over the general structure, function, and history of guilty plea negotiations. Before embarking on our quest to determine the extent and acceptability of pressures on criminal defendants, we must look initially at the varying definitions, descriptions, interpretations, denunciations and justifications of plea bargaining processes in America.

Definitions

Generally speaking, *plea bargaining* refers to an agreement between a criminal defendant and the government in which the accused pleads guilty in exchange for some sort of state consideration. Oddly enough, the term plea bargaining itself is controversial. While critics of the process are satisfied that the name adequately captures the "baazar-like atmosphere"[2] of most criminal courtrooms, supporters assert that it "invokes negative images inasmuch as the system is viewed as 'bargaining with criminals.' "[3] In "A Historical Sketch of Plea Bargaining," Joseph B. Sanborn, Jr. claims that "finding a proper title is a task in itself. No name seems totally fitting."[4] At present, the most widely used terms for the process are "guilty plea negotiations" and "plea bargains," both of which are used synonymously in this thesis. It is important to note, however, that "neither term [accurately] captures the extreme cases that are frequently present: the routine deal and the coerced bargain."[5]

The definition of plea bargaining is no less controversial than the terminology. Advocates of the process conceptualize it as a type of *"bargain justice"* in which defendants and prosecutors reach a *mutually acceptable settlement* through negotiations.[6] Critics assert that plea bargaining is a *"non trial mode of procedure"* in which the state places *a substantial burden* on defendants by making it "costly for the accused to claim his constitutional rights."[7] There are, however, certain procedural elements that are widely identified with the plea bargaining process and are said to define it. Both supporters and critics generally agree that in order for there to be a plea bargain, first, an actual guilty plea must be entered and, secondly, the defendant must have reason to expect some form of concession in exchange. In Plea Bargaining: Critical Issues and Common

Practices, William F. McDonald, deputy director of the Institute of Criminal Procedure at Georgetown University, asserts that:

> the test is of whether there has been a "plea bargain" is whether the defendant has reasonable grounds to believe that he or she will receive some perceived benefit from the state by pleading guilty. . .. [I]t underscores the point that it is the perception of the defendant which influences his or her decisions.. . . [O]ur definition is somewhat open ended . . . but this reflects the reality it attempts to define. [8]

That a defendant *perceives* that she will receive some form of concession from the state if she pleads guilty is the primary factor that distinguishes plea bargaining from a merely entering a guilty plea. There are certainly instances in which defendants plead guilty for reasons that have nothing to do with an expected pay-off, but more often than not, a plea of guilty is the result of a reasonable expectation of leniency and is therefore a part of the process of plea bargaining. [9]

We should also note here a few other terms which will be used throughout this study and warrant some explanation. The *criminal justice system* usually labels the mechanism which the government uses to adjudicate criminal cases. For our purposes, however,

> [r]ather than being a system, criminal justice should . . . be referred to as a process that encompasses many individuals who work their wills within the confines of broad, and often ambiguous statutes and bureaucratic regulations.[10]

In other words, the criminal justice system is the process by which judges, prosecutors and defense attorneys exercise their discretionary powers to effectuate criminal case disposition. In this regard, the "system" is actually defined by the actions of the individuals who comprise it.

In that all prosecutors and public defense attorneys and most judges are, in a sense, government officials (who are elected by the people or are appointed by their representatives), these court actors can be and are occasionally referred to throughout this study as *the state* or as *government officials* . In truth, it is through all three professions that the government is able to exercise its will over the lives of defendants. It is important to remember that "the state" as it is used in this paper is not confined to the prosecution, but extends to the other court professionals as well. Likewise, the use of the phrase *court administrators* refers to those actors listed above who are engaged in administering justice and not, as elsewhere, to the agents who oversee the criminal court system in general.

Types of Plea Bargaining Systems

There are four basic types of plea bargaining processes which can be distinguished by two general characteristics: form and substance. The "form" distinction describes the way in which the exchanges happen within a given criminal system, that is, it indicates whether the negotiations are *explicit* or *implicit* . Explicit plea negotiations are characterized by a specified concession from the state. The prosecutor or judge offers the defendant a specific benefit if he agrees to plead guilty, and there is little doubt that the state is seeking to negotiate a settlement. On the other hand, when bargaining is implicit, there is no state sanctioned negotiation, but "defendants learn they will be more severely punished for going to trial."[11] In jurisdictions in which implicit plea bargaining is the norm, judges may establish a pattern of giving more lenient sentences to those defendants who waive their rights, and over time, defendants may develop a reasonable expectation of a benefit for pleading guilty. In courts in which implicit plea bargaining occurs, "defendants are

simply informed that they have a choice: they can either plead guilty and get mercy or go to trial and get justice." [12]

The two other basic types of plea bargaining systems are related to the "substance" of the negotiation and can best be understood in terms of the types of concessions that a defendant is offered. Generally, if a defendant pleads guilty and waives her right to a trial, the state will agree to either 1) change or lower the charges, or 2) recommend to the court that the defendant receive a specific sentence. Accordingly, the two types of plea negotiations which have these results are termed *charge bargaining* and *sentence bargaining* . According to Norman Lefstein, professor of law at the University of North Carolina, "the most common type of plea agreement . . . is a plea to a lesser offense or to one of several charges, with the prosecutor agreeing to waive or dismiss all of the remaining charges. "[13] Usually, in a charge bargaining jurisdiction, prosecutors will give defendants the opportunity to avoid having an extensive criminal record by allowing them to plead to only one charge or to only one count. As will become apparent in Chapter Three, state prosecutors have a good deal of discretion when deciding what to charge defendants with and whether to "bargain" and, as a result, have tremendous leverage in most plea negotiations.

Despite the prevalence of charge bargaining, Professor Milton Heumann, professor of political science at Rutgers University and author of Plea Bargaining: The Experience of Prosecutors, Judges and Defense Attorneys, asserts that "sentence bargaining is the key to superior court plea bargaining."[14] Sentence bargaining varies from system to system, but generally speaking, it involves the state's agreement to recommend to the judge that a defendant receive a lesser sentence than she would have been given otherwise. In most sentence bargaining situations, the state is bound by its agreement once the defendant has waived his trial rights, and the prosecutor must suggest to the court that a defendant receive the

predetermined sentence. While a judge may decide to sentence a defendant to a punishment that is not in line with the prosecutor's recommendation, more often then not, the judge will accept the state's suggestion. According to Professor Heumann, "despite the perfunctory though mandatory warnings [the judge] gives that he is not bound by any recommendation, . . . the judge almost always rubber stamps the agreement."[15]

For the purposes of this thesis, plea bargaining processes can be thought to involve an implicit or explicit exchange of a guilty plea for a lighter sentence or a lesser charge.[16] Despite this apparent limitation on the scope of the bargains that fall within our definition, plea bargaining is by no means a restricted phenomenon. There may be as many different ways to conduct a plea bargain (within the general perimeters of our definition) as there are federal and state criminal justice jurisdictions in the United States. And while it is important that the differences between explicit charge bargaining systems in which judges participate, for example, and implicit sentence bargaining systems with prosecutorial guidelines, are acknowledged, it is not necessary to enumerate the distinctions at this point. It will become clear in Chapters Three and Four that the most effective way of conceptualizing the subtle variations among specific plea bargaining techniques is to present them in tandem with an analysis of their effects on defendants in the plea bargaining process as a whole.

History

The current controversy over plea negotiations manifests itself in the historical accounts of the emergence of the process. As with many debatable policies, plea bargaining's historical origins are often used by modern scholars and theorists as a way of either legitimating or undermining the validity of negotiations

in criminal justice. Historians who support plea bargaining often assert that guilty plea negotiations are as old as the criminal justice system itself. Conversely, those who oppose the practice argue that negotiated guilty pleas are a relatively new phenomenon that did not arise until the latter half of the nineteenth century. As Joseph Sanborn, Jr. asserts in his article "A Historical Sketch of Plea Bargaining,"

> plea bargaining is one of the most emotional and controversial topics in the field of criminal justice. Not only is it defined and documented poorly, its origins also are much disputed. Pro-plea bargainers like to trace plea bargaining to Cain and Able's classic struggle. Anti-plea bargainers cite the post-American Civil War era as the beginning point of plea negotiation. The truth lies somewhere in between. [17]

In attempting to get at "the truth," we must briefly examine the origins of plea bargaining from the vantage points of those who support and those who oppose the practice, and who thus "rival each other for the claim that their positions are traditional."[18] The necessity of a historical overview will become apparent in Chapter Four, for only after examining the origins of the plea bargaining process and the factors that have given rise to negotiations in our modern courts can we even attempt to address the state's interest in pressuring defendants to waive their constitutional rights.

Donald J. Newman, author of the book Conviction: The Determination of Guilt or Innocence Without Trial, has been quoted as commenting, "in all probability, [plea] bargaining has gone on as long as there have been criminal courts.. . . [I]t wouldn't surprise many court observers to learn that Cain had pleaded to a lesser charge after having murdered Able." [19] While most supporters of the plea bargaining process do not assert that its roots extend back to biblical times, some historians claim to have found evidence of forms of plea negotiation as

early as the eleventh century primarily in the principles of variable guilt and punishment bargaining. [20] Trials by ordeal and confessions through torture, which arose during the medieval era, are also argued to have been a historical impetus for the emergence of modern plea processes. When England established jury trials in the early thirteenth century as a way of avoiding the medieval "law of torture," British adjudicators ran into an even greater difficulty: inexperienced jurors who were apt to give the "wrong" verdict in order to spare the life of the accused. "The state devised two remedies" one that controlled and a second that by-passed the jury decision."[21] Thus, according to some legal historians, the modern plea bargain was born.

While several legal historians argue that the processes of fifteenth and sixteenth century England are the historical antecedents of plea bargaining practices, others protest the assertion that pre-revolutionary trial procedures have any bearing on the plea bargaining of today. In his article, "Plea Bargaining and its History," Professor Albert Alschuler, professor of law at the University of Colorado and one of the most noted legal scholars in this field, categorically denies any evidence of plea bargaining practices before the nineteenth century. He points to the very absence of documentation of plea bargaining as possible proof for his claim that guilty plea negotiations did not exist in ancient times. Furthermore, Alschuler cites numerous common law treatises which "indicate that for many centuries Anglo-American courts did not encourage guilty pleas but actively discouraged them." [22] Blackstone's *Commentaries on the Law of England* which were published in the eighteenth century, for example, are quoted as stating that the courts are "very backward in receiving and recording [a guilty plea] . . . and generally advise the prisoner to retract it."[23]

Like Alschuler, Lawrence M. Friedman doubts that plea bargaining's history dates back any further than the nineteenth century. He notes that allusions to the

practice appear in various documents from the 1860s, just prior to the Civil War. Apparently, in the mid-nineteenth century, district attorneys from New York City were encouraging defendants to "plead guilty to lesser offenses," as had some of their counterparts in England. Even in the 1800's, though, there was controversy over emerging plea bargaining processes:

> A letter from the Home Office to a magistrate in [England] complain[s] about the practice. Offenders (the letter said) were . . . pleading guilty to the charge of 'stealing from the person' in order to avoid the charge of robbery, which carried a heavier penalty. "Permission to plead guilty followed by a trifling sentence," said the Home Office sternly, was no deterrent to crime at all. [24]

Despite the continuing debate over the historical time period during which plea bargaining first emerged, there is little dispute concerning the fact that by the early twentieth century, plea bargaining was the dominant form of criminal adjudication in the United States. The crime commissions that were established in the 1920s and 30s were among the first systematized studies of the American criminal justice system, and as such, were the first to adequately document the prevalence of plea bargaining. While the "under the table" aspect of many of the early plea bargains limits the accuracy of the statistics regarding such practices, the reports propounded to establish that by 1920, plea bargains accounted for 88 percent of the convictions in all of New York State--up from 22 percent in 1839 and 70 percent in 1869.[25] Raymond Moley's statistics in Politics and Criminal Prosecution (1929) confirm the predominance of plea bargaining throughout the country in the early twentieth century:

> Guilty pleas in the 1920s accounted for many more convictions than did bench or jury trials: 85 percent in Chicago, 70 percent in Dallas, 86 percent in

> Cleveland, 79 percent in Des Moines . . . 74 percent in California, and 58 percent in Georgia.. . . . [A]nd the percentage kept rising thereafter. [26]

Despite the predominance of guilty plea negotiations, the United States Supreme Court did not speak directly to the issue of plea bargaining until the late 1940s. Professor Alschuler attributes this silence to the fact that, until 1889, the Supreme Court's "jurisdiction in criminal cases was extremely limited." [27] It can be argued that until the "due process revolution" of the 1960s, there was no real need, politically or otherwise, for the Court to rule upon issues regarding the rights of criminal defendants. In a series of cases beginning in 1959, the Court established its support of plea bargaining processes. An examination of the Court's analysis in some of these cases regarding the voluntariness of guilty plea negotiations appears in Chapter Six. At this point, we need only be concerned with the effect of the Court's favorable opinions on the history of negotiated dispositions. As a result of the Supreme Court's willingness to sustain guilty pleas that were entered in accordance with prosecutorial inducement, pressures on local court systems and individual defendants to accept guilty pleas increased. [28] According to Milton Heumann, "court personnel" believed that the Supreme Court was "providing a . . . imprimatur to plea bargaining. No longer did they . . . feel that plea bargaining was a tainted process." [29] In the eyes of those who would later push to use plea bargaining to its fullest extent, the Supreme Court's sanction of plea negotiations brought a process that had been "underground" since the turn of the century out into the open.

The history of plea bargaining spans at least a century. In "Plea Bargaining in Historical Perspective," Lawrence Friedman summarizes the chronicle:

> We can roughly divide the ninety years between 1880 and 1970 into three distinct periods. Until the first years of the twentieth century, there was a mixed system. Many defendants took a chance on trial by jury; others plea bargained; and still others pleaded guilty and claimed their "reward." In the second period, lasting

> until about 1950, the guilty plea was much more dominant. It was plainly worthwhile to plead guilty. Trials were less common.. . . In the most recent period, plea bargaining took center stage. [30]

In the 1990s, guilty plea negotiations are in the spotlight. Some scholars claim that the fact that plea bargaining processes have become dominant is a natural if not evolutionary testament to social progress. Others argue that plea bargains are an aberration which represent a radical break with (as opposed to a continuation of) the past. Needless to say, plea bargaining's history has been used to bolster arguments about the legitimacy of the process in America's modern courts. It is to these arguments that we now must turn.

The Debate

During the "three main periods of intense research on plea bargaining: the 1920s and 30s, the 1950s and 60s, and the 1970s," [31] a number of viewpoints in regards to the validity of negotiated guilty plea processes have developed. At the risk of oversimplifying the complex nature of the plea bargaining controversy, the debate can best be conceptualized as a clash between supporters, abolitionists and reformers. On the one hand, the supporters of plea negotiations are generally content with the way that the process operates--especially in regards to efficiency. On the other hand, the reformers and abolitionists are critical of plea bargaining in practice. The reformers mainly argue that the process by which guilty pleas are being negotiated in various jurisdictions is at present unfair and should be reformed; while the abolitionists assert that there is something inherently unjust about guilty plea negotiations and that plea bargaining should be completely abolished. Before attempting to focus in on the specific issue of coercion in guilty plea dispositions, it is important to first understand the broader context of the attack on plea bargaining

and the fundamental nature of the arguments that have been marshalled to its defense.

The fact that many prosecutors, judges, and defense attorneys are in support of plea bargaining processes is itself one of the strongest arguments in favor of the practice. After interviewing seventy-one members of the criminal justice "work group" in six courts in the state of Connecticut, Professor Milton Heumann concluded that "prosecutors, defense attorneys, and judges share a basic belief that plea bargaining is the appropriate means of disposing of many, if not most, criminal cases." [32] Indeed, even the Supreme Court of the United States has joined the ranks on the side of those who argue that plea bargaining is "not only an essential part of the [criminal] process but a highly desirable one for many reasons."[33] In 1971, the Supreme Court summarized many of the arguments in favor of guilty plea negotiations:

> [Plea bargaining] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. [34]

While the Court may appear to be advancing several arguments (many of which are discussed in Chapter Six) concerning the safety of the community and the rehabilitative advantages of the sentencing that results from a negotiated guilty plea, the single most common consideration that is brought forth by guilty plea supporters is the notion that plea bargaining allows for greater efficiency in the criminal justice system. Quite simply, it is argued that plea bargaining is the only way that the state and federal justice systems can process the unbelievably large number of cases that they are called upon to dispose of. Writing for the Court in *Santobello v. New York*

404 U.S. 261 (1971), Chief Justice Burger comments that "[i]f every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." [35] By negotiating at least some of the cases, the argument goes, the courts can save time and money and can "preserve the meaningfulness of the trail process for those cases in which there is a real basis for disputes."[36] The arguments related to case pressure and efficiency are examined in detail in Chapter Four. At this point, suffice it to say that administrative interests are the battle cry of many (if not all) of the supporters of the plea bargaining process.

There are some scholars who advocate plea bargaining because they believe that negotiation is actually in the interest of justice. According to Malcolm Feeley, author of Court Reform on Trial, often "a charge reduction facilitates the pursuit of substantive justice in the face of legal inflexibility."[37] There are instances, supporters argue, in which mitigating circumstances in a particular case might call for less of a punishment than the law allows. If there was no plea bargaining, there would be no way to address the interests of justice in these cases. Bargaining-as-justice supporters seem to assume that the judges who rule upon cases with mitigating circumstances would somehow be bound to the letter of the law after a trial in a way that they would not be after a guilty plea. Nonetheless, the argument holds that "substantive justice can be facilitated by flexibility in charging and pleading." [38] In the end, supporters assert that plea bargains are best for all concerned--courts save time and money, court personnel save effort and energy, and defendants save themselves from longer prison sentences.

While the "support" side of the plea bargaining debate is comprised mostly of the attorneys, judges, and prosecutors who actually administer justice, the opponents' camp tends to be made up of legal theorists and scholars who criticize both the process and the substance of guilty plea negotiations. Reformers,

including the American Bar Association and the President's Commission on Law Enforcement and the Administration of Justice, seem to "focus on procedural deficiencies of particular bargaining systems: the possibility of broken or misunderstood promises, for example . . ., " [39] while abolitionists like Professor Alschuler argue that plea bargaining negotiations in any form are so prone to prosecutorial abuse that they should be abolished. It is important to review some of the major criticisms that are generally characteristic of the opponents of the plea bargaining process.

The Constitution of the United States guarantees every criminal defendant "the right to a speedy and public trial, by an impartial jury of the State." The most basic objection to plea bargaining processes is that they undermine constitutional protections and threaten the very values on which this country was founded. Many opponents are firm believers in Judge Richard T. Rives's memorable aphorism: "Justice and liberty are not the subjects of bargaining and barter."[40] In "Understanding the Short History of Plea Bargaining," John H. Langbein spells out an argument that is common in modern plea bargaining debates: "Plea bargaining subverts the design of our Constitution.. . . . When an accused is convicted following a jury trial, we punish him twice: once for the crime, and then more severely" for going to trial. [41] In a sense, guilty plea negotiations undermine an individual's Fifth and Sixth Amendment rights and to leave her defenseless against state prosecution. Says Dean Justin Miller of the Southern California Law Review:

> There can be no doubt that [our undercover system of criminal law administration] is dangerous, both to the rights of individuals and to orderly, stable government.. . . The necessity for making a good record may very well result in prosecutors overlooking the rights, privileges and immunities of the poor, ignorant fellow who . . . is induced to

> confess crime and plead guilty through hope of reward or fear of punishment.. . . [42]

Not every critic of the plea bargaining process opposes it on behalf of the defendant's rights. There are those opponents who argue that plea bargaining should be reformed or abolished because it is too lenient on criminals, and allows too many of them "get away like bandits." To the extent that most of the accused persons with whom the state is bargaining are actually guilty to some degree, the argument goes, the state should seek to maximize justice in the form of punishment and to deny criminals the opportunity to get lighter sentences than they deserve. Theorists such as James Q. Wilson advocate the elimination of plea bargaining for serious offenders "to insure that [they] cannot have the charges against them reduced simply to induce a guilty plea." [43] In the long run, these opponents argue, it is the state's duty to punish criminals in accordance with what they deserve, and there is a "societal interest in rational (and appropriately stringent) criminal sentences."[44]

Although the "hawks" of the criminal process--those who view guilty plea negotiations as pandering to criminals--are generally the majority of the opponents of plea bargaining, there are those critics who assert that guilty pleas "fail to provide a full demonstration of guilt and leave the detailed circumstances of the offense undeveloped."[45] According to this argument, the primary danger of plea negotiations as they presently operate is that they might induce *innocent* defendants to plead guilty. Professor Alschuler is well-known for his belief that "the safeguards of the plea negotiation system" against "false conviction" are "inadequate." [46] Similarly, most guilty pleas are negotiated based on the prosecution's evidence, which may not legally be enough to convict a defendant before a jury. Those who oppose guilty pleas on this basis also argue that a trial allows for a more thorough examination of the circumstances surrounding a case and

that considerations often emerge during trial procedures that may not have been heard if a defendant were to plead guilty. One of Milton Heumann's interviewees comments:

> I think the client should have his trial, have a chance of beating the case completely, and be assured that he'll get a full defense.. . . And, in fact, the trial often brings out facts that are mitigating.. . . [T]here may have been circumstances that are involved, or the witness may prove unreliable. That kind of stuff would come out in a trial that might not otherwise. . .. [47]

The critics' assertion that, in the course of plea bargaining, the state and court personnel coerce the defendant into pleading guilty and into waiving the right to trial and the protection against self-incrimination is the argument that this thesis is designed to investigate. It is said that prosecutors, judges and sometimes even defense attorneys use their status as such to manipulate defendants in a variety of ways for a variety of reasons. Procedural fairness seems to mandate that a defendant should be protected from any threats, pressures or extreme inducements to give up his constitutional rights. Indeed, several State Supreme and Federal Appellate courts have held that "no sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him."[48]

The plea bargaining debate continues. As we have seen, there is little agreement between the supporters and the opponents, even over such seemingly innocuous factors as the definition and the history of guilty plea negotiations. Indeed,

> [t]he controversy over plea bargaining is complex. It involves both matters of fact about how plea bargaining actually does or could work and matters of policy regarding whether plea bargaining should

> be allowed to operate and, if so, according to what set of blueprints. [49]

This chapter has been designed to set the stage for the impending analysis of the coercive forces at work in plea negotiations. We must keep in mind that "there is no rank order of importance among the many questions which arise [in an examination of plea bargaining], nor is there any single critical issue that, if settled, would quiet all of the anxieties about" the process.[50] Nevertheless, the remainder of this study attempts to focus in on what many supporters and opponents deem to be the strongest argument against the practice: its coercive nature. [51] Many criminal defendants who have waived their right to trial later assert that they felt forced to do so. Using the definitions, descriptions and history presented in Chapter One as background, the rest of this thesis attempts to determine the validity of these claims.

CHAPTER THREE

"NOTHING NEGOTIABLE": *IDENTIFYING PRESSURES*

> Some prosecutors will tell you that in their jurisdictions no "plea bargaining" goes on, but readily admit that many cases are settled before trial. Some judges . . . flatly deny that any "plea negotiations" go on in their courts. They are right: in those courts, there is nothing *negotiable* about pleading guilty. . ..
>
> William F. McDonald, "From Plea Bargaining to Coercive Justice"

The claim of having been "coerced into accepting a plea bargain," is one of the single most common assertions made by imprisoned defendants. [1] While many such complaints may be dismissed as a part of the natural tendency to blame the system for an unpleasant outcome, we must investigate the manner in which the criminal justice participants of various localities utilize their discretionary powers to pressure defendants into relinquishing their rights. The research, observations and interviews that I have conducted seem to suggest that defendants are sometimes strongly encouraged to waive their rights, if not actually pressured into pleading guilty. Within the criminal justice systems of most states, "very explicit pressures . . . are exerted in some measure by all court personnel." [2]

This chapter is devoted both to exploring the opportunities that exist within the plea bargaining process to actively encourage defendants to relinquish important constitutional protections, and to identifying the types of pressures that are brought to bear upon the accused. It is important to note at the outset that we are concerned here with the potential for abuse, and are in no way implying that all court professionals--even all of the ones who occasionally engage in these activities--are

seeking to pressure pleas. Some of the reasons why those court actors who do endeavor to pressure defendants engage in these activities are discussed in Chapter Four, and whether or not these pressures are coercive and unacceptable is the subject of Chapters Five and Six. At this point, we need only be concerned with

> examin[ing] the practice [of plea bargaining] to determine whether it involves a manipulation of the defendant's choice situation by the court, the prosecutor, or the defense counsel in such a manner that the defendant is constrained to plead guilty . . ..[3]

In attempting to recognize the various ways that pressure manifests itself in plea bargaining, we must keep in mind that no single means of inducement is necessarily common to all criminal jurisdictions. According to Lawrence M. Friedman, "high rates of guilty pleas mean *some* form of threat, force, promise or inducement, though the precise mix of carrot and stick varies from place to place."[4] We may find it helpful to categorize the pressures that we are examining in terms of 1) judicial participation in the plea bargaining process, 2) prosecutorial discretion as it involves the charging decision, and 3) defense attorney manipulation of both the information that is available to defendants and of the advocacy role. While not the only ways of conceptualizing the inducements, all three types of pressures are generally present to different degrees in most criminal systems, and have a significant impact upon a defendant's decision to plead guilty. In The Practice of Law as a Confidence Game , theorist Abraham Blumberg asserts that "all court personnel, including the accused's own lawyer, tend . . . to become agent-mediators who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty."[5] As we will soon discover, the "help" of which Professor Blumberg speaks often takes the form of extreme pressure, force, inducement, implicit promises, and explicit threats. In order to

best evaluate plea bargaining processes, we must be aware of the types of forces that defendants in various criminal justice jurisdictions across the nation encounter every day.

Judicial Participation

On the federal level, judges are prohibited by law from engaging in guilty plea negotiations. Rule #11 of the Federal Rules of Criminal Procedure state definitively that regarding plea negotiations, "the court shall not participate in these discussions." At the state level, however, the rules about judicial participation in plea bargaining are generally less explicit and, though they vary from state to state, generally allow (if not encourage) judges to become actively involved in plea bargaining practices. "In state courts," Miami defense attorney Yale Freeman explained to me, "nearly all of your judges will participate in 'discussions'--not 'plea bargaining,' they hate that word--*'discussions.'* "

Supporters of the plea bargaining process argue that judges and criminal court magistrates at both levels have little (if anything) to do with negotiated guilty pleas. If a judge is involved in plea negotiations, some legal theorists assert, it is only as a neutral overseer of the fairness of the plea bargaining process. In Judicial Process in America, for example, Robert A. Carp argues that

> [u]nder plea bargaining the role of the judges in the criminal justice system is much *smaller* than most of us assume.. . . [B]ecause plea bargaining virtually seals the fate of the defendant *before* trial, the role of the judge is simply to ensure that the proper legal and constitutional procedures have been followed. [6]

While Carp's description may be the prescribed function of the judge, in the modern system, I found that the reality of criminal court interactions at both the

federal and state level is that judges are often involved in discussing, encouraging, coordinating, mediating and forcing negotiated guilty plea settlements.

Sentence Differentials

The primary way that judges from both federal and state systems indirectly yet actively exert pressure upon defendants is through the imposition of sentence differentials. By giving defendants who plead guilty and waive their right to trial substantially lighter sentences than those who put the court through "the inconvenience and necessity of a trial,"[7] judges can pressure the accused into entering a guilty plea. Joe Smith, for example, is a defendant who is accused of armed robbery, which in New York State may carry a statutory penalty of approximately 3 to 6 years. A judge who is interested in promoting a plea bargain lets Smith know in no uncertain terms that if he were to plead guilty, he would receive the minimum penalty. If, however, Smith were to exercise his constitutional right to trial and were to be found guilty, the judge would most certainly give him the maximum sentence that the law allows. In many instances, the difference between the post-trial and the post-plea sentence is so great that the defendant is undoubtedly pressured into waiving his/her right to trial. Says Manhattan defense attorney Diana Maldonado: "It is very difficult to tell defendants 'you can't just exercise your rights. You pay a price.' " In most cases, a judge who consistently gives a more severe sentence to those defendants who are convicted at trial or who grants leniency in punishment to those who plead guilty can effectively pressure the accused into "voluntarily" waiving their rights.

We must keep in mind that the "essential dependence on the *sentence differential* between those who plead guilty and those who are convicted after trial *may pressure [defendants] into pleading guilty* ."[8] The case of Brady v. United States 397 U.S. 742 (1969), a landmark Supreme Court case regarding plea

negotiations, provides one of the most vivid examples of the possible effects of disparate sentences. Defendant Brady was accused of having been involved in a kidnapping and "faced a maximum penalty of death if the verdict of the jury should so recommend."[9] If Brady opted to plead guilty, however, the greatest possible punishment would be life imprisonment. Brady chose to plead guilty and was sentenced to 50 years in prison. He then "sought relief . . . claiming that . . . his plea was induced by representations with respect to reduction of sentence and clemency."[10] Although the Supreme Court rejected Brady's claim in this instance, many legal scholars argue that his plea was "coerced" in the sense that the statute allowing for the imposition of the death penalty "made the risk of death the price of a jury trial."[11]

It is important to note that the sentence differential established in Brady was the result of a state statute, not a judicial pronouncement. The incentive of a sentence reduction if one waives one's rights and the threat of a possible increased sentence if one exercises them can be imposed directly or indirectly by both the legislature and the judiciary. Nonetheless, in most of the cases occurring in lower trial courts, the trial judge generally has the power (within legislative guidelines) to construct sentences in such a manner that the defendant is faced with an offer she will find it difficult to refuse.

Bail

Another way that judges from both the federal and state systems can pressure the accused is through manipulation of the bail decision. While bail procedures vary from state to state, every jurisdiction has some process during which "the magistrate will determine whether or not the accused is to be released on bail, and if so, what the amount of bail is to be."[12] Although it is difficult to provide much concrete evidence of malice in the bail decision, it is plausible (and

even probable in some states) that judges keep certain defendants in jail in order to increase the chance of plea bargaining leverage later on in the criminal process. As one Manhattan attorney (who asked to remain anonymous) asserts:

> Being "in" wears you down. You go into jail and you say, "I'm gonna fight this case." And I tell ya, after months and months of coming back to court being woken up in Rikers at 4:00 AM; getting onto a God-forsaken bus; sitting for hours and hours in courtroom pens; getting five minutes with your lawyer and two minutes with a judge, you lose your commitment.. . . I have seen clients who should go to trial and intend to go to trial just giving up. They decide to take a plea because they just can't take it anymore.

In the city of Miami, for example, bail is generally set or denied within the first twenty-four hours after an arrest. If a defendant cannot make bail, he or she must remain in jail at least until the day of arraignment.[13] What often happens, according to Dade County Public Defender Bennett Brummer, is that a judge will offer a defendant in a misdemeanor case "credit time served" if she will plead guilty at arraignment. In other words, a defendant who has been in jail for seven days will be asked to plead guilty to the charge and in return will be sentenced to seven days "credit time served." Thus, in many cases, a defendant who has been kept in jail by a judge's initial bail determination will get released, *if* she pleads guilty and gives up her right to contest the charges.

The amount of pressure that can be placed upon defendants when their immediate release is one of the terms of the plea agreement is almost inconceivable. "Would *you* plead plead guilty?" Mr. Brummer asked in a recent interview. "Want to go home *today* ? Of course you could stick around a few more months and wait for your trial to come up. You could take the risk that the jury will find you not guilty or that something will get better, but it's hard when they're offering you 'time served.' " It is possible that at least in misdemeanor cases, the judges'

knowledge of the force of "credit time served" factors into the initial bail decision. According to Whitney North Seymour, Jr., former U.S. Attorney and author of the book Why Justice Fails,

> [p]lea bargaining is particularly troublesome when it involves a defendant held in custody before trial because he cannot raise enough money to be released on bail. After he has been in custody for several months, an offer to let him be sentenced to the time he has already been in jail makes a total travesty of the whole process. Who wouldn't plead guilty under these circumstances--whether actually guilty or innocent?[14]

Direct Intimidation

An even more explicit form of judicial pressure often takes place when, instead of pressuring the defendant by manipulating her choice of sentences or her stay in jail, state judges employ direct intimidation techniques. Some judges may use their power and position to create apprehension in the mind of the defendant regarding the possibility and advisability of exercising the right to trial. For reasons that will be made clear momentarily, it is intimidating to defendants when judges become directly involved with trying to negotiate a settlement. According to the Ohio State Supreme Court, " no matter how well motivated the judge may be, " when she gets involved in plea bargaining, "the accused is subjected to a subtle, but powerful influence to plead guilty." [15]

A trial judge who is actively involved in moving the business of the court through plea bargaining is often perceived of (and I believe rightly so) as having a bias for plea bargaining as a means of case disposition. This bias and the judge's efforts to communicate her preferences to the defendant can often result in the defendant's rendering of a guilty plea, at the expense of her right to trial.

Bonfire of the Vanities, Tom Wolfe's fictional attempt to portray the workings of Manhattan's criminal justice system, gives a rather accurate account of the interaction between some New York City judges and defendants regarding plea bargaining negotiations. In one scene, a Bronx criminal court judge attempts to persuade a young defendant who wishes to exercise his right to trial that it would be "in his best interest" were he to plead guilty. After learning of the details of the case from a bench conference with the attorneys, the judge turns to the defendant and says, "Come on up here, son. I want to talk to you.. . .Whaddaya wanna get involved in all these . . . robberies for?"[16] For the next three pages, the trial judge tries every means possible of "reasoning" with the young man. The judge both complements and belittles the defendant, brings up his family, job, and future, and even analogizes his problem to a "cancer" which needs to be caught early before it "spreads through your whole body and takes over your whole life."[17] Undaunted, Wolfe's defendant holds on to his trial right and, conceivably, to his dignity. Needless to say, however, other less courageous defendants faced with similar situations would probably have given in to the powers of judicial persuasion.

In the case of State v. Byrd 298 N.E.2d 603 (1973), for example, a trial judge from Ohio took the defendant into his chambers without the defense attorney, and told him, among other things, that "he considered the offered concessions to be 'a pretty good deal.' "[18] The judge also met with the defendant's mother and sister and "actively enlist[ed] [their] aid in eliciting a guilty plea from Byrd."[19] As a direct result of the inducements, Byrd relinquished his right to trial. One cannot underestimate the realities of pressure from a trial judge who becomes actively involved in attempting to persuade defendants to plead guilty. When the incredible force of judicial power is used to pressure the accused into opting for one form of case disposition over the other, there is little reason to doubt that defendants feel

overwhelmed and are more likely than not to succumb to the judge's powers of suggestion. Defense attorney Whitney Tymas comments:

> One day I was watching a defendant enter a plea while waiting for my case to be called. When the judge asked the perfunctory questions about whether anyone had made any promises or threats . . . she yelled out, "Yes! *You* did! You told me that you would put me in jail for a long time if I didn't plead guilty!" Although the judge looked shocked, I am sure that her claims were true. It happens all of the time.

Direct judicial participation in plea bargaining processes can also lead to the apprehension of judicial vindictiveness if the accused does exercise her right to trial, which in itself can operate as a form of intense pressure. This pressure is not caused by the threat of a larger sentence per se, but by *the fear of an unjust trial* if the accused were to opt to exercise their rights. It has been argued that a judges' participation in a plea bargain might be construed by the defendant as an indication of both the judges' belief in the defendant's guilt, and the judge's predisposition to be less inclined to ensure that the trial process (if it does occur) is fair. The Ohio judge in the Byrd case, for example, not only expressed to the defendant his preference for a negotiated settlement, but also "emphasized that since he would preside at the trial, the sentencing would be subject to his discretion."[20] In deciding the case, "the Ohio State Supreme court found that a judge's active participation in plea negotiations should be deemed to be coercive if this conduct could have led the defendant to believe that he would not receive a fair trial."[21]

At this point, there are those who would argue that, to the extent that obvious vindictiveness renders certain cases overturnable on appeal, judges will most likely refrain from abusing their powers during a trial. While this may be true to some extent, we must keep in mind that the issue, again, is not what a judge actually does during a trial, but whether a defendant might *perceive* the opportunity

for judicial misconduct and opt to plead guilty as a result of this reasonable perception. The problem with direct judicial participation seems to be that

> whenever a trial judge suggests during plea negotiations that a defendant adopt a particular course of action, the judge abandons his role as a neutral arbiter and instead becomes an advocate for a proffered course of action.[22]

When judges appear to advocate plea bargaining, defendants may lose faith in an unbiased trial preceding and feel forced into entering a guilty plea.

Court-packing

According to the New Jersey Law Journal, a new twist to the relatively old method of pressure through direct intimidation is attempted once a week by Warren County Criminal Presiding Judge Michael Imbriani. To put a "dent [in the] county's case backlog," Judge Imbriani schedules weekly calendar calls for the trial cases that appear on his docket.[23] Thus, every Monday morning, *all at the same time* , defendants and their attorneys have to appear before Judge Imbriani -- even though the judge can hear only a fraction of the cases. Says one defense attorney who is quoted in the paper: "This policy is wreaking havoc on every private practice and on the lives of defendants who have jobs or who must travel from Ohio or California or Hawaii, despite the unlikelihood that their case will proceed to trial."[24] If a defendant does not show up, an warrant may be issued for his arrest.

Christina Hollman, a defendant who is accused of cocaine possession before Judge Imbriani and is out on bail, has to drive four hours every week with her mother and three year old daughter in order to make the calendar call. "Yet each week her case is postponed . . . so [they] return home, only to repeat the ordeal the

next Monday." Ms. Hollman apparently makes the trip because she refuses to accept the plea bargains that the prosecutors offer-- "she wants and in fact demands" her right to trial. It goes without saying that other defendants, in a similar situation, may not have the strength to fight to system. Despite Judge Imbriani's claim that the "unusual situation [case backlog] requires a drastic plan of attack," defense attorneys argue that his policy unduly burdens defendants rights. "The weekly ritual, (attorney Pamela Bruase is attributed as saying), is a harassment by a presiding criminal judge trying to move cases by coercing pleas."[25]

Indirect influences

A judge's influence over the plea bargaining process can often also amount to manipulation of the administrative power of the court in order to pressure attorneys to negotiate a deal and to get their clients to plead guilty. Many of the attorneys that I interviewed--both prosecutors and defenders-- asserted that one of the most effective ways that a judge can "force a plea" is by pressuring them to work something out.

"Ms. Prosecutor, why haven't you plead this case out yet? " According to Dade County Florida District Attorney Janet Reno, when the attorneys in her office are faced with questions like this while in the courtroom and on the record, they often feel compelled to work out a plea bargain--even when to do so is not in the best interest of justice. At the state level, trial judges often engage in open altercations with the attorneys who are involved in cases which have not yet been resolved. Throughout the work day, Miami defense attorney H.T. Smith assured me, judges make it very clear to both attorneys that they need to dispose of a lot of cases, and "the only way to get rid of that many cases in that little time is through plea bargaining." In his study of the new court participant's response to the plea

bargaining process , Professor Milton Heumann acknowledges that, for example, judges may "announce from the bench that they will be available during a specific time to *"pre-try"* cases."[26] Some judges use this "pre-trial" opportunity to mediate a settlement and to "encourage counsel to negotiate their cases."[27] As a judge who is quoted by Donald Newman comments:

> In these pre-trial conferences, I always make it clear to defense counsel that if his client goes to trial and is convicted, I will impose a sentence pretty close to the maximum permitted by statute and will not consider probation. Under such conditions, a guilty plea can usually be worked out.[28]

Several of the attorneys with whom I spoke also accused judges in their jurisdictions of pressuring pleas by manipulating the timetable so as to make it difficult for a case to be tried effectively. In most criminal justice systems, if a defendant pleads not guilty at arraignment, the judge schedules a trial date for some point generally three to six months later. When judges wish to force guilty plea negotiations, however, they schedule a trial for a much earlier time, often even within one month. In one Miami attorney's opinion: "Judges move cases through fear. Say you have a significant case. If the judge sets it thirty days after arraignment, there is no way you can be ready. What choice do you have?"

Another type of time pressure is occasionally brought to bear upon the attorneys via their personal lives. In a recent case disposition which I observed in New York City, a Superior Court judge attempted to force a plea by refusing to postpone the scheduled trial so that the defense attorney could take her previously planned vacation trip out of town. After being reminded that the attorney was scheduled to take a vacation and needed a continuance until the following week, the judge stated in open court: "If you want to take your vacation tomorrow, counsellor, get your client to plead guilty today." This is but one example of the

way in which some judges attempt to pressure defendants into giving up their rights to trial by "punishing" their attorneys.

According to William McDonald, jurisdictions which allow the trial judge to play an active role in plea bargaining often do so because a judge is thought to be "the key actor in taming the dragon" of manipulative negotiations.[29] From my observations, however, it can be asserted that trial judges can become more involved in *inciting* the dragon by forcing guilty pleas than in ensuring the fairness of the plea bargaining process. Through extreme sentence differentials, discretionary bail determinations, direct intimidation, and manipulation of the administrative scheduling power, judges have the power to actively pressure defendants into giving up their rights.

Prosecutorial Discretion

Prosecutors, who are very much an integral part of the actual plea negotiation, have a tremendous amount of discretion in deciding how cases are going to be handled. Before we can adequately address how prosecutors actively pressure defendants into pleading guilty during negotiations, we must first understand the nature of prosecutorial discretion in most criminal justice jurisdictions. A writer for the Southern California Law Review briefly summarizes the status, function, and operation of prosecutorial decision making across the country.

> Although officially considered a part of the executive branch of government, in actuality, the district attorney's office is an administrative agency with quasi-judicial and quasi-legislative functions. In performing these functions, the office exercises considerable discretion at many critical stages of criminal prosecution. The most important aspects of this discretion include the power to charge or to refrain from charging an individual with a crime, to reduce charges to a lesser offense prior to trial, to not charge prior offenses, to dismiss or request

> court dismissal after trial commences, or to recommend a lighter sentence. [30]

According to guidelines that Miami District Attorney Janet Reno distributes to the attorneys in her office, "the first objective of a prosecutor should be to make sure that innocent people do not get charged. The second objective should be to convict the guilty according to due process." Certainly, similar ethical standards are posited by chief prosecutors in every criminal justice system in the United States. Nevertheless, as we shall see in a moment, the tremendous amount of discretionary power that is given to individual prosecutors in determining the perimeters of charging and in developing the state's case sometimes leads prosecuting attorneys to act in ways that are fundamentally inconsistent with the a aformentioned prosecutorial obligations.

Because of the nature of their discretionary power, prosecutors can pressure guilty pleas in primarily two different ways: overcharging and bluffing. We must keep in mind that the district attorney's office--the embodiment of "The People" in criminal cases--has the sole responsibility for establishing guidelines regarding both the decision to charge and the decision to negotiate. When asked whether or not prosecutors sometimes use their discretionary powers to pressure defendants into accepting their plea offer, a vast majority of the judges and defense attorneys with whom I spoke answered unequivocally in the affirmative. Says Bennett Brummer, the Public Defender for Dade County, "Of course. Certainly. Absolutely. Yes . . . I *know* that they do."

Overcharging

After the initial discretionary decision that prosecutors make--deciding whether or not to prosecute a case--the decision most prosecutors confront is the

determination of what to charge a defendant with. In that it establishes the tone and terms of the treatment of the defendant in every subsequent stage of the criminal process, the charge is undoubtedly one of the single most important stages of the criminal process, especially in regard to plea bargaining. Given that a district attorney is generally not an eyewitness to the crimes she prosecutes and is most likely to be unaware of the true "facts" of the case, she is supposed to base her accusation upon the testimony of police and witnesses in accordance with standards of probable cause. It is argued that prosecutors often "overcharge"--file more or higher charges than are sustainable by the evidence-- for the purposes of plea bargaining. As one Manhattan defense attorney quipped in a recent interview, "it's like a department store sale. Prosecutors mark up the charges so that they can eventually cut them down and appear to be offering a deal."

There are two general types of "overcharging" that have been identified by legal scholars in plea bargaining literature. "Vertical overcharging" occurs when prosecutors "'charge a single offense at a higher level than the circumstances of the case seem to warrant.' "[31] The classic example of this type of pressure is the "prosecutor who may have a policy of charging every homicide as a first degree murder even if he initially thinks a particular defendant is guilty of [some other charge] because of the circumstances."[32] What is apparently the problem with vertical overcharging, according to some criminal justice participants, is that "prosecutors set their evidentiary threshold at far too low a level when drafting their initial charges,"[33] and use their discretionary powers to claim that the defendant has done something which the evidence does not completely support. The fear that this higher charge instills in innocent individuals (or even persons guilty of a substantially lesser crime) often causes defendants to jump at the opportunity to receive a reduced charge--even one that is still substantially higher than the evidence warrants.

One Manhattan public defender recounted the story of a defendant who had killed someone in self-defense, but was charged with first degree murder. "We took the plea because the risk was too great," she said sadly. "If the D.A. had charged it as it should have been, we wouldn't have had that murder charge and fifteen-to-life hanging over our heads." At a later point she added, "my client would have felt freer to exercise his right to trial." In a sense, vertical overcharging, coupled with the prosecutor's discretion to lower the charge, poses a threat similar to that of judicial and legislative sentence differentials. If a defendant exercises his right to trial, he could be facing a higher charge and substantially more time than he justly deserves.

Members of various district attorneys offices often argue that it is not possible to effectively mark up the charges in the manner that is suggested by "vertical overcharging" claims because a charge which has been completely fabricated will be impossible to sustain before a grand jury. Says Fredrick Watts, of the Manhattan District Attorney's office: "The grand jury is the body that reviews the evidence and the prosecutor's suggested charges, and which determines the indictment. The *grand jury* sets the indictment, not us." Prosecuting attorney Armond Durastanti pointed out that, in addition, "judges review the grand jury minutes for errors" in evidentiary standards, defendants will hardly ever be faced with more serious charges than they deserve. These assertions, while correct in principle, are out of touch with the reality of plea bargaining processes. In the first place, the grand jury and the judges seem to be less of a deterrent to prosecutorial; abuse that it is apparently supposed. In speaking with one judge, I discovered that when reviewing the minutes, "judges tend to give The People the benefit of the doubt."

Secondly, a prosecutor's discretionary power to lower the charges at any point will almost always create enough of a charge differential that a defendant will

be forced to give up the trial right sometimes even before the case begins the trial stages. A prosecutor has every incentive to mark up the charges initially because, as a result, in the vast majority of cases, she will never even have to go trial. Third, and most importantly, as long as a defendant *perceives* that the prosecution might try to sustain the greater charge, an element of pressure exists whether the prosecution can carry effectively out its threat or not. Once again, it is the perception of the defendant which is central to determining which state actions are unduly burdensome and how so. Without adequate assistance from a competent defense attorney (a factor which will be addressed later in this chapter) defendants may not be aware of the inflated and unsubstantiated nature of the original charges, and may feel forced into accepting the proposed alternatives.

The other type of "overcharging" of which prosecutors are frequently accused is "horizontal overcharging," and is defined as an instance in which a prosecutor "files numerous accusations against a single defendant."[34] If a defendant were guilty of writing bad checks, for example, a prosecutor may decide to charge him with "not only with one, but with three separate offenses: forgery, uttering, and obtaining property by false pretenses."[35] In most cases, the prosecutor has little intention of attempting to hold the defendant responsible for each offense, but uses the numerous charges as numerical leverage in plea negotiations. Many defense attorneys assert that horizontal overcharging

> gives the prosecutor a tactical advantage in plea negotiations and at trial. It is "dishonest" in that the prosecutor is not really interested in securing convictions to all charges and when he dismisses some charges in exchange for a plea he is giving the defendant a bogus consideration, "the sleeves from his vest."[36]

Horizontal overcharging occurs in like manner when prosecutors file separate indictments for each count of a crime. If our defendant is accused of writing five bad checks, he may be faced with three different charges for *each* of the *five* counts. This deception is considered to be "corrupt" by some defense attorneys in the sense that the considerations upon which the defendants base their decision have been intentionally manipulated by a prosecutor as a method of increasing the perceived seriousness of the case and, thus, of pressuring defendants to "voluntarily" surrender their rights. As attorney Joel Hirschhorn comments:

> I have one case of *75* counts of mail fraud; another of *103* counts of money laundering. What's the difference? The judge is not going to give them more then twenty-five years no matter how many charges are stacked. But it scares the hell out of the client.

Several theorists, William McDonald included, have argued that "the 'overcharging' of prosecutors does not involve unethical or unlawful conduct."[37] It is true that in most cases overcharging does not amount to "accusing the defendant of a crime of which he is *clearly innocent* in order to induce him to plead guilty to a 'proper' crime."[38] What does seem to happen, though, is that prosecutors inflate the "proper" charge. Professor Heumann notes that

> [the] piling on of charges, when combined with mandatory five year minimum sentences for offenses such as sale of heroin, and robbery with violence, and with repeated offender statutes, which double exposure for the second offender in particular crimes, provide ample years for the state's attorney to "play with" in negotiations. [39]

Miami private attorney Yale Freeman gives an example of one of his actual cases to illustrate this point. A seventeen year old, African American youth was walking down the street in Greater Miami. In response to racial slurs which were being

shouted at him from a gang of boys, he picked up a rock and through it. The rock apparently broke a window, a violation that Mr. Freeman believes should have been charged as "pure criminal mischief." He asks, "Now, what's it get charged as? *Throwing a deadly missile into an occupied building*. [That charge] takes it from a misdemeanor punishable by thirty days in jail tops, to a felony punishable by five years."

In the language of prosecutorial overcharging, a delinquent's "joyride," for example, becomes "grand larceny" punishable by years in prison. "I don't doubt that some overcharging occurs," admitted Paul Shechtman, Chief Counsel to the Manhattan District attorney, in a recent interview. "I just don't know if it's intentional." One anonymous prosecutor seemed to suggest that it is.

> Some prosecutors feel we should start out realistically, but my feeling is that for a defense attorney to get his guy to plead, you've gotta give him something.. . . You just file high and then deal down a notch to what it should have been all along and everybody's happy. [40]

The question, however, is whether the defendant--the individual who's life is affected and who's choice is manipulated--is "happy." He no doubt feels compelled to give up his right to contest the state's accusations, and accepts a plea bargain on the basis of benefits which, in actuality, do not exist. In that "charges can be dropped without reducing the realistic range of years within which the defendant will be sentenced,"[41] defendants may sometimes plead guilty to a prosecutor's gamut of charges because they perceive a benefit which they ultimately do not receive. Says Manhattan Supreme Court Justice Richard Andrias: "Often the legislative penalties and D.A.'s stance are really Draconian. There is overcharging, so although the defendant may appear to be getting a 'bargain,' it is really no less than what he'd receive anyway."

Bluffing

When state attorneys seek to a force a guilty plea by hiding the weaknesses of the state's case and offering a deal, they are generally accused of "bluffing." The point of their endeavors is often to make a defendant and her attorney believe that the state has a strong case against the accused and, therefore, that it is in the defendant's best interest to plead guilty and to accept the prosecution's terms of the bargain. Comparing her experiences in both New York City and Boston, public defender Diana Maldonado asserts that bluffing occurs far more frequently in New York and accounts for some of the reason why "defendants here just feel cattled through the system." In Manhattan, "the decision to take a plea happens very quickly and often with little knowledge of the case . . . It feels worse to take make a decision with less knowledge." While defendants and their attorneys regard bluffing as fundamentally unfair, prosecutors seem to regard bluffing as an integral part of the "gamesmanship" which accompanies plea bargaining in most jurisdictions.[42] It is possible, however, the deliberate withholding of information and the resulting misinterpretation of the state's ability to secure a conviction is tantamount to "deceptive sales practices" which force the accused into giving up their rights.[43]

It must be kept in mind that "central to bluffing is the notion of a weak case," and that "[t]he majority of prosecutors are willing to do a certain amount of bluffing . . . *when the state's case has fallen apart.* "[44] As a result, some defense attorneys argue that bluffing about the evidence has the potential to lead to the conviction of innocent defendants. In a case in which her client was charged with child abuse, Boston attorney Abby Smith did a considerable amount of investigation and found the charge to be unsupportable, even though the prosecutor claimed otherwise. After months of prosecutorial "bluffing" about the case, the

assistant district attorney begin to offer to negotiate as a result of the weakness of the evidence. Instead of dismissing the case entirely, the prosecutor offered Ms. Smith's client two years non-reporting probation in exchange for a guilty plea. Says attorney Smith:

> I hit the ceiling.. . .This, to me, was an example of a coercive offer. I said to the D.A., "You've put my client in an untenable position. The mother is a single parent with two children. You offer her the opportunity to get rid of the possibility of spending five years in prison and of losing her children for something that she says she didn't do. How is a person supposed to make that decision?! As a defendant?! As a mother?! As an innocent person?! As *what* ? If you think that she did it, then it's a serious crime, so prosecute. But if you have your doubts, don't offer two years non reporting probation. Dismiss the case.

Eventually, all charges were dropped.

In his attempts to show that prosecutorial bluffing does not "undermine . . . legal innocence," William McDonald argues that, although many prosecutors engage in bluffing when their cases fall apart, there is an ethical line which they draw for themselves in most cases. The prosecutors in his study believed that "a factually innocent defendant should [not] be allowed to slip through the . . . system," and they

> did not regard bluffing in . . . cases as wrong provided that the bluff did not include withholding exculpatory evidence and (for many of them) provided that it did not require them to cross an imaginary line between legitimate puffery, posturing and gamesmanship, on the one hand; and outright lying, on the other. [45]

I would argue, however, that in terms of excessive inducements, the line between "gamesmanship" and "lying" is not as clear for the defendant as it apparently is for

the prosecution. The defendant bases her decision to plead guilty partially upon the strength of the state's case, and upon whether her attorney believes that she could win at trial. To the extent that prosecutors generally use puffery in cases in which, for them, the trial outcome is "uncertain" and "unfavorable," then prosecutorial bluffing is utilized to purposely misconstrue the state's ability to convict and, thereby, to pressure the accused into pleading guilty.

In speaking of prosecutorial discretion, I do not mean to imply that prosecutors always intentionally use their discretionary powers in a malicious manner, or to conjure up

> the image of prosecutors out to get something from every defendant; exhibiting a remarkable disregard for false conviction; magnifying pressures to plead guilty in cases where the evidence is most dubious; and lying, bribing and filing fraudulent returns in order to convict defendants in cases that are effectively unconvictable. [46]

The attorneys and judges with whom I spoke generally denied that the situation is as extreme as this assessment, although they admitted that some of these activities do occur with alarming frequency in many criminal court jurisdictions. What needs to be remembered is that the prosecutor wields a tremendous amount of power and has every opportunity to manipulate the terms of plea bargaining agreements in order to pressure defendants.

Defense Attorney Manipulation

For many people, the mere possibility that an accused person's own lawyer participates in plea bargain pressures is difficult to accept. In Chapter Four, we will discuss some of the motivations for defense attorney pressures but, before we can

do so, we must first investigate some of the ways that an advocate can encourage (to the point of pressure) defendants into accepting guilty pleas.

According to Professor Abraham Blumberg, "the defense attorney [actually] acts as a double agent, to get the defendant to plead guilty."[47] While none of the defense attorneys with whom I spoke admitted to having "rolled a client," several told stories of colleagues who "sell their clients down the river" by presenting the options in such a way that defendants believe that they have no choice but to plead guilty. From my observations and interviews, I noted at least three categories of ways that defense attorneys pressure their clients, each of which involves a degree of manipulation. In order to best understand the defense attorney's role as a "double agent," we need to examine each of these types of pressure in turn.

Situation Manipulation

There are many defense attorneys who attempt to manipulate their situation as a personal advisor to defendants. The access that defense attorneys have to defendants who are contemplating their criminal case disposition options allows for the unique opportunity to "lean" on the client. Instead of merely explaining the advantages and disadvantages of each course of action, and making sure that the decision to plead guilty or to opt for trial remains the defendant's, some attorneys yell or belittle or berate their clients into pleading guilty. Says one Boston attorney,

> I go a long way to convince my client to plead guilty. I'll yell. I'll fight. I'll double team him by bringing in family and colleagues . . . I don't think that leaning on a client undermines his autonomy. A client who is locked up in jail for ten years out of a foolish, destructive desire to go to trial is not going to feel so autonomous.

A recently released film gives an accurate portrayal of the type of direct pressure scene that I observed while working in Manhattan this summer. A

defendant who was charged with armed robbery and aggravated assault and who was facing up to ten years in prison was offered a plea bargain of three to six. During a private conference, his public defense attorney broke the news of the prosecutor's offer and within moments expected the defendant's decision. As the defendant grappled with what in many ways must have been one of the most difficult decisions of his life--contest the state's accusations or plead guilty and receive a greatly reduced sentence-- his attorney jumped up abruptly and said in a forcefully condescending tone of voice (something to the effect of): "Look, let me put it to you this way. You have a kid. If you take the plea, you can walk your kid to elementary school. If you don't, you *may* be able to see him graduate from college. Think about it. " While the attorney in this story may have been doing his job--laying out the options--his manner of speaking and tone of voice gave the impression that he was much more concerned with getting the defendant to take the plea then with carefully explaining each course of action. There is reason to believe that, especially in cases with indigent defendants who are being represented by over worked public attorneys, this type of pressure occurs all of the time.

An interesting turnabout can occur if, instead of directly pressuring or threatening the defendant, the defense attorney manipulates his situation by doing nothing for or saying nothing to his client. From the bench where I was invited to sit with a Manhattan judge, I witnessed a defendant who was pro se petitioning for a new attorney. He argued that his lawyer would not return his phone calls or talk to him about his options. Though the public defender denied the allegations, the defendant complained bitterly, and asserted that he wanted a new lawyer "because this man won't talk to me." He said "I don't want to plead guilty" but "I don't want this man to be my attorney in a trial." Compounding the already intense pressures to enter a guilty plea, his motion was denied.

Information Manipulation

Perhaps even more frequent is a type of pressure which results from the manipulation of the information that is available to the accused. A defense attorney who is supposed to be counselling her client as to the extent of the charges, the estimated sentence, the relative strength of the state's case, and the chances of acquittal may decide not to tell a defendant facts about his case which would increase the prospect that he may opt to go to trial. An attorney from Utah, with whom I spoke by telephone, noted that one of the most manipulative ways that attorneys in his office pressure clients to plead guilty is by omitting information about the prosecution's tendency to overcharge and the particular judges' trends in sentencing. A defendant who is charged with five counts of a crime, for example, and is offered the option to plead guilty to two of them has nothing to lose by going to trial if the judge would impose roughly the same sentence in either case. "A defender might tell his client that at trial he'd receive three years for each indictment," the attorney explained. "What he *won't* say is that the judge will most likely make the sentences run *concurrently*," and that the sentence would be from three to six years regardless of the form of case disposition.

Defense attorneys can also manipulate the information that defendants receive by giving skewed insight into the relative strength of the state's case and the prospect of the defendant's chances of winning at trial. According to Professor Abraham Blumberg,

> lawyers frequently claim to have inside knowledge in connection with information in the hands of the district attorneys, police or probation officials or to have access to these functionaries. Factually, they often do, and need only to exaggerate the nature of their relationships [with other court officials] them to obtain the desired effective impression upon the client. [48]

If an attorney asserts that the state's evidence is very strong or that the defense has been able to marshall very little evidence of its own, a defendant can be "persuaded" to plead guilty and to hope for leniency. If the defense attorney applies information manipulation, the accused usually believes that he has no other choice.

System Manipulation

Finally, defense attorneys can find ways to manipulate the court system for plea bargaining purposes. By asking judges for a series of adjournments on a single case, for example, an attorney can increase the length of a defendant's pre-trial detention--a tactic which can effectively wear a defendant down and stifle his desire to fight the system. In a recent interview, acting Manhattan Supreme Court Justice Patricia Williams recounted the story of an attorney who kept asking her for adjournments and delaying the case. His client, who was out on bail, had to take a day off from work and come into the court every time his case was recalled, which was at least twice a month. After four months, the defendant came to court ready to enter a guilty plea because, as much as he wanted to go to trial, his attorney claimed not to be ready, and he "couldn't afford to keep losing jobs." In what she considered to be an act of justice, Justice Williams dismissed the case.

Unfortunately, attorneys who manipulate the situation, or the information, or the court system are not as easy to dismiss, or to disregard. "In his role as a double agent, the criminal lawyer performs an extremely vital and delicate mission . . ..There is no other person more strategically located . . . [or] more ideally suited"[49] to pressuring defendants into accepting guilty pleas. There are some attorneys who make it their business to search for ways to settle every case, and who pressure every client into incriminating himself. In The Best Defense, Professor Alan Dershowitz comments: "They may look like defense attorneys.

They may talk like defense attorneys. They may even have defendants as clients. But they are really prosecutors at heart." [50]

Because of considerations which we will explore in the next chapter, many judges, prosecutors and defense attorneys would much rather plea bargain than go to trial, and several of them make their preferences very clear to the accused. These court participants, who themselves comprise the criminal justice system, have what is arguably unlimited access to both the means of inducing guilty pleas and the individuals who are faced with the decision as to whether or not to waive their rights. Thus, through sentence differentials, bail considerations, direct intimidation, court packing, overcharging, bluffing and manipulation, court administrators work their wills and exert their influences over defendants' decisions. Says Miami attorney Joel Hirschhorn: "The system is clearly susceptible to abuse, and there is no question that abuses have the tendency to pressure a significant number of people." We will examine the possible reasons for these pressures in Chapter Four.

CHAPTER FOUR

"HIDDEN AGENDA": *EXAMINING INTENT*

> Some observers have described the criminal justice system as a sticky legal and quasi-legal spider web . . .. Decisions made by the system in matters dealing with the accused are likely to be weighted down by [a] hidden agenda, which seeks to resolve a case in a decision of guilt for the defendant.
>
> T. Moran, Discretion and the Criminal Justice Process

If it can be argued that court officials in various jurisdictions sometimes act in a manner that pressures criminal defendants, and that the types of pressures that were identified in the previous chapter actually do occur, then it becomes necessary to examine the motivations ("hidden agendas," if you will) which arguably underlie these attempts to get the accused to waive their constitutional rights. Some legal theorists assert that the court actors who actively engage in plea bargaining processes "make decisions that please them personally," and purposely pressure defendants in order to serve their own vested interests.[1] Others argue that much of the pressure in the plea bargaining process "represents rational attempts to achieve worthy goals."[2] This chapter seeks to explore and to evaluate some of the various reasons that state and court officials often go to great lengths to pressure the accused into giving up their constitutional rights within the context of plea bargaining. It is important to note that the focus here is not necessarily on what accounts for plea bargaining in general, but what accounts for plea bargaining *pressures* (even though some of these factors may be one in the same). Our final analysis is inextricably linked to an examination not only of the means by which

guilty pleas are generally obtained, but also of the ends for which pressure is generally applied. We must endeavor to identify "the motivation of individual decision makers exercising delegated authority" both as support for the assertion that the process is pressure-laden (Chapter Two), and as a premise for the argument that the pressures themselves are unacceptably coercive (Chapters Five and Six).[3]

Before launching into a full-scale investigation of the major reasons for pressuring defendants into pleading guilty (which are subsequently analyzed in terms of systemic motivations, external motivations, and individual motivations), we must first briefly address two obvious difficulties of the task before us. One is best summarized by Chief Justice Earl Warren who comments in United States v. O'Brien 391 U.S. 367 (1968) that "inquiries into . . . motives or purposes are a hazardous matter," and that "the stakes are sufficiently high for us to eschew guesswork."[4] We may never know exactly why some judges make threats, some prosecutors overcharge and bluff about the strength of their cases, and some defense attorneys manipulate the information that defendants base their plea bargaining decisions upon. Nevertheless, the type of "guesswork" that we are engaged in in this chapter is supported by concrete data, factual observations, and personal interviews--all of which suggest that those professionals who are pressuring the accused are doing so for specific reasons. Even though we may not be able to identify with any certainty the intentions of various members of the criminal justice community, we can attempt to derive motivation by looking at the goals which are achieved and the advantages which are gained from the state's use of its coercive power.

Likewise, it is important to note that, however difficult assessing motivations may be, identifying motive is indeed much of the business of criminal law and much of the function of judicial courts. When, for example, "a defendant alleges that executive, administrative, or judicial action has penalized him for

asserting a constitutional right," the court before which his claim is made is called upon to "engage in a traditional fact finding inquiry designed to ascertain the decision maker's intent." [5] In much the same way, it is possible to inquire about and to identify the motivations of court administrators who are involved in plea bargaining processes when *their* actions appear to burden the exercise of the constitutional rights of the accused.

It is clear that, in this instance, an examination of the motivations of court actors in pressuring defendants presumes intent. In other words, by asserting that there are identifiable reasons for the pressures, this thesis assumes that those who are exerting pressure are purposely doing so in order to achieve the desired result. The second difficulty that needs to be addressed, then, is the assertion that the pressure which defendants feel should not be interpreted as an intentionally imposed means to a desired end, but rather as an unfortunate result of a mutually advantageous plea agreement. Several of the judges with whom I spoke argued, for example, that they do not *intend* to place pressure upon defendants at all. The differential sentences are imposed because defendants who plead guilty show "an indication of remorse," and not because the judges wish to achieve some ultimate goal by coercing pleas. The significance of this argument at this juncture lies in its narrowly construed definition of the term "intent." We must keep in mind that, as Federal law clerk Howard Abrams argues:

> "Intent" denotes two distinct concepts. In the first sense ("subjective intent"), it encompasses human desires and goals, and refers to a mental state of being.. . . Subjective intent is independent of all external reality, except insofar as one attempts to effectuate one's desires.. . . Objective intent, [on the other hand], refers to the obvious and inevitable consequences of any human action. [6]

In this sense, "intent includes those consequences which a) represent the very purpose for which an act is done," and "b) are known to be substantially certain to result (regardless of desire)."[7] To the extent that intent is often only used to refer to subjective goals rather than to "substantially certain result[s]," it is argued that one cannot *intend* to achieve something unless one acts *for that purpose* . Since pressuring defendants is not necessarily a judge's goal, the argument goes, then there is neither intent nor actual motivation. A definition of intent that also encompasses the obvious outcome of an action, however, satisfactorily overcomes this objection to the search for the reasons which underlie plea bargaining pressure. The judge who methodically imposes sentence differentials which have the *effect* of pressuring defendants *intends* to exert pressure in the objective sense whether or not to do so is her ultimate goal.

The difficulties of identifying motivation and establishing intent aside, we can now turn our attention to assessing the objectives which are intentionally sought by court actors and are ultimately achieved by pressuring defendants into giving up their constitutional rights. For the purposes of clarity, it is necessary to divide the reasons for pressuring the accused into three general categories. By "systemic motivations," I mean those reasons that are primarily related to the actual workings of the criminal justice system itself. Whether the pressure to enter a guilty plea stems from the historical evolution of the various criminal justice processes in the United States, from the administrative crises that characterize the present system, or from the working relationships and legal culture of the criminal justice community, this group of motivations is categorized because they stem from the internal processes of the criminal justice system. "External motivations," by contrast, are primarily the influences of the larger society upon court actors who (in turn) exercise their power over individual defendants. The intersection and interaction of the criminal justice system and American society is largely a political phenomenon

and manifests itself in public sentiment and legislative regulation. Often it is in response to the external political climate that criminal justice administrators place pressure upon the accused. "Individual motivations" are the personal beliefs and individual performances of those who participate in the criminal justice process, and are by far the most difficult to accurately assess. These factors are in many cases specific to individual prosecutors, judges and defense attorneys--if not to each group of professionals as a whole. Examining the reasons for plea bargaining pressures in terms of these categorizations may help us conceptualize the administrative and personal stakes which are often involved in guilty plea negotiations.

Systemic Motivations

> [S]tudies . . . have shown that factors fostering plea bargaining are not confined to a few unskilled lawyers, overworked prosecutors, or uncaring judges, but are a *part and parcel of the structure of the criminal court system itself*. [8]

The "Due Process Revolution"

Many legal theorists who have written on the subject of plea bargaining look to historical changes within the criminal justice system as a major rationale for the "mounting pressure for self-incrimination" that characterizes the plea bargaining process today. [9] One such historical catalyst is the "due process revolution" of the 1960s and 1970s, during which the Supreme Court sought fit to grant a number of procedural protections to criminal defendants.[10] According to one prosecuting attorney, a primary motivation for finding ways to secure guilty pleas has been that "Supreme Court decisions have given defense attorneys an excellent shot at beating us." [11] Certainly, before the Court's decisions in cases such as North Carolina v.

Pearce (1969), Brady v. United States (1970), Santobello v. New York (1971), and Bordenkircher v. Hayes (1978), defendants had very little chance of prevailing against the state--trial or no trial-- so there was little need to pressure them into pleading guilty. Indeed, most defendants would either go to trial, without an attorney or procedural protections, or plead guilty without any encouragement whatsoever.

The "due process revolution" finally gave defendants the means and the opportunity to claim their right to make the prosecution prove their guilt before a jury of their peers. It gave them, among other things, an attorney in all criminal proceedings, meaningful protection against forced confessions and self incrimination, and the right to appeal a jury's verdict. It also made state actors accountable for their actions in apprehending a defendant by providing for the exclusion of evidence or the dismissal of the charges in instances of abuse. In short, defendants were given an arsenal with which to fight the state's accusations, and ultimately an increased chance of being acquitted.

As a direct result of the strengthening of a defendant's power vis-a-vis the state, prosecutors and other state officials developed ways to "encourage" defendants to negotiate and to bargain away their newly granted rights. As the risk of losing increased, prosecutors sought to minimize the risk of having to fight at all. Says Paul Shechtman of the Manhattan District Attorney's Office, "we offer a concession in plea negotiations because we are bargaining away the risks that we may lose at trial."

The cause and effect relationship between increased due process protections and plea bargaining pressures is identified by Professors Oaks and Lehman in their study of the new criminal code of procedure which went into effect in Chicago in 1964.

> Oaks and Lehman anticipated that defense attorneys would respond to the increased chances of success . . . by taking more cases to trial. They found the reverse instead. The number of guilty pleas *increased* . . .. The critical response to procedural developments, the authors concluded was the reaction of prosecutors, not that of defense attorneys. With a declining prospect of winning at trial, prosecutors found additional incentive to bargain for pleas of guilty.[12]

As ironic as it seems, the more protection that defendants were given against the government, the more vulnerable they became to the state's relentless attempts at prosecution. Professors Oaks and Lehman "wondered whether the due process revolution was yielding the antithesis of its objective, and whether procedural reforms were [actually] resulting in the *conviction* of a greater number of defendants."[13] Whether or not defendants who received procedural protections during the due process revolution were pleading guilty as a direct response to increased state inducement has not been conclusively determined. Nevertheless, it is clear that, as Albert Alschuler asserts, "a major effect of the 'due process revolution' was to augment the pressures for plea negotiation." [14]

The Modern Trial

The "due process revolution" is the source of another frequently mentioned systemic motivation for plea bargaining pressure--the costliness and inefficiency of the present trial process. There was once a time when a defendant's right to a trial by a jury of his peers could occur relatively quickly and easily, and without much cost to the state. In his study of patterns of case disposition in Alameda County, California from 1880 until 1980, Lawrence M. Friedman describes the typical trial process of the late nineteenth century as "cut-and-dried--and very short, perhaps a half an hour at most."[15] In contrast to present-day trials, before the turn of the century,

> a hastily selected jury [often] heard case after case. The complaining witness told his story; sometimes there was another witness or two; sometimes the defendant brought in witnesses, or made a statement; arguments were made; the jury was charged, retired, voted and returned; [and] the court went immediately into the next case.. . . [16]

It is important to note that "the rapid trials of the past plainly lacked safeguards that we consider essential today."[17] While the brief, amateurish and informal nature of the classical trial undoubtedly led to travesties of justice in many cases, it was at the very least a process which could be afforded to defendants and which was not so costly to the state as to necessitate selective utilization. At present, a trial can as much as two weeks take up to a seven days to complete and often requires increased state expenditures to cover the overtime salaries of court personnel, witness transportation and compensation, and jury accommodations if necessary. Unfortunately, the adversarial trial--"a tense, dramatic, knockdown and drag-out battle of lawyers"--costs.[18] And it is a price that most criminal justice jurisdictions are unwilling (and unable) to pay. Professor Alschuler summarizes the trial-expense problem and the resulting motivation for pressuring defendants into giving up the right to trial:

> [O]ur system of resolving criminal cases has now become absurd both in the complexity of its trial processes and the summary manner in which it avoids trial in the great majority of cases. For all the praise lavished upon the American jury trial, this fact-finding mechanism has become so cumbersome and expensive that our society refuses to provide it. Rather than reconsider our overly elaborate trial procedures, we press most criminal defendants to forego even the more expeditious form of trial that defendants were once afforded as a matter of right. [19]

The Crisis

As we have seen, historical factors like the due process revolution are by no means unrelated to the present-day realities of criminal adjudication in most major metropolitan areas. Partly as a result of history, the criminal justice systems of the United States are terribly understaffed and overworked. Systemic developments coupled with huge increases in the sheer numbers of cases that are being prosecuted have resulted in what can only be described as "an administrative crises of major proportions."[20] The process of having to dispose of too many cases with too few resources is cited as the primary reason why most courtroom professionals feel obligated to pressure defendants into pleading guilty. Considering the current administrative crises in our courts, it is suggested that there may be pressure to enter guilty pleas because the maintenance of the system simply requires it.

In a recent report, the New York State Judicial Commission on Minorities argued that a lack of resources and an increase in case load has contributed to the phenomenon of "assembly line justice."

> The time spent in obtaining the disposition of a case in one of the [lower] courts may be exceedingly brief. Thus, after enduring deplorable facilities and discourteous and dehumanizing treatment, the [defendant's] "day in court" may amount to no more than 4-5 minutes of the court's attention. [21]

Most of this "exceedingly brief" time in many cases is spent trying to negotiate a deal--to convince defendants to relinquish their rights--instead of discussing the merits of the case. The system must induce defendants to plead guilty in this brief time, some argue, so that it will not have to spend more time--in terms of trial--in the future. Says Joel Hirschhorn, "In many cases, I would bet major deals are struck in less than five minutes. Is that fair?" Maybe not, but as many of Mr.

Hirschhorn's colleagues suggested, under the current administrative crisis--which has become more the national norm than the regional exception -- it is deemed to be *necessary* .

> In many cities, the criminal case load has doubled within the past decade, while the size of the criminal bench has remained constant.. . . Only the guilty-plea system has enabled courts to process their case loads with seriously inadequate resources. The invisible hand of Adam Smith is at work. Growing concessions to guilty-plea defendants have almost matched the growing need to avoid the burdensome business of trying cases. [22]

The Culture

Thus far, we have looked at systemic motivations for pressuring defendants to plead guilty which stem from an apparent need to minimize the number of trials due to either historical procedural developments or current administrative deficiencies. Until Professor Milton Heumann's study in 1977, it was assumed by many legal theorists that avoiding the economic expense and procedural risks of going to trial were among the only reasons for actively encouraging defendants to plead guilty. Professor Heumann concluded, after interviewing a number of participants in several criminal justice jurisdictions, that plea bargaining was not solely a function of case pressure. In many instances, he found that adaptation to the criminal court environment and to the attitudes of experienced court actors provided a motivation to actively participate in securing guilty pleas, even in those criminal justice systems where there were relatively few cases and more than adequate resources. [23]

Like Professor Heumann's research, my interviews and observations seem to suggest that in the criminal court environment there is an administrative ethic--a "legal culture" --which encourages and rewards plea bargaining.[24] Author Alan Blumberg uses the phrase "court organization" to describe both these values of the

court community and the willingness of some actors to pressure guilty pleas in order to maintain them. He asserts that, in the attempt to account for the actions of criminal justice administrators,

> [l]argely overlooked is the variable of the court organization itself, which possesses a thrust, purpose and direction of its own. It is grounded in pragmatic values, bureaucratic priorities and administrative instruments. These exalt maximum production and the particularistic career designs of organizational incumbents, whose occupational and career commitments tend to generate a set of priorities. These priorities exert a higher claim than the stated ideological goals of "due process of law," and are often inconsistent with them. 25

Indeed, prioritized "court organization" values, which provide an impetus to pressure guilty pleas, are prevalent specifically in the criminal justice systems of Miami and Manhattan. In these jurisdictions, I observed that court actors often interacted with each other and with defendants in such a manner as to uphold three basic tenents of administration: 1) efficiency, 2) conformity, and 3) networking. It is important to note that, in themselves, these principles are not antagonistic to the interests of justice. What may be a problem, however, is the extent to which the achievement of these goals causes judges, prosecutors and defense attorneys to pressure defendants into pleading guilty. As will become clear momentarily, securing guilty pleas is a primary way of both maintaining the pervading culture of "courtroom organization" which is embodied by these three tenents, and of ultimately getting one's job done.

The quest for administrative efficiency manifests itself in nearly every process of criminal adjudication from arrest to sentencing. Although criminal justice administrators are sometimes inclined to offer the rationalization that "justice delayed is justice denied," the true goal of a system which adheres to the efficiency ethic is to process as many cases in as little time as possible. Plea bargaining is the

most efficient way to dispose of criminal cases, and if efficiency is a goal of a justice administration, its officials may be inclined to pressure the accused into pleading guilty in order to achieve it. According to Justice Richard Andrias, "there's pressure to be efficient . . . but not on any individual case. You just know that you need to get cases resolved." To be sure, the court organization ethic teaches court actors that "disposing of cases is a valued practice, [and] that plea bargaining provides a means of efficiently moving the business, while at the same time minimizing . . . expenditures."[26]

To increase efficiency, some criminal justice administrations have instituted subtle systems of rewards and sanctions for criminal court actors who consistently "clear court calendars." According to Professor Heumann,

> [t]he rewards that flow from most cases being plea bargained, and the potential sanctions related to trials, contribute to the favorable posture toward plea bargaining evidenced by most judges. Furthermore,. . . judicial behavior with regard to facilitating (coercing) plea bargains can [sometimes] be accounted for in terms of rewards and sanctions felt by the judge.[27]

Prosecutors, too, are sometimes motivated by their role as court administrators and by their interest in processing cases. As T. Kenneth Moran asserts in Discretion and the Criminal Justice Process, "a prosecutor is foremost an administrator," and as such "he has to be concerned with the the flow of cases that come before him." Although "being efficient may not be the best means for ensuring that justice is being done for the state and for the accused," the court organization ethic holds that the more efficient a judge or prosecutor is, "the better he is doing his job." [28]

An air of conformity is also a part of the court organization culture which may affect criminal case disposition. In many criminal justice systems, especially

those in which efficiency is valued and resources are scarce, plea bargaining is predominant, and there is a "strict code of conduct" regarding courtroom behavior which deviates from the norm.[29] Lawyers who actively seek trial resolutions by filing motions and requesting hearings despite "reasonable" plea offers are thought to be "swimming against the tide," are perceived as "making trouble," and are sometimes ostracized by the other court professionals. As Boston attorney Abbe Smith disclosed, "believe me, if you don't give a little, [the other court actors] won't do anything to make your life any easier."

Ironically enough, it is sometimes important in an adversarial criminal court environment not to "make waves" so to speak, and not to follow the initial instinct to take every case to trial. Newcomers are taught to conform to the predominant "reality" of the criminal court system and its bureaucratic obsession, and soon "learn that compelling reasons to negotiate cases," and to pressure defendants if need be, "are a part of this reality."[30] Within a system that encourages administrative court organization and that "discourages, under risk of penalty, adversarial motions and trials,"[31] some court actors pressure defendants into plea bargaining partly out of an unwillingness to pay the price for their lack of conformity to the prevailing bureaucratic practices.

The administrative court organization ethic, like the workings of the criminal justice system itself, depends largely upon the interaction of the various court actors. We must keep in mind that "criminal courts are operated by a group of actors who are tied together by a variety of interdependencies and who share a common work place."[32] Judges, prosecutors and defense attorneys within the criminal justice system do not act independently of one another, but often "give consideration to each other, to their opposing counsel and to the judge when preparing cases." Arguably in the spirit of the age-old adage that it is "possible to catch more flies with honey than with vinegar," criminal lawyers will often "try to

maintain an air of friendship and comradeship, even when they are on opposing sides of the issue."[33] To this extent, *negotiations* (as opposed to trials) are an important means of resolving cases. Rather than engage in adversarial "combat" and risk jeopardizing an amicable work-group relationship, some attorneys will find ways to induce defendants into entering into a guilty plea settlement. After all,

> [a]ccused persons come and go in the court system schema, but the structure and its occupational incumbents remain to carry on their respective career, occupational and organizational enterprises. The individual stridencies, tensions, and conflicts a given accused person's case may present to all the participants are overcome, because the formal and informal relations of all the groups in the court setting require it. [34]

While amicable work relationships are and should be a part of any work environment, what is slightly troubling in the case of plea bargaining is the potential to for defendants to be pressured into taking a plea because the "work group" participants fear jeopardizing continued interactions. If a defendant's rights are sometimes being compromised because court participants believe that "the probability of future relations must be maintained at all costs," then the work group situation in the criminal courts is highly suspect.[35]

Two of the Miami attorneys with whom I spoke seemed to believe that in court interactions there is potential for working relationships and networks to impede the "proper" functioning of business. This they found to be the case especially during sessions in which a prosecutor and a public defense attorney are negotiating a number of cases at the one sitting. What occasionally happens, they commented, is something akin to political logrolling--"horsetrading: give me a break on this case and I'll do the same on that one."[36] "If I am a public defender," says Miami attorney H.T. Smith, "the prosecutor has to deal with me every day. If I've been reasonable, he understands when I say 'Look, I've got to have this one.'" It is because of this constant contact and networking relationship with prosecutors

that public defenders are seen to have an advantage over private attorneys who only have one or two cases and who thus thus have less bargaining leverage. "The public defender is often in a better position than we are to negotiate," says one private attorney, "because he's got this attitude, like, you give me this one; I'll give you that one."

Some attorneys argue that developing a "network" within the court system helps their clients in the long run in the sense that prosecutors and judges are sometimes willing to give "bargain basement" deals to attorneys with whom they have working relationships. While this may be the case, Alan Dershowitz asserts that the highest priority for some attorneys is actually their own networking relationships and the resulting career advancements.

> No defendant should ever rely on the advice of a lawyer with a hidden agenda. The agenda of a "prosecutor in a defense attorney's clothing" generally includes getting the best possible deal for the client [who wants one], but it may also include a desire to remain in the good graces with the current prosecutor, even at the expense of a particular client.[37]

As a result of the desire for continued work relationships within a theoretically adversarial environment, attorneys and judges may find themselves pressuring defendants to plead guilty.

External Motivations

It is possible that the sole external motivation for pressure within the criminal justice system is, of course, American politics. Like all other democratic social institutions, most criminal justice systems are responsive to the political climate of the society in which they operate. To the extent that the American

criminal justice system is "an arm of the government" which is responsible for controlling social behavior, it is particularly influenced by public opinion, social sentiment and legislative pronouncement.[38] In order to thoroughly examine politics as an external motivation for pressuring the accused to relinquish their rights, we must first understand the political dynamics and ramifications of dealing with crime. Many of the legislative and institutional responses to crime are directly influenced by public sentiment. In the past decade, for example, when there was an epidemic of drug-related criminal activity, the government was called upon to respond to the tremendous "public hue and cry about 'rising crime rates,' the need for greater 'police protection,' and specifically calls for programs to prevent 'street crimes'."[39] The mass media played a "subtle" and and often undetectable role in fomenting and perpetuating the public outcry, since it was through their portrayals of certain segments of the population that most Americans gained insight into the nation's "crime problem." As we will soon see, the media-induced public attitude toward crime influences the criminal justice administrations of various cities and ultimately creates a political need for pressure to plea bargain.

The claim that one is "tough on crime" becomes a valuable political tool once the American public becomes enraged about criminal activity. Often, as a direct result of rising crime rates and public outcry, elected legislators will seek to enact statutes that restrict judicial discretion and mandate specific minimum sentences for certain offenses. A new government goal for prosecuting accused criminals is born: to put as many convicted criminals in jail for as long as possible. In the 1980s, an era of "get tough" conservatism, "investment in criminal justice rose sharply and legislative attention creating new crimes or making penalties harsher increased."[40] Ironically, it is to achieve the political end of convicting more criminals that prosecutors sometimes pressure defendants into a plea bargain.

As "a political figure in his own right,"[41] a prosecutor's career depends upon his ability to convict criminals, and there is no more certain way of assuring conviction than by insuring that defendants enter guilty pleas. "Conviction then becomes a primary concern of the prosecution," asserts T. Kenneth Moran, and "this attitude of obtaining a conviction *places the rights of the accused second best to its prosecution effort* ."[42] Indeed, "the political value of a high conviction rate [provides] strong inducements for prosecutors to enter plea agreements," and is one of the most important motivations for all of the elected court officials who attempt to get defendants to plea guilty.[43]

Along with a high conviction rate and increased popularity, in many jurisdictions, comes more funding for one's office or department. Yale Freeman comments:

> Statistics. That's what it's all about. How do you get funding? Why does a prosecutor's office file some of the mist garbage cases? They know [the cases] are going to die in the end. Statistics. Funding. I get more money if I can prove to the legislature that have 1,000 cases instead of 100.

Again, the only way to process 1,000 cases in this time of political pressure and administrative need is, of course, to plea bargain.

We must keep in mind that public sentiment and the political process play significant roles in influencing the internal workings of the criminal justice system. External motivations to pressure defendants into plea bargaining are inherent in our political system and in our society's attempts to balance criminal prosecution on the one hand, with individual rights on the other. It is important to note that while "the public may call for stronger measures against criminals by the justice system, . . . what [it] does not seem to realize is that stronger measures against criminals also means that the system will have greater power over them."[44] And to the extent that

"any citizen can become an accused," greater power over *them* necessarily means greater power over *us* .

Individual Motivations

This final category of motivations comprises all of the personal motives that court actors sometimes have for wanting to resolve cases by plea bargaining and for acting upon that desire. It is possible that "[t]he people who run the criminal justice process and the decisions that they make are more likely to serve their interest rather than the system's clients." [45] Within a social institution of such tremendous power and influence, statutorial and ideological concepts have the potential to be manipulated by individuals for personal gain. And though "people can justify their [actions] in the name of the collective good," they may actually be attempting to "disguis[e] a vested interest."[46] Before we can effectively analyze plea bargaining, we must attempt to identify the personal hidden agendas of various court professionals.

Certainly, an incentive of the first order is the fact that through plea bargaining court actors save a tremendous amount of time and effort. "Trying cases is hard work which prosecutors and defense counsel try to minimize to some extent."[47] The average defense attorney, for example, would have to engage in investigations, question witnesses, gather evidence and coach her client in preparation for a trial. All of these tasks are virtually eliminated by the acceptance of a guilty plea. Likewise, according to T. Kenneth Moran, "the prosecutor is relieved of the major responsibility of his office. Through plea bargaining he does not have to prove an accused party guilty." A district attorney save time and effort because he "does not have to concern himself with marshalling evidence and persuading juries."[48] Interestingly enough, judges (who are the least active

participants during the trial process) also find that plea bargaining requires less of them than does a jury trial disposition.

> [P]lea bargaining saves the judge some time and effort and, overall, serves to make his job easier. There is no need to prepare for a trial, to write instructions for a jury, to rule on legal issues at stake in a case. Accepting a guilty plea and asking the defendant the checklist of questions on the voluntariness of his plea is a much simpler process. And when an agreed recommendation is part of the negotiated disposition, one of the most vexing problems for a judge--sentencing--is also removed. [49]

As natural as the tendency to want to avoid extra work may seem, there is cause for a certain amount of concern when such a personal interest becomes a motivation to pressure defendants into giving up their rights. Says District Attorney Janet Reno, "I am haunted by what lazy lawyers might do in terms of pleading a client just because they do not want to go to trial--the client may be innocent, or may not necessarily be guilty of the charge."

To a certain extent, fear of going to trial is also a motivating factor to pressure pleas. One prominent attorney with whom I spoke noted the reluctance of many of the younger, less-experienced lawyers to take their cases to trial. He attributed some of this fear to his belief that most law schools do not prepare their graduates for actual litigation. "After graduation, we know all of the theories and terms and the way that a trial looks on paper," the attorney commented, "but we have no idea how to actually try a case." And in certain instances, those in which there is no real training program for newly hired public or private lawyers, the reluctance to take the life and well being of a defendant in one's own inexperienced hands makes some attorneys avoid at all costs the possibility of going to trial.

Some judges, too, fear trials because of the possibility of having their decisions reversed on appeal. "Understandably, judges dislike appellate reversal; it

is certainly not the most pleasurable of experiences to have a higher body produce a publicly available, written reversal of one's decisions."[50] Since cases that are plea bargained generally have fewer substantial appellate issues than those that are taken to trial, there is an incentive for judges who are "apprehensive about their reputations" to pressure defendants to give up their trial rights.[51]

Many court professionals hold personal beliefs which may also motivate plea bargaining pressures. I was frankly surprised at the faith that many of the court actors had in plea bargaining as a proper and just form of criminal case disposition. I noted that judges who were concerned about case load and actively involved in the plea process still asserted their ability to determine in a five minute allocution process if a plea has been entered voluntarily. Defense attorneys argued that there was nothing wrong with "bargaining the odds" of losing at trial as long as their client--with a resulting prison record and possibly violated rights--had (by their calculations) "won." Perhaps most surprising was the unanimous conviction of assistant district attorneys that, "only guilty people plead guilty." No matter how much pressure, how much threatening or overcharging, or how great the sentence differential, prosecutors like Manhattan Assistant District Attorney Hector Gonzalez, tend to believe, as he claimed, that "the guilty plead guilty ; the innocent go to trial."

The notion that plea bargaining is a fair and just means of criminal case disposition is sometimes a corollary to the belief that most "cases are simply not 'worthy' of trial."[52] While it is understandable that there are some cases with few contestable legal issues--cases which may be resolved by some nontrial mode of criminal procedure--the implications of a determination of which cases are "worthy" and which are not is one of the greatest anathemas underlying the criminal justice process today. In speaking of the reasons for pressuring some defendants into pleading guilty, private defense attorney H.T. Smith asserts that in the current

system, "you are innocent, until you're indigent.. . . A lot of court personnel think that poor people and Black people are animals, and that taking their cases to trial is not worth the trouble."

It is interesting note that the biases that Mr. Smith mentioned surfaced in a subsequent interview with one Manhattan judge. In response to a question about the difference between white collar and street crimes, she commented: "most of the people we are dealing with here in these [street] courts are simply not habituated. Because you and I are middle class," she said to me, "we can predict that if 'I do wrong today, I will go to jail tomorrow.' For the most part, we are dealing with people who do not have these capabilities." Undoubtedly, the belief that only certain defendants are "worthy" and "capable" of exercising their rights is pervasive and, as Mr. Smith remarked, "so many Black people and poor people get forced into a plea because they don't believe (and reasonably so) that anybody gives a damn about them."

Personal gain is an obvious individual motivation for nearly all human actions, and plea bargaining is no exception. Private defense attorneys, of course, stand to make a substantial amount of money by "rolling" their clients. A private attorney in Miami divulged that in a recent white collar case, a lawyer told his client that he would either have to pay a *one million dollar* trial fee up front, or take the plea bargain being offered in the case and "cut his down side liability." The defendant "never thought that he was guilty," says the attorney relating the story, " he just couldn't afford to defend himself."

To the extent that some attorneys charge a flat fee for their services, and do not get paid any more or any less for the form of case disposition, it is advantageous to pressure clients to plea bargain. Although defendants may want to take their cases 'all the way to the Supreme Court,' in some instances "the criminal lawyer develops a vested interest of an entirely different nature in his client's case:

to limit its scope and duration rather than do battle."[53] There are even times when private attorneys fail to disclose pertinent information to their clients solely because to do so would jeopardize their fee. "I know of another attorney," my Miami confidant continued,"who took $100,000 from a client to plead him guilty to a crime on which the statute of limitations had run out." Noting some of the things that his peers are apt to do and some of the pressures that they place upon clients just to increase their retainer, another Florida attorney shook his head sadly and commented, "some people will do anything to make a buck."

We, too, should be saddened by some of the motivations identified in this chapter, and the possibility that defendant's protections are being sacrificed because of them. We have yet, however, to make the specific allegation that plea bargaining pressures are coercive or that the interests identified herein are not enough to justify infringements upon individual rights. At long last, we shall turn to these arguments now.

CHAPTER FIVE

"FUNDAMENTAL EVIL": *ASSESSING COERCIVENESS*

> The fundamental evil of plea bargaining is the state's improper use of its coercive power.
>
> William F. McDonald

When asked to identify the point at which the pressures and inducements of the criminal justice system could be rightfully called "coercive," many of the judges, prosecutors and defense attorneys that I interviewed had difficulty giving a concrete response. Some answered with anecdotes describing their interpretation of the differences between allowable pressure and inexcusable coercion. Others drew diagrams and made calculations indicating that a theoretical line could be drawn between the two concepts. By far, the most realistic response was given by Justice Richard Andrias of the New York City Supreme Court. After a bit of thoughtful reflection, he simply asserted: "coercion is like pornography. It's hard to tell you what it is, but you always know it when you see it."

The extent to which the pressures and inducements of the criminal justice system actually operate as coercive forces is, like pornography, a much debated topic among legal scholars. Some theorists assert that plea bargaining pressures are merely inducements which in no way constrain an individual's freedom of choice. Others argue that plea bargains themselves burden the exercise of trial rights, and in doing so, coerce defendants into pleading guilty. In this chapter, we will attempt to assess the coerciveness of the government's plea bargaining pressures. Because "coercion" is an ambiguous term used to define a complex concept, we must examine and evaluate various definitions and theories of coercion, and apply them to

the current situation in our criminal courts. It is important to note at the outset that , for our purposes, coercion is to be viewed not as distinct from pressure but as a certain type of pressure which involves the manipulation of the will of the individual. By, first, identifying the major premises of coercion theory and, secondly, evaluating the most widely held perspectives of coercion, we can attempt to determine whether current plea bargaining practices coerce criminal defendants.

Premises

Most theoretical evaluations of coercion are premised by the notion that "coercion compromises or negates the *voluntariness* of an act," that is, "that we do involuntarily what we are coerced to do."[1] In Coercion, Professor Alan Wertheimer, labels assertions of involuntariness--e.g.,"he made me do it"-- coercion claims, and argues that "the distinction between voluntary and involuntary actions is an essential feature of our moral, political, and legal discourse. "[2] In a broad sense, coercion itself is characterized by a presumption of involuntariness--a coerced act is one in which the agent is not "free from constraints imposed by other persons or social institutions."[3] We must be aware when exploring definitions of coercion that the connection between coercion and involuntariness is itself an arguable assumption that is sometimes denied by theorists who believe that a definite distinction can be drawn between the two concepts.[4] Nevertheless, most theories assume, and I believe rightly so, that an element of involuntariness--defined as social constraint--characterizes coerced actions.

It is important to note that a coerced or involuntary action, by most accounts, is not necessarily one over which an individual has no control. While theorist Michael Philips narrowly describes involuntary acts as those in which one's will is overborn,[5] Professor Wertheimer identifies three different senses of

involuntariness. In one sense, the term "involuntary" can be applied to the *nonvolitional movements* of the body "such as twitches, seizures, spasms and reflex actions . . . which are autonomic and virtually divorced from a person's will."[6] Involuntary can also be construed to apply to actions which are characterized by *defects of volition* resulting from some impairment of the will. Such internal conditions as insanity or retardation, or external pressures such as torture or intimidation can be said to be involuntary in the sense that one's will is literally overborne.[7] The sense of involuntary which seems most useful for our purposes is that of *constrained volition* . In these instances, there is a rational choice among options, but this choice is not free from tremendous constraints which act to burden the will. An individual who, for example, is faced with the demand "your money or your life" at gunpoint, makes a rational determination about which to relinquish, all things considered.[8] Handing over one's wallet under those circumstances would be an act of will, and yet few philosophers would argue that such an action should be considered voluntary. Instead, as theorist David Hoekema asserts, such an individual is the "victim of coercion" because "he can choose only between the alternatives of complying with the threat and risking the threatened penalty."[9] We can say at this point, then, that coercion occurs when person (B) is constrained by another person (A) to do act (X) in such a manner that B's choice to do X is involuntary. While this definition is broad and itself insufficient to explain coercion, the following theories may help us come to a better understanding of the ambiguous phenomenon.

Threats/Offers Theory

In its decision in Brady v. United States 397 U.S. 742 (1970), the Supreme Court gives this interpretation of the conditions under which a guilty plea agreement is to be considered voluntary and, therefore, not coerced:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any promises made by the court, prosecutor or his own counsel, must stand unless induced by threats. . ., misrepresentation (including unfilled or unfillable promises), or perhaps by promises that are by their very nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).

According to this traditional interpretation of coercion, a guilty plea is voluntary (when entered knowingly) "unless induced by threats" or improper promises. The threats/offers theory of coercion, as this perspective might be termed, turns on an analysis of situations based upon a categorization of the means of pressure. If person A *threatens* person B--proposes to worsen B's situation--unless B does action X, and as a result, B does X, then, according to this theory, A has coerced B. The gunman who demands that I choose between my money and my life, for example, *threatens* my well-being. If I hand over my money in response to the threat to my life, this argument goes, I have been coerced into giving up my savings. If, however, A *offers* B an opportunity (or choice) that B would not otherwise have had by proposing X, then A has merely augmented B's freedom by increasing the options available for B's selection. The person who offers to pay my college tuition if I give a speech at her next business association meeting, for example, does not coerce me into delivering an oration under this theory, but rather gives me the opportunity to finance my higher education.

Before we can assess the coerciveness of guilty plea negotiations from a threats/offers perspective, we must first evaluate the theory itself. Two of the major

tenets of the threats/offers theory of coercion are: 1) threats can be distinguished from offers, and 2) only the former coerce. As we analyze each of these principles in turn, it should become apparent that this theory does not allow for an adequate determination of which pressure situations are coercive and which are not. Although we will ultimately test plea bargaining by this traditional theory's standards, it is important to recognize and to understand its weaknesses.

If, as threats/offers theorists assert, an act is voluntary "unless induced by threats," it is important to determine when a proposal is threatening. Unfortunately, in that one man's threat is another man's offer, identifying a threatening (and potentially coercive) proposal and distinguishing it from an offer (tenet #1) is not always an easy task. Threats and offers are "relative terms" which "refer to a change in an agent's condition, a change from some stipulated starting point to a new condition that is better or worse, respectively, from the agent's point of view."[10] It is important to note that, according to threats/offers theorists, a proposal to change B's condition--to do something for or to B if B does X--can be evaluated as a "threat" or an "offer" depending upon whether the proposal *betters* or *worsens* B's situation.

It follows, then, that in order to evaluate coercion from a threats/offers perspective "one must have a stipulated starting point or baseline from which to measure these changes in condition."[11] The primary weakness of the threats/offers theory is that the baseline is itself variable. In that B's baseline could be his condition prior to the proposal, or the condition that he is *entitled* to be in regardless of his actual condition, or any number of other vantage points (depending upon the analyst's theoretical preferences), A's proposal could be characterized by two different observers as *both* a threat *and* an offer.

Two of theorist Robert Nozick's hypothetical examples best illustrate the difficulty of distinguishing threats from offers with any certainty. In the first

example, a person (Q) is drowning in the ocean, and another person (P) comes along in a boat. If they both know that there is no other rescue in sight, and if P proposes to save Q only if the latter promises to pay the former $10,000 within three days of getting ashore, "is P *offering* to take Q to shore if he makes the promise," Nozick asks, "or is he *threatening* to let Q drown if he does not make the promise?"[12] The second example asks us to suppose that a master beats his slave every morning, and that on a particular day, the master tells the slave that he will not beat him if he agrees to do act (A). Is this a threat or an offer?

A determination of threats and offers in each of these cases is dependant upon the baseline. If, Nozick argues, the baseline in the first scenario is a "normal course of events" in which people are expected to help others, than P is threatening Q; if it is not, then P is making an offer. Yet, "the normal course of events" in the slave scenario is a beating--which would make the master's proposal an offer-- even though, Nozick asserts, the "*moral* course of events" would make it a threat. As should be apparent, the distinction between threats and offers, which is the crux of the threats/offers theory of coercion, blurs when we consider the fact that "baselines do not come to us prelabeled. We must decide how a defendant's baseline is best understood, and no particular account of that baseline has an obvious claim to our assent." [13] In that theorists "have thus far failed to identify any single baseline that adequately distinguishes . . . offers from threats for the purposes of coercion," we must question whether " 'coercion' can indeed be defined as the structuring of an agent's choices by means of threats and [offers]."[14]

Throughout the subsequent analysis of plea bargaining pressures, we must keep in mind that we cannot always make a clear distinction between threats and offers, nor can we assert with any certainty, as the second tenet of the threats/offers theory does, that only threats coerce. Professor Nozick advances the argument that "offers of inducement, incentives, rewards, bribes, consideration, renumeration,

recompense, [and] payment do not normally constitute threats," and "the person who accepts them is not normally coerced."[15] The apparent basis for the alignment of coercion with threats (as opposed to offers) is the characterization of a threat as a proposal which stands to worsen an individual's situation. It can be successfully asserted, however, that the effective worsening of one's situation is not a necessary criteria for coercion. In other words, there are instances in which individuals who stand to benefit from a proposal (an offer) can be coerced into accepting its terms. Like Nozick's drowning man, a person can be so circumstanced as to be forced to accept a proposal--even one which may better her situation. If I cannot otherwise afford to go to college and will never be able to acquire the funds to finance my education, the conditional scholarship "offer" in my previous example could be a means by which to effectively constrain my will in such a way as to force me to perform the requested act. It is my contention that, depending upon the situation of the agent, it is possible for an "offer" to be coercive. Professor Wertheimer and Robert Nozick give two examples which I now use to further illustrate this point:

> *The Lecherous Millionaire.* B's child will die unless she receives expensive surgery for which the state will not pay. A, a millionaire, proposes to pay for the surgery if B will agree to become his mistress.[16]
>
> Q is a drug addict. P is Q's usual supplier of drugs, and today when he comes to Q he says that he will not sell them to Q, as he normally does, for $20 dollars, but rather will give them to Q if and only if Q beats up a certain person.[17]

In both of these examples, the proposal is most likely an offer under the threats/offers theory, and yet it is arguably coercive. From these examples and others, I would argue that

> there are many ways in which one person can manipulate the conditions of another's choice so that his social freedom is infringed upon, without threatening to worsen his condition if he fails to comply with certain demands.[18]

Not only is the threats/offers distinction blurred by a variable baseline, but the subsequent assertion that only threats coerce is undermined by manipulative "offers" which are couched in individual circumstances.

Despite the weaknesses of the threats/offers theory of coercion, we will now endeavor to apply the theory to plea bargaining pressures. The first step in evaluating plea bargaining from a threats/offers perspective is to determine a defendant's baseline. According to Tony Honoré, a writer for the Oxford Journal of Legal Studies, "the accused person's base line . . . embodies what [she] is in law *entitled* to expect."[19] Our Constitution affords accused persons the right to "a speedy and public trial by an impartial jury." In the normal course of affairs, the no bargain state, defendants can choose to either take their cases to trial or to plead guilty. After this decision has been made, they can expect to be either acquitted by a jury, or convicted, by plea or trial, and to be sentenced on the merits of their infractions.

The proposal which serves to change the conditions of the defendant's baseline is either a judge's implication that she will give the defendant a markedly lower sentence or a prosecutor's assertion that he will decrease the charges--if the defendant pleads guilty. The threats/offers theory requires that we examine these proposals to determine, on the one hand, if they are operating as threats and are therefore potentially coercive, or on the other, if they can be construed as non-coercive offers which give the defendant benefits that he is otherwise not entitled to receive.

There are few aspects of the plea bargaining process which can be as threatening as a judge's active participation in the negotiations. In many cases, a magistrate may forcefully detail the defendant's options in such a manner as to convey that she intends to worsen the defendant's situation by giving a higher sentence unless he pleads guilty. "Obviously," Manhattan Supreme Court Justice Carol Berkman said in an interview, "the fact that you tell somebody they're going to get the maximum is something that we use here in state court to induce or influence--whatever word you want to use--defendants into pleading guilty." Under the threats/offers theory such 'inducements' operate as a threat and are, thus, coercive. It is interesting to note that a judge's mere participation in a plea settlement, whether sentences are discussed or not, may also be a coercive threat to the accused. It is possible that "the high potential for coercion" is a function of mere judicial authority and "inheres in the 'vastly unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison.' " [20]

Those who disagree with this assessment of judicial participation in plea bargaining may argue that judges rarely act in a way that blatantly threatens defendants, and that they hardly, if ever, propose to "punish" defendants for exercising their right to trial. In other words, judges generally present bargains as undue offers of leniency--*discounts* rather than mark-ups. Despite the fact that, according to Judge Andrias, " this a rationalization that we [judges] often use," the truth of the matter is, the method of case disposition often plays a role in the sentencing decision. "People know that if you go to trial you get high end of the sentencing guidelines," says Yale Freeman, "The system *punishes* you."

Even in instances in which judges are actually perceived to be giving more lenient sentences to pleaders (rather than harsher sentences to defendants who go to trial), the Supreme Court has found that such a sentence differential scheme is still

threatening in that it *burdens* a defendant's right to trial. In the case of United States v. Jackson,390 U.S. 570 (1968), the Court was called upon to evaluate the constitutionality of the Federal Kidnapping Act, a statute which allowed only those defendants convicted by a jury to be executed. "By implication, execution was not permitted if conviction resulted from a guilty plea."[21] Defendant Jackson was accused of violating this statute, yet refused to plead guilty, and was convicted. A United States district court held on appeal that the portion of the Federal Act which allowed for disparate sentences was unconstitutional because it discouraged a defendant from exercising his right to a trial. The Supreme Court upheld the decision primarily because the resulting sentence-differential placed "an impermissible burden upon the exercise of a constitutional right." Considering that a "burden" is "that with which one threatens a person,"[22] the Court's holding in Jackson characterizes sentence differentials as threatening and, thus, inherently coercive. New York City Supreme Court Justice Carol Berkman comments:

> I don't know whether our constitution in theory prohibits us from punishing people who exercise their rights, but really, it's like Humpty Dumpty. I can give him a benefit for pleading guilty but that's not punishing him for exercising his rights. But the bottom line is that if you go to trial you get more time. You may in some legalistic theory say you're not punishing them, but what does it feel like?

Although we have considered whether judicial participation and sentence differentials can be considered threatening from a threats/offers perspective, we have yet to determine whether a prosecutor's proposal to *lower* the charges is an "offer" or a "threat." Ardent supporters of the plea bargaining process assert that prosecutors are "offering" to exercise their right to determine the charges in a manner which benefits defendants. In evaluating this claim, it is important to remember that the court is entitled to set a convicted person's sentence in accordance with rules prescribed by the government, and that defendants have no right to be exempt from

trial by jury. Nevertheless, one cannot rightly call the prosecutor's guilty plea proposal an "offer" under the threats/offers theory without assuming that the plea bargain serves to better the defendant's situation. It is my contention that in many instances this is not necessarily the case.

The defendant's baseline entitlement is the right to trial by jury. We must remember when trying to determine whether the prosecutor's proposal is a threat or an offer that a jury trial is not inherently a worse option for the defendant than a plea bargain. It is possible that a defendant who takes his case to a jury may be acquitted, or that the judge may find mitigating circumstances for substantially decreasing the ultimate sentence--both of which are seemingly better consequences than if the defendant pleads guilty. What apparently makes the trial option worse for the defendant is the burden placed upon its exercise--the fact that going to trial may result in a greater penalty than the state agrees to impose if one pleads guilty. Viewed in this light, a prosecutor's "offer" of leniency (like a judge's) seems to threaten the defendant's right to trial in much the same manner as the legislative pronouncements in Jackson. Although a state may have the discretion to set the charge, conditioning a lower charge upon a defendant's agreement to waive her trial right may be no less burdensome--potentially coercive--than the millionaire's condition that, in order to save her child, the mother consent to having intimate relations with him.

It is also possible to construe a prosecutor's plea bargain "offer" as coercive in the sense that it amounts to the manipulation of the undoubtedly desperate situation of the accused. Most defendants' circumstances are such that they desire to avoid severe penalties such as excessive fines or incarceration for substantial amounts of time. Like the aforementioned drug addict, they are desperate for a way of decreasing the foreseeable harm, even if to do so means giving up significant protections from government exploitation. Although it may be argued that a criminal

defendant does not have a *right* to limited punishment any more than a drug addict has a right to illegal hallucinogens, both the prosecutor and the pusher seem to be taking "*unfair advantage* of the circumstances of [the individuals] to get them to choose against their wills and to perform actions that the [proposers] desire."[23] A prosecutor's plea bargaining "offer"--"an offer to a person so circumstanced that he cannot [reasonably] refuse it"--can be coercive, even from a threats/offers analytical perspective.[24]

We must be aware that, as theorist Conrad Brunk comments, "the problem of coercion and social freedom is more complex than is suggested by a simple distinction between threats and offers."[25] Many of the people with whom I spoke agreed. Says Judge Berkman, "when a person is, let's say, faced with 12 to 25 years if convicted at trial and is offered 2 to 4, that is clearly coercive. If we're going to recognize reality. That is clearly coercive. The system is coercive." What is important, in my opinion, is not that a distinction can be drawn between threats and offers "for the purposes of distinguishing noncoercive proposals from coercive ones," but that both concepts be viewed as means of manipulating choice relative to individual situations.[26] In this sense, both threats and offers can place significant constraints upon individual freedom of choice, and both can be interpreted as potentially coercive.

Nature of the Act Theory

Unlike the threats/offers theory, nature-of-the-act coercion theory asserts that a proposal's coerciveness depends upon the *kind of act* that an apparently coerced individual is being constrained to perform. It is argued that in order for B to be coerced by A, act X (what B is being asked to do) must itself be undesirable to B. In other words, individuals can only be coerced into performing the actions that they

find undesirable, that they would not otherwise be inclined to perform, and that, according to Robert Dahl, "involve severe deprivation."[27] In his article entitled "'Freedom' and 'Coercion'--Virtue Words and Vice Words," Peter Westin puts forth a nature-of-the-act argument by asserting that the term "coercion" only extends to "willed actions" that individuals "would not otherwise have willed."[28] Westin looks to the life of Fredrick Douglass, a former African American slave and one of the greatest orators in American history, to illustrate his point:

> Fredrick Douglass's master, believing that Douglass wishes to marry Clara and believing that Douglass will welcome the demand that he marry Clara, tells Douglass that he will shoot him on Monday if Douglass does not marry Clara on Sunday. Douglass, having changed his mind about wishing to marry Clara but not wishing to tell his master, marries her anyway for fear of being shot. We might perhaps say in that event that Douglass's master "forced" Douglass into marrying Clara, but we would not say that he coerced [him].[29]

To the extent that nature-of-the-act theorists argue that "a person has been coerced only if he has done something against his will," plea bargaining pressures may be thought of as coercive only to innocent defendants who would not have otherwise desired to plead guilty.[30] Guilty individuals are not coerced according to nature-of-the-act theorists because they may have desired to plead guilty even without government intervention. In other words, for guilty defendants, there is nothing undesirable in the nature of the act being requested--a guilty plea-- therefore, inducements to plead guilty may not be coercive.

Indeed, a common objection to the assertion that plea bargaining is coercive is the belief that defendants actually *want* to plead guilty because it saves them the embarrassment of a public trial, legal fees, and a prolonged battle with the courts. While this may be the case, I take issue with the assertion that undesirableness is a prerequisite for coercion. The fact that I may have chosen to act in one way prior to

the proposal (i.e., the action itself is not undesirable) does not mean that my will is any less constrained by an imposition which *forces* me to act in that way. I may have every desire and intention, for example, to give money to a disadvantaged person who asks me for it when I am walking down the street. Yet, if the person who is soliciting my money pulls out a pistol and demands my wallet, I am just as coerced as I would be if to do so were an onerous task. According to theorist David Hoekema, in order to find that a proposal is coercive

> the action which the coercer demands need not involve any deprivation at all. If a highwayman threatens to kill me unless I sing the national anthem, I am coerced to sing--even if singing, far from being a serious harm, is one of my greatest pleasures.. . . As long as I sing out of fear of being killed, I am coerced none the less. Coercion is usually employed as a way of getting people to perform acts they would rather not do; but this is not essential to coercion, nor need the coerced action involve any loss or harm. [31]

Like the singer, many defendants may actually desire to do the very act that they are pressured into doing. They may be coerced regardless, however, because they plead guilty out of fear of a greater sentence after trial. We must keep in mind when attempting to judge the coerciveness of a proposal, that the important issue may not be the nature of the act, but the severity of the threat that constrains one to do an act no matter how desirable. "The question is whether [the defendant's] *choice situation* is coercive"--an inquiry made in the next section--"and not whether the defendant's *will* has been impaired" in the sense that he is being forced to do something that he would rather not do. [32]

Choice Situation Theory

A substantially different definition of coercion arises out of a focus upon the defendant's choice situation. Rather than categorizing as a "threat" or an "offer" the

kind of proposal which characterizes a coercive "agreement," or the *kind of act*, choice situation theorists are primarily concerned with evaluating the *kind of choice* an individual faces in a potentially coercive situation. This perspective offers, in my opinion, one of the most convincing defenses of the claim that plea bargaining processes are coercive. We will spend the remainder of this chapter identifying the major arguments of choice situation theory, and evaluating plea bargaining pressures in light of them.

Choice situation theorist Conrad Brunk characterizes a coercive situation--an imposition upon freedom of choice--as one in which "*a person is required by circumstances to perform an action as a means to the achievement of a desired end, and this means is less desirable than some other that will normally achieve the same end.*"[33] While this line of argument is confusing, an evaluation of coercion based upon an individual's choice situation may be broken down into two basic components. First, an individual must be "required by circumstance" to choose to do a particular act; and secondly, the new choice situation must be less desirable than the old. Brunk illustrates this "choice situation" interpretation of coercion with the example of a mother who "tells her son that he cannot play baseball with his friends until he has cleaned up his room." The action of cleaning the room in this case is a *required means* to the end of playing baseball, and a means which is undoubtedly "less desirable to Sonny than the normal means (e.g. cleaning dirt from his spikes)." That Sonny must now choose to clean his room in order to play ball, Brunk argues, "is an imposition on his freedom of choice, brought about by the manipulation of that choice by his mother," and as such, is coercive. [34] Sonny's situation meets (what we will call for the purpose of clarity) the "no choice" and "less desirable" requirements for coercion. In order to understand plea bargaining in terms of a defendant's choice situation, we must look at each of these criteria in turn.

According to philosopher Gerald Dworkin, coercion "requires that the victim . . . should have no alternative to submission."[35] In understanding the "no choice" prong of the choice situation theory, we must keep in mind that "'no choice' should not be taken literally."[36] More than an assertion that there is only one available option, "no choice" describes an instance in which, given the circumstances, there is only one rational alternative. The drowning swimmer, for example, arguably has no choice but to give in to the boater's demands. Likewise, the individual who is forced at gunpoint to choose between his money and his life and who has no hope of avoiding a decision, has but one rational alternative: to hand over his wallet. In this sense, it is possible to assert, as choice situation theorists do, that a coerced individual makes a rational choice, and yet has really has no choice at all. As Professor Hoekema comments, "a person who claims to have been coerced claims to have acted in the only *reasonable* way, not necessarily the only *possible* way."[37]

In Bordenkircher v. Hayes 434 U.S. 357 (1978), the Supreme Court argues that plea bargaining is not coercive "so long as the accused is free to accept or reject the prosecution's offer." This interpretation of the defendant's choice situation seems to underestimate the extent to which a defendant is actually free to choose between going to trial and pleading guilty. "On the surface it appears that defendant's have a choice," one attorney commented, " but usually they don't . . . usually the penalty for going to trial is so great that they almost have to take the plea bargain." A defendant's choice situation is similar to that of the son's in Brunk's baseball example. If he wants to play ball, Sonny has no choice but to clean his room. In such a situation, Sonny will legitimately feel that he had been coerced into cleaning is room."[38] Similarly, the no choice situation of guilty plea negotiations makes many defendants, who plead guilty because they believe that it is the only way to receive a "fair" sentence, feel as though they have been coerced into giving

up their rights. Similarly, if the defendant wishes to receive a "fair" sentence, he is usually made to believe that he must plead guilty.

In that plea bargains are often arguably beneficial to defendants, the second criteria for coercion from a choice situation perspective--that a defendant's choice situation after the state's proposal is *less* preferable than situation before--is not easy to defend. It is commonly argued that defendants would prefer to have the opportunity to trade their guilty plea for a more lenient sentence. While this objection is difficult to overcome, I believe that the key to doing so lies in the distinction between a more desirable *consequence* and a more desirable *choice situation* . As we shall see momentarily, the argument can be made that the choice situation that a defendant is in after the plea bargain proposal is considerably less desirable than the one which results from the state's intervention.

At most arraignment proceedings, defendants are given the opportunity to enter a plea of either "guilty" or "not guilty." At this early stage, prior to plea bargaining pressures other than "time served," a defendant has the theoretical "freedom" to choose either course of action, since both can be expected to produce a similar outcome. A guilty defendant can either go to trial or plead guilty and can expect that his punishment will be roughly the same in either case. Although pleading guilty is not and should not be an option for innocent defendants, prior the state's plea bargain proposal, there is nothing other than inevitable trial risks to constrain an accused person's desire to take his case to trial and to rely upon the jury's acquittal. The normal choice situation in plea bargaining,

> is the set of options the defendant would face in a no-bargain prosecutorial system that meets constitutional and critical moral standards and possesses similar statutes, procedures, and protections at trial and similar risks of conviction and punishment. [39]

Assuming that implicit bargaining does not affect a defendant's expectations, the "no bargain" state is one in which the defendant is free to exercise either his trial right or his right to enter a guilty plea without the influence of burdensome sentence differentials.

After the state intervenes through its plea bargaining proposal, however, a defendant is arguably less free to choose a means of adjudication without penalty. If, as was argued earlier, plea bargaining burdens the exercise of the trial right, then, by definition, the burden makes the exercise of that right less preferable than it otherwise would have been. Choice situation coercion theorists argue, and I believe rightly so, that once the trial option is burdened, so too is there a social constraint placed upon the defendant's freedom to opt for trial. As Brunk emphasizes, "[i]f . . . the prospect of a trial becomes significantly more burdensome to the defendant, then it is likely that the defendant's choice situation is worse than the choice situation presented in the no-bargain system."[40] Even if it could be argued that a defendant is in a more preferable choice situation after the plea bargain proposal than before, we must remember that a plea bargaining system is "less preferable than the choice situation that the offeree has every reason, even *right* , to expect."[41] Keeping in mind that a defendant has the right to exercise his right to a trial by jury, a situation which compromises this legitimate expectation and which makes the defendant feel as if he has no choice but to plea guilty is less preferable than his basic entitlements. From a choice situation perspective as well, plea bargaining may be labeled coercive.

"It is easy to say that [someone] is coerced in these cases," Professor Wertheimer notes, but "it is less easy to explain what *makes* them coercive."[42] The closest we can hope to come to an estimation of the true value of coercion claims is a consolidation of the theories and ideas explored in this chapter and elsewhere. Coercion can be said to occur when A threatens to impose some penalty or offers to confer some benefit, the promise of which intentionally and effectively constrains

B's freedom to choose between doing and not doing the requested act X; and as a result, B does X. Generally speaking then, plea bargains, which threaten burdensome sentence differentials and are fueled by incentives that are not a part of our regular adjudication process, can be said to operate in an inherently coercive manner. The very essence of the plea bargaining practice is the manipulation of a defendant's choice situation by the state in order to constrain the defendant's will to exercise his right to trial by jury. Whether it is "fundamentally evil" for the state to do so, is the subject of Chapter Six.

CHAPTER SIX

"INDISCRIMINATE MANIPULATION": EVALUATING ACCEPTABILITY

> The indiscriminate manipulation of the powers entrusted to public officials to coerce defendants into yielding important constitutional rights is anathema to those who claim that "steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." The very possibility of such manipulation breeds contempt and resentment--instead of remorse and resolve--on the part of defendants and undermines the justice system's credibility and legitimacy in the eyes of the public.
>
> Peter Nardulli, The Tenor of Justice

If public officials in the criminal courts use the "powers entrusted to [them] to coerce defendants into yielding important constitutional rights," it would be easy to immediately conclude that guilty plea negotiations are unacceptable and illegitimate. It would be easy, that is, if we could ignore the fact that "the use of state coercion per se is not enough to justify a ruling to the effect that an act or agreement" is invalid. [1] Certainly, "the power of the government is intrinsically and inescapably a coercive power,"[2] and "on any plausible account of 'coercion,' agreements entered into in response to coercion are an inevitability of social life."[3] What remains to be established is whether the government should be allowed to use its coercive power to force criminal defendants to waive their rights within the context of plea bargaining. Amid the overwhelming support for plea bargaining processes that has come from the Supreme Court, legal theorists and court administrators, we must determine whether state coercion within guilty plea negotiations is legitimate and acceptable.

This chapter seeks primarily to answer the question: "Under what circumstances is the use of state penal power to obtain convictions . . . an acceptable policy?"[4] Assuming that plea bargaining is coercive, in order to determine its acceptability we need to understand 1) the legal boundaries of the state's use of its coercive power, and 2) the reasons (if any) that court professionals might be ethically justified in using coercion to obtain convictions. It is important to note at the outset that our inquiry into the acceptability of state coercion within the context of plea bargaining is necessarily limited. Few set standards exist for deciding whether the state is improperly compelling criminal defendants, primarily because legislators and justices have generally denied the possible coerciveness of plea bargaining processes, and have structured legal discourse about plea bargaining in such a way that "involuntariness" presumes unacceptability. Nevertheless, we shall concern ourselves with evaluating the existing interpretations of the impropriety and acceptability of coercive plea bargaining practices. Inferences from analogous legal situations and ethical dilemmas lend support to our final assertion--that coercive plea bargaining practices should not be accepted as a valid part of our criminal justice process.

Legal Boundaries

Supreme Court perceptions

The Supreme Court's interest in preserving the plea bargaining process as an administrative tool has caused it to shy away from interpretations of the law which would in any way proscribe the power of the government to engage in plea bargaining. In several of its most famous cases regarding plea bargaining, the Court acknowledges that guilty pleas are often compelled by the state but finds that such

compulsion does not render the pleas involuntary or invalid. In Brady v. U.S., 397 U.S. 742 (1969), for example, the Court asserts:

> All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; pleas are no more *improperly* compelled than is the decision by a defendant at the close of the State's evidence that he must take the stand or face certain conviction.[5]

Because of the presumption of acceptability concerning compelled guilty pleas that pervades the Supreme Court's decisions, it is difficult to gauge the Court's assessment of the legal limits of coercive plea bargaining. "In ruling that plea bargaining is constitutional," Thomas R. McCoy and Michael Mirra write in an article for Stanford Law Review, "the Court has relied . . . on the requirements that plea bargaining processes conform to certain common standards of commercial fairness."[6] Through a brief historical sketch of the Court's most famous decisions regarding the voluntariness and acceptability in plea bargaining, we may be able to determine what these "commercial standards" are.

In one of the Supreme Court's earliest cases regarding guilty plea processes, Von Moltke v. Gilles 332 U.S. 708, (1948), the majority held that "if the defendant does not completely, intelligently and with full understanding of the implications waive his or her constitutional right to counsel . . . the guilty plea is invalid."[7] Although the case dealt specifically with the defendant's decision to give up her right to an attorney, the issue of most importance was the notion that defendants could waive their rights if they did so *"knowingly and voluntarily."* In Machibroda v. United States 368 U.S. 487 (1962), the Court expanded the voluntary-intelligent standard for the validity of rights waivers by giving a defendant the right to contest his conviction by guilty plea on the grounds of voluntariness.

In 1963, the Court held that--even though all criminal defendants did not yet have a right to an attorney--"the preliminary hearing of the state court was a critical stage, and that lack of counsel at the time of a guilty plea vitiates conviction"[8] In other words, in order for a defendant's plea of guilty to be considered valid, she must have the assistance of *a competent attorney* . By this Court pronouncement, the government was limited in its ability to coerce the accused into accepting a plea bargain without counseling. While there is little disagreement that a competent attorney is a necessary component of any valid plea agreement, the development of the right to counsel doctrine has lead to the implication that the mere presence of an attorney in the course of plea negotiations is enough to validate almost any degree of state compulsion. In other words, coercion in plea bargaining is deemed acceptable not just *if* the defendant has an attorney, but *because* she has one. Considering the fact that some defense attorneys have a stake in compounding (rather than refracting) the pressures that their clients experience, I take issue with this view that the presence of counsel is enough to legitimate the state's use of coercion. An attorney is definitely necessary for the acceptability of a plea, however compelled, but it can be argued that the presence of counsel is not itself sufficient.

"By 1969," according to Professor Loftus E. Becker, Jr., "the Court had considered the requirements for a valid guilty plea in about a half dozen cases . . . [and] there existed a small body of law, generally vague and frequently dicta . . .."[9] The thrust of the Court's declaration of commercial standards for the impropriety of plea bargaining emerged during the early 1970s. In Santobello v. New York 404 U.S. 257 (1971), the Court first implicitly analogized plea bargaining negotiations to the making of a contract between a defendant and the state. The majority in this case held that the prosecutor could be held to the promise that he had made to the defendant, just as civil litigants may be held to the terms of a contract. Unfortunately, the implicit connection between state and civil court negotiations

seemed to make duress (the standard for voluntariness and acceptability in contract law) applicable to criminal actions. In that duress requires that the government's act be "wrongful"--out of the scope of state power--in order to be considered unacceptable, the Court began to consider "contracts" made between the defendant and the state to be prime facie valid, unless certain minimum conditions were *not* satisfied.

Such a stance had been implicitly taken by the Court a couple years early in the case of United States v. Jackson 390 U.S. 570 (1968). Although the Court found that in defendant Jackson's case there was a needless and impermissible burden on the right to trial, the Court held, according to Professor Becker, that "if the particular plea bargaining system . . . was not in itself unconstitutional, then pleas produced by the pressures of the system would, as a general matter, be voluntary and thus valid." [10]

The early 1970s clearly marks the beginning of the diminution of the Court's standards regarding the limits of the government's power to pressure guilty pleas. In Brady v. United States (1970), the Court basically reversed its specific holding in Jackson argued that the fact that one pleads guilty for fear of capital punishment is not enough to render a guilty plea involuntary or invalid. "Plainly it seems to us," says the Court in Brady, "Jackson ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not." While the Court rejected sentence-differentials and the fear of death as conditions which may in themselves invalidate guilty pleas, it did seem to imply that *face-to-face threats* are unacceptable. The Court noted that [defendant] Brady had not been threatened in 'face-to-face encounters,' suggesting that . . . doing so . . . would be improper." [11]

Finally, the Court's decisions in North Carolina v. Alford 400 U.S. 23 (1970) and Bordenkircher v. Hayes (1978), seemed to undermine even its own

implicit boundaries to the state's power to coerce guilty pleas. In Brady, the Court apparently implies that "plea bargaining which induces *innocent defendants* to plead guilty is immoral,"[12] Yet, in its decision in Alford, the Court allows trial courts to accept guilty pleas from defendants who plead guilty even though they proclaim innocence. Defendant Alford, charged with first-degree murder, pleaded guilty to second degree murder even though he refused to admit guilt and steadfastly proclaimed his innocence. The Court nonetheless held that "a plea that refuses to admit commission of the criminal act" can still be considered valid if a "defendant intelligently concludes that his interests require entry of a guilty plea, and [if] the record before the judge contains strong evidence of actual guilt."[13] Considering that the greatest pressures are inversely proportional to case strength and that Alford eliminates a defendant's own admission of guilt in conjunction with entering a guilty plea, the Court may have made the very instance that they find to be unacceptable--the use of coercion to obtain convictions from innocent defendants--highly possible.

The Court first asserted that *vindictive* uses of state power are inappropriate and unacceptable in North Carolina v. Pearce 395 U.S. 711, (1969). Yet, in Bordenkircher, the Court allows a vindictive prosecutor to bring a defendant up on even greater charges solely because the defendant did not plead guilty to "save the court the inconvenience and necessity of a trial." Indicted for forgery "in the amount of $88.30,"(punishable by a two to ten year jail term), Hayes faced a district attorney who said that if he did not plead guilty and serve five years, he would be reindicted under the Habitual Criminal Act, which would subject him to a mandatory life sentence. Hayes refused to plead guilty, was reindicted, convicted and sentenced to life imprisonment. In one of its most shocking decisions regarding plea bargaining, the Supreme Court upheld the conviction on the grounds that "the prosecutor's decision to indict [Hayes] as a habitual offender was a legitimate use of available leverage in the plea-bargaining process." Justice Stewart writes for the

majority: "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." Despite the vindictiveness limit upon the government's power imposed by the Court in 1969, eleven years later there seemed to be little, if anything, keeping the state from exercising its power to coerce defendants to the fullest extent.

In sum, the Supreme Court implicitly acknowledges the validity of compelled guilty pleas unless such pleas are coerced by face-to-face threats, because of vindictiveness, without the assistance of a competent attorney, or with the effect of false prosecution on a wide scale. The problem with the Court's assessment of the limits of the state's power, according to many legal theorists, is that underlying the Court's opinions is *a presumption of the acceptability of plea bargaining processes* which undermines the Court's own pronouncements and amounts to "a mantle of hypocrisy that characterizes much of our official pronouncements with regard to plea bargaining."[14] As the Court holds in Bordenkircher, "acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in the constitutional sense." Instead of telling us when and under what circumstances the state is allowed to use compulsion, the Court assumes that compulsion is acceptable *unless* the aformentioned conditions occur. In its analysis of plea bargaining, then, the Supreme Court rejects the opportunity to set definite affirmative limitations on the state's use of coercive power, and instead, indirectly answers only the theoretical question: "when *can't* the state use compulsion to encourage guilty pleas?" We must keep in mind throughout our evaluation of the acceptability of coercive plea bargaining practices that "the question of whether the state may coerce . . . is really a question of what harms the state *may* threaten and carry out for what purposes."[15]

The "balancing test"

Indeed, the legal key to a pronouncement about the impropriety of the state's use of its coercive power in the plea bargaining process is an assessment of both the harms that the state's action renders, and the government's reasons for engaging in the coercive behavior. When, as in this instance, there seems to be a fundamental conflict between the interests of the state (to administer justice efficiently) and the interests of the individual (to exercise the right to trial by jury), and the state's actions are viewed as infringing upon or harming individual interests, courts generally conduct a "balancing test" as the legal means of resolving the issue of the limits of state power. According to Professor Patrick McFadden of Loyola University of Chicago, a balancing test

> directs a judge to eschew the application of formal rules in deciding a case, and instead to balance the competing interests of the litigants (or the competing interests of society more generally), and to give judgement for the side with the weightier interests.[16]

In plea bargaining, as in other legal practices, there are "two or more sets of . . . interests, each set pointing to a different outcome."[17] In our assessment of the acceptability of coercive plea bargaining, we must attempt, as judges do, to "weigh" the competing claims of the state and the defendant. Only by doing so can we determine whether the state's use of coercion to compel defendants to waive their rights is actually "improper" in the legal sense.

While there are different types of balancing tests, there are generally three steps common to most legal attempts to evaluate competing interests. First of all, when employing a balancing test, a judge will "set a balance by describing the elements to be weighed and the legal effect of the outcome." Secondly, a judge will

generally endeavor to "discuss the elements" that she has chosen to weigh in light of important legal considerations; and thirdly, she will "declare the winner based on the results of the weighing procedure."[18] It is important to note that these guidelines leave a tremendous amount of room for judicial discretion, that is, that there is no set procedure for actually determining which interests outweigh others by how much. Nevertheless, through the balancing process, the judge is able to escape the rigid rules of legal formalism, and to "take into account any broader societal interests."[19] In our quest to judge the acceptability of coercion within the plea bargaining practice, we, too, must assess the interests at stake by "deleneat[ing] . . . the factors to be considered" and "call[ing] for the weighing of those factors in reaching the judgement."[20] The first step--a description of the interests to be weighed and of the legal outcome of such a balance--necessitates the recognition that we are dealing with the *constitutional rights* of the defendant, on the one hand, and the *administrative interests* of the state on the other. "It is tautological but not trivial," as Professor Wertheimer asserts, "to note that the right to a trial by jury and the right not to be compelled to incriminate oneself are *rights* " which accused persons are often coerced into waiving by criminal justice administrators.[21] Needless to say, these rights are among those constitutional provisions which are deemed to be the bulwark between the oppressive powers of the state and individual defendants. The following comment from a Harvard Law Review editorial enumerates the rights that are compromised by a coercive plea bargaining process.

> The Constitution establishes an accusatorial system of public trials to determine the guilt of persons charged with crimes. The fifth amendment privilege against self-incrimination and the sixth amendment rights to confront one's accusers, to have compulsory process for obtaining witnesses, and to stand trial by jury are available to anyone accused of crime. [22]

The conflict between individual rights and the state's interest arises because "by inducing waiver of the constitutional trial rights, plea bargaining systematically undermines these protections, substituting administrative determination of guilt for the decisions of the judge and jury."[23] Such a substitution may ultimately be deemed proper (and coercive plea bargaining acceptable) if the state's interests in administering justice are found to outweigh an accused person's right to trial. Certainly, in that resources are scarce and trials cannot be provided to all, the government has a legitimate reason to seek nontrial modes of criminal case disposition. What we must determine in the subsequent discussion of the various interests (step 2) is whether one set of concerns can be said to "outweigh" the other.

Interestingly enough, there is a theoretical debate about the "weight" that should be afforded to the right to trial in the "balance" against the state's interest in coercive plea bargaining practices. Says one Manhattan Judge, "there's nothing sacred about a trial. Once you [attorneys and judges] have looked at all of the evidence, what are you going to do . . . give it to twelve strangers?" The prevailing belief in the importance of the jury trial as a constitutional right meets a similar objection from those who argue that the jury trial is of little value outside of its consequences. This assertion holds that the significance of the jury trial is only measurable by the defendant's perception of the jury's verdict. To the extent that defendants are often able to receive "better" sentences at the conclusion of guilty plea negotiations than they would have received after trial, it is argued that the "weight" of the trial procedure as an "inalienable right" which deserves protection is diminished.

While these perceptions are interesting ways to conceive of the American jury trial, they seriously underestimate the value of the trial process in a society in which formal criminal adjudication serves an important function. In determining the theoretical "weight" of the trial procedure, we must keep in mind that

> [f]ormal, public condemnation or vindication of an accused benefits society generally by enhancing the legitimacy of the criminal justice system. Trials increase the participation of members of the community as jurors and make the guilt determination process more visible. Trials are also valuable for the public and the accused as "lesson[s] in legal procedure, dignity, fairness, and justice."[24]

Moreover, in a society in which an accused person is presumed to be legally innocent until *proven* guilty, at trial, unlike with plea bargaining, there is always the possibility of acquittal. In fact, if the defendant is innocent, the formal trial is the only method of case disposition which provides sufficient protection against false conviction. In comparing trials and plea bargains, Albert Alschuler asserts:

> A jury is unlikely to seek conviction for the sake of conviction, to respond to a defense attorney's tactical pressures, to penalize a defendant because he has taken an inordinate share of the court's and the prosecutor's time, to do favors for particular defense attorneys in the hope of future cooperation, or to attempt to please victims and policemen for political reasons.. . . [25]

Even if the defendant is guilty and is convicted by a jury, trials afford the court the opportunity to review all of the evidence and to hear both sides of the story in making a determination of the sentence. In some instances, the judge is informed by testimony which seems to mitigate the seriousness of the crime. "Sometimes," says Manhattan Supreme Court Justice Richard B. Lowe III, "you hear things at trial which give you a more favorable opinion of the defendant . . . some mitigating circumstances that affect sentencing." Likewise, many theorists assert that trials are simply better suited to discovering the truth and to achieving justice than plea bargains. As Kenneth Kipnis asserts:

> In contrast to plea bargaining, the disposition of criminal cases by jury trial seems well calculated to avoid internal injustices even if these may sometimes occur. Where participants take their responsibilities seriously we have good reason to believe that the outcome is just, even when this may not be so. In contrast, with plea bargaining we have no reason to believe that the outcome is just even when it is.[26]

The final point that needs to be made with regard to the trial side of the "balance" is that, whatever interpretive significance we may decide to give to certain rights, in most legal balancing tests, constitutional rights are presumptively paramount. Picture (if you will) the balancing test as actual scales of justice onto which the interests of each side are placed. In a test which involves nonconstitutional government and individual interests, courts have often put each consideration on the scale in turn and have, in many instances, awarded legal legitimacy to the side with the greatest number of important interests. Where constitutional rights are involved, however, the Supreme Court has placed them on the scale first and foremost, and have argued that they are so important that significantly "heavier" state interests are needed to "outweigh" them. In most of its decisions regarding the balancing of individual rights and the public interest, the Court has held that "the public interest must be 'compelling' in order to overcome the individual's constitutional rights."[27]

The "compelling state interest" requirement is one of two legal considerations that we must keep in mind as we begin to evaluate both the state's reasons for coercing defendants and the relative weights of the competing claims.[28] Whether the state's administrative concerns can be said to "outweigh" the defendant's rights depends upon a finding that 1) the state's interest is "compelling," and, if so, that 2) the intrusion upon rights that is caused by the state's action is the least restrictive means of achieving the government's important interest. Only after making this

determination can we move to the third step of the balancing test--the declaration of a winner.

Few theorists have been able to argue successfully that the government does not have a legitimate interest in inducing defendants into waiving their right to trial. In Chapter Four, we examined the administrative crisis that has left many of the criminal justice jurisdictions in major metropolitan areas seriously overworked and understaffed. What we need to address here is the question of whether administrative concerns are "compelling" enough (in the legal sense) to validate the state's forcing defendants to waive their rights to trial. Of course, we cannot even attempt to call the administrative interests that we previously investigated "compelling" without first getting a sense of what a "compelling state interest" actually is.

Even though the Supreme Court has found reason to employ the "compelling state interest" test in some of its recent cases, the Court has not as of yet given a concrete definition of which interests it considers to be " compelling" under what circumstances. At present, we can only look briefly at the Court's rulings and make inferences about the types of interests that it found to meet the requirement. For example, in the case of Korematsu v. United States 323 U.S. 214 (1944), one of the most controversial decisions in American jurisprudence, the Court held that Japanese Americans could be interned in camps during World War II as a part of the government's "protection against espionage and against sabotage." The government's "compelling" reason for infringing upon the constitutional liberties of this group of citizens was apparently *national security* : it "decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily." While I am in no way addressing the merits of this case, I do wish to point out that it is one of the most widely known

examples of a weighing of interests in which the Court implied that the state's reasons were"compelling" enough to legitimate the harm to individual rights.

Another one of the Supreme Court's most controversial decisions, Roe v. Wade 410 U.S. 113 (1973), yields a clear statement of the principle of "compelling state interests" in their application. Writing for the majority, Justice Blackmun explains that "[w]here certain 'fundamental rights' are involved, the Court has held that . . . limiting these rights may be justified only by a 'compelling state interest.' " The majority in Roe, found that the state's interests in both the "*health of the mother*" and in "*protecting the potentiality of human life* " were "important and legitimate," and that each interest became "compelling" during different stages of a woman's pregnancy. While it is unnecessary to go into the details of the Court's trimester plan here, it is important to note that the justices found the aforementioned interests "compelling" enough to justify state intrusions of a woman's apparent right to privacy only during certain periods throughout her term. "This holding, we feel," Justice Blackmun wrote in summary, "is consistent with the relative weights of the respective interests involved."

In Roe, Korematsu and a number of other cases in which a balancing test is employed, the Supreme Court seems to reserve the label "compelling" for state interests which are accompanied by a sense of necessity or urgency, which correspond to the government's obligation to to protect the "health, safety and welfare" of its citizens, and which are themselves legitimate. While I hesitate to call these "criteria" for a determination that an interest is "compelling" enough to outweigh individual rights, they are certainly considerations which must be taken into account as we attempt to assess the status of the state's administrative interests with regard to the coerced waiver of rights which we have sometimes found to occur in plea bargaining.

There is no doubt that the desire for efficiency and the need to keep the system from collapsing under the tremendous weight of its case load is an important state interest. If it is indeed true, that as attorney Joel Hirschhorn states "the system would collapse if it were forced to try more than one case in fifty," then the government has a serious problem which it must dedicate itself to addressing. I would argue, however, that the state's administrative interest in coerced plea bargain negotiations is not of the same caliber as those interests which the Court has found to be "compelling" in other instances. Consider, if you will, the distinct differences between the state's restriction of rights for the alleged purposes of national security or for the expressed purposes of the protection of the health of American citizens, on the one hand, and the state's interest in maintaining an efficient and resourceful system of criminal justice on the other. It seems to me that the former set of interests, while maybe no more of a necessity than the latter, are a more direct expression of the government's charter--to "promote the general welfare"--and as such, perhaps are more compelling. The only apparent legal justification for undermining individual rights seems to be that in doing so, the government is directly acting to protect individuals in society in some significant way.

It can be argued that, by making sure that the criminal justice system continues to function at some level, the government *is* protecting society, and that its interest in maintaining the criminal justice system as "compelling" is an interest in national security or health. This perspective is weakened by a consideration, first of all, of the fact that the protection which is being afforded in the form of the assured punishment of alleged criminals is often illusive. In truth, defendants convicted by a coerced guilty plea are actually receiving less punishment than they otherwise might have and are spending less time incarcerated or on probation. "If plea bargaining weakens the deterrent and incapacitative effects of punishment, it may stimulate the rate of crime . . . and thereby actually increase the quantitative strain on the

system."[29] Moreover, there is little reason to believe that defendants who engage in plea bargaining are being rehabilitated before they return to the community. If anything, pressures to plead guilty and to reap the system's benefits may create a revolving door in which defendants--who might have been coerced into waiving their right to trial initially--learn after repeated offenses to use the system to their advantage at the same time the system uses them.

For the government to be allowed to engage in a prime facie *in* justice solely for the purposes of maintaining a system that is supposed to be dispensing justice is, to me, not only paradoxical, but also nonsensical. Unlike the interests in national security or health, the state's administrative interest in plea bargaining amounts to the maintenance of a process *for the process's sake* . Thus, to find the government's interest "compelling" enough to legitimate coerced plea bargains, we would be saying, in effect, that the continuance of the criminal justice system is so important, *regardless of whether the system is actually just* , that we will allow it to create injustices in order to maintain itself. This, to me, is not conceptually distinct from a government's decision to violate the rights of poor citizens in a number of different ways because the cost of supporting them is so great that the national deficit is compounded and the future of the government is itself jeopardized. What good, I am essentially asking, is the continuance of the government *as an interest in itself* , if citizens rights (the reason for the government's existence) are being compromised for the sole purpose of the government's preservation? In a sense, by finding an administrative interest to be "compelling," we would be asserting that the preservation of the criminal justice system (a system designed to protect rights) necessitates the undermining of rights, and that to do so is legally acceptable. To me, a government program which can only be maintained by violating the rights of citizens, and which purports to undermine rights solely for the purpose of its own survival, is actually not worthy of maintenance.

Certainly, the government has the legitimate right and authority to violate individual rights *when to do so furthers a "compelling state interest."* My point here is not to advocate anarchy, but to argue that the efficiency and resourcefulness of the criminal justice system--even to the extent that the system cannot function without these attributes--are not sufficient reasons for undermining individual rights.

Even if we could believe that administrative interests are sufficiently "compelling," there are significant questions about whether coercive plea bargaining is the least restrictive means by which the government could obtain these objectives. If the government were to train and to hire more court personnel, for example, and to build more criminal justice facilities, the state's administrative interests may be met without resorting to infringements upon rights. Similarly, there are theorists who argue that the criminal courtroom is not the proper forum for the conceptualization and implementation of solutions to administrative problems. Ronald Dworkin suggests (and I believe rightly so) that "the proper business of the Courts is to resolve questions of principle. Policies are legislative, not judicial concerns."[30] In light of the purpose of the criminal justice system--to ensure that defendants receive just and fair adjudication--the state's administrative cannot be said to outweigh a defendant's Fifth and Sixth Amendment rights. Legally speaking, coercive plea bargaining is, therefore, not acceptable.

I am certain that my argument meets objection from both critics and supporters of plea bargaining. Though plea bargaining's critics may agree with my final assessment--that coercive plea bargaining does not outweigh individual rights and is therefore not acceptable--many of them must consider the formality of balancing constitutional rights against the interests of the state to be improper if not unnecessary. The Fifth Amendment provides a privilege against self incrimination which expressly prohibits government compulsion, and the Sixth Amendment guarantees that "in *all* criminal prosecutions the accused shall enjoy the right to a

speedy and public trial by an impartial jury." It would seem from the mere wording of the constitution that the government's attempts to coerce defendant's into waiving their rights would be unacceptable. As Professor Wertheimer comments:

> If a defendant has a right not to be compelled to incriminate himself or waive his right to a trial by jury, and if pleading guilty is incriminating oneself and waiving one's right to a trial by jury than straightforward deduction seems sufficient to show that guilty pleas cannot be compelled.[31]

What we need to remember is that although "the [constitution's] words leave little room for interpretive maneuver," constitutional rights are not absolute.[32] Especially in the comparable area of the First Amendment--in which the government "shall make no law . . . abridging freedom of speech"-- the courts have found instances which necessitate exceptions to the rule. Once it is accepted that, regardless of the "readily ascertainable content" of the "protecting language" of the constitution, there will be times that these rights must be suspended in the name of more immediate interests, then the court "will inevitably create *some* limiting principle or principles" for government behavior.[33] The Supreme Court has held that the "balancing" and "compelling state interest" tests are the governing principles concerning limitations on state power, and I believe that they are as good as any other principles which could be conceived of in this regard. In response to those who essentially argue that the liberties of the constitution are diminished by "balancing" them against possibly prevailing government interests, Professor McFadden comments:

> [T]he Court must draw lines between permissible and impermissible government action. Any line it draws, upon any ground it wishes to draw it, will diminish fundamental liberties if the "proper"

> measure of liberty is "no law" at all infringing the freedom of speech. The real debate concerns the extent of permissible legislation [or state action] not the proper method of constitutional interpretation.[34]

Plea bargaining's supporters may take issue with the fact that my "balancing" analysis assumes that there is a conflict between the state's interests and the individual's rights, and may argue that no such tension exists if you conceptualize plea bargaining (however coercive) as within the state's legitimate power to sentence defendants according to society's values and needs. Returning to the notion (which I explored at length in Chapter Five) that plea bargains are *benefits* that the government *offers* to the accused, some theorists will undoubtedly assert that, even though the resulting burden on rights is coercive, the government's beneficial actions should be allowable. They may, as the Supreme Court does in Bordenkircher, argue that

> [w]hile confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"--and *permissible* --"attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[35]

It is in response to the assertion that burdens on the trial rights are "inevitable" and "permissible" because of the perceived benefits of plea bargaining, that I offer the third, and final, legal perspective of determining the acceptability of coercive plea bargaining, and that I attempt to explore the aforementioned critique as an ethical justification for coercive plea bargaining practices.

Unconstitutional conditions doctrine

While there has yet to be established in criminal law a definitive legal usage of what has been termed the "unconstitutional conditions doctrine," legal theorists conceptualize the principle as one which limits a state's power to confer benefits that are conditioned upon the waiver of rights. Frost & Frost Trucking Co. v. Railroad Commissioner 271 U.S. 538 (1926) is one of the first Supreme Court cases in which it was held that "a state *impermissibly* pressures a citizen to forego exercising a constitutional right when it requires the relinquishment of that right as a condition for receipt of an important state benefit." In other words, even though the state's power to pressure its citizens to waive constitutional rights may take the form of *offers* conferred to individuals rather than of *threats* leveraged against them, legally, the effective burdening of rights is not any *less* coercive or any *more* permissible. In "Plea Bargaining and the Supreme Court," Professor Loftus Becker gives a concise explanation of the issue of state benefits and unconstitutional conditions:

> Governments frequently want to condition the grant of benefits, or the abatement of burdens, on an agreement to waive, or not to exercise, at least for the time being, some constitutional right. At one extreme this is indispensable to the operation of government.. . . At the other extreme, however, allowing the government to condition receipt of any government benefit on the waiver of every constitutional right would effectively destroy *all* such rights. The doctrine mediating between competing considerations is known as the doctrine of unconstitutional conditions. [36]

Several of the legal scholars who have written about plea bargaining assert that the unconstitutional conditions doctrine is specifically applicable to the state's act of conditioning leniency upon a defendant's waiver of her right to trial. Supporters of plea bargaining processes (the Supreme Court included) may attempt to cast the results of plea negotiations in a beneficial light, and to assert that the unavoidable

coerciveness of the burden on rights is nonetheless acceptable because the government grants benefits that defendants would not otherwise receive. While this seems to be a reasonable argument, the law holds that--without "a purpose for the waiver that [is] more than a simple desire to prevent the exercise of [constitutional] rights"[37]--a state cannot make offers that effectively burden those rights no matter how beneficial.

In criminal law, the Supreme Court's most famous application of the unconstitutional conditions doctrine occurs in its decision in Garrity v. New Jersey 385 U.S. 493 (1967). Although in this case, the Court is addressing the state's ability to threaten to *withhold* benefits, the principle of unconstitutional conditions remains the same. Defendant Garrity was a police officer (a government employee) who was asked to testify in court regarding an incident which was under investigation. Although Garrity had the right to remain silent because the information that he was asked to disclose might be used against him at a later trial proceeding, he was also told that if he exercised this right, he would be fired. In other words, the government was conditioning a benefit (Garrity's job) upon his waiver of the privilege against self-incrimination. Placed in this difficult position, Garrity testified, and was later convicted using information that he had disclosed. He appealed his conviction, and the Supreme Court held that "the option to lose [one's] livelihood or to pay the penalty of *self-incrimination is the antithesis of a free choice . . .*." Not only did the Court find the government's scheme to be coercive, but also impermissible--"there are rights of constitutional stature," Justice Douglas writes, "whose exercise a State may not condition by the exaction of a price."

Oddly enough, the Court apparently does not consider the privileges incorporated in the Fifth and Sixth Amendments to be such rights when in the context of plea bargaining. The unconstitutional conditions doctrine, as it is expressed by the Court in Garrity, states that the government cannot threaten to

withhold benefits such as a job on the condition that an individual waive his rights. It seems plausible to apply unconstitutional conditions to plea bargaining, and to assert that a state cannot condition *leniency* --an apparent benefit--upon a constitutional waiver. The effect of the unconstitutional conditions doctrine, which I believe is the same for both jobs and sentence leniency, is to proscribe the government's ability to grant and to threaten to withhold benefits based on the waiver of rights. As Professor Wertheimer acknowledges:

> If it is impermissible to induce someone to waive his right not to *testify against himself* by threatening to *fire* him, it must surely be impermissible to induce someone to waive his right to a *jury trial* by threatening a *severe punishment.* The Court need not strike new ground to find bargained guilty pleas involuntary or unconstitutional. It need only be consistent with its own Fifth Amendment decisions.[38]

Indeed, the Court laid the foundation in Garrity for a legal standard by which to judge the permissibility of state's power to coerce--even when the coercion may have a beneficial outcome.

In all sincerity, the unconstitutional conditions doctrine is lacking as a complete explanation for the disallowance of state granted benefits within the context of a bargain. Though an individual may be under extreme pressure to negotiate a deal, and though this pressure may even be coercive, we, in American society, tend to shy away from condemnation of any practice if it is perceived to result in a mutually beneficial settlement. While plea bargaining may sometimes result in the punishment of innocent defendants (which is categorically impermissible), in many instances, defendants serve a substantially lesser sentence than they otherwise would have received. Why, then, must the practice be condemned? If, even though plea

bargaining is coercive, some defendants *benefit* , why should we argue that it is improper? These questions are not actually legal but *moral* concerns and can best be addressed within the context of an inquiry into American society's values regarding the extent of benefits as a justification for otherwise improper acts. According to David Hoekema, "to judge whether the state exercises its power properly, we must determine whether other moral considerations outweigh the costs . . .." [39] We shall examine the belief that coercive plea bargaining's ultimate good justifies its use in the following section.

Ethical Justifications

According to Professor Wertheimer, "the [Supreme] Court's principle defense of plea bargaining is consequentialist--'it benefits all concerned.'"[40] Indeed, the Court has enthusiastically embraced plea bargaining practices, minimizing important legal objections like the ones raised in the previous section, and heralding the apparent benefits of the process. Few moral theorists would fail to recognize the utilitarian nature of the Court's justification of plea bargaining. The principle of utility, which is inherent in the supportive claims of plea bargaining advocates, holds that "only that which in someway maximizes the . . . happiness, pleasure or satisfactions of human beings . . . is acceptable."[41]

In the tradition of utilitarianism, supporters of the plea bargaining process argue that what justifies coercive plea bargaining practices is that they can be deemed ultimately beneficial. We should accept the process despite the legal illegitimacy of its coerciveness, advocates seem to say, because in the end it is advantageous for the largest number of people. Plea bargaining is, in effect, "the greatest good for the greatest number." In responding to this ethical justification for coercive plea

bargaining, I wish to avoid simply recounting the litany of well known objections to utilitarian principles. While I am persuaded that utility fails to account for differences in judgement, for example, and that therefore, it is not necessarily an appropriate way of judging acceptability, I will attempt here to stay within the framework that supporters of the process have brought forth. In other words, I am attempting to address utilitarian claims from a utilitarian perspective, and to argue that, even from this viewpoint, alleged justifications for coercive plea bargaining fail.

In the first place, since utilitarianism is about "counting heads" (so to speak) and determining whether the policy in question leads to the greatest happiness for the most people, it is important to acknowledge that there are innocent defendants who are swept up in the criminal justice machine and are coerced into pleading guilty. Says Robin Steinberg, a defense attorney in upper Manhattan:

> There is no question that some innocent people plead guilty because the offers are low and the risk factor of going to trial is tremendous. I don't' think that there is an honest attorney in the City who can tell you that they have not had the experience of knowing someone is not guilty and advising them to plea guilty anyway.

Plea bargaining is obviously not the "greatest good" for innocent defendants, and in assessing whether the policy is acceptable by utilitarian standards, we must discount the number of innocents, who are made unhappy by the process, from the group of defendants for whom plea bargaining is said to be a benefit. What is this number? Considering the fact that most defendants deny guilt initially, that there is a legal distinction between factual guilt and legal guilt, that the system is not inordinately concerned with weeding out the good from the bad in terms of plea bargaining, and that the most pressure to plead guilty is generally placed upon those defendants against whom the government has the weakest cases, it is literally

impossible to be certain. We can only look to the opinions of those court professionals who knowledgeable of the system. In a recent interview, Dade County Public Defender Bennett Brummer commented:

> You can't hold people in jail and tell them that they can go home today if they plead guilty and not have innocent people plead guilty. I don't think that there are a lot of them, but they definitely do exist. There may even be a lot of them numerically, not a huge percentage, but it's a sizeable amount of people.

Moreover, because of a defendant's "choice situation" which I discussed in Chapter Five, and the legal benefits of the trial process which were enumerated earlier in this chapter, I have doubts about the notion that plea bargaining is truly the greatest good for defendants in general. One Manhattan attorney stated unequivocally that

> as far as my clients are concerned, plea bargaining is a terrible process. There are some people who believe that plea bargaining is a great thing for our clients . . . it benefits the guilty. But it's a terrible system because it basically forces them into certain positions . . .. They really have no choices.

To the extent that some defendants may be "happier" with the outcome of a negotiated settlement than they would be with the outcome of a trial, assuming they are guilty, one wonders whether the state's hand in setting sentence differentials nullifies its ability to successfully argue that plea bargains benefit the accused. Bargains are only beneficial *because* the state has structured its justice system so that the outcome of a plea negotiation is "better" than that of a trial. We must keep in mind that, as Kenneth Kipnis asserts, "the state forces a choice between adverse consequences that it imposes."[42] Coercing the accused into accepting the "beneficial" choice cannot necessarily be justified by the fact that it is "better" than

the other option--one which has been intentionally manipulated by the state so that it's outcome is "worse."

Be that as it may, the most significant argument against the utilitarian justifications for coercive plea bargaining practices is that, although the practices may benefit the state and the accused, they are a detriment to society as a whole. If we are truly considering "the greatest good for *the greatest number,* " then harms to society cannot be justified even from a utilitarian standpoint. As Professor Wertheimer comments: "it is doubtful that plea bargaining serves . . . society's interests in the criminal justice system."[43] I would argue that plea bargaining may even harm society. There are two major detriments which counter and override the benefits of coercive plea bargaining practices. First, as I argued earlier, granting "benefits" to defendants in terms of leniency (a coercive practice) means that a greater number of defendants spend less time incarcerated and little or no time in programs which may help to regulate their behavior, and facilitate their return into the community. "Is it really right," Miami defense attorney Joel Hirschhorn asks, "for society to have to be put in a position of having to welcome out on the street someone who should have been put away for a long time?" Indeed, society would most likely be "happiest" if the accused persons who deserve both punishment and help were actually able to receive them. While the argument that plea bargaining does not punish enough can be interpreted as a strike *against* defendant's rights (the very principle that this thesis upholds), it is offered here as a response to the assertion that coercive plea bargaining practices are justified and acceptable on the basis of utility.

Secondly, and perhaps more importantly, coercive plea bargaining practices "threaten many *values* embodied in the Bill of Rights and, indeed, many *values and interests* of any rational and moral criminal justice system."[44] While this view is not necessarily a response to utility from within the bounds of utilitarian thought

(i.e., utility argues that there is no value to rights outside of their consequences), it may be argued that the *result* of undermining existing values is that to do so is itself detrimental to our society.

A democratic society is theoretically based upon the liberties of the individual and the limitations of the state. What gives our government legitimacy and our criminal justice system credibility is the basic tenet that the rights of individuals are protected from encroachments by the majority. To accept without question that the "benefits" to the state and to the accused in plea bargaining justify a burden upon a defendant's constitutional rights, is to challenge our faith in the fundamental principles of democracy. It cannot honestly be asserted that policies which admit constitutional violations and abuses on the basis that they are "beneficial" are the greatest good for a society which values individual protection as highly as we do. In this sense, I suppose, utility is actually in conflict with our existing values. If government officials were morally justified in wielding power with an oppressive hand on the basis of utility, then our democratic society would be much worse off--even from a utilitarian viewpoint--because we would be on a slippery slope sliding toward totalitarianism.

Coercive plea bargaining practices are not justifiable or acceptable by our own ethical and legal standards. At present, "a wide variety of coercive devices are employed against an accused-client--couched in a depersonalized, instrumental bureaucratic version of due process of law, which are in reality a perfunctory obeisance to the ideology of due process."[45] Like Manhattan Justice Carol Berkman, some theorists concede that plea bargaining "forces defendants to make difficult choice," and that "yes, the system is coercive. If you didn't have plea bargaining," Justice Berkman acknowledges, "you would probably have less coercion but you would lose all of the benefits." In a democracy, there are very few "benefits" the acquisition of which properly requires individuals to sacrifice their

constitutional rights. It is my argument that the plea bargaining "alter" destroys the theoretical sanctity of the American criminal justice process.

CHAPTER SEVEN

CONCLUSION

"If they agree on nothing else," Alexander Hamilton asserts in Federalist No. 83, " the friends and adversaries of the plan of the convention . . . concur at least in the value they set upon the trial by jury." As I sat in the criminal courtrooms of Manhattan, Miami, and Boston, I wondered how shocked the framers would be to learn that the venerable trial by jury--that which the federalists called "a valuable safeguard to liberty" and the anti-federalists labeled "the very palladium of free government"--is no longer an integral part of the American criminal justice system.[1] What I witnessed in the summer of 1991 was a process in which the accused are systematically deprived of their right to contest the government's accusations. What I wrote about in this thesis was my attempt to investigate, examine and assess the limits (or lack thereof) of the government's authority over its citizens with regard to plea bargaining processes. What I found, in the end, was that to the extent that guilty plea negotiations involve a certain amount of state coercion and that the government in this instance has no justifiable or "compelling" reason for exerting pressures which burden constitutional rights, "the institutionalized practices by which pleas of guilty are arranged and accepted *corrupt* criminal justice."[2]

I began my personal inquiry into the coerciveness and acceptability of guilty plea negotiations as we began here--with an overview of the plea bargaining process in general. I felt that until I understood the definitions, history, and major arguments surrounding this widely misunderstood and relatively controversial

issue, I would not be able to make an effective case about what I had observed. After gathering general information about plea bargaining, I set out to speak with some of the court participants of three major metropolitan areas and to identify the various types of pressure that exist in some criminal justice jurisdictions. As is to be expected when discussing the problems of any system or profession, I suppose, I found that judges blamed prosecutors, prosecutors blamed judges and defense attorneys blamed them both. They all agreed, however, that regardless of who was at fault, defendants were being pressured by the system in a variety of different ways. It was at this point that I realized that my idealistic eyes (which had been bred on *L.A. Law*) had not deceived me, and that the problem in America's criminal courts was actually much larger than it had been made to appear in the newspapers and on television. If defendants were, indeed, being pressured into giving up their constitutional protections, I wondered, what was the government's motivation for doing so? Could we theoretically conceive of such pressure as "coercive"? And, if so, to what extent could we continue to accept such an institution as a valid part of our criminal justice process?

With these questions in mind, I began to examine the reasons that my interviewees, legal theorists and the Supreme Court itself gave for why the pressures to plead guilty exist. The administrative crisis in the modern court system--the most frequently used rationalization--was mentioned in some way, shape or form by nearly every court professional with whom I spoke. In addition, I discovered other, more hidden agendas for pushing the accused into a "bargain" with the government--including political success, the administrative culture, and fear of reversal on appeal. It is interesting to note that while the Supreme Court admits that states "encourage" guilty pleas, the Justices--like some of the court professionals whom I interviewed--are generally hesitant to call such pressures "coercive." To "protect the myth of an adversarial trial process," Professor Lloyd

Weinreb argues, the law must conceive of "a plea of guilty [a]s the defendant's independent choice.. . ." [3]

Having already acknowledged the reality of the modern *non* -adversarial system, I turned to literature on the definitions and theories of "coerciveness" in hopes of finding some conclusive way of determining whether or not (as some theorists claimed) the pressures and inducements of the system are actually coercive manipulations of a defendant's will. I found none. In truth, depending upon one's theoretical starting point, which theory one deems to be the proper way of looking at the issue, and which perspective one chooses within any particular theory, "coercive" could apply to almost any action engaged in in response to a another's proposal. By assessing the threats/offers theory, the nature of the act theory, and the choice situation theory, I attempted to point out the strengths and weaknesses of each of these philosophical viewpoints, and to show that despite the relativeness of the concept of coercion, plea bargaining could be deemed "coercive" by almost every standard. Professor Albert Alschuler suggests that it would do us little good to deny the coercive character of the system," for in doing so, "we magnify its injustice as we delude ourselves."[4]

To have ended there--with an identification of the pressures and the reasons for them, and an ambiguous sense of the coerciveness of the process--would not have addressed what, to me, is one of the most important issues underlying the plea bargaining controversy. "Whatever else one thinks about plea bargaining," says John Kaplan in his book Criminal Justice, "the practice makes a statement about the relative power of the citizen and the state." [5] An examination of plea bargaining does not only speak to the issue of coercion, but also to legitimacy of "the state's use of its powers to obtain the grounds for punishing some individual or achieving some good."[6] Assuming that plea bargaining pressures are coercive, it would be

necessary, I thought, to determine the extent to which the government's use of its coercive power could be deemed legally acceptable and ethically justifiable.

Looking at the legal limitations upon the state's power to engage in guilty plea negotiations, I realized that our highest court has found the process to be both "voluntary" and "valid." The Supreme Court apparently asserts that if a defendant enters a plea bargain "knowingly" and accompanied by counsel, and if the state's scheme does not involve vindictiveness, face-to-face threats or the disproportionate coercion of innocent persons, then the process is legally permissible. I found (for reasons discussed at length in Chapter Six) the Court's rationale to be insufficient to yield a realistic standard for determining the acceptability of guilty plea negotiations as they currently operate.

Nevertheless, by conducting my own "balancing test," I was able to argue that plea bargaining processes are legally improper in the sense that the state's administrative interests are not "compelling" enough to outweigh the threat to individual rights. The "unconstitutional conditions doctrine" supported both my conclusion and the notion that "there are some rights of constitutional stature whose exercise the State may not condition by the exaction of a price."[7] Moreover, the philosophical principle of utility (conceivably a moral justification for coercive plea bargaining) buttressed my seemingly contradictory argument that an individual's Fifth and Sixth Amendment Rights "should not the subject of bargain and barter," even if to do so seems beneficial to the parties involved. In a country that is founded upon the belief that individual rights should be protected from the forces of a tyrannical majority, there is, in my opinion, no greater threat to society than the institutionalization of the government's power to manipulate the wills and circumstances of individuals. Even if both the defendant and the state benefit, when the hand of oppression reigns, society suffers.

Given that I have argued that plea bargaining is unacceptably coercive, it would seem that the abolition of the process is our only recourse. While I consider the abolition of plea bargaining to be the ultimate goal of any reform that aims at eliminating state coercion in the criminal justice system, at this point in time, I must be realistic. The process as it currently operates is far too prevalent and much to ingrained to be easily dismissed. At present, because complete abolition is unlikely and, arguably, impossible, "the best we can hope for is to purge the taking of guilty pleas of some of the worst features of bargaining."[8] We must keep in mind that "we are ultimately addressing the question of the state's use of its coercive power [and] . . . systems for the administration of that power can be structured in various ways."[9]

One of the most debatable reforms at present involves the elimination of the judge from plea bargaining negotiations at both the federal and state levels. "The fact is," says Professor Graham Hughes of New York University School of Law,

> that while trial judges are permitted to participate in plea negotiations, it will never be possible to dispel suspicion of vindictiveness and thus never will be possible to ensure that unwholesome official threats are not being leveled at the accused. [10]

Theorist Conrad Brunk agrees. The involvement of the judge, in his opinion, takes away from "an assurance of full due process at trial if the defendant refuses a bargain and opts for trial." To "guard against this burdening of trial," Brunk asserts, judicial involvement in the plea bargaining process and subsequent presiding over a trial, must be avoided.[11] Likewise, the First Circuit Court of Appeals argues that where judicial participation occurs, "the relative equality of bargaining power that characterizes negotiations between the prosecutor and the defense attorney is clearly absent."[12] Although the notion that the prosecution and

the defense have equal bargaining power is itself questionable, the point that is to be made is that some scholars and practitioners view judicial participation in the plea bargaining process as inherently coercive and vindictive, and out of the scope of normal judicial functioning. Says Judge Harry Ackley: "the role of the court must be to stay out of the dispositional process until the question of guilt has been resolved."[13]

On the other hand, there are theorists who argue that judicial participation is the only way to ensure the fairness of a reformed plea bargaining process. Considering our determination that both prosecutors and defense attorneys often have hidden agendas for pressuring defendants into pleading guilty, this argument seems to have at least some merit. Says Professor Alschuler, "judicial bargaining, in an appropriately limited form, us is no more coercive than prosecutorial bargaining, and . . . the bargaining process can operate in a fairer, more straightforward manner when judges do take an active part." [14] It may be necessary to include the judge in plea bargaining processes as a check on prosecutorial power, and as a way to "bring to negotiated dispositions some of the attributes of formal trial procedure,"[15] at least until a formal trial becomes more widely available.

It is difficult to decide whether leaving the judge in the plea bargaining process as it presently stands would be more detrimental than removing her from the negotiations altogether and, in truth, such a determination is probably best left to the professional theorists. I can only say that, as the court actor with the power to sentence, the judge is most likely the single individual with the greatest power to threaten defendants and to scare them into relinquishing their rights. Perhaps through the establishment of separate bureaus for judicial plea bargaining, which may be entered at the request of the defendant,[16] we may be able to eliminate the

potential coerciveness of plea bargains entered into both with and without the magistrate.

Considerably less controversial are reforms which call for the elimination of prosecutorial overcharging and the establishment of nearly complete discovery in all criminal justice jurisdictions. If we are to make plea bargaining as acceptable as possible, we need to reduce the opportunity for "distort[ion] of the actual risks involved in exercising the trial option."[17] The charging standards of District Attorney's offices might have to be subject to some sort of judicial review in order to ensure that defendant's are facing charges that are commensurate with the alleged crime. Likewise, prosecutorial bluffing may be curbed by a semi-complete discovery system in which important information and documents which comprise the People's case can be revealed at the request of a defense attorney.[18] As Paul Shechtman, Chief Counsel for the Manhattan District Attorney's Office, commented in a recent interview: "With bargaining, there ought to be more sharing of information."

Of course, no reform is as crucial to the reduction of coercion in the plea bargaining processes of the criminal justice system as one which addresses the specific administrative crisis that has created the apparent need to pressure criminal defendants. "We would need twice as many judges and twice as many courtrooms to make a difference," says one Manhattan attorney. According to Dade County District Attorney Janet Reno, "the problem now is having enough judges in all of the courtrooms to try all of the cases." It is apparent that there will continue to be pressure to get the accused to waive their rights to trial as long as there is not enough time (fueled by a lack of resources) to try them. While coercive plea bargaining would not be completely eliminated with increased funding, we would be at least a little closer to ensuring that due process becomes a reality for those individuals who are accused of crimes.

Our eventual goal in reforming the plea bargaining process should be to make the trial right available to all who desire to exercise it. Of course to do so would require a commitment on behalf of the American government and its citizens that such a goal is worth the financial investment. Getting the resources that are necessary to make sure that there are enough judges, and enough courtrooms, and enough correctional facilities will not be an easy task in this day and age. Says attorney Joel Hirchhorn, "people simply don't want to pay for what its going to take for the system to get better." Indeed, there are a number of people who believe that we already spend too much on the accused. As Manhattan Supreme Court Justice Richard Andrias asserts: "there has been a gross expansion of defendant's rights at the expense of society. We now [attempt to] provide jury trials and lawyers for *everyone* with money that is better spent elsewhere." Certainly, we will pay the price financially for making constitutional protections a reality. However, if we continue to allow the government to force defendants to waive those constitutional protections that exist to keep us all safe from the hand of oppression, it seems that we stand to pay a price in terms of individual sovereignty, which I would argue, is even more costly.

The greatest challenge that we now face in searching for ways to make plea bargaining and other criminal justice processes less unacceptably coercive is overcoming the general hostility and apathy--in both the criminal justice community and the larger society-- toward the rights and privileges of "those people" who are accused of criminal mischief. Says attorney Yale Freeman, "but for a series of circumstances, *I* could be sitting on the other side of the desk just like them. The day that I start calling my clients *'those people,'* it's time for me to get out of the business." Unfortunately, there are too many criminal justice participants who do not share Attorney Freeman's beliefs. Too many court actors are willing, in effect, to "bargain away" our rights by coercing criminal defendants into giving up theirs.

If it is true that, as New York Supreme Court Justice Richard B. Lowe III asserts, "the criminal justice system is only as good as the individuals who comprise it," then it is our responsibility to make sure that the individuals who administer justice are "as good" when dealing with the rights of the accused as we have a right to expect them to be. We must ensure that the scales of justice are not destroyed in the hands of those who have the power to oppress. Our civilization hangs in the balance.

CHAPTER ONE--NOTES

[1]Alschuler, Albert W., "Plea Bargaining and its History," 79 Columbia Law Review, 1979, p. 40

[2]*ibid.*

[3]*ibid.*

[4]Jones, David A., Crime Without Punishment. Lexington, MA: Lexington Books, 1979., p.75

[5]Report of the New York State Judicial Commission on Minorities . BSy James C. Goodale, Chairman. Vol. One, Executive Summary. New York: April, 1991

[6]Blackledge v. Allison 431 U.S. 63 (1977)

[7]McDonald, William, F. Plea Bargaining: Critical Issues and Common Practices. Washington, D.C.: U.S. Department of Justice, 1985, p. 1

[8]*ibid.*

[9]In that all of the interviews took place during the months of December and January and that all of the interviewees are criminal justice participants in these three major metropolitan areas, I have refrained from footnoting each individual interview that is mentioned throughout this study.

[10]Gordon, Diana R. The Justice Juggernaut. New Brunswick: Rutgers University Press, 1990, p. 35

[11]Mill, John Stewart. On Liberty. Edited by David Spitz. New York: W.W. Norton and Company., 1975, p.3

[12]Rosenblatt, Roger, "The Bill of Rights," Life: Bicentennial Issue, Fall Special 1991, p. 21

[13]Gordon, p. 10

[14]*ibid.*, p. 35

[15]Dershowitz, Alan M., The Best Defense, New York: Random House, 1982, p. 416

CHAPTER TWO--NOTES

[1]Maynard, Douglas W., Inside Plea Bargaining: The Language of Negotiation. New York: Plenum Press, 1984, p. 1

[2]Nardulli, Peter F., and James Eisenstein, and Roy B. Flemming. Tenor of Justice: Criminal Courts and Guilty Plea . Chicago: University of Illinois Press, 1988, p. 208

[3]Sanborn, Joseph, B. "A Historical Sketch of Plea Bargaining," Justice Quarterly, Vol. 3., no. 2,, 1986, p. 111

[4]*ibid.*

[5]*ibid.*

[6] Church, Thomas W., "In Defense of "Bargain Justice," Law and Society Review, Vol. 13, Winter 1979, p. 509

[7]Langbein, John. "Understanding the Short History of Plea Bargaining," Law and Society Review, Vol. 13, Winter 1979, p. 261

[8]McDonald, William, F., Plea Bargaining: Critical Issues and Common Practices, U.S. Department of Justice, National Institute of Justice, July 1985, p. 6

[9]Friedman, Lawrence M., "Plea Bargaining in Historical Perspective," Law and Society Review, Vol. 13, Winter 1979

[10]Moran, T. Kenneth, and John L. Cooper. Discretion and the Criminal Justice Process. Port Washington: Associated Press Press, 1983, p. preface

[11]Mc Donald, William F., "From Plea Negotiation to Coercive Justice," Law and Society Review, Vol. 13, Winter 1979, p. 386

[12]McDonald, "From Plea Negotiation," p. 385

[13]Lefstein, Norman, "Plea Bargaining and the Trial Judge, The New ABA Standards, and the Need to Control Judicial Discretion," North Carolina Law Review, Vol. 59, 1981, p. 489

[14]Heumann, Milton. Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978., p. 43

[15]*ibid.*,

[16]Other types of bargains, such as those in which lighter sentences are exchanged for information or testimony, are not included in this particular definition of plea negotiations, although they are considered to be a part of plea bargaining generally. These types of plea bargains have been excluded since we are primarily concerned here with a defendant's *self* -incrimination.

[17]Sanborn, p. 111

[18]Alschuler, Albert W., "Plea Bargaining and its History," 79 Columbia Law Review, 1979, p. 2

[19]*ibid.*

[20]It is asserted that before there were even trial procedures, ancient magistrates and governments would sentence the accused based upon the certainty of guilt and upon the defendants ability to "buy" a certain

CHAPTER TWO--NOTES (continued.)

punishment. "The first objects of barter" were money and punishment, not guilty pleas. Sanborn, Joseph, "A Historical Sketch of Plea Bargaining," Justice Quarterly, Vol, 3., no. 2, p. 115

[21]*ibid.*, p. 119

[22]*ibid.*, p. 5

[23]*ibid.* , p. 8

[24]Friedman, p. 248

[25]McDonald, Plea Bargaining . . ., p. 3

[26]Friedman, p. 255

[27]Alschuler, footnote #128

[28]*ibid.*

[29]Heumann, p. 14

[30]Friedman, p. 256

[31]McDonald, Plea Bargaining . . ., p. 1

[32]Heumann, p. 156

[33]Santobello v. New York 404 U.S. 257, 261(1971)

[34]*ibid.*

[35]*ibid.*, 260

[36]McDonald, Plea Bargaining . . ., p. 4

[37]Feeley, p. 201

[38]*ibid.*, p. 202

[39]Church, p. 509

[40] Alschuler, p. 35

[41] Langbein, pp. 261-262

[42] Alschuler, p. 30

[43] Wilson, James Q., Thinking About Crime, Basic Books, Inc., 1975, p. 133

[44]Church, p. 510

[45]Hughes, Graham, *Pleas Without Bargains* , Rutgers Law Review, Vol. 33, p. 753

[46]McDonald, Plea Bargaining. . ., p. 5. At present in most jurisdictions, judges merely ask defendants a series of questions before accepting the plea. The plea allocution, as the questioning is called, is most often just a meaningless ceremony since defendants are told what to answer by their attorneys and since judges rarely deny the admittance of a guilty plea.

[47]Heumann, p. 160

[48]Alschuler, p. 20

[49]McDonald, Plea Bargaining . . ., p. 1

[50]Id., p. 2

[51]see Church, Thomas

CHAPTER THREE--NOTES

[1]Heumann, Milton. Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978, p. 163

[2]Kaplan, John and Jerome H. Skolnick . Criminal Justice : Introduction Cases and Materials. Mineola, NY: Foundation Press, 1982, p. p. 464

[3]Brunk, Conrad, G. "The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea," 13 Law and Society Review. Winter 1979, p. 542

[4]Friedman, Lawrence M., "Perspectives on Plea Bargaining," 13 Law and Society Review, Winter 1979, p. 255

[5]Blumberg, Abraham, S. "The Practice of Law as a Confidence Game: Organization Co-option of a Profession." Criminal Justice Law and Politics. Edited by George F. Cole. Pacific Grove, CA: Brooks/Cole Publishing, 1988, p. 210

[6]Carp, Robert A., and Ronald Stidham. Judicial Process in America. Washington, D.C.: Congressional Quarterly Press, 1990, p. 153, emphasis added

[7]Bordenkircher v. Hayes, 356 U.S. 357, 358 (1978)

[8]Hughes, Graham. "Pleas Without Bargains," 33 Rutgers Law Review, 1981, p. 753

[9]397 U.S. 742, 743

[10]*ibid.*, 746

[11]*ibid.*

[12]Carp, Robert A. and Ronald Stidham. Judicial Process in America. Washington, D.C.: Congressional Quarterly Press, 1990, p. 149

[13]The arraignment is "the first time that a defendant is brought before the judge . . . in order to respond to the prosecutor's bill of information."
Carp, p. 152

[14]Seymour, Whitney North, Jr. Why Justice Fails. New York: William Morrow & Company, 1973, p. 88

[15]Hiser, Michael. "State v. Byrd: Judicial Participation in Plea Bargaining--Fundamental Fairness?" 8 Ohio Northern University Law Review, 1981, p. 215

[16]Wolfe, Tom. Bonfire of the Vanities. New York: Farrar, Straus, Giroux, 1987, p. 117

[17]*ibid.*, p. 119

[18]Hiser, p. 215

[19]*ibid.*, p. 214

[20]*ibid.*, p. 215

[21]*ibid.*, p. 213

[22]Nugent, Paul. "Judicial Participation in Plea Bargaining Which Creates Reasonable Apprehension of Vindictiveness in the Defendant's Mind Violates Due Process," 16 Suffolk University Law Review, 1982, pp. 185-186

CHAPTER THREE--NOTES (continued.)

[23]Riss, Suzanne, "Case Management or Coercion?" New Jersey Law Journal. November 15, 1990, p. 1
[24]*ibid.*
[25]*ibid.*
[26]Heumann, p. 147, emphasis added.
[27]ibid., p. 145
[28]Newman, Donald, "The Negotiated Guilty Process." The Invisible Justice System: Discretion and the Law. Edited by Burton Adkins and Mark Pogrebin. Criminal Justice Series: Anderson Publishing, 1978., 194
[29]McDonald, W., "From Plea Negotiation to Coercive Justice," 13 Law and Society Review, Winter 1979, p.390
[30]"Prosecutorial Discretion and the Initiation of Criminal Complaints," 42 Southern California Law Review. The Invisible Justice System: Discretion and the Law. Edited by Burton Adkins and Mark Pogrebin. Anderson Publishing, 1978., p. 137
[31]McDonald, W., Plea Bargaining . . ., p. 19
[32]*ibid.*
[33]*ibid.*
[34]*ibid.*
[35]Kaplan, p. 453
[36]*ibid.*
[37]*ibid.*, p. v
[38]*ibid.*, p. 19, emphasis added.
[39]Heumann, p. 42
[40]McDonald, Plea Bargaining . . ., p. 20
[41]Heumann, p. 42
[42]McDonald, Plea Bargaining . . ., p. 49
[43]*ibid.*
[44]*ibid.*, pp. 50, 59
[45]*ibid.*, p. 52
[46]*ibid.*, p. 50
[47]Blumberg, p. 207
[48]*ibid.*, p, 217
[49]*ibid.*
[50]Dershowitz, Alan M. The Best Defense. New York: Random House, 1982. p. 400

CHAPTER FOUR--NOTES

[1]Moran, Kenneth T., and John Cooper. Discretion and the Criminal Justice Process. Port Washington, NY: Associated Faculty Press, 1983, p. 14

[2]Abrams, Howard E. "Systemic Coercion: Unconstitutional Conditions in the Criminal Law, 72 Journal of Criminal Law and Criminology. 1981, p. 143

[3]*ibid.*, p. 144

[4]*ibid.*, It should be noted here that Justice Warren is speaking specifically of determining legislative intent. However, the same difficulties that arise when attempting to determine a legislator's motives occur in the instance at hand as well.

[5]*ibid.*

[6]*ibid.* , pp. 143, 146

[7]*ibid.*

[8]Feeley, Malcolm. "Plea Bargaining and the Structure of the Criminal Process," Criminal Justice Law and Politics. Edited by George Cole. Pacific Grove, CA: Brooks/Cole Publishing, 1988, p. 470

[9]Alschuler, Albert. "Plea Bargaining and its History," 79 Columbia Law Review, 1979, p. 40

[10]The earliest cases which can be attributed to the "due process revolution" actually were ruled upon in the late 1950s, but for our purposes, the 1960s and 1970s most accurately connote the time period in which the "revolution" took place.

[11]Alschuler, p. 38

[12]*ibid.*, p. 39, emphasis added.

[13]*ibid.*

[14]ibid., p. 38

[15]Friedman, Lawrence, M. "Plea Bargaining in Historical Perspective," 13 Law and Society Review. Winter 1979, p. 257

[16]*ibid.*

[17]Alschuler, p. 41

[18]Friedman, p. 257

[19]Alschuler, p. 41

[20]Kaplan, John, and Jerome H. Skolnick. Criminal Justice: Introductory Cases and Materials. Mineola, NY: Foundation Press, 1982, p. 445

[21]Report of the New York State Judicial Commission on Minorities. By James C. Goodale, Chairman. New York: July, 1991

[22]Kaplan, p. 445

[23] Heumann, Milton. Plea Bargaining: The experiences of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press, 1978, chapter three.

[24]see *T. Kenneth Moran*

[25]Kaplan, pp. 461-462

[26]Heumann, p. 148

CHAPTER FOUR--NOTES (continued.)

[27]*ibid.*
[28]Moran, p. 63
[29]*ibid.*
[30]Heumann, p. 154
[31]ibid., p. 163
[32]Nardulli, Peter F., James Eisenstein, and Roy B. Flemming. The Tenor of Justice: Criminal Courts and the Guilty Plea. Chicago: University of Illinois Press, 1988, pp. 123-124
[33]Moran, p. 63
[34]Kaplan, p. 462
[35] *ibid.*
[36]Feeley, Malcolm, "Perspectives on Plea Bargaining," 13 Law and Society Review, Winter 1979, p.200
[37]Dershowitz, Alan. The Best Defense. New York: Random House, 1982, p. 402
[38] Moran, p. 9
[39]*ibid.*, p. 11
[40]Gordon, Diana R. The Justice Juggernaut: Fighting Street Crime, Controlling Citizens . New Brunswick, NJ: Rutgers University Press, 1990, p. 16
[41]Moran, p. 60
[42]*ibid.*, p. 61
[43]Alschuler, p. 31
[44]Moran, p. 32
[45]*ibid.*, p. 14
[46]*ibid.*
[47]McDonald, William F., Plea Bargaining: Critical Issues and Common Practices. Washington, D.C.: U.S. Department of Justice, 1985, p. 68
[48]Moran, p. 59
[49]Heumann, p. 144
[50]*ibid.*
[51]*ibid.*
[52]Heumann, p. 157
[53]Kaplan, p. 465

CHAPTER FIVE--NOTES

[1]Wertheimer, Alan. Coercion . Princeton, NJ: Princeton University Press, 1987, p. 8

[2]ibid., p. 3

[3]Brunk, Conrad, G. "The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea," 13 Law and Society Review, Winter 1979, p. 532. Indeed, there are many different types of freedom and "the terms 'freedom' and 'voluntary' can be used in different senses depending upon the constraints and goals that are selected." (B2, 531) For our purposes, freedom is to be defined as the absence of social (rather than psychological) constraints upon both the circumstances and will of the agent.

[4]In "Are Coerced Agreements Involuntary?", Philips argues that an involuntary act is one in which an individual "fails to satisfy some necessary condition of free agency." Free agency requires an expression of the will, so to act involuntarily is to be incapable of making a rational decision. Coercion, by contrast, is to act act rationally (express a will) in the context of "unwanted, unpleasant alternatives." Law and Philosophy, vol. 3, 1984, p. 134

[5]Philips, Michael, "The Question of Voluntariness in the Plea Bargaining Controversy," 16 Law and Society Review, 1981-1982, pp. 133-134

[6]Wertheimer, p. 9

[7]*ibid.*

[8]Kipnis, Kenneth. "Criminal Justice and the Negotiated Plea," Ethics, Vol. 86, 1976. Kipnis's gunman has become the paradigmatic case scenario for coercion.

[9]Hoekema, David A. Rights and Wrongs: Coercion, Punishment and the State . London: Associated University Press, 1986, p. 19

[10]Westin, Peter. "'Freedom' and 'Coercion'--Virtue and Vice Words, Duke Law Journal, June-September, 1985, p. 572

[11]*ibid.*

[12]Nozick, Robert . "Coercion," Philosophy, Science and Method: Essays in Honor of Earnest Nagel. Edited by Sidney Morgenbesser, Patrick Suppes, and Morton White. New York: St. Martin's Press, 1969, p. 449

[13]Wertheimer, p. 136-137

[14]Westin, p. 573

[15]Nozick, p. 447

[16]Wertheimer, p. 229

[17]Nozick, p. 447

[18]Brunk, p. 539

[19]Honoré, Tony. "A Theory of Coercion," Oxford Journal of Legal Studies, Vol. 10, 1990, p. 96

[20]Hiser, Michael. "State v. Byrd: Judicial Participation in Plea Bargaining--Fundamental Fairness?" Ohio Northern University Law Review, Vol. 8, 1981, p. 215

CHAPTER FIVE--NOTES (continued.)

[21]Wertheimer, p. 131
[22]Westin, p. 572
[23]Brunk, 539
[24]*ibid.*
[25]*ibid.*
[26]Westin, p. 573
[27]Hoekema, p. 23
[28]Westin, p. 566
[29]*ibid.*, p. 563
[30]*ibid.*
[31]Hoekema, p. 23
[32]Wertheimer, p. 126
[33]Brunk, p. 537
[34]*ibid.*
[35]Hoekema, p. 36
[36]Wertheimer, p. 6
[37]Hoekema, p. 33
[38]Brunk, p. 537
[39]*ibid.* , p. 544
[40]*ibid.*, p. 546
[41]*ibid.*, p. 540
[42]Wertheimer, p. 6

CHAPTER SIX--NOTES

[1]Philips, Michael. "Are Coerced Agreements Involuntary?" Law and Philosophy, Vol. 3, 1984, p. 144

[2]Hoekema, David A. Rights and Wrongs: Coercion, Punishment and the State. London: Associated University Press, 1986, p. 14

[3]Philips, p. 133

[4]McDonald, William F., "From Plea Negotiation to Coercive Justice," 13 Law and Society Review, Winter 1979, p. 391

[5]397 U.S. 742 at 750, emphasis added

[6]McCoy, Thomas and Michael Mirra, "Plea Bargaining as Due Process in Determining Guilt, Stanford Law Review, Vol 32, p. 888

[7]Jones, David A, Crime Without Punishment . Lexington, MA:Lexington Books, 1979, p. 138

[8]*ibid.*, pg. 139

[9]Becker, Loftus E., "Plea Bargaining and the Supreme Court," Loyola of Los Angeles Law Review, Vol. 21, p. 763

[10]Becker, p. 793

[11]Wertheimer, Alan. "Freedom, Morality, Plea Bargaining, and the Supreme Court," Philosophy and Public Affairs, Vol. 8, 1978-79, p. 228

[12]Wertheimer, "Freedom, Morality . . ." p. 229

[13]400 U.S. 23,37

[14]Hughes, Graham, "Plea Without Bargains," Rutgers Law Review, Vol. 33, p. 761

[15]Hoekema, p. 124, emphasis added.

[16]McFadden, Patrick M., The Balancing Test, Boston College Law Review, Vol. 29, 1988, p. 586

[17]*ibid.*, p. 592

[18]*ibid.*, p. 596

[19]*ibid.*, p. 586

[20]ibid., p. 595

[21]Wertheimer, "Freedom, Coercion . . .", p. 230

[22]Harvard Law Review, "The Unconstitutionality of Plea Bargaining," Vol. 83, 1970, p. 1395

[23]*ibid.*

[24]Harvard, p. 1395

[25]Alschuler, Albert . "The Prosecutor's Role in Plea Bargaining," 36 Univ. of Chicago Law Review,p. 30

[26]Kipnis, Kenneth, "Criminal Justice and the Negotiated Guilty Plea," Ethics, vol. 86, 1976, p. 104

[27]McFadden, p. 594

[28]It is important to note here that this is a different sense of "compelling" than they one which is used as a verb--to compel--and is virtually synonymous with coercion. "Compelling state interest" does not refer to coercive state interests but rather to interests of such importance that the state is forced to act upon them.

CHAPTER SIX--NOTES (continued.)

[29]Wertheimer, "Freedom, Morality . . ." p. 231
[30]*ibid.*, p. 230
[31]*ibid.*, p. 203
[32]McFadden, p. 637
[33]*ibid.*, p. 638
[34]McFadden, p. 638
[35]43 U.S. 357, 364, emphasis added.
[36]Becker, p. 788
[37]*ibid.*, p. 788
[38]Wertheimer, Alan. Coercion, Princeton, NJ: Princeton University Press, 1987, p. 129
[39]Wertheimer, Coercion, p. 124
[40]Wertheimer, "Freedom, Morality . . .", p. 230
[41]Hodson, John D. The Ethics of Legal Coercion. Boston: D, Reidel Publishing, 1983, p. xi.
[42]Kipnis, p. 100
[43]Wertheimer, "Freedom, Morality . . .", p. 232
[44]Hughes, p. 753, emphasis added.
[45]Kaplan, John, and Jerome H. Skolnick. Criminal Justice: Introductory Cases and Materials. Mineola, NY: Foundation Press, 1982, p. 464

CHAPTER SEVEN--NOTES

[1]Hamilton, Alexander. The Federalist Papers, *No. 83* . Edited by Clinton Rossiter. New York:Mentor, 1961, p. 499

[2]Weinreb, Lloyd L. Denial of Justice: Criminal Process in the United States. New York: Free Press, 1977, p. 79

[3]*ibid.*

[4]Wertheimer, Alan. Coercion . Princeton, NJ: Princeton University Press, 1987,p. 125

[5]Kaplan, John, and Jerome Skolnick . Criminal Justice: Introductory Cases and Materials. Mineola, NY: Foundation Press, 1982.

[6]McDonald, William F., "From Plea Bargaining to Coercive Justice," 13 Law and Society Review, Winter 1979 , p. 391

[7]Garrity v. New Jersey, 385 U.S. 493 (1967)

[8]Hughes, Graham. "Pleas Without Bargains," Rutgers Law Review vol. 33, 1981, p. 754

[9]McDonald, p. 391

[10]Hughes, p. 761

[11]Brunk, Conrad, "The Problem of Voluntariness and Coercion in the Negotiated Guilty Plea," 13 Law and Society Review, Winter 1979, p. 546

[12]Nugent, Paul, "Judicial Participation in Plea Bargaining which Creates Reasonable Apprehension of Vindictiveness . . ." Suffolk University Law Review, vol. 16, 1982, p. 187

[13] Ackley, Harry, "Plain Talk About Plea Bargaining, "Pepperdine Law Review, vol. 10., p.49

[14]Alschuler, Albert, "The Trial Judge's Role in Plea Bargaining," Columbia Law Review, vol. 79, 1979, p. 1060

[15]Schlesinger, Steven Malloy and Elizabeth A., "Plea bargaining and the Judiciary: An Argument for Reform," Drake Law Review, vol 30, p. 584

[16]Manhattan has just recently implemented a variation of this reform in its criminal justice jurisdiction. At least now defendant's have the opportunity to avoid vindictiveness because they hava separate proceedings for pleas, and see a different judge than the one which is scheduled to preside over a trial if there is one.

[17]Brunk, p. 549

[18]Miami has a policy of almost "complete discovery"--meaning that there defense attorney has a lot greater access to the prosecution's case. As a result, there is little or no bluffing.

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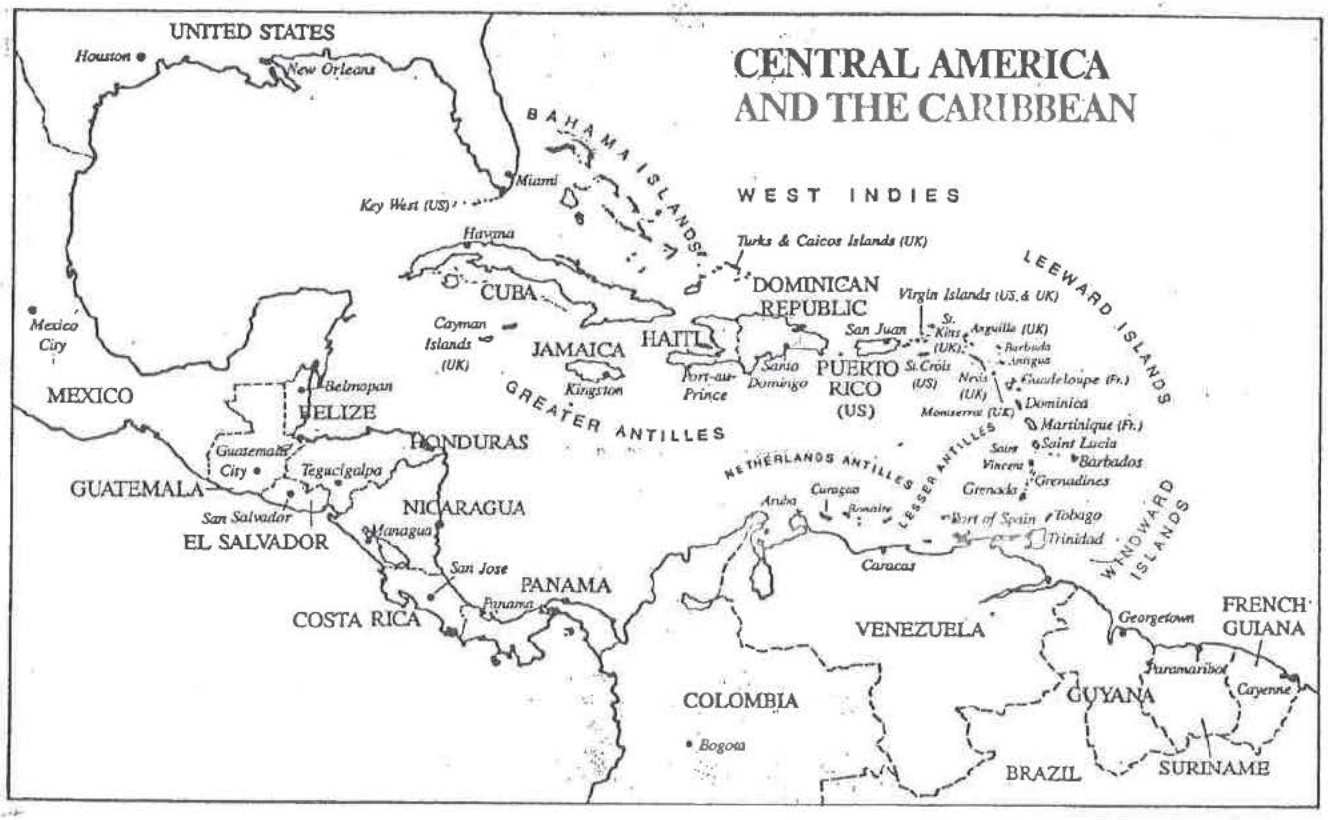
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Volume 4 Fall, 1987 Number 1

PROGRESSIVE FORENSICS

ADDRESSING ISSUES OF PUBLIC CONCERN



"RESOLVED: THAT THE UNITED STATES GOVERNMENT SHOULD ADOPT A POLICY TO INCREASE POLITICAL STABILITY IN LATIN AMERICA."

Place Oratory
Invitati

It's About Time

Katanji O. Brown
William Faulkner Invitational
Oratory Winner

Coached by Fran Berger

Did you know that it takes .002 of a second for a balloon to pop? Or that it takes .3 of a second to slam a drawer shut? Did you know that in one minute a newborn baby's brain grows 1 to 2 milligrams, and in one week that same baby soils 70 to 90 diapers? Whereas, in 1 minute, the heart of a shrew beats 1,000 times and in 2 minutes a giraffe can run an entire mile, the duration of hypnotism in sheep is only 30 seconds. One second is not only the average time that it takes for an adult to read a 5 syllable word, but it's also the shortest interval of time between windshield wiper strokes of a 1975 Chevelle.

O.K. - be honest. How many of us knew that? How many of us really care? Who would actually take the time to figure out how much time these things take??? In his book Durations, author Stuart Sandow lists a veritable panorama of events that fill time. While the Guiness book is a record of how long things have taken, Durations is an encyclopedia of how long things take. Although the book itself is a bit unorthodox in its approach, Sandow's focus shouldn't come as a surprise to us -- after all, we are a time-oriented society.

TIME! For all practical purposes, it can be defined as a "stretch of duration in which things happen," and nearly everything we do or say in our modern society is affected by it. Think for a second. In a typical 24-hour day, we are expected to get up early in the morning and arrive at work or school on time. We are given a lunch hour (which is often only 30 minutes long), and a pay-check or report card, based on hours on the job. At home, we take time out to listen to Bruce Springsteen's "Glory Days" and Cyndi Lauper's "Time After Time" or to watch "Days of Our Lives" and "60 Minutes" or to read Time Magazine and the New York Times. Time is also prevalent in our extracurricular activities. In sports, there are time-outs and half-times. In debate, you have prep time, time cards, and time keepers. In a speech tournament, I'm sure that you have all observed the competitor in a speech tournament who marches confidently to the front of the room and asks, "Is there a time-keeper?"

The truth is - we are all time-keepers in our everyday lives. And not only do we keep time -- we buy it, spend it, borrow it, save it, kill it, conserve it, use it, and lose it within the course of every day. In his book, Living on the Ragged Edge, Dr. Charles Swindoll asserts that time is our most precious commodity, but unfortunately too few people use it wisely or appreciate its value.

You know, the teenage boy who comes home from school with tons of homework - but his top priorities are snacking, watching T.V., and shooting a few hoops; of course, later that evening he complains that he doesn't have time to complete his assignments. Or the working mother whose time is so tightly scheduled from 6:30 A.M. to 10:00 P.M. with work, children, dancing lessons, little league baseball, cooking, washing, and cleaning that when her son announces on the way home from school that he left his Kermit the Frog lunchbox by the Jungle Gym,

the extra 15 minutes for the return to the school throws her entire schedule off for the rest of the day. Finally, what about the businessman who rushes through the reports to save time then spends more time trying to straighten out the mess he's made than he would have actually saved in the first place. We can all identify with each of these three - because each scenario exemplifies a typical waste of time.

I, for one, am a classic example of wasting time due to my lack of organization. As a result, just like the teenage boy, I wind up struggling to finish a physics lab at 1:30 in the morning and wondering where my time went. Alan Lakein in How to Get Control of the Time and Your Life explains "to waste your time is to waste your life." By not organizing your time and completing the most important tasks first, you actually limit the amount of free time available for what you really enjoy doing.

On the other hand, there are those who are so time-conscious that they overschedule themselves in an attempt to utilize every spare minute. Not only is this type of organization unhealthy, it is, as the mother in the scenario learned, very impractical. Acclaimed artist Andy Worhol once said that "we'd all be famous for 15 minutes," but considering our tightly-arranged schedules, how many of us would ever have the time? Many people still believe that the only way to make the most of their time is to do as much as possible with their time. Although waste-no-time schedules are efficient, Alan Lakein remarks that "that kind of efficiency means taking the thinking out of an activity and reducing it to a series of mechanical routines." Scheduling causes us to focus more on the quantity of time rather than its quality, and places more emphasis on the systematic rather than the humanistic.

In her article "Active Lives '85," Irene Borger summarized the problems of the overschedulers: "Time becomes segmented, both professionally and personally. We must schedule friends into our books, since intimacy is rarely threaded into the day. Schedules are more valued than people, "and life proceeds like clockwork."

Although life probably isn't quite so calculated for the majority of us, we have all experienced the "rushing" phenomenon at one time or another. Irene Borger remarks that we hurtle through time trying to see just how many things we can cram into one day. The June 1984 edition of Health Magazine explains that as the quantity of self-assignments mount up, we find it necessary to rush in the hopes that the faster we get one thing done, the sooner we can get on to the next. Unfortunately, what generally results is that "the hurrier we go, the behinder we get." And the fact still remains that no matter how we rush, time cannot be saved.

In the early 1970's, famed rock musician Jim Croce wrote a song entitled "Time in a Bottle." Croce wrote the song for his wife, expressing his longing to try and save their times together, since according to the lyrics, "there never seems to be enough time to do the things you want to do." In

September 1973, before he had the time to sing the song to his wife, Jim Croce was killed in a plane crash. Tragically, his death points out what so many of us have yet to understand. We do not know how much time we have, but instead of trying to save it, we should make the most of the time that we are given. In this respect, time is analogous to money: we can spend it any way we want, but we can only spend it once. And just like money, time is much too valuable to lose.

In order to make the most meaningful use of our time, we can't treat it whimsically, schedule it mechanically, or rush through it insanely. The only way to appreciate the value of time is to use it wisely. I need to place less emphasis on the amount of time being devoted to each activity and more on the quality of that time. Although you may have scheduled only half an hour to interact with your children every night, realize that a discussion may take more time, and learn to be flexible-relying less on your log book and more on your instincts. And finally, if you are running a little late, don't rush. You're not really saving any time. In fact, you will have used even more time by the time you've changed your torn stockings and coffee-stained blouse, bandaged your cut finger, and switched your shoe with the broken heel - all caused by your haste.

It's about time that people begin utilizing time wisely and not wasting so much of it, hurrying through it, or getting so wrapped up in it that an entire schedule is ruined just because it takes five minutes to prepare a bowl of minute rice. Time is very valuable, and although you might not know that it takes ten minutes for air-conditioners to blow a cycle of fresh air throughout the Empire State Building, I'm sure you do know that my time is almost up. Ben Franklin once said that "time is the stuff life is made of." Maybe by learning to appreciate the time that we are given, we will someday realize what it means to have the time of our lives.

Ketanji O. Brown, a student at Palmetto Senior High School, Miami, Florida won first place in Oratory at the 6th Annual William Faulkner Invitational High School Forensics Tournament held at the University of Mississippi, October 11 and 12, 1987. Director of Forensics at the University of Mississippi is Joann Edwards.

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THE JOB FREEZE

The most recent economic news is upbeat. There's just one little problem: nobody's hiring.

By JOHN GREENWALD

FOR MORE THAN A YEAR, THE U.S. has been tantalized by tidings of economic recovery. And now those esoteric leading indicators that so hearten the experts are becoming visible to average workers: consumers are buying, and the economy is growing at a steady, if unspectacular, pace. Yet something important is missing as President Clinton prepares his prematurely overdue economic plan: new jobs.

In spite of the good news about the economy as a whole, most large corporations prefer almost any alternative to hiring new full-time employees. Not only do they have painful memories of the recent recession, but they now face runaway costs for health care and other benefits that often make it prohibitively expensive to expand their work force. The same companies are being squeezed even tighter by global competition, which has made cost cutting and downsizing—on a permanent basis—a way of life.

"There is almost a paranoia about creating new jobs in large corporations," says David Orr, a managing partner for the outplacement firm Jannotta, Bray. Concurs Audrey Freedman, president of the Manpower Plus employment-consulting firm: "Companies are about as glad to see a new worker in their ranks as impoverished families are to add another plate to their table."

Even companies who want to hire say they are constrained by doubts about the recovery. "This recession has had nine lives, and we've already seen a number of false starts," says John Roach, chairman of Tandy Corp., which owns the Radio Shack electronics stores. "Actual growth in jobs will require a stronger rebound in the economy than there seems to be right now." At lumber giant Georgia-Pacific, hiring plans have been shelved despite forecasts of increased homebuilding in 1993. "Consumers would have to come back after the Christmas buying binge and show continued confidence," says president A.D. Correll. "We would have to see some real economic growth."

That is particularly alarming because no matter what policies the new Administration pursues, the fate of the recovery will ultimately rest on the willingness of companies to start hiring again. So far, the outlook seems stubbornly dim. A recent American Management Association index of the hiring plans of 785 companies stands at a dismal 9.6 on a scale of 100. A growing economy would normally produce an index at least in the 30s. "This recovery will be limited to fewer jobs and lower incomes than at any other time in the postwar period," says Lawrence Mishel, research director of the Economic Policy Institute in Washington. "Many Americans may not feel they are in a recovery at all."

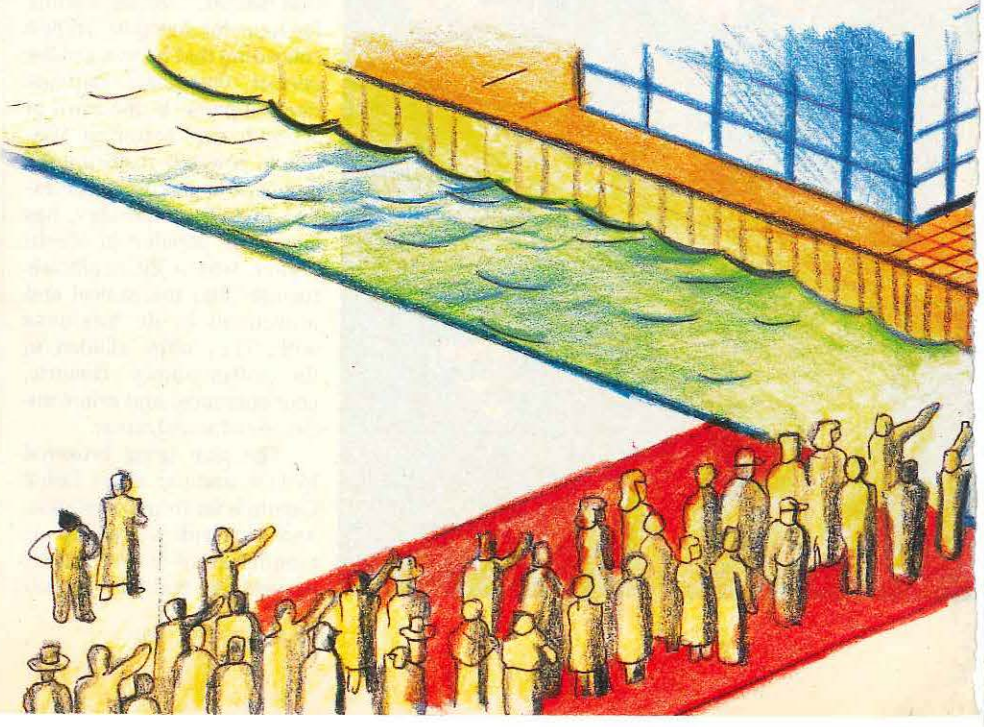
Instead of hiring, such giants as IBM, General Motors, United Airlines and Eastman Kodak are still slashing their payrolls. And dynamic small start-up firms—which created 20 million jobs in the 1980s—have faced a lending crunch that denies them the capital they need to grow and add new jobs. All that has left the health-care and temporary-help industries as the chief source of hiring since the recession officially ended in March 1991.

Dreary job prospects have led to a steady drop in campus recruiting. Companies plan to cut their college interviews 6% this year, after a 28% decline in 1992, according to a Michigan State survey. That could force more graduates to settle for short-term jobs rather than entry-level career positions. Fully 43% of workers between 18 and 24 are already stuck in minimum-wage jobs, up from 23% during the 1981 slump.

Even the health-care industry, the economy's bright spot in recent years, has begun to falter as a source of jobs. Faced with mounting public pressure to restrain runaway prices, drug firms and hospitals have been closing facilities and letting people go. "There's bound to be some sort of fallout as we try to slow the escalating cost of health care," says R. Clayton McWhorter, chief executive of HealthTrust Inc., based in Nashville, Tennessee, which may consolidate several of its 81 hospitals. "Naturally there are going to be personnel reductions."

The result is a Catch-22 dilemma: health-care costs must be contained in order to encourage corporations to take on full-time workers, but the process could curtail growth in the one job sector that has been robust. "Clinton is targeting the health-care industry for reforms, but the effects would be regressive right off the bat," says Ed Yardeni, chief economist for the C.J. Lawrence investment firm. "The first impact of new regulations would be to kill the goose that laid all those golden jobs since the recovery began."

Nor can the economy expect much help from defense contractors, which are still shedding jobs while searching for ways to branch into civilian lines of business. "We'll be down somewhat again this year—a small percentage," says Kent Kresa, chief executive of military-jet builder Northrop, which cut 3,000 jobs, or nearly 10% of its labor force, in 1992. Such layoffs continue to



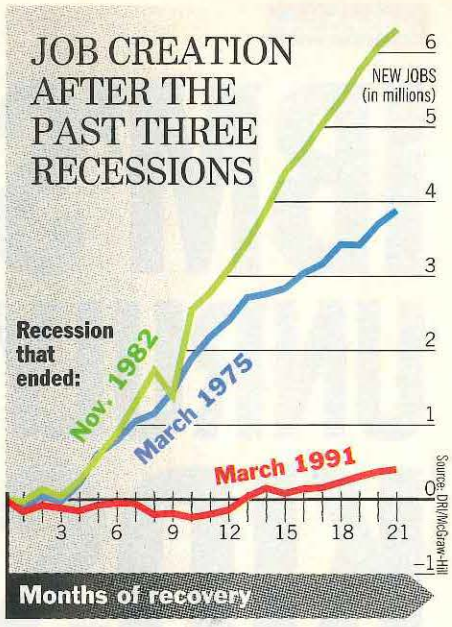
batter Southern California, the home of the U.S. aerospace industry. "This is akin to what happened when Pittsburgh lost its steel firms and Detroit downsized its auto industry," says Jack Kyser, chief economist for the Economic Development Corp. of Los Angeles County.

Small start-up companies, the main engines of job growth in the 1980s, are in a hiring slump. Unable to get loans from risk-averse banks and burdened by rising health-care costs, small firms last year added jobs at a rate of just 10,000 a month—compared with a peak of 175,000 a month in the 1980s. "If this company had tried to start out in 1991 or 1992, we wouldn't be here today," says Bernard Marcus, chairman of the Home Depot chain, which has grown to 214 household-improvement stores since opening its first one in 1979. "No bank in the U.S. in the past two or three years would have financed this business."

The bleak picture has brightened a bit, as banks, flush with profits, have begun making more business loans. "We have certainly seen an increased tendency to lend," says Richard Syron, president of the Boston Federal Reserve Bank, "and part of this lending goes to small firms, some of which are hiring." But while the number of new small-business jobs has risen to about 50,000 a month, economists say it would take four times that rate of growth to reduce the U.S. unemployment level from its present 7.3% to a more comfortable 6%.

If companies are reluctant to add full-time workers, they are happy to replace many current employees with consultants and temporary help. That spares firms the cost of health insurance and other benefits and lets them expand or contract their work force as swiftly as business conditions demand. Even as IBM executes plans to lay off 25,000 employees in 1993, it maintains contracts with 300 outside firms to handle tasks ranging from running the computer giant's payrolls to designing software programs. Prodigy Services, a money-losing IBM-Sears venture that provides computerized home-shopping and information networks, is laying off 250 workers while hiring a company to take over its customer-services department.

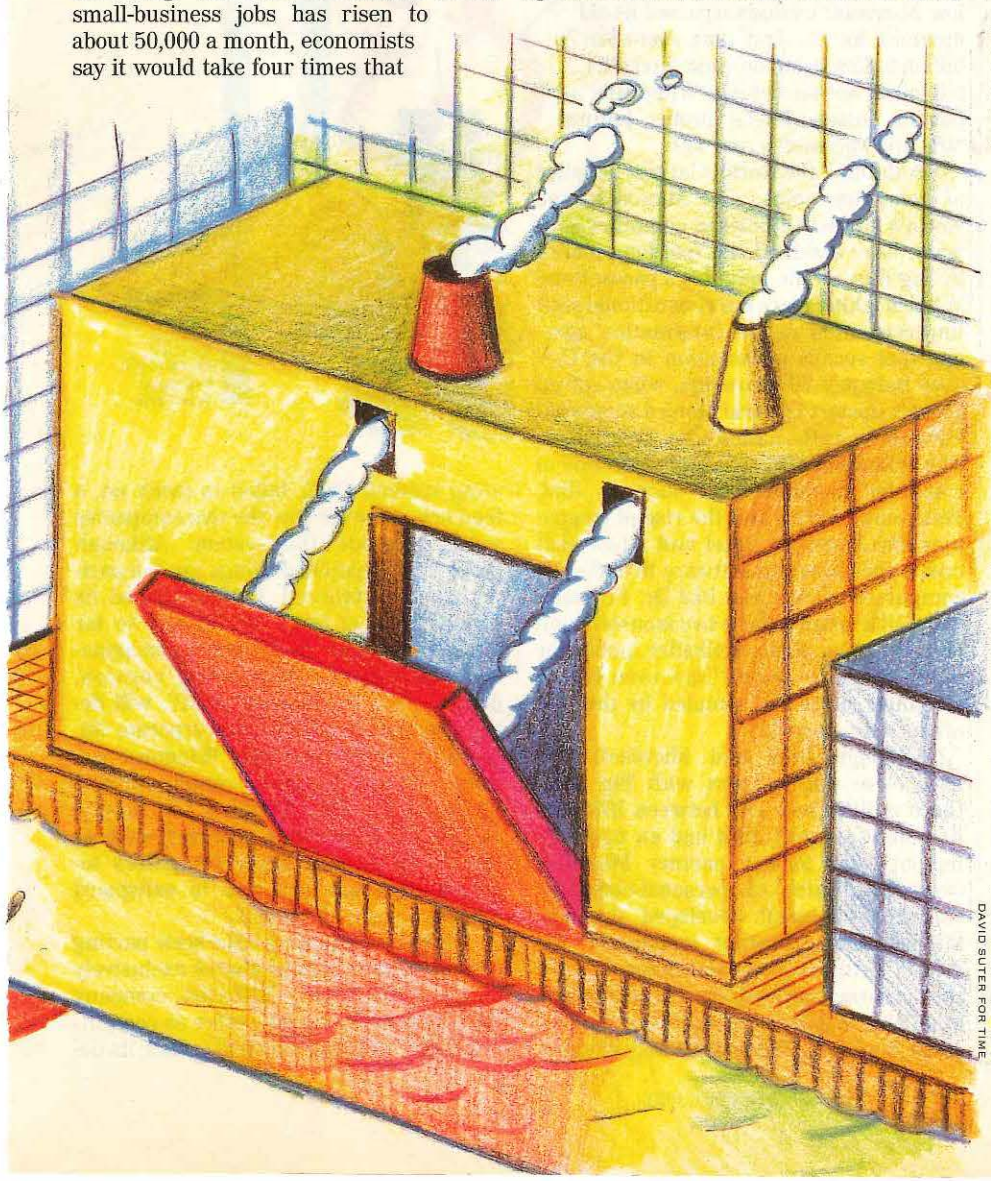
Such moves are swiftly reshaping U.S. employment practices. Few jobs are too large or too small to be handled by temps or consultants, who can range in skill from fledgling secretaries to surgeons to computer scientists with Ph.D.s. David Lewin, director of the UCLA Institute of Industrial Relations, says contract employees could grow from 24% of the U.S. work force today to 40% by the end of the decade as companies continue to replace permanent positions with temporary jobs.



Though the hiring news is mostly bad, it is certainly not all bad. Some companies have gone right on hiring despite the sluggish economy. Andersen Consulting, a four-year-old spin-off of the Arthur Andersen accounting firm, has been recruiting full-time employees at the rate of 2,000 a year. Sara Lee, an aggressive food and apparel maker whose marketing skills have made best sellers of brands like L'eggs hosiery and Hanes underwear, has built 25 U.S. plants and doubled its job rolls since 1989. And Genzyme, a Cambridge, Massachusetts, biotechnology research and marketing firm that is developing drugs for diseases like cystic fibrosis, plans to hire some 200 scientists and technicians for the third straight year, bringing its payroll to nearly 1,700 workers.

But most companies have put their expansion plans on hold while waiting to see how the economy behaves under the new Administration. "We're still overstored, overbanked and overgoverned," says Rex Adams, a vice president of Mobil, which has laid off 13,000 petroleum workers in recent years. "We're still a country of excess capacity. There is going to be job growth, but there will still be fewer manufacturing jobs and fewer secure jobs. People are only going to start hiring in significant numbers when they feel they have a possibility of making some money."

If Bill Clinton hopes to solve all these problems in the long run, he will have to deliver on promises to improve the education and skills of the work force and the strength of the nation's infrastructure. Only that will restore U.S. competitiveness and create new jobs in a global setting in which people and their skills are the resources that really count. ***—Reported by Jordan Bonfante/Los Angeles, Ketanji O. Brown/New York and William McWhirter/Chicago***



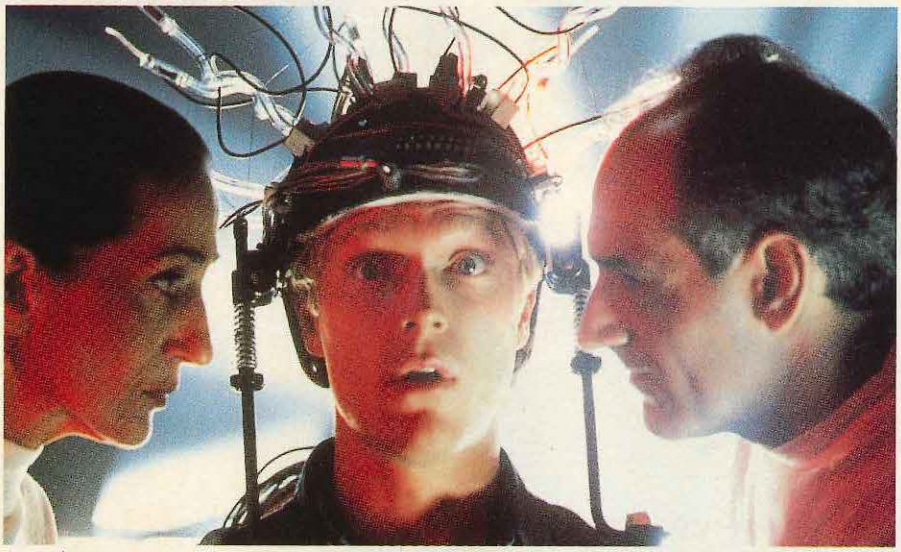
DAVID SUTER FOR TIME

2/1/93

ADVERTISING

Hollywood Rocks Madison Avenue

Creative Artists shakes up the ad business with a sparkling new series of commercials for Coca-Cola



Coke's new commercials feature offerings from Hollywood directors like Richard Donner (*Lethal Weapon*)

By JANICE CASTRO

AT ANY OTHER TIME, THE announcement by Coca-Cola president Donald Keough of a worldwide campaign of 26 new commercials would have been cause for celebration in the advertising industry. Describing just such an occasion last week, a pumped-up Peter Sealey, Coke's director of global marketing, said, "It was a seminal moment, like the first sustainable nuclear reaction." Maybe so, but this time it was Madison Avenue that was feeling the heat. After relying on New York's respected McCann-Erickson advertising agency (est. 1992 billings: $6 billion) for nearly 40 years, Coca-Cola had taken the unprecedented step of seeking outside help for its new campaign, tapping Creative Artists Agency, the movie industry's top talent shop. To the ad industry's dismay, nearly all the new commercials introduced last week were produced by CAA. Even worse, they are terrific.

Wry, hip and charming, the ads, which will air beginning this week on shows ranging from *The Simpsons* and *Saturday Night Live* to CNN newscasts, deliver the pitch for Coke in a series of vignettes:

▶Red Coke signs flash against a rhythmic backdrop of bright colors, all in time to a lilting rock song: "Wherever there's a beat, there's always a drum; wherever there is fun, there is Coca-Cola."

▶A polar bear rumbles across the ice pack, joining his family to view the northern lights. Settling down with a grunt, he takes a long swig of Coke. Ahhh.

▶Evil scientists try to brainwash a cheerful young man who simply wants a Coke, chanting in unison, "All colas are the same, all colas are the same."

The apparent success of the ads from Hollywood is unsettling for the advertising industry. After all, this is a key account, on which Coke spends about $600 million a year. "Anytime a major client like Coca-Cola makes a public demonstration of lack of confidence, it's not good for your reputation," says James Dougherty, an advertising specialist at Dean Witter.

Why bring in CAA? During McCann's long and successful partnership with Coca-Cola, the agency has scored with such popular notions as "Things Go Better with Coke" and "It's the Real Thing." But over the past few years, while Michael Jackson moonwalked and Ray Charles sang "Uh-huh" for archrival Pepsi, Coca-Cola Classic's advertising often seemed somewhat flat. Something had to give.

In 1991 Coke surprised McCann by signing CAA for what it vaguely described as media and communications advice. "What is that?" asked a testy McCann executive. "Isn't that what agencies do? Create an image, a media concept?" Before long, the McCann team found out what Coke had in mind: CAA advisers were working alongside them in their New York City offices, suggesting ideas for Coke Classic. Coca-Cola had created an uneasy creative alliance in search of better ideas. They had also created a mild panic in the advertising business, where many executives viewed CAA's new role with alarm. Rumors flew that CAA might even try to capture the Diet Coke account handled by the prominent Lintas agency.

CAA is accustomed to complicated arrangements. Controlling hundreds of leading actors, directors and producers, the agency's chief, Michael Ovitz, has reinvented the meaning of the deal in Hollywood, often representing nearly every major player in top films and selling them as a package. But Ovitz has long yearned to have his firm branch out from being merely talent agents. He got close to Coke executives when he helped arrange Sony's friendly purchase of Columbia Pictures from Coca-Cola in 1989.

In his latest deal, he was able to offer Coke the services of top filmmakers as collaborators on its ads. Film directors Rob Reiner (*When Harry Met Sally, A Few Good Men*) and Richard Donner (*Superman, Lethal Weapon*), for example, were among those producing the new Coke commercials. "What we do every day," explains Ovitz, "is listen to ideas, encourage them, nurture them. This is no different. Instead of creating a story that is TV or feature-film length, we shifted to stories that are 30 seconds or 60 seconds long." As for what Coca-Cola paid CAA for its work, no one is saying. Jokes Ovitz: "I only asked for one thing in exchange: the Formula."



DAVID STRICK—ONYX

Michael Ovitz made it happen

A spokesman for McCann, which came up with the new slogan, "Always Coca-Cola," maintains that the agency is pleased with the new commercials. McCann will remain Coke's agency of record, creating ads and providing a variety of marketing and administrative services in many of the 195 countries where Coca-Cola sold a record 10 billion cases of its regular and diet sodas last year. If the help from Hollywood was cause for anxiety, what really matters for both Coke and McCann is their strong new armory of advertising for the company's flagship brand. ***—With reporting by Ketanji O. Brown/New York***



JOHN CHIASSON—GAMMA LIAISON FOR TIME

FEELING THE PAIN: Vaccination costs have risen sharply

BUSINESS

OUCH!

Which hurts more, the shot or the bill? Now drug firms also feel the pain as Clinton blasts their prices.

By JOHN GREENWALD

NO WONDER JO HARRIS, 79, IS FURIOUS about the price of prescription drugs. In the past two years the Montana widow has seen the cost of her medications soar, including a 50% jump in the price of the Voltaren tablets she takes for arthritis pain, which rose to $89.95 for a month's supply of 60 pills. "I feel like they rob me without a gun," Harris says. "When I paid the drugstore clerk, I told him, 'You know Bill Clinton's watching you, don't you?' I believe the guy will try to do something about this. I sure hope he can."

The new team of Clinton & Clinton sure seems to be trying. With concerns about medical costs reaching feverish heights, prescription prices have become

MIRACLE DRUG: ONLY $350,000 A YEAR

CEREDASE, A BREAKTHROUGH TREATMENT for the crippling and sometimes fatal genetic disorder called Gaucher's disease, is changing lives, even saving them—but not always making them better. For Jeanne Rogal, 29, of Harrisburg, Pennsylvania, Ceredase has reduced the pain from her crumbling bones, removed the lipid deposits choking her liver, and restored her energy so she can enjoy life again. But with it comes a crushing financial burden: Ceredase can cost up to $350,000 for a year's treatment.

Rogal has already exhausted one health-insurance policy and is whittling down a second. Although Medicaid pays part of the cost of the drug, the government dictates brutally austere terms: if Rogal accepts the payments, she isn't allowed to own major assets or have a bank account with more than $250 in it. "I finally have this great new life where I can do things," she says, "and I can't even save the money for a vacation."

Ceredase, and the Massachusetts company called Genzyme that makes it, illustrates how some drug companies have turned government research and regulations into Big Business. The Federal Government financed the discovery of the drug and then paid tax dollars so that entrepreneurs could learn how to manufacture it. Now it is paying as much as 20% of the nation's Ceredase bill through Medicare and Medicaid. And Ceredase isn't the only high-priced drug that has flowed from government laboratories. The new chemotherapeutic taxol, as well as almost half of all other cancer drugs, owes its existence to government scientists, as do nearly all AIDS drugs.



JAMES COOK FOR TIME

Karen Guth refused the expensive drug

The story of Ceredase starts with government-sponsored scientists who in 1965 found that Gaucher's disease resulted from the lack of an enzyme. Later another group of government scientists patented a method for harvesting that enzyme, and contracted with researchers at Tufts University to supply the enzyme in large enough quantities for research.

During the 1980s the Tufts researchers gradually spun away from the university and started the biotech firm Genzyme. By then the government had spent nearly $9 million—fully 20% of all measurable research-and-development costs, according to the Office of Technology Assessment—to aid in developing Ceredase. Genzyme disputes the figure and says the government provided only 14% of the drug's development costs. Still, when the company brought its drug to market, it set the price extraordinarily high, claiming that the process of harvesting the enzyme from human placental tissue is ex-

the first major target of health-care reformers' wrath. The President last month blasted the price of prescription drugs as "shocking" and blamed vaccinemakers for pursuing "profits at the expense of our children." His remarks came a day after Hillary Rodham Clinton denounced the cost of childhood vaccines—which have risen 1,000% in a decade—and suggested that drugmakers would oppose the Administration's forthcoming health-care reforms. The industry's earnings also came under attack; Democratic Congressman Henry Waxman of California last week unveiled a 354-page Office of Technology Assessment report that charged that drug firms raked in $2 billion of "excess profits" a year and lavished vast sums on "wasteful" campaigns to encourage doctors to prescribe pricey medications.

The attacks stunned the $75 billion U.S. pharmaceutical industry, long the country's most profitable manufacturing sector and one of its last world leaders in developing new products. On Wall Street, fear of possible government price controls has helped whack 15% from the collective value of pharmaceutical stocks this year. Frightened drug firms have responded with a spirited defense, including full-page newspaper and magazine ads proclaiming the benefits of their products.

The industry's arguments often boil down to a simple concept: developing wonder drugs takes lots of money. "It costs upwards of $200 million just to get a product to market," says a spokesman for Johnson & Johnson. "And for every one that gets there, there are several that fail because of unfavorable side effects, no demonstrable increase in benefits, or a variety of other reasons." Moreover, experts say, costly marketing programs are a vital extension of the companies' research efforts. Declares Boston University economist Laurence Kotlikoff: "What good does it do to discover a health-improving drug and not have anyone know about it?"

FOR SMALLER COMPANIES, THE PRICE of failure can indeed be catastrophic. Shares of the biotech firm Synergen plummeted 68% in a single day last week after the company disclosed that tests of its most promising new drug had been disappointing. Synergen stock closed last Friday at 15¼, down 26⅞ for the week. The debacle followed the January collapse of shares of Centocor, which fell more than 60% when the firm suspended U.S. testing of its bacterial-shock treatment Centoxin.

At stake in the latest attacks on drugmakers, their defenders say, is nothing less than the industry's ability to lead the race to discover new treatments for disease. "If you take away the profits that these companies are able to earn," warns James Fenger, who watches pharmaceutical stocks for Kemper Financial Services in Chicago, "the incentive to do research will diminish, and our competitive position in the world will decline."

But how much profit do drug firms really need? Thanks to sky-high pricing, as much as 16% of the industry's sales flow straight to the bottom line, or about three times the average for FORTUNE 500 companies. Fueling those profits, wholesale drug prices rose nearly six times as fast as inflation between 1980 and 1992, according to a recent report for the Senate Special Committee on Aging. Moreover, a single successful drug can deliver a bonanza. Merck's Mevacor, the first drug to lower cholesterol levels, arrived in 1987 and now rings up sales of $1 billion a year. And Merck's patent doesn't expire until 1999.

Prices can swell even more at the retail level as pharmacies and drugstore chains take their cut of profit. For example, Voltaren maker Ciba-Geigy said it raised the wholesale price of its arthritis drug just 5% in the past year. "What happens after that is really out of our control," a corporate spokesman says.

Much of the rest of the world puts strict controls on pharmaceutical prices. So American firms have been recouping research-and-development costs at home that they could not recover abroad. "We're paying a premium because other countries are regulating prices and profits," says Stephen Schondelmeyer, a University of Minnesota health-care economist. "If

pensive, a claim challenged by a growing number of Gaucher's patients. "This is the worst illustration of corporate greed I've seen," says Abbey Meyers, executive director of the National Organization for Rare Disorders. Responding to Meyers, Genzyme's chairman of the board, Henri Termeer, says, "It's not a matter of greed. It's a high-cost product. There is no flexibility on price here."

Genzyme's marketing tactics have also raised eyebrows. Company salesmen use the unusual tactic of contacting Gaucher's victims and their doctors directly, enticing them with videos and publications suggesting that a healthy, pain-free life is at last at hand.

In spite of the aggressive commercial campaign, a mere 800 of the 11,000 Gaucher's patients who need treatment have signed up for Ceredase. One who refused, Denver teacher Karen Guth, estimates she would need to spend $350,000 for the drug each year. "It's a terrible position to put human beings in," she says. ***—By Dick Thompson/Washington***

federal study found that the cost of Upjohn's Halcion sleep-inducing medication rose 110% between 1985 and 1991, while the price of McNeil's Tylenol with Codeine jumped 160% during the same period. McNeil said it had held the price of the drug steady from 1980 to 1985.

Johnson & Johnson stirred outrage last year by charging about $1,300 for a dose of its colon-cancer treatment Ergamisol, even though another firm sells a veterinary drug with the same active ingredient, levamisole, for just $14. In its defense, Johnson & Johnson points out that it reformulated its version for human use and the price of its drug is comparable to that of other cancer treatments. But the president of another pharmaceutical company gave the magazine *Business for Central New Jersey* a blunt assessment of the price Johnson & Johnson set for the drug. Said he: "Why in the hell did they do something dumb like that?"

Small wonder that many Americans, who typically must pay 75% of the cost of prescriptions out of their own pockets, have been flocking to Mexico for pharmaceutical bargains. "When you're retired and faced with these humongous medical bills, it about kills you," says Turner Ashby, 64, a former trucker who figures he and his wife saved about $4,000 last year by driving 1,000 miles from their Idaho home to stock up on medicine in Mexico. "It's a terrible rip-off," Ashby adds. "The government has to go in there and say to these guys, 'The party's over.' "

Such concerns have opened the door to political grandstanding by critics of the industry. In attacking childhood-vaccine prices as "unconscionable," for example, Clinton pointed out that the overall cost of a full series of immunizations has jumped from about $23 a decade ago to more than $200 today. But 80% of the increase reflected the addition of two costly vaccines plus an excise tax that Washington began collecting in 1988 to pay for liability insurance for the companies. "The new costs," Schondelmeyer says, "are not driven primarily by the industry's desire to enhance the bottom line." (Cheap vaccines can wind up being costly: Defense Secretary Les Aspin spent four days in the hospital last week after military doctors gave him a 35¢ typhoid shot that aggravated a heart condition instead of using a $1.90 oral dose with fewer side effects.)

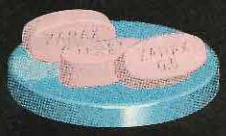
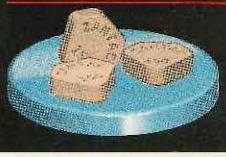
Drug companies argue that the 17-year patents on their drugs force them to try to recoup their investments quickly. Since it can take an average of 12 years for companies to develop new drugs and get federal approval to sell them, firms may have just five years to wring profit from their inventions before generic-drug makers rush in with their own versions. Companies also say profits from successful drugs are often plowed back into new products. Wyeth-Ayerst, for example, insists that the large profits it has made from Premarin and Inderal helped finance the revolutionary Norplant implantable contraceptive that it introduced in 1990.

Faced with a growing political backlash and the looming prospect of price controls, many drug companies have been taking steps to slash their costs and moderate their prices. Bristol-Myers Squibb last year said it was cutting 2,000 of 53,000 jobs; Warner-Lambert expects to eliminate 2,700 of its 35,000 positions.

At the same time, health-maintenance organizations have been driving down prices by buying in bulk and demanding the most cost-effective medications. Thanks to such methods, the level of pharmaceutical prices rose less than 6% in 1992, says Fenger, compared with traditional increases of as much as 10% a year. Adds he: "Companies want to limit their price increases so there is less incentive for the government to put price controls on the industry."

Experts also say drug prices could be better controlled if doctors paid more heed to drug costs and patients had the information they need for comparison shopping. The facts could be readily available through a national computerized data bank for patients and physicians. "Government should not be saying what prices are right or wrong and requiring certain behavior," says M.I.T. medical economist Jonathan Gruber. "Rather, it should be helping to make information available to people. Right now, we know more about the apples we eat than the drugs we use." And the public is paying the price of its ignorance. ***—Reported by Ketanji O. Brown and Jane Van Tassel/New York and Dick Thompson/Washington***

HOW U.S. PRICES OF SOME BEST-SELLING DRUGS COMPARE WITH CANADA'S

A sampling of pharmaceuticals, their use and manufacturer	1991 WHOLESALE PRICE U.S.	1991 WHOLESALE PRICE CANADA	FIVE-YEAR PRICE HIKE IN THE U.S. 1987-1992
 CECLOR Bacterial infections (Lilly)	$134.18 100 capsules	$84.14 100 capsules	+60.1%
 TYLENOL with CODEINE 3 Pain relief (McNeil)	$19.38 100 tablets	$3.32 100 tablets	+86.4%
 XANAX Anxiety and nervous tension (Upjohn)	$47.81 100 tablets	$16.92 100 tablets	+87.4%
 ZANTAC Ulcers (Glaxo)	$70.19 60 tablets	$53.82 60 tablets	+40.6%

Source: Prime Institute; University of Minnesota TIME Graphics by Steve Hart

you squeeze a balloon everywhere but one place, imagine what's going to happen."

There is no shortage of examples of huge increases in prescription prices. According to a 1991 Senate report, Wyeth-Ayerst raised the price of Premarin, an estrogen replacement used during menopause, 131% between 1985 and 1990, and boosted the cost of its Inderal heart medication 112%. (The Consumer Price Index went up 21% during that period.) Another

death by a mob of white partygoers while they taunted him for being Asian.

Despite the threat of tougher sentencing, hate crime is increasing. The Anti-Defamation League counted 1,730 anti-Semitic incidents in the U.S. last year, the second highest total in the 14-year history of the ADL's audit. The National Gay and Lesbian Task Force says attacks on homosexuals increased by 172% over the past five years. Klanwatch, a project of the Southern Poverty Law Center in Montgomery, Alabama, reports that 1992 was "the deadliest and most violent year" for bias-related events in more than 10 years. Thirty-one of these were murders.

Despite the growing numbers, Harvard law professor Laurence Tribe believes Wisconsin-style statutes are reasonable and necessary. "The absolute right to think and believe what you want," says Tribe "and to express any viewpoint, however hateful, has nothing to do with some kind of license to target victims of violence based on their race, sex, religion or sexual orientation." If the court struck down these laws, he adds, "the decision would cast a long shadow of doubt over all antidiscrimination measures and much of criminal law because the state of mind of the offenders is typically a critical element of how crimes are defined and how punishment is meted out."

The growth of hate crimes suggests that prejudice with its fists clenched is not all that susceptible to the persuasive power of the law. The legislation designed to deal with hate also becomes harder to justify when applied to threats—but not to acts—of violence. One of those laws became an issue in a major Ohio case that grew out of a 1989 incident at a public campground near Columbus. A black camper, Jerry White, complained to a park ranger about loud music coming from the neighboring campsite of David Wyant, a white man. After the park ranger left, Wyant shouted threats to shoot the "niggers." He was eventually charged with and convicted of aggravated menacing, a misdemeanor. But because his threat fell under Ohio's "ethnic intimidation" law, Wyant's crime was reclassified as a felony, which brought him an 18-month jail sentence.

Wyant's behavior was repellent, but it never degenerated into violence. If the law places extra penalties on his threats because they were racist, isn't it edging closer toward punishing offensive speech by itself? "The drafters of [the law] may have had in mind marauding Klan members or skinheads," says Susan Gellman, an Ohio public defender who filed a brief in Wyant's appeal opposing her state's hate-crime law. "But what they're getting is Archie Bunker." Then again, Archie Bunker didn't usually threaten to shoot anyone.—***Reported by Cathy Booth/Miami, Lynn Emmerman/Chicago and Julie Johnson/Washington***

A.C.L.U.—NOT ALL THAT CIVIL

THE AMERICAN CIVIL LIBERTIES UNION IS EVER READY FOR A LEGAL SQUABBLE, and sometimes the most intriguing ones occur among its own 300,000 members. Lately they have been split over free speech and hate speech, sexual harassment and the Rodney King beating, the same arguments that have divided other Americans. One essential conflict is between strict libertarians, for whom individual rights are as sacred as Moses' tablets, and new-breed egalitarians who favor minority and feminist causes and are more willing to see civil liberties give ground in the name of justice and equality.

After last year's acquittal in state court of the four policemen who beat Rodney King, A.C.L.U. president Nadine Strossen joined calls for a second prosecution under federal law. That represented a break with an A.C.L.U. position adopted in 1990 that repeat prosecution by different jurisdictions for the same act amounted to double jeopardy, which is unconstitutional. Last summer the national board suspended that position and considered supporting the second trial of the policemen. Then, at an argumentative meeting this month, the board voted 37-29 to reinstate the 1990 policy. All eight African-American board members at the meeting backed the losing side. "Rodney King could be my son," said Gwen Thomas, chair of the Colorado Civil Rights Commission.



QUINTANA ROO/JUNNE FOR TIME

STROSSEN: An old faith questioned

First Amendment absolutists lost, however, when the organization adopted a position in January on the hate-crime case being argued this week before the Supreme Court. The A.C.L.U. is siding with the state of Wisconsin's view that it is constitutional for courts to impose heavier penalties when an action that is already a crime, like assault, is motivated by bigotry. In a rare step, the Ohio chapter of the A.C.L.U. has filed a Supreme Court brief that opposes the national organization and argues that such laws are an inadmissible limitation on free speech. And while the national organization in 1990 came out against speech codes that punish bigoted remarks on college campuses, the board voted after heated debate this month to revise its position that workplace speech could be regarded as sexual harassment only when it was directed at an individual and had "definable consequences" on such things as promotion. The new definition covers offensive language that is aimed at no one in particular—like a bulletin-board sign that says A WOMAN'S PLACE IS IN THE KITCHEN—and merely leaves hurt feelings.

Insiders disagree on whether the shifting views are fostered by the A.C.L.U.'s in-house affirmative-action plan that requires the board, formerly dominated by white males, to be at least 50% female and 20% minority. Whatever the reason, old soldiers like Harvard law professor Alan Dershowitz and columnist Nat Hentoff, both onetime A.C.L.U. board members, see a serious threat to single-minded support of individual liberty. Dershowitz asserts that "the A.C.L.U. is a very different organization today." To him, the key tenet of the A.C.L.U. faith is support for free-speech rights for "causes that you despise." Without that, "all you are is a political activist."

The consensus that appears to be emerging within the A.C.L.U. is typified by board member and gay activist Tom Stoddard, who says the absolutists are seeking "otherworldly vindication of one constitutional right without recognizing that all rights have value and can be reconciled." To him, both equality and liberty must be weighed and many rights enshrined. "Pure consistency is never possible in an organization that addresses so many rights simultaneously," says Stoddard. To the embattled Old Guard, however, purity and consistency were precisely what the A.C.L.U. was once all about. —***By Richard N. Ostling. Reported by Ketanji O. Brown/New York and Julie Johnson/Washington***

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(b)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States



STRATEGIC PLAN 2017-2021

Adopted
December 14, 2016

Council for Court Excellence
Improving Justice for the Community

Message from the Strategic Planning Committee Co-Chairs

November 2016

Every five years—for at least the last two decades—the Council for Court Excellence has engaged in a long-range planning exercise to determine the breadth of our next reform agenda. We have conducted survey research, compiled interview data, and convened a broad range of board directors and stakeholders to discuss the substantive projects we might undertake to improve the District of Columbia's justice system. We have also, on occasion, addressed our financial challenges in an effort to agree affirmatively on belt-tightening policies and growing or shrinking our staff, among other responses to fiscal challenges. A financial retreat was certainly the priority in 2004 with a new incoming executive director, and then again in 2008, on the brink of a major recession.

With our existing 2011-2016 long-range plan set to end in December, the Council's leadership last fall determined that the development of a more comprehensive, organizational strategic plan was not only warranted, but necessary in light of our current executive director's planned departure in 2017. Indeed, the strategic plan that you are about to read has been the perfect opportunity to review, redefine, reassess, and in some cases reaffirm what CCE is about, with a focus on what we should do (the substance), who does it (the board, the staff, our stakeholders), and how to achieve greater quality, sustainability, and transparency.

Developing this strategic plan was a comprehensive and collaborative experience. To begin, CCE obtained funding and hired a superb strategic planner, Jen Lachman of Lachman Consulting. A strategic planning committee was convened, which we were asked to co-chair, that included a cross-section of the CCE board, diverse in terms of demographics, familiarity with the organization, and background. The 30-person committee, including all CCE staff, met monthly between March and October, along with dividing itself into working groups that focused on CCE's programs, board composition and structure, fundraising and communications, and its upcoming leadership succession. CCE staff provided significant input throughout this process. Finally, the committee's progress was reported regularly to the executive committee and to the board of directors at the June meeting to ensure a high level of transparency and accountability.

The strategic direction CCE will take, as outlined in this plan, is clarified through an aspirational vision statement and a redefined mission statement. We began by asking and answering a series of questions: How will the justice system in DC be different in five years as a result of CCE's success? What will be the single best measure of our success? How does CCE need to look different internally to achieve our vision? How will we communicate our mission and impact? What will remain unchanged about CCE? By exploring these questions, we became more deeply grounded in our vision for a justice system in the District of Columbia that equitably serves its people, and we became more strongly aligned around the unique role CCE plays to identify and implement lasting improvements by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

The committee spent significant time examining CCE's geographic direction, in terms of remaining DC-focused vs. regional, vs. national. The consensus we reached is to remain a DC-focused organization, adding a regional layer if and when the issue or problem in question

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Council for Court Excellence
Improving Justice for the Community

warrants a broader geographic approach. It was also agreed that CCE will make every effort to impact justice systems at a national level by promoting its work among justice organizations throughout the country.

The plan sets forth five strategic priorities with specific goals to guide their future implementation. Under the first priority, the committee proposes that three of the four standing program committees be renamed to emphasize that CCE's work extends beyond the courts to the entire justice system, and that each committee create a five-year program plan. Given this wider focus on the District's entire justice system, rather than only its courts, the strategic planning committee recommends that the organization undergo a rebranding effort so that its name reflects this extended focus.

The second priority, to diversify and grow CCE's funding streams, focuses on ways to expand our fundraising efforts, including growing our fee-for-service work and increasing revenue from events and individual donors. These goals are closely linked to the third priority, to increase our visibility through branding, improving how we measure outcomes and impact of our work, and our communications efforts in general.

Priority four relates to the CCE board of directors, and focuses on specific ways to increase our board diversity and engagement in order to capitalize on our robust pool of talent that has made this organization so unique and productive.

The fifth priority area covers succession planning both in regard to the 2017 departure of CCE's executive director and the creation of a succession plan for future leadership transitions.

CCE's strategic plan concludes with a section on strategic adaptability, developed through the committee's discussions about the need for greater transparency in how we monitor progress and make decisions about project opportunities or organizational challenges. The five strategic criteria described in this section will act as a guiding framework to support us in making the right choices for CCE and the communities we serve.

This strategic plan will be presented to the CCE board of directors at its December 14, 2016, meeting for a formal vote. A series of implementation efforts, reflecting the plan's priorities and goals, will begin in early 2017 and will be refined—and reported on—throughout the life of the plan.

We acknowledge and thank the members of the strategic planning committee, listed below, who participated in this exceptional process. We are also grateful to Goodwin Procter LLP, Hollingsworth LLP, and Sidley Austin LLP for their generosity in hosting the committee's meetings. Finally, we acknowledge and thank our consultant Jen Lachman, whose skilled leadership propelled us from her very first question: What would it take to develop a shared picture of CCE's future vision and translate that vision into a blueprint for the next five years and beyond?

Sincerely,

Cary Feldman and Cynthia Wright
CCE Strategic Planning Committee Co-Chairs

Council for Court Excellence
Improving Justice for the Community

Strategic Planning Committee

Co-chairs

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Council for Court Excellence
Improving Justice for the Community

Strategic Plan, 2017-2021

CCE's Vision

The Council for Court Excellence envisions a justice system in the District of Columbia that equitably serves its people and continues to be a model for creating stronger and more prosperous communities.

CCE's Mission

The Council for Court Excellence's mission is to enhance the justice system in the District of Columbia to serve the public equitably. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

CCE will enhance the justice system in the District of Columbia by focusing on the following strategic priorities in 2017-2021:

Priority 1	Priority 2	Priority 3	Priority 4	Priority 5
Strengthen the impact of CCE's initiatives through strategic focus on our four program areas: ➢ Civil Justice ➢ Criminal Justice ➢ Youth Justice ➢ Justice Education	Diversify and grow funding streams, so that CCE becomes more financially secure and sustainable.	Increase CCE's visibility and become more widely recognized as the go-to organization for justice policy issues in the District of Columbia.	Diversify board recruitment, engage current board directors, and cultivate new board leaders, so that CCE continues to capitalize on its robust pool of talented leadership.	Ensure an orderly, smooth leadership transition in 2017 and prepare CCE for any future leadership transitions.

Council for Court Excellence
Improving Justice for the Community



Jury Service Revisited:

UPGRADES *for the* 21ST CENTURY

DC JURY SERVICE STATISTICS IN BRIEF

The US District Court for the District of Columbia and the Superior Court of the District of Columbia hold petit jury trials.

In 2014, the District Court held 46 jury trials, representing 2,984 prospective jurors in attendance at the Court for jury selection or orientation. In 2015 the average number of prospective jurors present for selection was 56.9, with 43.2% either not selected or challenged.

In 2014, the Superior Court Criminal Division held 367 jury trials and the Civil Division had 105 cases reach judgment from a jury trial. This represents 31,345 prospective jurors reporting for service, an average of 169 per day, with 24,404 sent to voir dire and 5,657 selected for panels. To reach those numbers, in 2014 the Superior Court sent out 150,454 summons, of which 22,027 were returned as undeliverable, 70,715 were never responded to, and 12,898 were responded to with a request for deferment.

A Note About the Highlight Boxes

Throughout the report you will see highlighted quotes and figures. This data comes from surveys, focus groups, roundtable discussions, and interviews. The Data Collection and Methodology section of the report explains how this information was gathered.

CONTENTS

Note from the Co-Chairs of the DC Jury Project 1

Mission Statement 2

Project Overview 3

Project Members and Acknowledgements 4

Summary List of Recommendations 5

Recommendations from Juror Care Working Group 8

- Exhibit A: Sample Juror Forms 19
- Exhibit B: Sample After Service Pamphlet 24
- Exhibit C: Sample Letters of Thanks 28

Recommendations from Jury Pool and Summoning Working Group 32

- Exhibit D: Kentucky Department for Libraries and Archives Model Employer Jury Duty Policy 41
- Exhibit E: Selected State Laws Regarding Jury Service 42
- Exhibit F: Other Model Jury Duty Policies 43

Recommendations from Trial Structure Working Group 46

- Exhibit G: American Bar Association Formal Opinion 466 53
- Exhibit H: Model Civil Jury Instructions Based on Superior Court Model Criminal Jury Instructions 1.102 60
- Exhibit I: Sample California Jury Trial Information Sheet 62
- Exhibit J: Sample General Order for Expedited Trial Procedures (California) 64
- Exhibit K: Criminal Jury Instructions for the District of Columbia, Instruction 1.106, Questions by Jurors 75

Issues to Watch 81

Data Collection and Methodology 83

Helpful Resources 122

NOTE FROM THE CO-CHAIRS OF THE DC JURY PROJECT

For the past 12 months, a Committee of the Council for Court Excellence (CCE or The Council) has undertaken to re-examine the jury system in the District of Columbia, as a follow up to CCE's initial study of jury service in 1998. We have been pleased to co-chair this recent effort, and we are delighted to share the results in this report: ***Jury Service Revisited: Upgrades for the 21st Century.*** Building on the seminal CCE study, our devoted Committee—comprised of judges, court officials, trial attorneys, bar leaders, policy experts, and former jurors—spent many hours researching various aspects of jury service in the District, debating potential proposals, and drafting the recommendations that appear in this report, which we hope will be useful both to the officials in our community who bear the responsibility of administering this critical institution and to the citizens who devote their time and attention to the important work of serving as jurors.

We would like to take this opportunity to applaud CCE for initiating this re-evaluation of the petit jury as an institution, and for supporting and facilitating this effort. We also express our gratitude to the judges and court administrators of the Superior Court of the District of Columbia and of the United States District Court for the District of Columbia for their participation and cooperation, without which we could not have produced such an informed report. These officials do an excellent job of endeavoring to insure that the time-honored institution of jury service functions well in the District of Columbia, and we sincerely hope that they will consider our recommendations in the spirit in which they are offered: to build upon and improve this vital organ of our democracy, which is key to the fair and just resolution of disputes between private citizens and also disputes between citizens and our government.

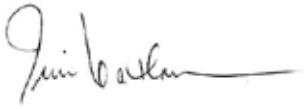
We want to extend special thanks to those who served on this Committee—your dedication, insight, and expertise were invaluable and much appreciated. This undertaking was no small task, and we applaud the participants for working in good faith to bridge differences that arose during the discussion of complex issues. Not all of the recommendations made are entirely unanimous, so the Working Groups deserve credit for tackling these issues forthrightly to produce recommendations that reflect the general consensus of the group. We are also grateful to those who advised our Committee in their capacity as former jurors, as well as those who answered our surveys and participated in our focus groups; we thank you for your reflections and your time. It is because of the collective efforts of all of the people who have been involved in this project in some way that we have been able to provide these recommendations, and it is our sincere hope that future participants in the jury system—whether they be prospective jurors, jurists, lawyers or litigants—will benefit from this group's work.

As you will see, the Committee's recommendations cover a wide spectrum of topics related to jury service. These suggestions are designed to account for changes in technology and circumstances that have occurred in the nearly twenty years since CCE's prior report; to make the system more efficient for jurors, judges and litigants; to foster understanding regarding the importance of jury service in our community; and ultimately, to increase satisfaction with the fairness and efficacy of the jury system on the part of all who come in contact with it.

We hope the recommendations will stimulate thought, and like the 1998 Report, will lead to constructive changes as appropriate, whether by legislation, rules, policies, or practices. All on our Committee stand ready to discuss, to explain, and to help implement the recommendations in order to update and improve jury service in the District of Columbia in the years to come.



The Honorable Ketanji Brown Jackson
United States District Court for the District of Columbia



Irvin B. Nathan
Senior Counsel, Arnold & Porter
Former DC Attorney General

MISSION STATEMENT

In consideration of the importance of the right to a trial by jury in the United States, the Council for Court Excellence, in cooperation with the leadership of the Superior Court of the District of Columbia and the US District Court for the District of Columbia, seeks to evaluate and strengthen the institution of the jury in the District of Columbia. This mission was originally articulated by the Council's 1998 Jury Project Committee, and is adopted here as part of the effort to evaluate that project's impact while also looking to the future and building on its work.

To this end, a Committee comprised of judges, court staff, interested members of the public, former jurors, attorneys, civic and business leaders, academics, and others has been established under the auspices of the Council for Court Excellence. The Council is a non-profit, non-partisan, civic organization that works to improve the administration of justice in the local and federal courts and the justice system in general.

The overall goal of the Committee is to support citizens in their roles as jurors and to improve the effective administration of justice through juries. Specifically, the DC Jury Project Committee will:

1. Study and evaluate the utilization of juries and the conduct of jury trials in both the United States District Court for the District of Columbia and the Superior Court of the District of Columbia. This evaluation will include examinations of jury selection, the trial process, and the jury service experience in general.

2. Publish and disseminate findings and recommendations of specific ways to enhance jury trials.

3. Encourage and support testing of proposed improvements through pilot projects in courtrooms of the DC Superior Court and the US District Court for DC.

4. Support implementation of recommendations contained in the DC Jury Project Report.

5. Suggest educational programs for the bench, the bar, jurors and the public concerning any prospective jury reforms.

6. Establish methods to periodically examine the utilization of any newly adopted rules and procedures to determine their effects, and suggest modifications when necessary.

PROJECT OVERVIEW

Creation of the Committee

The Council for Court Excellence assembled a 16-member Planning Committee on December 20, 2013 and charged it with laying the groundwork for a year-long study of the jury system in the District of Columbia. This group modeled its work after the successful efforts of the 1998 Jury Project Planning Committee and identified a number of priority issues to examine, structuring this effort as both a look forward and a look backward.

This core planning group was expanded to a 40-member DC Jury Project Committee by July 2014. Judge Ketanji Brown Jackson of the US District Court for DC and former DC Attorney General Irvin Nathan served as co-chairs of the Committee. Project members were drawn from the legal, civic, academic, and business communities in the District of Columbia.

Committee Structure and Process

DC Jury Project members were divided into three Working Groups – Juror Care, Jury Pool and Summoning, and Trial Structure. Over the course of a year, these respective Working Groups examined the summoning process, including the scope and quality of juror source lists, summons response rates, juror utilization, and sanctions for scofflaw jurors; addressed issues related to the nature of the trial process and how that process affects both judicial efficiency and juror understanding; and studied issues related to the quality of the juror experience, such as the physical environment of the courthouse, orientation materials, juror privacy, and juror compensation. The Working Groups were made up of former jurors, judges, attorneys, court administrators, and academics. The Working Groups met monthly to develop draft recommendations for consideration by the full Project Committee.

PROJECT MEMBERS AND ACKNOWLEDGEMENTS

Co-Chairs

Hon. Ketanji Brown Jackson, US District Court for the District of Columbia

Irvin B. Nathan, Senior Counsel, Arnold & Porter, former DC Attorney General

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Within the Council for Court Excellence, this project was staffed by June Kress, Executive Director; Zach Zarnow, Jury Analyst/DC Jury Project Manager; Emily Tatro, Policy Analyst; Amanda Townsend, Development Director and former interns Abdiaziz Ahmed, Daisy Ayon, Nathaniel Goodman-Johnson, Grace Kim, Daria Kapitanova, Rebecca Kozlowski, Badria Mryyan, Alyssa Orozco, Gregory Segal, Sheron Torho, Benjamin Wright, and Ilana Yanku.

The Project Committee wishes to thank the leadership and staff of the US District and DC Superior Courts for their assistance with this project.

The Committee also wishes to thank Judge Gregory E. Mize and Paula Hannaford-Agor of the National Center for State Courts for their input and assistance, as well as the American Board of Trial Advocates and the American Bar Association for inviting CCE staff to attend their respective conferences, which were invaluable in the collection of best practices.

The Council for Court Excellence would like to thank all of the jurors, judges, attorneys, and employers who gave their time to participate in focus groups and roundtable discussions, and to take our surveys.

Finally, thanks to the student volunteers from Howard University School of Law, George Washington University Law School, and University of the District of Columbia David A. Clarke School of Law for their help in voir dire and trial observation.

The Council for Court Excellence is especially grateful to our anonymous donors, as well as The Morris & Gwendolyn Cafritz Foundation, The City Fund, The GEICO Philanthropic Foundation, Pepco, the State Justice Institute, and the Anne and Ronald Abramson Family Foundation.

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SUMMARY LIST OF RECOMMENDATIONS

JUROR CARE:

1. Using Positive Means to Encourage Participation

   The DC Jury Project recommends that the courts increase the use of positive means of encouraging participation in the jury system.

2. Augmenting the Summons

   The DC Jury Project recommends that the summons form be augmented to include information about term of service, payment, amenities, and the like.

3. Providing Substantial Information During Juror Orientation

   The DC Jury Project recommends that substantial information concerning jury service and the judicial system be provided before and during the juror orientation process.

4. Implementing a Call-In/Online Check-In System

   The DC Jury Project recommends the utilization of a call-in and/or online check-in system for petit jurors in DC Superior Court to decrease juror "wait time" and increase juror satisfaction and willingness to serve.

5. Using Technology to Interact with Jurors

   The DC Jury Project recommends that DC Courts make further use of technology to communicate and interact with jurors.

6. Improving Juror Compensation

   The DC Jury Project recommends that the DC Council and DC Courts implement changes to juror compensation funds for the betterment of jurors, the Courts, and the community.

7. Reducing Juror Stress

   The DC Jury Project recommends that the Courts consider enhancing procedures relating to the stress associated with jury service.

8. Adjusting Trial Schedules

   The DC Jury Project recommends that judges consider adjusting trial schedules where feasible to minimize juror inconvenience.

9. Thanking Jurors

   The DC Jury Project recommends that the Courts implement formal and official means of thanking potential and empaneled jurors for their service, including service as alternates.

JURY POOL AND SUMMONING:

10. Ensuring Agency Source List Certification

    The DC Jury Project recommends amending the DC Code so that agencies that provide the Court with source lists have to certify that the lists have been accurately updated.

11. Adding New Source Lists

    The DC Jury Project recommends drawing from additional source lists to increase the accuracy and representative nature of the master jury lists at DC Courts.

12. Utilizing Big Data Technology

    The DC Jury Project recommends that the DC Courts examine the possibility of improving jury summoning rates by using big data resources to identify more accurate addresses and contact information for potential jurors.

13. Permitting Citizens to Provide the Court with Updated Information

    The DC Jury Project recommends that citizens be permitted to provide information for inclusion in the master juror source list in DC in order to ensure that the source list includes citizens who are qualified but who are not otherwise included.

14. Reducing Felon Restrictions

    The DC Jury Project recommends that the Superior Court revise its jury plan so as to reduce the ten-year restriction on people with felony convictions being called to serve on a petit jury.

15. Improving Employer Jury Service Policies with Civic Leave

    The DC Jury Project recommends that employers adopt policies that encourage their employees to serve on juries and that make explicit the Constitutional and civic nature of jury service.

16. Excusing Jurors for Previous Service

    The DC Jury Project recommends that the Superior Court and the District Court modify their jury plans to state explicitly that they will excuse prospective jurors who have served on a petit or grand jury within the past two years.

TRIAL STRUCTURE:

17. Clarifying the Rules for Researching Jurors

    The DC Jury Project recommends that lawyers and their agents be permitted to research potential jurors and to monitor selected jurors by looking at the publicly available portion of social media sites subscribed to by those jurors. However, direct contact between an attorney or agent and a potential or selected juror should continue to be prohibited.

18. Sharing the Results of Criminal Background Checks of Jurors

    The DC Jury Project recommends that judges consider ordering the government to share with defense attorneys the results of criminal record checks of potential jurors in criminal cases unless prohibited by law from doing so.

19. Improving Voir Dire and Peremptory Challenges

    The DC Jury Project makes four recommendations regarding the jury selection process.

    - First, the Committee recommends that prospective jurors be provided with questionnaires that request additional biographical information when they arrive for jury service and that these questionnaires be made available to counsel and the litigants when a panel arrives in the courtroom.
    - Second, the Committee recommends that judges use the index-card method, or some similar technique, for voir dire screening that permits counsel both to offer additional questions and to make reasonable follow-up inquiries at the bench.
    - Third, the Committee recommends that a jury panel be called in the Superior Court only after all preliminary trial matters have been resolved and that the number of jurors to be utilized for a venire should be limited to those prescribed by the Court's protocol, unless special circumstances warrant a larger pool.
    - Fourth, the Committee recommends that the number of strikes permitted to litigants not be reduced below that now provided by statute and by rule in Federal and Superior Court.

20. Instructing the Jury on Social Media Rules

    The DC Jury Project recommends that, before the trial begins, the Court instruct the jury regarding restrictions on the use of social media while serving as jurors.

21. Offering Expedited Jury Trials

    The DC Jury Project recommends that the Superior Court provide an expedited jury trial option for civil trials. Shortening trials saves litigants and the Court time and money and reduces the burden of service on jurors.

22. Providing Affirmative Instructions on Note-Taking to Jurors

    The DC Jury Project recommends that the Courts take special care to provide affirmative instructions to jurors so that jurors are aware that they are permitted to take notes during the trial.

23. Explaining the Procedures for Jurors to Ask Questions

    The DC Jury Project recommends that judges in the DC Courts, in the exercise of their discretion in appropriate civil cases, permit jurors to submit written questions for witnesses so long as the Court instructs the jury that: (1) The Court will determine whether it is proper to pose the question to the witness; (2) The juror should not discuss any unasked question with the jury and should not draw any inference from the judge's decision not to pose the question to the witness; and (3) The questions as posed by the trial judge should be designed to assist the jury in reaching an impartial determination of the facts and not to serve as advocacy for either side in the trial.

    Because no model jury instruction for civil cases similar to Criminal Jury Instruction 1.106 concerning questions from jurors in criminal cases currently exists, the DC Jury Project recommends the creation and adoption of a similar instruction in the model Civil Jury Instructions.

    The DC Jury Project recommends that judges in DC Courts, in the exercise of their discretion in appropriate criminal cases, permit jurors to submit written questions for witnesses so long as the Court instructs the jury in accordance with DC Criminal Jury Instruction 1.106 that: (1) The Court will determine whether it is proper to pose the question to the witness; (2) The juror should not discuss any unasked question with the jury and should not draw any inference from the judge's decision not to pose the question to the witness; and (3) The questions as posed by the trial judge should be designed to assist the jury in reaching an impartial determination of the facts and not to serve as advocacy for either side in the trial.

24. Encouraging Post-Trial Communications Between Attorneys and Jurors

    The DC Jury Project recommends that post-trial communications among jurors willing to speak with counsel and the Court should be encouraged in order to improve the administration of the jury system.

NEXT STEPS:

25. Authorizing Implementation of Recommendations

    The DC Jury Project recommends that CCE advocate for the implementation of the recommendations in this report by conducting an education campaign that publicizes the report's findings, encourages citizens to serve on juries, and improves the perception and reality of jury service.

JUROR CARE WORKING GROUP

The Juror Care Working Group focused on promulgating recommendations aimed at building upon and improving the overall juror experience in the DC local and federal court system. The members of the Working Group included a variety of legal practitioners and consultants. Several of the members of the Working Group also have previously served as jurors in both the local and federal court. The Working Group was therefore able to draw from a variety of different experiences in reviewing and promulgating its recommendations. The Working Group examined and supplemented these issues with additional topics that became evident as our work progressed. Members of the Working Group also examined relevant practices and processes in neighboring jurisdictions with similar dockets, such as Maryland.

The Working Group met monthly from September 2014 to June 2015 starting with an agenda of issues gleaned from CCE's 1998 report. Based on the Working Group members' individual experiences and the information gathered by CCE staff members, Working Group members, and volunteer law students, the Working Group agreed upon and drafted nine separate recommendations. The Working Group believes that jury service is a vital aspect of our justice system, and our recommendations hope to not only encourage participation in the jury system, but also to ensure that all individuals have a positive experience before, during and after jury service. The recommendations thus can largely be grouped into two primary areas: Methods to encourage and increase jury participation prior to jury service through the promulgation of information, and enhancing the processes that are currently in place to ensure that jurors have a positive experience throughout their jury service.

For the first area, the Working Group examined studies that reveal a low turnout rate for citizens summoned for jury service, approximately 19% of whom ignore jury duty and approximately 43% of whom never receive the summons. The Working Group discussed factors that may drive this low turnout rate, and how to encourage participation by both the dissemination of information on the jury service process and the use of positive means. For example, the Working Group discussed ways the courts can promulgate information to prospective jurors as part of the summoning process in an effort to alleviate any confusion or apprehension regarding serving on a jury.

For the second area, the Working Group focused on recommendations related to jury service itself. The Jury Project's recent survey found that while over 75% of jurors called to serve left with a favorable attitude toward jury service, less than half of those surveyed were eager to serve in the future. The Working Group discussed and examined methods to improve on a juror's experience so that a greater percentage of jurors will leave eager to serve in the future and will relay their positive experience to other potential jurors in the community. For example, the Working Group specifically discussed methods the courts can use to streamline the orientation and check-in process, as well as practices to ease scheduling, stress and compensation issues that many jurors encounter during their service.

The DC Jury Project understands and appreciates that the DC Courts are committed to ensuring that all jurors have a positive experience during jury service. We hope that our recommendations will assist in this effort.



Dana E. Koffman
Arnold & Porter
Juror Care Working Group Chair

01 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS INCREASE THE USE OF POSITIVE MEANS OF ENCOURAGING PARTICIPATION IN THE JURY SYSTEM.

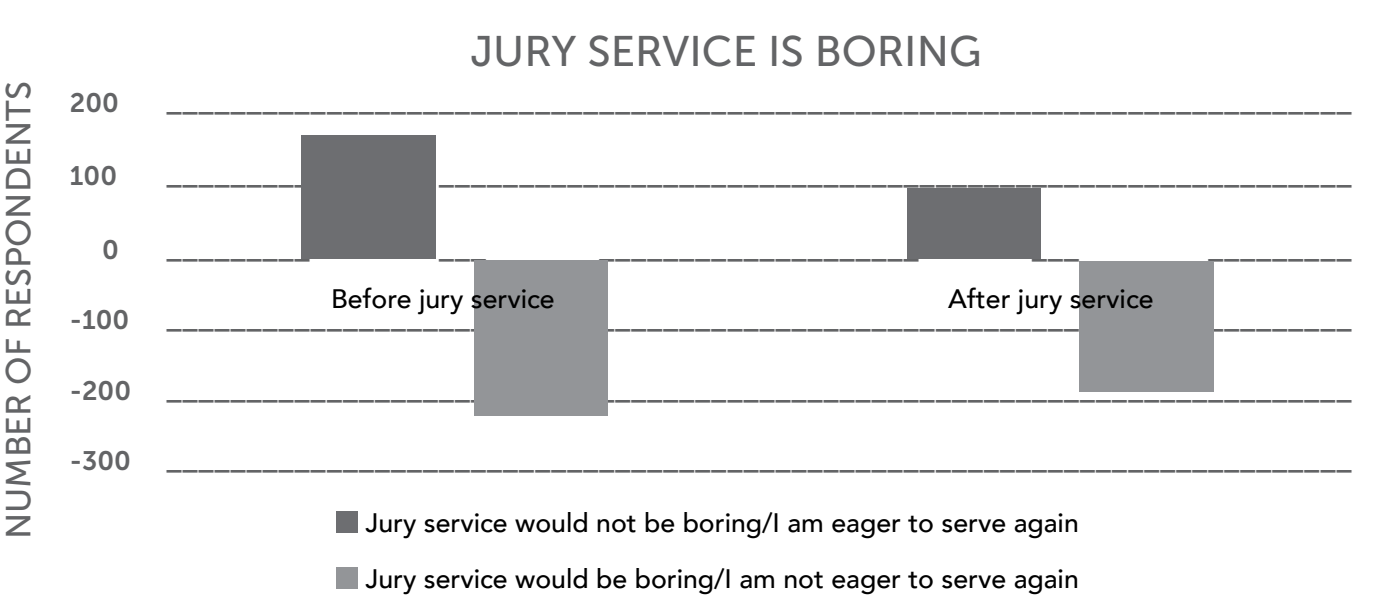
The DC Jury Project recommends that the Superior Court and the District Court take a positive approach to encouraging citizens to participate in jury service. Several actions may be taken to encourage participation in the jury system:

- Inform the public of the importance of jurors in the judicial system;
- Provide information to prospective jurors regarding what to expect, along with the summons;
- Advise jurors of the services available at the court (such as wireless internet and childcare);
- Educate jurors about the process when called to serve; and
- Express appreciation to jurors at the conclusion of their service.

In 2014, the Superior Court experienced a low turnout rate for citizens summoned for jury service, approximately 15% of which were undeliverable and 47% to which a response was never received.[1] The DC Jury Project's recent survey reveals that while over 75% of jurors called to serve leave with a favorable attitude toward jury service, less than half of those surveyed were eager to serve in the future. The DC Jury Project believes that if positive reinforcement is provided from the time a juror is summoned through the conclusion of a juror's service, a greater percentage of jurors will be eager to serve in the future and will convey their positive experience to other potential jurors in the community. For example, the DC Jury Project commends the Superior Court for its policy of monitoring Twitter and thanking prospective jurors and former jurors who tweet about their positive experience. The DC Jury Project recommends that this practice be expanded and adopted by the US District Court.

The DC Jury Project recommends that the courts provide specific, helpful information to summoned prospective jurors, recognizing that summoned citizens may have limited experience with the judiciary and with the services available to a juror. While there is ample information available online for prospective jurors, not all citizens who are called to serve have access to the

1 Past studies show similarly low turnout rates. See Council for Court Excellence, Improving Juror Response Rates in the District of Columbia (2006).



internet; therefore, the DC Jury Project recommends that the courts consider providing information regarding jury service, such as the answers to Frequently Asked Questions, along with the summons (See Recommendation #3). Additionally, courts should considering using text messages, phone calls, letters, and email reminders that could include some of this information as well as an additional thank you.

The DC Jury Project also recommends that the courts show their appreciation for citizens who have heeded the call to serve as jurors at the conclusion of their service, whether or not they have been empaneled on a jury, through a personal interaction with a judge (See Recommendation #9). The DC Jury Project's recent survey reflects a higher level of frustration with jury service in summoned citizens who are not empaneled than in those who are. The DC Jury Project recommends that before releasing prospective jurors who are not empaneled, a judge personally express appreciation for the time taken by the juror to appear for service, both in person and potentially though a thank you letter.

The DC Jury Project recommends that in contrast to positive means of promoting jury service, which should be widely implemented, the use of severe sanctions, including monetary fines, should be carefully considered prior to implementation. In light of the inaccuracy of the current source lists, it is possible that a citizen who never received a summons could be targeted for sanction. Furthermore, it is clear from surveys with jurors that the imposition of sanctions may lead to greater participation, but it could also result in far greater resentment toward what should be a positive experience.[2]

2 Council for Court Excellence Jury Project, Show Cause Survey (2015).

02 THE DC JURY PROJECT RECOMMENDS THAT THE SUMMONS FORM BE AUGMENTED TO INCLUDE INFORMATION ABOUT TERM OF SERVICE, PAYMENT, AMENITIES, AND THE LIKE.

Providing important and specific information to citizens who have been called for jury service regarding their expected term of service prior to their arrival at the courthouse would significantly reduce juror frustration, confusion, or apprehension and limit the number of inquiries to the jury office. Giving citizens who are summoned more and earlier information about jury service would relieve anxiety and improve the overall court experience.

Given that approximately 30% of the residents of the District of Columbia do not have broadband internet access[3], the DC Jury Project recommends that citizens receive substantial written information concerning jury service at the time that they are summoned. The summons should be clear and easy to read. It should include specific information about getting to and through the courthouse (including Metro and parking information, the need to arrive at least ten minutes early to go through security, and the location of the jury office and jurors' lounge). Additionally, information about the summoning process and deferral and excusal procedures and policies should be included. At the time the summons issues, recipients should be informed about the term of service required, especially if circumstances may result in exceptions to the standard term. Citizens should also be notified of the appropriate attire, lunch information, payment information (such as juror debit cards and proof of service for their employers), amenities (such as WiFi access, childcare, the health unit for nursing mothers, vending machines, and lockers), things to bring (such as books, magazines, newspapers, laptops, and tablets) and any special services for persons with disabilities and persons needing assistance with communicating in English. Additionally, the juror summons should direct citizens to the court's website and the jury office for other helpful information, such as the juror fee schedule, courthouse evacuation procedures, inclement weather procedures, and a list of places to eat in the surrounding area.

The Superior Court and the District Court should include this additional information along with the summons, so that citizens receive it before their assigned reporting date. The Superior Court has already developed a very thorough Superior Court Juror Frequently Asked Questions (FAQs) handout, which includes much of the additional information referenced above.[4] The DC Jury Project recommends that the courts consider redesigning the summons to incorporate the information provided in the FAQs handout and other necessary information. If redesigning the summons is not possible, the DC Jury Project recommends that the courts consider sending citizens reminders of their assigned reporting dates by email and/or text message and include the information provided in the FAQs handout and other necessary information along with the reminder email and/or text message.

3 Connect DC Digital Inclusion Initiative, Connect DC Fact Sheet, available at: http://connect.dc.gov/sites/default/files/dc/sites/connect/publication/attachments/Fact%20Sheet.pdf

> This was my first experience with DC Superior Court. It would have been nice to have known about amenities in advance. I didn't bring my laptop because I didn't know there was wifi.
>
> —An Anonymous Juror

4 The FAQs are available on the Court's website, here: http://www.dccourts.gov/internet/faqlocator.jsf

The courts should also consider how best to communicate this information with persons who have the ability to speak English but who are not fully able to understand the language in written form. The DC Jury Project recognizes that the District of Columbia is a diverse area, and that it is not feasible to mail jury summonses in all languages. However, interpretation assistance should be available by telephone to all citizens summoned for jury service. Due to the large percentage of Spanish-speaking residents, each mailed summons should state prominently on its cover that persons who speak Spanish may call the jury office to receive a written summons in Spanish or determine the appropriate course of action. A Spanish-speaking person should be available to assist these citizens when they call. In addition, a juror FAQ should be made available in the jury office and online in various popular languages (such as Spanish, French, Chinese, Korean, Amharic, Arabic, and Russian).

The following resources from DC and other jurisdictions should be consulted when determining how to best augment the summons:

DC Superior Court FAQ:
http://www.dccourts.gov/internet/faqlocator.jsf

DC District Court FAQ Handout:
http://www.dcd.uscourts.gov/dcd/sites/dcd/files/jury-FAQ.pdf

San Diego County Summons and Information Sheet[5]

Virginia Answer Book for Jurors:
http://www.courts.state.va.us/courts/circuit/jury.pdf

5 On file with CCE, available upon request.

03 THE DC JURY PROJECT RECOMMENDS THAT SUBSTANTIAL INFORMATION CONCERNING JURY SERVICE AND THE JUDICIAL SYSTEM BE PROVIDED BEFORE AND DURING THE JUROR ORIENTATION PROCESS.

Most citizens are not familiar with the court system. Therefore, the judiciary has an obligation to make its processes understandable and as user-friendly as possible. The orientation video currently in use in the DC Superior Court is a quality production that conveys important information on the importance and nature of jury duty. Similarly, the juror orientation slides currently available on the US District Court for DC's website provide key information on the overview and history of jury duty. These resources are crucial to ensuring that citizens receive information at the beginning of the jury service process, and the DC Jury Project recommends that the courts increase the visibility of this information and provide additional resources to supplement this information in order to ensure that citizens are provided with substantial background information about the courts and jury service from the beginning of the jury service process. Ensuring that citizens receive such information during, and even before, juror orientation will alleviate anxieties about jury service and improve potential jurors' overall court experience from the outset.

The DC Jury Project recognizes that the DC Superior Court and US District Court make their orientation materials (e.g., the Superior Court's orientation video) available to jurors online before they appear for jury service. The Committee recommends that notice of the availability of orientation materials also be included in the summons. In addition, the DC Jury Project recommends that the courts make their orientation materials available to a broader audience in and around the District in an effort to raise general awareness about the jury duty process, such as by providing public libraries with copies of the materials or by placing informational posters in public areas like the Department of Motor Vehicles, libraries, and local and federal government buildings. The DC Jury Project also recommends that the courts work with DC area schools to incorporate juror orientation materials as part of Civics or Government courses and to encourage schools to utilize the programs available to raise awareness of jury service, such as the DC Superior Court's Court Visitor Program and CCE's School Jury Education Program.

The DC Jury Project also recommends that when citizens arrive for jury service, the courts provide them with orientation materials that contain information on specific logistics and expectations involved during the jury service process. Such information could consist of a brochure, handouts, or posters that discuss the basics of jury service and the court system and convey relevant information on accommodations and expectations for jurors during trial. The courts should also consider making available during orientation the same information that the DC Jury Project recommends be included with the summons to accommodate citizens who do not bring such information with them when they report for jury service (See Recommendation #2). While the District Court makes its juror orientation slides available online, it should also ensure that the informational slides are provided to citizens when they arrive for jury service. Providing citizens with specifics on the logistics of and expectations for jury service would be an effective supplement to the orientation materials presently utilized by the courts.

In addition, the DC Jury Project recommends that the courts increase staff presence during orientation to provide prospective jurors with the information described above. An increase in staff presence would humanize the juror service experience and also provide a forum for questions to be asked and answered. The increased presence of helpful court staff at the beginning of jury service would also serve to alleviate anxiety about the process.

04 THE DC JURY PROJECT RECOMMENDS THE UTILIZATION OF A CALL-IN AND/OR ONLINE CHECK-IN SYSTEM FOR PETIT JURORS IN DC SUPERIOR COURT TO DECREASE JUROR "WAIT TIME" AND INCREASE JUROR SATISFACTION AND WILLINGNESS TO SERVE.

A frequent complaint that citizens who are called for jury service make is the amount of idle "wait-time" spent during their time in the courthouse. Specifically, potential jurors often get discouraged over the amount of time they spend waiting to be assigned to a courtroom for voir dire and, in many instances, with the fact that they end an entire day of jury service without ever being sent to a courtroom at all. To alleviate part of the frustration with the amount of wait-time jurors experience, the DC Jury Project recommends the implementation of a telephone and/or online check-in system for petit jury service in Superior Court. These are time-tested methods for decreasing juror wait-time, which may increase overall satisfaction and willingness to serve on petit juries.

The DC Jury Project applauds the Superior Court for achieving a jury utilization rate of 78% for CY 2014, as reported in the District of Columbia Courts Statistical Summary 2014.[6] However, this report also indicated for CY 2014 that while, on average, 169 jurors reported for service, only 131 were sent to voir dire each day. Consequently, on average, approximately 38 jurors, or 22.5% of jurors who reported each day, spent the day waiting and were never sent to a courtroom for voir dire.

A proven, successful method for the reduction of juror wait-time is the implementation of a telephone call-in system, an online reporting system, or a combination of both call-in and online systems for juror summoning. Previously known as a "standby" juror system, call-in/online check-in systems require summoned jurors to call an automated telephone system or to check in online through the court's website after 5:00 pm the night before the juror's assigned service date to determine whether he or she is required to appear. Upon entering the juror identification number that appears on the summons, an automated telephone message or online notice indicates which citizens do not need to report for duty.[7]

In its 1998 report, *Juries for the Year 2000 and Beyond,* the Council for Court Excellence encouraged the courts to investigate the implementation of such a standby juror system as one method of decreasing juror wait-time during the pre-trial phase of jury selection and improving overall juror satisfaction by eliminating unnecessary trips to the courthouse.[8]

> "It would have been more convenient if DC had a call ahead system, like they do in other states."
> —An Anonymous Juror

The call-in/online check-in system for juror reporting is prevalent in most state court systems. A 2006 National Center for State Courts (NCSC) study revealed that nearly two thirds of state courts nation-wide employed a call-in system; and in jurisdictions with populations of 100,000 to 500,000 (similar to the District of Columbia), 82.4% of these jurisdictions utilized a telephone call-in system (while 22.3% also utilized online reporting technologies through the courts' jury websites).[9] Currently,

6 Data from the District of Columbia Courts Statistical Summary 2014: Case Activity for CY 2014. http://www.dccourts.gov/internet/documents/2014-Statistical-Summary-FINAL-02-12-15.pdf, p. 21.

7 Jurors summoned to report on a Monday would be instructed to call or check in online after 5:00 pm on the Friday prior to their Monday report date.

8 Council for Court Excellence (1998) District of Columbia Jury Project, *Juries for the Year 2000 and beyond: Proposals to Improve the Jury Systems in Washington,* DC RECOMMENDATION 13, p.16.

9 Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole Waters, Ph.D. The State-of the-States Survey of Jury Improvement Efforts: Compendium Report, Table 14 (2007). http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendium-Final.ashx

most US District Courts, including the US District Court for the District of Columbia, utilize a call-in/online jury notification service.[10] Similar services are also present in nearby urban state jurisdictions, such as Fairfax County, VA, and Montgomery County, MD, as well as the City of Baltimore, MD which handles a case-load similar to DC Superior Court.[11]

The DC Superior Court website's eJuror Services currently is a technology that might be adjusted to include an online check-in component. Currently, eJuror Services permits summoned jurors to complete their juror questionnaire form online and to defer jury service for up to 90 days from the date of the original (as well as additional services, such as looking up a juror's last or next date for jury service).[12] The Jury Administration Office indicates that the majority of citizens summoned for jury service in the Superior Court of the District of Columbia currently utilize eJuror Services to complete their juror qualification questionnaires.[13]The DC Jury Project recommends that the DC Superior Court Jury Administration Office investigate ways to expand eJuror Services to include an online notification system for petit jurors such that on the night before their service, summoned jurors can check in to determine whether they will need to report. The DC Jury Project also recommends that the Jury Administration Office investigate the implementation of an automated telephone call-in system for those citizens who do not have regular internet access.

The DC Jury Project recognizes that the Jury Administration Office staff in Superior Court currently evaluates the need for jurors each day through their daily morning check-in emails and coordinates with the presiding and deputy presiding judges for each of the Criminal and Civil Divisions, who notify the Jury Administration Office as to the names of the judges and courtrooms for their respective divisions that will be requesting jurors for trial and the number of jurors needed per courtroom. This coordination between the presiding judges and deputy presiding judges of each division and the Jury Administration Office presently occurs in the morning of each trial day; the DC Jury Project recommends that this coordination occur in the afternoon prior to the court day for which jurors would be needed for voir dire and jury selection (currently Monday –Thursday) to facilitate an appropriate automated telephone and internet announcements that would be available to summoned petit jurors through the Jury Administration Office or online on eJury Services after 5:00 pm. Such a procedure would allow summoned jurors to confirm whether to appear for jury service the following day (on Friday after 5:00 pm for jurors scheduled to appear on a Monday).

The American Bar Association's American Jury Project's Principles for Juries and Jury Trials, Principle 2 D, Sections (1) and (2) respectively, state that "courts should coordinate jury management and calendar management to make effective use of jurors. Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of persons summoned for jury duty and the number assigned to jury panels."[14] The one-day/one-trial (OD/OT) jury service term, as currently utilized by the DC Superior Court, aims to make effective use of juror time, since it only requires one day of a juror's life in accordance with the principles set forth by the ABA American Jury Project and the goals and best practices pursued by most urban court systems. Utilization of a call-in/online check in system by jurors would further maximize court efficiency, decrease juror wait-time and would address juror frustrations and concerns such as those reported by jurors in this study.[15]

10 As confirmed by email correspondence 04/14/2015 with Regina Larry, Jury Administrator, USDC for the District of Columbia.
11 Through telephone and email correspondence (04/03/15) with Melissa Monroe, acting manager of the Jury Division of the Circuit Court of the Circuit Court for Baltimore City learn this court has 33 sitting judges, summons 1200 jurors per day and sends up to 300 jurors to courtrooms per day for both criminal and civil jury trials.
12 http://www.dccourts.gov/internet/jurors/usingejuror.jsf
13 In the April 24, 2015 meeting between members of the Jury Administration staff and representatives of the DC Jury Project, the Jury Administration office of Superior Court has estimated that close to 70% of citizens summoned for jury service in Superior Court already utilize Superior Court of DC eJuror Services to complete the Juror Qualification Form and defer jury service.

14 http://www.americanbar.org/content/dam/aba/migrated/jury projectstandards/principles.authcheckdam.pdf
15 Regarding the responses of surveyed jurors who indicate that jury service interferes with work (53.5%) and is inconvenient (42.3%). See Council for Court Excellence Jury Project. Survey of recent jurors (2015).

05 THE DC JURY PROJECT RECOMMENDS THAT DC COURTS MAKE FURTHER USE OF TECHNOLOGY TO COMMUNICATE AND INTERACT WITH JURORS.

The DC Jury Project recommends that DC Courts use and/or expand the use of email, text messages, and social media to communicate with jurors and prospective jurors in at least four ways: (1) reminders about service; (2) scheduling changes; (3) expressions of appreciation for service; and (4) the creation of an online and/or automated telephone call-in system at the Superior Court (See Recommendation #4). The Jury Project also recommends that the Courts consider the expanded use of technology to include automated juror check-in kiosks at the Courts. These recommendations are based on research regarding innovations and best practices in other jurisdictions, as well as the results of the Jury Project's surveys of jurors and those present at a show cause hearing and juror focus groups.[16]

Several jurisdictions are already using these technology tools. New Jersey, for example, implemented a Jury Online System (JOS) in 2010, which allows prospective jurors to opt-in to receive email or text message reminders.[17] The first reminder is sent four days prior to the juror's service date, and another is sent the day before. The day-before reminder also serves as a notification of reporting status, meaning that jurors who do not need to report do not have to check the website themselves, but are instead alerted automatically.[18] Jefferson County, Texas has plans to implement an I-Jury System that allows residents to fill out their questionnaires online and also allows prospective jurors to block out any dates in a three-month window when they will be unavailable for service.[19] Racine County, Wisconsin, has also implemented an online and text message reminder system, which includes the ability to check on the status of rescheduled service.[20] San Joaquin County, California, allows jurors to sign up for text message alerts regarding their reporting status.[21] The county also allows jurors to check in at a kiosk, bypassing lines and reducing the burden on the jury office.

The DC Superior Court should be commended for its use of Twitter to thank and encourage citizens who serve on juries. Twitter has also been useful in alerting prospective jurors of unexpected court closures and in monitoring for impermissible communications by jurors. The Jury Project recommends that the use of Twitter be expanded in both Courts. The DC Superior Court should also be commended for implementing an online chat feature where prospective jurors can ask questions and for the creation of a special email address where prospective jurors can send their questions. The DC Jury Project recommends that the District Court employ similar methods to allow prospective jurors to communicate with the Court.

CCE's survey of show cause hearings

4 out of 20 said they missed their original service date because they forgot

7 out of 20 indicated that they would have liked some kind of reminder about their service

16 Council for Court Excellence Jury Project. Survey of recent jurors (2015).

17 Rabner, Stuart. "Using Technology to Improve Jury Service." *Trends in State Courts* (2014): 39-42. http://www.ncsc.org/~/media/Microsites/Files/Future%20Trends%202014/Using%20Technology%20to%20Improve%20Jury%20Service_Rabner.ashx. If a similar system were introduced in D.C., prospective jurors would be provided detailed information in their mailed summons about the various functions of the JOS. The summons would also include the instructions for providing the Court with their electronic contact information, should they choose to opt-in. See recommendation on augmenting the summons.http://www.njd.uscourts.gov/court-info/faq/ejuror_summons

18 *Id*. at 41.

19 Henderson, Chelsea. "County Considers Adopting I-Jury." *Port Arthur News* (2015). http://m.panews.com/2015/06/01/county-considers-adopting-i-jury/.

20 Bauter, Alison. "Jury Duty Reminders Now Available Online, Via Text Message." *Journal Times* (2013). http://journaltimes.com/news/local/jury-duty-reminders-now-available-online-via-text-message/article_5f850d30-1a0c-11e3-82d7-0019bb2963f4.html.

21 Mumma, Linda. "San Joaquin County Using Text Messages to Notify Jurors." *KCRA* (2015). http://www.kcra.com/news/san-joaquin-county-using-text-messages-to-notify-jurors/33053480.

06 THE DC JURY PROJECT RECOMMENDS THAT THE DC COUNCIL AND DC COURTS IMPLEMENT CHANGES TO JUROR COMPENSATION FUNDS FOR THE BETTERMENT OF JURORS, THE COURTS, AND THE COMMUNITY.

The DC Jury Project recommends that the DC Superior Court and US District Court for DC allow jurors to elect to waive the compensation that is ordinarily paid to jurors and have it designated for juror-related programs at the courts. This could be a source of revenue for the courts' jury infrastructure improvements, and it is also one means of empowering jurors.[22]

In Maryland, Arizona, and Texas, jurors are allowed to donate their compensation to the court for jury services and amenities as well as to local charities.[23] In Prince George's County, Maryland, jurors have the option of donating their stipend to the Department of Social Services to help children in need.[24] The Texas Attorney General recently approved an expansion of eligible organizations to include organizations that may not directly benefit jurors.[25] The DC Jury Project recommends that waived juror compensation be directed toward increasing the current transportation subsidy for all jurors and/or for court improvements that relate to jury service. Such funds could also be dedicated to a "lengthy trial" fund to support jurors who undertake substantial service commitments.

The DC Jury Project also recommends that the DC Courts consider establishing a lengthy trial fund, to be used to provide additional compensation to jurors in the rare circumstance when they are required to serve on a long trial. This fund would be available only for those jurors who are assigned to lengthy trials and who are not being paid their regular wages by their employer. This would lessen the financial burden on jurors and decrease the number of prospective jurors claiming financial hardship to judges and the jury office. The Arizona lengthy trial fund reimburses jurors who lose earnings while serving as a juror, up to $300 per day, with proof of employment and income.[26] Unemployed jurors, or those who earn less than $40 a day, are eligible for $40 per day.[27] Revenue for the fund is generated from a $15 filing fee applied to civil complaints, answers to civil complaints, and motions to intervene filed in Arizona's Superior Court.[28] Jurors become eligible to apply for the fund after serving for five days. A similar program in Oklahoma sets a 10-day service requirement.[29]

Finally, the DC Jury Project recommends that the Superior Court and the DC Council increase the current transportation subsidy in order to cover the minimum cost for round-trip travel to the courthouses during peak travel times. Jurors and prospective jurors typically must travel to the courthouse during peak hours on public

22 While it is a self-selecting group, several participants in Jury Project juror focus groups noted that they thought of jury service as a civic duty. Therefore, some argued that pay was unnecessary. Similarly-minded jurors might appreciate the ability to return their pay to the court or donate it to charity. Several jurors also specifically mentioned wanting to donate their pay, as they were aware of the practice being allowed in other jurisdictions.

23 Arizona Jury Service Brochure: http://www.superiorcourt.maricopa.gov/JuryServices/docs/JuryDutyGuide2.pdf; also see American Legislative Exchange Council, Model Jury Patriotism Act: http://www.alec.org/model-legislation/jury-patriotism-act/.

24 Juror Donation Fund Prince George's County: http://www.princegeorgescountymd.gov/sites/circuitcourt/JuryDuty/GenerousJuror/Pages/default.aspx

25 Some of the organizations added to the list include: Central Texas Sickle Cell Anemia Association, Brazos Education Foundation, Fuzzy Friends Rescue, Meals on Wheels, YMCA of Central Texas, Big Brothers Big Sisters, State Crime Victim's Fund, and the Humane Society of Central Texas.

26 2008 Arizona Lengthy Trial Fund Report: http://www.azcourts.gov/Portals/15/Jury/2008LTFreport.pdf (compensation is limited to the difference between the regular juror stipend and the amount the juror makes from employment wages, with a cap set at $300). Also see Arizona Claim Form in Exhibit B.

27 *Id*.

28 *Id*. The fund is not supplemented with appropriations from the legislature.

29 Oklahoma Jury Patriotism Act: http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/state-links.aspx?cat=Juror%20Pay#Oklahoma

transportation.[30] According to WMATA, peak hours include 5:00 am-9:30 am, and 3:00 pm-7:00 pm.[31] The current transportation subsidy provided by the Superior Court to jurors and prospective jurors is $4.00. The District Court provides jurors and prospective jurors with a $7.00 transportation subsidy.[32] A round-trip Metro train ride during peak hours (even one going only one stop) is $4.30.[33] A round-trip ride on a Metro bus during peak hours is $3.50. The Express Bus costs $8.00 during peak hours.[34] A considerable number of those citizens who are summoned or who serve as jurors must take train rides longer than one stop or must transfer between public transportation methods. The Jury Project recommends that the transportation subsidy be increased to offset these costs, and that subsequent increases be made automatically, in accordance with increases to the cost of Metro mass transit.

> The compensation should be commensurate with the rising Metro fare. What we got only paid for a one way Metro trip.
>
> —An Anonymous Juror

30 Prospective jurors summoned to Superior Court are requested to arrive for either the 8:30 am or 10:30 am orientation and check-in sessions. Most trials at both courts begin between 9:00 am and 10:00 am. Prospective jurors at the Superior Court who are being dismissed pursuant to the one day/one trial system are typically dismissed after 2:30 pm, meaning they will also likely be traveling during peak times. Those on a voir dire panel or serving on a jury will likely be traveling later, but still during peak travel times.

31 WMATA metro information: http://www.wmata.com/rail/?-forcedesktop=1

32 DC District Court Juror F.A.Q.: http://www.dcd.uscourts.gov/dcd/sites/dcd/files/jury-FAQ.pdf

33 DC Courts Juror Subsidy information: http://www.dccourts.gov/internet/jurors/gettingpaid/main.jsf. Metro Calculator for trains and buses: http://www.wmata.com/rider_tools/calculator/calculator.cfm

34 *Id.*

EXHIBIT A

SAMPLE JUROR FORMS

County Auditor's Form 346
Harris County, Texas (REV. 10/13)

JUROR'S DONATION AUTHORIZATION FORM

INSTRUCTIONS

1. Complete this form ONLY if you wish to donate all or a portion of your reimbursement money.
2. Please print or verify your name, the beginning date of service, and your juror number.
3. Designate the amount you wish to donate – all or a specified dollar amount.
4. Designate the program to which you wish to donate. (Select only one applicable for trial duration.)
5. Return the completed and signed form to the Court Clerk on the last date of your jury service.

NOTE: Incomplete or unsigned forms will result in automatic payment to the juror.

Juror's Reimbursement Available for Donation: $ _____ for _____ day(s) served.

I, _____, authorize Harris County to donate

☐ All or ☐ $_____

of my juror reimbursement for service beginning _____, to the Program indicated below.

PROGRAM NAME AND BRIEF DESCRIPTION

Preferred Program	Program Name	Program Description
☐	***Victims of Crime Fund***	Provides assistance to eligible innocent victims of crime who have resulting expenses that cannot be reimbursed from insurance or other sources. This fund provides compensation on approved claims such as the following: • Reasonable medical, counseling, prescription, and rehabilitation expenses • Certain funeral expenses • Partial loss of earning and support • Child care to enable a victim or spouse, or the surviving spouse of a deceased victim, to continue employment The Office of the Attorney General administers the fund and is committed to helping victims who qualify under the statutory guidelines of the Texas Victims' Compensation Act (Chapter 56 - Subchapter B, Texas Code of Criminal Procedure).
☐	***Children's Protective Services Child Welfare Service Fund***	Responsibilities of this program include accepting all child abuse and neglect referrals, working with families toward the goal of resolving family problems and preventing the removal of children from the home, placing a child in appropriate substitute care or adoption when necessary, providing casework services to status offenders and children in need of supervision, and providing children in agency custody with adequate medical care. The executive director is responsible to the Children's Protective Services Board, which is appointed by Commissioners Court in accordance with Texas Family Code §264.005.
☐	***Child Advocates, Inc.***	Mobilizes court appointed volunteers to break the cycle of child abuse and speak up for and guid abused children into safe environments where they can thrive. This organization trains and supports volunteers assigned to the cases of children who have been victims of life-threatening abuse or neglect and, as a result, have been placed in protective custody. Volunteers server children involved in the juvenile court system once appointed to a child's case by a juvenile court judge, and have the legal status of "guardians ad litem," giving them the power to affect real change in the life of a child.
☐	***Crime Stoppers of Houston, Inc.***	Mission is to solve and prevent crime in the Greater Houston area in partnership with citizens, media, and the criminal justice system.
☐	***Casa De Esperanza De Los Niños, Inc.***	Provides residential care for abused, abandoned, neglected, medically fragile, and HIV affected infants and young children.
☐	***Tejano Center for Community Concerns, Inc.***	Mission is to improve life opportunities of low-income children and families through the provision of education, social and health services, and community development initiatives.
☐	***The 100 Club***	Mission is to provide assistance to dependents of certified peace officers and firefighters who are killed in the line of duty while protecting our lives and property, to provide law enforcement agencies with life protecting equipment that cannot be secured through budgeted funds, and to provide law enforcement with educational opportunities.
☐	***ESCAPE Family Resource Center***	Mission is to prevent child abuse and neglect before a child is hurt by providing intervention, education, and support programs to families in crisis.

JUROR AUTHORIZATION

_____ _____ _____
Signature of Juror | Juror Number | Date

Juror Badge #_____

ARIZONA LENGTHY TRIAL FUND
JUROR CLAIM FORM

The following information is needed to process your claim. The information you provide will be used for administrative purposes only and will not be open to public inspection.

Complete either Section A, B or C of this form, depending on your employment status. Everyone must complete Section D. Everyone must sign this form under oath or affirmation. If you complete Section B, Part 1, you must submit the form to your employer for completion of Section B, Part 2. **If you complete Section C, you must sign in the presence of a Notary Public or Clerk of Court.** If you complete either Section B or C, you must attach documentation to support your claim such as copies of recent pay stubs or your IRS Form 1040 income tax return for the prior year.

Submit your completed claim form and supporting documentation to the Jury Commissioner for processing.

Section A – JURORS WHO ARE UNEMPLOYED OR RETIRED SHOULD COMPLETE THIS SECTION AND THEN GO TO SECTION D.

1. I, [print full name] _____, do hereby claim payment from the Arizona Lengthy Trial Fund for my recent jury service on a trial that lasted more than five days.

2. Check the one box that applies to you:

   a. [ ] I am currently unemployed and therefore request the minimum payment allowed by statute.

   b. [ ] I am retired and therefore request the minimum payment allowed by statute.

Go to Section D.

Section B, Part 1 – JURORS WHO ARE PAID A REGULAR HOURLY WAGE OR A REGULAR SALARY SHOULD COMPLETE THIS SECTION. SUPPORTING DOCUMENTATION MUST BE ATTACHED.

1. I, [print full name] _____, do hereby claim payment from the Arizona Lengthy Trial Fund for my recent jury service on a trial that lasted more than five days. My employer does not pay me for all of the time I missed work due to my jury service.

2. (Check the one box that applies to you):

   [ ] I have attached a copy of my employer's jury service policy.
   [ ] My employer does not have a written jury service policy.

To determine the amount of your claim, complete the information below. Attach additional pages if you need to explain overtime pay or if your work schedule varies.

3. The following describes how I am paid (choose a or b.):

   a. I am paid by the hour and normally work _____ hours per day. I earn $_____ per hour.

   I normally work the following days of the week (circle all that apply):
   Sunday Monday Tuesday Wednesday Thursday Friday Saturday

   -I am paid by the hour and normally work _____ hours of overtime per day for which I am paid $_____ per hour.

   I normally work overtime the following days of the week (circle all that apply):
   Sunday Monday Tuesday Wednesday Thursday Friday Saturday

   b. I am paid a salary and normally earn $_____ per pay period in gross wages.

(Continued on next page)

A COMPLETED CLAIM FORM AND ALL SUPPORTING DOCUMENTATION MUST BE SUBMITTED TO THE JURY COMMISSIONER **NO LATER THAN 30 DAYS AFTER YOUR JURY SERVICE IS COMPLETED.** CLAIM FORMS AND DOCUMENTATION SUBMITTED AFTER 30 DAYS WILL NOT BE PROCESSED OR APPROVED.

SECTION B, PART 1 (CONTINUED)

4. My normal workday begins at _____ (AM/PM) and ends at _____ (AM/PM).

5. My pay period is (circle the one that applies to you):

Daily Weekly Biweekly Semimonthly Monthly

6. I was NOT paid by my employer for the following dates of my jury service (Please indicate whether or not you lost an entire shift due to jury service, the amount of pay you lost on each date, and whether or not you were able to make up your missed shift at another time.):__ _____

_____

7. I will continue to lose $_____ per day for the following dates of my jury service: _____

_____ (Note: If this amount changes, you **must** submit a revised juror claim form.)

8. I have attached copies of my last two pay stubs or (identify other records attached as supporting documentation)

_____

Have your employer complete **Section B, Part 2**, then go to **Section D.**

SECTION B, PART 2 – TO BE COMPLETED BY YOUR EMPLOYER.

1. Company name:_____

2. Company address:_____

3. Contact person to verify the employment information in Section B, Part 1: [print name, title, phone number, address]

_____

I have read the information provided in Section B, Part 1 and swear or affirm under penalties of perjury that it is true and correct.

_____ _____

Signature of employer or authorized agent Date

SECTION C – JURORS WHO ARE CONTRACT OR TEMPORARY EMPLOYEES, SELF-EMPLOYED, OR WHO ARE PAID COMMISSIONS ONLY SHOULD COMPLETE THIS SECTION. SUPPORTING DOCUMENTATION MUST BE ATTACHED.

1. I, [print full name] _____, do hereby claim payment from the Arizona Lengthy Trial Fund for my recent jury service on a trial that lasted more than five days. Due to my service as a juror, I lost the following earnings that I would otherwise have made: $_____ per day.

2. My claim is based on the following explanation: _____

_____

_____

3. I have attached a copy of my last year's 1040 income tax return (do not include income tax schedules), SE Form or (identify the records you have attached) _____

to support my claim (additional documentation may be required).

Go to **Section D**.

A COMPLETED CLAIM FORM AND ALL SUPPORTING DOCUMENTATION MUST BE SUBMITTED TO THE JURY COMMISSIONER **NO LATER THAN 30 DAYS AFTER YOUR JURY SERVICE IS COMPLETED**. CLAIM FORMS AND DOCUMENTATION SUBMITTED AFTER 30 DAYS WILL NOT BE PROCESSED OR APPROVED.

Section D – MUST BE COMPLETED IN FULL BY JUROR BEFORE PAYMENT CAN BE ISSUED.

1. My Social Security Number is: _____. (This information is being collected pursuant to 26 U.S.C. §6109 to provide you and the Internal Revenue Service with a FORM 1099 statement if applicable. It will not be used for any other purpose.)

2. Send my payment to the following address:

_____

_____

3. Daytime Phone Number _____

I swear or affirm under penalty of perjury under the laws of the State of Arizona that the information I have provided herein is true and accurate to the best of my knowledge and belief.

Pursuant to A.R.S. § 21-222(D)(3), if you reported income from self-employment or you reported compensation other than wages, you must sign this form in the presence of a notary.

_____ _____
Signature of claimant Date

State of Arizona)
) ss.
County of _____)

Subscribed and sworn (or affirmed) before me on this _____ day of _____, 20____.

My commission expires:_____ _____
Notary Public or Clerk of Court

FOR COURT USE ONLY:

Case No. _____ Number of ALTF-eligible trial days: _____

[ ] Claim approved in the amount of $40/day from day 4 through the last day of this juror's service in the case listed above.

[ ] Claim approved in the amount of $_____.

[ ] Claim disapproved.

A COMPLETED CLAIM FORM AND ALL SUPPORTING DOCUMENTATION MUST BE SUBMITTED TO THE JURY COMMISSIONER **NO LATER THAN 30 DAYS AFTER YOUR JURY SERVICE IS COMPLETED**. CLAIM FORMS AND DOCUMENTATION SUBMITTED AFTER 30 DAYS WILL NOT BE PROCESSED OR APPROVED.

07 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS CONSIDER ENHANCING PROCEDURES RELATING TO THE STRESS ASSOCIATED WITH JURY SERVICE.

The DC Jury Project recommends that the District Court and the Superior Court consider implementing structural and procedural changes that are designed to prevent and alleviate stress related to jury service. Jurors may experience moderate stress during a trial, and approximately 10% of jurors may experience significant amounts of stress.[35] This service-related stress could be caused by a number of factors, including missing work, possible loss in pay, disruption of normal routine, information overload, and the elements of a case that are particularly gruesome or sensitive.[36] Moreover, nationwide studies by the National Center for State Courts have shown that jurors often feel underappreciated for their service, as well as upset, because internet access in jury lounges is lacking, restrooms are generally not well maintained, and they feel generally unappreciated.[37] The DC Jury Project recommends that the courts seek to address juror stress in various ways, including by enhancing juror lounges and deliberation rooms, creating a more welcoming environment for jurors arriving at the courthouse, and providing coping mechanisms for use after service has been completed.

When the courts next consider renovating, painting, or otherwise updating physical facilities, the DC Jury Project recommends that the courts consider these renovations as opportunities to improve the experience of jurors. In addition, the DC Jury Project suggests providing refreshments or breakfast items for jurors who are sitting through orientation and waiting for instructions. We applaud the US District Court for providing jurors with refreshments during trials as appreciation for their service. We recommend that the DC Bar create a fund to help provide these services to the courts, especially in lengthy civil trials, to aid jurors in remaining attentive and to help them feel appreciated.

The DC Jury Project also encourages judges and clerks to recommend that jurors leave the building during breaks and lunch to clear their minds and relieve stress.

Finally, the DC Jury Project recommends offering jurors in certain cases information about coping mechanisms once their service is complete. Multiple states, including Arizona and Wisconsin, provide coping tips to jurors in every case through a pamphlet that also addresses common symptoms of stress.[38] Arizona also gives jurors access to six free counseling sessions to help cope with the effects of particularly difficult trials. This is known as "critical incident debriefing," and is provided through the Employee Assistance Program for all jurors who serve.[39] In Washington State, several courts have licensed mental health counselors who serve as "jury debriefers" to help jurors deal with stress and trauma and transition back to normal life after an intense trial.[40] We recommend the courts plan ahead for mitigating juror stress if they know a case will be particularly sensitive or disturbing.

The DC Jury Project has created a sample pamphlet, which the courts may wish to use or modify. It can be found in Exhibit B.

35 Paula Hannaford-Agor. *Jury News, The Court Manager,* 26(2), 50-52 (2011). See also, e.g., http://www.9news.com/story/news/health/2015/04/13/emotional-toll-of-being-a-juror/25728697/.
36 J. Chris Nordgren. Unified Justice System. *Practical Tips on Coping with the Stress of Jury Duty*. (1999). http://ujsjurors.sd.gov/stress.html.
37 National Center for State Courts. *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998). *http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/THROUGH%20THE%20EYES%20OF%20THE%20JUROR.ashx*
38 Section of pamphlet used at the Superior Court of Arizona, Maricopa County. "Tips for Coping After Jury Duty". Paula Hannaford-Agor. . *Jury News, The Court Manager*, 26(2), 50-52 (2011). http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.ashx and Wisconsin general brochure for stress: http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf
39 Paula Hannaford-Agor. *Jury News, The Court Manager,* 26(2), 50-52 (2011).
40 Libby Denkmann, *Guilty or innocent, debriefers help jurors recover from trauma after verdict*, Mynorthwest.com, KIRO Radio, April 10, 2015: http://mynorthwest.com/11/2744794/Guilty-or-innocent-debriefers-help-jurors-recover-from-trauma-after-verdict.

EXHIBIT B

SAMPLE AFTER SERVICE PAMPHLET



Council for Court Excellence
Improving Justice for the Community

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution" – Thomas Jefferson

[COURT NAME]
[CHIEF JUDGE]
COURTHOUSE:
[NAME]
[ADDRESS]

PH: [PHONE]

[WEBSITE]

Now What? How to Cope After Jury Service



After Service Information

Thank You

Thank you for fulfilling your civic responsibility by serving on a jury. Jury service is an essential part of our justice system and can be very rewarding.[27] You were asked to listen to evidence and examine facts. Although coming to a conclusion may have been difficult, we appreciate your participation and understanding.[28]

Serving on a jury is not an everyday task, so some stress may occur. Some jurors experience moderate levels of stress as one point or another.[29] There is no guarantee that you will experience stress after service, but if you do, know that you are not alone.

Signs You Might Be Stressed[30]

Physical reaction: muscle tension, changes in sleep patterns or lack of energy.

Mental reaction: difficulty concentrating or remembering things or having a hard time making decisions.

Emotional reaction: moodiness, guilt, fear or dwelling on the details of the case.

Behavioral reaction: isolation, an increased desire to be alone, changes in eating habits or increased drug/alcohol use.

Coping Tips

Although stress is a normal reaction to jury service, and the symptoms usually subside in due time, there are some ways to cope.

- Understand that unless desired, you do not have to speak about the trial to anyone.[31]
- Stick to your normal routine as best as possible.[32]
- Avoid caffeine, alcohol, and nicotine as they increase anxiety and can increase problems.[33]
- Try relaxation techniques such as meditation, yoga, and relaxed breathing.[34]
- Exercise and take care of your body as healthy habits can decrease stress.[35]
- Speaking to family members, friends, or fellow jurors may be helpful to alleviate stress and remind yourself that you were part of a group and are not alone. Avoid negative thoughts about the verdict in these discussions.[36]

Need More Assistance?

You are not alone when it comes to experiencing stress after jury service. This is a normal reaction to a stressful event. If signs of distress persist for two weeks after the jury service has ended consider contacting your physician to speak about alternate coping options.[37]

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[27] After Your Jury Service. Wisconsin Juror Brochure: http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf

[28] Tips For Coping After Jury Duty, Arizona Brochure: http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.ashx

[29] *Id.*

[30] After Your Jury Service. Wisconsin Juror Brochure: http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf

[31] *Id.*

[32] After Your Jury Service. Wisconsin Juror Brochure: http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf

[33] Tips For Coping After Jury Duty, Arizona Brochure: http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.ashx and After Your Jury Service. Wisconsin Juror Brochure: http://www.doj.state.wi.us/sites/default/files/ocvs/specialized/jury-stress-brochure.pdf

[34] *Id.*

[35] *Id.*

[36] Tips For Coping After Jury Duty, Arizona Brochure: http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/Jury%20News/A%20New%20Option%20for%20Addressing%20Juror%20Stress.ashx

[37] *Id.*

08 THE DC JURY PROJECT RECOMMENDS THAT JUDGES CONSIDER ADJUSTING TRIAL SCHEDULES WHERE FEASIBLE TO MINIMIZE JUROR INCONVENIENCE.

Many judges do not hold trials on Fridays, instead holding initial scheduling conferences and attending to other matters. The DC Jury Project recognizes that non-trial days are critical to the management of the courts' docket. However, the DC Jury Project recommends that when the Court's schedule permits, judges consider holding trials on Fridays when doing so would result in the trial ending on that Friday, thus eliminating the need for the jury to return the next week for a single day. The DC Jury Project recognizes that many judges already consider rescheduling their other matters and hold trial on Fridays when doing so will mean that the trial will not need to continue into the next week and applauds them for doing so.

09 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS IMPLEMENT FORMAL AND OFFICIAL MEANS OF THANKING POTENTIAL AND EMPANELED JURORS FOR THEIR SERVICE, INCLUDING SERVICE AS ALTERNATES.

The DC Jury Project recommends that the District Court and the Superior Court thank jurors formally and officially by communicating with them directly after service. Jurors play an important role in our judicial system; those who answer a summons to serve should be made to feel appreciated, including those who never go through the voir dire process and those who serve as alternate jurors.

The Committee's research indicates that courthouse staff and judges do not universally thank jurors for their service. The DC Jury Project recommends that thanking jurors in person be made a standard practice in the DC courts.[41] Staff should thank prospective jurors during orientation and at the conclusion of the day, when they are dismissed, on behalf of the court. Similarly, judges should take care to thank jurors at the start and end of each day of voir dire or trial, and should also thank jurors upon the conclusion of a trial.

The courts should also issue standard-form thank you notes, signed by a judge, to every citizen who responds to a summons and reports to the courthouse for duty. (See Exhibit C for sample thank you letters for use as models.) As a way to distribute these letters, we recommend that these letters be made readily available to the jury office for distribution to jurors when they return their badges upon dismissal.[42] The DC Jury Project further recommends creating a rotation for non-seated judges to thank jurors who were not empanelled for trial. The judges on this rotation should thank the jurors in the jury lounge when they are dismissed from their service for the day.

Finally, the DC Jury Project recommends notifying jurors who were selected as alternates and dismissed from the trial prior to deliberation about case outcomes. In several focus group sessions, former alternate jurors expressed their frustration with not being made aware of the case outcome after devoting so much of their time and effort to the process. Similarly, alternates who were notified reported being much more satisfied with their service.

> We had to take off our job, I had to get someone to take care of my daughter. I felt like a number, not appreciated. If you don't get picked you don't get paid. If someone had just come out and told us what was going on, I would have felt better about it. Someone could have just come into the room and thanked us.
>
> —An Anonymous Juror

41 As the court moves toward communicating with jurors via email, the DC Jury Project recommends considering this medium as a way to thank jurors as well.

42 Distribution in this manner might mitigate some of the administrative concerns that several judges have expressed regarding the amount of time and effort that would be required to address and mail personal letters to jurors.

EXHIBIT C

SAMPLE LETTERS OF THANKS

[FOR LONG TRIALS]

[date]

_____
_____
_____

Dear [Mr.] [Ms.] _____:

I would like to express my formal appreciation to you, individually, for your service to our Court in the recent [civil] [criminal] case of [caption]. You have made a significant contribution to the fair and impartial administration of justice in our community by your performance of duty on this jury. While jury duty always imposes a sacrifice for each person whose routine schedule is disrupted, the trial in this case took longer than many trials do. I especially appreciated your patience, understanding, good humor, spirit of cooperation, and commitment to the process.

Without good citizens like you, we judges could not fairly administer justice. Thank you so very much for your service on this jury. It was a pleasure to meet you and your colleagues.

Sincerely,

Paul L. Friedman

[DATE]

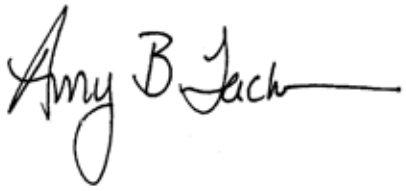
JUROR NAME
ADDRESS

Dear Mr./Ms._____:

I am writing to thank you for your service as a juror in *United States v. XX* this week. Although the trial ultimately did not move forward, your willingness to participate as a juror helped ensure the defendant's right to a jury trial, which is a fundamental part of our system of justice. The system would not work at all if members of the community were unwilling to participate, and I appreciate the attention and patience you showed in these proceedings.

You have made a valuable contribution to the Court and to the community. Thank you again for your service.

Sincerely,



Amy Berman Jackson
U.S. District Court Judge

[Letterhead on Stationary]

[Date]

[Juror Name]

Dear Mr./Ms. [Juror Name]:

On behalf of the United States District Court for the District of Columbia, I want to personally thank you for the time and service you have provided to the Court as a juror. Your participation was essential to the resolution of the case in which you were a juror.

When the Constitution of the United States was adopted, and at various times thereafter, the founding fathers of our country and the Congress of the United States decided that certain legal disputes should be decided by jurors. Like any system of justice that mankind has ever devised, our system is not infallible. Nevertheless, I firmly believe that America has developed a system of justice that rivals any system that operates in the world today. In fact, having had the opportunity to examine and observe first hand many other systems of justice in other countries, I can confidently conclude that the United States stands far above virtually all other systems in providing quality justice to all individuals who enter the doors of our Nation's courthouses.

Your service as a juror contributed tremendously to the country's ongoing effort to ensure that all who access the courts of our Nation are treated fairly and receive equal protection under our laws. I commend you for your contribution to those goals and I hope that you will be willing and able to serve as a juror again when called upon by one of the courts of our Nation to do so.

Sincerely,

Reggie B. Walton
United States District Judge

[FOR SHORT TRIALS]

[date]

_____
_____
_____

Dear [Mr.] [Ms.] _____:

I would like to express my formal appreciation to you, individually, for your service to our Court in the recent [civil] [criminal] case of [caption]. Jury duty always imposes a sacrifice for each person whose routine schedule is disrupted. So I very much appreciated your patience, understanding, attention, spirit of cooperation, and commitment to the process.

Without good citizens like you, we judges could not fairly administer justice. Thank you so very much for your service on this jury. It was a pleasure to meet you and your colleagues.

Sincerely,

Paul L. Friedman

JURY POOL AND SUMMONING WORKING GROUP

The current response rate to a jury summons in the courts of the District of Columbia is about 22%. The principal focus for consideration by the Jury Pool and Summoning Working Group was the question of how we can increase that response rate. If more citizens responded to their summons, individuals would be summoned less frequently, and the burden on those who respond would be lessened, as would the burden on the courts. The Working Group considered a variety of important and interesting proposals, including additions to the juror source lists, cooperation between the local and federal courts to avoid double booking of jurors, and juror summons and failure to appear. As explained below, two broad themes permeated our discussions.

As a first theme, we reflected on the need for a legal, business and community culture of support for the jury system. We believe that the overall response of citizens to jury service reflects that culture. Broad dissemination of information about jury service helps create a supportive culture. We discussed the ways in which we might improve the support of the business community and employers for attendance at the Court when potential jurors are summoned. We also considered whether and how to approach the Council of the District of Columbia about compliance with the requirement of the *Jury Trial Improvements Act of 2006* that agencies providing lists of names to the court for jury service update those lists annually. We believe also that allowing people to volunteer to serve may mitigate the problem of low summons response rates.

Second, the advance of technology opens new avenues for improving participation. We support expanding the use of technology in the court system to take advantage of relevant innovations developed in the private sector. Technological advances may enable great improvement in the collection, automation, and accuracy of juror source list creation and summoning. Increased utilization of technology tools may allow jurors to call in, get text message reminders, consult websites, and receive emails regarding their jury summons, resulting in a greater response rate from those who actually receive their summons. Political campaigns and the private sector are successfully using data to pinpoint demographic targets and interests, which could help improve the accuracy of source lists.

Our work also considered the earlier studies and recommendations on this topic. In 2006, the Council for Court Excellence published a report, *Improving Juror Response Rates in the District of Columbia.* Much like our own work, this report was in part a look backwards at the recommendations made by the 1998 Jury Project. In brief, the report recommended four methods to improve response rates: 1. Improve automation support; 2. Improve the master jury list; 3. Expand the follow-up program for non-responders; 4. Revisit the 10-year hold-out for convicted felons. CCE staff and interns have been tracking the implementation of the 1998 Jury Project's recommendations. In part, the task of the Working Group was to assess the level of implementation of the previous recommendations, determine whether there is still room for improvement in a recommendation's area, and advise whether the recommendation should be re-introduced or modified.

We know the courts are committed to improving the "yield" for jury summoning, and we hope our recommendations will aid that effort.



Rodney F. Page
Bryan Cave
Jury Pool and Summoning Working Group Chair

10 THE DC JURY PROJECT RECOMMENDS AMENDING THE DC CODE SO THAT AGENCIES THAT PROVIDE THE COURT WITH SOURCE LISTS HAVE TO CERTIFY THAT THE LISTS HAVE BEEN ACCURATELY UPDATED.

The DC Jury Project commends CCE for its efforts to draft and pass the *Jury Trial Improvements Act of 2006*.[43] Among other things, the act amended Section 3, Title 16 of the DC Code to include § 16-5104 (District of Columbia government agency source lists), providing that:

> Any agency or instrumentality of the District of Columbia government required to provide names and addresses of individuals to the Court pursuant to § 111905 for purposes of summoning individuals for jury service shall take all reasonable steps to ensure that the names and addresses are accurate, including:
>
> (1) Entering into a memorandum of understanding with the Court for the prompt sharing of complete and accurate information; and
>
> (2) The purging of inaccurate name and address information by the provider agency or instrumentality not less than once every calendar year.

The DC Jury Project recommends that this section be amended to add the following third provision:

> (1) Certifying via signed declaration by the agency head and the inclusion of a "change log," documenting differences in the new list as compared to the old list, that the agency completed all due diligence to ensure that the list was accurately updated.

The DC Jury Project does not believe that penalties for non-compliance need to be included in the legislation, as the DC Council's oversight power and the Superior Court's jurisdiction are sufficient.

43 Jury Trial Improvements Act of 2006, DC Law 16-272 (Mar. 14, 2007). http://dcclims1.dccouncil.us/images/00001/20070108174433.pdf.

11 THE DC JURY PROJECT RECOMMENDS DRAWING FROM ADDITIONAL SOURCE LISTS TO INCREASE THE ACCURACY AND REPRESENTATIVE NATURE OF THE MASTER JURY LISTS AT DC COURTS.

The DC Jury Project applauds the DC Superior Court for its efforts to implement CCE's previous recommendation to increase the number of source lists used.[44] According to the most recent Superior Court Jury Plan, the Court currently uses lists from the following sources:

> (1) the list of voters registered in the District of Columbia; (2) the list of drivers, eighteen (18) years or older, licensed in the District of Columbia; (3) the list of residents of the District of Columbia, eighteen (18) years or older, who have received a non-driver's identification card from the District of Columbia; (4) the most recent list of individuals to whom District of Columbia personal tax income forms have been sent by the DC Department of Finance and Revenue, as well as the most recent list of individuals who have filed personal income tax forms in the District of Columbia; (5) the most recent list of individuals who have qualified to receive any type of public assistance benefits in the District of Columbia; (6) the most recent list of persons who have become naturalized citizens in the District of Columbia since the previous master jury list was created; (7) such other source lists as may become available.[45]

The DC Jury Project first recommends that the list of newly naturalized citizens be supplied to the Court by the United States Citizenship and Immigration Services, as set forth in the Court's jury plan. The DC Jury Project believes that CCE and its partners could help facilitate this exchange.

The DC Jury Project further recommends that, in addition to the six sources listed above, the Superior Court seek other source lists pursuant to the seventh provision of the Jury Plan. In particular, we recommend obtaining a list of 18-year-olds from DC Public Schools to ensure adequate representation of DC youth in the jury pool.

The US District Court for the District of Columbia uses fewer source lists than the Superior Court to create its master jury wheel. The District Court currently uses lists from the following sources:

> The judges of the Court find, pursuant to 28 U.S.C. § 1863(b)(2), that while the Registered Voters Master File of the DC Board of Elections represents a fair cross-section of the community in this District, an even greater number of citizens will be eligible for jury service if supplemental sources are also employed. In order to broaden the base from which potential jurors shall be chosen, the Court approves a source list compiled by merging the Registered Voters Master File of the DC Board of Elections or its supporting computer tape file, the computer tape file maintained by the DC Department of Motor Vehicles of individuals 18 years and older who hold a driver's license, learner's permit, or valid identification card issued by the DC Department of Motor Vehicles, and the list of all individuals of the District of Columbia whose income tax forms are

> I generally get called every two years. I have some friends who have never been called.
>
> —An Anonymous Juror

44 See *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) at Recommendation 6.
45 Jury Plan for the Superior Court of the District of Columbia, Effective November 9, 2013. http://www.dccourts.gov/internet/documents/Jury-Plan-effective_11-9-2013.pdf.

filed with the DC Department of Finance and Revenue. This merged list will hereafter be referred to as the "Source List."[46]

The DC Jury Project recommends that the US District Court expand the number of source lists used to include newly naturalized citizens, DC Public Schools, and others that would help to ensure that its master jury wheel is as representative of the population of DC as possible.

46 Jury Selection Plan for the United States District Court for the District of Columbia for the Random Selection of Grand and Petit Jurors (As Amended Through October 2012) at Section B. http://www.dcd.uscourts.gov/dcd/sites/dcd/files/JSPFinal120612.pdf.

12 THE DC JURY PROJECT RECOMMENDS THAT THE DC COURTS EXAMINE THE POSSIBILITY OF IMPROVING JURY SUMMONING RATES BY USING BIG DATA RESOURCES TO IDENTIFY MORE ACCURATE ADDRESSES AND CONTACT INFORMATION FOR POTENTIAL JURORS.

In 2014, the Superior Court of the District of Columbia sent out over 150,000 summonses to potential jurors.[47] Of that number, approximately 22,000 summonses were returned to the Court as "undeliverable."[48] An additional 70,000 summonses were registered as "failure to respond."[49] New data collection services exist that can help to update contact information for potential jurors who live in the District of Columbia.

These information services companies – colloquially known as "big data" or public records companies – collect mailing addresses, email addresses, telephone numbers, and other public as well as private information about individuals in all 50 states across the United States. Big data companies can provide cost-effective services to update the source lists that the DC Courts use to identify qualified individuals who may be summoned to serve as potential jurors. The companies can also check the accuracy of current contact information the courts possess. This updated contact information could be utilized to supplement existing court strategies for improving the accuracy of receipt of the summons by residents, including permitting the implementation of an email notification system whereby courts could send the initial summons to a juror in digital format, and send follow-up reminders to the juror with the date and time of their service (See Recommendations #4 and #5). Thus, the use of big data resources offers an opportunity to minimize the number of undeliverable and unknown responses, and to develop more effective ways to communicate with potential jurors, which would ultimately save the courts time, money, and effort.

By way of example, one potential service provider (LexisNexis) has a "Batch Service" that can update the court's existing list of names and addresses for jurors with current mailing addresses, email addresses, and telephone numbers for the individuals whose summonses have been returned or who have no contact information. This updated information would provide the court with data about jurors who no longer live at the mailing address, and as a result, the court would avoid sending future summonses to the old addresses. The service could also verify that jurors who have not responded to a summons do, in fact, live at the address to which the summons was mailed. Both pieces of information could help the court improve its jury yield rate.[50]

The DC Jury Project Committee recommends that the courts undertake an examination of the feasibility of utilizing big data services, recognizing that any issues regarding cost and security should be addressed prior to the implementation of any such services. The Committee suspects that personal privacy concerns are likely to be minimal, given that only public records are being used, and the only proposed use is to update addresses that the court already has permission to have and utilize.

47 Interview with Superior Court Jury Officer Suzanne Bailey-Jones, Judge Melvin Wright, and Mr. Herbert Rouson, Special Operations Division, at DC Superior Court on April 23, 2015.
48 *Id.*
49 *Id.*

50 The DC Superior Court is currently undertaking a trial of LexisNexis Accurint Batch to evaluate the benefit of utilizing such a big data or public records service.

13 THE DC JURY PROJECT RECOMMENDS THAT CITIZENS BE PERMITTED TO PROVIDE INFORMATION FOR INCLUSION IN THE MASTER JUROR SOURCE LIST IN DC IN ORDER TO ENSURE THAT THE SOURCE LIST INCLUDES CITIZENS WHO ARE QUALIFIED BUT WHO ARE NOT OTHERWISE INCLUDED.

Citizens should be permitted to provide information for inclusion in the master juror source list. Such information could include updated addresses and contact information, as well as an indication of when the individual would best be able to serve. To create this opportunity, the Courts could utilize an online form; have paper forms available in public places, such as libraries and the DMV; or create an automated telephone hotline.

Permitting this practice could expand the jury pool, as well as increase its representativeness, while preserving the random selection of jurors (See Recommendation #11). Additionally, it furthers the important goal of court accessibility, and it helps to ensure that the juror source list includes citizens who are qualified to serve as jurors in DC Superior Court and the US District Court for DC, but who are not otherwise listed on one of the juror source lists.[51]

Citizens should not be permitted to volunteer to serve at a particular time, but they should be allowed to indicate to the courts the most optimal time for jury service, which would be added to the jury pool information, and could still allow the courts to make targeted random selections from the master list.[52] This practice would increase the summons response rate overall, and it would not skew the jury pool because the source lists would continue to be generally sorted and randomized.

This practice is currently permitted in four states: New York, Pennsylvania, Alaska and Maine.[53] As these jurisdictions have found, this practice helps capture and engage those citizens who are willing to take a proactive approach with regard to jury service.

51 This recommendation was also made by CCE in 1998, but was not implemented. See *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) at Recommendation 7.

52 A targeted random selection means drawing from the master jury wheel a group of prospective jurors, some of whom have indicated a certain time period is easier for them and some who have not done so, and then sending this mixed group a summons for service during a period that falls during the preferential period. This mixed group would be available for all of the jury trials taking place during that period and would also be subject to voir dire. The practical effect is the same as allowing prospective jurors to postpone their service to a later date.

53 In New York, the Jury Information Line (a toll-free telephone number) prompts citizens to volunteer to be on the jury list. If qualified, these citizens are placed on the jury list from which jurors are randomly selected. See http://www.nyjuror.gov/juryQandA.shtml#Q2. In Pennsylvania, procedures for a citizen having their name included on the master juror list are addressed by the jury commission for each county. In Alaska, citizens may contact the administrative director of the Alaska Court system to provide the information the administrative director may require so they are included on the juror source list. Alaska Statute 09.20.050(d). In Maine, citizens can contact the clerk of court in their county of residence to be listed on the juror source list.

14 THE DC JURY PROJECT RECOMMENDS THAT THE SUPERIOR COURT REVISE ITS JURY PLAN SO AS TO REDUCE THE TEN-YEAR RESTRICTION ON PEOPLE WITH FELONY CONVICTIONS BEING CALLED TO SERVE ON A PETIT JURY.

The DC Superior Court currently requires felons who have completed their incarceration, probation, parole, or supervised release to wait ten years before they are permitted to serve on a jury.[54] This requirement greatly surpasses the limitation that the District of Columbia Code sets in Section 11-1906(B), which states that people with felony convictions who have completed their sentencing requirements must wait only one (1) year before they may serve on a jury.[55] We recommend that the DC Superior Court revisit its rule and implement changes so that the court's requirement conforms with the one year limitation in the legislation. This would help to increase the size and inclusiveness of the petit jury pool.

There are several reasons why people with felony convictions should be allowed to serve on a jury soon after they have completed their sentences and have reintegrated back into society. First, like voting, serving on a jury is an important Constitutional and civic act. In DC, a felon's right to vote is automatically reinstated,[56] due in no small part to the growing recognition that a key element of rehabilitation is permitting felons to participate in the civic life of their community.[57] Second, the increased juror pool would help ensure that the overall jury venire is representative of DC's population. And third, allowing felons to serve on juries within a shorter period of time after they have completed their sentences would have the practical effect of easing burdens on the court by increasing the pool of prospective jurors and simplifying the management of source lists, which now undergo an extensive purging process necessitated by the ten-year restriction.

Finally, the arguments against allowing felons to serve on juries are unpersuasive. For example, there is often no meaningful distinction between felons (who are excluded for ten years) and those who are convicted of misdemeanors (who are not excluded at all), given that misdemeanor convictions often involve similar criminal conduct and result from plea bargaining rather than any real difference in the culpability of the offender.[58] Similarly, once the punishment handed down is served, requiring ex-felons to continue to be excluded from the jury pool for lengthy amounts of time does not advance the purposes of punishment in any way.[59] Opponents of felon inclusion cite issues of inherent bias, presumption of character, and impact on reintegration and criminal desistance as reasons for exclusion.[60] However, research indicates that having a felony conviction is no more predictive of a pro-defense bias in a criminal case than several other factors.[61] There is also no support for the contention that being a felon degrades one's character to the point at which he or she could not be added to the jury pool and go through the same voir dire pro-

54 DC Superior Court Jury Plan Effective November 9, 2013. Section 6(g). http://www.dccourts.gov/internet/documents/Jury-Plan-effective_11-9-2013.pdf.
55 DC Code §11-1906(B). http://law.justia.com/codes/district-of-columbia/2013/division-ii/title-11/chapter-19/section-11-1906/.
56 National Conference of State Legislatures. Felon Voting Rights. http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx; also see http://www.nonprofitvote.org/voting-as-an-ex-offender/#District_of_Columbia.
57 See *The Exclusion of Felons From Jury Service*, 53 Am.U.L. Rev. 65 (2003).
58 *Id.*
59 See American Bar Association, Principles for Juries and Jury Trials (2005) at Principle Two: http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf.
60 See James Binnall. *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73. Alb. L. Rev. 1379 (2010); James Binnall, *A Field Study of the Presumptively Biased: Is there Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 U. Denv. L. & Pol'y 1 (2014); James Binnall, *A jury of none: an essay on the last acceptable form of civic banishment*, 34 Dialectical Anthropology 533 (2010); James Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 Va. J. Soc. Pol'y & L. 1 (2009); James Binnall, *A Felon Deliberates: Policy Implications of the Michigan Supreme Court's Holding in* People v. Miller, 87 U. Det. Mercy L. Rev. 59 (2009).
61 See *id.; see also The Exclusion of Felons From Jury Service*, 53 Am.U.L. Rev. 65 (2003).

cess as any other prospective juror.[62] Lastly, studies in Maine, where there are no restrictions on felons serving on juries, indicate that felons were excited about their opportunity to fulfill their civic duty and viewed service as a unique element of their reentry into society.[63]

62 See *Id.*
63 See James Binnall, *A Field Study of the Presumptively Biased: Is there Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 U. Denv. L. & Pol'y 1 (2014).

15 THE DC JURY PROJECT RECOMMENDS THAT EMPLOYERS ADOPT POLICIES THAT ENCOURAGE THEIR EMPLOYEES TO SERVE ON JURIES AND THAT MAKE EXPLICIT THE CONSTITUTIONAL AND CIVIC NATURE OF JURY SERVICE.

A survey of 72 DC-area employers indicates that practices regarding leave for jury service vary from employer to employer, including how time spent serving is classified and whether and for how long employees are paid their regular wage while serving.[64] Because serving on a jury is an important civic act with direct Constitutional ties, the DC Jury Project recommends that employers adopt specific jury duty leave policies, and that such policies be as permissive and encouraging of jury service as possible.

To this end, the DC Jury Project has drafted the following model "Civic Leave" policy that it recommends be adopted by area employers:

> Serving on a jury and voting are two of the most important civic acts a citizen in a democracy can take. In recognition of that fact, and to encourage participation in the democratic process by our employees, [ORGANIZATION] provides employees summoned to jury service, or wishing to vote in an election, paid time off, classified as Civic Leave, to do so.
>
> **Voting in an election:** Supervisors are encouraged to schedule later starts, earlier dismissals, and longer lunches on election days. No employee will be prevented from voting. Neither the time spent traveling to and from a polling place nor the time spent voting will be deducted from an employee's hourly wage or treated differently in any way from normally scheduled working time. Employees are encouraged to work with their supervisors to schedule time to vote.
>
> **Jury service:** An employee's position will be held with similar hours, benefits, and salary until the completion of service. Similarly, an employee summoned for jury service will be paid for the duration of their service at their normal rate of pay. Compensation from the court can be kept or returned. Employees must notify their supervisor that they have been summoned for jury duty and must provide proof of summons.

See Exhibits D through F for model jury service policies from other jurisdictions.

The DC Jury Project also recommends that the DC government and courts encourage the adoption of jury service policies, and that good corporate citizens—businesses that adopt policies that are permissive when it comes to leave for jury service—should be recognized for their efforts and civic contributions in this area.

53.5% of those surveyed at the Superior Court said that jury service interfered with their work.

Employer Policies

(Does your employer have a jury service policy?)
Percent of Respondents Answering "Yes"

	Employment Status		
	Part Time (n=24)	Fulltime (n=371)	Self-Employed (n=37)
Employer has jury service policy	25.0%	79.6%	16.2%
Employer pays for jury service	29.2%	86.8%	16.2%
Satisfied with compensation	37.5%	68.5%	51.4%

64 See employer service policy results in the Methodology and Data Collection section.

EXHIBIT D

KENTUCKY DEPARTMENT FOR LIBRARIES AND ARCHIVES MODEL EMPLOYER JURY DUTY POLICY

Sample Policy #1

Employees subpoenaed for jury duty by the court will receive straight time earnings for the day or days served. The Library Director must be appropriately notified. Employees will be expected to work any hours before and after their jury duty service. Court duty leave does not apply if the employee is a party to any non-library related civil or criminal litigation.

Sample Policy #2

An employee will be granted necessary time off, with pay, to perform jury duty as required by law. The employee shall notify the Library Director immediately, in writing, of the requirement for this leave along with a copy of the notice of report for jury duty.

An employee who reports for jury duty and is excused from serving before noon must report to work for the afternoon, according to the work schedule of his or her department. However, the combination of jury duty and Library work shall not amount to more than a normal workday.

Part-time employees and employees in the introductory period summoned for jury duty will be granted time off with pay for the first three days of jury duty and unpaid time off for additional days in accordance with state and federal laws

Sample Policy #3

Jury Duty

Jury Duty is recognized as a civic responsibility and staff members are encouraged to fulfill this obligation. Employees will be granted time off (regular work schedule) with pay to serve on a jury or as a witness when subpoenaed. The Library Director may request a copy of such official notice before leave is granted. If jury or court appearance does not require a full workday, the employee is expected to return to work. Staff members will be permitted to retain the jury compensation. Court appearances by employees of a personal business nature will be counted as vacation time or personal days.

Sample Policy #4

Jury Duty

_____ encourages you to fulfill your civic responsibilities by serving jury duty if you get a summons. Employees in an eligible classification will be granted paid leave for jury duty for that period they are required to serve on a jury.

If you are eligible for jury duty, you will be paid at your base rate of pay for the number of hours you would normally have worked that day. Employees in the following classifications are eligible for paid jury duty leave:

- Regular full-time employees
- Regular part-time employees

If you get a jury duty summons, show it to your supervisor as soon as possible. This will help us plan for your possible absence from work. We expect you to come to work whenever the court schedule permits.

Either you or _____ may ask the court to excuse you from jury duty if necessary. We may ask that you be relieved from going on jury duty if we think that your absence would cause serious operational problems for_____.

Subject to the terms, conditions, and limitations of the applicable plans, _____ will continue to provide health insurance benefits for the full period of jury duty leave.

Your vacation, sick leave, and holiday benefits will continue to accrue during jury duty leave.

EXHIBIT E

SELECTED STATE LAWS REGARDING JURY SERVICE

Model State Policy for Employers:

American Legislative Exchange Council, "Jury Patriotism Act"
Under the "Rights of Petit Jurors" section there are points for job preservation, benefits protection, length of service, frequency of service, and small business protection.
Under the "Lengthy Trial Fund" there are multiple points regarding pay of jurors from government or employer, and how to determine what is best for the circumstances.
http://www.alec.org/model-legislation/jury-patriotism-act/
This policy has been implemented by over 14 states.

Maryland:

Employers cannot force employees to use annual or sick leave for service. They cannot fire an employee because of jury service. Employer also cannot require an employee to work on the days they are scheduled for service.
http://www.courts.state.md.us/juryservice/pdfs/employersandjuryservice.pdf

Section 8-501, Employment loss. Section 8-502, Leave. If these sections are violated there is a potential fine of no more than $1,000.
http://www.mdcourts.gov/juryservice/pdfs/employersandjuryservice-laws.pdf

Virginia:

Your employer cannot fire, demote, or otherwise penalize you for missing work while performing jury service. If you have been summoned and appear for jury duty for four or more hours in one day, including travel time, your employer may not require you to start any work shift that begins at or after 5:00 p.m. on the day you appeared for jury duty, or to start any work shift that begins before 3:00 a.m. on the day following the day you appeared for jury duty. Many employers will continue to pay your salary while you are in jury service. Contact your employer to find out what the policy is at your job.
http://www.courts.state.va.us/courts/circuit/jury.pdf

If any employer violates these provisions they are guilty of a Class 3 Misdemeanor.
https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+18.2-465.1

Employer is not required to pay employee during jury duty.
http://www.employmentlawhandbook.com/leave-laws/state-leave-laws/virginia/#4

District of Columbia:

§ 11-1913. Protection of Employment of Jurors.
If any employer violates these terms they are guilty of criminal contempt. Subject to $300 fine and/or 30 days imprisonment for first offense, and $5,000 and/or 180 days imprisonment for subsequent offenses.
http://dccode.org/simple/sections/11-1913.html

Pennsylvania:

Employer cannot fire or penalize employee because of jury service.
http://www.blr.com/Compensation/Benefits-Leave/Jury-Duty-Court-Appearance-in-Pennsylvania

If an employer penalizes employee due to jury service, the employee may bring civil action against employer to recover wages and benefits. Employee may also sue for reinstatement under certain circumstances.
This does not apply to retail or service industry employers who have fewer than 15 employees or manufacturing industry with less than 40 employees.
http://law.justia.com/codes/pennsylvania/2010/title-42/4563

EXHIBIT F

OTHER MODEL JURY DUTY POLICIES

MODEL POLICY[65]

_____ recognizes jury duty as an important civic responsibility and highly encourages employees to partake when they are called to serve the community. Participating in jury duty will not be held against the employee in any way. They will maintain all benefits and wages agreed upon before being called for jury duty. When an employee is called for jury duty, they must inform their employer immediately after receiving the summons from the court.[66]

What to give Employer:

Copy of jury duty summons

Date required to report

Days of work being missed (if known)

PAY WHILE SERVING

According to federal law, _____ is not required to provide payment to employees while they are on jury duty.[67] However, _____ pays most employees while they are serving jury duty. If an employee continues to be paid while on jury duty, any money received from the court can be kept or returned to the court.

Who Qualifies:[68]

Full-time Employees
(30 hours a week or more)

Part-time Employees
(If lost hours cannot be rescheduled)

Seasonal Employees
(Length of employment exceeding 3 months)

JURY DUTY LEAVE

_____ employees are given jury duty leave when they are summoned. This leave is considered paid time off, but is its own form of leave. Employees will not use sick leave, personal days, or vacation days to serve on a jury. Employees are expected to report to court for jury duty on the days requested. If the employee does not have jury duty (for any reason) on a day they are scheduled to work, the employee must report to work. If jury duty ends before 12:00 pm and the employee had been scheduled to work, they are expected to report to work.[69] Employees must inform their employer when their jury service has been completed, and report to work on their next scheduled day.

_____ maintains the right to send a letter to the court asking for said employee to be excused from jury duty if the business is in danger of experiencing major setbacks without that employee.[70] Please note that there is no guarantee that the court will grant this request. The employee is not to use potential loss of pay as an excuse to get out of jury duty.

65 AboutMoney. Use This Jury Duty Policy To Craft Your Own Policy (2015). http://humanresources.about.com/od/policysamplesik/g/jury-duty.htm.
66 Kentucky Model Employer Policy #2. See Exhibit B.
67 United States Department of Labor. Leave Benefits. http://www.dol.gov/dol/topic/benefits-leave/juryduty.htm.
68 CBIA Human Resources. If Your Employee Is Called to Jury Duty (2015). http://www5.cbia.com/hr/if-your-employee-is-called-to-jury-duty-2/.
69 Kentucky Model Employer Policy #2. See Exhibit B.
70 *Id*.

16 THE DC JURY PROJECT RECOMMENDS THAT THE SUPERIOR COURT AND THE DISTRICT COURT MODIFY THEIR JURY PLANS TO STATE EXPLICITLY THAT THEY WILL EXCUSE PROSPECTIVE JURORS WHO HAVE SERVED ON A PETIT OR GRAND JURY WITHIN THE PAST TWO YEARS.

The Superior Court of the District of Columbia and the US District Court of the District of Columbia both currently excuse prospective jurors from service if they have served as jurors in that court within the last two years.[71] The DC Jury Project commends both courts for achieving this and recognizes the progress that has been made since *Juries for the Year 2000* recommended service no more frequently than every two years as an aspirational goal.[72] The DC Jury Project recommends that the DC Courts modify their jury plans consistent with this recommendation and make this change known to the public. The questionnaire that arrives with the jury summons should list service within the last two years at either court as a permissible excuse from jury service. The two courts should work together to share records and verify previous service.

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71 Superior Court Jury Plan Section 15, DC Code § 11-1911 ("In any twenty-four (24) month period an individual shall not be required to serve more than once as a grand juror or petit juror except as may be necessary by reason of the insufficiency of the Master Jury List or as ordered by the Court."). http://www.dccourts.gov/internet/documents/Jury-Plan-effective_11-9-2013.pdf; District Court for the District of Columbia Jury Selection Plan H(2), 28 U.S.C. § 1866(e) ("The following class of persons shall be excused from jury service... Persons who have served as grand or petit jurors in the US District Court for the District of Columbia within two years as specified in 28 U.S.C. § 1866(e)"). http://www.dcd.uscourts.gov/dcd/sites/dcd/files/JSPFinal120612.pdf.

72 *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) at Recommendation 9 (recommending service not more frequently than every two years, stated in part "while this recommendation may be impractical at this time... [the courts should] set a goal to this effect").

TRIAL STRUCTURE WORKING GROUP

The Trial Structure Working Group was comprised of a range of practitioners in the DC Superior Court and US District Court for the District of Columbia, including prosecutors, representatives of the Office of the Federal Public Defender and the Public Defender Service for DC as well as civil attorneys. Because of the diversity of practices, the group was able to identify a broad range of issues affecting prospective jurors, sitting juries and the litigants who depend upon them for decisions in their cases. The majority of jury trials occur in the Superior Court, so our work spotlighted the practices in that court as it provided a rich resource of practical experience. However, we also examined how federal court procedures differ from those in the Superior Court, reflecting that though federal trials are less frequent, they are often more lengthy and complex than the Superior Court cases and thus present different problems for jurors, lawyers and administrators.

The Trial Structure Working Group began examining the issues present in CCE's 1998 report and supplemented these issues with additional topics that became evident as our work progressed. Changes in technology and communications since the last CCE report caused us to examine issues that did not arise in the earlier study. The personal observations of practitioners well familiar with the operations of our courts including criminal law and civil practitioners were supplemented with information gathered by CCE staff members and by volunteer law students. In addition, several Committee members participated in round-table meetings with US District Court and Superior Court judges to discuss unwritten but important practices developed in the crucible of an active docket. The results of this information gathering enabled us to start down the arduous road of drafting recommendations. Along the way, we also surveyed practices in other jurisdictions that were described in the literature of court administrative journals. This process illuminated the multi-faceted issues we faced and enabled us to refine our thoughts into the recommendations that appear in this report.

Examining familiar issues is not enough in a rapidly changing world, so the Working Group considered how the development of social media, the internet and rapidly evolving communications have affected the conduct of jurors and of the court and how technology could be employed to promote the efficiency of the jury selection process. The intersection of many views in our Committee meetings made for spirited discussions enabling us to see important issues from many perspectives and thus to refine our recommendations to take account of the varying interests expressed by practitioners. For example, we examined and debated the practice followed by some -- but not all -- judges to invite jurors to submit questions to the court during the trial to supplement examinations by counsel; we looked at the post-trial communications between counsel and the jurors; we examined the proper limits of using social media in selecting jurors and in observing their conduct while serving on a jury. We also scrutinized the detailed and important mechanics of how jurors are screened for service by the *voir dire* process in an attempt to balance fairness to the litigants with the efficiency that jurors expect of our system.

Most of our recommendations were presented to the Plenary Committee as the unanimous view of the Trial Structure Working Group except with respect to the submission of questions by jurors in criminal cases. There, the strongly held views of some criminal defense attorneys focusing chiefly on the prosecution's burden of proving its case collided with the views of other Committee members who emphasized engaging jurors in a search for truth more as participants than spectators. The outcome of this disagreement was the submission of a dissenting view.

We hope and trust that these recommendations will improve the functioning of our jury system since it is an essential pillar to our system of justice.



Peter Kolker
Zuckerman Spaeder
Trial Structure Working Group Chai

17 THE DC JURY PROJECT RECOMMENDS THAT LAWYERS AND THEIR AGENTS BE PERMITTED TO RESEARCH POTENTIAL JURORS AND TO MONITOR SELECTED JURORS BY LOOKING AT THE PUBLICLY AVAILABLE PORTION OF SOCIAL MEDIA SITES SUBSCRIBED TO BY THOSE JURORS. HOWEVER, DIRECT CONTACT BETWEEN AN ATTORNEY OR AGENT AND A POTENTIAL OR SELECTED JUROR SHOULD CONTINUE TO BE PROHIBITED.

Collecting information about prospective jurors is a time-honored method of evaluating the potential fact-finders in a case about to begin trial. A traditional method of resorting to public records is not problematic. In the digital age, however, there are many more methods of learning about jurors. Many websites, such as Facebook and Twitter, enable users to make some information publicly available, while other information can be restricted to certain individuals designated by the user. Although attorneys and their agents can view information that is designated as publicly available, they should not make specific requests of a juror through social media that would allow them to view information that is not available to the general public. Doing so would constitute a prohibited communication between the attorney (or the attorney's agent) and a potential juror.

However, when viewing publicly available information on social media websites, some websites provide no feedback to the prospective juror regarding who has reviewed that information, whereas others may provide both notice that someone has viewed the publicly available profile as well as the identity of the viewing party.

The DC Jury Project adopts the opinion of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, which expressed in a Formal Opinion[73] that a notification of this type does not constitute a communication between a lawyer and a juror or potential juror. In this formal opinion, the Committee refers to Model Rule 3.5(b),[74] which provides, in part, that:

A lawyer shall not:

> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> > (1) the communication is prohibited by law or court order;
> >
> > (2) the juror has made known to the lawyer a desire not to communicate; or
> >
> > (3) the communication involves misrepresentation, coercion, duress or harassment . . .

The ABA has determined that merely viewing an individual's public profile (which the ABA defines as "passively viewing" an individual's social media presence), even if that individual is informed of the identity of the viewer, does not constitute such a communication.[75] However, any effort to reach out to a potential juror through social media, even if limited to a request to be added to the potential juror's social network, would be considered a

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73 American Bar Association *Formal Opinion 466: Lawyers Reviewing Jurors' Internet Presence*: ckdam. http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authchepdf

74 Rule 3.5 of the District of Columbia Rules of Professional Conduct is to the same effect.

75 As discussed in depth in ABA Formal Opinion 466, the Association of the Bar of the City of New York Committee on Professional Ethics and the New York County Lawyers' Association Committee on Professional Ethics have found that a passive notification of this type may violate the rules of ethics. As of the drafting of this recommendation, the District of Columbia Bar has not issued any opinions addressing the topic.

prohibited communication.

The Association of the Bar of the City of New York Committee on Professional Ethics (ABCNY), in Formal Opinion 2012-2 has taken a position contrary to the ABA. The ABCNY concluded that a "passive notification" to a juror with a social media account that an attorney had viewed his/her publicly-available social media profile constituted a prohibited communication with the juror. The ABCNY found that this was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception— including the fact that they have been researched." The ABCNY did include a caveat, and found that the communication would be prohibited only "if the attorney was aware that her actions" would cause such a notification to be sent to the juror. The New York County Lawyers' Association Committee on Professional Ethics (NYCLA) in Formal Opinion 743 subsequently agreed with ABCNY's opinion and stated, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." These opinions are discussed in-depth in the ABA's opinion, included as Exhibit G. The Committee has chosen to adopt the rule set forth by the ABA, rather than that set forth by the ABCNY and NYCLA.

The researching of jurors may also provide an opportunity to courts to ensure jurors are maintaining impartiality. Researching jurors can provide a path for courts to obtain critical information not divulged during voir dire.[76] *See Johnson v. McCullough*, 306 S.W.3d 551 (Mo. Banc 2010) (granting motion for a new trial when an empanelled juror did not respond in the affirmative when asked during voir dire if he had been a party to previous lawsuits and a background check conducted by attorneys after the completion of trial found that the juror had been a party in multiple lawsuits)[77]; *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App. 2012) (holding the plaintiff suffered no prejudice when a juror was removed prior to opening statements after the defense researched the juror's social media profile and found comments that would have been potentially detrimental to their case)[78,79]; *see also Carino v. Muenzen*, 13 A.3d 363 (N.J. Super. Ct. App. Div. 2011) (holding that the trial court abused its discretion in preventing an attorney from researching jurors online because he had not informed the court or opposing counsel of his intent to do so in advance)[80]; Missouri Supreme Court Rule 69.025 (requiring the court to allow litigants an opportunity to conduct an investigation, through case.net, of potential jurors' litigation history).

See Exhibit G for the full text of ABA Formal Opinion 466.

76 Hoffmeister, T. Investigating Jurors in the Digital Age: One Click at a Time: https://law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v60/03_Hoffmeister_Final.pdf

77 Johnson v. McCullough 306 S.W.3d 551 (Mo. Banc 2010): https://cases.justia.com/missouri/supreme-court/sc90401-37456.pdf

78 Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (2012): https://scholar.google.com/scholar_case?case=18547872645567278 5&q=Khoury+v.+ConAgra+Foods&hl=en&as_sdt=20006&as_vis=1

79 Browning, J. (2013). As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn: http://www.thejuryexpert.com/2013/05/as-voir-dire-becomes-voir-google/

80 Carina v. Muenzen, 13 A.3d 363 (N.J. Super. Ct. App. Div. 2011) (table opinion): http://www.leagle.com/decision/in%20njco%2020100830280.xml

18 THE DC JURY PROJECT RECOMMENDS THAT JUDGES CONSIDER ORDERING THE GOVERNMENT TO SHARE WITH DEFENSE ATTORNEYS THE RESULTS OF CRIMINAL RECORD CHECKS OF POTENTIAL JURORS IN CRIMINAL CASES UNLESS PROHIBITED BY LAW FROM DOING SO.

The DC Jury Project notes that a unique consideration related to researching jurors is the Government's access to the criminal records of jurors. Prosecutors are able to access the criminal records of jurors in ways that defense counsel are not because prosecutors often have access to non-public databases and resources that criminal defense attorneys do not. This may include the ability to simultaneously search multiple jurisdictions using databases that, while consisting of public records, are not available to criminal defense attorneys or the public. To conduct a similar search, defense attorneys would have to perform multiple searches on multiple databases, or dispatch agents to multiple jurisdictions. Accordingly, to ensure fairness, judges should consider ordering the prosecutor to share with the defense the results of any criminal records checks on potential jurors.[81]

81 See, e.g., *State v. Bessenecker*, 404 N.W.2d 134, 138-39 (Iowa 1987) ("We agree with the reasoning of those courts that generally have allowed defendants equal access to jurors' rap sheets obtained by the county attorney. We believe that considerations of fairness and judicial control over the jury selection process requires this result.")

19 THE DC JURY PROJECT MAKES FOUR RECOMMENDATIONS REGARDING THE JURY SELECTION PROCESS:

First, the committee recommends that prospective jurors be provided with questionnaires that request additional biographical information when they arrive for jury service and that these questionnaires be made available to counsel and the litigants when a panel arrives in the courtroom.

Second, the committee recommends that judges use the index-card method, or some similar technique, for voir dire screening that permits counsel both to offer additional questions and to make reasonable follow-up inquiries at the bench.

Third, the committee recommends that a jury panel be called in the superior court only after all preliminary trial matters have been resolved and that the number of jurors to be utilized for a venire should be limited to those prescribed by the court's protocol, unless special circumstances warrant a larger pool.

Fourth, the committee recommends that the number of strikes permitted to litigants not be reduced below that now provided by statute and by rule in federal and superior court.

CCE's 1998 study of jury functioning in the District of Columbia evaluated the manner by which petit juries were selected and seated in DC Superior Court and in US District Court. A number of suggested recommendations were made in that study, and many of them have been implemented in DC Superior Court where the majority of DC jury trials take place. The 2015 DC Jury Project addressed the voir dire process in a variety of ways; to wit—by reviewing the recommendations in the prior report[82]; by conducting in-court observations of the process by which jurors are screened, challenged, and selected; by meeting with US District Court and DC Superior Court judges; and by interviewing attorneys who practice frequently in both federal and local court. In addition, the Committee reviewed relevant literature that a number of groups that have studied the operation of various jury systems have produced. Based on these data points, the Committee note the following:

(1) Juror Information and the Use Of Questionnaires

Jurors appearing in routine cases in Superior Court and in US District Court do not typically receive a case-specific juror questionnaire in advance of their service, although the opposite is often true for high-profile cases or for prolonged trials in federal court. Information relating to the backgrounds and attitudes of potential jurors can provide important data for an attorney deciding whether to exercise a peremptory challenge. However, a questionnaire particularized to the individual case is not feasible for routine cases, which comprise the bulk of the DC Superior Court jury trial caseload.[83] Providing jurors with a questionnaire on background issues when they arrive for jury service could provide valuable additional information to counsel. These questionnaires could then be correlated with each juror's designated juror number, and the information could be provided in written form to counsel and the litigants, along with the jury panel list, at the start of jury selection.

(2) Requesting the Venire

The size of the panel to be sent to a courtroom from the juror lounge in DC Superior Court, and the timing of doing so, are important factors in minimizing the inconvenience to prospective jurors and avoiding prolonged and unnecessary waiting periods. The DC Superior Court administration has established procedures designed to take account of the prospective jurors' time by designating protocols to implement these procedures. Specifically, a judge trying a misdemeanor calendar with jury cases

82 Recommendations 17 - 32 made in the 1998 report were the focus of this aspect of the 2015 study.

83 Recommendation 19 of the 1998 DC Jury Project suggested completion of a written questionnaire by all jurors, presumably on the day of their service, but it is not clear that the mechanics of that task could be efficiently implemented or could provide a better alternative to the furnishing of additional information at the time of summons response.

and a judge with a felony II calendar are limited in the size of the venire normally sent to the courtroom to 54 panel members.[84] The size of the panel is determined by the number of peremptory strikes allowed (three per side for misdemeanors; ten per side for felony cases, with possible additional strikes for alternate jurors and/or for multi-defendant cases). For civil cases, most of which involve juries of six, plus one alternate, the jury panel typically consists of twenty-four persons (consistent with the rule allowing three peremptory challenges per side). These normative levels of jury panel size can be exceeded only with the permission of the administrative judge for the criminal or civil division if the trial judge requests a larger panel because of a high-publicity case or a case involving sensitive matters that are likely to elicit emotional reactions from panel members.

Moreover, a request for a panel should only be made to the jury officer when the trial judge is ready to actually begin the voir dire process. That is, preliminary matters that must be conducted out of the presence of the jury must have concluded before the prospective jurors are sent to the courtroom in order to avoid having jurors stand in the corridors outside of the courtroom to avoid hearing preliminary matters which are not appropriate for juror consideration. The Committee is aware of instances in which a trial judge has sought to "reserve" a panel by calling for one before the completion of preliminary matters, resulting in unnecessary waiting by panel members. The Committee recommends that this practice not continue.

In addition, it is important that members of the jury panel understand that they have contributed to the functioning of the jury system even if they are not selected for service as the development of an acceptable panel depends upon eliminating jurors whom the litigants or the court elect to challenge with peremptory or "for cause" challenges.

(3) Peremptory Strikes

The ability to exercise peremptory strikes has long been considered "one of the most important rights" for a criminal defendant,[85] and has been a feature of the jury selection process that has been recognized as essential to ensure fairness.[86] Section 11-1908(b)(2) of the DC Code provides for the peremptory challenge, and Superior Court Criminal Rule 24 (b) specifies ten peremptory challenges per side for felonies and three per side for misdemeanors. Additional peremptory challenges are allowed for alternates, the number of challenges varying with the number of alternates. Rule 24 of the Federal Rules of Criminal Procedure provides for the same number. Three peremptory challenges per side are permitted in both Superior Court and federal court civil cases.[87]

Peremptory strikes are used after obtaining information from prospective jurors about sensitive issues. An efficient method of obtaining this information from individual jurors has evolved at Superior Court and some, but not all, judges use it. The process involves seating each prospective juror by reference to his or her place on the jury panel list provided by the jury office and identifying the prospective juror only by his or her number for public purposes on an index card provided by the court to panel members. (Litigants are made aware of the names, addresses, and other basic information for the jurors, and this information could be augmented by the responses to questionnaires, as proposed above.) The judge conducts the basic voir dire by asking questions already reviewed with the lawyers. A juror with a positive response indicates the question number on his or her index card. The judge then interviews each such juror at the bench about those responses after all of the voir dire questions have been posed to the jurors. The conversation is on the record but is not heard by others in the courtroom, as the bench conference is shielded by the court's "husher" (a "white-noise" machine controlled by

84 Felony I trials involve the most serious crimes, often resulting in lengthy trials. Because of this and because the serious offenses are sometimes difficult for prospective jurors to hear, Felony I judges are given greater leeway to request a larger venire panel, typically 70 persons.

85 *Pointer v. United States*, 151 US 396 (1894).
86 *Wells, et al. v. United States*, 516 A.2d 1108 (DC 1986).
87 SCR-Civil, Rule 47-I; F. R. Civ. P., Rule 47(b); 28 U.S.C. § 1870.

the judge).[88] Some judges believe that it is beneficial to speak with each prospective juror -- including those who have not given a positive response to any of the voir dire questions -- as some prospective jurors seem reluctant to respond positively even when the questions do raise concerns for them. When probed individually, sometimes these concerns come to the surface,[89] and the Committee therefore recommends that each prospective juror be interviewed at the bench.

In addition, many believe that attorney-conducted voir dire is beneficial to the litigants and can be managed without substantial additional time. Therefore, the Committee encourages this practice as well, and even when attorney-led voir dire is not permitted, counsel should be permitted to make follow-up inquiries of prospective jurors who respond positively to the court's voir dire and who are called to the bench for examination. Although this is frequently allowed, the practice among Superior Court judges is not consistent.

(4) Number of Peremptory Challenges

The number of peremptory challenges is fixed by statute or court rule, as stated above.[90] The 1998 Jury Project considered reducing the number of peremptory challenges as a method of reducing the size of the panels sent to the courtroom and ultimately the number of jurors summoned. However, there was division among the 1998 Committee on this subject, and no change in the statutory number or the number fixed by rule was recommended, nor has any such change occurred.

Many frequent litigators are of the view that peremptory challenges serve the vital function of selecting a jury that the litigants consider to be fair.[91] Because court approval of "for-cause" challenges tends to be spare, the use of peremptory challenges provides the best safety valve for litigants who question the fairness of particular prospective jurors on their panel.[92] Therefore, the Committee does not favor reducing or eliminating peremptory challenges even though reducing peremptory challenges would reduce the number of jurors to be summoned. Any change is considered unnecessary in light of the other procedural improvements that have streamlined the process of selecting jurors and have reduced the number of prospective jurors called to a courtroom in the venire panel.

88 Use of the husher has been validated by the DC Court of Appeals. *Copeland v. United States, 111 A.3d 627* (DC # 13-CO-746, decided 3/12/15). Criminal defendants are able to hear the colloquy and thereby participate in this phase of the trial by remaining at counsel table with ear phones.

89 See, *Be Cautious of the Quiet Ones,* Hon. Gregory Mize (Ret.), 10 Voir Dire 1 (2013).

90 See SCR-Civil, Rule 47-I; F. R. Civ. P., Rule 47(b); 28 U.S.C. § 1870 and accompanying text, supra.

91 *Wells, et al. v. United States*, 515 A.2d 1108 (DC 1986).

92 The Committee is mindful of the need to ensure that peremptory challenges are not exercised in a manner that offends the principle of fairness established in *Batson v. Kentucky,* 476 US 79 (1986) prohibiting challenges that have the intent or effect of discriminating against jurors for racial or other improper reasons.

20 THE DC JURY PROJECT RECOMMENDS THAT BEFORE THE TRIAL BEGINS, THE COURT INSTRUCT THE JURY REGARDING RESTRICTIONS ON THE USE OF SOCIAL MEDIA WHILE SERVING AS JURORS.

The DC Superior Court has model jury instructions for criminal cases that admonish jurors:

> In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept messages, including email and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.[93]

The thrust of these instructions is a warning to jurors that they are prohibited from using social media during trial to conduct research about the case, disclose thoughts about the case, or seek advice on how to decide the case. The DC Jury Project recommends that the Court instruct potential jurors regarding the use of social media early in the proceedings, and in most cases even before trial begins.

Moreover, although the standard criminal jury instruction technically applies only to criminal cases, the DC Jury Panel believes that the standard criminal jury instruction is appropriate and should be used in civil cases as well.

The relevant text of the criminal jury instruction, as modified to add a new last paragraph, is attached in Exhibit H.

93 DC Superior Court Mode Criminal Jury Instructions 1.102

EXHIBIT G

AMERICAN BAR ASSOCIATION FORMAL OPINION 466

Formal Opinion 466 April 24, 2014

Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Juror Internet Presence

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried by a jury may review the jurors' or potential jurors' Internet presence leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review. Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to[1] Formal Opinion 466 to another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

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1 Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

2 The capabilities of ESM change frequently. The Committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet saturated world, the line is increasingly blurred.

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites. If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

A lawyer shall not:

> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> > (1) the communication is prohibited by law or court order;
> >
> > (2) the juror has made known to the lawyer a desire not to communicate; or
> >
> > (3) the communication involves misrepresentation, coercion, duress or harassment.

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. See, e.g., In re Holman, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).[4]

3 While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." See also Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

4 Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). See also In re Myers, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); cf. S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7] , concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception— including the fact that they have

5 Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, supra note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). See also N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, supra note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6 See Or. State Bar Ass'n, supra note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, supra note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, supra note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). But see N.H. Bar Ass'n, supra note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

7 Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, supra, note 3.

been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy Formal Opinion 466 6 features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may

8 N.Y. Cnty. Lawyers' Ass'n, supra note 5.

9 For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., More from the #Jury Box: The Latest on Juries and Social Media, 12 Duke Law & Technology Review no. 1, 69-78 (2014), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10 Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/juryinstructions.pdf.

> not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal District Court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7- 102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). Report-

11 Id. at 66.
12 Id. at 87.
13 Ethics 2000 Commission, Model Rule 3.3: Candor Toward the Tribunal, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

er's Explanation of Changes, Model Rule 3.3.[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venire person engages in conduct that is fraudulent or criminal.[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

14 Ethics 2000 Commission, Model Rule 3.3 Reporter's Explanation of Changes, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15 Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....").

16 See, e.g., US v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. US v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

EXHIBIT H

MODEL CIVIL JURY INSTRUCTIONS BASED ON SUPERIOR COURT MODEL CRIMINAL JURY INSTRUCTIONS 1.102

Between now and when you are discharged from jury duty, you must not provide to or receive from anyone, including friends, co-workers, and family members, any information about your jury service. You may tell those who need to know where you are, that you have been picked for a jury, and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone, or computer communications.

In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept messages, including email and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

You must decide the facts based on the evidence presented in court and according to the legal principles about which I will instruct you. You are not permitted, during the course of the trial, to conduct any independent investigation or research about the case. That means, for example, you cannot use the Internet to do research about the facts or the law or the people involved in the case. Research includes something even as simple or seemingly harmless as using the Internet to look up a legal term or view a satellite photo of the scene of the alleged crime.

I want to explain the reasons why you should not conduct your own investigation. All parties have a right to have the case decided only on evidence and legal rules that they know about and that they have a chance to respond to. Relying on information you get outside this courtroom is unfair because the parties would not have a chance to refute, correct, or explain it. Unfortunately, information that we get over the Internet or from other sources may be incomplete or misleading or just plain wrong. It is up to you to decide whether to credit any evidence presented in court and only the evidence presented in court may be considered. If evidence or legal information has not been presented in court, you cannot rely on it.

Moreover, if any of you do your own research about the facts or the law, this may result in different jurors basing their decisions on different information. Each juror must make his or her decision based on the same evidence and under the same rules.

In some cases, there may be reports in the newspaper or on the radio, Internet, or television concerning the case while the trial is ongoing. If there should be such

According to CCE trial observers, the US District Court was consistent in the use of admonitions concerning juror use of social media, repeating the admonition periodically during the trial. DC Superior Court, in contrast, gave the admonition in less than two-thirds of the trials, usually at the beginning of the trial and, in half the trials, at the end of the trial.

Social Media Admonitions

	USDC	DCSC	
Social media admonition given	100%	58%	*
Beginning of trial	100%	61%	
During trial	100%	28%	***
End of trial	100%	50%	
Compliance confirmation	0%	12%	

* p<.1
** p<.05
*** p<.01

media coverage in this case, you may be tempted to read, listen to, or watch it. You must not read, listen to, or watch such reports because you must decide this case solely on the evidence presented in this courtroom. If any publicity about this trial inadvertently comes to your attention during trial, do not discuss it with other jurors or anyone else. Just let me or my clerk know as soon after it happens as you can, and I will then briefly discuss it with you.

Finally, if you become aware that another juror may be violating my instructions, please let me or my clerk know as soon as you become aware so we can discuss it.

21 THE DC JURY PROJECT RECOMMENDS THAT THE SUPERIOR COURT PROVIDE AN EXPEDITED JURY TRIAL OPTION FOR CIVIL TRIALS. SHORTENING TRIALS SAVES LITIGANTS AND THE COURT TIME AND MONEY AND REDUCES THE BURDEN OF SERVICE ON JURORS.

The DC Jury Project recommends creating an optional expedited civil jury trial program in DC Superior Court. This could reduce the amount of time that is spent on cases prior to and during trials, thereby reducing the burden of jury service. It is suggested that DC Superior Court also make an informational document available to parties contemplating the expedited trial process.[94] An example of such a document can be found in Exhibit I to this recommendation.

We commend DC Superior Court for implementing the Track System that was previously suggested by the Council for Court Excellence in 2002.[95] The DC Jury Project recommends expanding the current Track System[96] to add an expedited option for all civil jury trials. We further recommend revisiting the "Time to Disposition" performance standards that the Court implemented in 2007 in order to adhere more closely to an expedited trial program.[97] It is recommended that the expedited trial program include provisions that limit discovery, peremptory challenges, and trial time for parties that opt for the expedited trial track. In exchange for these mutually agreed-upon concessions, the case would advance on the trial calendar on a more expedited basis than even the Track I cases.

Multiple states, including California, Texas, Delaware, and Utah have implemented a type of expedited civil jury trial program.[98] Texas recently established an expedited trial program with multiple limitations on discovery. To be compatible with an expedited trial program, we recommend that discovery for each party be limited to a total of fifteen (15) interrogatories, requests for production, and requests for admissions.[99] We also recommend the courts consider allotting one (1) hour for voir dire, and three (3) to fifteen (15) hours for each party to present evidence; including the examination of witnesses.[100]

While the bulk of civil trials in Superior Court relate to auto accident cases, other disputes may also be amenable to the fast track approach that could be incorporated into the DC Superior Court's current tracking system.

> One of the lawyers did an hour long closing statement. The lawyer-based time wasting was frustrating.
>
> —An Anonymous Juror

94 See Exhibit A. California Expedited Jury Trial Information Sheet: http://www.courts.ca.gov/documents/ejt010info.pdf:

95 See CCE, Superior Court Success Story: Civil Case Reform in the District of Columbia, Appendix E: DC Superior Court Civil Actions Case Processing Diagram (2002). http://www.courtexcellence.org/uploads/files/Superior_Court_Success_Story_2002.pdf

96 Civil Rule 16 and Form CA 113 outline the tracking system now in force.

97 Superior Court of the District of Columbia Administrative Order 07-18 (Performance Measures-Time to Disposition and Excludable Time). http://www.dccourts.gov/internet/documents/07-18.pdf

98 NCSC report: Short, Summary & Expedited the Evolution of Civil Jury Trials. Document available upon request.

99 Howell, A. A Close Look at Texas' New Expedited Trial Rules: http://www.zelle.com/news-publications-237.html

100 Utah Courts Expedited Jury Trial Requirements and Waivers: http://www.utcourts.gov/howto/civil/expedited_jury_trial/ and California Courts General Order Number 64 Attachment A. file:///C:/Users/Intern.CCE-DT7-06/Downloads/GO64.pdf: See Exhibit B.

EXHIBIT I

SAMPLE CALIFORNIA JURY TRIAL INFORMATION SHEET

THE COMMITTEE PROVIDES THIS EXHIBIT FOR INFORMATIONAL PURPOSES BUT DOES NOT ENDORSE ALL OF THE PROVISIONS HEREIN

EJT-010-INFO **Expedited Jury Trial Information Sheet**

This information sheet is for anyone involved in a civil lawsuit who is considering taking part in an **expedited jury trial**—a trial that is shorter and has a smaller jury than a traditional jury trial. Taking part in this type of trial means you give up your usual rights to appeal. **Please read this information sheet before you agree to have your case tried under the expedited jury trial procedures.**

This information sheet does not cover everything you may need to know about expedited jury trials. It only gives you an overview of the process and how it may affect your rights. **You should discuss all the points covered here and any questions you have about expedited jury trials with your attorney. If you do not have an attorney, you should consult with one before agreeing to an expedited jury trial.**

(1) What is an expedited jury trial?

An expedited jury trial is a short trial, generally lasting only one day. It is intended to be quicker and less expensive than a traditional jury trial.

As in a traditional jury trial, a jury will hear your case and will reach a decision about whether one side has to pay money to the other side. An expedited jury trial differs from a regular jury trial in several important ways:

- **The trial will be shorter.** Each side has 3 hours to put on all its witnesses, show the jury its evidence, and argue its case.
- **The jury will be smaller.** There will be 8 jurors instead of 12.
- **Choosing the jury will be faster.** The parties will exercise fewer challenges.
- **All parties must waive their rights to appeal.** In order to help keep down the costs of litigation, there are no appeals following an expedited jury trial except in very limited circumstances. These are explained more fully in (5).

(2) Will the case be in front of a judge?

The trial will take place at a courthouse and a judge, or, if you agree, a temporary judge (a court commissioner or an experienced attorney whom the court appoints to act as a judge) will handle the trial.

(3) Does the jury have to reach a unanimous decision?

No. Just as in a traditional civil jury trial, only three-quarters of the jury must agree in order to reach a decision in an expedited jury trial. With 8 people on the jury, that means that at least 6 of the jurors must agree on the verdict in an expedited jury trial.

(4) Is the decision of the jury binding on the parties?

Generally, yes, but not always. A verdict from a jury in an expedited jury trial is like a verdict in a traditional jury trial. The court will enter a judgment based on the verdict, the jury's decision that one or more defendants will pay money to the plaintiff or that the plaintiff gets no money at all.

But parties who agree to take part in expedited jury trials are allowed to make an agreement before the trial that guarantees that the defendant will pay a certain amount to the plaintiff even if the jury decides on a lower payment or no payment. That agreement may also put a cap on the highest amount that a defendant has to pay, even if the jury decides on a higher amount. These agreements are known as "high/low agreements." You should discuss with your attorney whether you should enter into such an agreement in your case and how it will affect you.

(5) Why do I give up most of my rights to appeal?

To keep costs down and provide a faster end to the case, all parties who agree to take part in an expedited jury trial must agree to waive the right to appeal the jury verdict or decisions by the judicial officer concerning the trial unless one of the following happens:

- Misconduct of the judicial officer that materially affected substantial rights of a party;
- Misconduct of the jury; or
- Corruption or fraud or some other bad act that prevented a fair trial.

In addition, parties may not ask the judge to set the jury verdict aside, except on those same grounds. Neither you nor the other side will be able to ask for a new trial on the grounds that the jury verdict was too high or too low, that legal mistakes were made before or during the trial, or that new evidence was found later.

→

(6) How else is an expedited jury trial different?

The goal of the expedited jury trial process is to have shorter and less expensive trials. The expedited jury trial rules set up some special procedures to help this happen. For example, the rules require that several weeks before the trial takes place, the parties show each other all exhibits and tell each other what witnesses will be at the trial. In addition, the judge will meet with the attorneys before the trial to work out some things in advance.

The other big difference is that the parties can make agreements about how the case will be tried so that it can be tried quickly and effectively. These agreements may include what rules will apply to the case, how many witnesses can testify for each side, what kind of evidence may be used, and what facts the parties already agree to and so do not need to take to the jury. The parties can agree to modify many of the rules that apply to trials generally or even to expedited jury trials (except for the four rules described in (1).

(7) Who can have an expedited jury trial?

The process can be used in any civil case that the parties agree may be tried in a single day. To have an expedited jury trial, both sides must want one. Each side must agree that it will use only three hours to put on its case and agree to all the other rules in (1) above. The agreements between the parties must be put into writing in a document called a Proposed Consent Order Granting an Expedited Jury Trial, which will be submitted to the court for approval. The court must issue the consent order as proposed by the parties unless the court finds good cause why the action should not proceed through the expedited jury trial process.

(8) Can I change my mind after agreeing to an expedited jury trial?

No, unless the other side or the court agrees. Once you and the other side have agreed to take part in an expedited jury trial, that agreement is binding on both sides. After you enter into the agreement, it can be changed only if **both** sides want to change it or stop the process or if a court decides there are good reasons the expedited jury trial should not be used in the case. This is why it is important to talk to your attorney **before** agreeing to an expedited jury trial.

You can find the law and rules governing expedited jury trials in Code of Civil Procedure sections 630.01–630.12 and in rules 3.1545–3.1552 of the California Rules of Court. You can find these at any county law library or online. The statutes are online at *www.leginfo.ca.gov/calaw.html*. The rules are at *www.courts.ca.gov/rules*.

EXHIBIT J

SAMPLE GENERAL ORDER FOR EXPEDITED TRIAL PROCEDURES (CALIFORNIA)

THIS SAMPLE IS NOT ENDORSED BY THE COMMITTEE BUT IS PROVIDED TO ILLUSTRATE THE CONCEPT

GENERAL ORDER NO. 64 — ATTACHMENT A

PROCEDURE FOR EXPEDITED TRIALS

1. Expedited Trial Procedure

The court encourages parties to agree to an expedited trial. The Expedited Trial Procedure is meant to offer an abbreviated, efficient and cost-effective litigation and trial alternative. Subject to the approval of the assigned judge, the following procedures shall govern. "Expedited Trial" means a consensual, binding trial before a jury or before a judge with limited discovery and limited rights to appeal.

2. Effective Date

The parties shall file a written agreement, using the court form titled "Agreement for Expedited Trial and Request for Approval." Neither the agreement nor its existence shall be disclosed to the jury. The time schedule for expedited procedures and trial shall begin on the date the agreement is approved by the court.

3. Termination of Agreement

The agreement may be terminated by the court upon a showing that one or more parties have not participated in good faith with the provisions of this General Order or that previously undisclosed facts have been discovered that make it inappropriate to proceed pursuant to the agreement.

4. Applicable Rules

The provisions of the Expedited Trial Agreement, as approved by the court, shall supersede and govern over any inconsistencies or conflicts that arise between it and the Federal Rules of Civil Procedure or the Local Rules of this Court. Otherwise, all Federal Rules of Civil Procedure, Rules of Evidence, and Local Rules of this Court shall apply.

5. Initial Disclosures

If initial disclosures have not been exchanged, or if they are not yet due, the disclosures required by Rule 26(a)(1)(A) shall be exchanged within seven (7) days after the agreement is approved by the court.

6. Expedited Trial Conference

Immediately upon the filing of the agreement, plaintiff shall contact the courtroom deputy for the assigned judge and request an initial expedited trial conference. The conference shall occur no later than thirty (30) days after the filing of the agreement. Upon request of any party, the court shall permit counsel to appear by telephone. A Joint Expedited Trial Statement shall be filed seven (7) days before the conference addressing all of the topics set forth in the O No. 64 Attachment A page 2 Standing Order for All Judges of the Northern District of California Joint Expedited Case Management Statement, found on the Court's website: www.cand.uscourts.gov.

A case management order shall be issued following the conference. Unless otherwise ordered by the court, the order shall require the parties to exchange the documents described in Rule 26(a)(3) of the Federal Rules of Civil Procedure no later than fifteen (15) days before the pretrial conference and shall require the parties to complete all discovery no later than ninety 90 days after the expedited trial conference. All Rule 12 and pleading issues shall be resolved by the court at the expedited trial conference, except as provided in section 10 of this General Order. The court may determine the extent, if any, that previous case management orders on matters subject to the expedited rules shall supersede or be combined with any previous orders.

7. Pretrial Conference

The pretrial conference shall be held no later than one hundred fifty (150) days after the agreement is approved by the court.

8. Discovery

Unless otherwise ordered by the court or by agreement of the parties, discovery shall be limited to ten (10) interrogatories per side, ten (10) document requests, ten (10) requests for admission, and fifteen (15) hours of depositions, per side. The parties may agree or the court may order, that the time for response to written discovery be shortened. Deposition time limits are inclusive of fact witnesses and expert witnesses.

9. Expert Witnesses

No party shall call more than one expert witness to testify, unless permitted by the court or by agreement of the parties.

10. Pretrial Motions

No pretrial motion shall be filed without leave of court, which shall be sought by a letter not to exceed one page. If leave is granted, the motion shall be in letter form, filed with the clerk, unless otherwise ordered. The response to the motion shall be by letter filed with the clerk not later than seven calendar days after receipt of the motion. Unless otherwise permitted, no letter shall exceed three pages. A letter reply, not to exceed one page may be filed within three days after receipt of opposition. The court may decide the motion without a hearing. If the court finds that a hearing is necessary, it may establish a briefing schedule and order further briefing. Pendency of a dispositive motion shall not stay any other proceedings. O No. 64 Attachment A page 3

11. Trial Date

Unless otherwise ordered, trial shall be held no later than six months after the agreement is approved by the court.

12. Trial

Jury trial will be before six jurors and may proceed before a five-person jury if a juror is unable to serve through conclusion of trial and deliberations. The court shall conduct all voir dire and shall determine time limits for opening statements and closing argument. Each side shall have three hours to present evidence, not including time for opening statement and time for closing argument. There shall be no findings of fact or conclusions of law in non-jury trials. In multi-party trials, plaintiffs shall divide the three hours among themselves, and defendants shall divide the three hours among themselves. If the parties cannot agree to a division of trial time, the judge shall order a division.

13. Post-trial Motions

(a) Post-trial motions shall be limited to determination of costs and attorney's fees, correcting a judgment for clerical error, conforming the verdict to the agreement, enforcement of judgment and motions for a new trial.

(b) Within ten (10) court days after notice of entry of a jury verdict, a party may file with the clerk and serve on each adverse party a notice of intention to move for a new trial on any of the grounds specified in section 13(c) of these procedures. The notice shall be deemed to be a motion for a new trial.

(c) Grounds for motions for a new trial shall be limited to: (1) judicial misconduct that materially affected the substantial rights of a party; (2) misconduct of the jury; (3) corruption, fraud, or other undue means employed in the proceedings of the court or jury. [this provision is not recommended by the Committee]

14. Judgment

Judgment shall be entered within 30 days after a bench trial, except as ordered by the court for good cause.

15. Appeal [this provision is not recommended by the Committee]

Before filing an appeal, a party shall make a motion for a new trial pursuant to paragraph 13 of these procedures. If the motion for a new trial is denied, the party may appeal the judgment and seek a new trial only on grounds specified in subsection 13(c). All other grounds for appeal shall be waived and are not permitted, unless the parties agree otherwise.

22 THE DC JURY PROJECT RECOMMENDS THAT THE COURTS TAKE SPECIAL CARE TO PROVIDE AFFIRMATIVE INSTRUCTIONS TO JURORS SO THAT JURORS ARE AWARE THAT THEY ARE PERMITTED TO TAKE NOTES DURING THE TRIAL.

It is standard practice in the DC Courts for jurors to be permitted to take notes.[101] As part of its effort to assess the implementation of recommendations that CCE made in its *Juries for the Year 2000* report, the DC Jury Project undertook to evaluate this practice (and others) by conducting an extensive survey of judges, attorneys, and jurors, and also by holding both roundtable discussions with DC judges and focus groups with former jurors.[102] The resulting data indicate that all of the surveyed judges permit jurors to take notes, but not all of the jurors or attorneys who were surveyed report the same.

The following questions and corresponding results were obtained via surveys:

Judges were asked:

Please indicate whether the following jury practices were used in your last trial:

- ❏ Jurors were provided with note-taking materials by the court
- ❏ Jurors were provided with exhibit notebooks containing descriptions of trial exhibits
- ❏ Jurors were permitted to ask questions of witnesses
- ❏ Jurors were given a written copy of the jury instructions

The DC Jury Project found that 100% of the judges who answered this question reported that jurors were provided with note-taking materials by the court.

Attorneys were asked:

Please indicate whether the following jury practices were used in your last trial:

- ❏ Jurors were provided with note-taking materials by the court
- ❏ Jurors were provided with exhibit notebooks containing descriptions of trial exhibits
- ❏ Jurors were permitted to ask questions of witnesses
- ❏ Jurors were given a written copy of the jury instructions

The DC Jury Project found that 67% of the attorneys who answered this question reported that jurors were provided with note-taking materials by the court.

Jurors in Superior Court were asked:

The following are practices used by some judges. Did your judge allow the jurors to:

Take notes during the trial
❏ Yes ❏ No ❏ Don't know

Submit questions to witnesses during trial
❏ Yes ❏ No ❏ Don't know

Submit questions during deliberation
❏ Yes ❏ No ❏ Don't know

The DC Jury Project found that 48% of jurors in civil trials in Superior Court who answered this question reported being allowed to take notes, while 53% of the responding jurors in criminal trials in the Superior Court reported being allowed to take notes.

101 Indeed, DC Superior Court Criminal Jury Instruction 1.105 explicitly permits note-taking by jurors.

102 The DC Jury Project surveyed over 600 jurors at both courts, over 180 attorneys, and over 30 judges at both courts. Additionally, 10 jurors participated in three focus groups and 14 judges participated in three roundtable discussions. In both the surveys and discussions all parties were asked about note-taking by jurors. See Data Collection and Methodology section. *Juries for the Year 2000* made recommendation number 20, recommending "that jurors be permitted to take notes during trials and that they be advised that they may do so."

These survey results were similar to the experiences expressed in the roundtables and focus groups. That is, each of the judges at roundtable discussions reported allowing their jurors to take notes, while several of the jurors who participated in the focus groups reported not being provided with note-taking materials or not being told that they could take notes. Thus, while it is true that jurors may have been permitted to take notes, it also appears to be true that at least some jurors may not understand that they are being provided with note-taking materials and that they have permission to use them during trial.

These results have led the DC Jury Project Committee to recommend that judges and the courts take special care to correct any misperception that jurors might have about note-taking, and thereby ensure that jurors are aware of their ability to take notes during trial.

23 THE DC JURY PROJECT RECOMMENDS THAT JUDGES IN THE DC COURTS, IN THE EXERCISE OF THEIR DISCRETION IN APPROPRIATE CIVIL CASES, PERMIT JURORS TO SUBMIT WRITTEN QUESTIONS FOR WITNESSES SO LONG AS THE COURT INSTRUCTS THE JURY THAT: (1) THE COURT WILL DETERMINE WHETHER IT IS PROPER TO POSE THE QUESTION TO THE WITNESS; (2) THE JUROR SHOULD NOT DISCUSS ANY UNASKED QUESTION WITH THE JURY AND SHOULD NOT DRAW ANY INFERENCE FROM THE JUDGE'S DECISION NOT TO POSE THE QUESTION TO THE WITNESS; AND (3) THE QUESTIONS AS POSED BY THE TRIAL JUDGE SHOULD BE DESIGNED TO ASSIST THE JURY IN REACHING AN IMPARTIAL DETERMINATION OF THE FACTS AND NOT TO SERVE AS ADVOCACY FOR EITHER SIDE IN THE TRIAL.

BECAUSE NO MODEL JURY INSTRUCTION FOR CIVIL CASES SIMILAR TO CRIMINAL JURY INSTRUCTION 1.106 CONCERNING QUESTIONS FROM JURORS IN CRIMINAL CASES CURRENTLY EXISTS, THE DC JURY PROJECT RECOMMENDS THE CREATION AND ADOPTION OF A SIMILAR INSTRUCTION IN THE MODEL CIVIL JURY INSTRUCTIONS.

Within the last 20 years, trial and appellate courts in the District of Columbia have recognized that allowing jurors to submit proposed written questions to the trial judge to be asked of witnesses while they are on the stand testifying may have substantial benefits to the administration of justice and to the jurors' thorough consideration of the case. Jurors may be confused by technical jargon or by what they consider gaps in the evidence. Allowing the judge to ask proper and permissible juror-submitted questions may benefit not only the jurors in reaching a well-considered decision but also benefit trial counsel who thereby become aware of certain juror concerns. Allowing questions may heighten the jurors' attention to the case by making them feel a part of the process rather than merely spectators. It may also leave the jurors feeling more satisfied with their experience, which if communicated to others, may encourage others to be more willing to serve.

The submission of written questions by jurors in civil cases is currently permitted by certain judges in DC Superior Court and may also be followed in federal courts. Those judges who allow the practice instruct jurors at the beginning of the case that, after a witness has completed his or her testimony, the juror may submit a written question to the judge who, after consultation with counsel, will decide whether to ask the question. The judge

instructs jurors not to consider the question if it was not asked or to speculate on the reason the judge chose not to ask it or on what the answer might have been. Jurors are instructed that they are not to become advocates for either side by submitting questions.

While there are concerns in criminal cases (discussed in the following recommendation) as to whether the submission of questions by jurors sometimes reduces the prosecutor's burden of proof, those concerns are not in play in civil cases.[103] Accordingly, the Committee encourages trial judges in both Superior Court and US District Court to exercise their discretion to allow jurors to submit written questions in appropriate civil cases.

The Committee is mindful of the absence of a civil jury instruction concerning questions submitted by jurors and is aware that efforts are underway to develop a civil version of the Model Criminal Jury Instruction 1.106 and the Committee endorses completion of that project. Until that instruction has been finalized, the Committee recommends that the Model Criminal Jury Instruction be adapted on a case-by-case basis for use in civil trials.

103 E.g., American Bar Association, Principles for Jury Trials, August 2005, Principle 13 (C)) and related commentary, noting that there are concerns to jurors asking questions in criminal cases which do not arise in civil cases.

23 (CONTINUED) THE DC JURY PROJECT RECOMMENDS THAT JUDGES IN DC COURTS, IN THE EXERCISE OF THEIR DISCRETION IN APPROPRIATE CRIMINAL CASES, PERMIT JURORS TO SUBMIT WRITTEN QUESTIONS FOR WITNESSES SO LONG AS THE COURT INSTRUCTS THE JURY IN ACCORDANCE WITH DC CRIMINAL JURY INSTRUCTION 1.106, THAT: (1) THE COURT WILL DETERMINE WHETHER IT IS PROPER TO POSE THE QUESTION TO THE WITNESS; (2) THE JUROR SHOULD NOT DISCUSS ANY UNASKED QUESTION WITH THE JURY AND SHOULD NOT DRAW ANY INFERENCE FROM THE JUDGE'S DECISION NOT TO POSE THE QUESTION TO THE WITNESS; AND (3) THE QUESTIONS AS POSED BY THE TRIAL JUDGE SHOULD BE DESIGNED TO ASSIST THE JURY IN REACHING AN IMPARTIAL DETERMINATION OF THE FACTS AND NOT TO SERVE AS ADVOCACY FOR EITHER SIDE IN THE TRIAL.

Majority View:

The practice of allowing jurors in criminal cases to submit written questions for the trial judge's consideration has been approved by the appellate courts in both our local and federal courts. In *Yeager v. Greene,* 502 A. 2d 980 (DC 1985), the District of Columbia Court of Appeals authorized the submission of questions by jurors to the court in a criminal case. Later cases repeatedly reaffirmed the practice, which is followed by a number of, but not all, Superior Court judges.[104] .

In *United States v. Rawlings,* 522 F.3d 403 (DC Cir. 2008), the US Court of Appeals for the DC Circuit held that a trial judge in a criminal case, with proper instructions and cautions, may allow juror questions to be asked by the Court. However, the Court of Appeals observed that there were dangers in the practice and suggested it be used sparingly and only in appropriate cases. In *Rawlings,* the Court of Appeals observed, as several other Circuits have, that the practice of allowing jurors to submit written questions for the court's consideration may provide substantial benefits, noting "it can help focus the jurors, clear up confusion, alert counsel to evidentiary lacunae and generally ensure that jurors have the information needed to reach a reasoned verdict.[105]" But it also observed that the practice carries significant risks, such as potentially removing jurors from their appropriate role as neutral fact finders; causing jurors to evaluate prematurely the evidence and adopting a position before hearing all of the facts; delaying the trial; and potentially undermining counsel's litigation strategies. The *Rawlings* Court also noted that if a question is not asked a juror may feel that his or her pursuit of truth has been thwarted or, if asked, the question may assume too much importance by the other jurors. Some members of the DC Jury Project noted a concern that allowing jurors to submit questions may skew the burden of proof required of the government in criminal or in forfeiture cases by aiding the government in the identification of potential weaknesses in the prosecution's case. While empirical evidence of such an effect has not come to our attention,

104 See Timms v. United States, 25 A.3d 29 (DC 2011); Hinton v. United States, 979 A.2d 663 (DC 2009); Plummer v. United States, 870 539 (DC 2005).
105 Id at 407.

the concern is worth noting and our conversation with judges reflects that this concern is shared by some of those who decline to use the practice. Taking account of the potential perils of allowing questions, the Court of Appeals concluded that, "To minimize these risks, a District judge who decides to permit questioning by jurors in a given case should implement specific precautionary procedures."[106]

A large majority of states and all of the federal circuits that have entertained the question (all but the 10th Circuit, where the matter has not arisen) have agreed that permitting jurors to ask questions in this fashion in criminal cases is within the sound discretion of the trial court. A recent article in the American Journal of Trial Advocacy, after surveying all of the states and federal courts, concluded that "juror questioning …as a recognized trial procedure is complete" and is " an innovation whose time has fully arrived."[107] The article concluded that "every one of the empirical studies have verified the benefits juror questioning" and "strong statistical evidence exists when judges and attorneys use juror questioning their perceptions of this procedure change for the better."[108] Interviews of judges in our Superior Court and the federal District Court who have used this procedure for the past decade have confirmed that most of them agree with that perception. A study by the American Bar Association and the National Center for State Courts has found that in 28% of all state court trials and in 18% of federal court trials, jurors were permitted to ask questions.

We believe that the proper precautions are set forth in Model Jury Instruction 1.106 of the Criminal Jury Instructions for the District of Columbia which is used frequently by Superior Court judges in criminal cases. (See Exhibit K.) It emphasizes that the juror must be an impartial judge of the facts, not an advocate for either side. It makes clear that jurors may not ask questions orally. It states that questions will only be permitted when both sides' lawyers have concluded their examination, but before the witness leaves the stand. And most importantly, it makes clear that the judge will make the determination of whether to ask the witness the question after receiving input from counsel and will only do so if the judge deems it proper. It instructs the jury not to guess about what the answer would have been to an unasked question and not to discuss the unasked question with the other members of the jury.

In order to improve the administration of justice and enhance juror satisfaction and confidence in its verdicts, we urge trial courts to exercise their discretion in appropriate cases to allow jury questions in criminal trials in Superior Court and in Federal Court applying the cautionary suggestions embodied in the model jury instruction.

Jurors Asking Questions in Criminal Cases: Minority View:

The DC Jury Project Committee's recommendation that judges permit jurors to ask questions of witnesses in criminal cases was not unanimously agreed on by the entire Committee. In particular, both the Federal Public Defender and the Public Defender Service for DC, along with a substantial number of other members of the Committee, oppose the Committee's ultimate recommendation. Although case law permits the practice,[109] both public defender agencies assert that this practice is not without flaws.

The fact that both the local and federal courts of appeal in DC have held that juror questioning is allowed does not mean that the procedure is uncontroverted. The DC Circuit, in its opinion on the subject, *United States v. Rawlings*, 522 F.3d 403 (DC Cir. 2008), devoted substantial discussion to the reality that the "practice carries significant risk."[110] The court noted, with regard to the specific facts in the case, that "this case illustrates just how perilous it can be for the court to routinely solicit and ask juror questions."[111] The court observed that the case "highlights the risk of allowing jury questions during trial and demonstrates why other circuits have advised that they be used only sparingly. To limit such risk in the

106 *Rawlings* at 408.
107 Frank, An Interdisciplinary Examination of Juror's Questioning of Witnesses at Trial, 38 American Journal of Trial Advocacy, 1, 7, 26 (2014).
108 Id at 48-49.
109 See, e.g., *Timms v. United States*, 25 A.3d 29 (DC 2011).
110 *Id.* at 408.
111 *Id.* at 409.

future, we, as have our sister circuits, advise trial judges to consider on a case-by-case basis whether and to what extent jury questions are appropriate, balancing the potential benefit of such questions against the dangers they pose."[112] The court concluded that "[p]ermitting juror questions as a matter of course is ill-advised."[113] The DC Circuit's view is hardly a blanket endorsement of the practice, and trial courts should not therefore presume that juror questions benefit the trial process.

The DC Circuit is far from isolated in its concerns. As part of its research, members of this Committee sampled 16 states that permitted juror questions by court decision.[114] They also found three federal circuit courts of appeal that allowed questions by decision.[115] As part of their analysis, they found four states that prohibited juror questions by decision[116] and one federal circuit (the Second Circuit) that similarly prohibited juror questions by court decision. Concerning the permissive states and federal circuits, which number 19 in total, though, the *majority* of them (ten) acknowledge there are dangers inherent in the practice. Aside from our own federal circuit court in *United States v. Rawlings*, *supra*, the Fourth Circuit observed that "juror questioning is a course fraught with peril for the trial court. No bright-line rule is adopted here, but the dangers in the practice are very considerable."[117] The concerns are perhaps best summarized by the Alabama Supreme Court in *Ex Parte Malone*, 12 So.3d 60 (Ala. 2008). There, the court held that soliciting juror questions is not error *per se*, but "the practice should be disfavored and that a trial court should not promote or encourage the practice because it risks 'altering the role of the jury from a neutral fact-finder to inquisitor and advocate.'"[118]

Judges should not rely on the Frank article cited in the Committee's recommendation.[119] Although its conclusions are broad and sweeping, a closer reading of the article reveals its numerous shortcomings. The article itself acknowledges that some think "[p]ermitting jurors to question witnesses violates a defendant's Sixth Amendment right to an impartial jury by transforming the jury into an active, partial decision-making body . . . Although there may be problems with the jury system, juror questioning is not the solution. Trial courts should not continue to violate a criminal defendant's right to a fair trial. In the future, jurors should remain silent."[120] Indeed, the Frank article recognizes that the "transition from neutral to advocate was a significant concern" in allowing juror questioning, and acknowledges that no study has adequately addressed this issue.[121] Despite the passage of two decades, the Eighth Circuit's recognition of the pitfalls inherent in juror questions remain: "*[T]he fundamental problem with jury questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process*. Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury's role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct."[122] Indeed, in a very recent article by United States District Judge Mark Bennett, "Reinvigorating and Enhancing Jury Trails Through an Overdue Juror Bill of Rights: WWJW—What Would Jurors Want?—A Federal Trial Judge's View,"[123] he describes jury questioning in civil cases as a "superb innovation" that he now requires in all civil jury trials. He goes on to state, however, that despite being an ardent supporter of questioning in civil cases, he does not allow juror questioning in criminal cases "based on the problems that could arise with the presumption of innocence and shifting the burden of proof." The Committee simply notes these important issues as a "concern."

112 *Id*.
113 *Id.*
114 Alabama, Arkansas, Arizona, Colorado, the District of Columbia, Georgia, Hawaii, Maryland, Massachusetts, Missouri, New Jersey, New York, Nevada, Tennessee, Vermont, and Virginia.
115 Those circuits are: D.C., 6th, and 4th Circuit Courts of Appeal.
116 Minnesota, Mississippi, Nebraska, and Texas.
117 *DeBenedetto v. Goodyear Tire & Rubber Co.,* 754 F.2d 512, 517 (4th Cir. 1985).
118 *Id.* at 65-66 (citing *United States v. Ajmal*, 67 F.3d 12, 15 (2nd Cir. 1995)).
119 *An Interdisciplinary Examination of Juror's Questioning of Witnesses at Trial*, 38 American Journal of Trial Advocacy 1 (2014).
120 Frank at 11, n.38 (internal citations omitted).
121 Frank at 14.
122 *United States v. Johnson*, 892 F.2d 707, 711 (8th Cir. 1989) (emphasis in original) (internal citation omitted).
123 38 Ariz. St. L.J. ____ (2016) (forthcoming), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652216.

A substantial minority of members of this Committee believe that there is sufficient controversy in allowing juror questions, and these members do not endorse the recommendation of the entire Committee. In particular, the public defender agencies have observed first-hand, over many years, the practice at work. Their opposition to this recommendation is based not only on the studies, articles, and cases that the Committee has considered, but also on their experiences as indigent criminal defense attorneys. The issue for them is one of fundamental fairness for their clients, in ensuring that they receive a fair trial, which is in turn grounded in the Sixth Amendment concerns articulated in the cases above. For these reasons, the minority view is that the DC benches should not adopt a practice that benches in other jurisdictions have approached, at best, with caution.

EXHIBIT K

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION 1.106, QUESTIONS BY JURORS

Instruction 1.106 QUESTIONS BY JURORS

Generally, only the lawyers and I ask witnesses questions. Occasionally, however, a juror thinks that an important question has not been asked. As a juror, you must be an impartial judge of the facts, not an advocate for either side in this proceeding. While I am not encouraging any of you to pose questions to the witnesses, if during the course of the trial you feel an important question has not been asked, you may write out that question on a piece of paper. You may not ask a question orally at any time during a trial. In addition, you may not discuss the questions with any fellow jurors or anyone else. You should submit your question to the court after the lawyers are finished with their questioning of the witness, but before the witness leaves the witness stand. Once a witness has left the witness stand and been excused, that witness will not be recalled to respond to a juror's question.

After consulting with the lawyers, I will determine whether the question relates to a fact or facts about which the witness can properly testify. If it is proper, I will ask the question. If I do not ask the question, that means I have decided that the question is not a legally proper one. The juror posing it should not guess or speculate about what the answer might have been, and must not consider the question or discuss it with other jurors during deliberations. If I decide the question relates only to a legal issue, I may decide to wait until final instructions and answer the question then.

Comment:

In the Fifth Edition, the Committee retained the admonition to jurors that they must remain impartial but deleted the rest of the final paragraph of the instruction which had informed the jurors that their questions were only to help understand the testimony, clarify evidence, or seek information; but not to discredit or argue with a witness. The Committee decided that portion of the paragraph was misleading in that it set up a false dichotomy between "getting information" and assessing the credibility of the witness who is providing the information. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("truth" of a witness's testimony is ascertained not only by "delving into the witness' story" but also by assessing whether the witness should be discredited, for reasons of bias or otherwise).

In *Yeager v. Greene*, 502 A.2d 980 (D.C. 1985), the District of Columbia Court of Appeals upheld a trial court's exercise of discretion to permit jurors to pose written questions to witnesses. Thus, a trial court in the District of Columbia Superior Court has discretion to permit jurors to pose written questions to witnesses during trial. Other federal and state courts have also approved this practice. *See* Opinion of Superior Court Judge Henry Greene in *Yeager*, 502 A.2d 980 at n.18; *see generally Plummer v. U.S.*, 870 A.2d 539, 543 (D.C. 2005)

("procedures used by the trial judge . . . including her explanation of the process to the jurors, were essentially the same as those used by the judge in *Yeager*, and at least implicitly approved by this court"; noting that it might have been better if the court had decided not to ask certain questions but finding no reversible error). The U.S. Court of Appeals for the D.C. Circuit addressed this issue in *U.S. v. Rawlings*, 300 U.S. App. D.C. 380, 522 F.3d 403 (D.C. Cir. 2008), and advised trial judges to permit this practice only sparingly and to consider on a

case-by-case basis whether and to what extent jury questions are appropriate, balancing the potential benefit of such questions against the dangers.

The Committee recommends that if a juror's question is posed by the court, the attorneys be permitted to ask follow-up questions.

24 THE DC JURY PROJECT RECOMMENDS THAT POST-TRIAL COMMUNICATIONS AMONG JURORS WILLING TO SPEAK WITH COUNSEL AND THE COURT SHOULD BE ENCOURAGED IN ORDER TO IMPROVE THE ADMINISTRATION OF THE JURY SYSTEM.

Case law and rules of court permit post-trial communications with jurors by counsel and by the court, but the practices differ between the US District Court and the Superior Court. In its 1998 report, *Juries for the Year 2000 and Beyond,* the Council for Court Excellence encouraged the courts to "regularly seek the feedback of jurors" and to tabulate the results for review by judges, jury administrators and court policy makers." [124] The 1998 Report also encouraged "trial judges to join jurors at the close of a trial in order personally and informally to thank them for their service, to answer questions about the court and jury system, and to provide assistance for any juror who may have experienced extreme stress caused by the trial." [125] In federal court, post-trial communications between jurors and counsel are permitted only when leave of court has been sought and granted. [126] By contrast, the Superior Court does not provide a similar rule, and accordingly a different practice has evolved, where some judges note that counsel may speak with jurors after they have been excused if the jurors wish to have such communication whereas others do not discuss the issue. The overwhelming majority of the Committee believes such post-trial communications with jurors can occur without judicial supervision and that such communications should be encouraged, provided that jurors are advised they are free to decline requested interviews. However, a minority of the Committee believes that post-trial communications should have judicial oversight in both courts.

As was true of the 1998 Committee, the current Committee continues to believe that post- trial communications between jurors and the court and counsel can be instructive not only with regard to the particular case but also in a systemic way as jurors can point out problems they encountered that could be ameliorated by further adjustments. Encouragement of post-trial communications involving the court with jurors is also supported by the American Bar Association, but under certain conditions.[127] The ABA recommended that any discussions between court and jurors following the conclusion of trial and the completion of the jurors' service be conducted "only on the record and in open court with counsel having the opportunity to be present."[128] Although this recommendation pertains to criminal cases, the Committee does not foresee the necessity of having post-trial discussions with the jury on the record in civil or criminal cases, nor does the Committee consider that conversations must take place in the courtroom. Moreover, post-trial communications between jurors and counsel is not covered by the ABA Standards, and the Committee is of the view that these communications may generally take place without judicial supervision unless required by court rule, as in federal court.

But there can be problems with post-verdict communications with jurors in criminal cases, where sentencing takes place months after the verdict is rendered. In *Harris v. United States*, 738 A.2d 269 (DC 1999), the District of Columbia Court of Appeals described a well-intentioned

124 *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998), Recommendation 16.

125 *Council for Court Excellence, Juries for the Year 2000 and Beyond* (1998) Recommendation 32

126 Local Criminal Rule 24.2(b) of the US District Court provides: (b) *After trial.* After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of Court to speak with members or the jury after their discharge. Upon receiving such a request, the Court shall inform the jury that no juror is required to speak to anyone but that a juror may do so if the juror wishes. If no request to speak with jurors is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the Court for good cause shown in writing. The Court may grant permission to speak with a juror upon such conditions as it deems appropriate, including but not limited to a requirement that the juror be examined only in the presence of the Court. Local Civil Rule 47.2(b) is identical.

127 ABA Standards for Criminal Justice Discovery and Trial by Jury, 119 (3d ed. 1996); see, also, American Bar Association, *Principles for Juries and Jury Trials,* Principle 18 and associated commentary.

128 *Id.* at 227 – Standard 15-4.3

meeting of the trial judge with the jurors following the verdict, the purpose of which was to answer questions the jurors might have had and to determine if any improvements in the system might benefit the jurors. Counsel for the government and the defendant were not invited to participate in the conversation, and through the unpredictable evolution of the discussion, information came to the attention of the trial judge concerning the deliberations. At sentencing, the same trial judge described his conversation with the jurors and sought to assure defense counsel that the communications did not affect his sentencing decision.[129] Nevertheless, the Court of Appeals concluded that the trial judge, though inadvertently, had violated Canon 3(A)(4) of the ABA Model Code of Judicial Conduct[130] by having *ex parte* communications with the jurors.

To avoid the problem highlighted by the *Harris* court, the Committee, while encouraging post-trial communications between the court and jurors if they wish to participate in them, recommends that counsel be present during such communications. However, we do not believe it is necessary for such conversations -- or others with counsel and jurors but not the court -- to be on the record nor is it necessary for the trial judge to participate in these discussion, though they may certainly do so.

The Rules of Professional Conduct in force in DC do not preclude post-trial communications with jurors if there is no law, court order or rule barring such communications.[131] Thus, in the Superior Court, where no rule bars post-trial communications between counsel and the jurors, those communications may proceed with those jurors who chose to speak with counsel. This is true in both civil and criminal cases. As noted above, different Superior Court judges have different practices respecting such communications, with some allowing the communications to occur off the record in the jury room in the presence of both counsel, and others allowing the communications to occur in the courthouse corridors in the presence or one or both counsel. Still others do not express a view about such conversations.

On the other hand, the federal court local criminal rule 24.2 (b) and civil rule 47.2(b), cited above, clearly require a communication with discharged jurors to be preceded by an approved request to the court for leave to undertake such a conversation. The Committee urges federal judges to exercise their discretion by permitting such conversations when requested, and provided that jurors are informed of their right to decline requests for interviews and are cautioned to refrain from discussing the deliberation process.

In any event, courts have validated restrictions on the post-trial communications with jurors, particularly in criminal cases, but with some restrictions. In *United States v. Harrelson*[132] the Court of Appeals for the Fifth Circuit validated a rule imposing the following conditions on post-trial communications with jurors conducted by the press. There restrictions are sometimes applied by courts to conversations between counsel and jurors. The cautions that the *Harrelson* court recommended follow:

1. No juror has any obligations to speak to any person about this case, and may refuse all interviews or comment.

2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.

3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order.[133]

129 738 A.2d 269, 276-278

130 This Canon provides: "A judge should accord to every person who is legally interested in a proceeding or his [or her] lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." See also, *Foster v. United States*, 615 A.2d 213, 216 (DC 1992)

131 Rule 3.5 of the Rules of Professional Conduct provides, in pertinent part that "A lawyer shall not... (c) Communicate, either ex parte or which opposing counsel, with a juror or prospective juror after discharge of the jury if: (1) The communication is prohibited by law or court order; (2) The juror or prospective juror has made known to the lawyer a desire not to communicate or (3) The communication involves misrepresentation, coercion, duress or harassment..."

132 713 F.2d 1114 (5th Cir. 1983)

133 *United States v. Harrelson,* 713 F.2d 1114, 1116 (5th Cir. 1983)

The Committee does not believe that a *Harrelson*-type order is necessary for post- trial counsel/juror communications in the routine case and that such an order be issued only in cases that attract publicity or where the press has expressed a serious interest.

Moreover, there are sound reasons to caution counsel to avoid seeking to gain information from jurors aimed at impeaching the verdict by casting doubt on the jury's deliberations, as those are considered sacrosanct.[134]

Taking these cautions into consideration, the Committee is of the view that in civil and criminal cases in the Superior Court, post-trial communications between counsel and jurors who wish to discuss the trial, but without inquiring specifically into the deliberations should be encouraged. In addition, communications between willing jurors and the Court, in the presence of counsel, aimed at determining jurors' perception of their experience and how those experiences could be improved is healthy and should be approved.

134 See. *Tanner v. United States*, 483 US 107, 117 S.Ct. 2739 (1987); *Warger v. Shauers*, 574 US ___, 135 S.Ct. 521 (2014). Also, note that Rule 606(b)(1) of the Federal Rules of Evidence precludes a juror from testifying "about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote or any juror's mental processes concerning the verdict or indictment." Additionally, the Court may not consider an affidavit treating such matters.

25 THE DC JURY PROJECT RECOMMENDS THAT CCE ADVOCATE FOR THE IMPEMENTATION OF THE RECOMMENDATIONS IN THIS REPORT BY CONDUCTING AN EDUCATION CAMPAIGN THAT PUBLICIZES THE REPORT'S FINDINGS, ENCOURAGES CITIZENS TO SERVE ON JURIES, AND IMPROVES THE PERCEPTION AND REALITY OF JURY SERVICE.

The DC Jury Project recommends that upon publication of this report, CCE conduct an education and implementation campaign. The publicity and outreach efforts should focus on at least two areas: juror appreciation and promoting service.

Juror Appreciation

CCE should spearhead a variety of initiatives designed to demonstrate appreciation for jurors and jury service. These efforts could include videos of former jurors, civic and community leaders, and members of the judiciary talking about jury service. Videos would be made available online, on television, at libraries, schools, and other venues. Posters of a similar nature describing the importance of jury service and its connection to our Constitution could also be distributed. Additionally, forums and panel discussions with former jurors should be held. Finally, the publicity and outreach plan should strive to think creatively, and to consider not only raising the profile of jury service in the community but also generating tokens of appreciation for jurors, such as free or discounted meals with proof of service from corporate sponsors.

Promoting Service

CCE should also develop education initiatives designed to raise awareness of the important constitutional and civic nature of jury service. To that end, courts could host open houses and moderated panels regarding jury service, and there could be special programming at schools. Additionally, posters and other materials can be created, such as an "introduction to civic life" fact sheet for graduating high school students.

Social Media

Outreach efforts should make use of social media to promote jury service and raise awareness. Campaigns could feature #JurorVoices, #Iserved, service by celebrities and recognizable public servants, and first-person articles about service.

Strategic Partners

In implementation and education efforts, the assistance of CCE's partners will be essential. CCE should work with the courts, the DC Council, non-profits focused on civics, WMATA, local law schools and universities, pro-jury organizations like Save Our Juries (ABOTA), local schools, the American Bar Association, and others.

Implementation

The DC Jury Project recommends that CCE work with the project Committee and its partners to determine an outreach and community education plan that includes the order and methodology for raising awareness and interest and for implementing any of the Committee's recommendations.

Report Roll-Out Events

The publication of this report should coincide with a roll-out campaign designed to raise awareness of the report's recommendations, encourage discussion of jury service, and generate media coverage of the Committee's work. CCE should organize a media strategy, panel discussions, and events for the roll-out campaign.

ISSUES TO WATCH

This section includes ideas that relate directly to the modern realities of jury service, but about which the Committee is not yet able to make recommendations. These ideas relate to the core concerns of the Committee – expanding the jury pool, making juries more inclusive, and/or making the experience of service more enjoyable – but more information is needed, or the situation is changing and uncertain, or there is some other reason why making a recommendation at this time would be imprudent.

Service by Non-Citizens

Over the last several decades, the immigrant population in the United States has been steadily growing, resulting in an increase in the number of legal non-citizens living in DC and elsewhere. The inclusion of legal permanent residents in the jury pool could make the pool more representative. It is also potentially in line with the District's tradition of inclusiveness in democratic acts, particularly given recent movements relating to voting rights for legal permanent residents and the District's history of allowing people with felony criminal records to vote.[135] In 2013, the California legislature passed a bill that would have allowed legal permanent residents to serve on juries.[136] While the bill was ultimately vetoed by Governor Brown, his veto did not address the substantive arguments put forth by the bill's proponents.[137] However, unlike in California, the number of legal permanent residents living in DC is relatively small. In 2012, the Department of Homeland Security calculated that 2,811 legal permanent residents declared the District of Columbia as their place of residence.[138]

The Committee believes that, given the relatively small number of legal permanent residents in the District, and the Constitutional concerns raised by many Committee members, it would be imprudent to recommend any action on this issue without more study. As the demographics of the District change, the Committee believes that this issue will be worth watching.

Juror Security Line

The Committee has become aware of other jurisdictions that grant jurors access to a special security line or otherwise lets jurors bypass security checks at the courthouse entrance. The Committee agrees that jurors should be afforded such small conveniences, both as a means to make serving more pleasant and to minimize trial delays.

The Committee cannot presently recommend this practice because of the current physical layout of the Superior Court security lines and the inherent difficulties and costs associated with an attempt to re-organize them. The Committee, therefore, does not make any recommendation on this topic presently, but does recommend that this issue not be forgotten as the Courts renovate their facilities or otherwise reassess their security procedures.

Implicit Bias

Implicit bias refers to the positive or negative unconscious racial stereotypes that impact the human decision-making process.[139] Implicit bias is present to some degree in all people, regardless of their individual demographics.[140] These stereotypes are ingrained in people through their everyday lives via media sources,

135 There is a movement in DC and other jurisdictions to grant legal permanent residents the right to vote. http://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rightscontentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6_story.html. Per the DC Code, voting rights are restored upon completion of sentencing requirements. DC Code § 11-1906(B). http://law.justia.com/codes/district-of-columbia/2013/division-ii/title-11/chapter-19/section-11-1906/.

136 CA AB-1401 Jury duty: eligibility.http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1401.

137 The veto message, in nearly its entirety, reads: "Jury service, like voting, is quintessentially a prerogative and responsibility of citizenship. This bill would permit lawful permanent residents who are not citizens to serve on a jury. I don't think that's right." Governor Brown's veto message. http://gov.ca.gov/docs/AB_1401_2013_Veto_Message.pdf.

138 US Department of Homeland Security. 2012 Yearbook of Immigration Statistics. https://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf.

139 Anthony G. Greenwald and Linda Hamilton Krieger. *Implicit Bias: Scientific Foundations.* California Law Review. http://perma.cc/SN25-QZXF.

140 *Id.*

cultural beliefs, and family norms, among other influences.[141] These biases are so automatic that they are activated unconsciously.[142] The Committee recognizes that implicit biases may play a role in jury trials. For example, several studies have shown that criminal defendants with afro-centric facial features generally receive more severe punishments as compared to other criminal defendants.[143] Another study showed that ambiguous actions by African Americans were interpreted more negatively than the same actions by other races, which has implications for juror decision-making.[144]

The Committee believes that to formulate a recommendation on this topic would require more information and time than is presently available. In particular, any recommendation would require a thorough review of the scientific literature on both the phenomenon and potential fixes, neither of which is fully developed at this time.

Group Decision-Making Techniques

Making a decision as a group can be difficult. This is especially true for juries, where the issues being discussed are complicated, the repercussions of the group's decision are serious, and the people conducting the discussion are strangers who are often untrained in decision-making techniques. As such, some social scientists and legal scholars have begun advocating for courts to take a more active role in training jurors about group decision-making techniques.[145] These advocates argue that it is important for jurors to speak about group decision-making strategies in an effort to understand the goals and tendencies of all group members and to establish norms and rules for their discussion. Otherwise, minority views may be un-advanced or even forgotten if not directly addressed.[146] This is especially common in situations where the group never discusses decision-making strategies for the group until a norm has been violated.[147] Scholars have also conducted preliminary research that indicates that courts should encourage jurors to use an evidence-driven approach instead of a verdict-driven approach in deliberations. Evidence-driven deliberations exist when jurors focus on the story of the trial and the best account of facts. Verdict-driven deliberations entail jurors stating their individual verdicts prior to beginning discussion.[148] These studies suggest that an evidence-driven, rather than verdict driven, approach would be more beneficial to trial outcomes because jurors focus on all of the evidence to compile a story.[149] These same studies discovered that most juries conducted verdict-driven deliberations.[150]

At this time, the Committee believes that more study on this topic is needed. There is considerable research into group decision-making techniques in other contexts, but examinations of juries specifically are still preliminary and small in number. The Committee believes that there may be merit to the idea that jurors could benefit from being provided guidance in how to make their decisions, either through the judge, a handout describing decision-making techniques, or some sort of flow chart. However, the Committee believes that research into the best method for providing this guidance is still preliminary, and it would be premature to advocate for a particular method at this time.

141 Northwestern University Law Review. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson.* http://colloquy.law.northwestern.edu/main/2015/02/hidden-racial-bias.html.
142 Isabel Wilkerson. *No, You're Not Imagining It.* https://www.questia.com/read/1P3-3060466141/no-you-re-not-imagining-it (quoting leading implicit bias researcher David R. Williams that "this bias is so automatic that it kicks in before a person is ever aware it exists").
143 Jerry Kang. *Implicit Bias A Primer for Courts.* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.
144 *Id.* at 4.
145 Indiana Law Review. *All Together Now: Using Principles of Group Dynamics to Train Better Jurors.* http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1919&context=facpub; Jerry J. Fang. *12 Confused Men: Using Flowchart Verdict Sheets to Mitigate Inconsistent Civil Verdicts.* Full PDF available upon request; Joan Kessler. *The Social Psychology of Jury Deliberations.* http://joanbkessler.com/images/SOCIAL_PSYCHOLOGY_OF_JURY.PDF.
146 Indiana Law Review. *All Together Now: Using Principles of Group Dynamics to Train Better Jurors.* http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1919&context=facpub
147 *Id.* at 452.
148 National Center for State Courts. *Are Hung Juries a Problem?* http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx.
149 *Id.* at 13.
150 *Id*.

DATA COLLECTION AND METHODOLOGY

Research Design

This report represents the broadest and deepest data collection effort about jury service in DC in decades. The data include surveys of those summoned for jury service, those ordered to show cause for failure to appear, judges, attorneys, and employers. The data also includes roundtable discussions with District and Superior Court judges, focus group discussions with jurors, and observations of voir dire and trial proceedings at the District and Superior Court. Finally, best practices and current procedures were researched through discussions with jury office administrators, attendance at jury conferences, an extensive literature review, and other research activities. The data were collected over a one year period, from July 2014 to July 2015, and build on CCE's and the DC Jury Project Committee's existing knowledge, derived from years of jury reform work and from Committee members' experiences as trial attorneys, judges, consultants, former jurors, and members of the original Jury Project Committee in 1998.

Survey Methodology

The DC Jury Project Committee created nine surveys that were mostly quantitative in nature, but did allow for some open ended answers.

At the District Court, prospective jurors present for voir dire and selected jurors were surveyed in separate surveys, per the Court's request. The Court distributed the surveys at the courthouse once the prospective juror or juror had completely finished their service and were no longer subject to being on call. The Court also placed a link to those surveys on their website. Judges at the District Court were surveyed twice via emailed link, with the second survey as a follow-up containing additional issues raised during DC Jury Project Committee meetings. The District Court provided helpful feedback on the questions used to survey judges, prospective jurors, and jurors. The Court also granted requests to send reminder emails about the survey to judges.

At the Superior Court, those summoned for jury service were surveyed in person by CCE staff and interns. The Court granted a one month period during which CCE conducted the survey.

Judges at the Superior Court were surveyed only once via emailed link. Requests to send a reminder e-mail were declined, and the Court requested that several questions be omitted from the surveys.

In addition, the Superior Court granted a request to survey those appearing at an Order to Show Cause Hearing. CCE staff and interns conducted the survey among hearing attendees once they were released by replicating the procedure described above to survey jurors.

Attorneys were surveyed via emailed link. DC Jury Project Committee members, the CCE Board of Directors, and various bar associations and email list servers were utilized to attain a wide distribution.

Employers were surveyed via emailed link. DC Jury Project Committee members and the CCE Board of Directors were both asked to distribute this survey to their networks. Various human resources associations were also asked, but declined. Several attempts to receive assistance from the DC Chamber of Commerce were similarly unsuccessful.

Focus Groups and Roundtables Methodology

The DC Jury Project Committee convened three juror focus groups over lunch on three separate days, hosted by several Committee members' law firms. The Committee developed several pages of questions on topics of interest to all three Working Groups. A Committee member served as a moderator at each session, with CCE staff on hand to take notes. One session was video recorded, with the consent of the participants. Participants agreed that the Committee could quote them in the report anonymously, but any quotes given with attribution required permission.

Roundtable discussions with judges at the District and Superior Court were arranged with the assistance of the Chief Judges of both Courts and their staffs. As with the

juror focus groups, the Committee developed several pages of questions on topics of interest to all three Working Groups. Two Committee members served as moderators for each session, with CCE staff on hand to take notes. The roundtables were held over lunchtime at both courts, twice at the District Court and once at the Superior Court.

Court Observation Methodology

The Committee created two court observation forms, one for observing voir dire and one for observing a trial. The forms were designed to capture quantitative and qualitative information. Committee members and court administrators provided CCE staff with information on upcoming trials, and a team of student volunteers from George Washington University Law School, the University of the District of Columbia David A. Clarke School of Law, and Howard University Law School, as well as CCE interns and the occasional DC Jury Project Committee member, conducted observations. Observers were instructed to not observe the same proceeding. Observations at the Superior Court were usually arranged by sending a volunteer to the courthouse in the morning to check the trial schedule, as only the criminal calendar is available online, and trials are often rescheduled. The District Court trial schedule is published on-line, but it too is subject to change at the last minute, so volunteers were instructed to check the calendar frequently online and at the courthouse.

Methodological Considerations

The Committee believes that, taken in conjunction with research and personal experiences, it can make generalizeable assumptions about jury service in the District of Columbia from this data, but recognizes that more data would have been useful. In particular, it would have been helpful to have had more time to survey jurors at the Superior Court, where the most jury trials occur. The Committee similarly wishes that it had been able to observe more show cause hearings. The Committee did its best to conduct a broad survey of employers, but recognizes that the responses over-represent the legal industry. Finally, regarding focus groups, roundtable discussions, and court observations, the Committee again believes that these were useful and informative undertakings, but with more time could have perhaps been conducted in greater number and with more participants.

SUMMARY OF DATA COLLECTION

Superior Court Respondents

Jurors and Prospective Jurors: 573
Judges: 17
Order to Show Cause Hearing Attendees: 18

District Court Respondents

Selected Jurors and Prospective Jurors Not Selected during Voir Dire: 66
Judges: 17
Follow Up Survey of Judges Regarding Jurors Asking Questions and Post-Trial Communication: 9
Judge Roundtables: 2

Additional Respondents

Trial Attorneys: 183
DC Area Employers: 72
Juror Focus Groups: 3

Court Observations

Trials: 24
Voir Dire Proceedings: 26

REPRESENTATIVE SURVEY INSTRUMENT

DC Superior Court Jury Service Survey (Combined)

Thank you for taking the time to complete this brief anonymous survey about your experience with jury service in the DC Superior Court. Your response will be collected and analyzed by the Council for Court Excellence (CCE), a 32-year-old DC non-profit that promotes justice system reform.

The CCE is not a government agency and will not share your personal information with anyone.

Name (optional):_____

1. Do you recall your date(s) of service?

❑ Yes (please indicate the dates: _____) ❑ No

2. Using the scale below, please indicate your agreement or disagreement for each statement.

	Completely Agree	Agree	Neither agree/ disagree	Disagree	Completely disagree
I expected jury service to be inconvenient to me	❑	❑	❑	❑	❑
I thought that jury service would be a financial burden	❑	❑	❑	❑	❑
I thought that jury service would interfere with my work	❑	❑	❑	❑	❑
I thought jury service would be boring	❑	❑	❑	❑	❑

3. Does your employer have an established policy for jury service?

❑ Yes ❑ No ❑ Don't know

4. Does your employer continue to pay you while you are on jury duty?

❑ Yes ❑ No ❑ Don't know

5. Were you satisfied with the compensation you received for jury service?

❑ Yes ❑ No

6. How many days did you report to the courthouse? _____

7. How many times were you sent to a courtroom for jury selection? _____

8. When sent to a courtroom, did the judge explain the jury selection process clearly?
(If sent multiple times for jury selection, please indicate your response for each jury selection you attended).

Jury Selection 1 ❑ Yes ❑ No ❑ Don't know/don't recall
Jury Selection 2 ❑ Yes ❑ No ❑ Don't know/don't recall
Jury Selection 3 ❑ Yes ❑ No ❑ Don't know/don't recall

9. Were you in jury selection for a civil or criminal case?

(If sent multiple times, please indicate the number of times for each category).

❑ Criminal _____ ❑ Civil _____ ❑ Don't know

10. Using the scale below, indicate your level of satisfaction or dissatisfaction:

	Completely Satisfied	Satisfied	Neither Satisfied/ dissatisfied	Dissatisfied	Completely Dissatisfied
Staff assistance	❑	❑	❑	❑	❑
Adequate space in juror registration area	❑	❑	❑	❑	❑
Physical comfort of Jurors Lounge	❑	❑	❑	❑	❑
Treatment by court personnel	❑	❑	❑	❑	❑
Online eJuror services system	❑	❑	❑	❑	❑
Juror orientation video	❑	❑	❑	❑	❑
Information on delays and scheduling	❑	❑	❑	❑	❑
Information on transportation, parking, and directions	❑	❑	❑	❑	❑

If you **have not served** on a jury trial, please **SKIP to question #17**.
If you **have served** on a jury trial, please **continue** to answer all questions.

11. The following practices are used by some judges. Did the judge allow jurors to:

Take notes during the trial	❑ Yes	❑ No	❑ Don't know
Submit questions to witnesses during trial	❑ Yes	❑ No	❑ Don't know
Submit questions during deliberation	❑ Yes	❑ No	❑ Don't know

12. During the trial, did the judge tell you what the schedule would be, and to follow that schedule?

❑ Yes ❑ No ❑ Don't know

13. If your jury was having trouble reaching a verdict, did the judge:

❑ Speak to you ❑ Permit the lawyers to restate their closing arguments ❑ Don't know

14. Did the judge speak to you after the jury finished its deliberations?

❑ Yes ❑ No ❑ Don't know

15. Did you have any difficulty:

Understanding the evidence of the case?	❑ Yes	❑ No	❑ Don't know
Understanding instructions by the judge?	❑ Yes	❑ No	❑ Don't know

16. Did the judge tell you what to do if a member of the media contacted you?

❑ Yes ❑ No ❑ Don't know

17. Do you use social media (e.g., Facebook, Twitter, Instagram, LinkedIn, etc.)?

❑ Yes ❑ No

18. If yes, please indicate which social media platforms that you use.

❑ Facebook ❑ Twitter ❑ Instagram ❑ LinkedIn ❑ Other (please specify) _____

19. Using the scale below, indicate your level of agreement or disagreement for each statement.

	Completely Agree	Agree	Neither agree/ disagree	Disagree	Completely disagree
In general, my attitude toward jury service is favorable	❑	❑	❑	❑	❑
The jury system is an efficient process	❑	❑	❑	❑	❑
If summoned in the future, I would be eager to serve	❑	❑	❑	❑	❑
Jury service was inconvenient to me	❑	❑	❑	❑	❑
Jury service was a financial burden for me	❑	❑	❑	❑	❑
Jury service interfered with my work	❑	❑	❑	❑	❑

20. Would you be willing to participate in a focus group led by the Council for Court Excellence (CCE) to discuss your jury experience?

❑ Yes ❑ No

If yes, please provide:

Name _____

Email _____ Phone _____

Demographics (optional)—please check the answer that fits you best.

21. Gender ❑ Male ❑ Female

22. Age

❑ 18-22 ❑ 23-32 ❑ 33-42 ❑ 43-52 ❑ 53-62 ❑ 63-72 ❑ Over 72

23. Marital Status

❑ Single ❑ Married ❑ Divorced ❑ Widowed

24. Ethnicity

❑ Hispanic or Latino ❑ Not Hispanic or Latino

25. Race

❑ American Indian or Alaska Native ❑ Asian ❑ Black or African American
❑ White ❑ Native Hawaiian or Pacific Islander
❑ Other (please specify) _____

26. How many years of school have you completed?

❑ Less than a high school degree ❑ High School degree or GED
❑ One to three years of college ❑ Associate's degree
❑ Bachelor's degree or higher

27. What was your approximate household income in 2013?

❑ Under $16,500 (min. wage of $8.25/hour or less)
❑ $16,501- $30,000 (min. wage to $15/hour)
❑ $30,001- $50,000 (hourly wage from $15 to $25)
❑ $50,001 - $70,000
❑ $70,001 - $120,000
❑ Over $120,000

28. Job Status

- ❑ Employed full-time
- ❑ Employed part-time
- ❑ Self-employed
- ❑ Student
- ❑ Unemployed
- ❑ Retired

For questions, please contact Zachary Zarnow
Phone: 202-785-5917
Email: zarnow@courtexcellence.org

Council for Court Excellence (CCE)
1111 14th Street, NW, Suite 500
Washington, DC 20005

Website: www.courtexcellence.org

SUPERIOR COURT SURVEY RESPONDENTS

DC Superior Court Jurors and Prospective Jurors

Demographics

DEMOGRAPHIC CHARACTERISTICS	TRIAL JURORS	JURY PANEL	JURY POOL
N =	97	408	572
GENDER			
Male	46.4%	35.5%	35.5%
Female	43.3%	51.5%	53.1%
Unknown	10.3%	12.9%	11.2%
AGE			
18-22	6.2%	2.7%	3.1%
23-32	29.9%	26.7%	27.6%
33-42	19.6%	21.1%	20.8%
43-52	15.5%	14.5%	14.5%
53-62	14.4%	16.4%	16.8%
63-72	9.3%	8.3%	7.7%
Over 72	0.0%	1.5%	1.0%
Unknown	6.2%	9.8%	8.4%
MARITAL STATUS			
Single	61.9%	47.1%	49.5%
Married	24.7%	36.5%	35.5%
Divorced	5.2%	4.9%	5.1%
Widowed	2.1%	1.7%	1.6%
Unknown	6.2%	9.8%	8.4%
Ethnicity			
Hispanic/Latino	4.1%	4.2%	4.5%
Not Hispanic/Latino	51.6%	53.9%	55.1%
Unknown	44.3%	41.9%	40.2%
RACE			
White	41.2%	55.4%	55.2%
Native American	0.0%	0.7%	0.9%
Asian	5.2%	2.9%	2.8%
Black	38.1%	23.3%	25.2%
HPI	1.0%	0.5%	0.5%
Other	2.1%	2.7%	2.1%

Unknown	12.4%	14.2%	12.9%
EDUCATION			
Less than HS	3.1%	1.5%	1.6%
HS or GED	12.4%	6.1%	7.0%
1 to 3 Years College	12.4%	7.6%	8.0%
AA/AS Degree	3.1%	2.5%	2.3%
BA/BS or Higher	61.9%	73.0%	73.1%
Unknown	7.2%	9.3%	8.0%
HOUSEHOLD INCOME			
Under $16,500	8.2%	3.9%	4.2%
$16,501 to $30,000	7.2%	4.7%	4.9%
$30,001 to $50,000	17.5%	11.5%	11.7%
$50,001 to $70,000	13.4%	9.1%	10.5%
$70,001 to $120,000	21.6%	21.6%	22.6%
More than $120,000	19.6%	33.3%	32.2%
Unknown	12.4%	15.9%	14.0%
EMPLOYMENT STATUS			
Unemployed	7.2%	5.6%	5.4%
Student	6.2%	4.2%	4.4%
Employed Part time	4.1%	3.7%	4.2%
Employed Fulltime	63.9%	65.7%	65.0%
Self-employed	4.1%	5.6%	6.5%
Retired	7.2%	6.1%	5.9%
Unknown	7.2%	9.1%	8.6%
SOCIAL MEDIA USE	62.8%	74.1%	73.4%

Expectations

	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
I expected jury service to be inconvenient	62.4%	19.8%	17.7%
I thought jury service would be a financial burden	17.3%	19.8%	62.9%
I thought jury service would interfere with work	61.5%	11.5%	26.6%
I thought jury service would be boring	42.8%	25.0%	31.9%

Notes: Compared to persons not selected as trial jurors, persons selected were marginally less likely to agree that jury service would be inconvenient and significantly less likely to agree that it would interfere with work. Otherwise, there was no difference between persons selected and not selected.

Employer Policies (Does your employer have a jury service policy?)

Percent of Respondents Answering "Yes"

	Employment Status		
	Part Time (n=24)	Fulltime (n=371)	Self-Employed (n=37)
Employer has jury service policy	25.0%	79.6%	16.2%
Employer pays for jury service	29.2%	86.8%	16.2%
Satisfied with compensation	37.5%	68.5%	51.4%

Trial Practices

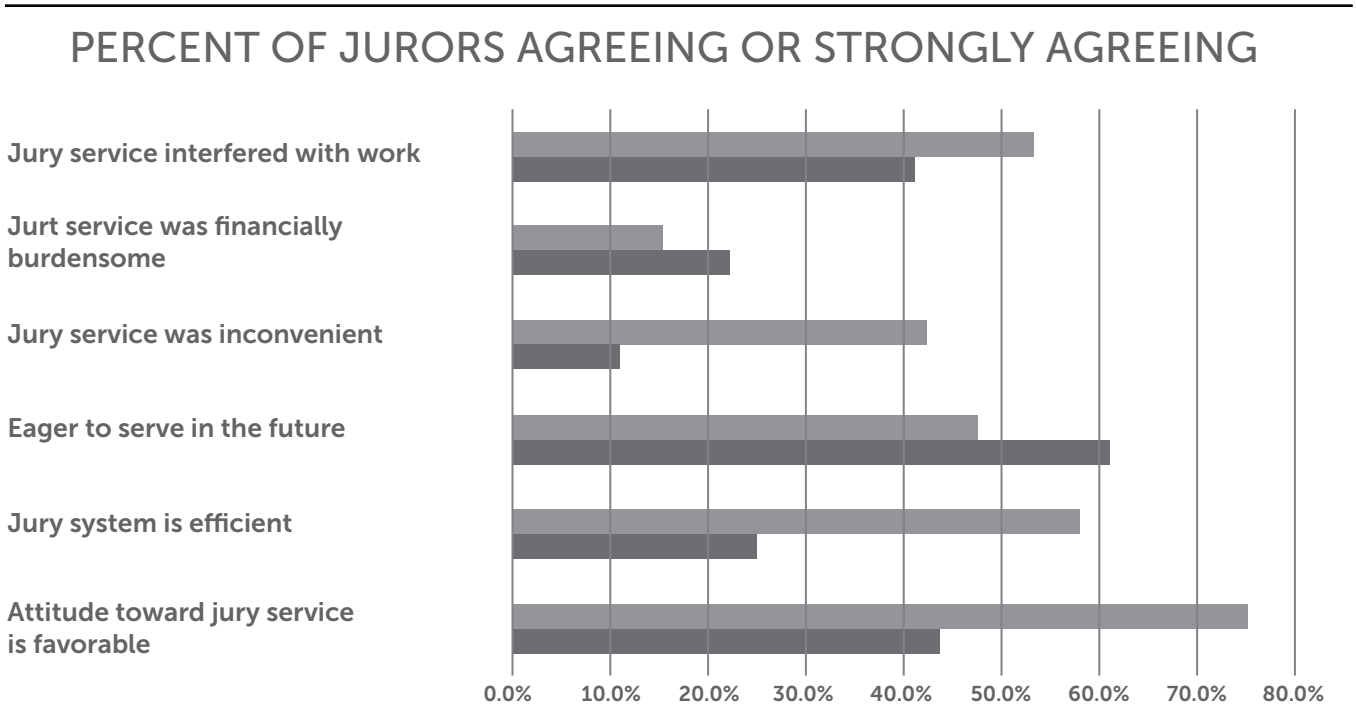
	Civil Trials (n=23)	Criminal Trials (n=66)
Judge permitted juror notetaking	47.8%	53.0%
Judge permitted juror questions to witnesses	4.3%	12.1%
Judge permitted juror questions during deliberations	39.1%	31.8%
Judge followed schedule	56.5%	69.7%
Judge spoke with jury after verdict	30.4%	36.4%
Difficulty with evidence	17.4%	6.1%
Difficulty with instructions	4.3%	9.1%
Guidance on media contact	8.7%	30.3%
Judge assisted with jury deadlock by …		
Speaking to jury	60.9%	34.8%
Permitting lawyers to restate closing arguments	13.0%	6.1%

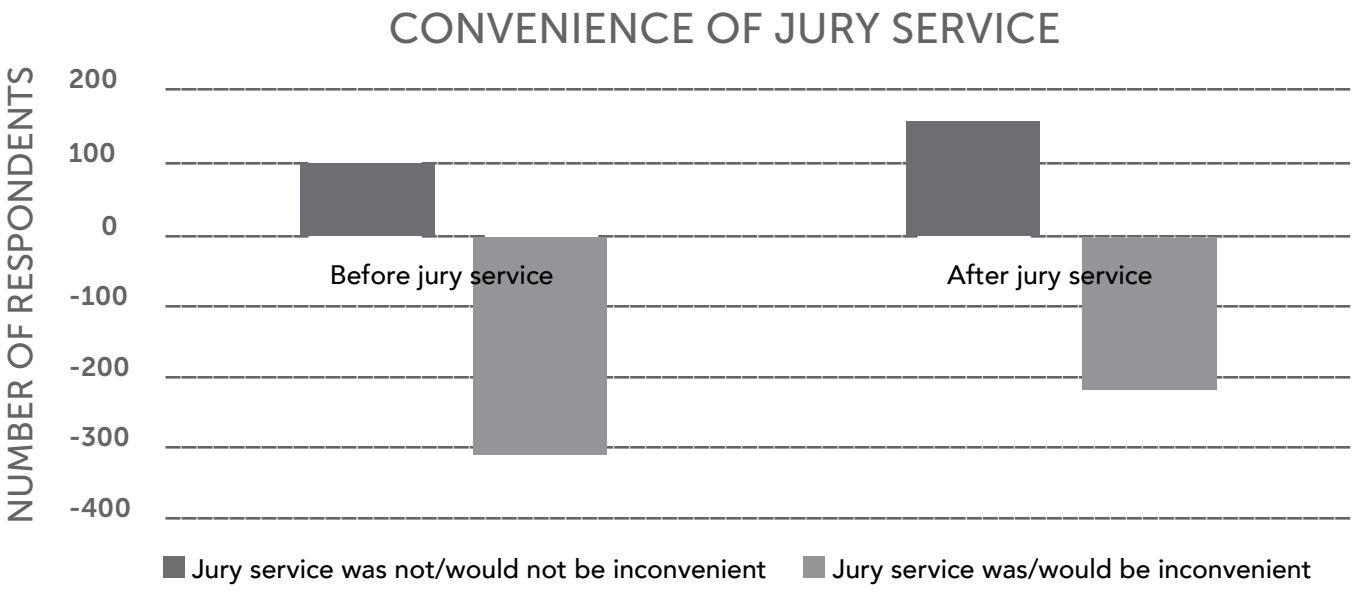
Experience Serving

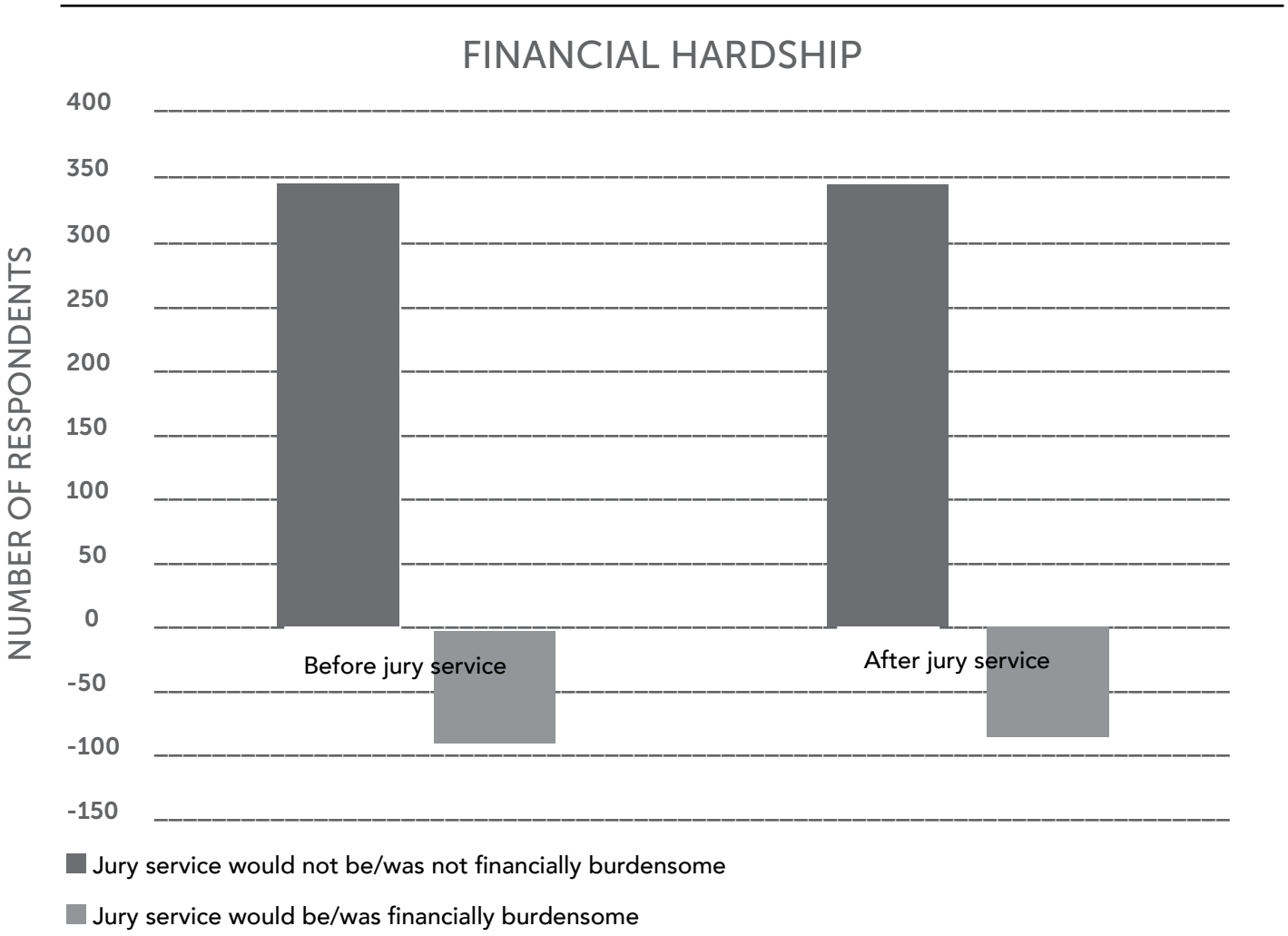
	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
Attitude toward jury service is favorable	75.2%	16.1%	8.4%
Jury system is efficient	58.2%	24.0%	17.8%
Eager to serve in the future	47.6%	34.0%	18.3%
Jury service was inconvenient	42.3%	27.5%	30.2%
Jury service was financially burdensome	15.4%	21.0%	63.6%
Jury service interfered with work	53.5%	15.3%	31.2%

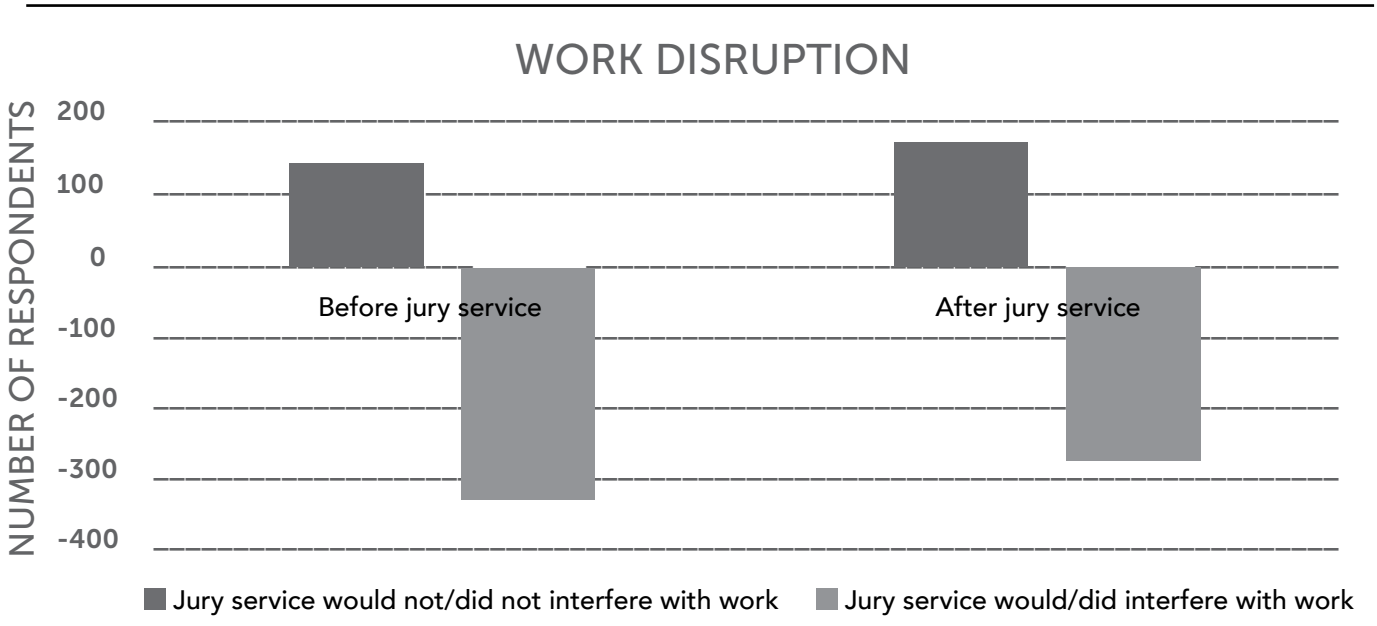
Note: Persons selected as trial jurors were significantly more likely to view the jury system as efficient, and significantly more likely to report that jury service was financially burdensome. There were no other statistically measurable differences between trial jurors and persons not selected as trial jurors.

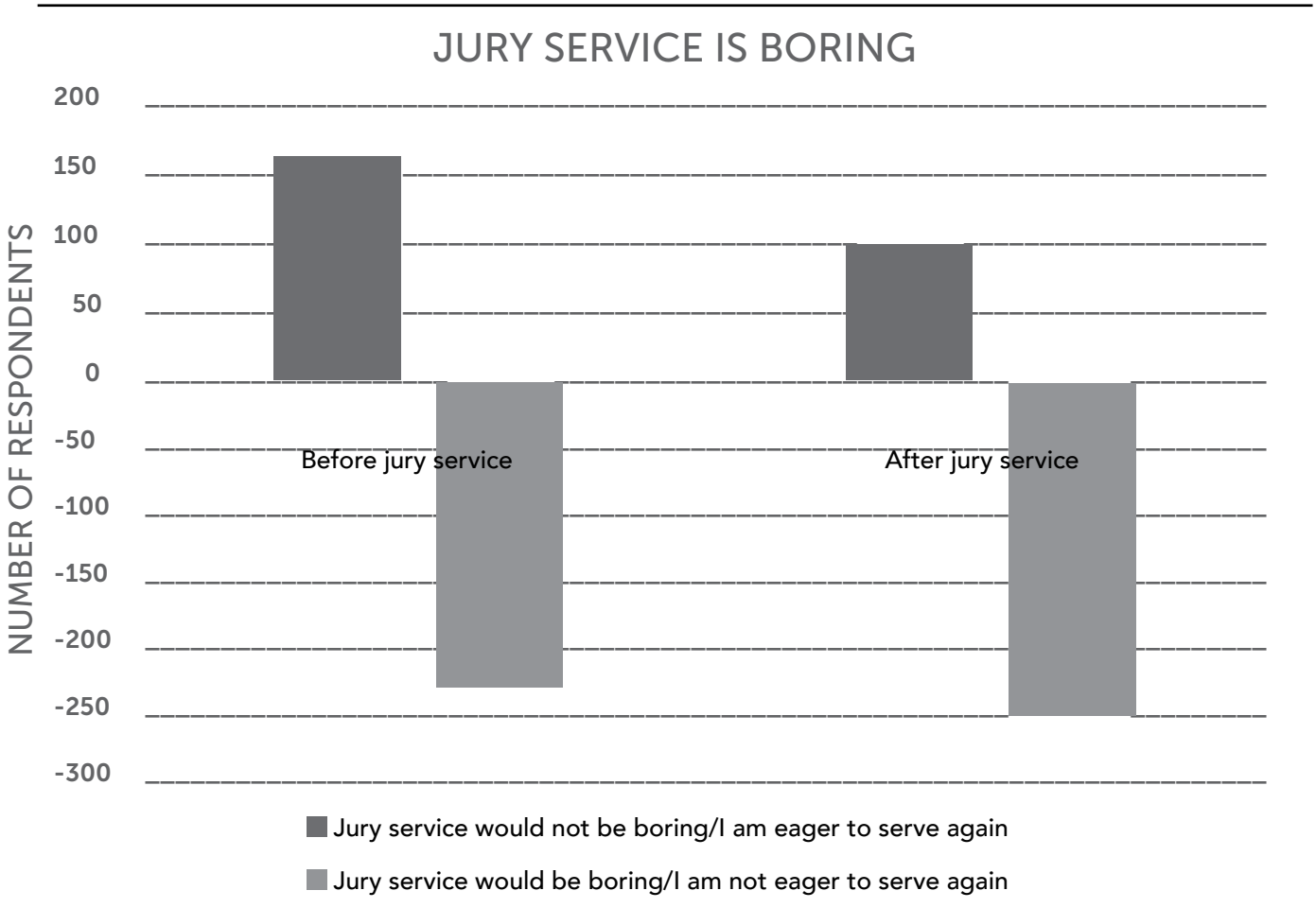
Attitudinal Changes






FINANCIAL HARDSHIP
NUMBER OF RESPONDENTS
400
350
300
250
200
150
100
50
0
-50
-100
-150
Before jury service
After jury service
Jury service would not be/was not financially burdensome
Jury service would be/was financially burdensome


WORK DISRUPTION
NUMBER OF RESPONDENTS
200
100
0
-100
-200
-300
-400
Before jury service
After jury service
Jury service would not/did not interfere with work
Jury service would/did interfere with work


JURY SERVICE IS BORING
NUMBER OF RESPONDENTS
200
150
100
50
0
-50
-100
-150
-200
-250
-300
Before jury service
After jury service
Jury service would not be boring/I am eager to serve again
Jury service would be boring/I am not eager to serve again

Juror Ratings

	Completely satisfied / Satisfied	Neither Satisfied nor Dissatisfied	Dissatisfied / Completely Dissatisfied
Staff assistance	93.10%	4.10%	2.80%
Juror registration area	90.8%	5.5%	3.7%
Jurors' Lounge	81.6%	10.6%	7.8%
Treatment by court personnel	94.4%	3.7%	1.9%
Online eJuror system	71.4%	22.8%	5.8%
Orientation video	71.1%	21.2%	7.5%
Information on delays/scheduling	74.2%	21.9%	4.0%
Information on transportation/parking and directions	75.1%	20.7%	4.3%

Note: no difference in satisfaction rates based on whether respondent was sent to a courtroom for voir dire or whether the respondent was selected as a trial juror.

Superior Court Judges

Please indicate whether the following jury practices were used in your last trial:		
Answer Options	Response Percent	Response Count
Jurors were provided with note-taking materials by the court	93.8%	15
Jurors were provided with exhibit notebooks containing descriptions of trial exhibits	18.8%	3
Jurors were permitted to ask questions of witnesses	25.0%	4
Jurors were given a written copy of the jury instructions	93.8%	15
answered question		16
skipped question		1

Superior Court Order to Show Cause Hearing Participants

Your feelings toward attendance: Why did you miss jury service?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	22 Other	7	38.9	38.9	38.9
	7 Too busy at work	2	11.1	11.1	50.0
	9 Personal illness	2	11.1	11.1	61.1
	2 Forgot	1	5.6	5.6	66.7
	4 Family illness	1	5.6	5.6	72.2
	10 Looking for work	1	5.6	5.6	77.8
	11 Lack of child care	1	5.6	5.6	83.3
	14 Lack of transportation	1	5.6	5.6	88.9
	17 Unaware of responsibilities	1	5.6	5.6	94.4
	21 More than one reason	1	5.6	5.6	100.0
	Total	18	100.0	100.0	

Your feelings toward attendance: Comments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid		10	55.6	55.6	55.6
	"I Forgot"	1	5.6	5.6	61.1
	"Rescheduled - Who arrived was not on list"	1	5.6	5.6	66.7
	"School"	1	5.6	5.6	72.2
	"Tried to defer. Told I couldn't until I was accepted	1	5.6	5.6	77.8
	Change of Address	1	5.6	5.6	83.3
	Didn't Receive Notice	1	5.6	5.6	88.9
	Maternity Leave - Breastfeeding	1	5.6	5.6	94.4
	Misinterpreted Summons	1	5.6	5.6	100.0
	Total	18	100.0	100.0	

Order to Show Cause Hearing participants were more likely than surveyed Superior Court jurors to say that jury service interfered with work or was inconvenient, and they were less likely to say that they were eager to serve in the future. However, they were also more likely to say that jury service was efficient, that they had a favorable attitude toward jury service, and that they were less likely to say that jury service was financially burdensome. These findings are surprising, but given the small sample size of Order to Show Cause Hearing participants these data might just reflect the idiosyncratic views of the respondents.

US DISTRICT COURT FOR DC

Selected Jurors and Prospective Jurors Not Selected during Voir Dire

Demographics

DEMOGRAPHIC CHARACTERISTICS	TRIAL JURORS
N =	66
GENDER	
Male	30.3%
Female	39.1%
Unknown	30.3%
AGE	
18-22	0.0%
23-32	12.1%
33-42	16.7%
43-52	15.2%
53-62	12.1%
63-72	10.6%
Over 72	3.0%
Unknown	30.3%
MARITAL STATUS	
Single	28.8%
Married	28.8%
Divorced	6.1%
Widowed	1.5%
Unknown	34.8%
ETHNICITY	
Hispanic/Latino	4.5%
Not Hispanic/Latino	40.9%
Unknown	54.5%
RACE	
White	27.3%
Native American	0.0%
Asian	6.1%
Black	28.8%
HPI	1.8%
Other	3.0%
Unknown	33.3%
EDUCATION	
Less than HS	0.0%
HS or GED	6.1%
1 to 3 Years College	6.1%
AA/AS Degree	4.5%
BA/BS or Higher	51.5%
Unknown	30.3%
HOUSEHOLD INCOME	
Under $16,500	1.5%
$16,501 to $30,000	3.0%
$30,001 to $50,000	7.6%
$50,001 to $70,000	12.1%
$70,001 to $120,000	16.7%
More than $120,000	21.2%
Unknown	37.9%
EMPLOYMENT STATUS	
Unemployed	1.5%
Student	0.0%
Employed Part time	1.5%
Employed Fulltime	53.0%
Self-employed	0.0%
Retired	10.6%
Unknown	33.3%
SOCIAL MEDIA USE	62.8%

Expectations

	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
I expected jury service to be inconvenient	51.6%	27.4%	20.9%
I thought jury service would be a financial burden	12.9%	19.4%	67.7%
I thought jury service would interfere with work	54.8%	19.4%	25.8%
I thought jury service would be boring	22.6%	32.3%	45.1%

Employer Policies

Percent of Respondents Answering "Yes"

	Employment Status	
	Part Time (n=1)	Fulltime (n=29)
Employer has jury service policy	0.0%	71.4%
Employer pays for jury service	0.0%	62.9%
Satisfied with compensation	100.0%	77.1%

Service Days

NUMBER OF DAYS REPORTING (N=66)	
One	9.1%
Two	0.0%
Three to five	39.4%
More than 5	45.4%
Unknown	6.1%

NUMBER OF COURTROOMS FOR JURY SELECTION (N=66)	
None	4.5%
One	80.3%
Two	4.5%
Three to five	3.0%
More than 5	1.5%
Unknown	6.1%

CASE TYPES (N=406)	
Civil	63.6%
Criminal	28.8%
Don't Know	7.6%

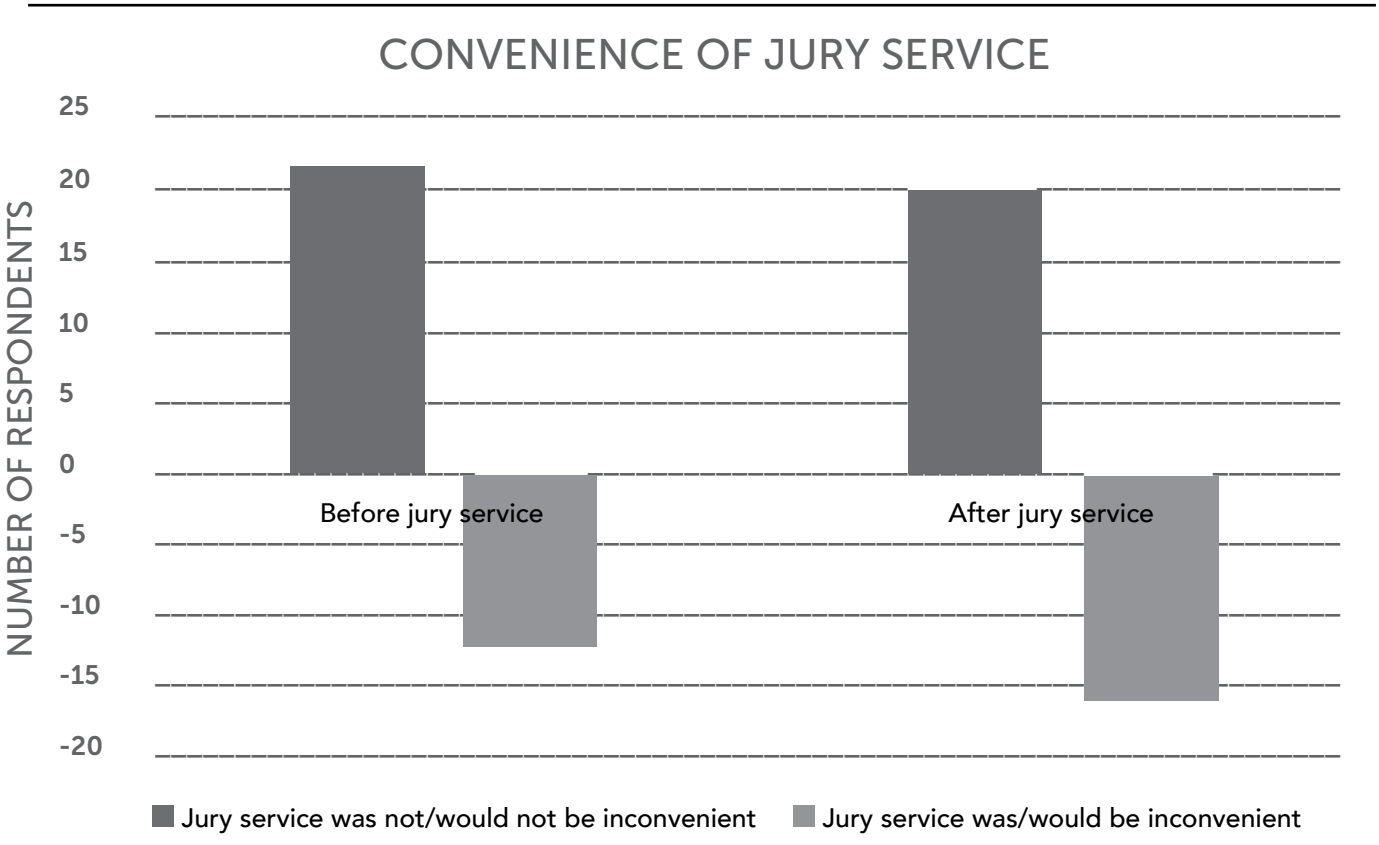
Trial Practices

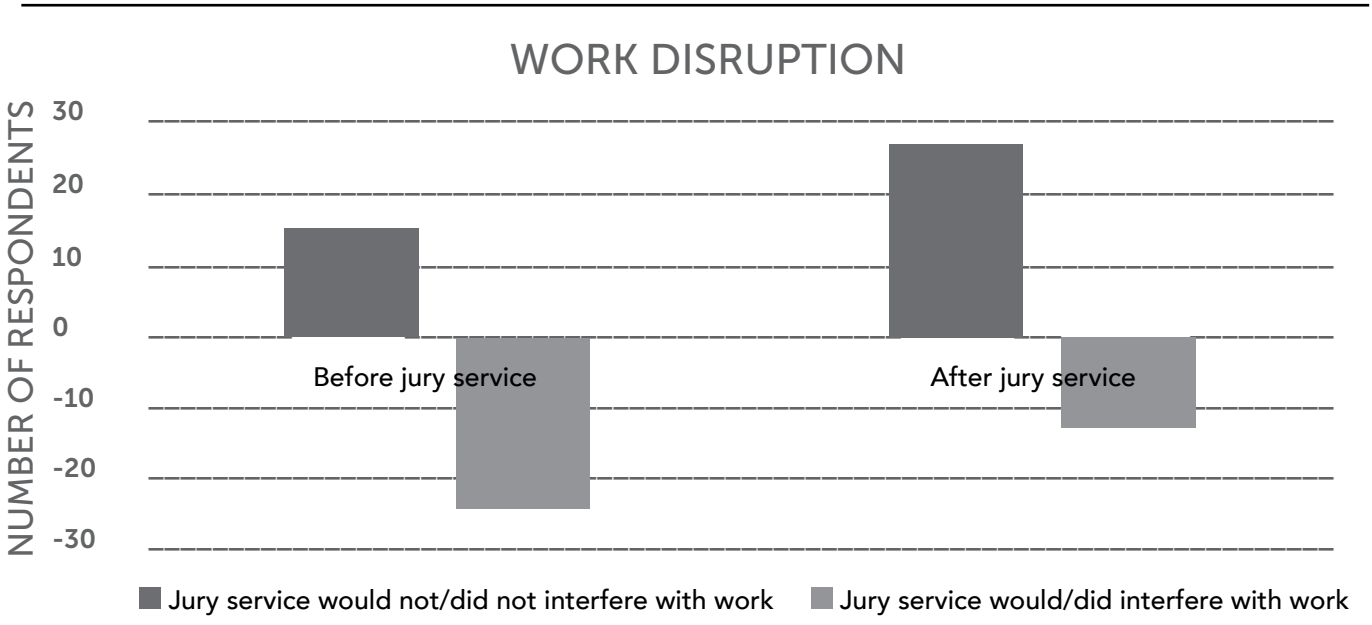
	Civil Trials (n=42)	Criminal Trials (n=19)
Judge permitted juror notetaking	69.0%	100.0%
Judge permitted juror questions to witnesses	11.1%	7.1%
Judge permitted juror questions during deliberations	64.3%	78.9%
Judge followed schedule	78.6%	94.7%
Judge spoke with jury after verdict	66.7%	89.5%
Difficulty with evidence	23.8%	10.5%
Difficulty with instructions	7.1%	15.8%
Guidance on media contact	33.3%	78.9%
Judge assisted with jury deadlock by …		
Speaking to jury	11.9%	63.2%
Permitting lawyers to restate closing arguments	4.8%	0.0%

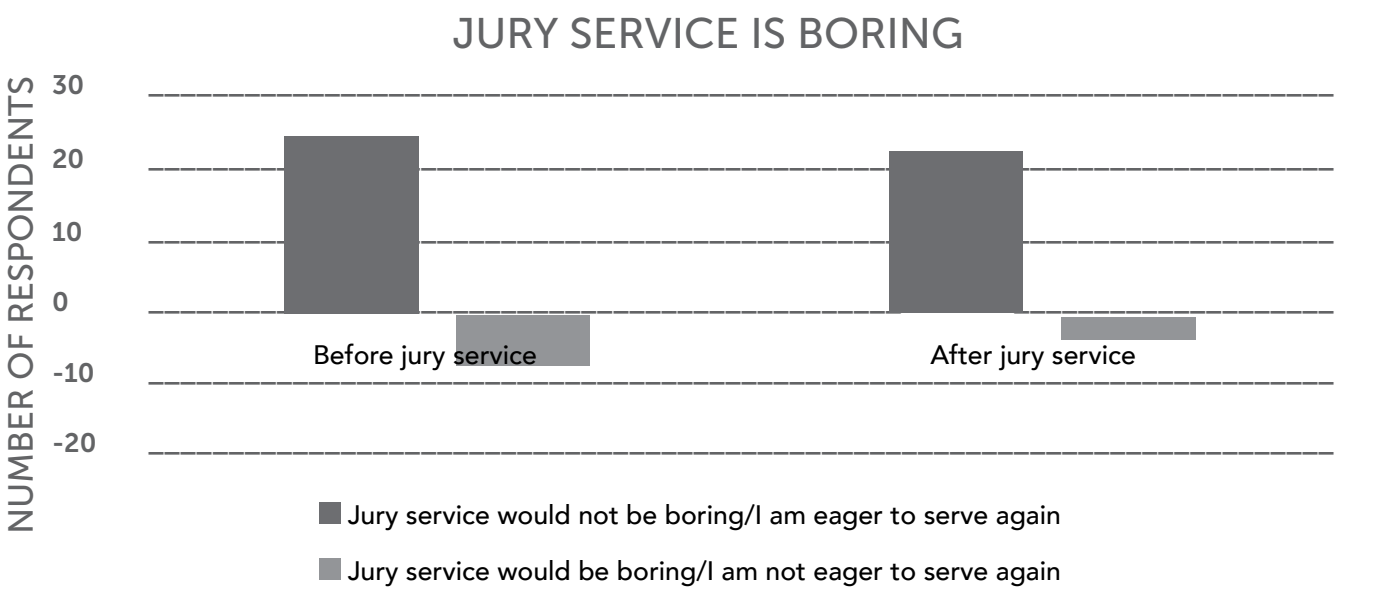
Experience

	Completely Agree / Agree	Neutral	Disagree / Completely Disagree
Attitude toward jury service is favorable	95.7%	4.3%	0.0%
Jury system is efficient	72.3%	19.1%	8.5%
Eager to serve in the future	52.9%	34.0%	12.8%
Jury service was inconvenient	46.8%	19.1%	34.0%
Jury service was financially burdensome	8.5%	12.8%	78.7%
Jury service interfered with work	58.7%	10.9%	30.4%

Attitudinal Changes




WORK DISRUPTION
NUMBER OF RESPONDENTS
30
20
10
0
-10
-20
-30
Before jury service
After jury service
Jury service would not/did not interfere with work
Jury service would/did interfere with work


JURY SERVICE IS BORING
NUMBER OF RESPONDENTS
30
20
10
0
-10
-20
Before jury service
After jury service
Jury service would not be boring/I am eager to serve again
Jury service would be boring/I am not eager to serve again

District Court Judges

Would you say the jury in your last jury trial was:

Answer Options	Completely Agree	Agree	Neither agree/ disagree	Disagree	Completely disagree	Response Count
Highly engaged and focused during the trial	13	4	0	0	0	17
Able to understand the facts in the case	14	3	0	0	0	17
Able to understand the law in the case	12	5	0	0	0	17
					answered question	17
					skipped question	0

Please indicate whether the following jury practices were used in your last trial:

Answer Options	Response Percent	Response Count
Jurors were provided with note-taking materials by the court	100.0%	17
Jurors were provided with exhibit notebooks containing descriptions of trial exhibits	17.6%	3
Jurors were permitted to ask questions of witnesses	17.6%	3
Jurors were given a written copy of the jury instructions	94.1%	16
	answered question	17
	skipped question	0

Have you experienced jurors who used technology, including social media (e.g., Facebook, Twitter, Instagram, etc.), in an unauthorized way to:

Answer Options	Yes	No	Don't Know	Response Count
Seek out information about the case or its elements?	8	8	1	17
Disclose information about the case or the juror's view on the case prior to the verdict?	1	12	2	15
			answered question	17
			skipped question	0

Did you specifically discuss the unauthorized use of technology and social media with jurors in your last jury trial?		
Answer Options	Response Percent	Response Count
Yes	100.0%	17
No	0.0%	0
Don't Know	0.0%	0
	answered question	17
	skipped question	0

Please rate the importance of the following proposals to increase juror turnout and satisfaction:

Answer Options	Most important	Important	Neither un/ important	Unimportant	Least important	Response Count
Improving child care at the courthouse	3	4	2	1	1	11
Raising juror pay	4	2	5	0	0	11
Raising the transportation allowance	3	6	2	0	0	11
Improving facilities for jurors	2	2	4	3	0	11
Reducing the number of jurors who arrive for service	3	1	4	2	0	10
Improving the ability of jurors to schedule their jury duty	4	7	1	0	0	12
Increasing the amount of information provided to jurors when called for service	3	5	4	0	0	12
Creating a smartphone app to give information to jurors prior to their service	3	3	5	1	0	12
Launching a campaign promoting jury service	4	2	4	0	0	10
Launching a jury appreciation advertising campaign	4	4	2	1	0	11
Increasing enforcement against jurors who ignore summons	3	4	1	2	0	10
Encouraging employers to adopt more jury-friendly policies	5	8	0	0	0	13
					answered question	13
					skipped question	4

Follow-up Survey of District Court Judges Regarding Jurors Asking Questions and Post-Trial Communications

Please indicate whether you permit jurors to submit questions to the court to ask witnesses:		
Answer Options	Response Percent	Response Count
Only in civil trials	11.1%	1
Only in criminal trials	0.0%	0
In both civil and criminal trials	11.1%	1
I do not permit jurors to submit questions	44.4%	4
Comments?	33.3%	3
	answered question	9
	skipped question	0

When you permit jurors to submit questions do you give the instruction in the "red book":		
Answer Options	Response Percent	Response Count
In criminal cases only	0.0%	0
In civil cases only	25.0%	2
In both civil and criminal cases	0.0%	0
I do not permit jurors to submit questions	62.5%	5
Other (please specify)	12.5%	1
	answered question	8
	skipped question	1

Consistent with your answers to the previous questions, when you do permit jurors to submit questions, do you do so:		
Answer Options	Response Percent	Response Count
Routinely	0.0%	0
Only when asked to do so by a party to the case	12.5%	1
Only when asked by the jurors if they are permitted to ask questions	0.0%	0
Only in complex cases	12.5%	1
Not applicable (I never allow jurors to ask questions)	62.5%	5
Other (please specify)	12.5%	1
	answered question	8
	skipped question	1

In your experience, has permitting jurors to submit questions aided one side in litigation more consistently than the other? (select all that apply)

Answer Options	Response Percent	Response Count
In criminal cases it more consistently aides the prosecution	0.0%	0
In criminal cases it more consistently aides the defendant	0.0%	0
In civil cases it more consistently aides the plaintiff	12.5%	1
In civil cases it more consistently aides the defendant	0.0%	0
Neither side is more consistently aided in criminal cases	12.5%	1
Neither side is more consistently aided in civil cases	25.0%	2
Not applicable (I do not allow jurors to ask questions)	62.5%	5
Other (please specify)	0.0%	0
	answered question	8
	skipped question	1

Do you typically grant requests by counsel to engage in post-trial communications with jurors?

Answer Options	Response Percent	Response Count
I typically grant such requests	44.4%	4
I typically do not grant such requests	11.1%	1
Other (please specify)	44.4%	4
	answered question	9
	skipped question	0

When you do grant requests for post-trial communications, do you:

Answer Options	Response Percent	Response Count
Observe but not participate in the discussion	0.0%	0
Observe and participate in the discussion	33.3%	3
Not observe, but require the presence of a clerk or court employee	55.6%	5
Not observe	11.1%	1
Other (please specify)	22.2%	2
	answered question	9
	skipped question	0

Do you believe the District Court rule requiring Court approval for such communications should continue?

Answer Options	Response Percent	Response Count
Yes	100.0%	9
No	0.0%	0
Comments?		2
	answered question	9
	skipped question	0

Attorneys

Percent of respondents who indicated that …	
Jurors were given notetaking materials	67%
Jurors were given an notebook	18%
Jurors were permitted to ask questions of witnesses	12%
Jurors were given written jury instructions	45%

Jurors in civil trials were marginally more likely to be given notetaking materials, and significantly more likely to be given copies of jury instructions

Jurors who were given notetaking materials were marginally more likely to be perceived as engaged and focused during the trial

Jurors who were given written jury instructions were significantly more likely to be perceived as engaged and focused during the trial.

NOTE: No effect of decision-making aids on perceptions of juror comprehension of the facts or the law

Percent of respondents who reported that …	Yes	No	DK
I have experienced jurors using technology to research the case	9%	31%	60%
I have experienced jurors using technology to disclose information about the case	3%	34%	62%
Jurors were instructed about inappropriate use of technology in my last jury trial	61%	16%	22%

No difference based on respondent court type.

Compared to respondents in civil trials, respondents in criminal trials were significantly more likely to report that jurors were instructed about inappropriate use of technology in their last jury trial.

Criminal defense attorneys were the most likely to report that they had experienced jurors using technology inappropriately (42% research, 27% disclosing information); all other respondent types were 20% or lower .

	No	Yes
Jury reflected demographic diversity of DC	44%	55%

Respondents who practice in USDC were significantly more likely than respondents who practice in DCSC to report that the jury venire reflected the demographic diversity of DC.

There was no difference in respondent reports based on trial type.

Average rating of importance of jury improvement efforts	
Encourage juror-friendly employment policies	4.12
Improving juror scheduling ability	3.87
Enforce jury summons (FTA follow up)	3.60
Juror compensation	3.57
Transportation allowance	3.57
Launch a public education campaign	3.55
Increased information about jury service	3.43
Childcare	3.36
Develop a smartphone app for jury service	3.26
Launch a juror appreciation campaign	3.20
Juror facilities	3.16
Reducing number of jurors reporting	2.95

Respondents who practice in USDC rated the importance of reducing the number of jurors who report for service and increasing the amount of information about jury service marginally higher, and rated increasing the transportation allowance marginally lower, than respondents who practice in DCSC.

Civil attorneys were the least likely to rate childcare as an important effort; judges were the most likely to rate FTA enforcement as an important effort.

EMPLOYERS

What type of employer are you?

Answer Options	Response Percent	Response Count
Food Service	2.8%	2
Non-profit	30.6%	22
Government	5.6%	4
Retail	1.4%	1
Health Care	1.4%	1
Legal	34.7%	25
Utility	0.0%	0
Construction	0.0%	0
Manufacturing	0.0%	0
Transportation	1.4%	1
Finance/Banking	1.4%	1
Insurance	2.8%	2
Real Estate	0.0%	0
Science/Technology	1.4%	1
Education	4.2%	3
Arts/Entertainment	0.0%	0
Agriculture	0.0%	0
Other (please specify)	12.5%	9
	answered question	72
	skipped question	0

How many employees do you have?

Answer Options	Response Percent	Response Count
1-5	16.7%	12
5-10	8.3%	6
10-15	5.6%	4
15-20	2.8%	2
20-30	0.0%	0
30-40	2.8%	2
40-50	4.2%	3
50-60	1.4%	1
60-70	2.8%	2
70-80	1.4%	1
80-90	1.4%	1
90-100	2.8%	2
100-200	11.1%	8
200-400	9.7%	7
≥400	0.0%	0
≥500	0.0%	0
≥700	5.6%	4
≥1,000	23.6%	17
	answered question	72
	skipped question	0

Do you have an established policy regarding employees summoned for jury duty?

Answer Options	Response Percent	Response Count
Yes	88.4%	61
No	8.7%	6
Don't Know	2.9%	2
	answered question	69
	skipped question	3

How do you inform employees about the jury duty policy?

Answer Options	Response Percent	Response Count
Employee handbook	63.8%	44
New-employee orientation	5.8%	4
Upon request by employee	10.1%	7
Other (please specify)	20.3%	14
	answered question	69
	skipped question	3

Which classifications of employees are compensated for days absent from work for jury duty?

Answer Options	Response Percent	Response Count
All	81.7%	49
Full-time salaried	10.0%	6
Full-time hourly	0.0%	0
Part-time hourly	0.0%	0
Part-time salaried	0.0%	0
Other (please specify)	8.3%	5
	answered question	60
	skipped question	12

What portion of employees' regular wages does the jury duty policy cover for days absent?

Answer Options	Response Percent	Response Count
None	4.6%	3
Half	1.5%	1
Full	80.0%	52
Other (please specify)	13.8%	9
	answered question	65
	skipped question	7

Are employees required to forfeit to the company any compensation received from the Court for jury service?

Answer Options	Response Percent	Response Count
Yes	34.4%	21
No	65.6%	40
If yes, please describe what percentage and any exceptions		12
	answered question	61
	skipped question	11

How many days will employees be paid while they are absent for jury duty?

Answer Options	Response Percent	Response Count
None	1.5%	1
1	4.6%	3
2	1.5%	1
3	1.5%	1
4	3.1%	2
5	6.2%	4
More than five (please specify)	81.5%	53
	answered question	65
	skipped question	7

Do you require employees to provide proof that they were summoned for jury duty?

Answer Options	Response Percent	Response Count
Yes	81.5%	53
No	10.8%	7
Don't know	7.7%	5
	answered question	65
	skipped question	7

How do you categorize days employees are absent for jury duty?

Answer Options	Response Percent	Response Count
Unpaid vacation time	0.0%	0
Paid vacation time	3.1%	2
Administrative leave	44.6%	29
Holiday	0.0%	0
Sick leave	0.0%	0
Other (please specify)	52.3%	34
	answered question	65
	skipped question	7

Court Observations

Findings from Voir Dire Observations

Court observers watched 26 jury selections, four in the US District Court and 22 in the DC Superior Court. Twelve of the trials were criminal trials; 14 were civil trials. The average length of jury selection was just under 2 hours for civil trials (112 minutes), but nearly 3.5 hours for criminal trials (209 minutes). This was a statistically significant difference (F=8.021, p=.012). The longest jury selection recorded was nearly 5 hours (285 minutes) for two cases (one civil cases in the District Court, one criminal case in the Superior Court).

The data included information 10 cases about the amount of time that passed from when the jury panel left the jury assembly room to when jury selection officially began in the courtroom. Fifty percent of the jury selections began 20 minutes or less after the jury panel left the jury assembly room in the courthouse. Only 2 cases began more than 30 minutes later (35 minutes, and 60 minutes, respectively).

The court observers took note of the apparent gender, race, and ethnicity of jurors on the jury panels. Although not generally the most accurate method for assessing demographic identification, observers did not have access to demographic information recorded in the courts' jury management systems. Table 1 shows the average demographic composition of the jury pools based on those observations. Jury panels in the US District Court had a much greater proportion of women compared to men (61% versus 39%) while the gender breakdown was approximately equal in the DC Superior Court. The difference in gender breakdown for the two courts was statistically significant. Jury panels in the DC Superior Court had marginally greater proportions of white jurors, but it is unknown whether this is an actual difference or resulted from errors on the part of the courtroom observers. No other statistically significant differences were observed for other races/ethnicities.

Table 1: Demographic Composition of Jury Panels

	USDC	DCSC	
Male	39%	51%	**
Female	61%	49%	**
White	52%	62%	*
Black	38%	31%	
Asian	4%	3%	
Other	0%	2%	
Hispanic	5%	3%	

* $p < .1$
** $p < .05$

The vast majority of judges (88%) in these trials adequately explained the jury selection process.[1] Table 2 describes the observers' assessments of courtroom management during jury selection. Judges in both courts were rated very highly (generally good or excellent) on all measures. Although observers rated the US District Court somewhat higher, only the assessments of the explanation of rules and procedures was marginally different between the two courts; differences for all other assessments were not statistically significant.

1 Only three observers reported that the judge did not explain voir dire. All of these cases were criminal trials in the DC Superior Court.

Table 2: Observer Assessments of Voir Dire Management
(mean rating on a scale of 1-5, with 5 being highest)

	USDC	DCSC	
Control of Courtroom	5.0	4.7	
Time Management	4.5	4.2	
Politeness	5.0	4.5	
Explanation of Rules/Procedures	5.0	4.3	*

$p < .1$

In 23 of the 26 trials, the judge summarized the case for the jurors at the beginning of jury selection; this information was missing for the remaining three trials. Most judges provided paper and writing utensils for jurors to use during voir dire, and approximately two-thirds (69%) provided index cards for jurors to signal affirmative answers to questions. Very few judges used preprinted forms, juror questionnaires, or electronic aids during jury selection. Table 3 summarizes the materials provided to jurors for conducting voir dire.

Table 3: Proportion of trials in which materials were provided to jurors for voir dire

Paper	81%
Writing utensils	89%
Index cards	69%
Forms	12%
Questionnaires	15%
Electronic aids	4%

In both courts, judge-conducted voir dire dominated the jury selection process (81% of trials). Most of the voir dire questions were delivered orally (85%). Two-thirds of the jurors (69%) responded in a bench conference and slightly more than one-quarter (27%) responded orally. In a small proportion of trials, judges asked prospective jurors to write their answers on index cards, which were then shared with the judge and attorneys during bench conferences.

When bench conferences were conducted, two-thirds of judges (69%) used noise machines to mask the conversation from the public, and more than half (55%) provided headphones to defendants to be able to listen to the bench conferences. At the conclusion of voir dire, 58% of judges thanked the jurors selected for trial, and 62% thanked the jurors who were not selected.

Findings from Trial Observations

Court observers watched 24 trials, five in the US District Court and 19 in the DC Superior Court. Sixteen of the trials were criminal trials; eight were civil trials. The average trial length was 3 days for both civil and criminal trials; the longest trial was 8 days (criminal trial in the DC Superior Court).

Table 4 shows the demographic composition of the impaneled juries. Like the jury pools from which they were selected, the juries in the US District Court have a much greater gender imbalance than those of the DC Superior Court. Interestingly, Hispanic representation in the District Court juries is considerably greater (13%) than that in the jury pools from which they were selected (5%). In the DC Superior Court, the racial demographics of the impaneled juries are considerably close to that of the local community than would be expected given the demographics of the jury pools. However, this is a small sample of trials and may not reflect the demographic composition of most juries in these courts.

Table 4: Demographic Composition of Juries

	USDC	DCSC	
Male	36%	54%	**
Female	64%	46%	**
White	36%	47%	
Black	31%	38%	
Asian	5%	2%	
Other	3%	1%	
Hispanic	13%	2%	***

* $p < .1$
** $p < .05$
*** $p < .01$

Table 5 shows the proportion of trials in which various jury trial innovations were employed. The US District Court appears to be more consistent across trials concerning these procedures than the DC Superior Court, but there was no statistically significant difference in the use of these procedures.

Table 5: Trial Procedures

	USDC	DCSC
Judge explained voir dire	100%	82%
Judge followed trial schedule	100%	88%
Jurors were given notetaking materials	100%	100%
Jurors were permitted to take notes	100%	100%
Juror questions to witnesses permitted	0%	26%
Juror questions during deliberations permitted	50%	50%
Judge gave interim summations	100%	89%
Attorneys gave interim summations	50%	65%
Written copies of jury instructions	75%	53%
Copies of witness photographs	0%	6%
Electronic exhibits displayed	100%	95%
Electronic exhibits available during deliberations	0%	0%

The US District Court was also consistent in the use of admonitions concerning juror use of social media, repeating the admonition periodically during the trial. The DC Superior Court, in contrast gave the admonition in less than two-thirds of the trials, usually at the beginning of the trial and, in half the trials, at the end of the trial. See Table 6.

Table 6: Social Media Admonitions

	USDC	DCSC	
Social media admonition given	100%	58%	*
beginning of trial	100%	61%	
during trial	100%	28%	***
end of trial	100%	50%	
compliance confirmation	0%	12%	

* $p < .1$
** $p < .05$
*** $p < .01$

Overall, observers gave judges in both courts relatively high ratings concerning trial management practices. See Table 7.

Table 7: Observer Assessments of Trial Management (mean rating on a scale of 1-5, with 5 being highest)

	USDC	DCSC	
Control of Courtroom	5.0	4.7	
Time Management	5.0	4.5	*
Politeness	4.6	4.6	
Explanation of Rules/Procedures	4.2	4.2	

$p < .1$

HELPFUL RESOURCES

ORGANIZATIONS

National Center for State Courts (NCSC)
http://www.ncsc.org/

American Board of Trial Advocates (ABOTA)
https://www.abota.org/

American Bar Association
http://www.americanbar.org/aba.html

American Judicature Society
https://www.ajs.org

PUBLICATIONS

"Juries for the Year 2000 and Beyond"
Council for Court Excellence
District of Columbia Jury Project
http://www.courtexcellence.org/uploads/publications/Juries2000.pdf

"Short, Summary and Expedited: The Evolution of Civil Jury Trials"
National Center for State Courts
http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx

"The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report"
National Center for State Courts
http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx

Voir Dire Magazine
American Board of Trial Advocates
https://www.abota.org/index.cfm?pg=voirdire

"Be Cautious of the Quiet Ones"
Gregory E. Mize
Voir Dire Magazine
http://www.thefederation.org/documents/36%20-%20Mize4.pdf

"The Exclusion of Felons from Jury Service"
Brian C. Kalt
American University Law Review
http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1090&context=aulr

"Principles for Juries and Jury Trials"
American Bar Association
http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf

"Dialogue on the American Jury: We the People in Action"
American Bar Association
http://www.americanbar.org/groups/judicial/american_jury/resources/dialogue_on_the_american_jury.html

"Why Jury Duty Matters: A Citizen's Guide to Constitutional Action"
Andrew Ferguson

"Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors"
Behavioral Sciences and the Law
http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1159&context=psychfacpub

"Reluctant Jurors: What Summons Responses Reveal About Jury Duty Attitudes"
Susan Carol Losh; Adina W. Wasserman; Michael A. Wasserman
Judicature, Volume 83, Number 6 (2000)

"Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It"
Robert G. Boatright
Judicature, Volume 82, Number 156 (1999)

MISCELLANEOUS

Jur-E Bulletin
National Center for State Courts
http://www.ncsc.org/jure

Jury Service FAQ
United States District Court for the District of Columbia
http://www.dcd.uscourts.gov/dcd/sites/dcd/files/jury-FAQ.pdf

Jury Service FAQ
DC Superior Court
http://www.dccourts.gov/internet/faqlocator.jsf

DC Superior Court Jury Orientation Video
DC Superior Court
http://www.dccourts.gov/internet/jurors/petitjury/main.jsf



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United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(c)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

Response to Question for the Record from Senator Dick Durbin, Chair, Senate Judiciary Committee to Judge Ketanji Brown Jackson, Nominee to the United States Court of Appeals for the D.C. Circuit

1. **The Judiciary Committee has received a number of letters of support from conservatives who have worked and clerked with you. As I mentioned during your hearing, Judge Thomas Griffith— an appointee of President George W. Bush who retired from the bench last year—wrote to the Committee: "Although [Judge Jackson] and I have sometimes differed on the best outcome of a case, I have always respected her careful approach and agreeable manner, two indispensable traits for success in a collegial body."**

   The Committee also received a letter signed by 23 Supreme Court law clerks who clerked alongside you during the October 1999 Term. The 23 signatories included clerks to Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O'Connor, among others.

   Please describe the importance you place on working with colleagues who may have different views or who may approach an issue differently than you do.

   RESPONSE: I have had the privilege of working alongside people who have a variety of viewpoints about the law and legal analysis throughout my professional career. As a Supreme Court law clerk, for example, I evaluated complex legal issues and regularly exchanged significant insights with the clerks of other Justices. Similarly, my work in both private practice and on the Sentencing Commission (a bi-partisan policymaking body by statute) routinely required me to consider, assess, and incorporate the views and concerns of brilliant lawyers and judges with different backgrounds and perspectives. Taking into account the views of others helped me to formulate my own perspective on the issues we were considering. And the skills that I developed while engaging in such interactions should serve me well on the circuit court, if I am confirmed. Because the D.C. Circuit often address complicated and potentially contentious legal issues, the ability to listen with an open mind to other points of view, and to be respectful even if a judge ultimately disagrees with another judge's analysis or conclusions, is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution.

Responses to Questions for the Record from Senator Chuck Grassley, Ranking Member to Judge Ketanji Brown Jackson, Nominee to the United States Court of Appeals for the D.C. Circuit

1. **Are you aware of the dark money left wing group Demand Justice?**
   a. **Are you aware that you are on their "shortlist" for the Supreme Court?**
   b. **Are you aware that when the group initially released their list on October 15, 2019 you were not on the list?**[1]
   c. **Do you have any idea why you were added to the list after originally being left off of it?**
   d. **Have you had any conversations with anyone associated with Demand Justice since October 15, 2019?**

   RESPONSE: I am aware that the group Demand Justice has compiled a Supreme Court "shortlist." I am also aware that I was not on the first iteration of that list, and that I am now listed. I do not know why I was added to the list. Chris Kang, who I understand is affiliated with Demand Justice, is among the many people who offered me congratulations on this nomination. I met Mr. Kang when he served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

2. **What is an *Irons* footnote?**

   RESPONSE: An *Irons* footnote is a mechanism by which a panel of the D.C. Circuit can overrule a circuit precedent that, "due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, . . . is clearly an incorrect statement of current law." D.C. Circuit Policy Statement on *En Banc* Endorsement of Panel Decisions ("*Irons* Footnote Policy") at 1 (Jan. 17, 1996) (alteration omitted); *see also Irons v. Diamond*, 670 F.2d 265, 267–68 & n. 11 (D.C. Cir.1981). D.C. Circuit panels are permitted to use *Irons* footnotes when "the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full en banc hearing." *Irons* Footnote Policy at 1; *see also Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013).

3. **What is *Skidmore* deference? Can you summarize the D.C. Circuit's current *Skidmore* jurisprudence?**

   RESPONSE: *Skidmore* deference refers to the Supreme Court's conclusion that a court may defer to an agency's interpretation of a statute that the agency itself administers, when that agency interpretation is not set forth in a document that has the force of law (i.e., not a rule or adjudication). When *Skidmore* deference is applicable,

[1] Available at https://demandjustice.org/demand-justice-releases-supreme-court-shortlist-of-diverse-progressive-lawyers/.

the agency's "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (explaining that a court applying *Skidmore* deference accords the agency's interpretation "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001))). The D.C. Circuit's current *Skidmore* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. *See, e.g.*, *Indian River Cty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 531 (D.C. Cir. 2019) ("When an agency's interpretation of a statute has been binding on agency staff for a number of years, and it is reasonable and consistent with the statutory framework, deference to the agency's position is due under *Skidmore*."); *Orton Motor, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 884 F.3d 1205, 1211 (D.C. Cir. 2018) ("Ultimately, a court will uphold an agency determination under *Skidmore* if it is persuasive.").

4. What is *Chevron* deference? Can you summarize the D.C. Circuit's current *Chevron* jurisprudence?

RESPONSE: I have applied the *Chevron* deference doctrine in at least 11 of my written opinions. *See, e.g.*, *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at *13 (D.D.C. Nov. 30, 2020); *Otay Mesa Prop., L.P. v. Dep't of the Interior*, 344 F. Supp. 3d 355, 368 (D.D.C. 2018); *Depomed, Inc. v. Dep't of Health & Hum. Servs*., 66 F. Supp. 3d 217, 229 (D.D.C. 2014); *Am. Meat Inst. v. Dep't of Agric*., 968 F. Supp. 2d 38, 52 (D.D.C. 2013). *Chevron* deference refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. The court decides, first, "whether Congress has directly spoken to the precise question at issue[,]" using "traditional tools of statutory construction[.]" *Chevron*, 467 U.S. at 842, 843 n.9. "If the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue," the court must proceed to determine whether the agency's interpretation is "based on a permissible construction of the statute[,]" *id.* at 843, and, if so, the court must defer to the agency's interpretation. The D.C. Circuit's current *Chevron* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. *See, e.g.*, *Murray Energy Corp. v. EPA*, 936 F.3d 597, 608 (D.C. Cir. 2019) (recognizing that, "[o]n questions of statutory interpretation, the court must review [the agency's] actions in

accordance with the standard set forth in" *Chevron*); *see also id.* (reiterating that "*Chevron* deference involves a two-step analysis.").

5. What is *Auer* deference? Can you summarize the D.C. Circuit's current *Auer* jurisprudence?

RESPONSE: *Auer* deference is a doctrine that instructs courts to "defer[] to agencies' reasonable readings of genuinely ambiguous regulations." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). Recently, in *Kisor v. Wilkie*, the Supreme Court clarified the circumstances under which *Auer* deference is warranted, holding that "a court should not afford *Auer* deference unless" the court determines that "the regulation is genuinely ambiguous" after "exhaust[ing] all the 'traditional tools' of construction." *Id.* at 2415. And even "[i]f genuine ambiguity remains," deference is only required when "the agency's reading" is "reasonable"—*i.e.*, "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415–16. An agency's interpretation of its regulations "must [also] be the agency's 'authoritative' or 'official position,'" as well as "in some way implicate its substantive expertise[,]" to qualify for *Auer* deference. *Id.* at 2416–17. The Supreme Court has further explained that *Auer* deference would not be warranted if the reviewing "court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, fair, or considered judgment[,]" *id.* at 2414 (internal quotation marks, alteration, and citation omitted), and is instead "a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack[,]" *id.* at 2417 (internal quotation marks, alteration, and citation omitted). The D.C. Circuit's current *Auer* jurisprudence is consistent with the Supreme Court's articulation of the doctrine. For instance, the D.C. Circuit recently maintained that "[a]n agency may receive deference when it reasonably interprets its own 'genuinely ambiguous' regulations." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2414); *see also id.* (emphasizing that "if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense" (quoting *Kisor*, 139 S. Ct. at 2415)).

6. Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?

RESPONSE: In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Supreme Court held that a federal court must defer to an agency's interpretation of a regulation that the agency administers. It appears that the Court has historically treated the *Seminole Rock* deference standard and as interchangeable shorthand for the same idea that it expressed in its subsequent articulation of *Auer* deference: "This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations" and "[w]e call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). The D.C. Circuit has relied on those two cases interchangeably as

well. *See, e.g.*, *Tilden Mining Co., Inc. v. Sec'y of Lab.*, 832 F.3d 317, 322 (D.C. Cir. 2016) (noting that courts afford deference to an agency's interpretation of its own regulation "based on the Supreme Court's decisions in [*Auer*] and [*Seminole Rock*]"). Whatever analytical differences there may be between *Seminole Rock* and *Auer*, the current controlling authority concerning deference to an agency's interpretations of its own regulations is neither *Auer* nor *Seminole Rock*; the Supreme Court has declined to overrule *Auer* / *Seminole Rock*, but, in *Kisor*, it established a detailed multi-factor process for determining when this kind of deference is proper. *See* 139 S. Ct. at 2414–18.

7. When a new presidential administration begins, they may want to reverse, review, expand upon, or otherwise change agency actions from the previous administration.

a. What kind of process do agencies have to go through in order to revoke a rule promulgated by a previous administration?

RESPONSE: Under section 1 of the Administrative Procedure Act ("APA"), an agency is generally required to use the same processes to repeal a rule as it used to promulgate the rule. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015). Thus, if the agency issued the rule after engaging in notice and comment rulemaking pursuant to section 553 of the APA, it must ordinarily go through the notice and comment process in order to repeal the rule.[2] However, if the rule in question did not require notice-and-comment rulemaking in the first place (if, for instance, it was an interpretive rule), then the agency need not use the notice-and-comment process to repeal the rule. *See id*. at 102 (holding that courts may not impose any additional procedural requirements on agencies beyond those set forth in the APA); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 524 (1978) (same). The Supreme Court has further emphasized that, when an agency changes its policy position on a matter, the agency must provide a "reasoned explanation for its action[,]" "display awareness that it is changing position[,]" and "show that there are good reasons for the new policy." *F.C.C. v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).

b. What has the Supreme Court said about this issue?

RESPONSE: Please see my response to Question 7a.

c. What are they key D.C. Circuit cases on point here?

RESPONSE: Key D.C. Circuit cases on this topic include *Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020), *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020), *Mingo Logan Coal Co. v. Environmental*

[2] The APA's notice-and-comment process entails issuing a notice of proposed rulemaking, giving interested parties an opportunity to comment on the proposed rule, and issuing a final rule with "a concise general statement of [the rule's] basis and purpose." *See* 5 U.S.C. § 553.

Protection Agency, 829 F.3d 710 (D.C. Cir. 2016), and *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982). The doctrine announced in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), has also been a "key" case in this area, but the Supreme Court abrogated the *Paralyzed Veterans* rule in *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015).

8. **You served as a law clerk for Justice Breyer with Tim Wu. Mr. Wu is now a member of President Biden's National Economic Council.**
    a. **How have you handled recusal when it comes to cases that have come before you that implicated Mr. Wu's work on the National Economic Council?**
    b. **If confirmed, how will you handle recusal when it comes to cases that come before you that implicate Mr. Wu's work on the National Economic Council?**

    RESPONSE: I have not had a case in which the National Economic Council was a party. In general, if confirmed to the U.S. Court of Appeals, my process for determining whether particular matters required my recusal would involve reviewing the Judicial Code of Conduct and 28 U.S.C. § 455 concerning the legal standards that pertain to recusal. I will also consult with my colleagues, and, if necessary, discuss the matter with counsel to the Judicial Conference Committee on Codes of Conduct. This is the process that I have followed as a district court judge.

9. **You were listed as a counsel on a brief in support of defendant-appellants in *McGuire v. Reilly*, 260 F. 3d. 36 (1st Cir. 2001). Some of the amici curiae your brief was on behalf of include: Repro Associates, Abortion Access Project of Massachusetts, Mass. NARAL, and the Religious Coalition for Reproductive Choice, among others.**
    a. **You appear to have worked on this brief while an associate at a law firm in Boston. Was this a pro bono case?**
    b. **How did you get involved with this case? Did you seek out this assignment?**
    c. **Based on your brief's analysis of *Hill v. Colorado*, could a legislature enact content-neutral buffer zones that prohibited protests to occur outside of federal courthouses or police stations?**

    RESPONSE: The referenced brief was drafted and filed when I was an associate at Goodwin Proctor LLP in Boston in 2001, during my first year of law practice after completing my Supreme Court clerkship. I was assigned to work on this amicus brief related to a matter that was pending in the First Circuit, among other projects. I do not recall how I came to work on this assignment, but I am listed on the brief along with the Goodwin Proctor partner and senior associate with whom I was working at that time. The analysis of *Hill* that is presented in that brief is a legal argument that was made on behalf of my amici-clients, and there have been developments in the law concerning buffer zones in the two decades that have transpired since the brief was filed.

As a sitting federal judge, I am bound by the Supreme Court's current First Amendment caselaw, and I would apply the binding case law of the Supreme Court and the D.C. Circuit if I am assigned to any First Amendment case in which such precedents are applicable. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the constitutionality of buffer zones that government officials might establish in hypothetical circumstances.

10. Some of my colleagues on the other side of the aisle have criticized previous nominees for their membership or involvement with the Federalist Society. While I know you were never a member, you have spoken at an event hosted by the American Constitution Society, a self-described progressive legal organization.

a. In your opinion, what is the substantive difference between the Federalist Society and the American Constitution Society?

b. Do you think a nominee's involvement with the American Constitution Society is less problematic than with a nominee's involvement with the Federalist Society?

RESPONSE: I am not a member of the Federalist Society or the American Constitution Society, and thus I am not in a position to speak to the substantive differences between those two organizations or whether a nominee's involvement with either organization is "problematic." Canon 4 of the Code of Conduct for United States Judges authorizes judges to participate in extrajudicial activities, including being involved with organizations, subject to certain limitations, *see also* Advisory Opinion No. 93 ("Extrajudicial Activities Related to the Law"), and the Code's commentary emphasizes that "a judge should not become isolated from the society in which the judge lives[,]" Commentary to Canon 4. The Judicial Conference Committee on Codes of Conduct has also spoken to this issue: Advisory Opinion No. 82 provides that, prior to undertaking involvement with any organization, judges should carefully consider "the Code's fundamental commands to avoid impropriety or the appearance of impropriety, [to] not lend the prestige of office, and [to] not participate in activities that would detract from the dignity of the judge's office, interfere with the performance of official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification." Advisory Opinion No. 82 ("Joining Organizations").

11. The left-wing group Demand Justice has deployed a billboard truck to pressure Justice Breyer into retiring:



Do you agree with Demand Justice's message?

RESPONSE: As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of that Court's composition. It would be inappropriate for me to comment on whether or when any sitting Supreme Court Justice should retire.

12. In response to a question from Senator Hawley about a statement of beliefs from a school on whose board you used to sit, you answered that you're a member of a lot of organizations and you don't know all the statements of every organization you're a member of. Then-Senator Franken asked then-Professor Amy Barrett at her hearing of her speaking at the Blackstone Fellowship in light of their positions on LGBT issues, "Is it your habit of accepting money from organizations without first learning what they do?"

a. Is it your habit to join an organization without knowing what they believe in?

b. Can you list the organizations you joined before learning about what the organization believed in?

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—from the fall of 2010 to the fall of 2011, prior to my nomination and confirmation as a federal district judge. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school's website at the time of my service. My service on the advisory school board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

13. What kind of analysis does the D.C. Circuit use to determine if a final rule is a "logical outgrowth" of a proposed rule?

RESPONSE: A final rule qualifies as a logical outgrowth of a proposed rule, and thus satisfies the Administrative Procedure Act's notice requirement, "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) (quoting *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009)). "On the other hand, a final rule is *not* a logical outgrowth if 'interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.'" *Id.* (quoting *CSX Transp.*, 584 F.3d at 1080 (emphasis supplied)). Thus, the D.C. Circuit has "found that a final rule represents a logical outgrowth where the [agency's Notice of Proposed Rulemaking] expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." *CSX Transp.*, 584 F.3d at 1081. "By contrast, [the D.C. Circuit's] cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position." *Id.*

14. Senator Booker invoked John Adams representing British soldiers accused of murder during the Boston Massacre as a reason why you are the right person for the job. Please list all the cases where you represented a client whose views you disagreed with or whose alleged crimes you found offensive.

RESPONSE: Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client's legal arguments and/or undermining her client's interests by publicly declaring the lawyer's own personal disagreement with the legal position or alleged behavior of her client. Because these standards apply even after termination of the representation, it would be inappropriate for me to list the cases in which I previously represented a client whose views I disagreed with or whose alleged crimes I found offensive.

15. In response to my question about sentencing reform, you mentioned that one of your rationales for giving judges more information is because judges don't like to be "outliers."

a. What, if anything, should we as Congress do about judges who *are* outliers?

b. Is that an area for the judicial branch to work on solutions for?

c. Is it worse to be an outlier below the mean, above the mean, or are they both equally bad?

RESPONSE: As a sitting federal district court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties' legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court and the D.C. Circuit. I no longer serve

on the United States Sentencing Commission, and canons of judicial ethics prevent me from opining on particular policy positions regarding sentencing reforms or commenting on the particular legislation that Congress should enact. Congress has authorized a policymaking branch of the Judiciary—the United States Sentencing Commission—to make proposals concerning sentencing reforms; additionally, with Congress' consent, the Commission promulgates sentencing guidelines for federal judges to use when imposing sentences in individual cases. After *Booker*, judges have a duty to calculate and consider the applicable sentencing guidelines in every federal criminal case, and to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of punishment, as 18 U.S.C. § 3553(a) requires.

16. During Senator Feinstein's questioning of you, she referenced a statistic from the left-wing group Alliance for Justice that put your reversal rate at less than 2%. I know that was not your statistic, but you didn't object to the premise of the question and answered. Do you believe 2% is an accurate portrayal of your reversal rate? If not, what do you think your reversal rate is?

RESPONSE: To the best of my knowledge, it is accurate to say that only 2% of the written opinions that I have issued have been reversed by the Court of the Appeals.

17. Westlaw has reversal reports for every sitting judge. Instead of using the total number of opinions (which appears to be the denominator used by AFJ in getting to 2%), Westlaw looks at the opinions that were *actually* appealed, which makes sense to me since an opinion that is not appealed cannot be reversed.[3] Using those numbers, you have been reversed 8 times out of 75 appeals, for a rate of 10.7%. Do you believe this is a more accurate reflection of your reversal rate? If not, why not?

RESPONSE: The reversal-rate analysis that Westlaw employs is misleading. Looking only at the number of reversals relative to the number of decisions that are "actually appealed" merely assesses a losing party's odds of being successful if an appeal is sought; that computation does not account for the overall number of opinions that the judge has issued and the fact that a losing party may choose to forego an appeal for a number of reasons, including the recognition that the ruling is correct and would be sustained on appeal. The performance of a judge who has written 562 opinions, only 75 of which have even been appealed, is not the same as that of a judge who has written 80 opinions, 75 of which have been appealed, even if those two judges have the same number of reversals. Westlaw would apparently characterize a hypothetical judge who has issued hundreds of uncontested written decisions as having a 50% reversal rate if only four of his decisions are appealed and if two of those four are reversed.

Westlaw's reversal-rate analysis also lacks an assessment of the relative complexity of the cases at issue or the practices of the court of appeals that reviews a district

[3] Westlaw notes that the number of cases appealed comes "from only those appeals where the lower court judge is identified in the decision."

judge's work. Not all reversals are equivalent. *See, e.g.*, *Gov't of Guam v. United States*, 341 F. Supp. 3d 74 (D.D.C. 2018) (adopting the view of the Sixth and Seventh Circuits, in the context of a circuit split, concerning a dispute regarding application of a provision of the Comprehensive Environmental Response, Compensation, and Liability Act), *rev'd*, 950 F.3d 104 (D.C. Cir. 2020) (reversing after a determination that the D.C. Circuit will side with the Ninth Circuit, rather than the Sixth and Seventh, with respect to the question at issue), *cert. granted*, 141 S. Ct. 976 (oral argument held Apr. 26, 2021). Thus, while Westlaw's analysis suggests that a judge's reversal rate (calculated solely based on the number of appeals and the number of reverses) is a reliable marker of judicial competence, without weighting the cases or standardizing the review practices of the various courts of appeals, it is difficult draw meaningful conclusions.

18. In your response to Senator Tillis, you said that you did not have control over what third parties or reporters say about your rulings.

a. Does any judge have control over what third parties or reporters say about her rulings?

b. Was it wrong for Senator Tillis to question you over what third parties or reporters said about your rulings?

c. Was it wrong of Democrats to question judicial nominees appointed by President Trump over what third parties or reporters said about their rulings?

RESPONSE: No judge has control over what third parties or reporters say about her rulings. It would be inappropriate for me to comment on the propriety of any question that any Senator asks of a nominee in connection with the Senate's exercise of its constitutional advise and consent power.

19. In your response to Senator Tillis, you said that you did not have control over what third parties or reporters say about your rulings. You also said in the *McGahn* opinion, "Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings." Did the Department of Justice claim monarchical powers for the President in that case?

RESPONSE: In *McGahn*, the Department of Justice claimed that the President has the power to prevent certain former staff members from appearing for questioning in response to a valid legislative subpoena, even against will of the former staff member to whom the subpoena is directed—i.e., even when the former staff member would otherwise be required by law to respond to the subpoena, would willingly do so, and would be able to invoke executive privilege in the context of such questioning, where appropriate.

20. You go on to explain, "This means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control."

a. Did the Department of Justice claim blood loyalty on the part of Don McGahn?

b. Assuming "not a subject, bound by loyalty or blood" is the correct analytical category by which to understand the relationship between the President and his staff, does it also apply to the following relationships? If not, why not?

i. Attorney General and political staff
ii. Attorney General and career staff
iii. Senators and Senate staff
iv. Judges and law clerks
v. Police chiefs and patrol officers

RESPONSE: As a sitting federal judge, it would not be appropriate for me to provide an opinion concerning hypothetical disputes over directives from the listed government officials to their staff members. With respect to the Department of Justice's arguments concerning the power of the President to direct that certain former White House staff members ignore a valid legislative subpoena, please see my response to Question 19.

21. In *McGahn* you continued: "Rather, in this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States."

a. Doesn't this beg the question?
b. Wasn't the position of the Department of Justice that Don McGahn couldn't comply with the subpoena *because of* his oath to protect and defend the Constitution of the United States?

RESPONSE: Please see my response to Question 19.

22. If a future Congress were to subpoena one of your law clerks to better understand your thinking in the *McGahn* case and you instructed him or her not to comply with the subpoena, would it answer that "the primary takeaway from the past 250 years of recorded American history is that Judges are not kings; this means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control"?

RESPONSE: Please see my response to Question 20.

23. President Obama famously said of enacting policy without legislation, "I have a pen and a phone." Was President Obama a king?

RESPONSE: I am not familiar with the quoted statement. The Supreme Court has addressed the extent of the President's authority to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act

of Congress or from the Constitution itself[,]'" *Medellin*, 552 U.S. at 524 (citation omitted), and the Supreme Court's pronouncements regarding this issue are binding on me as a sitting federal judge. The Code of Conduct for federal judges prevents me from further opining about the oft-litigated and controversial subject of the power of the President to enact policy without legislation.

24. During your hearing there were multiple comments made about the importance of an independent judiciary. You defined judicial activism to Senator Cruz as a judge unable or unwilling to separate personal views from the law and ruling consistent with those views instead of the law. I agree.

a. Is the final disposition of a case the only metric to mark judicial activism? More specifically—if a judge reaches the result mandated by the law and by precedent but editorializes why she disagrees with the result or engages in superfluous dicta, is that also judicial activism?

b. "I have my doubts about the wisdom of courts opining on hot-button political issues or the motives of citizens who hold one position or another in those debates." Do you agree with this statement? If not, why not?

RESPONSE: I am not familiar with the quoted statement. During the hearing, I emphasized that courts have a duty of independence from political pressure, meaning that judges must resolve cases and controversies in a manner that is consistent with what the law requires, despite the judge's own personal views of the matter, and this is so even with respect to cases and controversies that pertain to controversial political issues. While the judge may acknowledge the force of contrary positions regarding the legal issues in dispute, the result that a judge reaches must be consistent with the requirements of the law, as set forth in the binding precedents of the Circuit and the Supreme Court. Judicial activism occurs when a judge who is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views. It is my testimony that judicial activism is properly defined as characterizing a judge who is unwilling or unable to rule as the law requires.

25. Senator Cruz asked you if you believed in the idea of a "living constitution" and you declined to answer one way or the other, citing your lack of experience interpreting constitutional text. During your 2013 nomination to the District Court, the late Senator Tom Coburn asked you the following written question for the record: "Some people refer to the Constitution as a 'living' document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?" You responded: "No."

a. Why did your answer change from 2013 to now?

b. If you were absolute in your answer about disagreeing with the idea of a "living" constitution in 2013 but were not during your hearing last week, should we take your answer to mean that you at least agree with the "living" constitution more than you did in 2013?

c. If so, what has happened during your tenure as a District Judge to make you believe more in a "living" constitution than you did in 2013?

d. As I mentioned, you cited your lack of experience interpreting constitutional text in declining to answer Senator Cruz's question. Yet you answered freely in 2013. Did you have more experience interpreting constitutional text in 2013 than you do now?

RESPONSE: As a sitting federal judge, I am bound by the methods of constitutional interpretation that the Supreme Court has adopted, and I have a duty not to opine on the Supreme Court's chosen methodology or suggest that I would undertake to interpret the text of the Constitution in any manner other than as the Supreme Court has directed. I also have a duty to avoid commenting on, or providing personal views of, disputed legal matters such as the most appropriate method of interpreting the Constitution. I was not a sitting federal judge when I answered Senator Coburn's question in 2013.

26. Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?

RESPONSE: In *Schenck v. United States*, Justice Oliver Wendell Holmes, Jr., writing for the Court, stated in dicta that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. 47, 52 (1919). The facts of *Schenck* itself did not involve yelling fire in a crowded theater; instead, the Court was reviewing convictions for conspiracy to violate the Espionage Act of 1917, where the defendants had merely mailed leaflets that asserted that the draft was unlawful to men eligible for military service. *See id.* at 48–49. The Court affirmed the convictions on the ground that such speech presented a "clear and present danger" by obstructing the war effort. *Id.* at 52.

Schenck's "clear and present danger" test no longer governs the scope of permissible speech proscriptions, and the Supreme Court has generally recognized that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force[.]" *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, under *Brandenburg*, the State may proscribe speech or advocacy, including potentially yelling fire in a crowded theater, if the speech "is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." *Id.* (emphases added).

27. Justice Scalia's opinion in *D.C. v. Heller* does allow for some regulation of firearms, such as possession of firearms by felons. Which firearm regulations has the D.C. Circuit upheld as constitutional?

RESPONSE: Since the Supreme Court's decision in *Heller*, the D.C. Circuit has upheld challenged firearm regulations on five separate occasions. In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), the D.C. Circuit upheld the District's basic registration requirement as applied to handguns and the District's prohibitions on assault weapons and large-capacity magazines. In *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013), the D.C. Circuit upheld the federal law

prohibiting felons from possessing firearms as applied to common-law misdemeanants. In *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015), the D.C. Circuit upheld the District's basic registration requirement as applied to long guns, the District's requirement that a registrant be fingerprinted and photographed and make a personal appearance to register a firearm, the District's requirement that an individual pay certain fees associated with the registration of a firearm, and the District's requirement that registrants complete a firearms safety and training course. In *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019), the D.C. Circuit upheld the federal statute prohibiting felons from possessing firearms, as applied to a person convicted of a felony count of making a false statement to a lending institution. And, most recently, in *United States v. Class*, 930 F.3d 460 (D.C. Cir. 2019), the D.C. Circuit upheld a federal law prohibiting the possession of firearms on the grounds of the United States Capitol, as applied to a defendant who possessed guns in a parking lot near the Capitol.

28. Is it proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about in a dissent?

RESPONSE: A circuit judge might properly encourage the Supreme Court to reconsider holdings that are confusing or otherwise problematic in application, by pointing out a problem with the interpretation or application of a precedent, in either a concurrence or a dissent. But it would not be proper for a circuit court judge to depart from Supreme Court precedent when ruling in a case.

29. When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?

RESPONSE: As a sitting district court judge, I have routinely undertaken to interpret statutes, and I have issued nearly 50 written opinions that involve statutory interpretation. My review of my past practice indicates that I seek to resolve alleged ambiguities in a statutory provision by examining the structure of the statute as a whole and other indicia of meaning based upon the statutory text. *See, e.g.*, *All. of Artists & Recording Cos., Inc. v. Gen. Motors Co*., 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). If that does not resolve the ambiguity, I look to Supreme Court precedent for guidance as to the tools of interpretation to apply next in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). I have also consulted the legislative history of a statute, as the Supreme Court permits, but I have never resolved an ambiguity based solely on the legislative history of the statute.

30. When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?

RESPONSE: As a district court judge, I have routinely undertaken to interpret statutes, and I have issued nearly 50 written opinions that involve statutory interpretation. In my experience, canons of statutory interpretation sometimes lead to

conflicting results, and are not always and inevitably helpful. I attempt to resolve alleged ambiguities in a statutory provision by carefully examining the text of the provision and the statute as whole, including any statutory statements of finding and purpose. If necessary, I consult the legislative history of the statute, as the Supreme Court permits, in order to ascertain the will of Congress.

31. How do you decide when text is ambiguous?

RESPONSE: Some of the nearly 50 written opinions that I have issued that involve statutory interpretation address disputed questions of first impression about the meaning of the text. *See, e.g.*, *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 344 F. Supp. 3d 355, 367–70 (D.D.C. 2018). In each of those cases, when deciding whether the statute's text is ambiguous, I used traditional tools of statutory construction, including textual analysis, structural analysis, and canons of construction, to determine whether the statute at issue "can be read more than one way" and is therefore ambiguous, *AFL–CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) (citation omitted); *see also, e.g.*, *Otsuka Pharm. Co. v. Burwell*, 302 F. Supp. 3d 375, 391–99 (D.D.C. 2016), *aff'd*, 869 F.3d 987 (D.C. Cir. 2017).

32. Do you find, in general, Congressional statutes or agency regulations to consist of more ambiguous text?

RESPONSE: As a district court judge who has reviewed both congressional statutes and agency regulations, it is my role to interpret statutes and regulations, as necessary, to resolve the cases before me. I have not formed an opinion as to whether statutes or regulations tend to be more ambiguous as a generally matter, and I doubt that it is possible to determine in the abstract which form of law has "more ambiguous text." I evaluate each case that comes before me on its own merits.

33. In Federalist No. 62, James Madison wrote: "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" Do you agree with this statement?

RESPONSE: In our constitutional system, the Legislative Branch promulgates statutes, consistent with its limited authority under Article I of the Constitution and the protections of individual rights embodied in the Constitution's Amendments. I understand this quotation from Federalist No. 62, which is entitled, "The Senate," to be addressing the extent to which the Senate should exercise its powers in a prudent manner that leads to clear statements of policy concerning the matters that the Senate seeks to address. In any case that raises the question of the clarity of legislative enactments, it would be my duty to apply Supreme Court precedent and the binding law of the D.C. Circuit to resolve the dispute before me.

34. Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?

RESPONSE: During my confirmation hearing, I testified in response to a question from Senator Hawley that the Free Exercise Clause is a fundamental and foundational constitutional right. The Supreme Court has made clear that the First Amendment's Free Exercise Clause and Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.

35. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? What, in your view, are the limits on church autonomy consistent with what the Supreme Court has said?

RESPONSE: Federal courts, including the Supreme Court, are actively evaluating the scope of the fundamental First Amendment right of religious liberty in a variety of circumstances. I am bound by the Supreme Court's precedents and pronouncements regarding church autonomy, including its reaffirmance in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), that the Free Exercise Clause protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id*. at 2055 (citation omitted). As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for me to provide personal views regarding the limits of church autonomy beyond what the Supreme Court has said.

36. Do you agree that the Religious Freedom Restoration Act requires assessing compelling government interests "to the person" substantially burdened by a government action?

a. **If not, why not?**
b. **If so, can *general* interests restrict religious liberty, or must the interests be defined more precisely?**

RESPONSE: In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court held that the Religious Freedom Restoration Act "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430–31 (citation omitted). Thus, federal courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id*. at 431. My personal views of this standard, if any, are irrelevant; notwithstanding

any personal views of this issue, I am required to apply the Supreme Court's interpretation of what RFRA requires. If confirmed, I will do so.

37. Do you agree with the following statements?

a. **We live in a pluralistic society with people of widely diverse faith traditions. Religious freedom for all is part of our country's bedrock, from the enactment of our Constitution to the establishment of our more recent statutes that protect against religious discrimination.**

RESPONSE: Please see my response to Question 34.

b. **Title VII requires that employers not discriminate against applicants or employees because of their religious beliefs, observances, or practices and that employers accommodate religious beliefs, observances, and practices, absent undue hardship.**

RESPONSE: Title VII of the Civil Rights Act of 1964 prohibits employers from undertaking certain employment practices "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Under that statute, prohibited practices include the failure or refusal to hire an individual, or the discharge of an individual, on the basis of these protected characteristics, as well as "discriminat[ion] against any [such] individual with respect to his compensation, [or the] terms, conditions, or privileges of employment." *See id.* § 2000e-2(a). The definitions provision of Title VII defines "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

c. **Federal civil-rights regulators should seek to learn more about the extent to which employees request time off for prayer or Sabbath observance, seek exemption from grooming or dress codes, or seek to avoid participation in hot-button practices like abortion or LGBTQ celebration.**

RESPONSE: As a sitting district judge, my role in the judicial system is to consider any legal claims brought by employees concerning the manner in which their employers have treated their requests for religious accommodation. My role as a circuit judge, if confirmed, would be the same. It would be inappropriate for me to comment on threshold policy questions concerning what federal civil-rights regulators can or should do to educate themselves regarding such requests.

d. **It is important to improve religious discrimination awareness for employees and employers while encouraging meaningful dialogue between employees, employers, and the government.**

RESPONSE: As a sitting district judge, my role is to consider any legal claims brought by employees concerning alleged religious discrimination, and my role as a circuit judge, if confirmed, would be the same. It would be inappropriate for me to comment about threshold policy matters, including the importance *vel non* of general awareness and meaningful dialogue about religious discrimination.

e. **The federal government should prevent and remedy unlawful religious discrimination.**

Please see my answers to Question 37(c) and (d).

38. You can answer the following questions yes or no:

a. **Was *Brown v. Board of Education* correctly decided?**
b. **Was *Loving v. Virginia* correctly decided?**
c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia* v. Heller correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *Sturgeon v. Frost* correctly decided?**
k. **Was *Juliana v. United* States (9th Cir.) correctly decided?**
l. **Was *Rust v. Sullivan* correctly decided?**

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and consistent with the positions taken by other pending judicial nominees, it would be inappropriate for me to comment on the merits or demerits of any of the Supreme Court's binding precedents. Of the listed cases, the *Brown v. Board* and *Loving v. Virginia* opinions are two exceptions to this general rule. *Brown* overruled the manifest injustice of *Plessy v. Ferguson*, and its underlying premise—that "separate but equal is inherently unequal"—is beyond dispute. *Loving*, which reaffirms the Court's rejection of the "notion that the mere 'equal application' of a statute containing racial classifications" comports with the Fourteenth Amendment, is a direct outgrowth of *Brown*. Therefore, I can confirm that that these two matters were rightly decided without calling into question my duties under the Code of Conduct.

39. Do Blaine Amendments violate the Constitution?

RESPONSE: The original Blaine Amendment—a proposal that Congress considered but did not pass in the 1870's—"would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Some states have enacted state-law provisions or have adopted practices that bar government entities from appropriating funds to religious sects or institutions (which I understand

are referred to as Blaine Amendments), on the grounds that doing so is necessary to prevent Establishment Clause violations. The Supreme Court recently addressed one such state-law provision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2262 (2020) (assessing the Montana Supreme Court's application of a no-aid provision in Montana's Constitution to invalidate a state scholarship program). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court reviewed a similar state agency's practice of summarily denying a religious institution's application for competitively awarded grant funding on the grounds that the money could not be given to a religious institution. In both cases, the Supreme Court struck down the state restrictions as a violation of the First Amendment's neutrality requirement. *See also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). As a sitting federal judge, I am bound by the Supreme Court's precedents regarding whether a state prohibition concerning the provision of funds to religious sects or institutions violates the Constitution.

40. Please describe the selection process that led to your nomination from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

RESPONSE: On January 26, 2021, White House Counsel Dana Remus contacted me concerning my potential nomination to the D.C. Circuit to fill the anticipated vacancy that would arise from then-Judge Merrick Garland's confirmation as Attorney General of the United States. Since that date, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice regarding my potential nomination and the nominations process. On February 24, 2021, I met with President Biden and Dana Remus at the White House concerning the nomination, and on March 30, 2021, the President announced his intent to nominate me.

41. Have you had any conversations with individuals associated with the group Demand Justice, including but not limited to Brian Fallon or Chris Kang in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

RESPONSE: Chris Kang, who I understand is affiliated with Demand Justice, is among the many people who offered me congratulations on this nomination. Mr. Kang served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

42. Have you had any conversations with individuals associated with the American Constitution Society, including but not limited to Russ Feingold, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

RESPONSE: No.

43. Have you had any conversations with individuals associated with the Lawyers Committee for Civil and Human Rights, including but not limited to Vanita Gupta, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

RESPONSE: I had one conversation with Kristen Clarke in mid-April 2021, in which we discussed her experience in appearing before the Committee. That is the only communication that is responsive to this question.

44. You mention in your SJQ that you met with President Biden before being nominated. Did he ask you any questions about judicial precedent or public policy in that meeting? If so please describe those questions and your responses.

RESPONSE: President Biden did not ask me any questions about judicial precedent or public policy.

45. Please explain with particularity the process by which you answered these questions.

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. To generate each response, I read the question carefully, researched the law and my own practices as a district judge, as necessary, and drafted answers to the questions. I then shared my draft answers with employees of the Department of Justice's Office of Legal Policy and received their feedback. I then finalized the responses based on my independent judgment.

46. Do these answers reflect your true and personal views?

RESPONSE: I have responded truthfully to each question, and have provided answers that are true and consistent with my oath of office and my duties and obligations as a sitting federal judge.

Responses to Questions for the Record from Senator Tom Cotton
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   RESPONSE: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   RESPONSE: No.

3. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for drug trafficking should be more lenient?**

   RESPONSE: During my confirmation hearing, Ranking Member Grassley stated that he himself was "someone who has worked hard on the First Step Act and other issues of criminal justice reform," and that he "appreciate[d]" my prior work "on sentencing reform[.]" He then asked me one question about a particular policy position that I had publicly asserted as a member of the Sentencing Commission—a position that Judge William Pryor, a former Acting Chair of the Sentencing Commission, also shared. In this regard, Ranking Member Grassley noted that, as members of the Sentencing Commission, Judge Pryor and I had publicly "agree[d] sentencing needs to be reformed" but we had also publicly debated the nature of any such reforms. Ranking Member Grassley's one question to me during the confirmation hearing was to ask me to explain the difference between Judge Pryor's and my publicly stated policy positions on sentencing reform, and, specifically, "why [I] trust judges with more discretion when it comes to sentencing than Pryor does?"

   In response to Ranking Member Grassley's question, I first thanked Ranking Member Grassley, Chairman Durbin, Senator Lee and other members of the Judiciary Committee, "as a former member of the Sentencing Commission," for their work on statutory changes to the federal sentencing system. I then proceeded to explain the different approaches that Judge Pryor and I had taken "in our public statements and in the [Commission] meetings about the need for reform[,]" and I explained our respective, publicly stated views about "how do we change the system after the Supreme Court's decision making the Guidelines advisory and not binding anymore on judges?" Ranking Member Grassley did not respond to my description of the past

positions that Judge Pryor and I had taken in the context of proposed sentencing reforms during my service as a policymaker on the Sentencing Commission, nor did I engage in any policy discussion with Ranking Member Grassley or express a current position on any federal sentencing laws.

As a pending judicial nominee and a sitting federal judge, I am not a policymaker, and the Code of Conduct for United States Judges prevents me from expressing a view about the propriety of the penalties that Congress has prescribed for any crimes. It would be inappropriate for me to provide policy views concerning whether federal criminal sentences should be more lenient, even based on my expertise as a "former member of the Sentencing Commission[,]" because doing so would jeopardize the confidence of the parties and the public in my ability to set aside any such views and faithfully apply the penalties that currently exist in federal criminal statutes.

4. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for fentanyl trafficking should be more lenient?**

   RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for fentanyl trafficking.

5. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for heroin trafficking should be more lenient?**

   RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the

Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for heroin trafficking.

6. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for methamphetamine trafficking should be more lenient?**

   RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for methamphetamine trafficking.

7. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular sentencing laws passed by Congress. As a former member of the Sentencing Commission, do you believe that federal criminal sentences for armed criminals should be more lenient?**

   RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for armed criminals.

8. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular laws passed by Congress. As a former member of the Sentencing**

Commission, do you believe that federal criminal sentences for violent crime should be more lenient?

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about statutory penalties for violent crimes.

9. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." In that discussion, you also expressed your support for particular laws passed by Congress. As a former member of the Sentencing Commission, do you believe that illegally reentering the United States after being deported should be a crime?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about whether Congress should have criminalized illegally reentering the United States after being deported.

10. **During your confirmation hearing, you engaged in a policy discussion with Ranking Member Grassley regarding sentencing policy, which you clarified was a discussion in which you engaged not as a sitting judge, but "as a former member of the Sentencing Commission." You also told Senator Lee that you are "aware of" studies regarding racial bias, again mentioning your time as a member of the Sentencing Commission. You said further that the different thresholds to trigger mandatory minimum sentences in crack cocaine cases as compared with powder cocaine cases are one factor that you believe contributes to alleged racial disparities in criminal sentencing. What other factors to you believe contribute to alleged racial disparities in federal criminal sentencing?**

RESPONSE: Please see my response to Question 3, which clarifies the scope and circumstances of my statements in response to Ranking Member Grassley's question during my confirmation hearing. When I responded to Ranking Member Grassley's

request that I explain a particular policy position that I had taken publicly during my service as a member of the Sentencing Commission, I did not undertake to express any current policy views of federal sentencing statutes "as a former member of the Sentencing Commission" or otherwise.

In response to Senator Lee—who asked me whether I would agree or disagree "with someone who said that most racial disparities in criminal convictions and sentencings result from an unconscious racial bias of judges, juries, and other judicial decisionmakers"—I began by explaining that "as a judge now, it is very important for me not to make personal commitments about things like the question that you asked." I then acknowledged being "aware of social science research" regarding implicit bias, citing in particular the work of Harvard Professor Mahzarin Banaji, and I also stated that I am aware of research that the Sentencing Commission has conducted concerning the impact of certain policy choices in the federal sentencing system on different demographic groups. The Commission's body of research regarding the federal sentencing system in the wake of the Anti-Drug Abuse Act of 1986, which is the legislation that established mandatory minimums and created the 100-to-1 crack cocaine/powder cocaine disparity, is among the research with which I am familiar. The Commission's October 2017 report concerning the impact of mandatory minimum penalties for drug offenses in the federal criminal justice system is another such research study.

When I responded to Senator Lee, I did not express any personal views regarding my own beliefs about what factors contribute to alleged racial disparities in criminal convictions and sentencings, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities. It would likewise be inappropriate for me to identify other potentially contributing factors, in response to this policy question.

11. During your confirmation hearing, you commented on the Supreme Court's jurisprudence regarding the First Amendment. Specifically, you said that "the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental." I'd like to ask you about another of the Supreme Court's views on foundational, fundamental rights: You said during your hearing that you are bound by the Supreme Court's opinions on the Second Amendment, including *District of Columbia v. Heller*, and *McDonald v. Chicago*. Do you believe that the Supreme Court "rightly viewed" Second Amendment rights in those cases?

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]" expressly protects a fundamental and foundational right to religious liberty. I also explained that "the Supreme Court is working through the doctrine" and that "there has been a series of cases in the last few years as the [Supreme] Court determines what it means to treat religious organizations differently." Similarly, the Second Amendment

states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed[,]" and in *District of Columbia v. Heller*, the Supreme Court held that this constitutional provision establishes "an individual right to keep and bear arms[,]" *see* 554 U.S. 570, 595 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 74–50 (2010). As a current federal judge, I am bound to follow both *Heller* and *McDonald*, as I would be if confirmed to the D.C. Circuit. I have not expressed any personal views of the scope and contours of the fundamental rights protected by the First and Second Amendments, and it would not be appropriate for me to do so under Canon 3 of the Code of Conduct for Judges, given that the Supreme Court and other courts are actively considering such issues as applied to various government regulations.

12. During your confirmation hearing, you commented on the Supreme Court's jurisprudence regarding the First Amendment. Specifically, you said that "the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental." I'd like to ask you about another of the Supreme Court's holdings regarding the First Amendment: In *Citizens United v. FEC*, the Supreme Court held that the First Amendment prohibits the government from restricting independent political expenditures by entities such as corporations, nonprofit entities, and others. Do you believe that the Supreme Court "rightly viewed" the First Amendment's Free Speech Clause in *Citizens United*?

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]" expressly protects a fundamental and foundational right to religious liberty. The First Amendment also prohibits Congress from "abridging the freedom of speech" by legislation, and the Supreme Court has long held that it thereby expressly protects a fundamental and foundational right to free speech. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court determined that the First Amendment's fundamental right to free speech prohibits the federal government from imposing limits on corporate entities' independent expenditures for political communications. As a sitting federal judge, I am bound to follow *Citizens United*, as I would be if confirmed to the D.C. Circuit. I have not expressed any personal view about the Supreme Court's application of First Amendment protections to campaign-finance restrictions, or any other law, and it would not be appropriate for me to do so under the Code of Conduct for Judges, given the fact that I am bound by Supreme Court precedents and campaign-finance issues are the subject of ongoing legislative review. Disputes concerning these matters are routinely litigated in federal courts.

13. During your confirmation hearing, you commented on the Supreme Court's jurisprudence regarding the First Amendment. Specifically, you said that "the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental." I'd like to ask you about another of the Supreme Court's holdings regarding the First Amendment: In *Citizens United v. FEC*, the Supreme Court held that the First Amendment prohibits the government from

restricting independent political expenditures by entities such as corporations, nonprofit entities, and others. Do you believe that the Supreme Court "rightly viewed" the First Amendment's Free Speech Clause in *Citizens United*?

RESPONSE: Please see my response to Question 12.

14. During your confirmation hearing, you commented on the Supreme Court's jurisprudence regarding the First Amendment. Specifically, you said that "the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental." I'd like to ask you about another of the Supreme Court's holdings regarding the First Amendment: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court in November 2020 enjoined New York from enforcing its 10- and 25- person occupancy limits on religious gatherings, which it described as "the Governor's severe restrictions on the applicants' religious services." Do you believe that the Supreme Court "rightly viewed" the First Amendment's Free Exercise Clause in *Roman Catholic Diocese of Brooklyn v. Cuomo*?

RESPONSE: During my confirmation hearing, I expressed the indisputable fact that the First Amendment of the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]" expressly protects a fundamental and foundational right to religious liberty. I also explained that "the Supreme Court is working through the doctrine" and that "there has been a series of cases in the last few years as the [Supreme] Court determines what it means to treat religious organizations differently." As a sitting federal judge, I am bound to follow the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, as well as the principles that the Court recently articulated, *per curiam*, in *Tandon v. Newsom*, and I would continue to be bound by Supreme Court precedents in this area if confirmed to the D.C. Circuit. I have not expressed any personal views of the scope and contours of the fundamental right to religious liberty, and it would not be appropriate for me to do so under Canon 3 of the Code of Conduct for Judges, as the Supreme Court and other courts are actively evaluating the Free Exercise Clause, as applied to various government regulations.

15. During your confirmation hearing, you commented on the Supreme Court's jurisprudence regarding the First Amendment. Specifically, you said that "the Supreme Court has rightly viewed the First Amendment right to religious liberty as foundational, fundamental." I'd like to ask you about another of the Supreme Court's holdings regarding the First Amendment: In *Tandon v. Newsom*, the Supreme Court in April 2021 enjoined California from enforcing its limits on religious gatherings, including gatherings in private homes, noting that California "treats some comparable secular activities more favorably than at-home religious exercise." This decision did not break new ground, and the Court even noted that this ruling was "the fifth time that the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise," and that the Court's decisions have made the law on the Free Exercise Clause "clear." You

mentioned in your confirmation hearing that you are aware of the "series of rulings" from the Supreme Court on this issue in the past few years. Do you believe that the Supreme Court "rightly viewed" the First Amendment's Free Exercise Clause in *Tandon v. Newsom*?

RESPONSE: Please see my response to Question 14.

16. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, "I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can't infringe on people's religious rights." Do you believe that the First Amendment right to free speech, which the Supreme Court has held in *Citizens United v. FEC* also applies to the speech of corporations and nonprofit entities, is a "foundational tenet of our entire government, our constitutional scheme?"

RESPONSE: Please see my response to Question 12.

17. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, "I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can't infringe on people's religious rights." Do you believe in the Second Amendment right of an individual to keep and bear arms?

RESPONSE: Please see my response to Question 11.

18. During your confirmation hearing, when asked by Senator Hawley about the First Amendment right to religious liberty, you responded, "I do believe in religious liberty. That is a foundational tenet of our entire government, our constitutional scheme. The Supreme Court has made clear through its case law that governments can't infringe on people's religious rights." Do you believe that the Second Amendment right of an individual to keep and bear arms is a "foundational tenet of our entire government, our constitutional scheme?"

RESPONSE: Please see my response to Question 11.

19. Are civil rights guaranteed to all Americans, or only specific sub-sets of Americans?

RESPONSE: All Americans have the rights that are guaranteed by our Constitution. Federal civil rights statutes, such as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, and the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, contain provisions that specifically define the scope of the protections that are afforded by the particular congressional enactment, and in so doing, statutes such as these ultimately ensure liberty and justice for all. Such statutes also typically

contain extensive findings by Congress pertaining to the prior discriminatory treatment of the groups of persons that the statutes cover. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), 105 Stat. 1071 (stating that the law was meant to provide, among other things, "appropriate remedies for intentional discrimination and unlawful harassment in the workplace"); Americans with Disabilities Act § 2(b)(1) (declaring that the law's purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); Religious Freedom Restoration Act § 2(b)(2) (explaining that the law was intended to "provide a claim or defense to persons whose religious exercise is substantially burdened by government"). These civil rights statutes, and others, protect the constitutional rights of the categories of persons that are specifically identified in the statutes.

20. Do illegal aliens have a civil right to come to the United States?

RESPONSE: The circumstances under which noncitizens may be admitted into the United States are established in several federal statutes, including the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq*., as amended by legislation including the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009. Section 208 of the INA authorizes the Secretary of Homeland Security or the Attorney General to grant asylum to noncitizens who qualify as refugees within the meaning of the statute and satisfy certain eligibility criteria. *See* 8 U.S.C. § 1158. The Supreme Court has also held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent[,]" *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); however, the Court has recently clarified that noncitizens "seeking initial entry[,]" such as those "who arrive at ports of entry" or those who are "detained shortly after unlawful entry[,]" are afforded "only those rights regarding admission that Congress has provided by statute[,]" *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020).

21. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. To generate each response, I read the question carefully, researched the law and my own practices as a district judge, as necessary, and drafted answers to the questions. I then shared my draft answers with employees of the Department of Justice's Office of Legal Policy and received their feedback. I then finalized the responses based on my independent judgment.

22. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers,

please also identify the department or agency with which those officials are employed.

RESPONSE: The answers that I have provided to all of the written questions of the members of the Committee are mine alone. No individual outside of the United States federal government wrote or drafted any of the answers to any of the written questions that were sent to me by members of the Committee. My current and former chambers staff assisted me with research, as necessary, and employees of the Department of Justice's Office of Legal Policy provided feedback on the answers that I drafted.

Responses to Questions for the Record from Senator Ted Cruz
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit

1. Different judges apply different theories of interpretation to the Constitution. Some understand the Constitution to be living document, whereas Justice Scalia described himself as an originalist and said the Constitution was "dead, dead, dead." During your hearing, you testified that you have not presided over any cases that have "required [you] to develop a view on Constitutional interpretation of text."

a. Is it your testimony that, as a sitting judge and a nominee for D.C. Circuit Court of Appeals that you do not have a theory of constitutional interpretation?

RESPONSE: Yes, that is my testimony. As a sitting district judge, I view my role as applying D.C. Circuit and Supreme Court precedents to cases that come before me, and not developing my own theory of constitutional interpretation. If confirmed to the D.C. Circuit, I would likewise be bound by both Supreme Court and D.C. Circuit precedent.

b. If your answer to subpart (a) is anything other than "yes" please describe the theory of Constitutional interpretation of text to which you ascribe.

RESPONSE: Please see my response to subpart (a).

2. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.

RESPONSE: I do not have a judicial philosophy per se, other than to apply the same method of thorough analysis to every case, regardless of the parties. Specifically, in every case that I have handled as a district judge, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including the text of any applicable statutes and the binding precedents of the Supreme Court and the D.C. Circuit. And I have consistently applied the same level of analytical rigor to my evaluation of the parties' arguments, no matter who or what is involved in the legal action. Moreover, in my work as a district judge, I have not had occasion to evaluate broader legal principles or develop a substantive judicial philosophy. Given the very different functions of a trial court judge and a Supreme Court Justice, I am not able to draw an analogy between any particular Justice's judicial philosophy and the approach that I have employed as a district court judge or would employ as a D.C. Circuit Judge, if I am confirmed.

3. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

RESPONSE: As a sitting district judge, I am currently bound by the methods of constitutional interpretation that the Supreme Court has adopted, and I have a duty not to opine on the Supreme Court's methodology or suggest that I would undertake to interpret the text of the Constitution in any manner other than as the Supreme Court has directed. I also have a duty to avoid commenting on, or providing any personal views about, matters that are in the Supreme Court's province to decide, such as how best to discern the meaning of the Constitution's provisions and whether its meaning has changed over time.

4. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

RESPONSE: The Constitution requires that the President "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. As a sitting federal judge, who might be called upon to address a President's refusal to enforce a law in the context of a litigated case, it would be inappropriate for me to opine as to whether the President's refusal to enforce a law violates Article II, section 3 or any other constitutional provision.

5. What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

RESPONSE: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with the exercise any of governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President's ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

6. President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

RESPONSE: As a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of that Court's size or composition. It would be

inappropriate for me to comment on the merits or demerits of proposals to increase or decrease the number of Justices on the Supreme Court.

7. Do you personally own any firearms? If so, please list them.

RESPONSE: No, I do not own any firearms.

8. Have you ever personally owned any firearms?

RESPONSE: No, I have never owned a firearm.

9. Have you ever used a firearm? If so, when and under what circumstances?

RESPONSE: I have not had occasion to use a firearm. I am familiar with the operation of firearms, however, through my service on a court that often handles trial cases that involve unlawful possession of dangerous weapons, and also through my relationship with my only sibling, who has served both as an infantryman and officer in the Maryland Army National Guard (during which he was twice deployed overseas) and as an undercover narcotics recovery officer in the Baltimore City police department. My earliest exposure to firearms occurred in connection with my childhood relationship with two of my uncles, who were employed as law enforcement officers in Miami-Dade County when I was a child, one of whom was subsequently appointed as the Chief of the City of Miami Police Department.

10. Is the ability to own a firearm a personal civil right?

RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). In *McDonald v. City of Chicago*, the Court further held that the right that the Second Amendment guarantees is a fundamental right that applies to the states as well the federal government. *See* 561 U.S. 742, 750 (2010). These precedents of the Supreme Court are binding on me, and I would be required to apply them in any case that implicates a restriction or limitation on a person's individual right to own a firearm.

11. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

RESPONSE: The Supreme Court has held that the Second Amendment confers "an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The Court has also clarified that the individual constitutional right to keep and bear arms is "not unlimited, just as the First Amendment's right of free speech [is] not[.]" *Id.* To my knowledge, neither the Supreme Court nor the D.C. Circuit has concluded that the right to own a firearm receives less protection than the other individual rights that are specifically enumerated in the Constitution. If confirmed, I will abide by

Heller, *McDonald*, and any other Supreme Court and D.C. Circuit precedent that defines the scope of protections that the Second Amendment guarantees.

12. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

RESPONSE: Please see my response to Question 11.

13. Is the Religious Freedom Restoration Act a civil rights law?

RESPONSE: Yes. "Congress enacted [the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb4] in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 693 (2014). RFRA's statutory statement of findings and purpose states, *inter alia*, that, under our constitutional scheme, "governments should not substantially burden religious exercise without compelling justification[,]" 42 U.S.C. § 2000bb(a)(3), and RFRA was promulgated to ensure that the government "justif[ies] burdens on religious exercise imposed by laws neutral toward religion[,]" *id.* § 2000bb(a)(4). The statute is aimed at protecting individuals' First Amendment right to the free exercise of religion in a manner that is similar to the Civil Rights Act's protection of the Fourteenth Amendment right to equal protection and due process by prohibiting discrimination. Indeed, in interpreting a phrase "persons acting under color of law" as it appears in RFRA, the Supreme Court observed that RFRA "draws from one of the most well-known civil rights statutes: 42 U.S.C. § 1983, and explained that "[b]ecause RFRA uses the same terminology as § 1983 in the very same field of civil rights law, it is reasonable to believe that the terminology bears a consistent meaning." *Tanzin v. Tanvir*, 141 S. Ct. 486, 490–91 (2020) (internal quotation marks and citation omitted). Congress has also identified RFRA as a civil rights law by including it among the statutes for which attorneys fees are available under the Civil Rights Attorney's Fees Award Act. *See* 42 U.S.C. § 1988.

14. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be an religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

RESPONSE: The Supreme Court has made clear that, under certain circumstances, various constitutional protections limit what the government can impose on, or require of, private persons and institutions. These constitutional limits include the First Amendment's Free Exercise Clause. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–68 (2020) (per curiam). The Supreme Court has also found that government can lack the constitutional authority to regulate the conduct of private parties under certain circumstances. *See, e.g*., *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012).

15. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

RESPONSE: Under the binding precedents of the Supreme Court, the rights secured by the Free Exercise Clause and the Religious Freedom Restoration Act are not limited to religious practices in the home or in houses of worship.

16. You served on the advisory board of the Montrose Christian School. While you served, the school had a statement of beliefs, posted on its website, that included traditional Christian moral teachings like "all Christians are under obligation to seek to make the will of Christ supreme."

a. Were you aware of this publicly posted statement of beliefs during your time on the advisory board?

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—for one year, from the fall of 2010 to the fall of 2011. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school's website. My service on the board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

b. If so, were you aware of the specific declarations that:

i. "Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God's creation."

1. Yes or no?

ii. "In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including adultery, homosexuality, and pornography. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.

1. Yes or no?

iii. "A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation."

1. **Yes or no?**

RESPONSE: Please see my answer to Q.16.a.

c. I have not, and will not, inquire as to what you believe on these issues, and whether these statements reflect your personal views. Probing a nominee's faith, and making it a matter of public display and ridicule, is and has never been appropriate. Do you agree that an individual's beliefs on these matters do not affect his or her fitness to be a judge?

RESPONSE: Article VI of the Constitution forbids any religious test for appointment to any public office, including an appointment to judicial service. That provision states, in relevant part, that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Per the oath of office and the Code of Conduct, a judge is required to set aside all personal beliefs, including any religious beliefs, when she undertakes to rule in the cases to which she is assigned.

17. President Biden has promised to nominate judges "who look like America." What do you understand this to mean?

RESPONSE: My understanding is that President Biden is seeking to appoint judges from a variety of professional and personal backgrounds.

18. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

RESPONSE: As a pending judicial nominee and sitting federal judge, the Constitution and the Code of Conduct for United States Judges prevent me from commenting on the constitutionality of any particular set of factors that the Executive Branch might or does consider when making political appointments.

19. Is there systemic racism in public policy across America?

RESPONSE: I am aware that policymakers in the Executive Branch have expressed views about "systemic racism," including, for example, the view that "systemic racism refers to historic patterns or practices that have had a disparate impact of communities of color and other ethnic minorities, such as the fact that those communities have disproportionately lower rates of employment and wealth accumulation." Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General, at 64 (Feb. 28, 2021). Policymakers routinely consider evidence concerning such matters, and they also make determinations regarding relevant policy changes. The role of a judicial

officer is distinct from that of a policymaker; as a judicial officer, it is my duty to adjudicate individual claims, including claims of race discrimination, that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination and other unlawful conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, and I do not draw upon, reference, or consider my personal views, if any, regarding systemic racism. Thus, it would be inappropriate for me to comment on the existence *vel non* of any such phenomenon.

20. Is the criminal justice system systemically racist?

RESPONSE: Please see my response to Question 19.

21. If you are to join the D.C. Circuit, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the Court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;

c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or

d. **Meritocracy or related values such as work ethic are racist or sexist.**

RESPONSE: To my knowledge, the judges of the D.C. Circuit are not involved in evaluating or selecting training programs for court employees. If I join the D.C. Circuit, and if am asked to participate in evaluating any such program, I would assess the program's teachings and would oppose any instruction regarding race or sex that is unconstitutional or are otherwise contrary to law in light of the binding precedents of the Supreme Court and the D.C. Circuit.

22. Will you commit to opposing any proposed trainings for D.C. Circuit employees that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

RESPONSE: Please see my response to Question 21.

23. Is it appropriate for a witness to a crime to consider the race of the perpetrator when deciding whether to provide information to the police or federal authorities?

RESPONSE: As a sitting federal judge, it is not my role to determine whether a witness's consideration of the race of a perpetrator is "appropriate," as opposed to unlawful, and I assess the lawfulness of a defendant's behavior based solely on the

facts of the particular case and the applicable law, including binding precedents of the D.C. Circuit and the Supreme Court. In any event, this question provides insufficient information to form an opinion about the appropriateness of the hypothesized witness's decision-making process, and as a pending judicial nominee and a sitting federal judge, I am not able to provide any view regarding the lawfulness of a witness's consideration of race in this hypothetical situation.

24. Is it racist for a person to call police out of concern over the threatening or unlawful conduct of a person of color?

RESPONSE: As a sitting federal judge, it is not my role to determine whether conduct by individuals is "racist," as opposed to unlawful, but the question itself posits that race played no role in the caller's decision to contact the police. Moreover, as a pending judicial nominee and a sitting federal judge, I am not able to provide any view regarding the lawfulness of a person's decision to call the police in this hypothetical situation.

25. Does the President have the authority to abolish the death penalty?

a. Does the implementation of a criminal punishment prescribed by law depend entirely on the President's discretion?

b. Could a President lawfully declare, as a policy, that he disfavors physical imprisonment and order all federal prosecutors to refuse to seek it?

RESPONSE: Under our constitutional system, Congress determines the applicable penalties for conduct that it has declared unlawful, and, by statute, it has determined that the death penalty is an appropriate sentence for certain federal crimes under certain circumstances. The Supreme Court has upheld the death penalty as constitutional, and it is the President's duty to "take Care that the Laws be faithfully executed." U.S. Const. art II, § 3. Acting alone, the President does not have the authority to change the laws that Congress enacts, including the penalties that Congress has prescribed for criminal offenses. As a pending judicial nominee and sitting federal judge, I cannot opine as to any hypothetical scenario in which the President might refuse to implement any aspect of the criminal justice regime that the federal statutes embody.

26. At his hearing, Attorney General Garland said that an attack on a courthouse while in operation, and trying to prevent judges from actually trying cases, "plainly is domestic extremism." And when pressed, he mentioned also that an attack "simply on government property at night or any other kind of circumstances" is a clear and serious crime. But he seemed to make a distinction between the two, describing the latter (and only the latter) as an "attack on our democratic institutions." If you are confirmed, you will be sitting on a very important court. Do you agree with these statements?

RESPONSE: I am not familiar with these statements by Attorney General Garland, but the quoted statements appear to refer to alternative hypothetical circumstances involving an attack on a courthouse. Because litigation involving such issues might arise in the future, Canon 3 of the Code of Conduct prohibits me, as a sitting federal judge, from providing any personal view of whether the hypothesized conduct qualifies as "domestic extremism" or constitutes "an attack on our democratic institutions."

27. Do you agree that free speech is an essential and irreplaceable American value?

RESPONSE: Yes. The First Amendment of the Constitution plainly protects the right of free speech, *see* U.S. Const. amend. I, and the Supreme Court has long held that freedom of speech is a "fundamental" right. *See, e.g.*, *Schneider v. New Jersey*, 308 U.S. 147, 150 (1939).

a. What are the present threats to free speech in America?

RESPONSE: Policymakers routinely consider whether free speech in America is being threatened in various ways, and judicial officers also sometimes consider legal actions brought by individuals and entities who claim that their rights to free speech are being threatened. As a judicial officer, it is my duty to adjudicate individual claims of free-speech violations, and when I have jurisdiction to do so, I resolve properly filed legal disputes concerning violations of free speech based solely on the arguments that the parties make, the established facts of the particular case, and the applicable law. *See, e.g.*, *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013). I do not draw upon, reference, or consider my personal views, if any, regarding present threats to free speech in America. Thus, it would be inappropriate for me to comment on the existence *vel non* of any such threats.

b. What role do the courts have in addressing threats to free speech?

RESPONSE: Please see my response to Question 27(a).

c. Does the First Amendment protect speech that some may consider offensive?

RESPONSE: Yes. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

i. If so, what are the limits to that protection?

RESPONSE: The Supreme Court has made clear that "speech that is 'vulgar,' 'offensive,' and 'shocking`' is 'not entitled to absolute constitutional protection under all circumstances.'" *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978)). For instance, the government can "lawfully punish an individual for the use of insulting '"fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting *Chaplinksy v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Similarly, "obscene material is unprotected by the First Amendment[,]" such that the government may regulate materials that, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

d. What is "hate speech"?

RESPONSE: A plurality of the Supreme Court has described "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" as "hateful[.]" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion). However, the Supreme Court has not defined "hate speech" as a distinct doctrinal category, and the Court has consistently recognized First Amendment limits on the government's ability to regulate such speech. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 457–58 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992) (holding that an ordinance that prohibits "plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" is facially unconstitutional); *see also B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009) (observing that "[r]acially offensive speech cannot be restricted for that reason alone").

i. Is "hate speech," as you have just defined it, protected by the First Amendment?

RESPONSE: Please see my response to Question 27(d).

ii. If so, what are the limits to that protection?

RESPONSE: The Supreme Court has held that the government may punish "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[,]" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), consistent with the First Amendment. The government can also permissibly regulate "true threats," *i.e.*, "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

28. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?

RESPONSE: Yes. The Supreme Court has held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students" in public educational institutions, and that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Thus, "the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints." *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 667–68 (2010). However, the Supreme Court has held that public schools can regulate student speech that would "materially and substantially disrupt the work and discipline of the school[,]" *Tinker*, 393 U.S. at 513, and that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings[,]" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Whether the *Tinker* rule applies to student speech that occurs off campus is a matter that the Supreme Court is currently considering in the case of *Mahanoy Area School District v. B.L.*, No. 20-255 (U.S. argued Apr. 28, 2021).

29. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?

RESPONSE: The Supreme Court has held that the First Amendment does not directly regulate the actions of private educational institutions, because, by its terms, the First Amendment "appl[ies] to governmental action" and "ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech[.]" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).

30. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?

RESPONSE: Whereas Title VI of the Civil Rights Act of 1964 prohibits entities (including educational institutions) that receive federal funding from discriminating on the basis of race, color, or national origin, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972 prohibits educational institutions that receive federal funding from discriminating on the basis of sex, 20 U.S.C. § 1681(a), to my knowledge, no federal statute currently prohibits educational institutions that receive federal funding from discriminating on the basis of speech.

31. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letter to colleges and universities that broadened the definition of sexual harassment and required schools to adopt a lenient "more likely than not" burden of proof when

adjudicating claims, among other procedural defects. How does this compare with the standard of proof that governs in criminal prosecutions?

RESPONSE: It is well established that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Because the "more likely than not" burden of proof is a lower standard than proof beyond a reasonable doubt, it would be easier to establish guilt concerning claims of sexual harassment in the context of DOE adjudications than in criminal prosecutions concerning similar conduct.

32. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on this question.

Responses to Questions for the Record from Senator Mike Lee
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit

1. How would you describe your judicial philosophy?

RESPONSE: I do not have a judicial philosophy per se, other than to apply the same method of thorough analysis to every case, regardless of the parties. In every case that I have handled as a district judge, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including the text of any applicable statutes and the binding precedents of the Supreme Court and the D.C. Circuit. And I have consistently applied the same level of analytical rigor to my evaluation of the parties' arguments, no matter who or what is involved in the legal action. If confirmed to the U.S. Court of Appeals for the D.C. Circuit, I would do the same.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

RESPONSE: I have issued nearly 50 published opinions in which I have engaged in the process of interpreting a federal statute. When I undertook to determine the meaning of statutory text in each of those cases, I started with a comprehensive evaluation of the statute's text, using traditional tools of statutory construction, including a close textual analysis of the words and structure of the statute. *See, e.g.*, *All. of Artists & Recording Cos., Inc. v. Gen. Motors Co*., 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I have also occasionally employed canons of construction. Use of these tools ordinarily results in a conclusion regarding the meaning of the statutory provision. However, if I find that the statutory text is ambiguous insofar as it is susceptible to more than one meaning, I reconsider the parties' arguments and may consult the legislative history, as the Supreme Court permits, in an effort to ascertain the will of Congress. I have never resolved a statutory ambiguity based solely on the legislative history of the statute.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

RESPONSE: I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the

Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61. As a lower court judge, I am bound by both the precedents of the Supreme Court and its method of analysis, and if called upon to interpret a constitutional provision, I would adhere to the methods of analysis that the Supreme Court and the D.C. Circuit employ, without regard to any personal view of how the Constitution should be interpreted.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

RESPONSE: Please see my response to Question 3.

5. What are the constitutional requirements for standing?

RESPONSE: The "irreducible constitutional minimum" requirements for standing to invoke the power of a federal court to resolve, as necessary to demonstrate that the plaintiff's legal claim presents a remediable case or controversy that gives rise to jurisdiction under Article III of the Constitution, are: (1) that the plaintiff has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the asserted injury is fairly traceable to the defendant's action, and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

6. Do you believe there is a difference between "prudential" jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

RESPONSE: Article III, section 2 defines the scope of a federal court's jurisdiction—i.e., "[t]he judicial Power" that the Constitution vests in the federal judiciary—and the Supreme Court has developed various doctrines that relate the exercise of a federal court's jurisdiction. Some of these doctrines are mandated by the Constitution's text; others are merely "prudential."

Standing, mootness, and ripeness are all rooted in Article III's "case" or "controversy" requirement. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 81 (1978). These determinations are mandatory considerations that must be assessed at the outset of a case, and if there is no standing, or if the matter is moot or unripe, the court lacks jurisdiction to proceed to review the merits and resolve the dispute.

Other limits on a federal court's exercise of jurisdiction that are not grounded in the text of Article III, but the Supreme Court has determined that the exercise of a court's

jurisdiction over certain cases and controversies is restricted on these grounds nevertheless. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (explaining that "prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches" (internal quotation marks and citation omitted)); *Duke Power Co.*, 438 U.S. at 81–82 (discussing "prudential considerations embodied in the ripeness doctrine[,]" such as the extent to which the parties would be "adversely affected" by a "delayed resolution" of the case); *United States v. W.T. Grant Co*., 345 U.S. 629, 632–33 (1953) (noting that various practical concerns impact mootness determinations, such as the likelihood that an action will recur). Notwithstanding these "prudential" considerations, the Supreme Court has recently reiterated that federal courts must hear cases that have been properly brought, and that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation marks and citation omitted).

Another potential category of prudential restrictions that pertain to a court's jurisdiction relate to circumstances under which a court can hear claims that implicate the adjudicative authority of the States. The Supreme Court has sometimes required federal courts to abstain from exercising jurisdiction as a prudential matter, rather than one that is necessarily grounded in Article III. *See, e.g.*, *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (emphasizing that federal courts should abstain from exercising jurisdiction over a case involving state law when, for instance, resolution of a state law question by state courts can avoid the necessity of deciding a question of federal constitutional law); *see also Younger v. Harris*, 401 U.S. 37, 41 (1971) (holding that federal courts should not grant injunctive relief against state criminal prosecution pursuant to "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances").

7. How would you define the doctrine of administrative exhaustion?

RESPONSE: Administrative exhaustion is the principle that a plaintiff must pursue administrative remedies before seeking to challenge an agency or state action in federal court. *See, e.g.*, *McKart v. United States*, 395 U.S. 185, 193 (1969).

8. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

RESPONSE: The scope of Congress's constitutional authority is a matter that is subject to vigorous and ongoing debate. Article I, section 8 lists various specific powers of the Legislative branch, and it concludes with the statement that the Legislature also has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or

Officer thereof." U.S. Const. art I, § 8, cl. 18. Similarly, section 5 of the Fourteenth Amendment confers to Congress the "power to enforce, by appropriate legislation, the provisions of this article." Some have argued that these and other constitutional grants of authority compel the conclusion that the Framers intended for Congress to have implied powers beyond those enumerated in the Constitution.

The Supreme Court has, at times, recognized that Congress has certain implied powers. *See, e.g.*, *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (explaining that, "[a]lthough there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation"), *overruled in part on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967); *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927) (holding "that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective"). However, the Supreme Court has also made clear that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The federal government is acknowledged by all to be one of enumerated powers." (internal quotation marks, citation, and alterations omitted)). Thus, while "[t]he principle [that Congress] can exercise only the powers granted to it . . . is now universally admitted[,]" the significant "question respecting the extent of the powers actually granted[] is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Lopez*, 514 U.S. at 566 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)) (internal quotation marks and alterations omitted)).

9. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

RESPONSE: If I were ever called upon to evaluate a congressional enactment that did not reference a specific power enumerated in the Constitution, I would utilize the same methods of evaluation that the Supreme Court has used to assess Congress's ability to enact laws that have been challenged on those grounds.

In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Supreme Court assessed the authority of Congress to enact the Gun-Free School Zones Act by "start[ing] with first principles[,]" and in this regard, it focused on the text of the Constitution itself. *See id.* at 552 (noting that "[t]he Constitution creates a Federal Government of enumerated powers"). The Court then reviewed prior precedents that had addressed the extent of Congress's power under the Commerce Clause, *see id.* at 553–59, and gleaned applicable principles from those binding authorities, including confirmation that Congress's Commerce Clause power "is subject to outer limits[,]" *id.* at 557. The Court also determined, based on the circumstances presented in the prior binding precedents, that even its past decisions affirming Congress's authority to enact legislation under the Commerce Clause "had involved economic activity in a

way that the possession of a gun in a school zone does not[,]" *id.* at 560, and it also noted that, "as part of [its] independent evaluation of constitutionality under the Commerce Clause" it would have "of course consider[ed] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce[,]" if the statute or its legislative history had contained such findings, *id.* at 562.

I would ascertain if the Supreme Court or the D.C. Circuit has used additional, or different, tools to evaluate the constitutionality of enactments of Congress that do not reference a specific enumerated right. And I would research the applicable methods of interpretation, and apply such tools, if I had to evaluate the constitutionality of any such statute.

10. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

RESPONSE: The Supreme Court has determined that the Constitution protects certain rights that are not specifically enumerated in the Constitution. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel, and *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), articulate a limited right to terminate a pregnancy, particularly before viability, *Casey*, 505 U.S at 870. The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

According to the Supreme Court, the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights, and the Court has held that, as a general matter, due process protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty[.]" *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks and citations omitted). The Supreme Court has also, at times, suggested that the Ninth Amendment—which provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[,]" and the Privileges and Immunities Clause of Article IV, section 2, which states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States[,]" are sources for unenumerated rights. *See, e.g.*, *Roe*, 410 U.S. at 152–53; *Saenz*, 526 U.S. at 501–02.

11. What rights are protected under substantive due process?

RESPONSE: Please see my response to Question 10.

12. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

RESPONSE: As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding of the scope of substantive due process have no bearing on the constitutional analysis that I would impose in any case that implicates these issues. Under binding Supreme Court precedent, the substantive due process clause protects unenumerated rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted), and the government's regulation of such unenumerated personal rights may be subject to heightened scrutiny. The Supreme Court has not afforded the same protection to the unenumerated economic rights that were initially recognized in *Lochner*. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955). The Court has held that the government can regulate in a manner that restricts economic freedom if the regulation at issue is rationally related to a legitimate government interest. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

13. What are the limits on Congress's power under the Commerce Clause?

RESPONSE: According to the Supreme Court, Congress's power under the Commerce Clause is broad, but it is not unlimited. The Court has held that Congress may only regulate three categories of activity pursuant to that constitutional provision: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and activities that threaten such instrumentalities, persons or things, and (3) activities that "substantially affect interstate commerce[.]" *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

14. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

RESPONSE: When an act of government distinguishes between groups of people, the Supreme Court has described the "traditional indicia of suspectness" to include those classifications that pertain to "an immutable characteristic determined solely by the accident of birth," and also those that pertain to classes of persons who are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v.*

Robison, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted). To date, when there is a constitutional challenge, the Supreme Court has determined that race, religion, national origin, and alienage are suspect classes that are subject to heightened ("strict") scrutiny. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971).

15. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

RESPONSE: Checks and balances play an essential role in our constitutional scheme, because liberty can only be achieved, and retained, through the stratification of government power. The Framers carefully and deliberately divided the powers of government among the three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others' accumulation of power. In Federalist 51, James Madison explained that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("[T]he men who met in Philadelphia in the summer of 1787 . . . viewed the separation of powers as a vital check against tyranny."). And the structure of our constitutional system prevents autocracy while also promoting "a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id*. ("While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]" and thereby "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. *See Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.' . . . The purpose [of the doctrine of the separation of powers] was not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments," in order "to save the people from autocracy.").

16. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

RESPONSE: I have yet to be assigned a case involving a claim that Congress was not constitutionally authorized to enact certain legislation. If I had such a case, I would analyze the constitutional text that pertains to the issue in dispute consistent with Supreme Court and D.C. Circuit precedents that evaluate other allegedly unauthorized exercises of congressional authority, including cases such as *Medellin v. Texas*, 552 U.S. 491 (2008), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995).

In a case of mine that involved a claim that the President had overstepped his constitutional authority by issuing executive orders that governed the collective bargaining rights of federal employees in a manner that conflicted with the will of Congress as set forth in the prescriptions of Federal Service Labor-Management Relations Act ("FSLRMS"), 5 U.S.C. § 7101–35, *see Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev'd and vacated on other grounds*, 929 F.3d 748 (D.C. Cir. 2019), I consulted and applied binding Supreme Court and D.C. Circuit case law regarding the authority of the President to regulate federal labor-management relations with or without specific congressional authorization, *see id.* at 412–18, and interpreted the statute's text in light of precedents that define the statutory right of federal employees to bargain collectively, *see id.* at 418–40.

17. What role should empathy play in a judge's consideration of a case?

RESPONSE: A judge has a duty to decide cases based solely on the law, without fear or favor, prejudice or passion. In all cases, courts should generally be mindful that the exercise of judicial authority has a profound impact of the lives and circumstances of litigants. But to the extent that empathy is defined as one's ability to share what another person is feeling from the other person's point of reference, empathy should not play a role in a judge's consideration of a case.

18. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

RESPONSE: The statutes that Congress enacts are presumed to be constitutional, and there is no legal authority for a court to invalidate a congressional enactment that is, in fact, constitutional. Furthermore, the Supreme Court has long required lower federal courts to avoid considering constitutional questions that might lead to the invalidation of federal statutes, if possible, and there are often threshold considerations under Article III that limit a federal court's power to address a constitutional challenge in any event. Thus, I would need significantly more information than this question provides about the laws at issue and the circumstances under which they are being challenged in order to be able to form any opinion about which exercise of judicial authority is "worse." Even if such information was provided, however, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the relative merits or demerits of hypothesized scenarios regarding judicial treatment of challenged government action.

19. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

RESPONSE: Please see my response to Question 18. As a district court judge, my role has been to consider the facts and arguments that are presented in each case that is assigned to me, and to apply the law (including and especially the binding precedents of the Supreme Court and the D.C. Circuit) to resolve the matter before me. It is well established that "[i]t is emphatically the province and duty of the judicial department to say what the law is[,]" and that this power includes ruling on the constitutionality of legislation that Congress passes and the President signs, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But I have not formed any opinions about broader trends or changes in the Supreme Court's practices concerning invalidation of federal statutes. Even if I had formed such an opinion, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the benefits and disadvantages of difference in the rate at which the Court exercises its power to review the constitutionality of legislative enactments.

20. How would you explain the difference between judicial review and judicial supremacy?

RESPONSE: Judicial review refers to the power of the judiciary to assess the legality of decisions made by the executive and legislative branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial supremacy refers to the idea that the Supreme Court is the final arbiter on the meaning of constitutional provisions. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that, while "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference[,] . . . the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))); *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum. L. Rev. 1137 (2011) (explaining the doctrine of judicial supremacy).

21. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

RESPONSE: The Constitution's tenets are binding on officials who are elected to serve in the government of the United States, and it is clear beyond cavil that such officials have an independent obligation to adhere to the Constitution's commands. As a judicial officer, my role is to determine whether and to what extent the Constitution and laws of the United States have been violated by anyone, including such officials, in the context of cases or controversies that are properly filed in federal court and assigned to me. As a pending judicial nominee and a sitting federal judge,

it would be inappropriate for me to opine on the antecedent question of how such officials can avoid violating the Constitution as interpreted by the judiciary, or the means by which such officials can accomplish the subsequent duty of balancing their own understanding of what the Constitution requires with the determinations that are made in judicial decisions.

22. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

The Federalist Papers speak to the Framers' intent concerning the powers that the Constitution confers upon the branches of the federal government. In No. 78, Hamilton asserts that "the judiciary is beyond comparison the weakest of the three departments of power[,]" and he also makes clear that the judicial power to review and invalidate legislative action for conformity with the Constitution's commands—which is in "the proper and peculiar province of the courts"—does *not* "imply a superiority of the judiciary to the legislative power." The Federalist No. 28 (Alexander Hamilton). To this end, the Supreme Court has established various doctrines to ensure that courts, which are not accountable to the people by design, cannot exercise unlimited power. These doctrines include the Supreme Court's interpretation of Article III to confine courts to the consideration of "cases" or "controversies," and it is important for courts to keep the judiciary's limited authority in mind when judging, consistent with the Framers' intent. *See*, *e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (preventing the Judiciary from intruding into the executive sphere).

23. How would you describe your approach to reading statutes – how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

RESPONSE: As a district court judge, I routinely undertake to interpret statutes, and have issued nearly 50 opinions that involve some form of statutory interpretation. Based on my past practice, I give the statute's text controlling weight. I have considered the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation. *See, e.g.*, *All. of Artists & Recording Cos., Inc. v. Gen. Motors Co*., 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I also apply Supreme Court and D.C. Circuit precedents regarding the appropriate method of interpretation in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). If and only if a statute is ambiguous, I have also occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue. I have not considered the meaning of a statute to change as social norms and linguistic conventions evolve.

And I have not resolved a statutory ambiguity based solely on the legislative history of the statute.

24. As a circuit court judge, you would be bound by both Supreme Court precedent, and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

RESPONSE: It is the duty of a judge to apply Supreme Court and circuit precedent that governs the resolution of the issue at hand faithfully, regardless of that judge's personal opinion about either the matter at issue or the correctness of the holdings in those cases. However, if a particular Supreme Court or D.C. Circuit precedent is not applicable to an issue before me, I would look for analogous precedents to glean principles that could be applied to the circumstances of the case at hand. It might also be necessary to distinguish the instant circumstances from other seemingly applicable precedents, and to explain why the principles articulated in such other cases do not control the outcome of the case.

25. Would it ever be appropriate for a judge to review a decision of the President or an Officer of the United States that Congress has committed to the "sole and unreviewable discretion" of the executive?

RESPONSE: I confronted this question in *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), and my analysis of the facts and arguments in that matter, in light of D.C. Circuit precedents, yielded a nuanced answer.

The text of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act ("INA") grants DHS "sole and unreviewable discretion" to designate categories of unauthorized noncitizens for expedited removal, which plainly indicates Congress's intention to confer to DHS exclusive discretion to make that determination, insofar as the statute anoints the agency as the "sole" decider, and suggests that once DHS makes that determination, the agency's decision regarding how long a noncitizen must be present in the United States to warrant more extensive removal procedures is final (i.e., "unreviewable"). But Congress has also elsewhere directed executive agencies as to *how* they must go about exercising the discretion that it confers. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59. And the D.C. Circuit has long recognized that judicial review of the procedures that an agency employs to make congressionally authorized determinations may be authorized, despite broadly worded delegations of authority. *See, e.g.*, *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) (per curiam) (explaining that a "'statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review the agency's exercise of its discretion to avoid abuse,' especially

on procedural grounds" (quoting 3 Richard J. Pierce, Jr., Administrative Law Treatise § 17.6 (4th ed. 2002)). Thus, the question of first impression that I addressed in *Make the Road* was whether the "sole and unreviewable discretion" language in section 1225(b)(1)(A)(iii)(I) of the INA conferred discretion that was not *only* exclusive, but was *also* preclusive of the standard procedural requirements that would otherwise apply to govern DHS's decision making process.

As the opinion explains, in my view, the language of section 1225(b)(1)(A)(iii)(I) can be read together with the APA's procedural requirements, per the *in para materia* cannon and other traditional tools of statutory interpretation, to mean that Congress intended to provide DHS with the exclusive authority to make the expedited removal designation determination within the statutory limits, but that the agency must exercise its broad discretion consistent with its standard decision making obligations under the APA. Given this reading of the relevant statutes, section 1225(b)(1)(A)(iii)(I) serves to bar judicial review of the substantive merits of the agency's expedited removal designation decision (except, perhaps, for constitutional challenges), but judicial review of the procedures that DHS employs when it exercises the broad discretion that Congress has provided remains available, under the APA. *See Make the Road NY*, 405 F. Supp.3d at 43 (observing that, while the INA confers broad discretion to DHS to make the designation decision, it does not address the procedures that the agency must use, nor does it plainly indicate that Congress intended to authorize DHS to opt to forego the procedural mandates that would ordinarily apply); *see also id*. (reasoning that Congress's preservation of the federal court's subject matter jurisdiction to hear challenges to the validity of the implementation of the expedited removal system in 8 U.S.C. § 1252(e)(3) further suggests that Congress intended to authorize judicial review of the agency's abandonment of procedural standards with respect to the expedited removal process). On appeal, the D.C. Circuit panel disagreed with this analysis, *see Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020); it held, in essence, that where Congress has delegated to an agency "sole and unreviewable discretion" to make a specified determination, that language is sufficient to establish that Congress has necessarily granted decision making authority that is *both* exclusive *and* preclusive of APA review of the procedures that the agency employs. *See id.* at 633–34. That Circuit determination is binding precedent, which means that, going forward, it is not appropriate in this jurisdiction for a judge to review an executive decision that Congress has committed to the "sole and unreviewable discretion" of the executive based on a claim that the agency's exercise of that discretion violates the APA.

26. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

RESPONSE: No. My uniform practice in the eight years that I have served as a district judge has been to determine whether or not I have subject matter jurisdiction as a threshold question, and to dismiss the case where I have no jurisdiction, without reaching the merits. *See, e.g.*, *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 148 (D.D.C. 2016) (explaining that, because the

plaintiff lacked standing, "the Court is constrained to refrain from passing on the merits of Plaintiffs' arguments or granting them the relief they seek"); *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 206 (D.D.C. 2015) (finding that, because the plaintiffs lacked standing, "this Court has no authority to reach the merits of their case" and dismissing case as a result), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015); *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 53–54 (D.D.C. 2014) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction." (quotation marks and citation omitted)), *aff'd sub nom. Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015).

27. Once again, for the record, please explain your statement that "observed inconsistencies are largely attributable to factors other than group-based bias by judicial decisionmakers."

RESPONSE: The quoted statement is from a presentation that I made in May of 2019, as participant in Columbia Law School's Courts & Legal Process colloquium, which is a long-standing series that brings judges and other legal experts to campus to critique draft academic articles about judicial process for the benefit of students in Professor Burt Huang's seminar on the courts. The draft article that I was asked to review was entitled "Is Judicial Bias Inevitable?" and the authors opened with the contention that, while impartiality is a key tenet of any fair judicial system in theory, in practice, "judges cannot be impartial" because "[s]ocial science has uncovered the prevalence and inevitability of biases, heuristics, and stereotypes in human decision making, which operate automatically and, at times, unconsciously." The article cited and described the findings of various social scientists who study implicit bias, including Harvard Professor Mahzarin R. Banaji, as support for the proposition that "the particular identities and roles of parties have proven a significant factor in shaping judicial outcomes, casting a shadow on judicial impartiality." And due to what the authors called "the growing recognition of the prevalence and impact of implicit bias" in judicial decision making, the article's primary contribution was its exploration of the authors' proposed solution: "the use of online court proceedings" that "substitut[e] physical meetings with online interaction" and thereby "limit judicial exposure to, and hence the impact of, the group identities of the parties, thus mitigating disparities in judicial outcomes that stem from visible markers of group-based identity (for example, age, gender and race)."

In critiquing the article, I accepted the authors' premise that inconsistencies in judicial outcomes with respect to different demographic groups have been observed, and that the implicit bias phenomenon that social science research documents may be a factor. But I argued—as the quoted statement indicates—that such inconsistencies might also be attributable to factors other than implicit bias. I further maintained that, regardless, any judicial system that is devoid of human interaction would be unlikely to produce fair and just results. *See* KBJ Reflections on Courts & Legal Process Article, at 1 ("My concern is that the article both *overestimates* the extent to which disparate outcomes are in fact attributable to bias (unconscious or otherwise), and

underestimates the importance of human interaction as an indispensable feature of a fair and just[] dispute resolution system.") (emphasis in original).

28. In your hearing testimony, you mentioned that the sentencing disparity between crack and powder cocaine has resulted in disparities in criminal convictions and sentencing. What additional factors—other than unconscious bias—have you seen come into play that could account for some of the disparities we see in criminal convictions and sentencing?

RESPONSE: During my confirmation hearing, when I was asked whether I would agree or disagree "with someone who said that most racial disparities in criminal convictions and sentencings are result from an unconscious racial bias of judges, juries, and other judicial decisionmakers[,]" I began my response by explaining that "as a judge now, it is very important for me not to make personal commitments about things like the question that you asked." I then stated that I am "aware of social science research" regarding implicit bias, citing in particular the work of Harvard Professor Mahzarin Banaji, and I also stated that I am aware of research that the Sentencing Commission has conducted concerning the impact of certain policy choices in the federal sentencing system on different demographic groups. The Commission's body of research regarding the federal sentencing system in the wake of the Anti-Drug Abuse Act of 1986, which is the legislation that established mandatory minimums and created the 100-to-1 crack cocaine/powder cocaine disparity, is among the research with which I am familiar. The Commission's October 2017 report concerning the impact of mandatory minimum penalties for drug offenses in the federal criminal justice system is another such research study. I did not express any personal views regarding my own beliefs about what factors contribute to alleged racial disparities in criminal convictions and sentencings, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities. It would likewise be inappropriate for me to identify other potentially contributing factors in response to this policy question.

29. Does it concern you that so called "dark money" groups, like Demand Justice and the Leadership Conference on Civil and Human Rights, support your nomination to the U.S. Court of Appeals for the D.C. Circuit?

a. Have you ever spoken with anyone at Demand Justice or the Leadership Conference on Civil and Human Rights Regarding your nomination to the D.C. Circuit?

RESPONSE: Among the many people who have offered me congratulations with respect to this nomination was Chris Kang, who I understand is affiliated with Demand Justice. I met Mr. Kang when he served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. That is the only communication that is responsive to this question.

30. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identit(ies) (*e.g.*, race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

RESPONSE: Pursuant to section 3553(a) of Title 18 of the United States Code, district judges must impose sentences that are "sufficient, but not greater than necessary" to promote the purposes of punishment, including providing just punishment, deterrence, incapacitation and rehabilitation. 18 U.S.C. § 3553(a). When the Court undertakes to "determin[e] the particular sentence to be imposed" under this statute, Congress has directed the judge to consider "the nature and circumstances and the history and characteristics of the defendant[,]" among other things. 18 U.S.C. § 3553(a)(1).

31. Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemic sentencing disparities?

RESPONSE: No. The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code, and the need to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor that Congress has instructed courts to consider when crafting a sentence. Section 3553(a) instructs courts to consider "the need to *avoid* unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6) (emphasis added). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (i.e., sex, national origin, creed, religion, and socio-economic status) "are not relevant in the determination of a sentence."

32. It has been reported that you met with President Biden to discuss your potential nomination to the D.C. Circuit. Once again, for the record, will you confirm that President Biden did not discuss or ask for a commitment from you on any of the following issues:

a. Abortion or *Roe v. Wade*?

b. The Second Amendment, *District of Columbia vs. Heller* or *MacDonald v. Chicago*?

c. Efforts to defund the police?

d. Illegal immigration?

RESPONSE: President Biden did not discuss any of these issues with me or ask for any commitments related to these matters.

Responses to Questions for the Record from Senator Ben Sasse
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit

For all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   RESPONSE: No.

2. **Since becoming a legal adult, have you participated in any rallies or demonstrations where you or other participants have willfully damaged public or private property?**

   RESPONSE: No.

3. **Was Marbury v. Madison correctly decided?**

   RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

   Marbury v. Madison is one of three exceptions to the general principle that a judge should not critique or comment on the Supreme Court's precedents. *Marbury* warrants this special status because the principle of judicial review that that decision established—i.e., its holding that, per the design of our Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is[,]" *Marbury v. Madison*, 5 U.S. 137, 177 (1803)—is a foundational finding that is beyond dispute. *See* Federalist No. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts."). Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Marbury* was rightly decided without calling into question my duties under the Code of Conduct.

4. **Was Brown v. Board of Education correctly decided?**

   RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to

their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

Brown v. the Board of Education is one of three exceptions to the general principle that a judge should not comment on the Supreme Court's precedents. *Brown* warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, which had given rise to legally enforceable segregation in various places in the United States by endorsing 'separate but equal' as consistent with the Constitution's Equal Protection Clause. The underlying premise of the *Brown* decision—i.e., that "separate but equal is inherently unequal"—is beyond dispute, and judges can express their agreement with that principle without calling into question their ability to apply the law faithfully to cases raising similar issues. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Brown* was rightly decided without calling into question my duties under the Code of Conduct.

5. Was Loving v. Virginia correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

Loving v. Virginia is one of three exceptions to the general principle that a judge should not comment on the Supreme Court's precedents. *Loving* reaffirmed the rejection of the "notion that the mere 'equal application' of a statute containing racial classifications" comports with the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1, 8 (1967), and as such, it is a direct outgrowth of *Brown*. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Loving* was rightly decided without calling into question my duties under the Code of Conduct.

6. Was Roe v. Wade correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

7. Was United States v. Virginia correctly decided?

RESPONSE: My response to Question 6 applies to this question.

8. Was District of Columbia v. Heller correctly decided?

RESPONSE: My response to Question 6 applies to this question.

9. Was Boumediene v. Bush correctly decided?

RESPONSE: My response to Question 6 applies to this question.

10. Was Citizens United v. FEC correctly decided?

RESPONSE: My response to Question 6 applies to this question.

11. Was Obergefell v. Hodges correctly decided?

RESPONSE: My response to Question 6 applies to this question.

12. In the absence of controlling Supreme Court precedent, what factors determine whether it is appropriate for an en banc court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

RESPONSE: D.C. Circuit precedents make clear that it is appropriate for that court, sitting en banc, to overturn its own precedents only in a narrow set of circumstances. The primary circumstance in which that action is warranted is when "an intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress,' necessitates a shift in the Court's position." *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). In addition, "it is appropriate for the en banc court to set aside circuit precedent when, 'on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed.'" *Allegheny Def. Project v. Fed. Energy Regul. Comm'n*, 964 F.3d 1, 18 (D.C. Cir. 2020) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)). It is also permissible for the en banc court to overturn its own prior precedent "where the precedent 'may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.'" *Burwell*, 690 F.3d at 504 (quoting *Patterson*, 491 U.S. at 173).

13. In the absence of controlling Supreme Court precedent, what factors determine whether it is appropriate for an en banc court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

RESPONSE: Please see my answer to Question 12. It does not appear that the D.C. Circuit's practices concerning overturning its own past precedents turns on whether the prior precedent conflicts with the original public meaning of *the Constitution* as opposed to the circumstance in which a prior precedent conflicts with the original public meaning of the text of *a statute*. In the latter context, however, the D.C. Circuit has found that "[a] court of appeals sitting en banc may also reexamine its own interpretation of a statute 'if it finds that other circuits have persuasively argued a contrary construction.'" *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Critical Mass Energy Proj. v. NRC*, 975 F.2d 871, 876 (D.C. Cir .1992) (en banc)).

14. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant?

RESPONSE: No. The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code, and the need to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor that Congress has instructed courts to consider when crafting a sentence. Section 3553(a) instructs courts to consider "the need to *avoid* unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6)(emphasis added). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (i.e., sex, national origin, creed, religion, and socio-economic status) "are not relevant in the determination of a sentence."

Additional Questions For Judge Ketanji Brown Jackson:

1. Please list some examples from your time as a federal district court judge of when your rulings conflicted with your personal policy preferences.

RESPONSE: My role as a district court judge has been to consider the facts and arguments that are presented in each case and controversy that is presented, and to apply the law faithfully to resolve the issues before me. Because my personal policy preferences play no role in the performance of my duties, in every case that I have handled, I have set aside my personal policy preferences completely, and have considered only the parties' arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly identify those opinions of mine in which my personal

policy preferences conflicted with the ruling that I made in the case based on what the law required. This is because judges are duty bound not to act or speak in a manner that might call into question their impartiality or their ability to rule consistently with the law, rather than their stated policy preferences, and the discussion of a judge's own policy preferences gives rise to that concern.

2. Why did you choose to become an Assistant Federal Public Defender?

RESPONSE: I chose to become an Assistant Federal Public Defender because public service is a core value in my family, and after becoming a lawyer, I determined that being a public defender was the highest and best use of my time and talents. Both of my parents spent most of their careers in the public sector—my mother as a public school science teacher to start, and, later, the principal of a public magnet school in South Florida. My father started his working life as a public high school history teacher and ended it as chief legal counsel to the Miami-Dade County School Board. Two of my uncles were career law enforcement officers: one was a Miami-Dade County sex crimes detective, and the other rose through the ranks of the City of Miami Police Department to become the Chief of Police. And my younger brother (my only sibling) served as an undercover police officer in a drug sting unit in Baltimore after graduating from college, before he joined the Maryland Army National Guard, trained to be an infantry officer, and led two battalions during two tours of duty in Iraq and the Sinai Peninsula.

Given this family background, there was no question that I would gravitate toward public service at some point in my legal career. After clerking for three federal judges and working briefly in private practice, I served as a staff attorney at the Sentencing Commission in a legislative drafting and policymaking role. I soon discovered that I lacked a practical understanding of the actual workings of the federal criminal justice system, and I decided that serving "in the trenches," so to speak, would be helpful. A position with the Federal Public Defender was a highly competitive and extraordinary opportunity to hone one's litigation skills and to gain knowledge about critical aspects of federal criminal justice processes. I also viewed working in the office of the Federal Public Defender as an opportunity to help people in need, and to promote core constitutional values, such as the Sixth Amendment principles that the government cannot deprive people who are subject to its authority of their liberty without meeting its burden of proving its criminal charges, and that every person who is accused of criminal conduct by the government, regardless of wealth and despite the nature of the accusations, is entitled to the assistance of counsel.

3. Were you ever concerned that your work as an Assistant Federal Public Defender would result in more violent criminals—including gun criminals—being put back on the streets?

RESPONSE: The primary concern of lawyers of who work as public defenders is the same as that of the Framers who crafted the Sixth Amendment of the Constitution:

that, in order to guarantee liberty and justice for all, the government has to provide due process to the individuals it accuses of criminal behavior, including the rights to a grand jury indictment, a fair trial by a jury of one's peers, and competent legal counsel to hold the government accountable for providing a fair process and otherwise assist in the preparation of a defense against the charges. The Constitution guarantees that every person who is compelled to enter into the criminal justice system by virtue of being accused of a crime will receive representation in the context of their interactions with government authorities, and attorneys in the federal public defender's office perform this crucial function. Having lawyers who can set aside their own personal beliefs about their client's alleged behavior or their client's propensity to commit crimes benefits *all* persons in the United States, because it incentivizes the government to investigate accusations thoroughly and to protect the rights of the accused during the criminal justice process, which, in the aggregate, reduces the threat of arbitrary or unfounded deprivations of individual liberty.

4. **While working as an Assistant Federal Public Defender, why did you choose to work on behalf of Guantanamo detainee Khi Ali Gul? If you did not have a choice as to whether working on behalf of this client, did you ever consider resigning from your position?**

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government without charge or trial at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender's office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Khi Ali Gul was one of the individuals whom the D.C. Federal Public Defenders' office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

At the time of this representation, my brother was an enlisted U.S. Army infantryman who was deployed outside of Mosul, Iraq, and I was keenly and personally mindful of the tragic and deplorable circumstances that gave rise to the U.S. government's apprehension and detention of the persons who were secured at Guantanamo Bay. In the wake of the horrific terrorist attacks in September of 2001, I was also among the many lawyers who were keenly aware of the threat that the 9-11 attacks had posed to foundational constitutional principles, in addition to the clear danger to the people of the United States.

Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client's legal arguments and/or undermining her client's interests by publicly declaring the lawyer's own personal disagreement with the legal position or alleged behavior of her

client. Because these standards apply even after termination of the representation, it would be inappropriate for me to comment on whether I disagreed with Khi Ali Gul, found his alleged crimes offensive, or considered resigning my position as an Assistant Federal Public Defender based on any such disagreement or offense.

5. Were you ever concerned that your work on behalf of Guantanamo detainee Khi Ali Gul would result in him returning to his terrorist activities?

RESPONSE: Please see my response to Additional Question 4.

6. While in private practice, why did you choose to represent clients filing amicus briefs in support of the petitioners in Boumediene v. Bush and Al-Odah v. United States?

RESPONSE: Between 2007 and 2010, I was employed as Of Counsel in the Supreme Court and Appellate Group of a private law firm. The firm represented both paying clients and clients who retained our services pro bono. During that time, the Supreme Court was considering several cases that involved Guantanamo Bay detainees, including a challenge to the detention review procedures that the government was providing to such detainees, which it addressed in the consolidated cases of *Boumediene v. Bush* and *Al-Odah v. United States*, and a case that raised the issue of whether Congress had authorized the President to detain as enemy combatants, without criminal charge or trial, lawful residents of the United States who were apprehended within the United States (*Al-Marri v. Spagone*).

I co-authored Supreme Court amicus briefs for clients in two of these cases. One of the briefs that I drafted was filed on behalf of twenty former federal judges, who argued, on the basis of the examination of Founding-era historical texts, that the Framers would not have intended for our constitutional scheme to permit reliance on evidence that had be extracted from torture during criminal trials. I filed another amicus brief on behalf of The Cato Institute, The Constitution Project, and the Rutherford Institute, arguing that Congress's authorization for the use of military force did not permit lawful residents of the United States to be detained indefinitely as enemy combatants. I believe that I was assigned to work on these amicus briefs because of the knowledge of the military tribunal processes that I had accumulated from my prior work as an Assistant Federal Public Defender.

7. Were you ever concerned that your work in support of the petitioners in Boumediene v. Bush and Al-Odah v. United States would result in more terrorists being released back into the fight against the United States?

RESPONSE: Please see my response to Additional Question 5. The work that I did in relation to these cases was on behalf of clients who were filing amicus briefs to inform the Supreme Court concerning the clients' views of particular legal issues that the Court may have sought to address in the context of its review. The brief I filed on behalf of my clients—retired federal judges—in the consolidated *Boumediene* and *Al-*

Odah cases argued that the judicial review that the Detainee Treatment Act provided was not an adequate substitute for the common law writ of habeas corpus, because it did not appear that the reviewing court was authorized to determine the extent to which the Combatant Status Review Tribunal had relied on statements extracted by torture when the court ruled on the legality of the detention.

8. While in private practice, why did you choose to represent clients filing amicus briefs in support of the petitioner in Al-Marri v. Spagone?

RESPONSE: Please see my response to Additional Question 6.

9. Were you ever concerned that your work in support of the petitioner in Al-Marri v. Spagone would result in more terrorists being released back into the fight against the United States?

RESPONSE: Please see my response to Additional Question 7.

Responses to Questions for the Record from Senator Thom Tillis
to Judge Ketanji Brown Jackson, Nominee to the
United States Court of Appeals for the D.C. Circuit

1. **Judge Jackson, do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

RESPONSE: Yes. Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's own personal views regarding a matter must not have any bearing on her interpretation and application of the law.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

RESPONSE: Judicial activism occurs when a judge is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views. During the hearing, I emphasized that courts have a duty of independence from political pressure, meaning that judges must resolve cases and controversies in a manner that is consistent with the law, despite the judge's own personal views of the matter, even when the cases pertain to controversial political issues. Judicial activism, so defined, is not appropriate.

3. **Judge Jackson, do you believe impartiality is an aspiration or an expectation for a judge?**

RESPONSE: Impartiality is much more than a mere "aspiration" or "expectation." Ruling without fear or favor is the essence of judicial independence, which is the constitutional mandate of judicial service. *See* The Federalist No. 78 (Alexander Hamilton). My record of rulings in cases challenging government action demonstrates my ability to rule independently and impartially, regardless of the presidential administration that promulgates the policy being challenged.

4. **Judge Jackson, should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

RESPONSE: No. The role of a judge is evaluate legal claims that are made about an act of the defendant (who may well be a policymaker), and to determine the merits of those claims based on arguments presented by the parties, in light of applicable law, including the binding precedents of the Supreme Court. At no point in the process of judicial decision making can a judge substitute her own policy preferences for those of Congress or state legislative bodies, either to reach a desired outcome or for any other purpose.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

RESPONSE: Faithfully interpreting the law can sometimes result in an outcome that conflicts with a judge's own personal view of the matter. It is the judge's duty to set aside her personal view of the matter, and/or the outcome that she would personally prefer, and faithfully apply the law. An outcome that comports with the law, as set forth in the binding precedents of the circuit and the Supreme Court, is required by the judge's oath and the Constitution. Thus, that outcome *is* the most desirable one, regardless of a judge's own personal beliefs.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

RESPONSE: No. Please see my response to Questions 1, 2, 4 and 5. A judge has a duty to set aside her own politics and/or policy preferences when she is interpreting and applying the law.

7. **What is the longest decision you have issued as a District Court Judge?**

RESPONSE: I have written dozens of lengthy written opinions (defined as written rulings that are 50 or more pages long), dating back to the early days of my appointment as a federal judge. (*See* my response to Question 10, *infra*.) Although I may have missed one or more of my lengthy opinions in searching my records and electronic databases to respond to this question, it appears that the longest decision that I have issued as a district court judge was *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), which is 126 pages long.

8. **What is the shortest decision you have issued as a District Court Judge?**

RESPONSE: I have handled hundreds of cases, and have made thousands of decisions in connection with those matters, in the eight years that I have been a district court judge. I cannot accurately identify my "shortest decision," because many decisions at the trial-court level take the form of short orders that are not published in electronic case reporting databases such as Westlaw or LEXIS. The shortest written decisions I have issued as a district court judge take the form of paperless Minute Orders that consist of a sentence or two on the docket of a case. *See, e.g.*, *Tarque v. Biden*, No. 21-cv-338, Min. Order of Apr. 4, 2021 (granting motion for extension of time to answer complaint); *Citizens for Responsibility & Ethics in Wash. v. Dep't of Trans.*, No. 21-cv-610, Min. Order of Apr. 29, 2021 (requiring the parties to file a status report in a FOIA case); *Centro Presente, Inc. v. Wolf*, No. 19-cv-2480, Min. Order of Mar. 17, 2021 (granting motion for leave to appear pro hac vice). I have also routinely issued short paper orders regarding a variety of legal issues. *See, e.g.*, *Hogue v. Costal Int'l, Inc.*, No. 18-cv-389, Order Dismissing Case for Lack of Prosecution, ECF No. 39 (D.D.C. May 4, 2021); *In re Subpoena Duces Tecum to Verizon Wireless*, No. 19-mc-103, Order Transferring Case, ECF No. 4 (D.D.C. July 18, 2019); *Nugent v. Nat'l Pub. Radio, Inc.*, No. 14-cv-0416, Order, ECF No. 8 (D.D.C. March 28, 2014) (granting the defendant's motion to withdraw its notice of removal and remanding the case to the Superior Court of the District of Columbia).

9. **What is the average length of all of the decisions you have issued as a District Court Judge?**

RESPONSE: Please see my responses to Questions 7 and 8. I am unable to determine accurately the length of my shortest decisions and/or the precise number of short orders that I have issued as a district court judge. As a result, it is impossible to determine "the average length of all of the decisions that [I] have issued[.]"

10. **During the Senate Judiciary Committee Hearing, you said that your opinion in the McGhan case was "just another opinion."**

- How many pages was the opinion you issued in this case?

- Is this the longest opinion you have issued?

- Were you overruled at any level in full or in part upon appeal?

-Can you explain why you think an opinion that is so lengthy is "just another opinion?

RESPONSE: Please see my response to Question 7. It is routine for judges seated in the District of Columbia to issue lengthy opinions, such as the one in *McGahn*, because federal judges in Washington, D.C. regularly handle some of the most complex and consequential legal disputes that can be resolved by an Article III judicial officer under our constitutional scheme, due to the unique nature of our docket, which is largely comprised of legal disputes concerning the scope and application of the federal government's power. The length of a written opinion that resolves such a dispute depends on the complexity and number of legal arguments that the parties make concerning the significant legal claims brought in the case.

The opinion that I issued in *McGahn* was 118 pages long (excluding the table of contents). The following description documents my opinion-writing practices during the eight years that I have been on the bench and establishes that *McGahn* is the third longest opinion that I have issued as a district court judge.

In September of 2013, approximately six months after I received my judicial commission, I issued a 76-page opinion in *American Meat Institute v. U.S. Department of Agriculture*, 968 F. Supp. 2d 38 (D.D.C. 2013). The following year, in 2014, I issued four more opinions that were over 50 pages in length. *See Pencheng Si v. Laogai Rsch. Found.*, 71 F. Supp. 3d 73 (D.D.C. 2014) (51 pages); *Nat. Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 71 F. Supp. 3d 35 (D.D.C. 2014) (61 pages); *A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, 70 F. Supp. 3d 376 (D.D.C. 2014) (69 pages); *United States ex rel. Tran v. Computer Scis. Corp.*, 53 F. Supp. 3d 104 (D.D.C. 2014) (58 pages).

In 2015, I issued five lengthy opinions, including *Takeda Pharmaceuticals, U.S.A., Inc. v. Burwell*, 78 F. Supp. 3d 65 (D.D.C. 2015), which was 77 pages long; *XP Vehicles, Inc. v. Department of Energy*, 118 F. Supp. 3d 38 (D.D.C. 2015), was 67 pages long, and *Otay Mesa Property, L.P. v. U.S. Department of the Interior*, 144 F.

Supp. 3d 35 (D.D.C. 2015), was 62 pages long. Likewise, in 2016, I issued *Yah Kai World Wide Enterprises, Inc. v. Napper*, 195 F. Supp. 3d 287 (D.D.C. 2016), which was 65 pages long, and four other opinions that qualify as lengthy: *Otsuka Pharmaceuticals Co., Ltd. v. Burwell*, 302 F. Supp. 3d 375 (D.D.C. 2016) (57 pages); *Abington Memorial Hospital v. Burwell*, 216 F. Supp. 3d 110 (D.D.C. 2016) (59 pages); *Pacific Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196 (D.D.C. 2016) (51 pages); *New England Anti-Vivisection Society v. U.S. Fish & Wildlife Service*, 208 F. Supp. 3d 142 (D.D.C. 2016) (59 pages).

In 2017 I wrote an opinion that was more than 100 pages long. *Kubicki on behalf of Kubicki v. Medtronic, Inc.*, No. 12-cv-734, sealed slip. op., ECF No. 158 (D.D.C. Dec. 12, 2017), published at 293 F. Supp. 3d 129 (D.D.C. 2018), was 103 pages. I also issued *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174 (D.D.C. 2017), that year (52 pages). Similarly, I issued three lengthy opinions in 2018, including one that was 119 pages. *See Am. Fed. of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018); *see also In re Air Crash over S. Indian Ocean on Mar. 8, 2014*, 352 F. Supp. 3d 19 (D.D.C. 2018) (61 pages); *Yah Kai World Wide Enters., Inc. v. Napper*, 292 F. Supp. 3d 337 (D.D.C. 2018) (62 pages).[1]

Thus, the 118-page opinion in *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), which I issued in November of 2019, was not unusual. Indeed, just two months prior, in late September of that same year, I had issued *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), which was 126 pages long. And I issued the 51-page opinion in *Center for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019), at the beginning of September of 2019 a few weeks prior to *Make the Road New York*. In 2020, I issued three additional lengthy opinions: *Las Americas Immigrant Advocacy Center v. Wolf*, 19-cv-3640, --- F. Supp. 3d ----, 2020 WL 7039516 (D.D.C. Nov. 30, 2020) (60 pages); *Kiakombua v. Wolf*, --- F. Supp. 3d ---, No. 19-cv-1872, 2020 WL 6392824 (D.D.C. Oct. 31, 2020) (96 pages); *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020) (52 pages).

McGahn was a lengthy opinion because it required me to resolve cross-motions for summary judgment concerning "three legal contentions of extraordinary constitutional significance." 451 F. Supp. 3d at 152 (internal quotation marks and citation omitted). In particular, I held that (1) the inter-branch subpoena dispute between the President and the House Judiciary Committee was a justiciable matter that the Judiciary Committee had Article III standing to pursue in federal court; (2) the Judiciary Committee had a cause of action to seek enforcement of its subpoena; and (3) the President does not have the power to prevent his aides from responding to legislative subpoenas on the basis of absolute testimonial immunity. On appellate review, over the course of two opinions, a divided panel of the D.C. Circuit reversed my rulings on the standing and cause of action issues, but the entire D.C. Circuit granted en banc

[1] *Yah Kai* was a trademark matter in which I presided over two bench trials: one in 2016 addressing liability and one in 2018 addressing damages. Taken together, my findings of fact and conclusions of law in this matter totaled 127 pages.

review twice, and has now vacated both panel reversals. To date, the en banc D.C. Circuit has affirmed my conclusion that the House Judiciary Committee has standing to adjudicate its subpoena enforcement claims in federal court notwithstanding the inter-branch nature of the dispute. The cause of action and merits questions remain pending.

11. **As of November 1, 2019, were you a lawyer and former public defender?**

RESPONSE: On November 1, 2019, I was a lawyer and a federal district judge. I was also a former Vice Chair of the United States Sentencing Commission; a former law firm Of Counsel and associate; and a former Assistant Federal Public Defender who had been employed in the appellate division of the Office of the Federal Public Defender in Washington D.C.

12. **Are you a bold progressive champion? If yes, please explain.**

RESPONSE: I have never called myself or anyone else a "bold progressive champion" nor do I have a clear understanding of the meaning of that phrase. As a pending judicial nominee and sitting federal judge, it would contravene the Code of Conduct to associate myself with any political viewpoint or leaning.

13. **Have you been on the front lines advancing the law for progressive values? If yes, please explain.**

RESPONSE: I have never purported to be "on the front lines advancing the law for progressive values" or stated anything of the sort. As a pending judicial nominee and sitting federal judge, it would contravene the Code of Conduct to associate myself with any political viewpoint or leaning.

14. **You said that "you have served on "many boards" and that you "don't necessarily agree with all of the . . . statements of any of all the things those boards might have in their materials." Please list the name and length of service for each board on which you served that you do not entirely agree with all of their materials. For each one please identify each statement or material with which you do not agree.**

RESPONSE: During my confirmation hearing, Senator Hawley referenced various statements that apparently once appeared on the website of Montrose Christian School, a private kindergarten through 12th grade school. Montrose Christian School is now defunct; I served as an advisory school board member with respect to that school for one year, spanning 2010 and 2011. In the context of his question, Senator Hawley stated that he had defended Justice Amy Coney Barrett's right to serve on a religious school board, and that he would also "defend [my] right to religious liberty and to serve on this board whatever your opinions may be[.]" He also stated that he had gleaned "from [my] service" that I "believe in the principle of the constitutional right of religious liberty[.]" In response, and primarily to clarify that my board service did

not itself portend any personal belief about religious liberty or anything else, I explained that my views about religious liberty "come[] from my duty to observe Supreme Court precedent [and] to follow its tenets, not from any personal views that I might have." Emphasizing that "any personal views that I might have about religion would never come into my service as a judge," I also said that "I have served on many boards, and that I don't necessarily agree with all of the statements of all of the things that those boards might have in their materials." I did not state any personal view concerning the statements that Senator Hawley identified and that Montrose Christian School purportedly posted on its website. Nor did I express any agreement or disagreement with any statements of any other board on which I have served.

The various boards on which I have served—all without compensation—and my length of service are listed at questions 6 and 9 of my Senate Judiciary Questionnaire for Judicial Nominees. As a pending judicial nominee and sitting federal judge, it would be inappropriate for me to identify any statements or policy positions of those boards and indicate my personal agreement or disagreement with those statements.

15. **Is there any board on which you served in the past that you would not serve on today were you not a federal judge?**

RESPONSE: As a pending judicial nominee and sitting federal judge, I cannot give voice to any regrets concerning prior board service, because to do so would give rise to speculation about my personal views concerning such boards and their policy positions, which could undermine the public's confidence in my ability to set aside such personal views and rule only with respect to the facts and law in any case concerning parties that hold similar policy positions.

16. **Senator Hawley asked if you believe in the constitutional right of religious liberty based on your affiliation with a board you served on. You seemed to indicate in your answer that the reason you believe in the individual right to religious liberty is because of Supreme Court Precedent. Is that what you intended to say? Is it correct that the reason you believe in an individual's right to religious liberty is because of Supreme Court Precedent?**

RESPONSE: Please see my response to Question 14, which clarifies the intended scope of my answer to Senator Hawley concerning religious liberty. My duty as a federal judge is to uphold the Constitution, and the First Amendment states that the "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" The Supreme Court has repeatedly reaffirmed that the First Amendment to the Constitution expressly protects a fundamental individual right to religious liberty.

17. **Some are demanding that Justice Breyer retire. Do you agree that should Justice Breyer retire this year, President Biden would have the right to nominate someone to fill that seat on the Supreme Court?**

RESPONSE: Article II, section 2 of the Constitution vests the President with the "Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the supreme Court." *See* U.S. Const., art. II, § 2. I am obligated to apply binding precedents of the Supreme Court, regardless of its size.

18. **How would you respond if a group ran ads and publicly called for you to retire as a District Court Judge? Would this answer change as a Circuit Court Judge? As a Supreme Court Justice?**

RESPONSE: Under Article III, section 1 of the Constitution, all judges "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour[.]" To promote judicial independence and impartiality in the performance of a federal judge's duties, the Code of Conduct for United States Judges prohibits judges from engaging in public debates of a political nature or publicly responding to public pressure of any kind. *See* Code of Conduct for United States Judges, Canon 5. Therefore, it would likely be inappropriate for me to respond in any way to advertisements that call for my retirement as a district judge. The Code of Conduct for Judges applies to circuit judges as well, so in the unlikely event that a response to a group's public call for retirement would be appropriate for me as a district judge, such response would also be inappropriate for me as a circuit judge, if I am confirmed.

19. **Do you agree with that Justice Breyer should retire? If not, why not?**

RESPONSE: As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of that Court's composition. It would be inappropriate for me to comment on whether or when any sitting Supreme Court Justice should retire.

20. **Judge Jackson, if you are confirmed, what will you do to protect Americans' right to practice their faith during this incredibly difficult time?**

RESPONSE: As a sitting federal judge, I am bound to apply faithfully all binding precedents of the D.C. Circuit and the Supreme Court, including all precedents that pertain to the First Amendment's fundamental right to the free exercise of religion. If I were to be confirmed to the D.C. Circuit, that obligation would not change.

21. **Judge Jackson, is there a line where a First Amendment activity or peaceful protesting becomes rioting and is no longer protected? What is that line? Do you agree that looting, burning property, and causing other destruction is not a protected First Amendment activity?**

RESPONSE: The First Amendment expressly protects "the right of the people *peaceably* to assemble," U.S. Const. amend. I (emphasis added), and the Supreme Court has recognized that "peaceful demonstrations in public places are protected" but that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment[,]" *Grayned v. City of Rockford*, 408 U.S. 104, 116

(1972); *see also, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (explaining that a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment"). The precedents of the Supreme Court and the D.C. Circuit concerning this and all other legal issues are binding on me, and, if confirmed, I would faithfully apply those precedents if I were ever assigned a case on appeal that involved these issues. As a pending judicial nominee and sitting federal judge, it would be inappropriate for me to opine as to hypothetical circumstances that test of the limits of these principles, as such matters are regularly litigated in the Supreme Court and the lower federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

22. **Judge Jackson, how would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

RESPONSE: I would evaluate any case concerning handguns or COVID-19 restrictions consistent with the binding precedents of the Supreme Court. Two weeks ago, in the case of *New York State Rifle & Pistol Association, Inc. v. Corlett*, No. 20-843, the Supreme Court granted *certiorari* in case that involved the denial of applications to carry a gun outside the home for self-defense individuals that had been submitted pursuant to a New York statute. In a similarly recent series of *per curiam* opinions, including *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court has also addressed the application of Free Exercise principles to restrictions that various localities have issued out of COVID-related public health concerns. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine on the constitutionality of such firearm and religious-liberty restrictions while these issues are being actively litigated in the Supreme Court and other lower federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

23. **Judge Jackson, what will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

RESPONSE: As a sitting federal judge, I am bound to apply faithfully all binding precedents of the D.C. Circuit and the Supreme Court, including all precedents that pertain to the Second Amendment individual right to keep and bear arms. If I were to be confirmed to the D.C. Circuit, that obligation would not change.

24. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

RESPONSE: According to my records, I have considered whether qualified immunity shielded a law enforcement officer from liability for alleged constitutional violations nine times over the past eight years, and in each case, I carefully considered the particular facts and circumstances that the case presented and adhered to Supreme Court and D.C. Circuit precedents when reaching my decision. Under binding Supreme Court and D.C. Circuit case law, a court must grant summary judgment or dismiss a civil action against an officer "'when [the] official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). Thus, the two relevant questions in determining whether qualified immunity applies are (1) "whether a constitutional right would have been violated on the facts alleged[,]" and (2) "whether the right was clearly established" at the time of the violation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). In my rulings, upon consideration of these questions in light of the particular facts at issue, I have both granted defense motions for summary judgment on the grounds that the law enforcement officers are entitled to qualified immunity, and denied defense motions for qualified immunity based on a finding that the officer violated the plaintiff's clearly established rights. *See, e.g.*, *Kyle v. Bedlion*, 177 F. Supp. 3d 380 (D.D.C. 2016); *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013); *Page v. Mancuso*, 999 F. Supp. 2d 269 (D.D.C. 2013).

25. **Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?**

RESPONSE: The existing standards that the Supreme Court has adopted for determining whether a law enforcement officer is entitled to qualified immunity are binding on me, and are explained in my response to Question 24. If confirmed, I will faithfully apply all binding precedents of the Circuit and the Supreme Court, including any precedent pertaining to qualified immunity, and my past practices demonstrate that any personal views that I might have regarding the sufficiency of qualified immunity doctrine have played no role in my determination of whether to grant or deny a motion for qualified immunity. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on whether the Supreme Court's qualified immunity jurisprudence provides sufficient protection for law enforcement officers.

26. **What do you believe should be the proper scope of qualified immunity protections for law enforcement?**

RESPONSE: Please see my response to Question 25.

27. **Do you agree with the current state of the *Chevron* deference doctrine? Or do you believe there should be either more or less deference given to agencies?**

RESPONSE: *Chevron* deference refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Consistent with the current state of Supreme Court jurisprudence, I have applied the *Chevron* deference doctrine in at least 11 of my written opinions. *See, e.g.*, *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 2020 WL 7039516, at *13 (D.D.C. Nov. 30, 2020); *Otay Mesa Prop., L.P. v. Dep't of the Interior*, 344 F. Supp. 3d 355, 368 (D.D.C. 2018); *Depomed, Inc. v. Dep't of Health & Hum. Servs*., 66 F. Supp. 3d 217, 229 (D.D.C. 2014); *Am. Meat Inst.* v. *Dep't of Agric*., 968 F. Supp. 2d 38, 52 (D.D.C. 2013). As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on my personal beliefs regarding the current state of the *Chevron* doctrine. If confirmed as a circuit judge, I would continue to apply faithfully all binding precedents of the Circuit and the Supreme Court, including any precedent pertaining to the level of deference that should be afforded to agencies.

28. **How have your views on agency deference developed during your time as a district judge?**

RESPONSE: Prior to my work as a district judge, my expertise was in federal criminal sentencing policy, rather than administrative law. During my work as a district judge over the past eight years, I have handled many cases involving challenges to agency action, including challenges to an agency's interpretation of a statute. I have faithfully applied all binding precedents of the D.C. Circuit and the Supreme Court, including any precedent pertaining to the level of deference that should be afforded to agencies, and would continue to do so if am confirmed as a circuit judge.

JUDGE FOR THE DISTRICT OF NEVADA

Mr. Gordon. Thank you, Chairman, and let me thank the Committee entirely for having us here today. Ranking Member Senator Grassley and Senator Blumenthal, thank you for coming and allowing us to meet with you today.

I would like to thank the President for making this nomination. I would like to thank Senator Reid for his recommendation and his very kind words today, and thank you to Senator Heller for his kind words and supporting this nomination.

I would like to recognize my wife and inspirator, Sue Gordon. She is at home in Las Vegas with our daughter, Allison, who is a seventh grader at Faith Lutheran Middle School. My oldest son, Dan Gordon, is a sophomore at the University of Colorado at Boulder, who is studying for finals right now, so we figured that was a little more important. My other son, Matt Gordon, is a freshman at the University of San Diego. He, too, is studying for finals and could not make it out here as well.

I would like thank my parents: my mother, Lillius Gordon, who is in Las Vegas watching this on the Webcast. My father, Hank Gordon, and his wife, my second mom, Marti Gordon, they are also watching this on the Webcast from Las Vegas.

My brother, Scott, who is here with me from Albuquerque, was able to attend. I have two other brothers, John and Jeff. They are also watching this from Las Vegas. And my sister, Sandy, who is an attorney practicing in San Diego, is watching this as well. I thank them for their support.

With me today is my cousin, Allison Gordon, and her two children--I am sorry, Allison Cox, and her two children, Trey and Lauren, and I thank them for coming down and supporting us.

And, finally, with me today also is the managing partner of my law firm, McDonald Carano Wilson. His name is John Frankovich. He flew out from Reno to be here, and I thank him for his efforts to come out and support us.

I would also like to thank all the lawyers and staff at my law firm, McDonald Carano, in Las Vegas and Reno, who without their support I would not be able to get this far.

Thank you very much for your time.

[The biographical information of Mr. Gordon follows:]

[GRAPHIC] [TIFF OMITTED]

Senator Whitehouse. Thank you very much, Mr. Gordon.

Commissioner Jackson, welcome, and you are recognized for any statement or acknowledgments you would care to make.

STATEMENT OF KETANJI BROWN JACKSON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

Ms. Jackson. Thank you, Mr. Chairman, and thank you, Members of the Committee, for your time this morning. I would also like to thank the Chair of the Senate Judiciary Committee and the Ranking Member for scheduling this hearing and the President of the United States for having confidence in me and for giving me this great honor.

My thanks also extends to Congresswoman Norton who honored me with those very kind words of introduction and who also selected me for recommendation to the President. And thanks as well to Representative Ryan. I am so grateful that he was able to take time out of his busy schedule to come here and provide his personal endorsement.

I do have a number of family members and friends who have come here today and many who are watching by Webcast, and I appreciate this opportunity to acknowledge them.

First is my husband of 16 years, Dr. Patrick Jackson. Patrick is a terrific surgeon, and he is my best friend and my biggest fan, and without his love and support, I do not think I would have had the courage to pursue this dream.

Patrick is here with our two daughters, Talia and Leila, who are getting quite the civics lesson this morning; and my parents, Johnny and Ellery Brown. They have been with me from the beginning, and they have always been there when I need them, and they have flown here from Miami to be with me today.

Also here is my brother, First Lieutenant Ketajh Brown, and I am particularly happy that he was able to be with us, because not too long ago he was stationed in the Sinai Peninsula and in Mosul, Iraq; before that he was an infantry officer in the Maryland Army National Guard.

Also here are my in-laws, Pamela and Gardner Jackson, who have flown here from Boston, Massachusetts; and my wonderful and supportive brother-in-law and sister-in-law, William and Dana Jackson.

To the many friends and family members who are watching by Webcast and the other friends who are here and watching, I appreciate your words of encouragement.

And, finally, I would just like to give a special word of gratitude to the three federal judges for whom I clerked: Judge Patti Saris, Judge Bruce Selya, and Justice Stephen Breyer. They have been my inspiration through this journey, and I am grateful every day for their continued mentorship and support.

Thank you.

[The biographical information of Ms. Jackson follows:]

[GRAPHIC] [TIFF OMITTED]

Senator Whitehouse. Thank you, Commissioner Jackson.

Our final nominee, Judge Beverly O'Connell, welcome. Please proceed with whatever statement or acknowledgments you would care to make.

STATEMENT OF BEVERLY REED O'CONNELL, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge O'Connell. Thank you, Mr. Chairman.

First, I, too, would like to thank the President for nominating me for this honor; Senator Boxer for her kind words; Senator Feinstein for her support of my application; to you, Chairman Whitehouse, Ranking Member Grassley, for scheduling this hearing. And I would like to introduce to you some of the family that I have with me today.

We are a family of public servants, and I would like to introduce my husband, who is a deputy district attorney in Los Angeles; my sister, Linda Reid, formerly of the Central Intelligence Agency; her wife, Sherry Burns, retired from the Central Intelligence Agency; our niece, Kaelin, the only one who is in the private sector in our family; her friend, Whitney Welsh, who has become an adopted member of our family; and Presiding Justice Tricia Bigelow from Division 8, Second District Court of Appeal in Los Angeles.

I would be remiss without thanking my court staff: my court reporter, Mary Lou Murphy; and my courtroom deputy clerk, Martha Cabrera, whose professionalism and commitment to justice makes my courtroom a place where everybody has a fair chance to be heard.

I would also like to recognize all my friends and family in California who could not be here, but are probably going to watch a delayed recording since it is very early on the west coast.

Thank you.

[The biographical information of Judge O'Connell follows:]

[GRAPHIC] [TIFF OMITTED]

Senator Whitehouse. Thank you very much, Judge O'Connell.

As the Chairman of this particular hearing, I am going to be here through the bitter end of it, so I am going to yield my time right now to the Honorable Ranking Member, Senator Grassley, and then recognize Senator Blumenthal, then recognize Senator Lee, and reserve my questioning until the end. So without further ado, Ranking Member Grassley.

Senator Grassley. And that is quite a courtesy for us minority people here.

Senator Whitehouse. Not to have to listen to me.

[Laughter.]

Senator Grassley. Thank you very much, and I appreciate everything I have learned about you, although it has just been lately that I have learned it, but as other people have said, qualified to do this.

I am going to start with you, Ms. Dick, a couple questions. I understand that last year there was a significant class action settlement in favor of Louisiana health care providers in relationship to the Louisiana PPO Act. As a member of the Louisiana Workforce Commission, you heard cases involving disputed claims by health care providers, so I would like to have you explain your work there as it relates to the class action settlement. And, specifically, were any of your decisions overturned by that settlement?

Ms. Dick. Thank you, Ranking Member Grassley, for the question. Yes, I was hired by the Louisiana Workforce Commission, which is the agency that would be akin to a Department of Labor. We just happen to call it the ``Workforce Commission.'' They have jurisdiction over both workers' compensation and unemployment compensation. And there were approximately 4,000 to 5,000 lawsuits filed in the Office of Workers' Compensation that challenged whether or not physicians who treated injured workers could be compensated with PPO discounts if they had signed a PPO provider agreement.

As you might imagine, that volume of litigation literally flooded those administrative courts, and so the Louisiana Workforce Commission determined that they needed some help. And so I was engaged, really, to preside specifically over those cases.

There ultimately was a class settlement. I did not participate in that class settlement in any way. I simply presided over the cases that were assigned to my docket, set them for trial, set them for hearings, moved them along. Ultimately, I concluded that the physicians, if they had entered into a contract, that they could be compensated under the terms of that contract, and that decision in a different case was affirmed by the Louisiana Supreme Court.

Senator Grassley. Okay. A second question for you. There are a number of different theories explaining how judges should interpret the Constitution. We often hear nominees recite the mantra that they will apply the law to the facts, and I do not argue with that, but I am looking for an answer with a little bit more thought behind it. What constitutional interpretation models will guide you when you are faced with constitutional questions?

Ms. Dick. Senator, it is my very firm belief that it will be my job as a district court judge, which is, you know, kind of the grassroots foot soldier, and I am very cognizant of the fact that that will be my role, a foot soldier, and I will follow the precedent which is enunciated by the United States Fifth Circuit Court of Appeal and foremost by the U.S. Supreme

Court. Whether like it or not, that is of no moment. It is how does the U.S. Supreme Court interpret whatever congressional statute is at issue or the provisions of the Constitution, and that is what I would follow.

Senator Grassley. Mr. Gordon, I bet you are just going to love to be asked a question about something you wrote 30 years ago, but we do not do it because of--we kind of want to know what the situation is today. This dealt with the decriminalization of prostitution. At one point in the article, you discuss the 1908 Supreme Court case, Bitty. In that case, the Court upheld federal statute noting prostitution was hostile to ``the idea of the family.'' You criticized the Court for their view, stating that criminalization of prostitution ``is an ineffective way to preserve marriage and the family.''

I recognize that this paper was written 30 years ago and you were in college at the time, so the first question is: Have your views of this topic changed since you wrote that article so many years ago?

Mr. Gordon. Yes, Senator, they have changed somewhat. Like you pointed out, that was an article that was a condensed version of my honors senior thesis out of Claremont McKenna College that was more of a policy analysis of prostitution, comparing the Nevada model to the German model, and looking at various issues related to the policies behind criminalization of prostitution.

That policy analysis really is the area for Congress and the State legislatures to make decisions. It is not for judges to make policy decisions like that. That is the legislative body. I recognize that judges have a separate function. The Founders set up three branches of our government, and the judicial power is very limited. And it is up to the elected officials like Senators, Congress folks, and State legislators to pass those kinds of policy decisions.

Senator Grassley. Prostitution is largely, if it is a criminal activity, left to individual States. There is a federal interest. Congress has lawfully established anti-prostitution laws based on powers delegated in the Constitution: immigration, regulating interstate commerce, and establishing foreign trade. The statute at issue in Bitty is one example, so a broad question: When reviewing a federal statute, is it ever permissible for a court to refer to State laws in order to assist in its ruling? If so, when and under what circumstances?

Mr. Gordon. Senator, if the answer is obvious from the plain language of the statute, that ends the inquiry. If it is not, then I believe judges look to the precedent from the U.S. Supreme Court or the courts of appeals from that jurisdiction, and that should end the inquiry as well.

Senator Grassley. Okay. For all of you, I will have some written questions as well.

I want to go to Ms. Jackson. I thought after Ryan got done speaking about you we could just vote you out right away.

Ms. Jackson. That would be my hope, Senator.

[Laughter.]

Senator Grassley. Anyway, and that does not denigrate what your Congresswoman said about you, but I want to ask you about some terrorism cases. In looking at the arguments you have made in court representing terrorists and the notes you provided the Committee last week from a December 2007 presentation, I have questions about your views on the rights of detainees, and that in turn causes some concern about how you will handle terrorism cases that may come before you if you are confirmed.

Do you believe that terrorists pose a danger to America?

Ms. Jackson. Yes, Senator, I do.

Senator Grassley. Okay. Do you believe that the United

States is at war against terrorists?

Ms. Jackson. Yes, Senator, I do.

Senator Grassley. What is your understanding of the current state of law regarding those detainees as a result of the United States Global War on Terrorism? How will you approach these issues, if confirmed?

Ms. Jackson. Senator, I have not looked at the issue in terms of the current state of the law in many years. The time that I worked on the terrorism cases that you referred to, I was an assistant federal public defender. That was several years ago. And then I worked on a few amicus briefs when I was at Morrison & Foerster. In all of those situations, the views that were expressed were the views of my clients that I represented them in that capacity and the briefs did not necessarily represent my personal views with regard to the war on terror or anything else.

Senator Grassley. Okay. I will accept your answer for now. I might, on reflection, follow up, maybe, to ask you to look at it a little more definitively and give me a written answer.

Ms. Jackson. Yes, sir.

Senator Grassley. But do not do that until I submit it to you, because I want to think about that.

Since you are on the Sentencing Commission, I am going to ask you three questions.

Ms. Jackson. Okay.

Senator Grassley. But just one on sentencing, and then I have got two that I will submit in writing.

It is my understanding that sentences handed down by the D.C. district judges frequently are departures from the Sentencing Guidelines. Have you studied this since being appointed to the Commission? And do you have any observations to share with us on that topic?

Ms. Jackson. Well, the Commission is working on a report right now that gathers data and information not only about the D.C. District Court but also courts nationwide with respect to their sentencing practices. We are in the process of analyzing the information and issuing this report, which we hope will be out early next year.

I can say that, as the Chairman of the Commission testified to the House Judiciary Committee, the Commission is concerned about trends that we are seeing in the data with regard to increasing disparity in sentencing and that a number of courts have been in the position of having judges sentence outside the guidelines with respect to certain offenses, and we are analyzing that, and we hope to have a report shortly.

Senator Grassley. Ms. O'Connell, as a State judge in California, have you ever imposed a death sentence?

Judge O'Connell. No, I have not, Senator. In order to have a death case, I am under the California Rules of Court trained and eligible to handle such a case. The district attorney must seek the death penalty. The jury must return such a verdict before it would be appropriate for me to hand down a sentence like that, and no such case has yet come before me.

Senator Grassley. If confirmed, would you be able to impose the death penalty where it was appropriate as a federal judge?

Judge O'Connell. Yes, Senator, I would.

Senator Grassley. Okay. You co-authored a chapter on electronic evidence decisionmaking. In it, you wrote, ``An effective advocate is one who develops empathetic ties to decisionmakers, be they judge or jury, and exploits them to their clients' advantage.''

What role does empathy have in the role that a judge plays?

Judge O'Connell. Certainly, Senator, and to the extent empathy is defined as ``respect for the litigants,'' in my courtroom, all litigants who appear in front of me are treated

with respect. To the extent empathy means ``feeling sorry for someone'' or ``being guided by passion or prejudice,'' that has no place in judicial decisionmaking and has, over my seven years on the bench, played no role in my decisions from the bench.

Senator Grassley. I am going to read one question, but I think you just answered it, so you do not have to say any more. But I was going to follow up. Do you believe that the sentence a defendant receives for a particular crime should depend on the judge he or she happens to draw? Maybe I will ask you to speak to that.

Judge O'Connell. Okay. No.

Senator Grassley. Okay.

[Laughter.]

Senator Whitehouse. Short and sweet.

Senator Grassley. Thanks to all of you.

Judge O'Connell. Thank you.

Senator Whitehouse. Thank you very much, Senator Grassley.

Senator Blumenthal.

Senator Blumenthal. Thank you, Mr. Chairman.

Let me begin by asking a question of Ms. Dick and Mr. Gordon. I note from my review of your records that your respective practices have been primarily in the civil area, and I wonder whether you feel qualified to do the kind of criminal work that a federal district judge inevitably has to do. Ms. Dick, maybe you can begin by answering.

Ms. Dick. Yes, thank you, Senator Blumenthal. I do not feel qualified right now, but I will be qualified, and the way that I will come about that knowledge will be work ethic, work ethic, work ethic.

Senator Blumenthal. Thank you.

Mr. Gordon.

Mr. Gordon. Senator, I agree with Ms. Dick's comment. I recognize the need to roll up my sleeves and dig in and work, to study the applicable Rules of Criminal Procedure, case law, and Supreme Court precedent and will do so.

Senator Blumenthal. Thank you.

Commissioner Jackson, I want to ask you a couple of questions about the Sentencing Commission.

Ms. Jackson. Yes.

Senator Blumenthal. And, in particular, give you an opportunity to answer--it may not have been your decision, but the decision to apply retroactively some of the guidelines that the Sentencing Commission promulgated. Would you care to comment?

Ms. Jackson. Yes, Senator. It was in part my decision because the Commission unanimously determined that the standards that apply when the Commission decides retroactivity applied in the crack cocaine context. And I would say that the Sentencing Reform Act, which is the Commission's organic statute, as the Commission read it and as it states, requires that the Commission undertake retroactivity determinations whenever penalties are reduced, and the Commission reduced the crack cocaine penalties pursuant to Congress' direction when Congress enacted the Fair Sentencing Act. And so then we undertook the retroactivity analysis, and the bipartisan commission unanimously determined that the factors that apply, apply to the crack cocaine context, a decision that the Justice Department also agreed with, and so did nearly every party that appeared before us at the hearing.

Senator Blumenthal. And I think there is, for my own part, substantial persuasive basis for that decision, and I just wanted to give you an opportunity to address any concerns that may be raised.

Let me ask you, do you have a view as a prospective member

of the bench as to when departures from the Sentencing Guidelines are justified, what reasons there ought to be for departing from the guidelines?

Ms. Jackson. Well, Senator, the guidelines themselves have various departure criteria. The guidelines state that when there is a situation in which a factor is not taken into account by the guidelines or the degree to which the factor exists is unusual and takes the case out of the heartland of cases, that would be an appropriate circumstance to depart.

The Supreme Court in Booker also held that the guidelines themselves are no longer mandatory, that a court also needs to take into account, in addition to the guidelines, the factors that are listed under 3553(a), things like the nature and circumstances of the offense and the characteristics of the offender, and all of those factors are things that courts need to look at in determining whether or not to apply a guideline sentence.

So in my role as a district judge, if confirmed, I would follow the Supreme Court's precedents and give significant weight to the guidelines in that analysis.

Senator Blumenthal. Maybe I should have phrased it differently. Do you think there are some reasons that are more persuasive than others for departing from the guidelines, such as, for example, individual circumstances versus the policy of the sentencing statutes and so forth?

Ms. Jackson. Senator, I do not have a particular view on that. I think it would depend on the case, that the judge would need to look at the circumstances that exist in the case in deciding what factors to either stay within the guidelines as a result of or depart from the guidelines as a result of.

Senator Blumenthal. Judge O'Connell, do you have any views on the Sentencing Guidelines? I know you have not dealt with them directly as a State court judge, and I must confess I do not think California has sentencing guidelines, but----

Judge O'Connell. We do not, but you should know that with me is the author of the California sentencing, federal--excuse me, felony sentencing, so I have the expert in California law right behind me. But we do not have the guidelines in California. But as an Assistant United States Attorney, before the guidelines became advisory, they were mandatory. So I am certainly familiar with their application, and I believe that they provide a wonderful starting point to ensure uniformity of sentences.

Senator Blumenthal. I know that as an Assistant United States Attorney, you not only tried cases but also served in a supervisory role in, I think it was, the General Crimes Section. And I wonder whether you found yourself sometimes differing with what the guidelines provided.

Judge O'Connell. I have not been involved--that was quite some time ago, and I do not have any specific recollections. But the guidelines were mandatory, so we followed the guidelines.

Senator Blumenthal. Thank you.

Thank you, Mr. Chairman, and I thank each of you again for your willingness to serve in this very, very important capacity. Thank you.

Senator Whitehouse. Senator Lee.

Senator Lee. Thank you, Mr. Chairman. Thanks to all of you for coming and for your family members and friends who have joined us.

I wanted to start with Judge O'Connell. You have written that ``an effective advocate is one who develops empathetic ties to decisionmakers, be they judge or jury, and exploits them to their clients' advantage.'' Let us talk about that statement for a minute. I do not doubt you have got to persuade

as an advocate, but how should judges respond when they feel an empathetic pull on the part of one of the parties or one of the advocates?

Judge O'Connell. Empathy as far as feeling sorry or closeness for a party should not govern judicial decisionmaking. The sentence of a criminal defendant should not differ based upon the judge. I can respect that as effective advocacy. The fact that I recognize that is important because then I can disregard it.

Senator Lee. Good. So you think having written that and identified the fact, you would be able to identify it more quickly and say that is an empathetic factor, let us move on to the law?

Judge O'Connell. Absolutely, Senator. For example, apparently I have become much funnier after having been a judge than I ever was as an advocate, so I understand the pulls that, as a judge, advocates attempt to persuade me.

Senator Lee. And do they laugh more at your jokes while you are wearing the robe and in the courtroom?

[Laughter.]

Judge O'Connell. Probably.

Senator Lee. There was something else that you wrote that caught my attention because I come from a State with a lot of snow. You said that each judge's approach to electronic discovery and to the admission of certain types of evidence can differ as much as a snowflake might differ. Tell us what you mean by that.

Judge O'Connell. The admission of electronic evidence is an evolving area in California, and it depends on the purpose for admitting the evidence, whether it is for the truth of the matter asserted or whether it is for a different purpose, demonstrative evidence. The purpose of that comment was to say that the type of evidence and the uniqueness of the type of evidence must be analyzed.

Electronic evidence is also very dangerous because it is subject to manipulation, and judges need to be aware of how the technology works in order to adequately assess foundation and admissibility.

Senator Lee. In California, have you been able to--has a body of case law evolved to the point where parties know what to expect going into it?

Judge O'Connell. It has not yet evolved. In fact, in several areas, there are cases currently pending before the California Supreme Court which will give us guidance at the trial court level as to the admissibility of, for example, red light camera photographs, Facebook/MySpace pages, those types of things.

Senator Lee. Right. And as a federal judge, I guess you will have a different set of standards to abide by, but you will know what to ask.

Judge O'Connell. I will know the questions to ask, yes, Senator.

Senator Lee. Thank you.

And, Commissioner Jackson, I wanted to turn to you. First of all, I developed great empathy for you when I read that you were an attorney at the Sentencing Commission at the time Booker came down.

Ms. Jackson. Yes, I was.

Senator Whitehouse. How did that empathy work out for you?

[Laughter.]

Senator Lee. See, I am allowed to have empathy because I am a politician.

I was an Assistant U.S. Attorney at the time that came down. I was on a flight on my way to a wedding, and I read the clip about it, and all of a sudden I thought my world was about

to change, and it did.

Ms. Jackson. And it did.

Senator Lee. Tell us how you went about digesting that and writing up guidance materials for the Commission.

Ms. Jackson. Well, as you know, the Commission had a little bit of foreshadowing that something might happen in Booker because the previous year the Supreme Court handed down the Blakely decision.

Senator Lee. Right. I am sorry, yes, Blakely.

Ms. Jackson. Blakely.

Senator Lee. Yes, Blakely was the one that I read on the way to the wedding.

Ms. Jackson. Yes. So I was at the Commission as a staff member between Blakely and Booker, and it was a very interesting time.

Senator Lee. And we were not yet sure whether and to what extent it was going to apply to the federal----

Ms. Jackson. That is correct. And I was in the Drafting Division of the Sentencing Commission, and a lot of thought went into what might happen and what sorts of things the Commission could do in order to respond to a Supreme Court decision. So it was quite an interesting time for me.

Senator Lee. I suppose that there is not a direct analog to being a district judge and that that was our Nation's highest court, but it certainly is indicative of the ripple effect that a single court decision can have on the entire profession when it issues a ruling like that. But that is the case. There is not much we can do about that.

I also wanted to ask you, do you intend to follow Justice Breyer's very awesome style of questioning an oral argument in your court?

[Laughter.]

Ms. Jackson. I do not think anybody could match Justice Breyer in his questioning, and I do not know that I would even attempt to try.

Senator Lee. Thank you. I see my time has expired.

Thank you, Chairman.

Senator Whitehouse. Thank you very much, Senator Lee.

First of all, let me thank each of you for the decision that you have made to take this step into this particular kind of public service. I am sure that for many of you there would be more remunerative paths you could take, and there are also times when the role that you will be assuming, if confirmed, is a very lonely one. And my question for each of you is: In the event that the law requires--your reading of the facts and the law in the case before you requires that you make a decision that will be unpopular in your community, are you willing to take that step to cross public opinion and do what you believe is right? As you know, federal judges have a long and proud history of doing exactly that, particularly in the South through the civil rights era, but it is a very difficult position to be in to take a position that those around you disagree with. Ms. Dick.

Ms. Dick. Without question, Senator Whitehouse, I would be willing to cross public opinion in order to follow the rule of law.

Senator Whitehouse. Mr. Gordon.

Mr. Gordon. I agree, Senator. Without the courage to make such decisions, the very foundations of our government fall apart, and judges have to have the courage to make unpopular decisions at times.

Senator Whitehouse. Well said.

Commissioner Jackson.

Ms. Jackson. Yes, Senator, I certainly would. I would see that as my duty and obligation as a federal judge.

Senator Whitehouse. Judge O'Connell.

Judge O'Connell. Thank you, Senator. I believe it has been my practice and will continue to be my practice to follow the law, regardless of public opinion.

Senator Whitehouse. Good. Well, my final questions are going to be for Commissioner Jackson. We are going to have a Rhode Island moment now, Commissioner Jackson.

Ms. Jackson. Oh, goodness.

[Laughter.]

Senator Whitehouse. And let me remind you you are under oath as you answer these important questions.

Bruce Selya is a Rhode Islander. He is a person I am very proud of and admiring of. I am also impressed with his vocabulary. And I have always wondered, now that I have got a clerk of his before me, where do those words come from? Does he give you a thesaurus to find good ones? Does he simply have an amazing vocabulary in his mind? Can we confirm this important issue right now in this hearing?

Ms. Jackson. Yes, sir, and the latter is the case. It is quite amazing to work for him because one of the things you learn early on is that you as a clerk are not supposed to be the one to provide the words. That is his job, and so you write the opinion or draft the opinion, and it comes back with these wonderful words in them that come from his head. So he is truly amazing, as you said.

Senator Whitehouse. Well, Judge Selya is a very distinguished Rhode Island jurist. He was legal counsel to Senator John Chafee before he was Senator, when he was Governor of Rhode Island. Senator Chafee served with great distinction here in this body. Judge Selya went on to the First Circuit, and I think he recently passed a milestone of having written now more majority and court opinions than any judge in the history of the First Circuit, if I am not mistaken.

Ms. Jackson. I was not aware of that, but I would not be surprised.

Senator Whitehouse. Yes, very, very impressive.

Well, equally, each of you is very, very impressive, and we look forward to pushing for a prompt confirmation, and if this should wash into the following year, we hope very much that our colleagues will allow this hearing to stand so we do not have to replicate it and that we can quickly move you back into the queue and toward nomination. And with any luck, we will be able to slow down the logjam that occurs on the executive calendar on the Senate floor. Or, I guess, speed things up through the logjam would be the better way to say that.

So, once again, congratulations on the great honor of having been nominated by the President. Congratulations on the personal decision you made to go forward, and best wishes in the confirmation process and in your careers ahead.

The hearing record will remain open for another week for any further questions that the minority or the majority may have and for any materials that anybody may wish to add to the record. But subject to that, the hearing is adjourned.

[Whereupon, at 11:11 a.m., the Committee was adjourned.]

[all]

Response of Ketanji B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Amy Klobuchar

1. **If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

   Response: My judicial philosophy is to approach all cases with professional integrity, meaning strict adherence to the rule of law, keeping an open mind, and deciding each issue in a transparent, straightforward manner, without bias or any preconceived notion of how the matter is going to turn out.

2. **What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

   Response: If I am confirmed as a district court judge, the litigants in my courtroom could rest assured that I will treat everyone with patience, dignity, and respect no matter what his status or station in life. I will encourage all litigants to present their arguments and evidence and establish an environment in which everyone is afforded a full and fair opportunity to be heard. Having worked with a variety of people throughout my career, I am comfortable communicating with, and relating to, people of various beliefs and backgrounds. Moreover, I am entirely capable of approaching each matter with an open mind and giving thorough consideration to every argument, no matter who presents it. I would be fully committed to doing so if confirmed as a district court judge.

3. **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

   Response: Stare decisis is a bedrock legal principle that ensures consistency and impartiality of judgments. All judges are obligated to follow stare decisis, and the doctrine is particularly strong as applied to federal district court judges, who are bound to follow the precedents of the Supreme Court and the respective Courts of Appeals.

Response of Ketanji B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Chuck Grassley

1. **Please identify the provision in the Fair Sentencing Act of 2010 that granted authority for the United States Sentencing Commission to give retroactive effect to parts of the Commission's permanent amendment to the federal sentencing guidelines that implements the Act.**

   Response: The Commission's authority—and duty—to consider giving retroactive effect to the Commission's permanent amendment to the federal sentencing guidelines arose not from the Fair Sentencing Act itself but from another statute passed by Congress, Title 28 section 994(u). Sections 2 and 3 of the Fair Sentencing Act reduce the statutory penalties for certain crack cocaine offenses, and section 8 requires the Commission to make conforming reductions in the sentencing guidelines. As a result, the Commission was required to consider giving retroactive effect to those guideline amendments under section 994(u), which the Commission has long interpreted to require it to consider retroactivity whenever it reduces the term of imprisonment recommended in a guideline.

2. **The intent of the Fair Sentencing Act of 2010 was that new sentencing guidelines were to be applied only prospectively. As a Commissioner and Vice-Chair of the Sentencing Commission, what led you to believe that Congress intended a retroactive application?**

   Response: The Fair Sentencing Act of 2010 is silent on the matter of retroactivity. By contrast, Title 28 section 994(u) expressly states that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The bi-partisan members of the Commission unanimously determined that, because no provision in the Fair Sentencing Act abrogates the Commission's duties under § 994(u), Congress intended for the Commission to consider the circumstances, if any, and the extent of any retroactive application of the FSA guideline amendments.

3. **In arriving at your decision to support retroactive application, what weight did you give to concerns regarding administrative and financial burdens that would result from retroactive application?**

   Response: Whether or not retroactive application of a guideline amendment will result in administrative and/or financial burdens is one of the three primary factors that the

Commission considers when it undertakes the required retroactivity analysis. At the Commission's hearing on the retroactivity of the FSA amendments, judges, prosecutors and defense counsel testified regarding their experience with administering crack offender retroactivity applications in 2007, and every witness who spoke to this issue testified that the process was not administratively or financially burdensome. I gave great weight to this testimony in arriving at my decision to support retroactivity.

4. **The Sentencing Commission determined that approximately 12,000 prison inmates would be released because of retroactive application. As a Commissioner, what weight did you give to this factor in arriving at your vote to support retroactive application of the amendment?**

   Response: The Commission conducted a detailed data analysis regarding the retroactive effect of the FSA guideline amendments and estimated that approximately 12,000 inmates would be eligible to apply for a sentence reduction if the FSA guideline amendments were made retroactive. The submission of such an application does not in itself result in the release of the applying inmate; rather, it permits the sentencing judge to review the individual inmate's sentence and it requires the judge to consider various factors such as the risks to public safety when deciding whether a reduction in the term of imprisonment is appropriate in a particular case. As a Commissioner, I gave great weight to the Commission's data analysis and the fact that a judge would have to make a specific determination regarding the appropriateness of a sentence reduction in each case in arriving at my vote to support retroactivity.

5. **Please explain how the release of 12,000 prisoners, with high recidivism rates, helps to preserve public safety.**

   Response: The release of an inmate who has a high risk of recidivism does not help to preserve public safety; consequently, no prisoners were automatically released as a result of the Commission's retroactivity determination. Instead, retroactive application of the FSA guideline amendments permitted certain inmates who had been convicted of crack cocaine offenses to seek a reduced sentence by submitting an application for a penalty reduction to the sentencing court. Under the procedures set forth in Title 18 section 3582(c)(2) and U.S.S.G. § 1B1.10, the sentencing courts that received such applications were required to make individual determinations regarding the appropriateness of a sentence reduction after considering many specific factors, including the potential impact on public safety as a result of reducing an inmate's term of imprisonment.

6. **Given that the Sentencing Commission previously reduced crack cocaine sentences – in 2007 without Congressional approval – why do you believe it is fair to give these defendants a sentencing windfall by granting another opportunity for further sentence reductions?**

   Response: In 2007, the Commission unanimously determined that crack cocaine penalties under the guidelines should be reduced by two levels and that this sentence reduction should apply retroactively. The Fair Sentencing Act subsequently reduced the statutory mandatory minimum penalties and corresponding guidelines for crack cocaine offenses by an even greater amount. The defendants whose sentences were previously reduced by only two levels pursuant to the Commission's action do not receive a windfall as a result of retroactivity; rather, they are provided the same opportunity as other eligible inmates to apply to the sentencing court for an individualized determination regarding the appropriateness of the application of the lower guideline penalties prescribed in the Fair Sentencing Act.

7. **Please provide to the Committee any prepared statements, or transcripts of statements you made at any hearings, public meetings, or Commission business meetings regarding crack cocaine sentencing.**

   Response: There were four occasions in which I participated in public Commission hearings or meetings that considered crack cocaine sentences, all of which were included in the questionnaire that I submitted to the Committee in connection with my nomination:

   On October 15, 2010, the Commission held a public meeting concerning the Commission's adoption of a temporary emergency amendment implementing the Fair Sentencing Act. There is no transcript or video of that meeting. The minutes indicate only that I "noted that the proposed amendment is a temporary emergency amendment that seeks to adhere closely to congressional intent and that the Commission will have the opportunity to consider the §2D1.1 guideline in the course of this amendment cycle."

   On June 30, 2011, I made a statement at the public Commission meeting in which the Commission unanimously voted to apply the final Fair Sentencing Act guideline amendments retroactively. My Committee questionnaire included a link to the video from this meeting, as well as the meeting minutes. In addition, here is a link to the transcript, which is posted on the Commission's website: http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110630/Meeting_Transcript.pdf.

On March 17, 2011, and June 1, 2011, I questioned witnesses during the Commission's public hearings related to the enactment of the Fair Sentencing Act amendments and retroactivity. As noted in my Committee questionnaire, the hearing transcripts are available on the Commission's website at the following links: http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf, and http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Hearing_Transcript.pdf.

8. **Do you agree that the sentencing guidelines, if applied properly and followed faithfully, can go a long way to assure predictability and uniformity in sentencing?**

   Response: Yes.

9. **If you are confirmed, how would you apply the sentencing guidelines?**

   Response: Although the sentencing guidelines are now advisory, sentencing judges must consider the guidelines and policy statements pursuant to 18 U.S.C. § 3553(a)(4) and (a)(5), and the Supreme Court has repeatedly emphasized that sentencing judges must properly calculate and consider the guidelines as the first step of the federal sentencing process. *See, e.g.*, *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). The guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall v. United States*, 128 S. Ct. 586, 594 (2007), and they are both "the starting point and the initial benchmark" of federal sentencing. As a Commissioner on the Sentencing Commission, I am well aware of the careful process by which the sentencing guidelines have been developed and the importance of the guidelines in promoting nationwide consistency and uniformity in sentencing. If confirmed as a judge, I will give great weight to the sentencing guideline range in every criminal case.

10. **At your hearing, I asked you about your understanding of the current state of law regarding those detained as a result of the United States Global War on Terrorism. Now that you have had time to review that issue, please provide a response.**

    Response: The law regarding individuals who have been detained by the United States pursuant to the global war on terrorism is a complicated and fact-specific body of law that has been developing by federal statute and in the cases of the Supreme Court and the D.C. Circuit over the past decade. I have not handled detainee cases in many years and have no expertise in this area of the law, but I understand that the Supreme Court has

interpreted federal statutes to provide the Executive Branch with the authority to detain unlawful enemy combatants indefinitely. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the Court concluded that the detention of unlawful enemy combatants, "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." Moreover, the *Hamdi* Court signaled that detained enemy combatants may be tried by "appropriately authorized and properly constituted military tribunals," 542 U.S. at 538, and Congress subsequently enacted the Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (2006), to "establish[] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States." If confirmed and presented with a case involving these issues, I would carefully research the applicable statutes and precedents and faithfully apply the law, as I would in any other case.

a. How will you approach terrorism/detainee issues, if confirmed?

Response: It is my understanding that the judges of the U.S. District Court of the District of Columbia have decided that new terrorism/detainee cases involving detainees held at the U.S. facility in Guantanamo Bay will only be assigned to judges who have previously handled these matters. To the extent that I am confirmed and assigned a terrorism/detainee case in another context, I will research the law carefully and apply it faithfully, giving full consideration and effect to the applicable federal statutes and the terrorism/detainee-related precedents of the Supreme Court and the D.C. Circuit.

b. Will you recuse, if assigned terrorism/detainee cases?

Response: I will review the recusal standards established in the judicial code of conduct in all cases, and would recuse myself in any case that warrants such action under those standards, including any terrorism case.

11. You have participated in events involving the American Constitution Society for Law and Policy. There is nothing wrong with participation or membership in such groups. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, indicated that a goal of the organization is "countering right-wing distortions of our Constitution." Do you agree with this sentiment? If confirmed, would you follow what Mr. Edelman has described as a "progressive perspective of the constitution"?

Response: I was asked to be a panelist at a single event sponsored by the American Constitution Society. I have never been a member of the organization, nor was I previously aware of any statements that the organization's leaders have made regarding

the organization's goals or constitutional views. Given my limited involvement with this organization, I cannot opine on any characterization of its goals. If confirmed, I would follow the text of the Constitution as interpreted by the Supreme Court and the D.C. Circuit.

12. What is your view of the role of the courts on improving the lives of everyday citizens?

Response: Courts have a role in making sure that everyday citizens have access to justice. To this end, judges should convey respect in all of their interactions with the litigants and should ensure that the courtroom is a welcoming environment—one in which everyday citizens are encouraged to make their arguments to the best of their ability, and the presented claims are fully heard and fairly considered. Courts should decide pending matters expeditiously for the benefit of the parties, also should also encourage the local bar to provide representation for any litigant who wants counsel, regardless of their ability to pay.

13. Do you believe, as Delegate Norton testified, that the citizens of her district are "denied many of the ordinary rights enjoyed by other Americans." If so, what would be your role as a District Judge for the District of Columbia, to identify and guarantee those rights?

Response: If confirmed, my role as a judge would be to decide cases and controversies that come before me, based only on the law as set forth in federal statutes and handed down by the Supreme Court and the D.C. Circuit.

14. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is professional integrity, which includes reverence for the rule of law, total impartiality, and the ability to apply the law to the fairly determined facts of the case without bias or any preconceived notion of how the case is supposed to turn out. I believe that I possess this attribute.

15. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should treat everyone who appears before her with dignity and respect. She should have a calm, even-tempered, and thoughtful demeanor, and rule efficiently and decisively. Most importantly, a judge must be an effective communicator, both orally and in writing, so that the parties understand what has been decided and what to expect going forward. I believe that I meet this standard.

16. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher

courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed, I would be committed to following the precedents of the Supreme Court and the D.C. Circuit, even if I personally disagreed with them.

17. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In cases of first impression involving the interpretation of a statute, I would look at the plain language of the statute, the structure of the statutory provision, and any precedents regarding analogous legal provisions or similar issues. I would employ standard canons of statutory interpretation and interpret the statute consistent with existing precedents addressing related questions. Under all circumstances, I would studiously review the opinions of the Supreme Court, the D.C. Circuit, and other federal courts of appeals that address similar situations.

18. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: I would apply any and all decisions of the Supreme Court or the D.C. Circuit, even those that I personally believed were rendered erroneously.

19. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A federal court must respect Congress and its enactments, and should only declare a federal statute unconstitutional in the narrowest of circumstances. Such circumstances include when a statute has been enacted without authority, based on clear and controlling precedents established by the Supreme Court or a Court of Appeals.

20. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution?

Response: No, it is not proper for judges to rely on foreign law or the views of the "world community" in determining the meaning of the Constitution.

21. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: Managing mounting caseloads is a primary responsibility of a judge and is essential to stemming excessive litigation costs. Judges must actively engage in the supervision of cases and settlements, hold regular status hearings, streamline discovery,

rule on dispositive motions efficiently, and utilize the time and talents of magistrate judges. If confirmed, I would consider it my obligation to manage my cases, and I would employ all of these tools, and others, to achieve that goal.

22. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes, I believe that district court judges have an obligation to monitor and control the pace and conduct of the matters that are assigned to them. A federal judge can control his or her docket by paying careful attention to progression of cases, holding regular status hearings, issuing case management orders, ruling definitively and efficiently on dispositive motions, and working in concert with magistrate judges. If confirmed, I would take all of these steps, and others, to control my docket.

23. You have spent your entire legal career as an advocate for your clients, or in public policy positions. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed as a judge, I will decide cases and controversies by applying the law to the fairly determined facts in a straightforward, neutral manner. For guidance, I will look to all relevant legal authorities, including the Constitution and the plain language of federal statutes, as well as the binding precedents of the Supreme Court and the D.C. Circuit. The most difficult part of the transition from criminal justice policy is likely to be handling the variety of subject matters and issues that are presented to a district court judge.

24. Please describe with particularity the process by which these questions were answered.

Response: I reviewed the questions posed and drafted the answers on my own and without assistance. I then submitted my draft answers to an official at the Department of Justice, who discussed them with me. Shortly thereafter, I finalized the answers and forwarded them to the Department for submission to the Committee.

25. Do these answers reflect your true and personal views?

Response: Yes.

Response of Ketanji B. Jackon
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: No.

   a. **If not, please explain.**

      Response: The Constitution embodies fundamental principles of limited government authority that originated with the Founders and do not "evolve."

2. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: No.

   a. **If not, please explain.**

      Response: Courts must apply established constitutional principles to new circumstances, but the meaning of the Constitution itself does not evolve nor does it incorporate new understandings resulting from social movements, legislation, or historical practices.

3. **What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

   Response: In analyzing whether a statute infringes upon an individual right, I would look to the plain language of the statute and apply the binding precedents of the Supreme Court and the D.C. Circuit that analyze the statute or an analogous provision. My role as a district court judge would be to apply the law as handed down by the Supreme Court and the D.C. Circuit to the facts before me.

4. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy's analysis?**

   Response: The Supreme Court's decision in *Roper* is binding precedent and I would faithfully apply it, if confirmed as a district court judge. I do not believe that it would be appropriate for me to express my personal view of the Supreme Court's decision. My

personal views on this or any other subject matter would not affect my handling of any case that I might be assigned as a district court judge.

a. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?

Response: The laws and traditions of foreign countries are not relevant to the interpretation of the text of the U.S. Constitution. The Supreme Court has indicated that the laws of the American States can be relevant under certain circumstances, and if confirmed, I would faithfully apply any precedent on this issue.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see previous answer.

5. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Please see answer to question 4(a).

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: Any ideas and solutions to legal problems that foreign nationals may have would be matters for Congress to consider in making policy decisions regarding legal issues, not bases for a court's interpretation of the existing laws of the United States.

Written Questions of Senator Ted Cruz
Ketanji Jackson
Nominee, United States District Judge for the District of Columbia
U.S. Senate Committee on the Judiciary
January 25, 2013

Judicial Philosophy

Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: If confirmed as a district court judge, my judicial philosophy would be to approach each case with professional integrity, meaning strict adherence to the rule of law and application of the law to the facts in a straightforward and transparent manner, without any bias or preconceived notion of how the matter is going to be resolved. The role of a Supreme Court Justice is different than that of a district court judge in that it often extends to the development of broader legal principles to guide the lower courts, and Justices sometimes develop substantive judicial philosophies to guide them in this task. Given the very different functions of a trial court judge and a Supreme Court Justice, I am not able to draw an analogy between any particular Justice's judicial philosophy and the approach that I would employ as a district court judge.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. I am aware that the Supreme Court has employed originalism when interpreting various constitutional provisions. *See, e.g.*, *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715-724 (1999) (Eleventh Amendment). Moreover, while the Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576-77, Supreme Court cases also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53-54, 59, 61. If confirmed as a district court judge, I would follow the analysis of binding Supreme Court precedents when applicable to the cases before me, and I would apply those precedents without regard to any personal view of how the Constitution should be interpreted.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: District court judges must strictly apply precedents and cannot overrule them under any circumstances.

Congressional Power

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 552 (1985).

Response: In *Garcia*, the Supreme Court assessed whether Congress's application of federal wage and hour protections to municipal employees pursuant to the Fair Labor Standards Act contravened any constitutional limit on federal power. I do not believe that it is appropriate for me to express any personal view of the *Garcia* case or the policy matter that the quoted statement addresses. If confirmed as a district court judge, I would strictly adhere to the binding precedents of the Supreme Court in this area, including cases in which the Court has interpreted the Tenth Amendment as a limit on Congress's power for the protection of state sovereign interests. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has not categorically excluded non-economic activity from Congress's reach under the Commerce Clause, in conjunction with its Necessary and Proper Clause power. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *see also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). Nevertheless, the Court has thus far generally "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613; *see also United States v. Lopez*, 514 U.S. 549, 561 (1995). In this regard, the Court has held that the Commerce Clause authorizes the regulation of only three categories of activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and activities that threaten such instrumentalities, persons or things, and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. at 558-59 (1995). This is binding precedent, and if confirmed as a district court judge, I would strictly adhere to it as applicable to any case before me without regard to any personal opinion about the scope of Congress' power under the Commerce Clause.

Presidential Power

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v, Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453

U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with any exercise of governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President's ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

Individual Rights

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has generally defined fundamental rights protected by substantive due process as those liberties that are "deeply rooted in this Nation's history and traditions," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and among the "fundamental" rights that the Supreme Court has recognized are the rights of family autonomy, custody, travel, access to courts, and voting. District courts should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of rights for the purpose of any substantive due process case, as I would with any other Supreme Court case.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has established that certain classifications—primarily distinctions that the government makes based on suspect classifications such as race, national origin, and gender, or classifications that significantly burden a fundamental right—are subject to a heightened level of scrutiny under the Equal Protection Clause. *See City of Clyburne, Tex v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). District courts should interpret the Constitution in a manner that is entirely consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of classifications and tiers of scrutiny for the purpose of the Equal Protection Clause, as I would with any other Supreme Court case.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: In *Grutter*, the Supreme Court emphasized that "race-conscious admissions policies must be limited in time," 539 U.S. at 342, and it posited that the law school involved in that case likely would be able to achieve its interest in a diverse student body, without employing such policies, in the relatively near future. I have no particular insight into the future need for, or ramifications of, the continued use of race in admissions. I am aware that the Supreme Court is currently revisiting the issue of the constitutionality of race-conscious admissions policies in public higher education, and if confirmed as a district court judge, I would apply any binding precedent in this area of the law.

Written Questions of Senator Jeff Flake
Ketanji Jackson
Nominee, United States District Judge for the District of Columbia
U.S. Senate Committee on the Judiciary
January 25, 2013

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1. What qualities do you believe all good judges possess?

Response: A good judge has professional integrity, which includes reverence for the rule of law, total impartiality, and the ability to apply the law to the fairly determined facts of the case without bias or any preconceived notion of how the case will be resolved. A good judge also has the ability to treat everyone who appears before her with dignity and respect. She should have a calm, even-tempered, and thoughtful demeanor, and should rule efficiently and decisively. Additionally, a good judge must be an effective communicator, both orally and in writing.

a. How does your record reflect these qualities?

Response: As a result of prior legal training and professional experience, I am able to evaluate complex legal arguments and have developed excellent oral and written communication skills. In my current position, I am also required to look objectively at data and the law and to make fair and unbiased policy determinations. (Although a district court judge is not a policymaker, the skills I employ when evaluating sentencing-related facts and applying federal law are similar to the detached, objective evaluations that a good judge makes.) In addition, as a former advocate in both public and private practice, I have had the privilege of working with people from all walks of life. I understand the importance of patience in relating to other people, and I make it a priority to treat others with respect, no matter who they are.

2. Do you believe judges should look to the original meaning of the words and phrases in the Constitution when applying it to current cases?

Response: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. The Supreme Court has relied upon the original meaning of the words and phrases in the Constitution when conducting its constitutional analysis in various cases. *See, e.g., U.S. v. Jones*, 132 S. Ct. 945, 949, 953 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 576 - 600 (2008). If confirmed as a district court judge, I would follow the reasoning of binding Supreme Court precedents when applicable to the cases before me, and I would apply them without regard to any personal view of how the Constitution should be interpreted.

a. If so, how do you define original meaning originalism?

Response: "Original meaning" originalism is a form of textualism that bases constitutional interpretation on the ordinary meaning of the terms used in the Constitution as understood by average people at the time of the Founding.

3. **In Federalist Paper 51, James Madison wrote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." In what ways do you believe our Constitution places limits on the government?**

   Response: Our entire constitutional framework is fairly characterized as having been designed to limit the power of the federal government. For example, the powers afforded to Congress are specifically enumerated (*see* Art I, sec. 8), and Congress is prohibited from exercising any power that is not so designated. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("The principle, that [Congress] can exercise only the powers granted to it . . . is now universally admitted."). Various constitutional provisions also specifically proscribe government action in a number of respects (*see, e.g.*, Art I, sec. 9), including the first ten amendments, which essentially constitute a series of prohibitions against the exercise of government power in a manner that intrudes upon the liberty of individual citizens. Moreover, the Constitution places limits on the government insofar as it divides power between the states and the federal government, and also among the three branches of the federal government, to ensure that the functions of each branch are distinct and constrained and that no one branch can consolidate all power in itself. There are also numerous provisions in the Constitution that detail the authorized democratic process—*e.g.*, provisions that require government officials to be "chosen" by the people, secure for United States citizens the right to vote, and establish specifically the manner of election and limit office holders' duration of service. These, too, serve as significant constitutional constraints on the scope, size, and composition of government.

   a. **How does the Judicial Branch contribute to this system of checks and balances?**

      Response: The Judiciary contributes to the constitutional system of checks and balances because judges have the power to decide when, and under what circumstances, the Constitution's limits have been reached.

4. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

   a. **Some have said the Court's decisions in *Lopez* and *Morrison* are inconsistent with the Supreme Court's earlier Commerce Clause decisions. Do you agree? Why or why not?**

      Response: *Lopez* and *Morrison* marked the first time in nearly 60 years that the Supreme Court invalidated a federal statute as exceeding the power of Congress under the Commerce Clause. The Court's opinions in those cases distinguished, but did not purport to overrule, prior precedents.

b. In your opinion, what are the limits to the actions the federal government may take pursuant to the Commerce Clause?

Response: The Supreme Court has concluded that the Commerce Clause authorizes the federal government to regulate only three categories of activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and activities that threaten such instrumentalities, persons or things, and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This is binding precedent, and if confirmed as a district court judge, I would strictly adhere to it as applicable to any case before me without regard to any personal opinion about the scope of Congress' power under the Commerce Clause.

c. Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?

Response: No.

5. What powers do you believe the 10th Amendment guarantees to the state? Please be specific.

Response: The text of the Tenth Amendment says that the states retain all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States." Without specifically defining the full scope of the authority that is reserved for the states by virtue of the Tenth Amendment, the Supreme Court has indicated that the states' residual powers are "significant" and "inviolable," *New York v. United States*, 505 U.S. 144, 156, 188 (1992), and also that "[t]he principles of limited national powers and state sovereignty are intertwined," *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Moreover, the Court has characterized the powers that the Tenth Amendment reserves for the states as a "mirror image" of the powers that the Constitution grants to the federal government. *New York*, 505 U.S. at 156 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."). District court judges are bound by the Supreme Court's precedents regarding the scope of state power under the Tenth Amendment, and if confirmed as a district court judge, I would faithfully apply the Supreme Court's precedents in this area, as I would any other Supreme Court case.

Senator CARDIN. Thank you. Ms. Jackson.

STATEMENT OF KETANJI BROWN JACKSON, NOMINEE TO BE A MEMBER OF THE U.S. SENTENCING BOARD

Ms. JACKSON. Yes, sir. Senator, thank you very much for this opportunity to appear before the Committee today. I appreciate it. And I would like to start by thanking the President for nominating me to this position. I'd also like to thank the Chairman of the Committee and the Ranking Member, Senator Sessions.

I also appreciate the opportunity to introduce my family, beginning with my husband, Dr. Patrick Jackson, who is my support system for 13 years and a wonderful father to our two young daughters, who could not be here today, but are hopefully hard at work doing their homework right now.

I would also like to introduce my parents, Johnny and Ellery Brown, who have come here from Miami, Florida, to support me. My parents-in-law, Gardner and Pamela Jackson, who have come here from Boston, Massachusetts. My brother, Second Lieutenant Ketajh Brown, who is a member of the Maryland Army National Guard, who served in Iraq and who graduated from officer candidate school 2 weeks ago; his supportive girlfriend, Olga Butler; and, my wonderful brother-in-law and sister-in-law, Dana and William Jackson.

Other than that, Mr. Chairman, I don't have a statement, but I would like to say that if I am fortunate enough to be confirmed, I look forward to working again with the excellent staff at the Sentencing Commission. And I'm happy to take any questions that you might have.

[The biographical information of Ketanji Brown Jackson follows.]

Senator CARDIN. Well, thank you and we appreciate both of you introducing your families. It is a pleasure to have you all here in our Committee.

Ms. Robinson, if I just could begin with you. If you could just share with us, what would be your priorities, if confirmed to this position? How do you see the Office of Juvenile Justice and Delinquency Prevention, a very important part of local governments?

Give us a little idea about some of the priorities that you would look at within your portfolio of responsibilities, whether you think there is a need to change the way the priority decisions are made. How do you intend to work with the Judiciary Committee in carrying out that responsibility?

Ms. ROBINSON. Certainly, I'd be happy to. And, Senator, if I could first say, also, that I overlooked one of my family members, because I didn't know he was coming. I'd also like to introduce my brother, Peter Overby, who is seated over at the press table, because he's a member of the press. And he didn't tell me he was going to be coming.

Senator, if I'm lucky enough to be confirmed, I would want to emphasize these priorities: One of the key areas that OJP works in, of course, is partnership with the field. So I would say I'd give strong importance to strategic partnerships with state, local and tribal officials in working to reduce crime across the country.

Of course, this is a key area in which OJP has always worked, but I think there is much more that can be done to strengthen the way in which OJP—and you mentioned OJJDP, and that's a key part of this, particularly with the very difficult problems of youth violence that have so recently been highlighted just in the last few days—ways in which we can make sure that officials around the country can access the resources available through OJP and OJJDP.

In a second area, I want to make sure that what we're doing at OJP is based on what we know from science. I know that Senator Specter mentioned that, and this is an area that Senator Sessions and I have discussed in the past.

Is what we're doing based on the best evidence? We shouldn't be spending taxpayer dollars unless we know that it's on areas that really work. So that would be a second area of priority.

A third area of priority would be to ensure, working closely with the Inspector General, that we're ensuring that we're good stewards of Federal taxpayer dollars and guarding against abuse and fraud with those dollars.

Senator CARDIN. Well, the juvenile justice issues are really important. We are struggling with that in this Committee. We have had some legislation that we are considering.

If I had to pick the two areas we probably spend the most time, it would probably be juvenile justice and the drug issues, dealing with recidivism, dealing with drug treatment, dealing with how we handle the drug issues.

So you are going to get a lot of requests in both of these areas. For example, drug courts.

Ms. ROBINSON. Yes.

Senator CARDIN. Give me your thoughts as to how you would encourage, and I hope you would do this, a larger interest among the

local governments so that we can have better choices? I mean, the more interest you have, the more closely you can work with the local agencies, the better pool of requests we are going to have, the better programs we get, the best practices we all learn from each other's states.

Drug courts are working well in some states. Other states need help. How do you see your role in trying to bring this together?

Ms. ROBINSON. Senator, I think one way that OJP can do that better, if I am confirmed, I would want to set up what I call a "what works clearinghouse." I think OJP has not, in the past, done a good enough job in distilling information about the innovative programs out there that really are working well.

Have we really distilled the information from research on how well drug courts are reducing recidivism and reducing drug use? Let's help people, let's say, in Des Moines find out how the drug court in Denver is working well—or the one in Philadelphia—and show people over in Pittsburgh, just as examples.

I think if they can see how their peers around the country are using this in an effective way, not necessarily just a Federal agency telling them, but their peers in another jurisdiction, then that's a good selling point.

And if they can see the percentage reductions in recidivism, that's a selling point to their own city councils when Federal funding may run out.

Senator CARDIN. And you have a large workforce that is part of the office. Some are represented by AFSCME. Can you tell me how you would plan to work with the workers and their representatives in order to have unity for the purpose of the goal of the agency?

Ms. ROBINSON. Yes, Senator. When I was at OJP back in the 1990's, I had a very good working relationship with the union. I met regularly with the president of the union then, who was Stu Smith. We didn't always agree on every issue, but it was very good communication. And if I am confirmed, I would plan to have that same kind of regular communication and working relationship.

I believe very strongly in a fair workplace and ensuring that our managers and our supervisors at OJP are people who are fair in the way that they go about managing the workplace and that they have the training to ensure that they're good managers.

Senator CARDIN. Thank you. Ms. Jackson, I want to talk a little bit about sentencing with you. There is one issue that has been of foremost interest in this Committee, and that is disparity between crack and powder cocaine.

Now, these are statutes. So the sentence disparity needs to be corrected by Congress, I understand that. But the Sentencing Commission needs to take a look at that and is taking a look at it.

How do you see your role on the Sentencing Commission dealing with disparities in our system that are impossible to justify?

Ms. JACKSON. Well, Senator, thank you for your question. If I am fortunate enough to be confirmed, I believe that my role, along with the other commissioners, would be to look at the research, to look at the data, to consider the statistics and determine whether or not the disparities that are reflected in the data have some justification in the purposes of sentencing.

That's part of the role of the commission in setting Federal sentencing policy and it's certainly something that I know that at least with respect to crack and—the crack-powder disparity, the commission has looked at and was very forward thinking about addressing that particular disparity.

Senator CARDIN. And I do hope that our Committee will be able to deal with that issue. There is a lot of work being done by many members of our Committee to try to bring us together on that issue.

Do you have a view in regards to the Supreme Court decision in 2005, the Booker case, which held that the guidelines are not mandatory?

Ms. JACKSON. Well, it's a complicated decision, as you know, that has different aspects to it. I believe that at the end of the day, the remedial half of the opinion was the correct outcome given the constitutional holding.

And the guidelines, as you say, are now advisory and I do think that, as a result, there is additional statistical data that the commission can collect about what judges are actually doing in these cases where they now have the opportunity to sentence outside of the guidelines under the statute directly.

Senator CARDIN. Senator Webb has introduced legislation for us to take a look at the criminal justice system and our sentencing and penal issues. If that legislation is successful, your commission will have an important role in helping that study go forward.

Can you just share with me your thoughts as to Senator Webb's request that we take a more comprehensive look at our sentencing and penal policies in America?

Ms. JACKSON. Well, Senator Webb's proposal I have not studied in detail, but it certainly is a part of a national dialog that's going on right now with regard to Federal sentencing. And I believe that to the extent that his commission and working group is able to come up with proposals as to how to address sentencing, then that would certainly be welcome in the overall debate about what needs to be done now.

Senator CARDIN. Thank you very much. Senator Sessions.

Senator SESSIONS. Sentencing is such a big deal. You have got a 98 percent conviction rate. The real question in most cases is how much time will a person serve.

I am absolutely convinced, from my experience, that the fact that we have a lot of people in jail for fairly long periods of time has been a factor in—the predominant factor, in my view, in that decline in crime. Murder rates in a lot of areas are half what they were. Crime in general is down.

I became a United States Attorney in the early 1980s and people were terrified over crime. It is not as intense today and we have done some things right. But nobody should serve longer in the slammer than makes sense.

That is why I have supported substantial reductions in the crack cocaine penalties and I am working with a number of people to see if we can reach an accord. I have been supporting that for 6 years and never have gotten anything passed yet, maybe more than 6 years.

I am a little worried about where we are heading with the sentencing guidelines. Essentially, we need not go back to the situation in which two defendants are in the courthouse and one is down the hall before Judge X and one before Judge Y and they get five times the sentence for the same offense.

So the guidelines—*Booker* has opened up some real challenges for us and I hope that you will work on that.

Ms. Robinson, I really appreciated your talking about science, because what kind of defendants repeat and which ones, if you release, are likely to go back and commit serious crimes again are big factors. I support the drug courts. Senator Cardin, I really do. I think they work pretty well, but they are done quite differently in different cities.

I guess I really liked your answer to say, "Well, which one is working best?" And should we not be able to advise a community who is going to establish a drug court, especially if they are going to get a Federal grant, to ask them whether—are they going to comply with the best data we have out there on how to conduct that drug court.

Do you agree that we can do a better job of that, Ms. Robinson?

Ms. ROBINSON. Yes, Senator, I very much do. And I think a key part of what the Federal Government does best with these kinds of grants is provide technical assistance with them, which goes directly to your point.

And one of the key things about technical assistance is that the best way to provide it is to not have it be conducted by Federal employees from Washington, but have it conducted by people who are professionals from jurisdictions out in America who are doing this kind of work.

So we arrange it from an agency in Washington, but it's actually conducted out in the field by professionals, again, from one jurisdiction, maybe from Denver, going over to Des Moines or wherever.

Senator SESSIONS. I think that is a good idea and I would support that. I remember, and I have shared this story with you, Mr. Chairman, but Fred Thompson was elected to this body before I was. He chaired the Subcommittee on Juvenile Crime. At the time, there was a big emphasis on what to do about juvenile crime.

He said the only thing he was sure of when I took over that Subcommittee was that we did not know enough about why juveniles commit crime and if the Federal Government wanted to do something worthwhile, we would do some really aggressive studies into that, because 99.99 percent of juvenile cases are tried in state courts, not Federal courts. I always thought that was pretty commonsensical.

Do you think we know enough about juvenile crime, its causes, the recidivism possibilities? Do we provide enough data and information for individual juvenile judges and probation officers and juvenile prison systems around the country?

Ms. ROBINSON. No, Senator, I do not. I think we have——

Senator SESSIONS. You were there for 8 years.

Ms. ROBINSON. Seven years.

Senator SESSIONS. Seven years. What can we do to learn more about it?

Ms. ROBINSON. Well, I think we know some things, but we need to know much more. There is very little research money actually appropriated by Congress to look into these things. There's a lot of——

Senator SESSIONS. A lot of the money that goes to Office of Justice Programs, which you administer, are earmarked or directed to things other than research and development?

Ms. ROBINSON. That's correct. Most of it goes into programmatic money, which is very important, but a very small percentage goes to research.

Senator SESSIONS. Now, you say programmatic. Is that money that goes to state and local jurisdictions mostly?

Ms. ROBINSON. Correct.

Senator SESSIONS. To help them start a drug court or run one.

Ms. ROBINSON. Yes.

Senator SESSIONS. Or a juvenile program.

Ms. ROBINSON. Or for the Byrne grants, for example, for law enforcement task forces and those kinds of things.

Senator SESSIONS. So tell us, be honest with you, at the time of our budget, if we had to choose, it seems to me we would do better to investigate rigorously some of the programs that are being tried all over America and see if we cannot help give good advice, even if we had to reduce some of the grant money or program money.

Ms. ROBINSON. The fact is that even a doubling or a tripling of the research funding would make a tremendous difference, because it's not a tremendous amount of money. But even putting $20 million more or $10 million more into research could create a great deal more knowledge about these issues and really inform the spending of the program dollars.

Senator SESSIONS. I also appreciate your willingness to examine, Mr. Chairman, the operation and structure of Office of Justice Programs. It has been cobbled together by this legislation, gets passed and we are all proud of it, and we get a director in charge of it, director in charge of this one, and they have interest groups and everything, and then, at some point, you say it is time to run this thing more streamlined and we can be more efficient and be more productive, usually somebody hollers and objects and it is difficult to get anything done.

But I hope that you would continue your willingness to examine how to, as you just said, make sure we get the best use of the taxpayers' money. Will you do that for us?

Ms. ROBINSON. I would be happy to continue those discussions with the Committee, of course.

Senator SESSIONS. I know you had some good ideas on how we could improve the structure of that when you were part of the Clinton Administration and afterwards, too, you have testified here before our Committee on that.

So, Mr. Chairman, I think we have one of the best nominees of the Clinton Administration. I think you did a great job and managed well and worked hard and were focused on doing the right things and I think it gives us an opportunity, as the Committee, to listen to your advice and suggestions and see if we cannot help you do your job better, because as this system ha developed over

the years, it is not as productive, I think, as it should be. Thank you.

Senator CARDIN. Senator Sessions, let me agree with you. Your timing is perfect, because the budget is on the floor as we speak, being managed by my colleague from Maryland, Senator Mikulski and Senator Shelby. You are correct. We generally get involved with that as we put another little wrinkle into the program rather than looking at the overall effect.

I am very encouraged by Ms. Robinson's responses, because the purpose of the agency, the Office of Justice Programs, is to make sure that there is a national benefit to this. If it was just a funding program, we could just figure out a formula and save a lot of time.

But we are trying to make the benefit, so states can benefit from other states and that there are national strategies to help states, which are the primary agencies that deal with this problems, that there is a sharing of information and there is a more effective way for a state or local government to deal with these issues.

So I think Senator Sessions is absolutely right and, Ms. Robinson, we really do look forward to your recommendations in this area. I think we all are trying to get a better effectiveness on the use of these Federal funds. It really should not be just who can get as many earmarks to their states as possible, but how we can best utilize the funds to deal with this National priority of reducing juvenile crime and adult crime and make our communities safer in the most cost-effective way.

So I just wanted to add my support to Senator Sessions' comments.

Senator SESSIONS. What is the total OJP budget?

Ms. ROBINSON. For 2009, it was $2.8 billion.

Senator SESSIONS. So I am not saying any of this is wasted, although I am sure some is not spent well, but the idea that we do not have enough money to do good research raises questions, because $10 million or $20 million could substantially increase your ability to do research out of a multi-billion dollar budget indicates that Congress probably needs to examine how we allocate the money.

Senator CARDIN. I think that is our responsibility, you are correct. Let me thank both of our nominees. The record will remain open for 1 week, without objection. I will submit statements from—I understand, Ms. Robinson, you have an opening statement to submit for the record. That will be included in the record.

With that, the Committee will stand adjourned.

[Whereupon, at 5:24 p.m., the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Ketanji Brown Jackson
Nominee to be a Member of the United States Sentencing Commission
to Written Questions for the Record from Senator Jeff Sessions

1. **Pursuant to the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. Under the current system, it appears to me that as long as the sentencing judge (1) correctly calculates the guidelines, and (2) appropriately considers factors set forth in 18 U.S.C. 3553(a), he or she may impose any sentence ranging from probation to the statutory maximum. Following the Supreme Court's decision in *Gall v. United States*, appellate courts must apply the highly deferential "abuse of discretion" standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is virtually no substantive review on appeal.**

   a. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Yes, I agree that a defendant's sentence for a particular crime should not depend on the judge who sentences him or her. The federal sentencing system should embody the principle that similar offenders who commit similar crimes should be treated similarly.

   b. **Do you believe the current sentencing structure undermines several of the key goals of the Sentencing Reform Act of 1984, specifically, reducing unwarranted sentencing disparity?**

There are clear indications that the post-*Booker* advisory guidelines scheme is less effective at reducing sentencing disparities among similarly-situated defendants than the pre-*Booker* mandatory guidelines regime. One of the stated purposes of the guidelines under the Sentencing Reform Act of 1984 was to "provide certainty and fairness in meeting the purposes of sentencing" by "avoiding unwarranted sentencing disparities among defendants," 28 U.S.C. § 991(b)(1)(B), and it is fair to say that the current advisory sentencing structure makes achievement of that statutory goal more difficult than the mandatory sentencing system that Congress originally envisioned.

2. **Statistics compiled by the U.S. Sentencing Commission suggest that the rate of sentences imposed below the guideline range has risen dramatically 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 2009 Third Quarter Preliminary Report, a national comparison of sentences shows that district court judges imposed sentences below the guidelines range approximately 16% of the time. That is nearly four times as many below**

range sentences than were reported for the first quarter of 2005, when the percentage was 4.3%. *Booker* was decided in January of 2005.

a. How would you propose we address what appears to be the rise in below range sentences, and the sentencing disparities that will necessarily accompany this rise?

Any proposal to address the apparent rise in below-range sentences and sentencing disparities would need to be based on aggregated data over time and must reflect realistic views about whether the current guidelines system can adequately reduce unwarranted disparities while providing judges with sufficient flexibility to impose fair sentences. Thus, if confirmed, I would want to continue gathering data, information, and opinions about the operation of the guidelines—as the Commission is currently doing through its regional hearings and data-analysis divisions—and consider structural and substantive amendments to the guidelines themselves. If those were not sufficiently effective, I would consider fashioning a broader legislative proposal to address sentencing disparities under the advisory system in the aftermath of *Booker*.

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

I would certainly consider the creation of a binding and constitutional federal sentencing guidelines system. I believe that Congress should wait in its consideration of statutory reforms, however, to determine if acceptably consistent, predictable, and fair sentencing results can be achieved under the current advisory scheme and to get the results of the Commission's ongoing review.

The Commission is currently holding regional hearings across the country and receiving broad input from prosecutors, defense counsel, judges, and academics regarding the direction and future of federal sentencing. I would expect that the Commission plans to revisit the guidelines, both structurally and substantively, as a result of what it learns from this extensive information-gathering mission. If the guidelines are adjusted to reflect the new reality of the advisory system and to take into account the views of criminal justice practitioners regarding the appropriate sentences for various crimes, it is possible that the rate of judicial imposition of below-guideline sentences may decline, resulting in a reduction in sentencing disparities that would render congressional intervention unnecessary.

Congress should, of course, remain ever mindful of unacceptable disparities in sentencing that persist over time and that undermine the public's perception of the fairness of the system as a whole. Statutory reforms that reestablish a constitutional and binding sentencing system might prove necessary if the advisory guideline system itself cannot address and resolve the problem of unwarranted and unjustified sentencing disparities.

No. 09-6338

IN THE
Supreme Court of the United States

PERCY DILLON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether, in a sentence reduction proceeding under 18 U.S.C. § 3582(c)(2), the district court has authority to reduce a sentence of imprisonment in a manner inconsistent with the United States Sentencing Commission's policy statement at § 1B1.10 of the Guidelines Manual.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

A. The Commission's Amendment To The Guidelines Applicable To Crack Cocaine Offenses 2

B. The Commission's Determination To Make The Crack Cocaine Amendment Retroactive 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE COMMISSION PROPERLY CARRIED OUT ITS STATUTORY DUTIES UNDER 28 U.S.C. § 994(u) BY PROMULGATING THE POLICY STATEMENT AT USSG § 1B1.10 10

A. Section 1B1.10 Specifies "In What Circumstances" And "By What Amount" Sentences May Be Reduced Based On A Guideline Amendment 11

B. *Amici*'s Procedural Challenge To § 1B1.10 Has No Merit 14

II. THE LIMITED SCOPE OF § 3582(c)(2) PROCEEDINGS PERMITS THE COMMISSION TO MAKE INFORMED RETROACTIVITY DECISIONS 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Braxton v. United States, 500 U.S. 344 (1991) 1, 12, 13

Kimbrough v. United States, 552 U.S. 85 (2007) 2

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28 U.S.C. § 994(*o*) 2, 12

28 U.S.C. § 994(p)..... 2

28 U.S.C. § 994(u).....3, 8, 10, 11, 12, 14, 19

28 U.S.C. § 994(x)..... 14

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18 U.S.C. § 3553(a) 13

18 U.S.C. § 3582(c)(2) 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21

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§ 1B1.10 .....3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21

§ 1B1.10 cmt. background 4, 18
§ 1B1.10(a) 11
§ 1B1.10(b) 11
§ 1B1.10(b)(2)(A) 11, 17
§ 1B1.10(a)(2) 3, 11
§ 1B1.10(c) 3, 11
App. C:
Amend. 706 (effective Nov. 1, 2007) 2, 3, 4
Amend. 712 (effective Mar. 3, 2008) 7, 16
Amend. 713 (effective Mar. 3, 2008) 4, 6, 19
Fed. R. Crim. P. 43(b)(4) 20
Sup. Ct. R. 37.6 1
United States Sentencing Comm'n Rules of Practice and Procedure (2007) 15
Rule 4.1 4

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INTEREST OF *AMICUS CURIAE*[1]

The Sentencing Reform Act of 1984 ("SRA") charged the United States Sentencing Commission (the "USSC" or the "Commission") with the duty to create, review, and revise the Federal Sentencing Guidelines ("Guidelines"), 28 U.S.C. §§ 991-994, and "granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." *Braxton v. United States*, 500 U.S. 344, 348 (1991). The Commission accordingly has a direct interest in this case, which concerns sentence modification proceedings conducted in response to its decision to make an amendment to the Guidelines retroactive. The Commission previously submitted briefs in this Court as *amicus curiae* on issues of paramount importance to the Commission's mission and functions in *Rita v. United States*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005); and *Mistretta v. United States*, 488 U.S. 361 (1989).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

STATEMENT

A. The Commission's Amendment To The Guidelines Applicable To Crack Cocaine Offenses

Under the SRA, the Commission is charged with "establishing sentencing policies and practices" that "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). The SRA directs the Commission to ensure that federal sentencing policies "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process" and to measure the effectiveness of sentencing practices in meeting the purposes of sentencing. *Id.* § 991(b)(1)(C). The Commission accordingly has the obligation periodically to "review and revise" the Guidelines "in consideration of comments and data coming to its attention." *Id.* § 994(*o*). The Commission must submit to Congress its amendments to the Guidelines; the amendments are subject to disapproval by Congress for 180 days, after which time they take effect. *See id.* § 994(p).

The amendment to the Guidelines at issue in this case concerns offenses involving crack cocaine. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007). Under the Anti-Drug Abuse Act of 1986, Congress set mandatory minimum penalties for crack cocaine (or "cocaine base") offenses that "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007). The Commission initially incorporated that "100-to-1" ratio into the Guidelines, but, based on further research and study, came to the view that the extent of this disparate treatment was

no longer supportable.[2] In the absence of any legislative action by Congress, in 2007, the Commission adopted an amendment that reduced the base offense level for most crack cocaine offenders by two levels. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007).

B. The Commission's Determination To Make The Crack Cocaine Amendment Retroactive

1. When a Guideline amendment "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the SRA requires that the Commission "specify in what circumstances and by what amount" the sentences of prisoners serving terms of imprisonment for those offenses should be lowered. 28 U.S.C. § 994(u). Section 1B1.10 of the Guidelines Manual implements that directive and provides that a sentence reduction is appropriate only if one of the amendments "listed in subsection (c) [of § 1B1.10] is applicable to the defendant" and "ha[s] the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2). Section 1B1.10(c) thus identifies those amendments that the Commission has determined, pursuant to § 994(u), should be applied retroactively.

Section 1B1.10 also explains the criteria that the Commission uses for deciding whether to give an

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[2] *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), *available at* http://www.ussc.gov/crack/exec.htm; USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf.

amendment retroactive effect. Those criteria include "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." *Id.* § 1B1.10 cmt. background. In considering the difficulty of applying an amendment retroactively, the Commission considers not only how difficult applying the amendment would be in an individual case, but also the overall impact of a potential retroactivity decision on the federal criminal justice system.

To inform the Commission's deliberations, particularly with respect to that third enumerated factor, the Commission typically performs an analysis that estimates the number of offenders potentially eligible to seek a reduced sentence if the Commission were to make the amendment retroactive. It then projects release dates for those eligible offenders.[3] Using those criteria, the Commission has exercised its authority to make an amendment retroactive judiciously. Prior to *Booker*, the Commission had voted to apply only 24 of its amendments retroactively.

2. Following its submission of the crack cocaine amendment to Congress, the Commission published a Federal Register notice seeking public comment on whether the amendment should be given retroactive effect. *See* 72 Fed. Reg. 41,794 (July 31, 2007). Cognizant of the potential impact that Amendment 706 could have on the federal criminal justice system if applied retroactively, the Commission also requested comment regarding "whether, if it amends § 1B1.10(c)

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[3] *See*, *e.g.*, USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008); *see also* USSC Rules of Practice and Procedure 4.1 (2007).

to include [the crack cocaine] amendment, it also should amend § 1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. 3582(c)(2)." *Id*.

The Commission received "more than 33,000 pieces of public comment concerning the issue of retroactivity," representing each of the major participants in the federal criminal justice system.[4] Although many comments favored making the amendment retroactive, they also reflected concern for the procedures that would apply in the event of retroactive application. As the Committee on Criminal Law of the Judicial Conference of the United States stated: "[t]he Committee's recommendation [in favor of retroactive application of the crack cocaine amendment] rests on the hope that the Commission will implement procedures to reduce the administrative burden on the federal judiciary associated with the resentencings that would attend retroactive application."[5]

In addition to soliciting public comment, the Commission held a full-day hearing in Washington, D.C., where it heard testimony from many participants in the federal criminal justice system, including the judicial branch, representatives of the executive branch, private practitioners and representatives of federal public defenders, academics, and various community groups.

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[4] U.S. Sentencing Commission Public Meeting Minutes at 6 (Dec. 11, 2007), *available at* http://www.ussc.gov/MINUTES/20071211_Minutes.pdf.

[5] Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 1 (Nov. 2, 2007) ("Cassell Letter"), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf.

3. The Commission also analyzed and considered the potential impact on the prison population and the federal court system of applying the crack cocaine amendment retroactively.[6] The Commission's analysis was based expressly on its understanding of "the constraints imposed by 18 U.S.C. § 3582(c)(2) and § 1B1.10" limiting "the extent of any reduction under § 3582(c)(2) to the amended guideline range." Schmitt Memorandum at 4. Accordingly, the data considered by the Commission when it voted on retroactivity of the crack cocaine amendment "account[ed] only for the application of the two-level reduction provided by the crack cocaine amendment and [did] not assume any other reduction in the sentence." *Id.*

The Commission's analysis estimated that, of the 31,323 crack cocaine offenders sentenced between October 1, 1991, and June 20, 2007, and who were identified as imprisoned, 19,500 "would be eligible to seek a reduced sentence if the Commission were to make the 2007 crack cocaine amendment retroactive" and that "[t]hese offenders would be released over a period of more than three decades." *Id.* at 4-5. Further, the Commission estimated that "the average sentence reduction for those offenders who appear to be eligible to seek a reduced sentence would be 27 months (from 152 months to 125 months)." *Id.* at 23.

4. After considering the data and public input, the Commission voted on December 11, 2007, to give the crack cocaine amendment retroactive effect as of March 3, 2008. *See* USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The

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[6] *See* Memorandum from Glenn Schmitt et al., USSC, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 3, 2007) ("Schmitt Memorandum"), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

Commission also voted to amend § 1B1.10 to "clarify when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2)." *Id.*, amend. 712, Reason for Amendment (effective Mar. 3, 2008).

5. Since its decision to make the crack cocaine amendment retroactive, the Commission has compiled "data concerning recent court decisions considering motions to reduce the length of imprisonment for certain offenders convicted of offenses involving crack cocaine prior to November 1, 2007."[7] As of January 13, 2010, district courts had addressed and decided 23,471 motions brought under 18 U.S.C. § 3582(c)(2) during the approximately 22 months that the amendment had been in effect. *See* 2010 Report, Table 1. Of those 23,471 motions, district courts had granted 15,501 sentence reductions pursuant to the Commission's crack cocaine amendment and denied an additional 7,970 such motions. *See id.*[8] The average reduction in sentence was 25 months, compared to the 27 months the Commission had projected. *See id.*, Table 8.

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[7] USSC, *Preliminary Crack Cocaine Retroactivity Data Report* 1 (Jan. 2010) ("2010 Report"), *available at* http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf.

[8] Of those 7,970 motions, 6,763 were denied because the defendant was not eligible for a sentence reduction; 944 of those motions were brought by defendants whose offense(s) did not involve crack cocaine. *See id.*, Table 9.

SUMMARY OF ARGUMENT

I.A. Under 28 U.S.C. § 994(u), if the Commission reduces the recommended Guideline range applicable to a certain offense, it must "specify in what circumstances and by what amount" those sentences should be reduced for those serving terms of imprisonment for that offense. The Commission's policy statement at § 1B1.10 of the Guidelines Manual carries out those tasks by providing that a court may grant a sentence reduction under a Guideline amendment only if the Commission has designated that amendment as appropriate for retroactive application ("in what circumstances") and that a court may not reduce a defendant's sentence below the amended Guideline range ("by what amount"). *Amici*'s various arguments that courts are free to regard those limitations as non-binding are unpersuasive and contradicted by the express terms of 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2).

B. The Commission properly adhered to procedural requisites in formulating its decision. The Commission correctly forecast the thousands of requests for sentence modification that have been filed in response to the retroactive effect of the crack cocaine amendment. The Commission's amendments to § 1B1.10 were adopted to clarify any ambiguities in the policy statement that could lead to unnecessary litigation and confusion, and in turn could hinder the federal courts' ability to process the cases and to release those prisoners who would benefit from retroactive application of the amendment.

In amending § 1B1.10, the Commission was not required to use the notice-and-comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The Commission's organic statute is clear

that the APA applies only to promulgation of Guidelines and that the Commission should implement its authority under 18 U.S.C. § 3582(c)(2) through promulgation of a policy statement. Nevertheless, the Commission sought and received public comment on the changes to § 1B1.10 using the same procedures through which it obtained public comment on the crack cocaine amendment itself. Furthermore, the revisions merely clarified the appropriate circumstances for sentence modifications.

II. A significant factor in the Commission's consideration of whether to make a Guideline amendment retroactive is the effect retroactivity would have on the court system's ability to administer justice. Because courts of appeals have generally treated sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) as having a limited scope that does not entail a complete resentencing, the Commission has been able to predict with a high degree of accuracy what consequences to the judicial system are likely to flow from retroactive treatment of specific Guideline amendments. That assessment would be extremely difficult, if not impossible, to conduct if the Commission could not reasonably predict the extent of the reduction that could be granted to an eligible defendant or the nature and extent of the resulting proceedings. The regime that petitioner seeks – in which any amendment made retroactive would potentially afford each eligible defendant a full resentencing – likely would have the effect of diminishing retroactivity's usefulness as a tool for promoting fairness in sentencing and avoiding unwarranted disparities.

ARGUMENT

I. THE COMMISSION PROPERLY CARRIED OUT ITS STATUTORY DUTIES UNDER 28 U.S.C. § 994(u) BY PROMULGATING THE POLICY STATEMENT AT USSG § 1B1.10

By its terms, § 3582(c)(2) grants a district court authority to reduce a sentence only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The Commission joins in respondent's arguments as to why applying § 3582(c)(2) as written is consistent with the Sixth Amendment and this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005).[9] The Commission will address here certain of the non-constitutional, alternative arguments advanced by the Federal Defenders as *Amici Curiae*

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[9] That is the "nearly unanimous position" of the courts of appeals, which have held that "*Booker* does not alter the mandatory character of Guideline § 1B1.10's limitations on sentence reductions." *United States v. Doublin*, 572 F.3d 235, 238 (5th Cir.) (per curiam), *cert. denied*, 130 S. Ct. 517 (2009); *see also United States v. Fanfan*, 558 F.3d 105, 109-10 (1st Cir.), *cert. denied*, 130 S. Ct. 99 (2009); *United States v. Savoy*, 567 F.3d 71, 73 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 342 (2009); *United States v. Doe*, 564 F.3d 305, 313-14 (3d Cir.), *cert. denied*, 130 S. Ct. 563 (2009); *United States v. Dunphy*, 551 F.3d 247, 252-55 (4th Cir.), *cert. denied*, 129 S. Ct. 240 (2009); *United States v. Cunningham*, 554 F.3d 703, 706-07 (7th Cir.), *cert. denied*, 129 S. Ct. 2826, 2840 (2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir.), *cert. denied*, 129 S. Ct. 2746 (2009); *United States v. Rhodes*, 549 F.3d 833, 839-41 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2052 (2009); *United States v. Melvin*, 556 F.3d 1190, 1192-93 (11th Cir.), *cert. denied*, 129 S. Ct. 2382 (2009). *But see United States v. Hicks*, 472 F.3d 1167, 1169-72 (9th Cir. 2007). In *United States v. Fox*, 583 F.3d 596 (9th Cir. 2009), the Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*; that review has been stayed pending the Court's resolution of this case.

in Support of Petitioner ("*Amici*"). *Amici*'s arguments are unpersuasive.

A. Section 1B1.10 Specifies "In What Circumstances" And "By What Amount" Sentences May Be Reduced Based On A Guideline Amendment

1. Section 994(u) specifically directs that, "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). In response to that directive, the Commission promulgated § 1B1.10.

Section 1B1.10(a) specifies "in what circumstances" (28 U.S.C. § 994(u)) an amendment may be applied retroactively, by providing that a defendant is eligible for a § 3582(c)(2) reduction only if an "amendment[] listed in subsection (c) [of § 1B1.10] is applicable to the defendant" and "ha[s] the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2). Section 1B1.10(c) lists those amendments that the Commission has determined are appropriate for retroactive application. Petitioner and his *Amici* do not dispute that § 1B1.10 is binding in this respect – a court is not free to grant a sentence reduction under § 3582(c)(2) based on an amendment to the Guidelines that the Commission has not listed in § 1B1.10(c).

Section 1B1.10(b) specifies, in conjunction with the substantive amendment itself, "by what amount" (28 U.S.C. § 994(u)) the amendment should be given retroactive effect. Section 1B1.10(b)(2)(A) provides generally that "the court shall not reduce the defen-

dant's term of imprisonment . . . to a term that is less than the minimum of the amended guidelines range," as determined with the benefit of the amendment. Section 1B1.10 thus carries out precisely what § 994(u) directs the Commission to do when a Guideline amendment has the effect of reducing the recommended sentencing range for an offense or category of offenses.

2. Despite that direct relationship, *Amici* argue that the Commission's authority under § 994(u) is merely a "supplement" to its authority to amend the Guidelines under § 994(*o*) and that § 994(u) does not confer on the Commission any authority to issue policy statements that are "applicable" under the last clause of § 3582(c)(2). *Amici* Br. 14-19. In short, *Amici* acknowledge (at 18-19) that the Commission is authorized to "specify" in what circumstances and by what amount an amendment shall have retroactive effect, but argue that the Commission lacks authority to make such a specification in a way that matters – through a "policy statement" that is "applicable" under § 3582(c)(2). The argument thus implies that, in § 994(u), Congress charged the Commission with a pointless duty. That construction is untenable.

Any suggestion that § 1B1.10 does not *implement* § 994(u) is foreclosed by this Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991). As this Court explained, "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power *has been implemented in USSG § 1B1.10*, which sets forth the amendments that justify sentence reduction." *Id.* at 348 (second emphasis added). Although § 1B1.10 has been amended

since *Braxton*, it was then – and is now – a "policy statement," which is "applicable" under § 3582(c)(2).

3. *Amici* next make the (seemingly contradictory) argument that, *because* § 1B1.10 is a policy statement, it cannot be binding on district courts under § 3582(c)(2). *Amici* point out that § 994(a)(2)(C) expressly authorizes the Commission to issue policy statements regarding, among other issues, "the sentence modification provisions set forth in section[] . . . 3582(c) of title 18," 28 U.S.C. § 994(a)(2)(C), and contend that, because certain other of the policy statements authorized by § 994(a)(2) are "non-binding," § 1B1.10 should be regarded as non-binding by association. *Amici* Br. 27-29. That argument is similarly unpersuasive.

Although petitioner's *Amici* are correct that § 994(a)(2) authorizes the Commission to issue policy statements regarding a number of other statutory provisions, § 3582(c)(2) is unique in expressly requiring a court to act "consistent with" those policy statements. The binding nature of § 1B1.10 thus comes not from § 994(a)(2), but from § 3582(c)(2) itself.

Amici seek to avoid § 3582(c)(2)'s consistency requirement by re-writing it. *Amici* suggest (at 12) that Congress must have contemplated that the policy statements referenced in § 3582(c)(2) would contain only general "guidance in the exercise of discretion," rather than any specific binding directives. In *Amici*'s view, therefore, "consistent with" can be read to require merely that the court "consider" the Commission's policy statements, as would be the case under 18 U.S.C. § 3553(a). But Congress expressly directed the Commission to "*specify* in what circumstances and *by what amount*" an otherwise final sen-

tence could be reduced. 28 U.S.C. § 994(u) (emphases added). That directive clearly instructed the Commission to supply concrete and binding limits on a district court's discretion to reduce a sentence. Moreover, had Congress intended the court only to "consider" the Commission's policy statements, it knew how to say so. Section 3582(c)(2) requires a court to "consider[] the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). But Congress chose instead to make *consistency* with the Commission's policy statements a condition to the court's power to act regarding sentence reductions: a court may grant a reduction only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

B. *Amici*'s Procedural Challenge To § 1B1.10 Has No Merit

Amici's final argument is that § 1B1.10 is invalid because the Commission failed to comply with the notice-and-comment provisions of the APA, 5 U.S.C. § 553. That argument fails for at least three reasons.

1. Because § 1B1.10 is a policy statement, rather than a Guideline, notice-and-comment procedures were not required when the statement was amended in 2007. The Commission's organic statute, 28 U.S.C. § 994(x), makes clear that "[t]he provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure," are applicable only "to the promulgation of guidelines pursuant to this section," not to the issuance of policy statements. By *Amici*'s own argument, the Commission's amendments to § 1B1.10 are not "guidelines" and therefore are not subject to the notice-and-comment requirements of the APA.

2. Although in no way required, the Commission nevertheless sought and received public comment on changes to § 1B1.10 during its retroactivity deliberations. Consistent with its Rules of Practice and Procedure, the Commission twice requested public comment on possible changes to § 1B1.10 that would prevent motions seeking sentence reductions under the amended Guideline from unnecessarily burdening the courts and the probation system. The Commission received comment on possible changes from a variety of groups and individuals in the federal criminal justice system. As noted, the Committee on Criminal Law of the Judicial Conference of the United States recommended that the Commission give the crack cocaine amendment retroactive application and urged the Commission to "implement procedures to reduce the administrative burden on the federal judiciary." Cassell Letter at 1. In particular, the Committee emphasized its view that "a defendant's presence is *not* required for a reduction of sentence under 18 U.S.C. § 3582(c)" and that the reduction "could be a simple, clerical procedure." *Id.* at 5.

Contrary views were expressed as well. For example, the Practitioners Advisory Group, one of the Commission's standing advisory groups, stated that "motions under section 3582(c)(2) are uniquely committed to the discretion of the courts" and, as such, "it would be better to leave the courts with the greatest possible flexibility in applying section 1B1.10."[10] The Federal Public and Community Defenders also weighed in on the issue, recommending

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[10] Letter from David Debold and Todd Bussert, Co-Chairs, Practitioners Advisory Group, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 4 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_002.pdf.

only that the Commission "include in the commentary to § 1B1.10 a general recommendation that courts should at least reduce each eligible defendant's offense level by two levels in accordance with the amendment and to the extent consistent with § 3582(c)."[11] In their view, any other changes that would "provide specific guidance to courts in applying the amendment – or to limit its applicability in any way – would intrude upon the district court's statutory authority."[12] Indeed, contrary to *Amici*'s argument, every interested party, including *Amici* themselves, had the opportunity to provide comment and in fact did so.

The Commission took all of those views into account in adopting the 2007 amendments to § 1B1.10. To the extent notice-and-comment procedures were required, the Commission satisfied any such obligation here.

3. More fundamentally, the 2007 revisions to § 1B1.10 did not require notice-and-comment procedures because they did not alter the substance of that provision. Rather, the 2007 amendments "clarif[ied] when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2)." USSG App. C, amend. 712, Reason for Amendment (effective Mar. 3, 2008). In large measure, those changes consisted of moving existing language from the "commentary" section

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[11] Letter from Jon M. Sands, Federal Public and Community Defenders, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 10 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_003.pdf.

[12] *Id.*

into the body of the policy statement itself for ease of reference.

A comparison of the amended version of § 1B1.10 with the prior version of the policy statement on a provision-by-provision basis demonstrates the Commission's intent to clarify the application of the policy statement. Each of the critical portions of the policy statement that affects the extent of the reduction available to an eligible defendant has a substantially equivalent predecessor in the previous version of § 1B1.10. In particular, the provision at issue here that limits the available reduction to the minimum of the amended Guideline range, § 1B1.10(b)(2)(A), effective March 3, 2008, provides:

> Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

The 2007 version of § 1B1.10 contained the following statement in the commentary at Application Note 3:

> Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2).

There is no substantive difference between the statement that the amended Guideline limits the permitted reduction and the statement that a court may not reduce a sentence below the amended Guideline range. Because the prior version of § 1B1.10 also would have prevented the district court from reducing petitioner's sentence below the amended Guide-

line range, *see United States v. Hasan*, 245 F.3d 682, 686 (8th Cir. 2001) (en banc) (interpreting prior version of § 1B1.10 to limit "the relief which can be given to a prisoner at a § 3582(c)(2) resentencing" to the amended Guideline range unless a departure had been granted at the original sentencing), *Amici*'s procedural challenge to the 2007 amendments fails.

II. THE LIMITED SCOPE OF § 3582(c)(2) PROCEEDINGS PERMITS THE COMMISSION TO MAKE INFORMED RETROACTIVITY DECISIONS

A. Given the extraordinary nature of the remedy and the impact it has on the finality of sentences, the Commission exercises its authority regarding retroactivity with great care. The Commission has articulated three primary factors it considers when assessing whether a particular amendment should be applied retroactively: "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." USSG § 1B1.10 cmt. background.

The last two factors take into account any burdens that might be imposed on the judicial system. As noted in the Senate report on the SRA, frequent grants of retroactivity to small changes in the Guidelines could present a burden to the judicial system.[13] A difficult calculation not only can increase the burden on courts as to the decision required in each individual case, but also can lead to a large number of motions from ineligible defendants because of un-

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[13] *See* S. Rep. No. 98-225, at 180 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3363.

certainty as to which defendants are eligible to seek a reduction under § 3582(c)(2).

In exercising its authority under § 994(u), the Commission carefully considers such possible effects in conjunction with the purpose of the amendment. With regard to the crack cocaine amendment, the Commission estimated that almost 20,000 defendants would be eligible for retroactive application of the crack cocaine amendment. The Commission nonetheless decided that retroactive application was appropriate because (among other reasons) "the magnitude of the change in the guideline range, i.e., two levels, is not difficult to apply in individual cases" and because "the Commission received persuasive written comment and testimony . . . that the administrative burdens of applying Amendment 706 retroactively are manageable." USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The Commission's estimates of these impacts have proved remarkably accurate. As noted, the Commission projected that 19,500 offenders would be eligible for the reduction, and 15,501 sentence reductions have been granted thus far; the average reduction has been 25 months, compared to the 27 the Commission predicted. *See* 2010 Report, Tables 1, 8; Schmitt Memorandum at 4-5, 23. Moreover, the clarity of § 1B1.10's limitations on eligibility for, and the extent of, any reduction assisted the courts in disposing of 6,763 motions by defendants who did not qualify for a sentence reduction. *See* 2010 Report, Table 9.

B. The Commission's analysis of the effects of retroactivity was based on the Commission's view that § 1B1.10 would continue to apply as written – *i.e.*, defendants would get the benefit of the new amendment, but no other aspects of their sentences

would be subject to review. In that respect, the Commission relied on the near-consensus of circuit precedent regarding § 3582(c)(2) proceedings, which has long held that sentence modifications under that statute are not a "do-over of an original sentencing proceeding." *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (internal quotation marks omitted).[14]

In particular, the defendant has no right to a hearing and no right to be present in court for the sentence modification. *See id.*; *United States v. Edwards*, No. 97-60326, 1998 WL 546471, at *3 (5th Cir. Aug. 6, 1998) (judgment noted at 156 F.3d 182 (table)); *see also* Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present [when] . . . [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).").

Nor does the Sixth Amendment right to counsel extend to such proceedings. *See United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam); *see also Legree*, 205 F.3d at 730 (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 3582(c)(2) motion); *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999) ("The judge can appoint counsel for a movant, but need not do so."); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that 18 U.S.C. § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a § 3582(c)(2)

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[14] *See also*, *e.g.*, *United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) ("[A] sentencing adjustment undertaken pursuant to Section 3582(c)(2) does not constitute a de novo resentencing."); *United States v. Jordan*, 162 F.3d 1, 4 (1st Cir. 1998) ("To the extent that [the defendant] is arguing that . . . there is fully *de novo* resentencing under § 3582(c)(2), that is surely wrong.").

motion); *United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (same).

C. These (and similar) considerations make § 3582(c)(2) proceedings quite different from plenary sentencing proceedings. The flexibility attendant to such § 3582(c)(2) proceedings significantly reduces the systemic burdens the Commission must weigh in considering whether to make an amendment retroactive. The narrowly limited scope of § 3582(c)(2) proceedings also enables the Commission to evaluate more accurately the effects of deciding to make an amendment retroactive.

The dramatic expansion and alteration in the scope of § 3582(c)(2) proceedings sought by petitioner would shift that balance in important ways. Accurate assessments about the effects of retroactivity decisions would be very difficult, if not impossible, for the Commission to make. And increased uncertainty as to the likely effects of making an amendment retroactive would weigh against making Guideline amendments retroactive in the future. Thus, as respondent correctly points out, the consequence of the regime that petitioner seeks "would be to diminish Section 3582(c)(2)'s value as a mechanism for granting leniency to defendants who, like petitioner, would seek the benefit of the Sentencing Commission's decision to lower Guidelines ranges." Resp. Br. 37.

For the foregoing reasons, and for those stated in the Brief for the United States, the Court should hold that a district court's exercise of discretion to reduce an otherwise final sentence must be consistent with 18 U.S.C. § 3582(c)(2) and therefore with § 1B1.10 of the Guidelines Manual.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 3, 2010

Counsel for the United States Sentencing Commission

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(d)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

Harvard Alumni Association Unity Webinar
Moderated Conversation With Larry Bacow
October 6, 2021

Thank you Phillip, and hello President Bacow! It is great to see you, and I really appreciate your taking the time to chat with me as a part of this fantastic Unity Webinar Series. As you know, Harvard alumni of color have been connecting through an entire series of virtual conversations on pivotal topics, and this community of alumni is engaged and motivated to support the university and to do the work of ensuring that Harvard is an inclusive environment that is committed diversity, equity, inclusion and belonging for the benefit of all students—past, present, and future.

I am honored to have been asked to moderate this session with you, the goal of which is to hear from you about what the university has been doing to promote these values, among other things, and to discuss what more it can do to ensure that everyone on campus is made to feel welcome and included and valued.

I have a series of questions for you, and I hope that you will feel free to answer them in any way you'd like to over the next half an hour or so; then we'll open it up for questions from the audience.

Opening

So, let me start by asking the most general and open-ended question, which is, quite simply, *how are you doing*? I mean, I cannot imagine what it must be like to run an educational institution as complex as Harvard in even the best of times, and you have had to do so in the midst of a global pandemic! So, I really do want to know: have you slept at all in the past 19 months? Did you and Adele get away or have any time off this past summer?

COVID 19 – Harvard's Response & Leadership

(1) Part of what has made this period so challenging for *all* educational institutions is the need to respond to the exigencies of the moment—and there are many—but I will start with the most acute, which is the COVID-19 crisis. Educational institutions have had to move quickly to prioritize the

safety of students, faculty, and staff, and have had to do so without sacrificing their core values and educational mission. My first set of questions is related to Harvard's COVID experience—I will lump them together ask you to tell us, briefly:

(a) how Harvard has pivoted to address the COVID crisis, as a practical matter;

(b) what impact the pandemic has had on pedagogy; that is, the teaching and learning aspect of the university's responsibilities, and

(d) how are things going now—what is life like on campus post-COVID?

[*This is an opportunity for you to tell us about Harvard's response to the pandemic and the lessons that have been learned from this extraordinary experience.*]

(2) My only follow up is to note that the COVID crisis has been deeply personal and traumatizing for many members of the Harvard community, and it is among the many recent challenges that has brought into sharp focus the need for educational institutions to have robust mental health services. What is Harvard doing to support its students and community members in this regard?

Diversity, Equity, Inclusion & Belonging

(3) So, we have been talking about meeting the exigency of a once-in-century global pandemic, but our society is also facing other big challenges, and that is of particular interest to this audience is the growing inequality in wealth and access to education in the United States, and various systemic obstacles to social advancement and democratic ideals.

another challenge

- Has Harvard been playing a leadership role with respect to addressing these kinds of social issues, and if so, how so? [*Has Harvard been actively sharing its own wealth of knowledge with others, in order to advance equity, and has it played a role in serving as a resource that accelerates social justice and opportunity?]*

(4) Turning inward now, to the University's own diversity and inclusion efforts: as you know, the goal of the Unity events as explained in the promotional materials has been to [QUOTE] "provide a forum for diverse communities to come together for candid conversations on complex issues at the intersection of identity, inclusion, and impact." [END QUOTE] And there have been many webinar discussions that have been open, direct, and thought provoking. These interactions are taking place not only against the backdrop of a national conversation about race and identity, but also in light of particular concerns that have been raised about Harvard's own tenure process when it comes to professors of color, as well as enduring questions about the University's commitment to ethnic studies and to the teaching of race and ethnicity.

- Can you tell us a little bit about how the tenure process works, and the steps that Harvard is taking to ensure that it recruits and retains talented faculty of color?
    - *There has been particular criticism of the ad hoc committee aspect of the process, rooted in a concern that it might disfavor scholars of color and those who teach in non-traditional fields. Is there anything being done to alter that part of the tenure process, or perhaps to dispense with it as other universities have apparently done?*
- Who makes the ultimate decisions concerning course and program offerings—such as the recent decision to stop offering Latinx Studies for graduate students, and the fact that there is not an Ethnic Studies Department in FAS? Does Harvard/ President or Provost have any say as to whether such programs will be offered?
- More broadly, what *does* leadership concerning the specific issues of diversity, equity, inclusion look like at Harvard in the near future? Are there specific programs that have been or will be implemented to **support equality, diversity, and inclusivity** at Harvard?

Other Challenges

(5) Another related challenge that many universities are facing today is the difficulty of balancing the critical goal of diversity and inclusion, on the one hand, with **academic freedom** and the frank expression of differing views and philosophies, on the other, as is necessary for the learning environment to be enriching and welcoming for all. Has this particular balancing been something that Harvard has had to grapple with and what has it done to reconcile these competing interests?

(6) Circling back to another exigency of our time—one of the topics that has been addressed during Unity Weekend is environmental justice and the impacts of the **climate crisis** on communities of color. The climate crisis has also been a topic at the top of your agenda; in a letter to the Harvard community last month you wrote that "we must act now" to confront the many challenges posted by the climate crisis. Could you share more about what the University is doing in this regard?

University Priorities

(7) It is exciting to hear that the new Science and Engineering Complex in **Allston** has opened. How has that transition been for faculty and students? And can you talk more about what's happening now in Allston and what's next?

- How are you balancing the growth and support of STEM fields with the **importance of social sciences and humanities**?

(8) You've spent a lot of time **advocating on behalf of not just Harvard, but higher education, in DC** and elsewhere. How are you thinking about your advocacy priorities in the coming months – what are you focused on and how are you working with the Biden administration, Congress, and other officials to advance some of those priorities?

Immigration advocacy

Possible final question(s):

What are the top 3 things that alumni can do to support Harvard?

What are your greatest aspirations for us as a Harvard community as the academic year begins?

Thank you so much for joining us!

REMARKS FOR THE EMPOWERING WOMEN OF COLOR SIXTH ANNUAL CONSTANCE BAKER MOTLEY GALA COLUMBIA LAW SCHOOL

March 12, 2021

I am truly delighted to be with you all this evening, albeit virtually, and I so wish that we could all be together, greeting each other in person, as has been the case during past Empowering Women of Color galas. Among the many challenging circumstances of our post-COVID world is the lack of human connection and the lost opportunity to meet new people, so I want you to know that it is especially meaningful for me to have this chance to reach out beyond the isolation of my chambers and my home, and to interact with all of you as part of this event. Thank you to the leadership of EWOC, Dean Saavedra, and Columbia Law School for your generosity in providing this occasion!

I am also very grateful to be thought of as *worthy* of receiving such a beautiful award—if you haven't seen it, here it is—and it is an honor to receive this beautiful award from such a wonderful organization. I have done a bit of homework regarding your group, and I absolutely love that you have intentionally created space for female students of color at Columbia Law School to support and encourage one another. I also understand that the Constance Baker Motley Gala is the culmination of the group's programming every year, and that, as part of the gala, the EWOC takes the opportunity to honor a woman of color who is perceived to have [QUOTE] "made strides for the advancement of people of color, [and] especially women, in the legal profession." [END QUOTE] I am humbled that you have selected me for this extraordinary honor this year. And I am especially thrilled to receive this award in the name of Judge Constance Baker Motley, because one of my professional goals has been to try to inspire young women

lawyers and lawyers of color—just as Judge Motley and other brilliant black female jurists have inspired me.

As you know, Judge Motley was a civil rights pioneer, a fearless advocate for justice, the first African-American woman to argue a case in the United States Supreme Court, the drafter of the original complaint in *Brown v. the Board*, and the first black female federal judge in the United States. And as challenging as it can be at times to do the work that I have been called to do as a federal judge, I sometimes reflect upon the fact that my professional journey really has been smooth sailing compared to the challenges that Judge Motley faced, and the obstacles that she had to overcome in order to do the job that we have both been blessed to have. As I said last year in the speech that I gave at the University of Michigan Law School on Martin Luther King Jr. Day, I really feel as though I am standing on the shoulders of giants in my current professional post, and I know without a doubt that so much of what I have been able to do thus far in my career is purely a function of *timing*: I was born on September 14, 1970—which is 49 years to the day after Judge Motley's birth—and the mere circumstance of getting my start in 1970, as opposed to the 1921, has made all of the difference.

To understand what I mean by this, one can reflect on what 1970 was like as a period in American history. You will recall from your history classes that the early 1970s were an especially exciting time, because the country had arrived at the dawn of the *post*-Civil Rights Movement era. Congress had enacted not one but two Civil Rights Acts during the previous decade, to codify the gains that had been secured in the courts by brilliant lawyers like Judge Motley. And those new civil rights laws both officially abolished Jim Crow segregation and established by law that all Americans are entitled to equal rights.

So, for black Americans in particular, 1970 was a time of hope! There was a general sense that all of the hard work of the previous decade—the marches, the boycotts, the sit-ins, the arrests—had finally borne fruit for black people like my parents (who are attending this gala tonight, by the way); they had experienced firsthand the spirit-crushing limitations that legal segregation by race imposes while they were growing up. I grew up hearing the stories of what life used to be like for young black people of my parents' generation, and yet *my* life's circumstances were so different, that it is still hard for me to believe that strict racial segregation was the law of the land just a few years before I arrived!

The fact that Civil Rights era occurred immediately prior to my birth makes me a very lucky first inheritor of the work and legacy of women of color like Judge Motley, who faced the seemingly insurmountable obstacle of existing at the intersection of race and gender in the middle of the twentieth century; yet, did not buckle or fold but, instead, stood up, and bravely challenged the status quo to push for their equal rights. The good news for all of you, is that you, too, are an inheritor of that same legacy of strength and hope and perseverance—and I hope that that knowledge gives you some encouragement! To be the sure, there is no question that we continue face difficulties, and issues, and challenges; there are undoubtedly obstacles still for people of color in this country and in this society today. But it should be at least somewhat encouraging to you to know based on our history that change *does* happen, and that even the most dire circumstances can be overcome.

That is the lesson that *I* take away from the experiences of black people who were born into a system of legal segregation and were treated as 'second-class citizens' in every sense of the term; yet, have, remarkably, persevered, and, in many ways, have triumphed. It is also the lesson that can be drawn from the subset of such persons who found a way to study law in the '30s and '40s and '50s, and

used those tools to make lasting change for the betterment of their community and our country. The lawyers of color in the generation prior galvanized a movement that would change their lives, and that of their decedents, forever, and they did so during a period of time in which they themselves did not have the many benefits that we now enjoy. And if that's *not* a story of resilience, then I don't know what is!

And so, now, it is *our* turn. The mantle that Judge Motley and others took up in their time has been passed to *us*—as judges, and lawyers, and soon-to-be law graduates—*we* are now charged with the responsibility of making the most of our legal education and considerable good fortune, and of doing the work that is necessary to protect the rule of law and to promote equality and justice for all.

As a practical matter, this means that, first, each of you can, and should, make time in your career for public service. I have always believed that those who have benefitted from the sacrifices of our predecessors and the gains that were made through their hard work, have an obligation to work hard, for the benefit of others.

Taking up the mantle, as we've been called to do, also means that each of you can, and should, do everything you can to maximize the chances of your own success and advancement, by focusing on both developing the necessary skills and making connections with those who can train and mentor you. Remember that *you* have to put the oxygen mask on first, if you're going to be of any help to others! So this is the time to try new things; and to make mistakes, and to grow—right now, at this early stage of your career. And try not to be discouraged—legal analysis and the practice of law is nuanced; it is difficult to master this craft—but good mentors can help, so strive to find them (perhaps by clerking?). And, eventually, you will come to learn that it is the networks that we build, and the

connections we make, that put is in the best possible position to walk through new doors of opportunity and to open doors for others.

Finally, if you take away only one thing from my remarks here tonight, I hope it is this: that the key to success in this business or any other, for that matter, is believing in yourself and in your own ability to do good work, no matter what others might think or say. This mindset is something that I have been fortunate enough to have and to be able to draw upon in my life's work—it's a kind of self-confidence—and I actually credit my parents for cultivating it in me from an early age. As I mentioned, I was a child of the '70s, and at that time, my parents had just emerged with rest of society from the tumultuous civil rights era; they had *survived* and things had *changed*, for the better. For my parents, I can imagine that there was probably a sense of invincibility in that moment—and it showed. They gave me (their first-born child) an *African* name. They dressed me in a mini-daishiki—I've seen the pictures—I was rocking Afro-puffs! And, most importantly, my parents set out to teach me that, unlike the many impenetrable barriers that they had had to face, *my* path was clear, such that if I worked hard and believed in myself, I could do anything or be anything I wanted to be.

It is that same spirit that I encourage each of you to try to find within yourselves right now, as your complete your legal training and face the future. It *is* hard, but you can do it. I believe in you. I am grateful for you. And I thank you, again, for this wonderful honor.

NATURALIZATION CEREMONY SCRIPT

Good morning! My name is Ketanji Brown Jackson, and I am a District Judge on the United States District Court for the District of Columbia. It is my pleasure to welcome each of you to today's Naturalization Ceremony! It truly is an honor and a privilege for me to be able to preside over this proceeding today, during which I will administer to you the oath of allegiance and admit you as citizens of the United States. This is a memorable day and a true milestone in each of your lives, and I am grateful to be a part of it.

ROLL CALL & MOTION FOR ADMISSION

Ms. Bledsoe, when you are ready, you may introduce the ladies and gentlemen who are here today and who seek to become new citizens.

YOUR MOTION IS GRANTED

[stand]

It is now my honor to administer the oath to all of you who have come here from all over the world to pledge allegiance to the United States.

PLEASE RAISE YOUR RIGHT HAND AND REPEAT AFTER ME:

I hereby declare, on oath

That I absolutely and entirely

Renounce and abjure

All allegiance and fidelity

To any foreign prince, potentate, state or sovereignty

Of whom or which

I have heretofore been

A subject or citizen

That I will support and defend the Constitution and the laws

Of the United States of America

Against all enemies, foreign and domestic

That I will bear true faith and allegiance to the same

That I will bear arms on behalf of the United States

When required by the law

That I will perform noncombatant service in the Armed Forces of the United States

When required by the law

That I will perform work of national importance under civilian direction

When required by the law

And that I take this obligation freely

Without any mental reservation

Or purpose of evasion.

So help me God.

We will now say the Pledge of Allegiance together.

KBJ REMARKS ON NATURALIZATION

It is an honor to welcome all of you as fellow American citizens, and I want to emphasize how good it feels for me to be presiding over the ceremony this morning. Most of what I do in court involves dealing with unhappy people in conflict, so a naturalization ceremony is a rare opportunity for me to look out and see people who are genuinely happy to be here. And I am also happy that you are here in person—given the pandemic that we are all living through, being here with you, even socially distanced, is a welcome change.

At this point in the naturalization ceremony, the judge ordinarily gives additional remarks about the meaning and privilege of citizenship. I will do that in a moment, but first I thought that I would try something a bit different by showing you a video that is designed to capture the *feeling* of becoming a new citizen of the United States. This video features people who, just like all of you, have taken the oath and have been admitted as citizens of the United States. There is no speaking in the clip, but if you look carefully you will see quotations from many of these people and, of course, the looks on their faces speak volumes about the experience of raising one's hand and pledging allegiance to the United States for the first time.

I really love this video—and they say that a picture is worth a thousand words—so I will be quiet, and ask you to watch this.

******VIDEO (CLIP #1) *******

Thank you. As you saw, the various statements from people who have become naturalized citizens say much more than I ever could about what it

means to them to become an American. Each of you has your own story about the experience, and I suspect that the fact that you took your oath of office in a court in our Nation's capital makes it a very special experience. Washington D.C. is the seat of our federal government, but the true power and greatness of America is in its citizens, wherever they are all over this great nation. As President Harry Truman once said,

> We Americans are a diverse people. Part of our respect for the dignity of the human being is the respect for his or her fight to be different. That means different in background, different in beliefs, different in customs, different in name, and different in religion. *That* is true Americanism; that is true democracy. It is the source of our strength. It is the basis of our faith in the future. And it is our hope of the world.

Those words by our former president, which were spoken in 1948, are still every bit as true today. America benefits from your citizenship, and because of each of you (and those who have come before you, and those who will come after), American will be a stronger and better place.

Please know that it doesn't make any difference *when* you became an American citizen. Our country is a nation of immigrants, and each of you is an American citizen every bit as much as a citizen who can trace his or her lineage back to the Declaration of Independence. Based on your conduct and qualifications, and the oath that you have taken here this morning, you have earned a rightful place in our American heritage – a heritage that carries with it the most priceless civil liberties. Here, in the United States, under the protection of the U.S. Constitution and the Bill of Rights, we have a government of laws under which all persons are equal. This fundamental principle of equality before the law means that the law is supreme, and that

all men and women must act in accordance with our laws. As you know, our government is not one created for a King or a General or a religious leader, but for We the People. And we the people enjoy the rights and freedoms guaranteed by our Constitution and the Bill of Rights.

From my vantage point up here on the bench, I can see how happy you all are to have taken the oath (even through your masks), and I know that each of you will treasure the freedom, rights, and privileges of United States citizenship. Please know that you must also take care to *exercise* those rights as a matter of civic responsibility. As American citizens, you now can, and should, vote; serve as jurors; inform yourselves about civic matters; participate in local and national affairs; petition the government on issues of concern; volunteer to help others; and become full members of your community. Only by engaging fully with other Americans in this great exercise that we call democracy will you truly be able to take full advantage of your new citizenship. And, as President Truman suggested, it is only because the diverse citizens of the United States come together as one nation—to believe in the rule of law and to work for the common good—that the United States of America is, and continues to be, the greatest nation in the world.

Washington D.C. is a special place for you, as new citizens, because as the seat of our government, visitors and residents can gain a full understanding and appreciation of what it means to be a citizen of America. Once things open up, I encourage you to visit the institutions of our government and the city's many museums, and continue to learn about American history and the privileges of United States citizenship. I know that I have thoroughly enjoyed the unique opportunities that exist here in

terms of civic engagement, I hope that if you embark on such a learning experience, you, too, will find it to be very rewarding.

So, again, let me say congratulations on your entry into the privilege of United States citizenship. I regret that in the current circumstances we are unable to hold the traditional reception in the judges' dining room to celebrate this day. But please know that this is a day worth celebrating! And please accept my sincerest welcome into the community of citizenship and best wishes for the journey ahead.

THANK YOU.

Our Day in Court

by Dena Kolb | Mar 13, 2020 | School News

Last Friday, the Government class participated in the DC Circuit Court Historical Society's mock court program, alongside students from H.D. Woodson, Maret, School Without Walls and McKinley Tech. Latin students from Mr. Liu's government class presented oral arguments before U.S. District Court Judge Ketanji Jackson. The Latin students created smart responses to tough questions on a hypothetical Fourth Amendment case. Judge Jackson named senior Luke Tewalt as the outstanding advocate for her courtroom. Students that participated included Nathanael Cooper, Arthayuga Briscoe, Daisy Hand, Shelby Ferncrombie, Jala Lee, Antonina Gomez, Sydney Weaver, Micah Gans, Luke Tewalt, Isaiah Stewart, Maren Cochran, Jia Fleming, Zoe Woods-Arthur, Benjamin Southworth and Mason Gray. Special thanks go to the outside volunteer attorneys from the Department of Justice and Goodwin Procter LLP, who helped our students prepare.

Upcoming Events

PSAT/SAT School Day

03/02/2022
Event Details

Ash Wednesday

03/02/2022
Event Details

Senior Service Day

03/02/2022
Event Details

Board of Governors Meeting

03/03/2022 6:00 pm - 8:00 pm
Event Details

Wellness Day; half day for MS

Historical Society of the District of Columbia Circuit

Newsletter # 43 - April 2020

Historical Society of the D.C. Circuit - www.dcchs.org



15 YEARS OF STUDENT ADVOCACY: THE SOCIETY'S MOCK COURT PROGRAM

On March 6, 2020, 135 D.C. high school students arrived in the Courthouse, ready to argue a case before a federal judge. Each student, whether enrolled at Maret, McKinley Tech, School Without Walls, Washington Latin, or Woodson had arguments ready to present in either a First or Fourth Amendment case after having worked with a volunteer attorney and classroom teacher to prepare.

Each of the ten participating judges questioned the students appearing in her/his courtroom, forcing many to go off script and demonstrate their understanding of the issues involved in the case. Each judge then had the challenging job of selecting the most outstanding advocate from a group of newly seasoned litigants.

In the Historical Society's 15th year of encouraging high school students to learn how lawyers prepare and argue cases in court, students were eager to participate. In fact, some admitted that they might even consider a life in the law one day.

With kudos to each student who had the courage to stand up and argue in court, the advocates with the strongest presentations were: Elisabeth Betts, Maret; Christina Carter, Woodson; Leah Hornsby, School Without Walls; Cole Kalenak, McKinley Tech; Alexandra Diaz Merida, School Without Walls; Daveed Partlow, McKinley Tech; Ada Pryor, McKinley Tech; Matthew Rebour, School Without Walls; Mendel Socolovsky, School Without Walls; and Luke Tewalt, Washington Latin.

The Society thanks all the students for participating, the teachers who gave them encouragement, and the volunteer lawyers who visited the schools and helped them craft their arguments. Special thanks to the judges who spent a morning peppering the students with questions and demonstrating how the judicial system works: Chief Judge Beryl Howell and Judges Rudolph Contreras, Ketanji Jackson, Christopher Cooper, Tanya Chutkan, Randolph Moss and Reggie Walton; Magistrate Judges Deborah Robinson and G. Michael Harvey; and Federal Circuit Judge William Bryson. And thanks to Society President, Jim Rocap, who devotes hours each year to planning and implementing each detail of each Mock Court Program.



Judge Christopher Cooper with outstanding advocate Christina Carter, H.D. Woodson



Magistrate Judge Deborah Robinson with outstanding advocate Cole Kalenak, McKinley Tech.

JUST AHEAD

June 11, 2020: Revisit *United States v. Microsoft Corp.*

Issues that arose in *United States v. Microsoft Corp*. are as relevant today as they were when they were argued before the U .S. Court of Appeals for the D.C. Circuit sitting en banc in 2001. Those issues will be addressed in a re-enactment of the oral arguments in the *Microsoft* case and a panel discussion that follows, on June 11, 2020, in the Ceremonial Courtroom.

The program will begin with an overview of the *Microsoft* case and the legal background presented by Douglas Melamed, Professor of Law, Stanford Law School, after which Kristin Limarzi, Gibson Dunn, and David Gelfand, Cleary Gottlieb, will re-enact oral arguments on one of the issues in the case, before Judges David Tatel and Douglas Ginsburg who were members of the en banc Court. A panel discussion,

"THREE QUALITIES FOR SUCCESS IN LAW AND LIFE"
James E. Parsons Award Dinner Remarks
Univ of Chicago, BLSA
February 24, 2020

I. INTRODUCTION

Thank you very much for that kind introduction and for honoring me this evening. I am grateful that you find me worthy of this special award, and it is especially gratifying to be put in the same company as the two other federal judges who have received this honor to date, both of whom are legal luminaries. And, of course, Judge James Parsons's own extraordinary legacy has literally paved the way for all of the federal judges of African descent who have come after him. So it is incredibly humbling for me to receive an award that bears his name.

Getting this award from the Black Law Student's Association also raises a question that I have started to ask myself in recent years, given the number of law schools and law students who have reached out to ask me to come to their campuses to speak; I have begun to wonder what it is about my own professional journey that appears to be resonating with so many young lawyers of color today? Why do black law students routinely ask me for advice, and occasionally decide to bestow upon me significant honors such as this one? Well, I don't know for sure, but in thinking about it objectively, I think it might well be that I am comparatively young to have gotten this far in my career, and *that* makes me somewhat relatable. Indeed, one very important thing that you should know up front as it relates to my professional journey as a black female judge in America is that I was born in the decade *after* the Civil Rights Movement, and thus, my life experiences are closer in many respects to the opportunities and challenges that today's black law students and young professionals face than those that African-American lawyers and judges of prior generations encountered.

And while I hope to spend the bulk of my speech here this evening giving you my very best advice as to what you can and should do to be successful professionally (which is what most of the students who call on me hope that I will share with them), I do think that it is crucial that you first understand the era in which I was born, because it provides the historical context in which my professional mindset was first formed, which really has been one of the keys to my success. In fact, when people sometimes ask me which of the many relatively rare opportunities that I have had thus far in my career had the most bearing on my relative success, I respond that, in all honesty, the *most* fortunate aspect of my professional rise was actually the timing of my birth. So, let me briefly take you back to *my* beginning, and you will quickly come to realize why that is so.

II. MY BACKGROUND / UPBRINGING

I was born nearly fifty years ago, on September 14, 1970. Now, I am aware that that was well before many of you existed, so, for context, you should know that 1970 was a particularly exciting time in American history because it was the dawn of the *post*-Civil Rights Movement era. Congress had enacted two Civil Rights Acts in the decade before—one in 1964 and one in 1968—and had thereby officially abolished Jim Crow segregation and formally established by law that all Americans are entitled to equal rights. So, for black Americans in particular, 1970 was a time of hope! There was a general sense that all of the hard work of the previous decade—the marches, the boycotts, the sit-ins, the arrests—had finally borne fruit, and that young black professionals like my parents were finally on the verge of getting to enjoy the full freedom and equality that is promised to citizens of the United States. My parents had experienced firsthand the spirit-crushing limitations that legal segregation by race imposes while they were growing up in South Florida, and they had moved to the District of Columbia to start a new life

after graduating from their respective HBCUs and getting married. As a post-Civil Rights era kid, I grew up hearing the stories of what life used to be like for black people of my parents' generation, yet *my* life's circumstances were so different, that it is still hard for me to believe that strict racial segregation and the treatment of black Americans as second-class citizens was the law of the land just a few years before I arrived!

Think about that for a moment: in 1963, Dr. Martin Luther King Jr. could only *dream* of a day when "the sons of former slaves and the sons of former slave owners would be able to sit down together at the table of brotherhood." And less than a decade later, *that* was the world that I inhabited. Indeed, so much changed in such a short period of time, that by the time I was born, black couples in the nation's capital, must have felt invincible! My parents boldly and proudly gave me an African name; they dressed me in a mini-daishiki; I was rocking Afro-puffs! And, most importantly, they set out to teach me that, unlike the many barriers that they had had to face, *my* path was clear, and that if I worked hard and believed in myself, I could do anything or be anything I wanted to be.

As it turns out, what I really wanted to do and be as I progressed through school was a lawyer, and eventually, a judge. And, honestly, upon reflection, it clear to me that much of my good fortune in getting to achieve that goal is attributable simply to having been born at the right time. Of course, the good news for the minority law students among you is that you, too, have that substantial benefit! And in the time that I have remaining, I to speak directly to you students and to share three *other* characteristics that I believe have propelled my rise through the ranks of this profession more than anything else. This is what I often tell young lawyers of color when I am asked how one survives—and thrives—in this profession; I say with confidence that these three things have sustained me through it all and have made it possible to do what I have done: hard

work, big breaks, and tough skin. Now, each of these three core characteristics certainly warrants some explanation, which I will turn to now, and hopefully, I can inspire at least some of you to follow suit.

III. THREE QUALITIES FOR SUCCESS IN LAW AND LIFE

A. Hard Work

The first factor I have listed is "hard work," and it really shouldn't come as much of a surprise that, from now on as you progress professionally, you will need to work hard. If anyone has joined the legal profession expecting to be a seasonal performer—working when you want to, on your own schedule, traveling around, eating bon bons—I regret to inform you that you've taken the wrong fork in the road on your professional journey. Hard work *is* the nature of our profession. And I am not just talking about how hard it can be to interpret and apply the law; I am talking about the self-discipline and sacrifice that it takes to be at the top of what is, essentially, a service profession. I personally developed the necessary attitude in this regard way back in high school—I went to a large public high school in Miami Florida and was a nationally-ranked orator in our school's speech and debate program. What that meant was that while other kids were hanging out late going to parties, I was either writing or rehearsing my speech, or sleeping ahead of a 5 AM Saturday morning tournament wake-up call. And *that* kind of self-discipline and sacrifice has carried through at every stage thereafter, which, if I'm being honest, has made me kind of boring, but has also allowed me to have opportunities that my grandparents could not have even dreamed about.

So, point number one for each of you is that, in the context of whatever job you are privileged to have, you need to *commit to being a hard worker and to being perceived as such*. I have given that same advice to probably hundreds of young lawyers at this point, and sometimes I say it this way: do your best work for

every boss, on every assignment. And that will not be easy; believe me, I know what it's like to be tasked with something that you'd rather not have to do, and I have actually been affiliated with entire practices that did work that I had absolutely no interest in. But the people with whom I worked would never have known that. Why? Because it was important to me to be seen as a person who worked hard and was good to work with. As young black woman with a funny name, I *already* stood out, and so I invested heavily in doing what was required to build my brand within each organization I worked in.

You can, and should, do the same. Think of your professional self as a product, and you are out there in the marketplace: what do you want people to associate with you and your brand? I chose "hard worker," and I did what was necessary to reinforce that perception in the minds of the people with whom I worked. It meant that I was often the first one in the office and the last one to leave. And it meant that I presented myself as always eager to get new assignments, and to help my co-workers, enthusiastically, in any way I could. And while I endured the late nights and challenging periods, I also kept in the back of my mind a few verses from one of my favorite poems, *The Ladder of St. Augustine*, which was written by Henry Wadsworth Longfellow. Anyone who has a difficult and demanding job would do well to remember what Longfellow observed:

> Saint Augustine! Well, hast thou said,
> That of our vices we can frame
> A ladder, if we will but tread
> Beneath our feet each deed of shame!
>
> All common things, each day's events,
> That with the hour begin and end,
> Our pleasures and our discontents,
> Are rounds by which we may ascend.

* * *

We have not wings, we cannot soar;
But we have feet to scale and climb
By slow degrees, by more and more,
The cloudy summits of our time.

* * *

The heights by great men reached and kept
Were not attained by sudden flight,
But they, while their companions slept,
Were toiling upward in the night.

I hope you will remember that the commitment to toiling upward, by slow degrees, rung-by-rung, is the key to success in this business. Try to think of your hard work as a chance to gain and practice new skills and an opportunity to build your brand. If you approach each case and assignment with your own reputation in mind and with a sincere interest in doing the work that it takes to get better at whatever it is that you are called upon to do, you will go far.

B. Big Breaks

The second takeaway, for those of you who are keeping track, is "big breaks" and I will tell you, in all honesty, that hard work alone is not going to be enough to ensure your success as a lawyer. What I wish I knew (but didn't), when I was coming out of law school and working as a young lawyer, was how much of one's future success depends on *who you know*; in fact, as it turns out, it is *often* the connections that you make with other people that lead to your being in the right place at the right time so that you can take advantage of new opportunities. I am the first to say that, in addition to my hard work, the connections that I made and

sheer luck played a significant role at numerous points along my professional journey.

And to be honest, it actually started from the very beginning—I was extremely lucky to be born into a family that valued education, and also lucky to have parents who did what was necessary to make sure that I was prepared to take on the academic rigors of an elite college and law school. And, for *all* of us, just being a lawyer is a lucky break, especially when you think of the many talented kids and young people who look like us and whose life circumstances are such that they never have an opportunity to get a good education or to graduate from college or a professional school. In my current job, I often deal with people who actually had very little shot at doing anything other than making terrible decisions like getting involved with gangs, and drugs, and other criminal behavior—I have to sentence them—and I sometimes think: wow, that could so easily have been me. Or as my grandmother would have put it, "there but for the grace of God go I!" You are already the recipient of a big break in life, because you will soon have a prestigious law degree and will eventually hold important positions in the legal profession.

This gift carries with it the responsibility to do what you can to extend that good fortune to others. In my faith tradition, it is said that to whom much is given, much is expected. I take that to mean that we who have benefitted have a responsibility to give back to our community in whatever way we can, and I feel very strongly about that obligation.

I also happen to believe that the big break that you have already received requires you to do what you can in whatever context you are in to be as successful as possible and to maximize your chances of advancement. Now, I have occasionally crossed paths with lawyers who are content to be mediocre; they are fine with their lot in life, wherever things stand, and don't really feel the need to

progress. If that's you, then, the rest of this takeaway is inapposite, because right now, I am talking to the strivers: those who recognize that they have been handed a special opportunity that not many people get, and that they have a responsibility to make the most of it—and by that I mean, doing whatever is necessary to position yourself for the climb, so that, eventually and as luck would have it, you can get even better opportunities.

One thing you can do right now in this regard is something that I have already suggested: networking. Always remember that people with power know each other, and so talking to your professors, going to events and receptions, and meeting people can be very important in terms of your ability to advance. Figure out what kind of law you might want to practice, and in addition to taking classes in that area, attend related conferences and presentations and meetings, if you can. And then when you are at such events, *talk* to people; tell them who you are and what you are thinking about doing; be a self-advocate. Moreover, when you get out of school and start working, try to position yourself for new opportunities, for example, by finding lawyers from your organization who do the kind of work you want to do and going to them to ask if they need help. Believe me, they will find your enthusiasm for their practices charming and, hopefully, endearing, and will be more likely bring you on board to work with them than if you had stayed in your office waiting for the phone to ring. And, of course, once you get that assignment, you have to do good work for the client and for that partner—even if they never work with you again, if you impress them, they will remember you and can help to facilitate your next big break.

When I think about how networking works, I go back to the one big advantage that I think we have as minority lawyers—because there are relatively few of us, we are unusual; we stand out. And being memorable can really work for you if you know how to take advantage of it. If you do a bad job, being

memorable is a problem, but if you do good work, then the people you work with—who might very well have underestimated you to being with—will remember your contributions and advocate for you in the future.

You also need to think seriously about ways in which you can put yourself in a position to *receive* that next big break, which really does mean putting yourself out there, to some extent. Now is not the time to be shy or self-effacing, instead, you need to be assertive! Remember that you have been trained to represent people, and that the first and most important person that you need to be able to advocate for is yourself! Let people know what you have done and, more importantly, what you can do! Apply for anything and everything that interests you, and anything and everything that could potentially advance your career. Apply for law review, apply for clerkships, apply for internships, apply for fellowships—don't dwell on doubts your grades or your record; set those aside, and just apply! All you really need is for one reviewer to see the potential in you and give you a shot, and because you're going to work hard when you get the position (see point number one), that first experience will lead to the next one, which will lead to the next one, and the next thing you know, years will go by, and BLSA will be asking *you* to share the keys to your success!

C. Tough Skin

The third and final takeaway is the most difficult to articulate, and the one that I think might ultimately might be the hardest for some folks to follow. Let me start by saying that I recognize full well that I have something of an advantage when it comes to the quality that I am about to encourage you to have, because I sincerely believe that the greatest gift that my parents bestowed upon me at a very early age is think skin. As a dark-skinned black girl who was often the only person of color in my class, club, or social environment, my parents knew that it was

essential that I develop a sense of my own self worth that was in no way dependent on what others thought about my abilities. As I mentioned from the outset, my parents actively and intentionally built me up from a very early age to believe that I could do anything I wanted to do, and I have actually been reflecting on this extraordinary gift over the past few years as I now raise my own daughters. I cannot recall a single time in my childhood in which I *cared* about the slights and misperceptions and underestimations that came my way. What I *do* remember is often thinking "hmm; well, I'll show them." Whether it was running for class president, or becoming a champion orator, or even applying to Harvard after my public high school guidance counselor helpfully suggested that I not set my sights so high, I recall distinctly not being phased by the slings and arrows of implicit, or even explicit, bias, and making the conscious decision to push forward nonetheless.

What I think this means for you today, and what I hope to leave with you as the third and final take away, is my certainty that minority lawyers really have to develop a thick skin—and keep our eyes on the prize—as we progress in any professional environment. We have to know and believe that we deserve to be where we are, and that we have the skills to do what it takes. And with this belief firmly in mind *do not be distracted* by the naysayers! I absolutely know and understand that you will face prejudice and other obstacles that other people in your environment do not have to endure. Life is not fair, and I totally get that the microaggressions that you are observing are real. The question I am encouraging you to think about is whether being confrontational will actually solve the problem, and even more important, whether it is worth your time?! Having a thick skin means recognizing when you're being disrespected but also understanding that marshalling a response each time something happens is a big distraction that takes your mind and attention away from what *really* matters, which is doing the best job

that you can possibly do so that you can rise to a level in which you will actually be able to address the kinds of issues that you've witnessed.

Let me give you a concrete example from my college days. At Harvard, the freshmen all live in dorms in the Yard, which is in the heart of the campus, and my freshman year, one of my classmates chose to hang a confederate flag outside of his dorm room window—right there; in the middle of campus, for all to see. I was an active member of the Black Students Association, and of course, this was a huge affront: we organized rallies; we passed out flyers; we circulated petitions; we planned sit-ins. And, of course, while we were busy doing all of those very noble things, we were *not* in the library studying. I remember thinking how *unfair* it was to us that in addition to having to be victimized by the sentiments that that symbol expressed and by what we perceived to be the unacceptably lax response of the university, we were *also* missing classes, and could not just be regular students, focusing on the work we had to do, like the rest of our peers. And of course, that's exactly what the student who had hung the flag really wanted: for us to be so distracted that we failed our classes and thereby reinforced the stereotype that we couldn't cut it at a place like Harvard.

I am telling you that story to reinforce for you that the best thing that you can do for yourself and your community is to *stay focused*. You have work to do—hard work—and the most productive use of your time and talent is to tackle the task at hand with all of your mental energy, which means you have to let go of the additional burden of having to internalize, signal, and react every time you perceive that you've been slighted. And don't just take *my* word for that. Think about the living greats: Serena Williams, Simone Biles, Maxine Waters, Oprah Winfrey, Barack Obama, or any other person of color who is at the top of their game professionally: would they be where they are today if they allowed people who thought they were imposters to make them feel that way about themselves? I

would be willing to bet you that at some point in their lives each of them had to consciously aside their grievances—saying, "hmm, I'll show them"—and then, they *focused*, not on the injustices, but on doing whatever it took to be smarter, faster, more diligent, and more competent than anyone else. So what *does* it take to rise through the ranks despite those who don't think you have it in you and will remind you of their feelings at every turn? It *demands* that you to tune out those voices, block out their little flags, and *ignore* the haters, rather than indulging them.

In closing, I just want to be clear about how I envision thick skin: I am not asking you to put on blinders. You will see and experience social injustices, and you will feel wronged by them, legitimately and unfortunately wronged. As a professional of color, there will inevitably be times when you will feel singled out, challenged, questioned, undervalued, and misinterpreted, and you will very much want to call out or cancel people who say and do discriminatory things that are designed to make you feel unworthy. But doing so takes time and effort, and if we are going to get to where we belong on the ladder of our professional lives, we can't keep stopping and fretting over random ridiculousness! When you hear and see the bias, what I am asking you to do is not to be *distracted* by it, and thereby, ultimately defeated. Don't get mired down by the inequities—lift yourself up; rise above them; push them to the back of your mind; and don't let them get in your way!

I have already read to you part of one of my favorite poems, and I will close with another. In "Still, I Rise," the late poet Maya Angelou eloquently summarizes the mindset that many African-Americans have had to adopt in order to survive and thrive, despite how we have been treated historically and what we still experience in our professional lives and beyond. What I love about this poem, and what I will end with here this evening, is the reminder of the *power* that comes

from withstanding difficulties and emerging like a phoenix from the ashes. As people of color, we cannot allow our challenges to prevent us from achieving greatness, whoever we are, and whatever we do.

You may write me down in history
With your bitter, twisted lies,
You may trod me in the very dirt
But still, like dust, I'll rise.

Does my sassiness upset you?
Why are you beset with gloom?
'Cause I walk like I've got oil wells
Pumping in my living room.

Just like moons and like suns,
With the certainty of tides,
Just like hopes springing high,
Still I'll rise.

Did you want to see me broken?
Bowed head and lowered eyes?
Shoulders falling down like teardrops,
Weakened by my soulful cries?

Does my haughtiness offend you?
Don't you take it awful hard
'Cause I laugh like I've got gold mines
Diggin' in my own backyard.

You may shoot me with your words,
You may cut me with your eyes,
You may kill me with your hatefulness,
But still, like air, I'll rise.

Does my sexiness upset you?
Does it come as a surprise
That I dance like I've got diamonds

At the meeting of my thighs?

Out of the huts of history's shame
I rise
Up from a past that's rooted in pain
I rise
I'm a black ocean, leaping and wide,
Welling and swelling I bear in the tide.

Leaving behind nights of terror and fear
I rise
Into a daybreak that's wondrously clear
I rise
Bringing the gifts that my ancestors gave,
I am the dream and the hope of the slave.
I rise
I rise
I rise.

Thank you for listening – and, again, I am truly grateful for this wonderful honor.

BLSA Honors Judge Ketanji Brown Jackson at Third Annual Parsons Dinner



The Law School community gathered on February 24 for the third annual Judge James B. Parsons Legacy Dinner, a student-organized event that celebrates the integration of the federal judiciary. Judge Parsons, '49, was the first African American to serve as a federal judge under Article III in the continental United States.



The dinner is hosted by the Law School's Earl B. Dickerson Chapter of the Black Law Students Association and serves as an opportunity to honor a distinguished African American federal jurist.



This year, BLSA honored Judge Ketanji Brown Jackson (left) of the US District Court for the District of Columbia. She is show with BLSA vice president Adam Hassanein, '21 (center), and BLSA

President Tyree Petty-Williams.



The event drew members of the judiciary, including Cook County Circuit Judge Erika Orr (center), seen talking with Professor Herschella Conyers and Savannah West, '20.



Andre Williams, '19 (left), returned to the Law School for the event. He is part of the group that started the Parsons Dinner in 2018.



Dean Thomas J. Miles welcomed attendees to the event.



Hassanein, who organized the event, introduced Jackson. During his remarks, which included encouragement to pursue public service work, Hassanein paid tribute Law School pioneers Earl B. Dickerson, class of 1920, UChicago's first Black JD graduate, and Nelson Willis, class of 1918, the first Black student to receive an LLB from the Law School.



After accepting the award, Jackson spoke about her own career and offered advice for navigating the workplace.



John Parsons, Judge Parsons' grandson, offered brief remarks about his grandfather.


Petty-Williams discussed BLSA's achievements in the past year, including volunteer efforts and events like the Parsons Dinner.



Chris Verdugo, '20, talked with Martin Green, '77, during the cocktail reception before dinner.



Nat Piggee, '00, chatted with Professor from Practice Sharon Fairley and Jackson.



Daniel Jellins, '21, and Naphtalie Ukiri, '21, talked with Professor Jonathan Masur at dinner.



Alexis Grinstead, Tammy Adereti, Amiri Lampley, Savannah West, and Kamara Nwosu, all '20, at the event.



The event "was a wonderful opportunity to get current BLSA students in touch with our accomplished alumni to share common expierences and memories while we honor an inspiration to our legal community, Judge Jackson," Hassanein said.

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The event "was a wonderful opportunity to get current BLSA students in touch with our accomplished alumni to share common expierences and memories while we honor an inspiration to our legal community, Judge Jackson," said BLSA vice president Adam Hassanein, '21, who planned the event.

Click through to see images from the night.
Dickerson Centennial

Remarks for Saris USSC Portrait Unveiling
February 21, 2020

I have been given about 5 minutes to speak, and I really don't know that I can say all that I want to say that quickly. But I am mindful that *I* am the only thing standing between us and what's behind that curtain—which is very exciting! I am going to try to move fast.

As some of you know, I have known Judge Patti Saris for more than 20 years now—I clerked for her in 1996, which is the year that I graduated from law school, and she has been one of my personal mentors ever since. Indeed, when I think about our relationship, I believe that I have checked with her specifically regarding every major professional move that I have made over the past two decades—including regarding whether or not I should seek and accept an appointment to the Sentencing Commission—and I have also watched in awe and admiration as she has taken on, and mastered, various different and significant leadership roles during that time, including serving as Chair of this fine institution.

So, I am delighted to be here for today's Big Reveal, and quite honestly, for me this *particular* portrait ceremony is especially thrilling precisely because of how multidimensional Patti Saris is. I mean, let's be honest; quite a few judges and Commissioners seem to have only a few facets to their character, so before their portraits are revealed, you kind of already know what's coming: a formal, straight-laced depiction of their judicial demeanor, with hands folded and gaze afixed far off into the distance—presumably at the Constitution. But Patti Saris? She

can be credibly depicted in literally a thousand different ways! For example, as we all saw during Commission meetings, she can certainly be the master of Commissioner-like calm, a consensus builder, a good listener, a careful speaker: the essence of judicial temperament. But she also has that warm, brassy down-to-earth-ness in her personality as well—you know, hands-flailing, back-slapping, 'come here, let me talk to you!' *'Ack!*, can you believe what that witness just testified to!'—she is *that* judge/Commissioner, too, and everything in between.

So, when I think about who Judge Saris is and all of the incredible things she has done in her career and in her life thus far, it makes me wonder: what poor artist had the nearly impossible task of capturing the essence of an individual who has given so much of herself in so many different ways?! Now, I am sure that Ms. Minifie is excellent, and I have no doubt that the picture we will be seeing in a moment will be accurate and endearing in every respect. But Patti-worshippers like myself will agree that *this* portrait assignment, in particular, is not an easy one. And I honestly don't even know what to expect! There are probably certain standard aspects of a portrait of this nature, like a Sentencing Guidelines Manual (as no doubt deftly portrayed in one of the many colors that Judge Saris chose during her time as Chair) floating somewhere in the frame. But as far as depicting *her*, I am truly drawing a blank, because her image truly could have gone in any one of many directions: Commission Chair; Chief Judge; mother; mentor; friend; colleague; and confidante—just to name a few. And *any* of those portrayals would be entirely accurate, because she has been *all* of those

things, and has somehow managed to take on all of those responsibilities and more, and to do it all so effortlessly.

It is, in fact, her juggling of so many roles that, to me, is her most awesome and inspiring quality, and if I'm being really honest, ever since I first worked for her in 1996, all *I* have ever wanted to do professionally is to emulate her astonishing ability to do so many significant things at once and to do it all so well. I remember when I first started practicing in a law firm after finishing my clerkships—one of which was with Justice Breyer, who I am privileged to say is also one of my professional mentors—the firm's clear expectation was that I complete a substantial number of billable hours, and yet, I was pregnant with my first child and my husband was a surgical resident. All I could think of at the time was, "what would Patti Saris do?" Left to my own devices, I could not even imagine what adding a baby was going to do to my work life or the dynamic of our marriage, and I was terrified at the prospect of becoming a mom and of having to juggle everything that I was expected to do. And I remember very distinctly how much of a beacon of hope Judge Saris was for me in that moment. Here was a woman who had not only reached the stratosphere professionally but had done so while also managing a household and raising not just one but *four* children. Judge Patti Saris had seemingly done the impossible, and was *still* unfailingly optimistic about her work and her family and her life, and seeing her experience gave me hope that, when the baby came, maybe, just maybe, I could manage too.

I also deeply admired Judge Saris's passion for public service, and I have sought to model myself after that aspect of her career as well. As

I previously mentioned, Patti Saris was one of a handful of people who advised me concerning my own Sentencing Commission appointment, and due in large part to her guidance and support, I was confirmed to the Commission in February of 2010. Now, if you think about that timing, it is not hard to imagine my surprise when, just a few weeks after I started at the Commission, Judge Saris called *me* to say that *she* had been contacted about being nominated as the Commission's Chair, and asked for *my* advice about whether that was even feasible, and by that she meant, whether she could realistically expect to step into that position from the outside, without having previously worked inside the agency. And if recall correctly, what I told her in response had as much to do with the nature of the Sentencing Commission as with her—I was *thrilled* about the prospect, by the way, because it felt a little like being a matchmaker, and I was super excited both for the agency and for her, because I knew in my gut, it would be the perfect match.

If memory serves, I told Judge Saris that the Commission was an extraordinarily well-functioning organization of true professionals, and that, in my experience, the staff and Commission members would embrace her, and help to guide her, and teach her, and support her (and, as a corollary, not undermine her). I remembering telling her, in essence, that the members and staff of the Sentencing Commission are among the brightest, most creative, and most dedicated set of individuals I have ever known. And I *still* believe that, because, over time, while working as a staffer in the Special Counsel's Office here long ago and, more recently, as a member of the Commission, I had truly come to think of the people at this small agency like my family,

and like family members, we who had dedicated our professional lives to doing this work in this context were genuinely invested not only in the mission of the organization but also in each other.

And, of course, it made perfect sense to me that Judge Saris would come and join us, because she had been like family to me as well. Patti Saris had, essentially, mothered me in my first job out of law school; she taught me how to think and write like a litigator; she showed me how to balance work and family; and I was so grateful to have the enormous privilege of also being able to serve alongside her, as a colleague. Those of you who were here when she was Chair know what I mean: we had a front-row seat from which to observe her extraordinary leadership skills, her unwavering commitment to the goals of this institution, and her abiding interest in bringing people together. It was an extraordinary feat. She jumped right in and took the helm of an agency that she did not previously know and that did not know her; earned the trust of its crew; and skillfully steered this ship, at times through rocky terrain. And, of course, true to form, at the same time that she was doing an outstanding job running this very busy agency—to include traveling around the country to different cities almost every week as the primary ambassador of Guidelines—she also remained focused on her day job (as then Chief Judge of her district) AND was ever mindful of the particular progress and perils of various members of her family back in Boston: the graduations, business start-ups, graduate schools, trips, surgeries, weddings, grandchildren, and of course, her beloved Arthur.

So, circling back to my initial thought, as one who can personally attest to the fact that Patti Saris has worn too many different hats to *count*, not to mention *paint*, today's portrait unveiling is even more suspenseful than usual! Can *any* portrait accurately reflect Judge Saris's ever-present energy and optimism, or that sparkle in her eye when she thinks of a good idea or asks an insightful question punctuated with a pun? How can a two-dimensional painting adequately capture that deep-in-thought look that she gets when she's listening intently, or the steely determination (some would call it grit) that she conveys when there is a tough call to be made and it's up to her to make it? And is it even possible to depict her genuine humility and warm-hearted compassion on canvas, and if so, how so? To my mind, painting Judge Saris is kind of like being asked to copy the Mona Lisa: many have tried, but few can deliver because there is only one original.

Now, I do hope you all know—and especially the artist—that I am being facetious, and that I will most certainly be awed by the portrait that is presented here today. I have no doubt that what will soon be revealed will be worthy of the wonderful Judge, Chair, and person we have come to know and love, and you all here at the Commission will be very lucky to have the great privilege of getting to see Judge Saris regularly in this way. I have my own depiction of Patti Saris—if you ever stop by my office, I would be happy to show it to you; it is a simple color drawing—a caricature—that my co-clerks and I commissioned the year of our clerkship (you might remember us doing that!). A copy of it is in my chambers, and I keep it there to inspire me to keep going when I feel like shutting down because I'm being pulled in too many

directions. Much like a great portrait, my drawing also reminds me of the true character of its amazing subject: she is active, vibrant, brilliant; constantly in motion and in thought; surrounded by supporters (aka, groupies); giving fully of herself to others; and always ready to tackle the next big thing!

I am so happy to be here to see the Commission's version and to share this celebratory moment with you, Judge Saris. Congratulations!

COURAGE // PURPOSE // AUTHENCITY
Black Women Leaders In The Civil Rights Movement Era And Beyond

Ketanji Brown Jackson
University of Michigan Law School MLK Day Lecture
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I. INTRODUCTION

Good afternoon. I am delighted to be here and to have this opportunity to celebrate Dr. Martin Luther King Jr.'s birthday and civil rights legacy with all of you. I very much appreciate that kind introduction and warm welcome; it is always very humbling to hear one's own accomplishments listed back in that way. And you should know that I feel extremely fortunate to have had so many relatively rare professional opportunities thus far in my career.

Of course, the one thing that is perhaps the *most* fortunate aspect of my professional success is, actually, the timing of my birth: I was born nearly fifty years ago, on September 14, 1970. Now, that was well before many of you existed, so, for context, you should know that 1970 was a particularly exciting time in American history because it the dawn of the *post*-Civil Rights Movement era. Congress had enacted two Civil Rights Acts in the decade before, thereby officially abolishing Jim Crow segregation and establishing by law that all Americans are entitled to equal rights. So, for black Americans in particular, 1970 was a time of hope! There was a general sense that all of the hard work of the previous decade—the marches, the boycotts, the sit-ins, the arrests—had finally borne fruit for black people like my parents (who had experienced firsthand the spirit-crushing limitations that legal segregation by race imposes while they were growing up in South Florida). I grew up hearing the stories of what life used to be like for black people of my parents' generation, yet *my* life's circumstances were so different,

that it is still hard for me to believe that strict racial segregation was the law of the land just a few years before I arrived!

Think about that for a moment: as of 1963, Dr. Martin Luther King Jr. could only *dream* of a day when "the sons of former slaves and the sons of former slave owners would be able to sit down together at the table of brotherhood." But by 1970, less than a decade later, *that* was the world that I inhabited (as least as a matter of law). Indeed, so much changed in such a short period of time, that by the time I was born, black couples in Washington DC, which is where my parents lived at the time, probably felt invincible for the first time in their lives. And it showed. My parents proudly gave me an *African* name; they dressed me in a mini-daishiki; I was rocking Afro-puffs! And, most importantly, they set out to teach me that, unlike the many barriers that they had had to face, *my* path was clear, such that if I worked hard and believed in myself, I could do anything or be anything I wanted to be.

So, in a very real sense, I am a lucky first inheritor of Dr. King's civil rights legacy, and for that, I am profoundly grateful. I am particularly grateful for the sacrifices of my foremothers—the black women who faced the seemingly insurmountable obstacle of existing at the intersection of race and gender in the middle of the twentieth century, and yet bravely challenged the status quo to push for their equal rights. It is truly on their shoulders that I now stand, and as the title of this presentation suggests, my lecture today is a tribute to those women. I have focused in particular on black women who actively participated in the pivotal events that comprise what historians call the Civil Rights Movement of the 1950s and 1960s. But, first, a caveat: I am not a historian, so I actually had to do a fair amount of research, and what I discovered is that historians have only recently begun to recognize the unique leadership contributions of black women during the Civil Rights Movement era.

In the time that we have together, I hope to introduce to you to some of those women, and to discuss what historians have now identified as the core characteristics that black women leaders of that era generally shared. Researchers have concluded that black women exhibited a certain style of leadership that was not acknowledged as such, and in this regard, *I* need to acknowledge that the observations that I am presenting in this talk are not original; much of the credit goes to Dr. Janet Dewart Bell, who published a PhD dissertation on this topic in 2015.[1] I have drawn heavily from her excellent insights, and, like Dr. Bell's work, this talk relies to some extent on generalizations. But the characterizations that I am making are drawn from research that Bell and others have done regarding the individual, lived experiences of many black women civil rights pioneers.

Ultimately, I hope that you will come away with an understanding of not only what black women did to contribute to the success of the Civil Rights Movement, but also *who* these women were in terms of the applicable leadership paradigms, and *why* they played such an active role in the Civil Rights Movement at all. In a sense, their motivation for investing so much in the betterment of themselves and their community in the midst of a society that did not invest in them is an interesting question. This talk suggests an answer. And to the extent that the motivations and leadership qualities of black women leaders during the Civil Rights Movement era can be reliably characterized, one can presumably carry those observations forward, and make potentially useful insights about the role of black women leaders in modern times.

[1] Janet Dewart Bell, AFRICAN AMERICAN WOMEN LEADERS IN THE CIVIL RIGHTS MOVEMENT: A NARRATIVE INQUIRY, Antioch University—PhD Program in leadership and Change (May, 2015)

II. THE "INVISIBLE LEADERS" OF THE CIVIL RIGHTS MOVEMENT

Alright, so, to start, I want to establish a common base of knowledge about what is meant by the Civil Rights Movement. Generally speaking, the Civil Rights Movement is a defined historical period during which great legal and social transformation occurred with respect to race relations in the United States. That period was between approximately 1954, when the Supreme Court handed down its unanimous landmark decision in *Brown v. The Board of Education of Topeka Kansas*, and 1968, when Dr. Martin Luther King was assassinated in Memphis Tennessee. During this timeframe, [**slide**] the country shifted from a system of legalized segregation by race and the subjugation of black Americans based on the notion of white supremacy to [**slide**] widespread adoption of the fundamental principle of equal rights for all notwithstanding racial difference.

That was a dramatic change. And, as Bell emphasizes in her dissertation, this transformation of law and society did *not* occur as the result of "a singular united campaign with top down authority" (Bell at 5), but, instead, "consisted of [the] accumulated actions and ideas of many different people in many different places" throughout the United States (id.). Furthermore, the changes were not inevitable or evolutionary. They were *demanded*; in effect, they were forced into being through the visible, collective action of African Americans and their allies.

And so, when most people think about the civil rights movement, they think about either its most notable collective-action demonstrations: [slide] the marches, the sit-ins, the motivational speeches; or, the notorious instances of white resistance to change: [slide] the dogs, the fire hoses, the arrest and firebombing of the Freedom Riders. As far as leadership is concerned, [slide] our mental images of the Civil Rights Movement are often associated with outspoken and eloquent black men, who were indisputably leaders of various aspects of the Movement, and

they get, and deserve, an enormous amount of credit for what they accomplished. Dr. King, has his own monument [slide]—and rightly so. His leadership, and legacy, and are certainly unparalleled.

But what I would like to emphasize today is the fact that [slide] black women also played a significant role in the various events that comprise the Civil Rights Movement! Indeed, by the numbers, more black women participated in the Civil Rights Movement than did black men (Bell at 4 (quoting Payne)), and historians now believe that black women between the ages of "roughly thirty to fifty . . . were three or four *times* more likely to participate than [black] men." (Bell at 28 (quoting Payne).) Thus, although men were unquestionably the 'face' of the Civil Rights Movement, commentators have characterized women as its backbone, and to a certain extent its heart, because it was only through their persistent involvement that the push for equal rights gained, and kept, its momentum.

So, what, exactly, did black women do to power the Movement??? [slide]

A. Propelling Change Through Organization, Mobilization, and Collective Action

1. *General Role*

Generally speaking, black "women were responsible for the actual building" of the Civil Right Movement as an enterprise, "for doing the everyday [day-to-day] work" of it. (Bell at 29 (quoting Payne).) Both Bell and historian Charles Payne observe that "[w]hile men served as spokespersons, work traditionally recognized as leadership, women led by 'mobilizing already existing social networks around the organizing goals, mediating conflicts, conveying information, coordinating activity, [and] creating and sustaining good relations within the group.'" (Bell at 29 (quoting Payne).) Put another way, black women essentially served as the

Movement's chief operating officers: they generated ideas for how to dismantle legalized segregation in its various forms, and they also got it done, primarily by attending to the operational and administrative aspects of coordinating the necessary meetings, protests, and activities.

Now, the context in which black women did this work is an important part of the story. As I mentioned previously, Jim Crow segregation was a system of laws and norms that preferenced white people in almost every aspect of life and placed insidious restrictions on the freedoms of African Americans. (In the South, black folks were subjugated by law, and elsewhere across America rank discrimination on the basis of race operated to impose similar limitations.) For example, in many places, black people were required to pay special poll taxes or take literacy tests before they were permitted to exercise their right to vote. Black Americans did not have full and equal access to public transportation—they were relegated to certain cars on trains and certain seats on buses—and could only take advantage of public accommodations such restaurants and theaters on the specific terms that white shop owners dictated, usually that they had to sit at separate tables away from white patrons. There was segregation in housing, and, of course, black children were not allowed to attend public schools alongside white children, as a practical matter, even after the *Brown v. the Board* decision. In the South, there was also the ever-present threat of physical harm and even death to black people (men especially) who stepped out of line as far as white society was concerned.

As part of the Civil Rights Movement, black women addressed themselves directly to these various social ills, and took on a variety of tasks related to forcing change with respect to these restrictive laws and practices.

a. *The Montgomery Bus Boycott*

The Montgomery Bus Boycott is one prime example of women's work in this regard. [slide] That boycott began in Montgomery, Alabama on December 5th 1955—four days after a seamstress named Rosa Parks, who was seated in the front row of the "colored" section of a full public bus, refused to give up her seat for white passengers when asked by the bus driver to do so. Parks (who had a history of civil rights activism, by the way) was arrested and fined, and in response, the local black community rallied to support her and to oppose the city's transportation ordinance, which required black people to enter public city buses only through the rear door, to sit only in a designated section in the back of the bus, and to give up their seats for a white person if asked to do so.

As relevant here, a local organization of black women called The Women's Political Counsel, among others, called for a boycott of the bus system, which was the primary mode of transportation for black Montgomery residents at the time. The women circulated flyers to spread the word; black ministers announced the effort in churches across the city; and when the boycott began four days after Rosa Park's act of civil disobedience [slide], 40,000 African American bus riders—the majority of the city's ridership—stayed off the buses, opting instead to walk or carpool. Getting that many people to where they needed to go *without* using the buses was a herculean task, and it was black women who took up the charge. For an entire year, black women provided the practical support that was necessary to sustain the effort [slide]: they arranged carpools, they held bake sales, they gave people rides, and they themselves walked, everywhere, no matter how far. It was also five black women who filed the lawsuit in federal district court that eventually went all the way up to the Supreme Court and resulted in a decision in December of 1956 that required the city to integrate its buses.

Significantly for present purposes, historians have now concluded that the success of the Montgomery Bus boycott (which, by the way, was how a local Baptist preacher named Dr. Martin Luther King Jr. got his start as a national civil rights leader) would not have been possible without the commitment of black women, who apparently understood from the beginning that the boycott was about much more than one woman's right to remain seated. Instead, according to one women who was quoted in an article posted by the Library of Congress's Civil Rights History Project, the boycott was, [QUOTE] "a rebellion"—"a rebellion of maids, a rebellion of working-class women, who were tired of boarding buses in Montgomery, the public space, and being assaulted . . . and abused by white bus drivers." And, according to that commenter, "that's [precisely] why that Movement could hold so long. If it had just been merely a protest about riding the bus, it might have shattered. But it went to the very heart of black womanhood, and [as a result] black women played a major role in sustaining [it]." [END QUOTE]

b. ***Nashville's Lunch Counter Sit-Ins***

A similar story of black women's rebellious and sustaining activities during the Civil Rights Movement emerges from the historical record concerning the coordinated black student lunch-counter sit-ins that took place in Nashville, Tennessee in 1960. [slide] At that point in time, there were thousands of middle-class black college students in attendance at a cluster of historically black colleges in Nashville, and on February 13, 1960, 124 such students simultaneously walked into six area restaurants and department stores, and sat down at lunch counters that had been reserved for white people. The black student-protesters repeated this action daily for weeks [slide], and at times, their silent protests were met with

jeering assaults and harassment. Then, on one fateful day a couple weeks later (February 27, 1960), the protesters who had sat down at two of the restaurants were physically attacked [slide]—white men grabbed them, pulled the from their seats, and punched, kicked, and spat on them; yet, when the Nashville police arrived, they arrested only the black students, who were permitted to post bail, but decided to take a principled stand and thus refused. Ultimately, the black student protesters spent 33 ½ days in jail.

Now, this story should be somewhat familiar as a general matter, because the Nashville lunch counter sit-ins are a relatively well-known part of the Civil Rights Movement. But what is less well known is the fact that *women* students were among the most active participants in these and other similar instances of non-violent civil-disobedience by college students. [slide] In an article entitled "Always the Backbone, Rarely the Leader," which was published in 2010, Amanda Hughett explains that

> [i]n 1960 Nashville, change came from an unexpected place. As their mothers watched in horror, black college women renounced the protective environment of their campuses to participate in, and often lead, civil rights demonstrations alongside their black brothers. Frustrated by slow progress and encouraged to join in the movement by female friends, young black women could no longer tolerate sitting on the sidelines while black men led the way in the fight for first-class citizenship. (Hughett at 1, 2.)

2. *Marginalization*

Now, it *is* important to acknowledge the impact of gender on the recognition of black women's crucial contributions. Some historians now consider black women to be the "invisible leaders" of the Civil Rights Movement, and their marginalization was consistent with the treatment of *all* women in the 1950s and

60s, whowere generally considered subordinate and subservient to men. (Bell at 23)

As it relates to black women, the March on Washington was one prime example of this phenomenon. [slide] Women Marched on Washington in the thousands on August 23, 1963, but no woman was asked to give a speech as part of the official program on that day, and none was invited to the White House as part of the delegation of civil rights leaders that visited with President Kennedy after the day's events. And, of course, [slide] once a narrative has formed about the relative significance of the roles that various people played in important historical events such as the March on Washington, it is hard to change that perception as time goes by. Thus, even in modern times, historical reflections the Civil Rights Movement often omit the unique voices and perspectives of the black women participants and leaders. (Bell at 3)

3. ***Individual Profiles***

The good news is that recent scholars have begun to focus more intently on the black women who were leaders in the Civil Rights Movement. So, we now know much more about their contributions, and, again, part of my goal here today is to introduce you to some of those women. I have a whole list of folks whom you should know, and there are many others that I don't have time to mention here today. I am going to go through these quickly, and, for ease of discussion, I have organized these profiles into four categories, based loosely on the scope of the roles that these women played, as I understand them.

There are four groups.[2] *First*, there were a handful of women in formal, visible, national positions of authority within established civil rights organizations.

[2] (Bell at 5 – 6) (explaining that some people were "on the line"—i.e., were involved in direct action—while others supported civil rights activities in other ways).

Second, there were women who served as regional leaders, organizing civil rights initiatives in primarily one geographic locale or with respect to a particular issue. *Third*, there are the front-line troops: women who are primarily known for a particular instance in which they put themselves on the line directly. *Fourth*, and finally, are the women who facilitated the collective actions of others, through financing or legal support.

Okay, so I am now going to run through these profiles quickly with those four categories in mind.

(1) Category One

- **Dorothy Height** was a social worker, an educator, and a civil rights activist who rose to national prominence as a leader of the Civil Rights Movement when she became the President of the National Council of Negro Women in 1957. She was actively engaged in promoting civil rights in various ways, and was often the only woman involved in high-level strategy meetings with Dr. King and others. According to Andrew Young, Dr. King's chief strategist, "the men had a hard time getting along with each other because they were all young and each had a different approach to civil rights. Ms. Height "sat in on all the meetings" and "basically kept the peace amongst the six civil rights organizations." (Capeheart interview)

- **Ella Baker** was an advisor and mentor to many well known civil rights leaders, including Dr. King and Thurgood Marshall, and is considered to be the most influential woman in the Movement. Baker believed strongly in grassroots activism, and stressed the importance of the participation of young people and women; to that end, she was responsible for actively recruiting and mentoring the college students who formed the Student Nonviolent Coordinating Committee—known as "<SNICK>"—which was a major player in the organized student-led sit-ins and other demonstrations throughout the South.

- These next two women—**Dorothy Cotton and Septima Clark**—were educators who worked through the Southern Christian Leadership

Conference in Atlanta to encourage African Americans to learn to read and to harness the power of education. They both held the philosophy that "literacy means liberation," and they joined forces to direct SCLC's citizenship education program, which brought regional civil rights leaders to Atlanta for training. Many African Americans at the time had never learned to read or write, including many of the trainees who came to the Academy. Clark and Cotton taught the leadership trainees to read, which, in turn, facilitated their ability to advocate for voting rights and other causes in their home communities.

- **Mamie Till Mobley** was thrust into national prominence in August of 1955, when her 14 year-old son, Emmett, was abducted, beaten, and murdered while visiting family in Mississippi, allegedly for whistling at a white women. Till-Mobley had Emmett's funeral back in their hometown of Chicago, and she insisted on an open casket, with his disfigured face revealed, so that the world could see what had been done to him. After Emmett's murderers were quickly acquitted by an all-white jury, Till-Mobley became a national civil rights spokeswoman, who often offered powerful words about the values of redemption and forgiveness in finding peace. She is known for having said, "I have not spent one minute hating."

- **Josephine Baker** was a famous black American actress of film and stage in the 1920s—one of very few. She moved to France in 1925, began advocating for civil rights after the Second World War, and by the time the Civil Rights Movement took hold, she was routinely using her platform to highlight the comparative mistreatment of black people in the United States versus elsewhere in the world. Baker also got involved with the NAACP, and she was the only women who was officially allotted time to say anything from the stage at the March on Washington.

- Like Baker, **Ruby Dee** was also a famous American actress, who used her platform as an entertainer to motivate people to advocate for civil rights. Dee and her husband, Ossie Davis, were well-known equality activists, and were active members of several of the most prominent black civil rights organizations.

(2) Category Two

With respect to the regional-influencer category . . .

- **Jo Ann Robinson**, who was president of the woman's group that staged the Montgomery Bus Boycott. Robinson was the primary coordinator of that effort, and as a result, she was personally targeted several times, including having rocks thrown through the windows of her home and acid poured on her car. In her memoir, Robinson wrote that "an oppressed but brave people, whose pride and dignity rose to the occasion, conquered fear, and faced whatever perils had to be confronted."

- **Diane Nash** was a student at Fisk University in Nashville in the early 1960s, and led the wing of the Movement that coordinated the Nashville sit-ins. I discussed those sit-ins previously—Nash was one of the jailed students, and she is credited for being the impetus behind the desegregation of Nashville's lunch counters. (She publicly confronting the mayor during a press conference, and got him to admit that discrimination on the basis of race was wrong. Nashville's lunch counters were desegregated three weeks later.) Nash proceeded to co-found SNCC, and subsequently took over responsibility for coordinating the Freedom Riders, as well several of the large protest marches that took place in southern states during the early 1960s.

- **Fannie Lou Hamer** was a community organizer in Mississippi, who was fired from her job for attempting to exercise her right to vote. Hamer then motivated thousands of black Mississippians to become registered voters. She was also nearly fatally beaten by police officers when she was jailed after an altercation between Mississippi activists and a local cafe owner who had refused to serve them. And that incident fueled her determination to coordinate civil rights volunteers and to run for a seat in Congress. Hamer once said, "[t]here is so much hate. Only God has kept the Negro sane." And she also famously remarked, "I am sick and tired of being sick and tired."

- **Amelia Boynton** is another great regional leader, who worked tirelessly to plan demonstrations for civil and voting rights under challenging circumstances in Selma, Alabama. Most notably, Robinson played a key role in coordinating, and participating in, the historic Selma to

Montgomery march that historians referred to, in retrospect, as "Bloody Sunday." During that march, Boynton and other activists, including John Lewis, were beaten to unconsciousness by state police as they walked across the Edmund Pettit Bridge.

- **Daisy Bates**, a black newspaper owner in Arkansas, served as the president of the Arkansas state chapter of the NAACP. But Bates is perhaps best known for her pivotal role in planning for the desegregation of Little Rock's public schools. She personally supervised and shepherded the nine black students who entered Little Rock Central High School in 1957, and whose attempts to enroll prompted a confrontation with angry mobs of white parents and the state's governor. It was Bates who arranged to have local ministers escort the children into school, and throughout the ordeal, she took personal responsibility for the Little Rock Nine.

- **Shirley Sherrod** co-founded a collective farm in Southwest Georgia with her husband, in order to advance the rights of black Georgians with respect to self-sufficiency and agricultural development. Sherrod's team pushed for the right of African American farmers to farm land securely and affordably throughout the state.

- The final woman in this category is **Gloria Richardson**, who was a SNCC field officer in Cambridge, Maryland, and the co-founder of a local organization aimed at economic equality for black Americans. Richardson planned and participated in sit-ins and other acts of civil unrest locally, and she took part in several protests that ended in violent clashes with white residents. Richardson, who indirectly challenged SNCC's non-violent ideology, later observed that most of the demonstrators in her organization were women, and commented that, "[w]hen we were attacked at demonstrations, [we women] were the ones throwing stones back at the whites."

(3) Category Three

Most of the bios in the boots-on-the-ground category focus on a particular pivotal event, and are thus fairly straightforward.

- There is well-known civil rights advocate **Rosa Parks**, whose story was the impetus for the Montgomery bus boycott, as I previously explained.

- Earlier that same year, 15 year-old student **Claudette Colvin** had also been arrested on a Montgomery bus for that same kind of defiance, and Colvin then went on to become one of the five female plaintiffs in the federal civil rights lawsuit that the led to the Supreme Court striking down segregation on the city's buses.

- **Vivian Malone Jones** was one of the first two black students to try to enroll in the University of Alabama in 1963, after it was legally desegregated by court order. When she arrived to register, the governor of Alabama (George Wallace) and a phalanx of state troopers physically blocked her entry, and she was not allowed to pass until President John F. Kennedy sent in the Alabama national guard to escort her into the building. Jones graduated from the University of Alabama two years later, and was the first black student ever to do so.

- **Winson Hudson**, was a teacher in rural Mississippi, who also focused on solving the difficult problem of resistance to school desegregation. She and her sister initiated several lawsuits as a member of the local chapter NAACP, and due to their activism, the Hudson sisters and their families were terrorized by the Klan for nearly a decade.

- There is also **Gwendolyn Simmons**, who was essentially kicked out of Spelman College (an all-women's historically black college in Atlanta) in the early 1960s, for she insisting on wearing her hair natural and actively participating in grassroots civil rights demonstrations.

- Finally, in this direct action category, is **Ruby Bridges**, who was six years old in 1960, when her parents responded to a request from the NAACP in New Orleans for participants in a push for school integration. Bridges tested into a white elementary school, and was allowed to transfer in, but had to be escorted into school by federal marshals amidst angry crowds that formed to try to prevent her entry. She was in kindergarten. And that aspect of her experience was captured [slide] in a famous Normal Rockwell painting called "The Problem We All Live With." What is less well known is that Ruby was the only student in her classroom for more than a year—she was taught alone by a single teacher, because no other teacher would do so, and all of the white parents had pulled their children out of the school.

(4) Category Four

The last category is the facilitators and financiers.

- **Georgia Gilmore** was a cook from Montgomery Alabama who started a food-service business out of her home as a fund-raising effort after she was fired for participating in the bus boycott. She and her friends produced meals, and them sold them out of beauty parlors, laundry mats, and other places, and she then donated all of the profits to sustain the boycott as long as possible.

- I put **Coretta Scott King** in this category, because she was a classically trained musician—a vocalist—who was active in the Civil Rights Movement herself, apart from her husband, and often incorporated music into her civil rights work. And after Martin Luther King's assassination in 1968, she developed her own civil rights agenda, which included a push for women's and LGBT rights.

- **Pauli Murray** and **Dovey Johnson Roundtree** were lawyers who did extraordinary work to further civil rights causes at a time when few women had the privilege of practicing law. Murray graduated first in her class at Howard Law School in the 1940s, and went on to become the first black student to receive a doctorate of juridical science at Yale Law School. She wrote a book that examined and critiqued state segregation laws, which Thurgood Marshall called the bible of the civil rights movement. She also worked with Ruth Bader Ginsburg to do pioneering work on gender equality.

- Inspired by Pauli Murray and others, **Dovey Roundtree**, who was also a Howard Law graduate, represented black litigants in civil rights cases, beginning in the early 1950s. In one noteworthy effort, she sued to challenge the right of private bus carriers to impose Jim Crow segregation on passengers who were traveling across state lines, and in 1955, won a precedential administrative decision before the Interstate commerce commission that eventually put a permanent end to segregation in interstate travel.

- Last, but certainly not least, is a woman whose life and accomplishments have been extremely inspirational for me, personally: **Constance Baker Motley**. Motley was a lawyer who got her law degree from Columbia University in 1946, and she was a protege of Thurgood Marshall. Motley was the only female attorney at the NAACP Legal Defense Fund during that organization's coordinated legal assault on state-sponsored segregation, and she was the lead attorney on several significant civil rights cases—for example, she drafted the original complaint in *Brown v. Board*, and represented James Meredith in well-publicized his effort to desegregate the University of Mississippi. She was also the first African American woman to argue a case in the Supreme Court—she eventually argued ten SCt cases, and won nine of them outright (the tenth was eventually overturned in her favor).

  In the mid-1960s, Motley turned to state politics, becoming the first black women to be elected to the NY State Senate. And in 1966, President Johnson nominated her for a seat on the United States District Court for the Southern District of NY—when the Senate confirmed her later that year, she became the first black female federal judge in the United States.

  (As a point of personal privilege, I want to note two quirky coincidences: Judge Motley and I share a birthday—September 14th—and we have now both given lectures at this esteemed Law School on Martin Luther King Day; it appears from the program that she was the first person who was invited to speak at this event!)

B. <u>Exhibiting Servant Leadership</u>

So, there you have it: those are some of the black women leaders of the Civil Rights Movement, and I hope that that quick overview gives you a sense of their wide-ranging and significant contributions. Turning now to the more academic part of this talk, it is also important to understand that what these women did to instigate and advance civil rights reform is actually an established, albeit generally unrecognized, form of *leadership*. Historians have classified these and other black

women civil rights advocates participants as "servant leaders," which is a philosophy of leadership that has actually been around for ages, but the somewhat oxymoronic term for it was first coined in 1970 (of all years), in a totally different context, by philosopher Robert K. Greenleaf. [slide]

1. *Servant Leadership Defined*

The hallmark of servant leadership is the belief that "the main goal of a leader is to serve" others; that is, instead of the traditional paradigm, in which people work to serve the leader, the servant leadership model posits that the leader exists to serve the people. Thus, servant leaders operate consistent with what Bell calls "strong altruistic ethical overtones" (Bell at 158), and they are generally focused on the greater good—i.e., they are "more concerned with the collective interests of the group, organization, and society as opposed to their own self interests." (Bell at 20, quoting Avolia) These types of leaders set out to make a difference rather than to seek fame or fortune (Bell at 160), and the strength of their leadership is measured by the quality of their impact on the lives of people and polities"—in other words, its transformative effect (Bell at 24).

Importantly, servant leadership is generally considered to be leadership *without* authority. These leaders are not usually anointed or officially appointed, and they don't necessarily hold any titles; instead, they emerge due to the quality of their contributions to people's lives. (Bell at 19). Put another way, they have "person power" rather than "position power," and many undervalue their own leadership skills precisely because they have a servant mentality (Gyant at 642 – 44); they view themselves as merely doing what needs to be done. Thus, according to Greenleaf, servant leadership is best conceived of as "leadership . . . bestowed upon a person who was by nature a servant" (Bell at 158). "It begins with the natural feeling that one wants to serve, [and] to serve first. Then conscious choice brings one to aspire to lead." (Bell at 19)

2. *Core Traits of Black Female 'Servant Leaders' In the Civil Rights Movement*

As relevant here, the particular servant-leadership paradigm that researchers have identified with respect to the black women leaders of the Civil Rights Movement also corresponds with certain core qualities (Bell's dissertation calls them "themes") that these women leaders broadly shared. (Bell at 95 – 99) These qualities appear in the title of this presentation, and I will explain them briefly now, before discussing the circumstances that likely gave rise to these characteristics, and how they manifested themselves in the lived experiences of the black women leaders they describe.

The first is [slide] **courage**. As Bell defines it, *courage* is the will "to continue when one is apprehensive or scared, especially in the face of seemingly insurmountable obstacles[.]" (Bell at 97). These women were human, and they often had to put themselves in danger by doing this work; therefore, they certainly had fear. But they knew that they had to conquer their fears in order to do what was necessary to propel the Movement forward, which, in turn, was necessary for their long-term survival. Dr. King put it this way: "courage is an inner resolution to go forward despite obstacles"; and, by contrast, "cowardice is submissive surrender to circumstances." These women leaders were far from submissive; to the contrary, they were determined to persevere despite the dangers.

The second core quality of these women's particular brand of servant leadership is [slide] **purpose**. In this context, *purpose* is the belief that one exists, or has survived thus far, for a reason, and therefore, that one has a solemn duty to fulfill one's own personal destiny. (Bell at 98) As will be explained momentarily, the black women leaders of the Civil Rights Movement era operated within tight social networks, and generally had a moral sense of responsibility to others, which

motivated them to hone their skills and direct their talents toward the common interests of the black community. And many strongly believed that they were *called* to do this work.

Third, and finally, the black women leaders who actively pushed for civil rights reforms generally exhibited what Bell calls [slide] **authenticity**, which she defines as "the condition or quality of being genuine, free from hypocrisy[,]" and "of being oneself—transparent and confident and self aware" (Bell at 95). The women leaders she researched knew were well aware that, as black people, they had been mistreated, but they were also proud Americans, who felt deeply about their country's need to, as Dr. King once said, "rise up and live out the true meaning of its creed" that "all men (and women) are created equal."

* * *

So those are the core characteristics that, according to Bell, commonly characterized the manner in which black women pursued civil rights gains and supported others in achieving those goals. What bears emphasis is the fact that these common qualities appear to have been a function of black women's specific social circumstances at that time. What I mean by this is that there were certain aspects of black women's lives that were universal and that contributed to what some academics call their "cultural preparation for resistance." And I think these circumstances actually shed substantial light on how and why these women responded to the challenges of their time. [slide]

C. Making A Way Out Of No Way

1. Black women were on the bottom of the bottom rung of society

The first significant social circumstance is the fact that black women in the 1950s and 60s were literally on the bottom of the bottom rung of American society.

Dr. Janet Bell's late husband, Professor Derrick Bell, who was a civil rights lawyer and the first tenured African-American professor at Harvard Law School, wrote a book in the early 1990s about the persistence of racism in American life that he entitled "**Faces At the Bottom of the Well**." [slide] My parents had this book on their coffee table for many years, and I remember staring at the image on the cover when I was growing up; I found it difficult to reconcile the image of the person, who seemed to be smiling, with the depressing message that the title and subtitle conveyed. I thought about this book cover again for the first time in forty years when I started preparing for this speech, because, before the civil rights gains of the 1960s, black women were the quintessential faces at the bottom of the well of American society, given their existence at the intersection of race and gender—both of which were highly disfavored characteristics.

Black women had less status than both black men and white women, and it didn't help that many of them were relegated to domestic service jobs [slide], meaning that they worked in white people's homes as servants, and were thereby constantly reminded of their own subservience to white privilege. And there was no realistic prospect of upward mobility; the very fabric of society was designed to keep them in their place. (Bell at 171) [slide] There were some black families who managed to accumulate some wealth. But as far as their social status in the overall society, there was no relevant class distinction, and most people in the black community, with or without money, recognized their common fate (Bell at 19 - 20).

The "double (or triple) consciousness" of the limitations of race and sex and class (Bell at 154) that many black women had gave rise to a certain moral clarity grounded in the value of respect for others (Bell at 155). It is not surprising that people who are persistently oppressed develop a keen sense of what justice requires. And being at the bottom of the well also breeds ***courage***. [slide] There is

a certain resilience that is borne out of constantly having to face seemingly insurmountable barriers. If nothing else, already being at the bottom means that you don't have far to fall, and that, in turn, can generate a fighting spirit and a nothing-to-lose "freedom" to risk everything when the opportunity to improve one's lot arises. [Gyant article at 629, 632]

2. *Black women leaders had strong cultural bonds of community & faith*

The second circumstance that I think is important to mention is the fact that black women leaders had strong cultural bonds that helped them to find the strength to persevere. [slide] Black churches, for example, were, and have always been, pillars of the community. [Bell at 26 – 28] Black women also formed social and community groups [slide], and these organizations often mirrored the messages that black women received in church: lessons about long-suffering endurance, self-sufficiency, and hope; including, the belief that, whatever one was going through, God works all things together for good. The core value of faith in God and in humanity provided a sense of ***purpose***, and indeed, in an academic article entitled "Passing the Torch: African American Women in the Civil Rights Movement," which was published in the Journal of Black Studies in 1996, LaVerne Gyant reported that "many black women [sincerely] believed that their role as leader was "a God-given quality' although they had 'to hone it and shape it and work with it." (Gyant at 641) Dorothy Height identified another source of purpose—empathy—when she said that black "women have what I call a humane sense. They're concerned about what is going on with children, with the sick, with the elderly. They have learned. And they will join hands—they might have their disagreements and whatnot—but when it comes down to it, I always say, women know how to get things done." (Capehart at 15)

Now, admittedly, to some, a person who stands up for themselves and others, and portrays such a steadfast belief in her own self-worth (an "I can do all things" mentality) can come across as arrogant. But, again, context is important. Black women's enduring faith in their own ability to impact their circumstances, with God's help, was not only fodder for the will to challenge the status quo but also a coping mechanism that made it possible for them to get out of bed every day and face a society that scorned them. In this sense, having unwavering faith in one's own God-given talents and abilities was actually crucial to black women's survival, and research demonstrates that black women civil rights leaders almost uniformly led self-directed, faith-filled, purpose-driven lives.

3. Black women leaders had an unshakable commitment to the ideals of American society

The third and final circumstance that I want to highlight here today, is the fact that black women civil rights leaders appeared to have an unshakable commitment to the ideals of American society. [slide] Black women routinely "contribute[d] toward a better quality of life in Black communities and in society at large" during the Civil Rights Movement, and Gyant's article posits that, more than anything else, "it was their commitment to uplift the community that motivated women to assume a leadership role." (Gyant at 641)

I think that commitment is actually a species of the ***authenticity*** that Bell's dissertation identifies. In short, the black women who endured Jim Crow segregation were not big on hypocrisy: they knew what freedom meant, and they knew that it was being denied to black Americans, even as this country purported to promote the core values of liberty and equality. Their refusal to accept anything less is emblematic of their deep commitment to these principles, as well as their ability to "focus[] on the present while also holding a strategic vision for the future

of the black community." (Bell at 158). In Bell's view, the authentic contribution of African American women leaders is that they were somehow able to "hold in their hearts and minds the brutality of slavery, Jim Crow, and segregation," but not be defeated or [hopelessly] embittered as a result, and instead to "forg[e] ahead with hope, determination resiliency, and vision." (Bell at 153) Thus, as Bell observes, for many of these women, the Civil Rights Movement was "not just one isolated event after another, but a *series* of events *tied to one idea*": the betterment of black people and society. (Bell at 158)

This same theme resounds throughout "1619," the popular new historical accounting published by the NYTimes. [slide] In the series—which has also been published as a podcast—acclaimed investigative journalist Nikole Hannah-Jones (who happens to be a black woman) explains that the men who drafted and enacted the Constitution founded this nation on certain ideals: freedom; equality; democracy. Yet, at the time they formulated these principles, the institution of slavery already existed in the colonies—ever since the year 1619, when 20-to-30 Africans who had been captured in their homeland arrived in the colonies by ship and were exchanged for goods. Jones highlights the irony of the situation even further when she notes that at the very moment that Thomas Jefferson penned the self-evident truths of the Declaration of Independence, a black relative—a slave—had been brought into his office to serve him.

Thus, it is Jones's provocative thesis that the America that was born in 1776 was not the perfect union that it purported to be, and that it is actually only through the hard work, struggles, and sacrifices of African Americans over the past two centuries that the United States has finally become the free nation that the Framers initially touted. In one especially poignant segment of the podcast, Jones says:

> [W]e are raised to think about 1776 as the beginning of our democracy. But when that ship arrived on the horizon . . . in 1619[, the] decision made by the colonists to purchase that group of 20 to 30 human beings—*that* was a beginning, too. And it would actually be those very people who were denied citizenship in their own country, who were denied the protections of our founding documents, who would fight the hardest and most successfully to make those ideals real, not just for themselves, but for all Americans.

(Podcast, Episode 1, at 39:24 – 40:00) And, indeed, as Jones points out in the podcast, not only the post-Civil War Reconstruction Amendments to the Constitution and the Civil Rights Acts of the 1960s, but *all* subsequent civil rights gains—from women's rights to gay marriage—rely, in part, on the trailblazing work of black civil rights leaders, including black women like the ones I have profiled.

III. BLACK WOMEN LEADERS TODAY

In the time I have remaining, I want to touch briefly on modern times, which also undoubtedly reflects the legacy of black women civil rights pioneers like the ones I have discussed. Although progress has been slow, and, as one historian remarked in 1980, "the full leadership potential of Black females throughout our history in this country has remained a relatively untapped—or at best, underutilized—resource" (Gyant at 641(quoting Dumas)), this country has progressed quite a bit, thanks to the hard work of those who have come before.

For example, we have gone from the appointment of one black female federal judge to scores of them [slide]: by my count, there have been 57 black female judges appointed to the federal bench since Constance Baker Motley's appointment in 1966. And it was striking to hear that [slide] every single judge

who was recently elected to the state courts in one Houston, Texas county was a black woman!

[slide] Black women have also been elected to powerful positions in Congress, and [slide] are political players in their own right with platforms that permit them to address pressing social issues. [slide] They are also the *bona fide* leaders of mass social movements, such as #Me Too and Black Lives Matter, and [slide] are routinely called upon offer cogent commentary on the workings of government, on television and elsewhere, and, of course, they have also persisted in authentically and courageously [slide] speaking truth to power, standing in the gap between the powerful and the powerless, and providing crucial civil-rights litigation support. (Sherilyn Ifall, head of the NAACP Legal Defense Fund warrants her own slide.)

[slide] Black women financiers also make significant contributions—these women head major corporations, and give of their time, and resources, to support causes of significance within the black community.

Thus, it is clear that black women have now assumed positions of authority as legal and political officials, litigators, entrepreneurs, and other social influencers, in *far* greater numbers than before. Yet, they are still demonstrating courage, purpose, and authenticity in various ways, and are still doing the heavy lifting that is necessary to propel our society forward. Professor Derrick Bell acknowledged this, and also touted the limitless potential of black women's leadership, in 1996, when he dedicated one of his final books to his mother and wife, and in the inscription, unflinchingly declared his [QUOTE] "belief in the potential of women to save us all." [END QUOTE]

IV. CONCLUSION

So, with that, I have reached the end of my remarks. I have two remaining slides to show you: one of which, actually brings us back full circle—to 1970, the year that I was born. [slide] As it turns out, the very first issue of Essence Magazine was published in May of that year, and one of the articles aptly summarizes the core characteristics of black women leaders in the Civil Rights Movement era in terms similar to those that I have less artfully articulated in this talk. The article states that black women leaders are "bound together by race, by sex, by impatience, [and] by the simple yet complex proposition that Black people shall have dignity in America [and] in the world." It salutes several of the black women who took up the mantle and maintained the struggle for civil rights just a few years prior, and describes them as steadfastly believing that "whatever is required to obtain that dignity shall be done. And whatever forces combine to deny that dignity shall be removed forthwith."

And I will finish with what might be my favorite civil rights photograph of modern times. [slide] This iconic image, which was taken by Reuters photographer Jonathan Bauchman during a 2016 protest of the police-involved fatal shootings of Alton Sterling and Philando Castile, has won several awards and has name: it is called "Taking a Stand in Baton Rouge." The picture features a nurse from Pennsylvania named Ieshia Evans, who had traveled to Louisiana to attend her first protest. She was arrested by the two heavily armed officers you see in that photograph, and spent the night and most of the following day in jail.

Not surprisingly, this photo of the moment of her arrest was a viral sensation, and in my view, it is worthy of that acclaim, because just like the description of black women leaders in *Essence*, it captures *perfectly* the very essence of black women's civil rights stewardship over the years. Ms. Evans is

unflinchingly courageous, purposeful, and authentic. She persists despite what appears to be nearly insurmountable obstacles, and clearly believes in her own power to effect change. Above all, she exudes and demands dignity, and as such, much like the black women leaders of the past, reminds us all to strive for our better selves in fulfillment of the promise of our great Nation.

Thank you very much!

COURAGE
PURPOSE
AUTHENTICITY

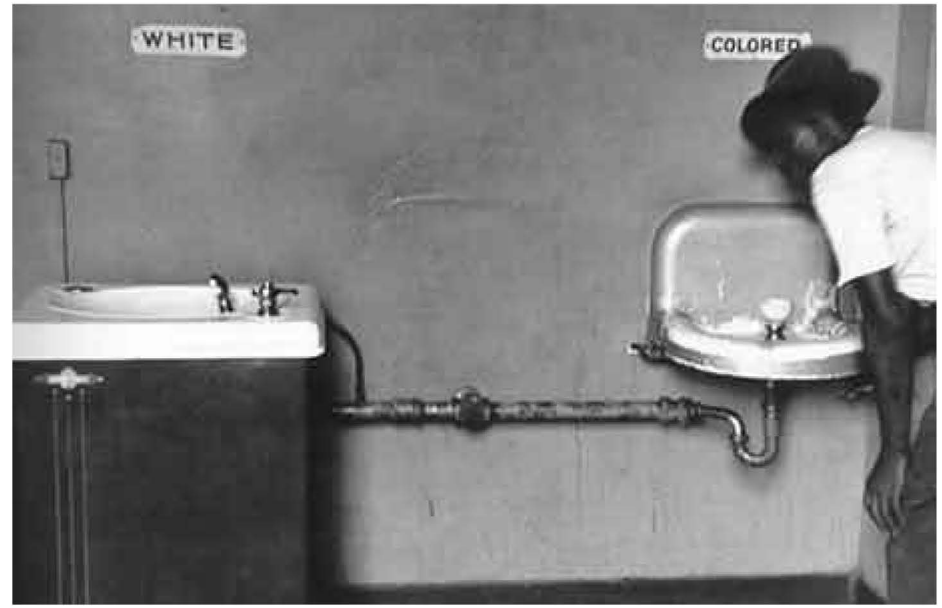
Black Women Leaders In The Civil Rights Movement Era And Beyond

Judge Ketanji Brown Jackson

Presented at the University of Michigan School of Law

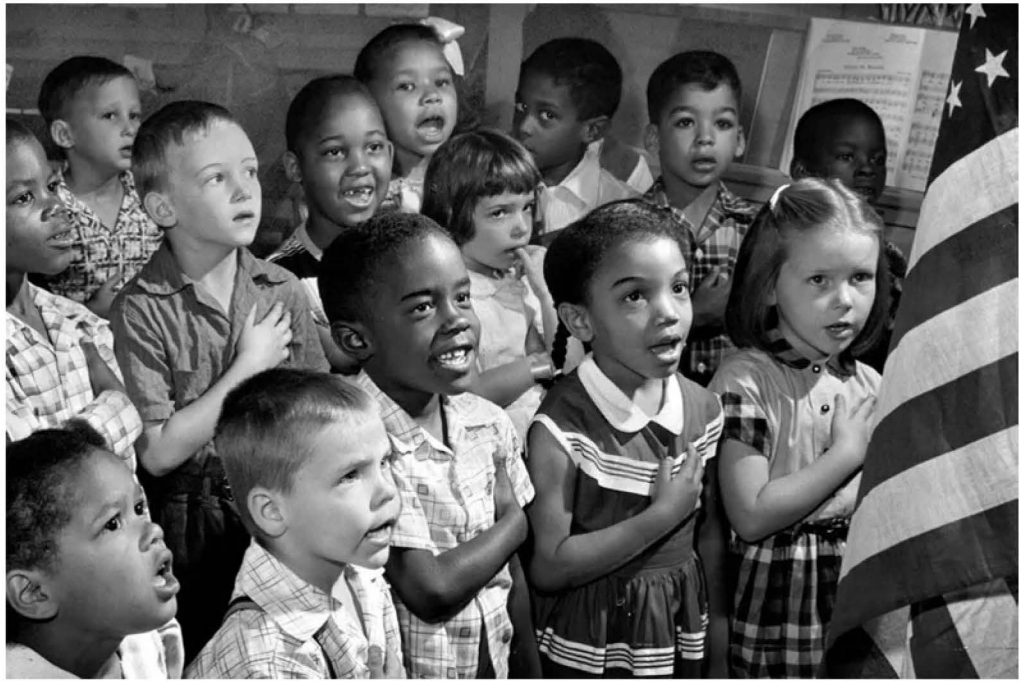
Martin Luther King Day Event, January 20, 2020


COLORED
WAITING ROOM
PRIVATE PROPERTY
NO PARKING
Driving through or Turning Around
BINGO TONITE!
Good Housekeeping
True Story
HITLER'S LOVE LIFE REVEALED
BY HIS FORMER MAID
FAITH BALDWIN'S
HAWAII
Cosmopolitan
COACH COMPANY
45


WHITE
COLORED


IMPERIAL
LAUNDRY CO.
WE WASH FOR
WHITE PEOPLE ONLY






10
3 0 0
4 0 0


WE DEMAND
EQUAL RIGHTS NOW!
WE MARCH FOR
INTEGRATED SCHOOLS NOW!
WE DEMAND
DECENT HOUSING NOW!
WE DEMAND
AN END TO BIAS NOW!









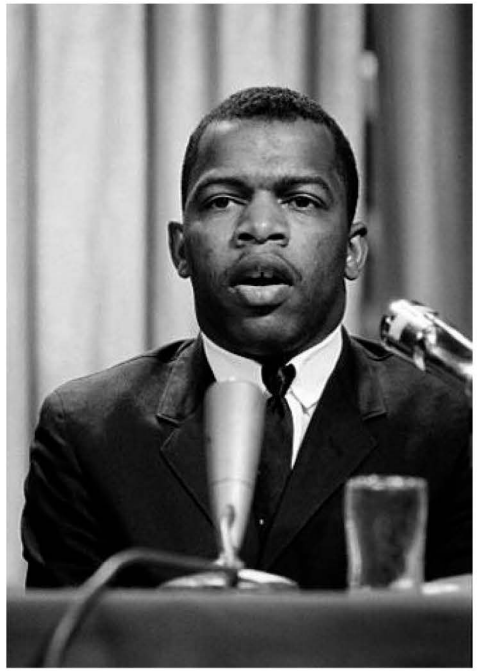

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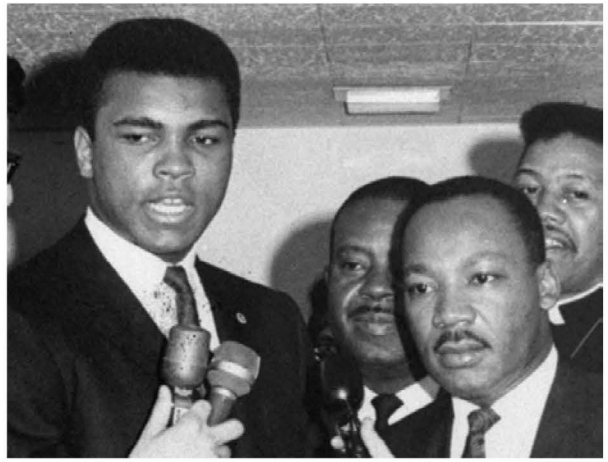


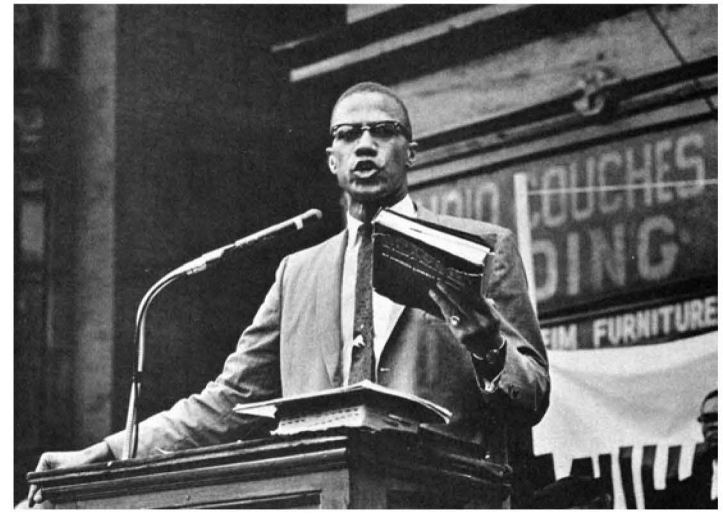



PAN AM








DING
FURNITURE








YOUNG
ADULTS
D.C. Chapter
Be One


Don't BUY
HERE
THIS STORE
PRACTICES
Racial
DISCRIMINATION

Propelling Change Through Organization, Mobilization, and Collective Action










TOYS


FREE
RIDE










FOUNTAIN
CLOSED
IN
INTEREST OF
PUBLIC
SAFETY


DONUT


15
BAKERY
FRESH
DONUTS














HELP THE STUDENTS IN THE SOUTH.
DO NOT BUY IN WOOLWORTHS
VILLAGE-CHELSEA NAACP
BOYCOTT
WOOLWORTHS
LUNCH COUNTERS ARE SEGREGATED IN THE SOUTH
VILLAGE-CHELSEA NAACP
egregation
Lives
DIES
SOUTH
NAACP













Dorothy Height





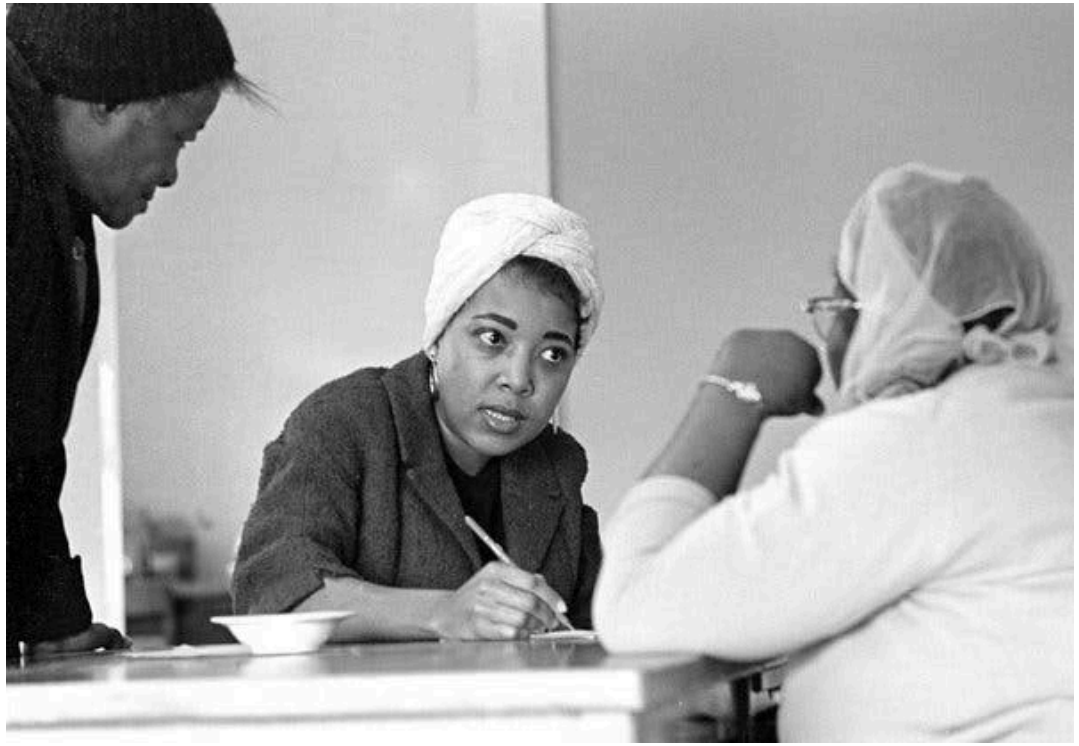
Ella Baker



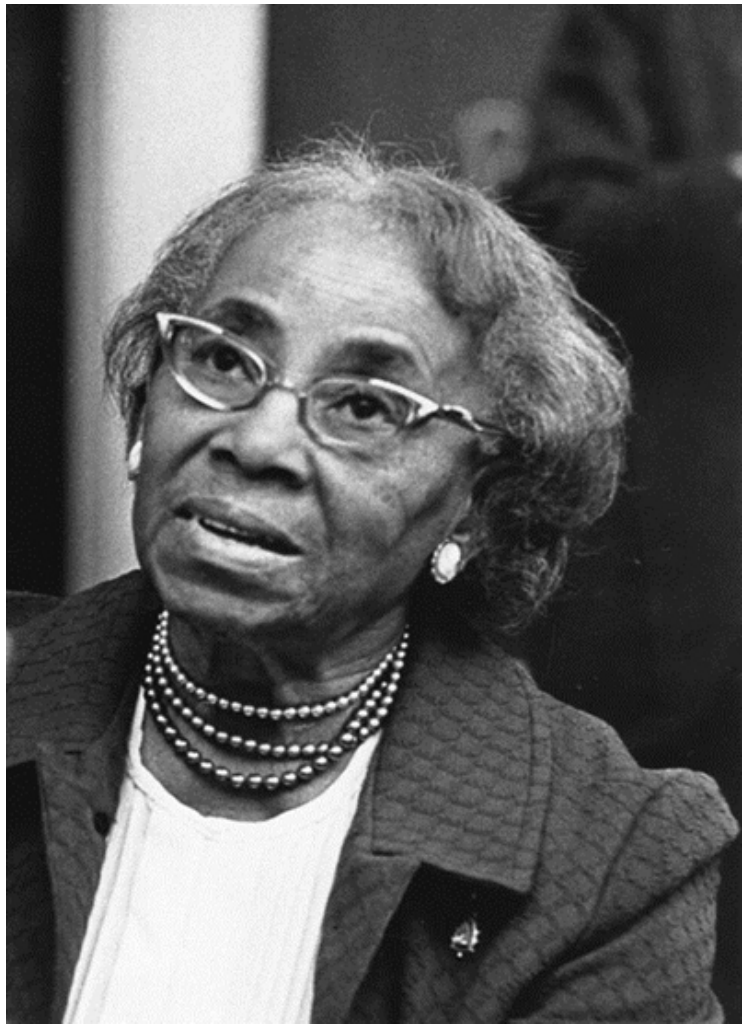


Dorothy Cotton





Septima Clark





Mamie Till Mobley





Josephine Baker





Ruby Dee





Jo Ann Robinson





Diane Nash





Fannie Lou Hamer





Amelia Boynton



Shirley Sherrod





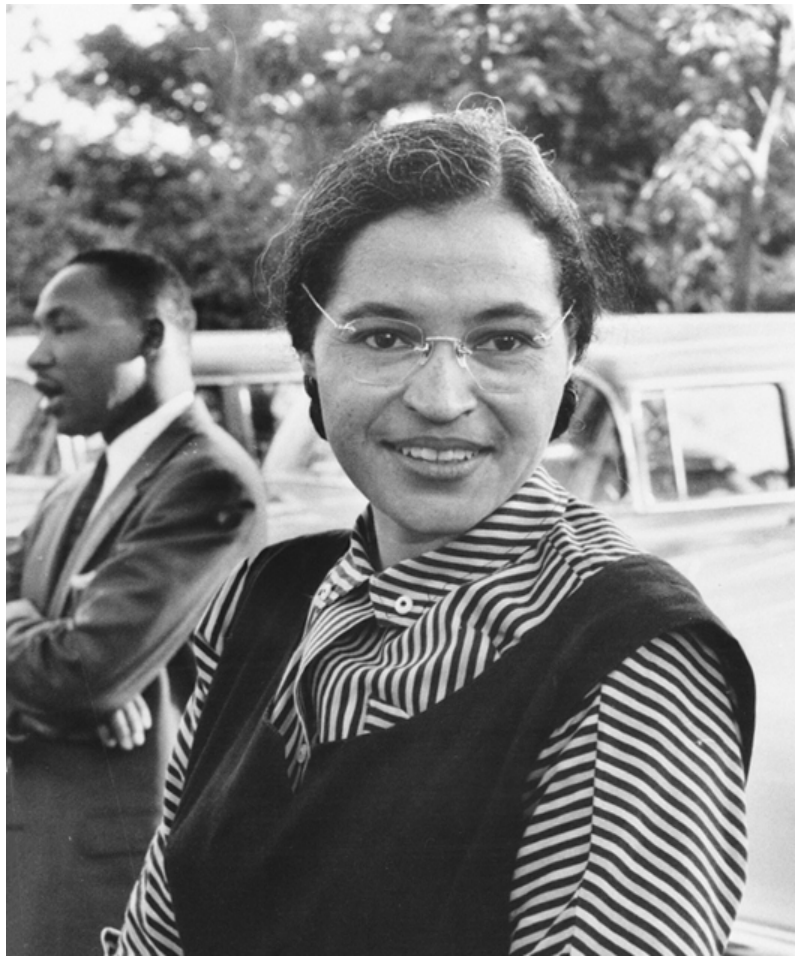
Gloria Richardson





Rosa Parks





Claudette Colvin



Girl, 15, Guilty In Bus Seat Case

MONTGOMERY, Ala. — A 15-year-old girl who refused to move to the rear of a city bus was found guilty in Juvenile court here last Friday on charges of assault and battery, disorderly conduct and with violating a city ordinance which makes it "unlawful for any passenger to refuse or fail to take those seats assigned to the race which it belongs."

The girl, Claudette Colvin, was declared a ward of the state and placed on probation pending good behavior

bus with a Negro woman when a group of white persons boarded the bus. Cleere said he asked both the girl and the woman to move to the rear. He said the woman

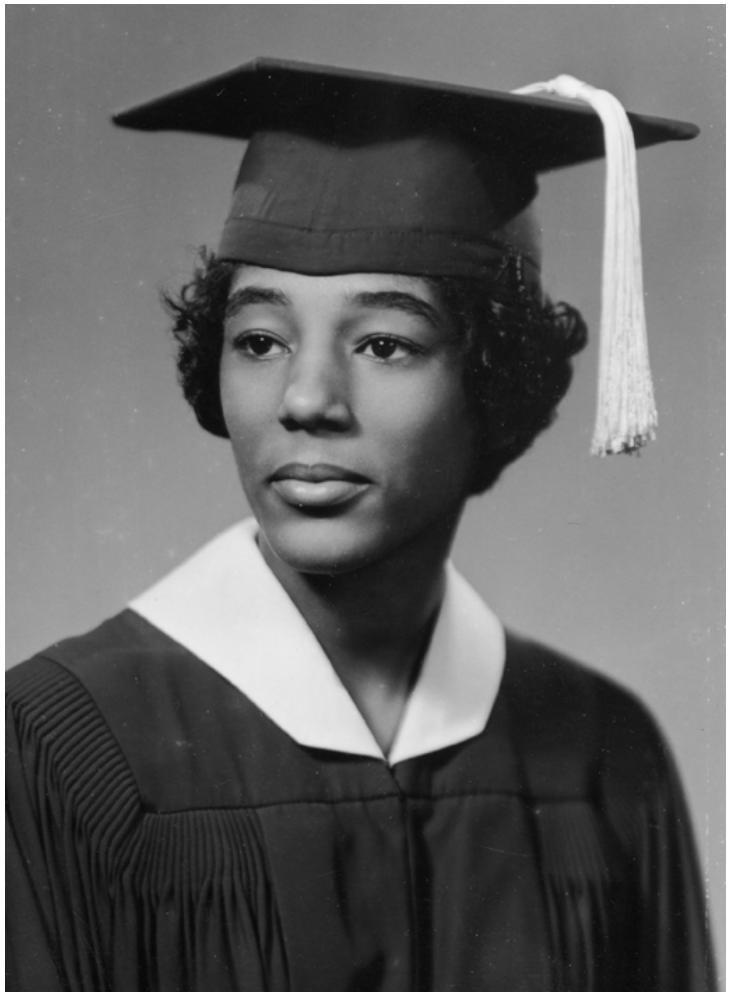
Put On Indefinite Probation

Negro Girl Found Guilty Of Segregation Violation

A 15-year-old Negro girl was ... looking high school student, ac-



Vivian Malone Jones





Winson Hudson





Gwendolyn Zohara Simmons



Ruby Bridges





Georgia Gilmore





Coretta Scott King





Pauli Murray





Dovey Johnson Roundtree





Constance Baker Motley

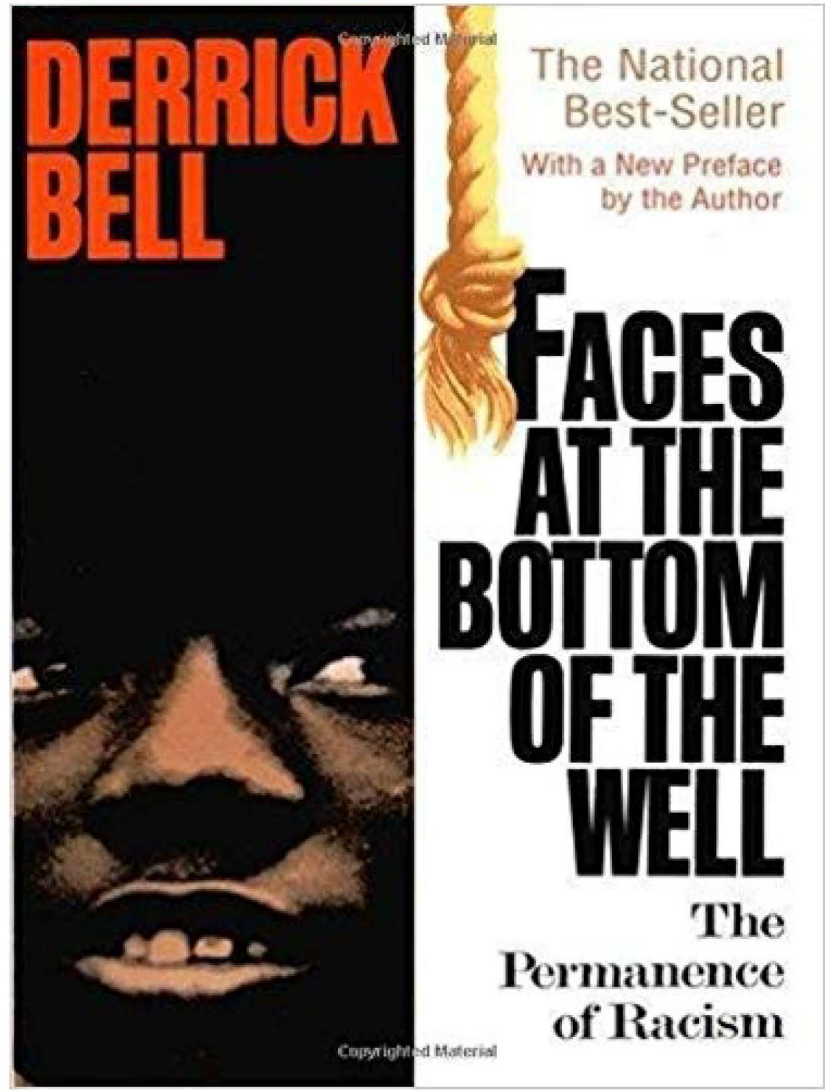




Servant Leadership

Courage // Purpose // Authenticity

Making A Way Out Of No Way


DERRICK BELL
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The National Best-Seller
With a New Preface by the Author
FACES AT THE BOTTOM OF THE WELL
The Permanence of Racism
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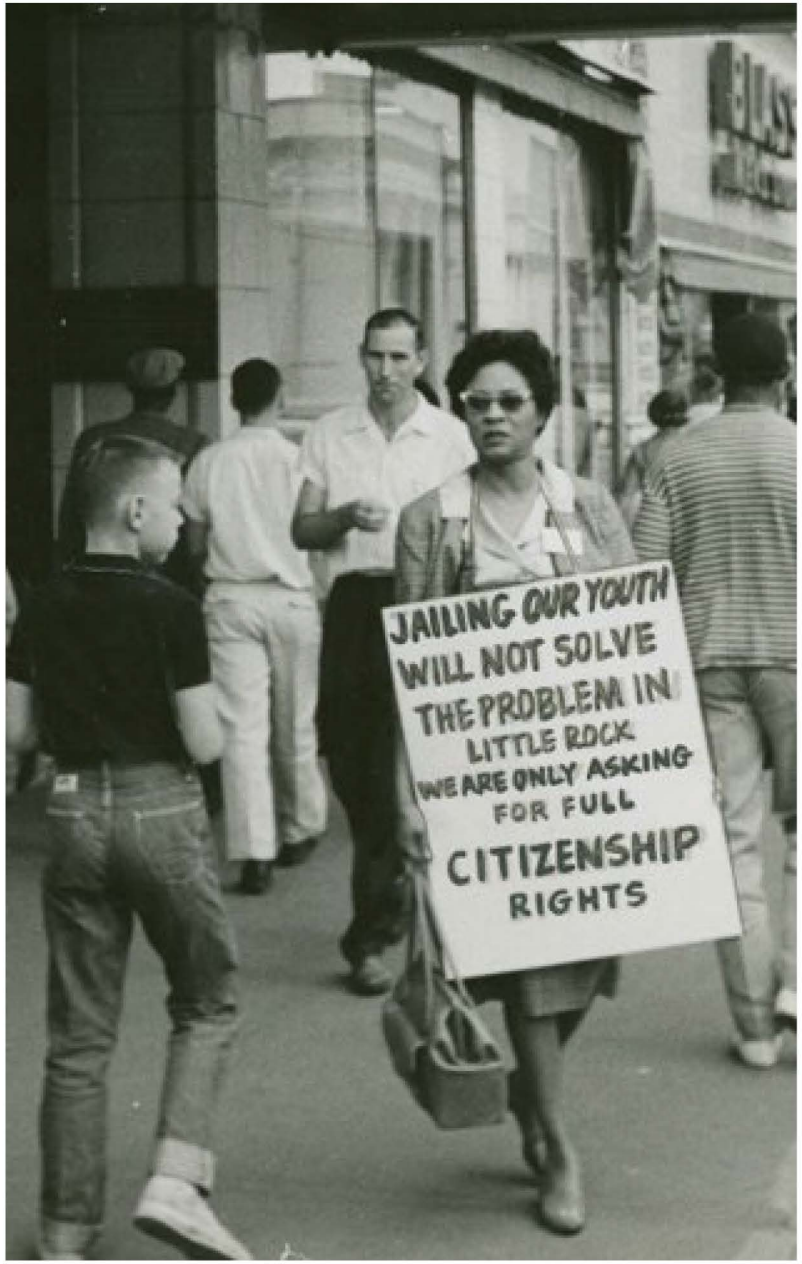


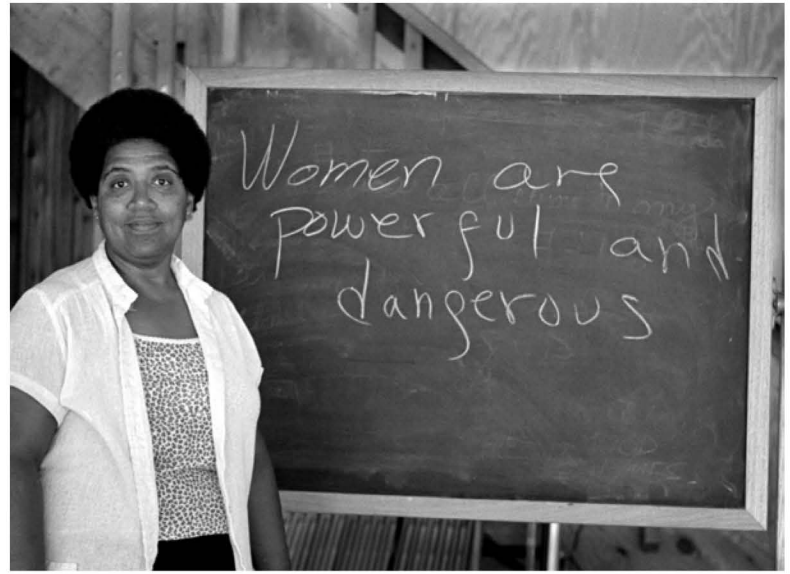









JAILING OUR YOUTH
WILL NOT SOLVE
THE PROBLEM IN
LITTLE ROCK
WE ARE ONLY ASKING
FOR FULL
CITIZENSHIP
RIGHTS


Women are
powerful and
dangerous



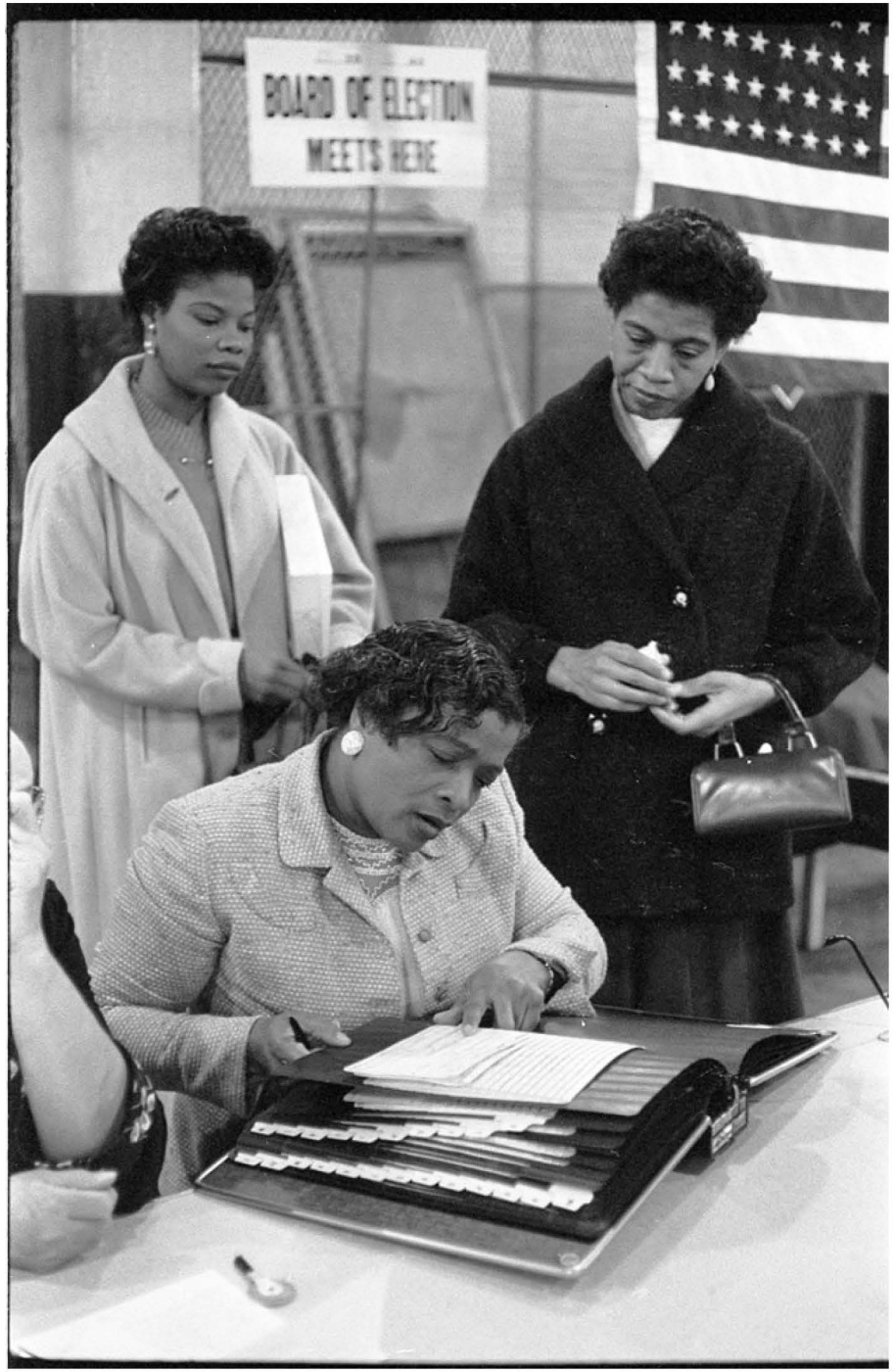

WOOLWORTH
PRACTICES
DISCRIMINATION
IN THE SOUTH
DON'T PATRONIZE!
LOCAL 62
INTERNATIONAL LADIES GARMENT WORKERS UNION
AFL-CIO







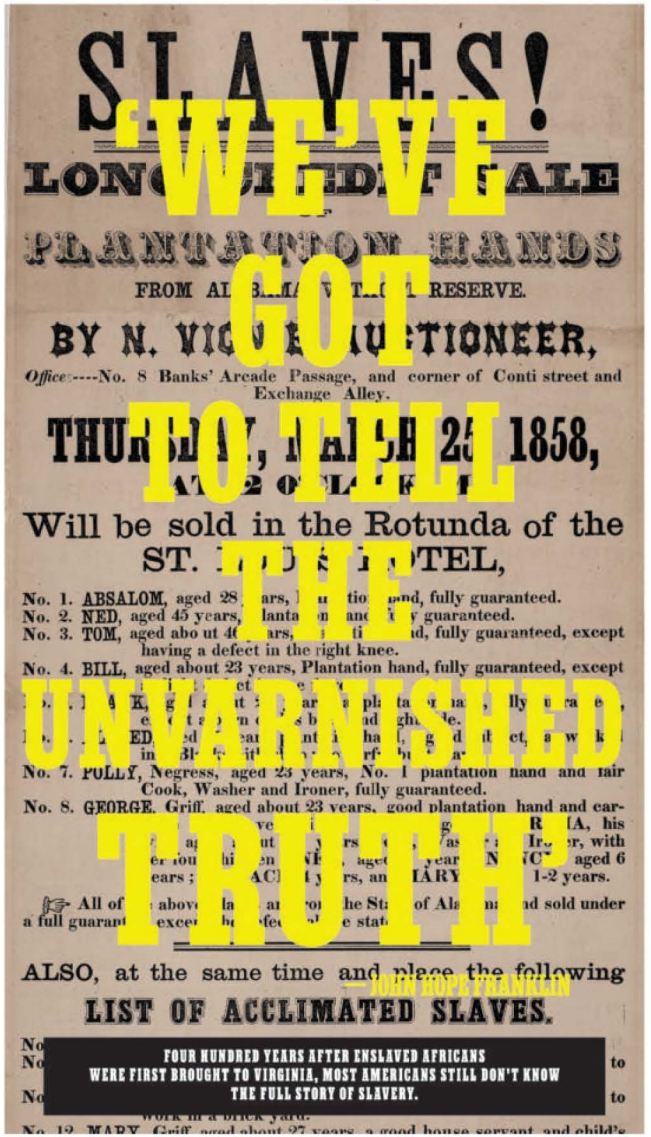



BOARD OF ELECTION
MEETS HERE


VERTICAL
CLEARANCE
14 FT. 10 IN.
EDMUND PETTUS BRIDGE



SUNDAY, AUGUST 18, 2019
The New York Times Magazine
The 1619 Project



'WE'VE GOT TO TELL THE UNVARNISHED TRUTH'

— JOHN HOPE FRANKLIN

FOUR HUNDRED YEARS AFTER ENSLAVED AFRICANS WERE FIRST BROUGHT TO VIRGINIA, MOST AMERICANS STILL DON'T KNOW THE FULL STORY OF SLAVERY.

































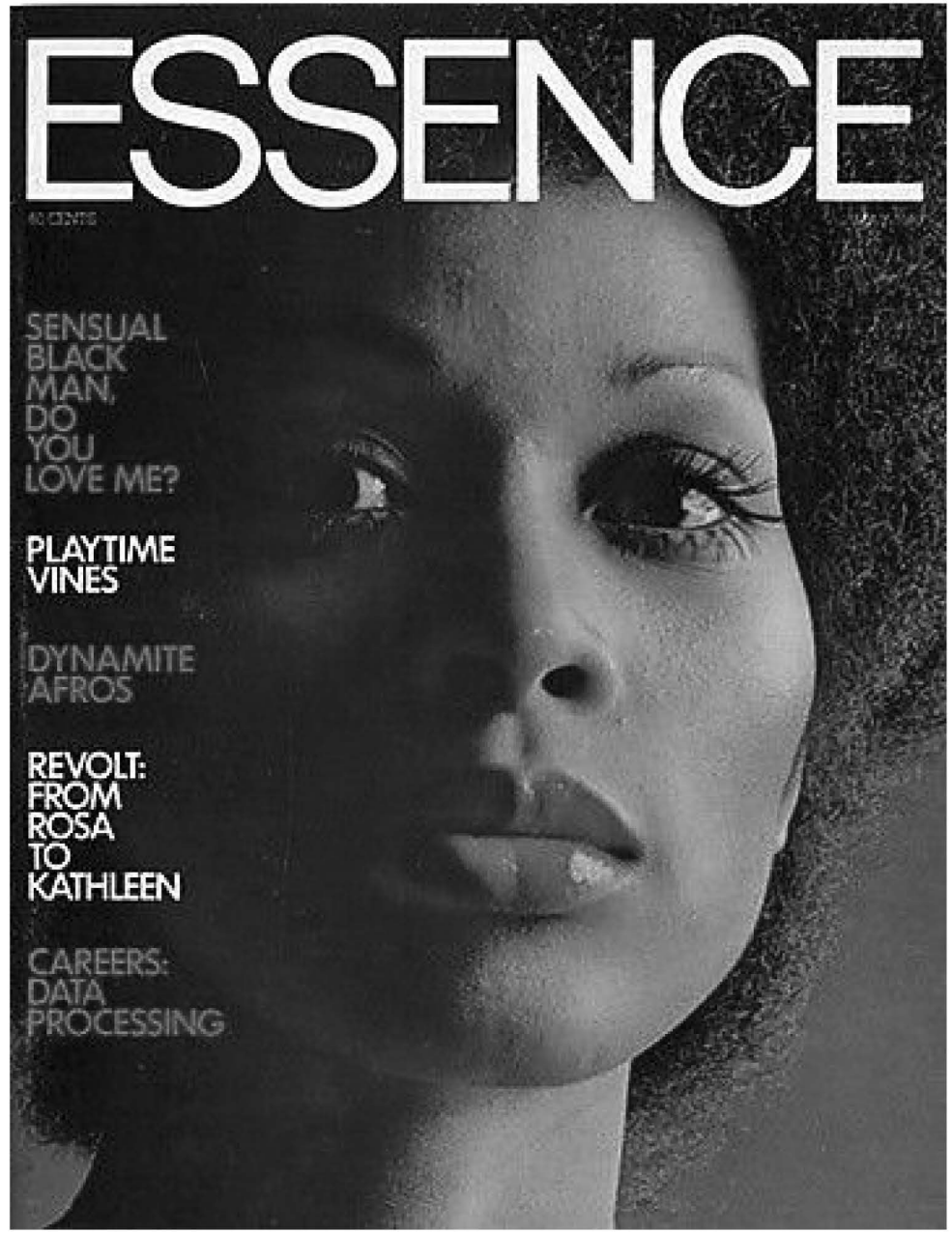











ESSENCE
60 CENTS
SENSUAL BLACK MAN, DO YOU LOVE ME?
PLAYTIME VINES
DYNAMITE 'AFROS
REVOLT: FROM ROSA TO KATHLEEN
CAREERS: DATA PROCESSING



THE END

The Hon. Ketanji Brown Jackson's MLK Day Lecture Honors Black Women Leaders in the Civil Rights Movement



Michigan Law Associate Dean Daniel Halberstam introduced The Hon. Ketanji Brown Jackson ahead of her Martin Luther King Jr. Day lecture at the Law School by listing a few of her many accolades.

She clerked for three federal judges, including Associate Justice Stephen Breyer of the U.S. Supreme Court. She served as commissioner and vice chair of the U.S. Sentencing Commission. She was a supervising editor of the *Harvard Law Review*.

Judge Jackson, a U.S. district judge for the U.S. District Court of the District of Columbia, then introduced herself through a different lens during her talk, "Courage // Purpose // Authenticity: Black Women Leaders in the Civil Rights Movement Era and Beyond."

"My parents gave me an African name," she said. "They dressed me in a mini dashiki." Growing up in the 1970s, she was "rocking afro-puffs."

"In a very real sense," said Judge Jackson, "I am a very lucky first inheritor of Dr. King's civil rights legacy. And for that, I am profoundly grateful."

The Law School has hosted speakers in celebration of the Martin Luther King Jr. holiday annually since 1999. Judge Jackson's lecture served as a tribute to the black women who actively participated in the "pivotal events" of the civil rights movement and their legacy—a legacy that has remained largely in the background of history, much like the women themselves.

"Although men were unquestionably the face of the civil rights movement," said Judge Jackson, "commentators have characterized women as its backbone, and to a certain extent, its heart."

Drawing on the research and work of other academics, Judge Jackson spoke to a standing-room-only crowd about the "core characteristics" that black women leaders of that era generally shared and explored the women's motivation for "investing so much in the betterment of themselves and their communities in the midst of a society that did not invest in them."

These characteristics of black women's lives—courage, purpose, and authenticity—contributed to their "cultural preparation for resistance," she said.

According to Judge Jackson, because of the position that black women generally held at the bottom rung of society, their "double or triple" consciousness of race, sex, and class limitations provided the moral clarity necessary to recognize the need for justice, as well as the courage to seek it. Black women's strong cultural bonds and faith gave them the strength to persevere and imbued them with a sense of purpose, and their unshakeable commitment to the ideals of American society could be characterized as a "species of authenticity."

"They knew what freedom meant and they knew it was being denied to black Americans, even as this country purported to promote the core values of liberty and democracy," she said.

Judge Jackson also acknowledged the impact of gender on the recognition of black women's political contributions during the civil rights movement. Calling them the movement's "invisible leaders," Jackson shed light on a few of those women and their work.

One such leader was The Hon. Constance Baker Motley. Judge Motley drafted the original brief in *Brown v. Board of Education*, was the first black woman to argue a case in the Supreme Court, became the first black woman elected to the New York state senate, and was the first black female federal judge in the United States.

As a "point of personal privilege," Judge Jackson had two additional observations to make about Judge Motley.

"First, Judge Motley and I share a birthday," she said. "And now, we both have given lectures at this esteemed Law School on Martin Luther King Day. As you see on your program, it appears she was the first to speak at this event."

The lecture culminated in a 30-minute Q&A session, followed by a reception hosted in the Jeffries Lounge.

Reenactment of *New Jersey v. T.L.O.*







The Perils of Smoking in the Bathroom –

Reenactment of Argument On Student Rights Under the Fourth Amendment

On December 18, 2019, over 160 students from eight DC public schools came to the E. Barrett Prettyman U.S. Courthouse to watch the reenactment of *New Jersey v. T.L.O.*, the landmark U.S. Supreme Court case addressing whether high school students were entitled to protection under the Fourth Amendment from unreasonable search and seizure by school officials. Students from seven D.C. public high schools (Anacostia, Ballou, Banneker, Capital City Public Charter, Dunbar, Roosevelt, West

Education Campus,) and McFarland Middle School participated in the program.

Three current judicial law clerks — Illyana Green, Maxwell Gottschall, and Harrison Stark — and former law clerk Tiffany Wright presented the arguments, derived from the actual transcripts of the oral argument and engaged the students in a discussion about the issues. Judges David Tatel, Sri Srinivasan, and Ketanji Brown Jackson played the roles of the Supreme Court justices and read the majority and dissenting opinions. Afterward, the judges answered a variety of questions raised by the students and posed for photographs with them. The program took place in the Ceremonial Courtroom.

A program highlight: Lois De Julio, the New Jersey public defender who represented the teenage defendant T.L.O., traveled to Washington, D.C. to share with the students her personal experiences and observations about accompanying her young client through this high-profile case.

Lead planners of the program, Society Board members Andrea Ferster, Jack Geise, and Channing Phillips promoted the program to the schools, and developed program materials for the teachers, including an overview of the T.L.O. case for use in the classroom, and Jack Geise visited several classrooms in advance to talk about the Fourth Amendment issues.

Archives

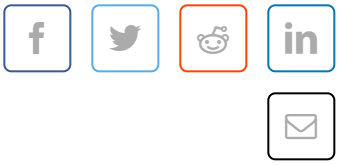
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RISING THROUGH THE RANKS:
A Tale of Hard Work, Big Breaks & Tough Skin

I. INTRODUCTION

Good afternoon – I am delighted to have been invited to spend some time with you, in order to tell you a bit about my background and to give you my very best advice about surviving and thriving in a law firm setting and beyond.

Let me start by thanking Husch Blackwell for giving me this platform; as you may have guessed most of my appearances are in a courtroom and I am usually confronting unhappy people in conflict, so it's quite nice to be gazing out at all of you—to see smiling faces for a change. What I really hope to do is to be helpful to you and to inspire you all to strive for excellence in your work and in your lives. And speaking of excellent, I also want to give thanks to my younger brother, Ketajh Brown for providing that gracious introduction. Ketajh is Husch associate in Milwaukee, and for those of you who do not know him, he has an extraordinary background as a former decorated Army officer and a police detective, and now he's killing it as a lawyer as well. So, even though we joke around with each other and sometimes refer to ourselves 'only children' due to the 10-year age gap between us, I am very proud to be his sister, and as I speak with you this afternoon, I will try not to embarrass him too much.

In addition to giving thanks generally, I would also like to express my gratitude to the Husch folks who nudged me to craft a title for my remarks here this afternoon, which is not something that I ordinarily

do, and I can say that it turned out to be an interesting and helpful exercise. You learn a lot when you try to summarize your remarks in this way, and I abandoned several other possibilities. "My Life" was too bland, and "What You Really Need To Know" seemed too professorial. Ultimately, I reflected on my legal career (which has included stints at several law firms) came up with what I thought was a pretty good balance — "Rising Through The Ranks: A Tale of Hard Work, Big Breaks, and Tough Skin." I think that pretty much captures who I am and what I have experienced as a woman of color in the legal profession. So, what I'd like to do in the time that we have together this afternoon is to give you a sense of that, by laying out my background, and then circling back to those three big takeaways—Hard Work, Big Breaks, And Tough Skin—which I do think are important for professional people of color in law firms and elsewhere to remember and to live by. I am also happy to take questions if we have some time left over at the end.

II. MY STORY

So, let me begin at the beginning—with who I am, and where I'm from, and what I've done.

Early Days

As you might know from the materials and that great introduction, I am Ketanji Brown Jackson; I am 49 years old; and I currently live and work here in Washington D.C. I grew up—with Ketajh—in Miami, Florida, but unlike Ketajh, I was actually born here

in the District, in the fall of 1970. Now, if you think back to your American history classes, you will recall that the early 1970s was the tail end of the Civil Rights Movement, and my parents—both Miami natives who went to segregated primary schools and experienced the Jim Crow South as children—were drawn to the District of Columbia's dynamism during those tumultuous times. After graduating from their respective HBCUs (historically black colleges and universities), they settled in Southeast D.C. and worked as public school teachers until shortly after I was born. Also having come of age during the 1960s, my parents thought it was very important to express their pride in my family's African ancestry when I was born, and they did so by asking my aunt—who was in the Peace Corps in West Africa when my mother was pregnant with me—to send a list of African girl names for their consideration. They selected the name "Ketanji Onyika," which they were told translated into "Lovely One," and for the first 26 years of my life, I was known as Ketanji Onyika Brown. So, I can say that perhaps my earliest life lesson is the pride in my ancestry that my relatively unique name conveys.

Of course, when I sat down with D.C. delegate Eleanor Holmes Norton as part of the confirmation process for my current position, she was less impressed with my name than with the fact that, by birthright, I am a "D.C. native." But, in fairness, I think it is more accurate to brand me as a Florida girl, since my parents and I returned to Miami, Florida—where the rest of my family on both sides lived—when I was three years old, and I was actually raised there. In fact, my earliest

memories are of our apartment in the married students housing complex on the campus of the University of Miami, where my father was a law student. We had returned to Miami so that my father could go to law school there, and even now, when people ask me how I ended up getting into the legal profession, I often tell the story of how, when I was in preschool, I would sit at the dining room table doing my "homework" with my father—he had his law books all stacked up and I had my coloring books all stacked up—and when I think back on those times, there really is no question that that my love of the law began in that formative period. Indeed, it honestly never occurred to me that I would do anything else when I grew up.

And as I am sure Ketajh would tell you, it was enormously beneficial to have been raised by professionals, who themselves worked very hard to provide for our family. My dad (OUR dad) got his law degree and worked, first, as in-house corporate counsel for a series of businesses and then became the principal attorney for the Dade County School Board, while my mom rose through the ranks in the public school system in Miami, starting as a science teacher, then becoming an Assistant Principal, and she eventually served 14 years as the Principal of Miami's premier public magnet school for the Arts. I had a close extended family in the greater Miami area (lots of aunts and uncles and cousins), and I got to spend time with my beloved grandparents, who were never formally educated, but worked very hard—manual labor—to ensure that their children and grandchildren got education and opportunities that they did not have.

When Ketajh was a baby, and I was in high school, we lived in a suburb of South Miami, and I went to a very good public school that gave me a strong academic foundation. I got involved in student government, becoming President of my large high school class (800+ students strong) my senior year—go Panthers! But my primary extracurricular activity was Speech and Debate, which is sometimes called forensics, and it was an experience that I can say without hesitation was the one activity that best prepared me for future success in law and in life. An extraordinary woman named Fran Berger was my coach and mentor, and she had an enormous influence on me. In addition to being like a second mother on team trips, she taught me how to reason and how to write, and through forensics I gained the self confidence that can sometimes be quite difficult for women and minorities to develop at an early age. I have no doubt that, of all the various things that I've done, it was my high school experience as a competitive speaker that taught me to *lean in* despite the obstacles—to stand firm in the face of challenges, to work hard, to be resilient, to strive for excellence, and to believe that anything is possible.

Competitive speech and debate was also the experience that literally paved the way for me to go to a great college. Our team travelled a fair amount to various meets and competitions, mostly within the state of Florida, but one of the few national debate tournaments that we went to every year was at Harvard. In February. Now, I don't know if any of you have ever been to Cambridge, Massachusetts in February, but I can tell you first hand, that being

there at that time of year is not an easy for a Miami girl! But I loved it. I loved everything about it, and when I applied to Harvard for college—and got in—I knew that there was no place I'd rather go. I matriculated there in 1988 and continued as an undergraduate student there through 1992, despite the unbearable winters. And it was unquestionably the right place for me—I had fabulous friends, took challenging courses, and participated in a range of interesting extracurricular activities, including drama and musical theater, during which I made several notable connections. Among them, comedian and commentator Mo Rocca, who played Seymour Krelborn in a *Little Shop of Horrors* production my freshman year in which I played a 'doo-wop' girl, and Matt Damon, who was assigned to be my scene partner during a drama course we took together one semester (as a side note, although I was pretty good, I doubt he'd remember me now).

In any event, while at Harvard, I also met and dated my first serious boyfriend, who later became my husband, and to whom I will be happily married 20 years this fall. It's interesting because my husband is a quintessential "Boston Brahmin"—his family can be traced back to England before the Mayflower and has been in Massachusetts for centuries; he and his identical twin brother are, in fact, the 7th generation in their family to graduate from Harvard College. By contrast, I am only the second generation in my family to go to *any* college, and I'm fairly certain that if you traced my family lineage back past my grandparent—who were raised in Georgia, you would find that my ancestors were slaves on both sides. In addition, while in college,

my husband was a pre-med science and math student, while I was a full-on government major, so we were an unlikely pair in many respects. But, somehow, we found each other, and we dated continuously for six-and-a-half years—through the end of college and the entirety of his Columbia Medical School experience and my Harvard Law School experience—before we got married in 1996. (In two days, we will celebrate our 23rd wedding anniversary.)

Career Track

Now, I don't know how many of you have already taken the plunge into marriage, and it is a wonderful thing, but it does require some compromise, and sometimes one has to make sacrifices in the professional realm. In my case, although I knew I was interested in criminal law and would have liked nothing more than to go directly into public service out of law school, as a newlywed, I also realized that I needed to pay rent and bills and pay off law school loans, so I did what many young lawyers do—I joined a law firm. In my case, it was actually a series of law firms: in 1998, fresh off of my clerkships with the Honorable Patti Saris on the District Court of Massachusetts and the Honorable Bruce Selya on the First Circuit, I took a job as an associate at a phenomenal white-collar defense boutique firm here in the District of Columbia, a firm called Miller, Cassidy, Larroca and Lewin. And I am sure that I would have stayed with Miller Cassidy for much longer than the 9 months I worked there, had it not been for the incredible opportunity to clerk for Associate Justice Stephen Breyer on

the Supreme Court of United States, which arose during October Term of 1999. All three of my clerkships were different and interesting, but I being at the Supreme Court was also *amazing*; and even today, I feel so lucky to have had the chance to work inside an institution that has such a significant impact on our lives as Americans, and that few people even get to see, much less be part of.

I did my best while at the Supreme Court—I routinely worked 14 – 16 hour days— and I learned a lot, and as much as I would have loved to stay in D.C. and launch my career right out of my clerkship, I thought it best to accompany my husband back up to Boston for the completion of his residency in general surgery at the Mass General, primarily because at that point was three months pregnant. And so began the delicate balancing that many young lawyers face in their professional lives: how *does* one manage the demands of your career and also the needs of your family?

When we returned to the Boston area, I took a position as a general litigation associate at the large law firm of Goodwin Proctor—and like many young women who enter Big Law, I soon found it extremely challenging to combine law firm work with my life as a wife and new mother. I sincerely hope that law firms today have made changes to address some of the issues that were prevalent in the early 2000s when I was there, and many now have very generous leave and part-time policies which help. As for me, I arrived at Goodwin about 7 months pregnant, and my first daughter, Talia, was born a few months

after I starting working there. The firm was generally very supportive of the idea, but I do not think it is possible to overstate the degree of difficulty that I faced as a new mother in the law firm context. The hours were long; the work flow was unpredictable; I had very little control over my time and schedule; so I quickly started to feel as though the demands of the billable hour were constantly in conflict with the needs of my child and my family responsibilities. I do want to be clear—this is *not* an indictment of Goodwin Procter in particular; it's a great law firm—it just appears that, at least back then, the *nature* of big firm law practice was difficult to manage when you have a young family, no matter how nice the firm's partners were. To be sure, there were plenty of women who managed to make it work—some were quite well-suited to the pressures, in fact—but I discovered early on that I was not.

And, unfortunately, researchers have discovered that I am not alone. A report published by the National Association of Women Lawyers in 2015 studied women's experiences in large law firms, and the statistics are bleak. For example, the survey found that, while 50 percent of the graduates of law schools each year between 1990 and 2015 were women, "only about 15 percent of law firm equity partners and chief legal officers have been women[,]" despite substantial recruitment efforts by law firms over the past two decades.[1] For some reason, there are more male associates than female associates in the

[1] Lauren, Stiller Rikleen, "Women Lawyers Continue To Lag Behind Male Colleagues," Summary of the 2015 NAWL Ninth Annual Survey, at 1.

U.S. offices of major law firms to begin with, and when it comes to rising through the law firm ranks, the NAWL survey showed that, of the total number of non-equity partners who graduated from law school in 2004 or later, only 38 percent are women, and the number of female equity partners remained essentially flat between 2005 and 2015.[2]

Drilling down even further, the survey announced that "virtually no progress has been made by the nation's largest firms [in the past 10 years] in advancing minority partners and particularly minority women partners into the highest ranks of firms"; and indeed, the few minority women who advance continue to play the role of "pioneers" because "minority lawyers are not achieving partnership at the rate they are entering law firms."[3] Specifically, according to the report, "[l]awyers of color"—male *and* female—"constitute only 8 percent of law firm equity partners" nationwide, and "among this [already] small percentage of equity partners of color, even fewer are women."[4] And the report put these statistics into a concrete context—it noted that "the typical [large] firm has 105 white male equity partners, seven minority male equity partners, 20 white female equity partners, and two minority female equity partners."[5]

And I suppose statistics such as these regarding who remains in the top-tier of law firms are not all that surprising when one considers research that has been done about the experience of minority women in

[2] *Id.* at 2-3, 6.
[3] *Id.* at 6.
[4] *Id.*
[5] *Id.*

many big law firms. The cover story of the March 2016 addition of the ABA Journal featured one such study, in a story that was entitled "Invisible Then Gone." The ABA discovered that, in many law firm environments, minority women lawyers are often left alone, without mentorship, to idle in stagnant practices. And as a result, some feel excluded from the centers of power and influence within the firm; the ABA reported that a whopping "[85%] of minority female attorneys in the United States will quit large firms within seven years of starting their practice."

Now, it is certainly true that causation is always difficult to ferret out meaningfully, but the report from the NAWL highlights specific statistics that hint at some of the potential causes of the law firm retention problem with respect to women overall. Specifically, the report notes that "the typical female equity partner earns [only] 80 percent of what a typical male partner earns."[6] Similarly, although the total hours women equity partners work actually exceeds those of their male counterparts, the data suggests that committee assignments, hourly billing rates, and the distribution of pro bono hours contributes to disparities in actual client billables, such that "[t]he typical woman equity partner ends up billing only 78 percent of what a typical male equity partner bills."[7] And, of course, the lower billables have a direct impact on women partners' take home pay: a survey from December of 2018, which reviewed the responses of more than 1,400 lawyers at the

[6] *Id.* at 3.
[7] *Id.*

largest law firms in the U.S., revealed a 53% gap between the salaries of women law firm parties at top firms and their male counterparts.[8]

In addition to the disparities in compensation and work load in the top tier of the law firm hierarchy, the NAWL report from 2015 identified barriers to the advancement of women at lower levels of firms; obstacles such as the lack of top-tier women who are in a position to serve as role-models and mentors, and firm cultures that isolate women associates and prevent the advancement of those who negotiate part-time or reduced-hours schedules. And according to researchers who study retention rates, all this might explain why large numbers of women move away from big law firm practice each year, and, at the very least, it "suggest[s] that women may be turning elsewhere for greater professional fulfillment."[9]

In my case, it was the *inflexibility* of the work schedules and assignments that became the deal-breaker as I struggled with being a young mother in a big law firm. Everyone has to make their own choices, and I do realize that you are here with a firm that is committed to doing what it takes to support and promote diversity—I will talk more about that in a bit, and you are quite lucky in that respect. For me, being a young woman associate and mother in a big law firm presented insurmountable obstacles, and taught me some hard, but important, lessons about who I am and what I needed out of law

[8] Elizabeth Olson, "Female Law Partners Face 53 Percent Gap, Survey Finds," Bloomberg Law, Big Law Business (Dec. 6, 2018)
[9] 2015 NAWL Ninth Annual Survey, at 2, 3.

practice. For example, I learned that, as much as I had enjoyed developing trial-practice skills—and, in my mind, I had many Perry Mason moments—if I was going to make life as a lawyer work for me and my family, I needed to use my legal skills in a more predictable, more controllable working environment, and also one that permitted me to thrive in a context that I truly enjoyed. *That* was a realization for me—the understanding that if I was going to leave my baby and go to work outside the home, I needed to find a job in which I could use my law degree to do work that I found fulfilling and that was also compatible with the needs of my family. And armed with that realization, I then began what I can only characterize as a professional odyssey of epic proportions.

As anyone who knows me well can tell you, there were a number of years in which I literally moved from job-to-job-to-job! Looking back on it now, I suppose that it might have made more sense for me to take the time to do the research, finding one great position and sticking with it over the next decade or so, but instead, I guess you can say I was something of a 'professional vagabond,' moving around from place-to-place, as my family's needs and circumstances changed. There were times when we lived in Boston and times when we lived in D.C. There were times when I went into government—for example, I worked on the staff of the Sentencing Commission, and later as an Assistant Federal Public Defender here in D.C. And there were times when, primarily for financial reasons, I went back into private practice, but I did so at a more senior level than in the early days, and by that time, I had become

an appellate lawyer, rather than a trial lawyer, which meant that I had discrete, manageable projects that could be handled without a lot of travel, and I worked with the same core group of great people, so there were few, if any, surprises.

In fact, by 2007, I thought I had finally nailed it—the perfect combination: I was doing challenging and interesting work as an Of Counsel in the D.C.-based Supreme Court and Appellate practice group of a wonderful California law firm called Morrison and Foerster ("MoFo" for short). Being a MoFo lawyer meant that I could support my family financially, and by doing appeals and opting out of the partnership track, I still had some control over my schedule. And I was at MoFo for a little more than 2 ½ years, perfectly content, when my circumstances got even better—in 2009, the White House called, and I got the chance to be considered for nomination to a fulltime seat on the United States Sentencing Commission, the judicial branch agency in which I had worked as a staffer just a few years before.

Now, as I am sure you can guess, this was, for me, the opportunity of a lifetime. And it was well worth the extremely nerve-wracking nomination and confirmation process—I actually taught myself to knit as a way to channel my nervous energy during that time (if anybody wants a scarf, I'm your source!). Many yarn skeins later, in February of 2010, the Senate confirmed me and the President appointed me as a Vice Chair of the Commission, and I was back working in an agency that I had previously been a part of, among the extraordinarily talented

and committed group of people who staff the Commission—which is an agency that really is a model of good governance. As many of you may know, the Sentencing Commission is a bi-partisan, independent agency here in the judicial branch that Congress has tasked with the responsibility of developing federal sentencing policy. From my perspective as a Commissioner, it was sort of like being part of a vibrant think-tank, and I was grateful for the time that I got to spend analyzing federal sentencing, which is a dynamic and fascinating field.

Being on the Commission also paved the way for me to be considered for an appointment as a United States District Judge—an appointment process that began in the early winter of 2012. I spent most of the winter, spring, and summer in the vetting process, and was formally nominated by President Obama in September of 2012—just two months before the presidential election that would determine whether or not I would actually be able to take the bench. Now, I need to pause here to make sure that you fully comprehend how stressful it was for me to have been given a shot at my dream job—being a federal judge—but to have my chances of actually getting that job hinge on circumstances that were completely out of my control; specifically, whether or not the country voted to reelect President Obama. When you add to this the fact that I am related by marriage to then-Representative Paul Ryan—who was running for Vice President of the United States at that very moment, *against* President Obama—you get the sense of what that period of time was like for me. I don't really know how to describe it except to say that I started so many scarves I

could have outfitted a small Army. And on election night, in November of 2012, I spend every penny that I had getting a variety of services at the one place I knew would have no phones, no internet and no television access—Elizabeth Arden's Red Door Spa.

Well, I am happy to report that all's well that end's well; I was confirmed by the Senate in March of 2013, and I was able to take a seat among the fabulous judges on the federal District Court bench that spring. And I can say with confidence now six and half years later that I really do love my job. I am very busy with a number of complex cases, and even more so in recent months, but I am also VERY satisfied with my work, and my life. And I guess you could say that my center of gravity on the work-life balance continuum has actually shifted—I probably work even longer hours now than I did at the firm, but my kids are older, which helps, and the cases are mine. I care deeply about reaching the right result and doing my best to render reasoned rulings for the benefit of the people who come before me.

So that's my life right now: I am doing work that is challenging, and interesting, and important, and work that I care about enormously. I feel very honored to have this opportunity. But make no mistake: what I do is not *easy*. On any given day, I have more than 200 cases that I am responsible for adjudicating, and some of them have substantial implications for the law and our society. In this regard, then, you can say that my life story is the quintessential example of the

first of my three takeaways for you all, which, as you know from the title of this address, is "hard work."

III. TAKE AWAYS

Hard Work

It really shouldn't come as much of a surprise to any of you that I am telling you that you need to work hard. If anyone has joined the legal profession expecting to be a seasonal performer, working when you want to, on your own schedule, traveling around, eating bon bons, I regret to inform you that you've taken the wrong fork in the road on your professional journey. Hard work *is* the nature of our profession. And I am not just talking about how hard it is to interpret and apply the law; I am talking about the self-discipline and sacrifice that it takes to be at the top of what is, essentially, a service profession. I personally developed the necessary attitude in this regard way back in high school—remember when I said that I was in speech and debate and how important that period was in my development? What it really meant to be a nationally-ranked orator was that while other kids were hanging out late going to parties, I was either writing or rehearsing my speech, or sleeping ahead of a 5 AM Saturday morning tournament wake-up call. And *that* kind of self-discipline and sacrifice has carried through at every stage thereafter, which, if I'm being honest, has made me kind of boring, but has also allowed me to have opportunities that my grandparents could not have even dreamed about.

So, if I had to whittle it down to only one piece of advice for each of you in the context of the firm, especially as people of color, it would be this: *commit to being a hard worker and to being perceived as such*. I have given that advice to probably hundreds of young lawyers at this point, and sometimes I say it this way: do your best work for every partner, on every assignment. And that will not be easy; believe me, I know what it's like to be tasked with something that you'd rather not have to do, and I have actually been affiliated with entire practices that did work that I had absolutely no interest in. But the people with whom I worked would never have known that. Why? Because it was important to me to be seen as a person who worked hard and was good to work with. As young black woman with a funny name, I *already* stood out in the law firm context, and so I invested heavily in doing what was required to build my brand within each organization I worked in.

You can, and should, do the same. Think of your professional self as a product, and you are out there in the marketplace: what do you want people to associate with you and your brand? I chose "hard worker," and I did what I could to reinforce that perception in the minds of the people with whom I worked. It meant that I was often the first one in the office and the last one to leave. And it meant that I presented myself as always eager to get new assignments, and to help my co-workers, enthusiastically, in any way I could. And as I worked hard, through the late nights and difficult times, I was still very grateful to be able to work with experienced lawyers, and I also kept in

the back of my mind a few verses from one of my favorite poems, *The Ladder of St. Augustine*, which was written by Henry Wadsworth Longfellow. Anyone who has a difficult and demanding job would do well to remember what Longfellow observed:

> Saint Augustine! well hast thou said,
> That of our vices we can frame
> A ladder, if we will but tread
> Beneath our feet each deed of shame!
>
> All common things, each day's events,
> That with the hour begin and end,
> Our pleasures and our discontents,
> Are rounds by which we may ascend.
>
> * * *
>
> We have not wings, we cannot soar;
> But we have feet to scale and climb
> By slow degrees, by more and more,
> The cloudy summits of our time.
>
> * * *
>
> The heights by great men reached and kept
> Were not attained by sudden flight,
> But they, while their companions slept,
> Were toiling upward in the night.

I hope you will remember that the commitment to toiling upward, by slow degrees, rung-by-rung, is the key to success in this business. Try to think of your hard work as a chance to gain and practice new skills and an opportunity to build your brand. If you approach each

case and assignment with your own reputation in mind and with a sincere interest in doing the work that it takes to get better at whatever it is that you are called upon to do, you will go far.

Big Breaks

My second takeaway, for those of you who are keeping track, is "big breaks" and I will tell you, in all honesty, that hard work alone is not going to be enough to ensure your success as a lawyer. What I wish I knew (but didn't), when I was coming out of law school and working as a young associate, was how much of one's future success depends on *who you know*; in fact, as it turns out, it is *often* the connections that you make with other people that lead to your being in the right place at the right time so that you can take advantage of new opportunities. I hope you heard *that* aspect of my story as well; I am the first to say that, in addition to my hard work, the connections that I made and sheer luck played a significant role at numerous points along my professional journey.

And to be honest, it actually started from the very beginning—I was extremely lucky to be born into a family that valued education, and also lucky to have parents who did what was necessary to make sure that I was prepared to take on the academic rigors of an elite college and law school. And, for *all* of us, just being a lawyer is a lucky break, especially when you think of the many talented kids and young people who look like us and whose life circumstances are such that they never have an opportunity to get a good education or to graduate from college or a professional school. In my current job, I often deal with people who

actually had very little shot at doing anything other than making terrible decisions like getting involved with gangs, and drugs, and other criminal behavior—I have to sentence them—and I sometimes think: wow, that could so easily have been me. Or as my grandmother would have put it, "there but for the grace of God go I!" We should all feel like the recipients of a big break in life because we have law degrees and hold important well-compensated positions in the legal profession.

This gift carries with it the responsibility to do what we can to extend our good fortune to others. In my faith tradition it is said that to whom much is given, much is expected. I take that to mean that we who have benefitted have a responsibility to give back to our communities in whatever way we can, and I feel very strongly about that obligation. In the law firm context, giving back often means doing some pro bono work, and I encourage you to find time and room in your schedules to take cases that involve the representation of indigent civil or criminal litigants. Paying clients are not the only clients out there, and many firm lawyers say that their fulfillment as a lawyer comes from using their skills and talents to help those most in need.

I also happen to believe that the big break that you have received—that is, your being a lawyer with a great law firm job—requires you to do what you can within the law firm to be as successful as possible and to maximize your chances of advancement. Now, I have occasionally crossed paths with lawyers who are content to be mediocre; they are fine with their lot in life, wherever things stand, and don't really feel the need to progress. If that's you, then, the rest of this

takeaway is inapposite, because right now, I am talking to the strivers: those who recognize that they have been handed a special opportunity that not many people get, and that they have a responsibility to make the most of it—and by that I mean, doing what is necessary to position yourself for the climb, so that, eventually and as luck would have it, you can get even better opportunities.

One thing you can do right now in this regard is something that I have already suggested: networking. Always remember that people with power know each other, and so going to receptions and bar events and meeting people can be very important in terms of your ability to advance. Figure out what kind of law you really want to practice and make sure to attend related conferences and presentations and meetings. And when you are there, talk to people; tell them what you do; be a self-advocate. Also, when you're back at the firm, try to position yourself for new opportunities, for example, by finding partners who do the kind of work you want to do and going to them to ask for work. Believe me, they will find your enthusiasm for their practices charming and, hopefully, endearing, and will be more likely bring you on board to work with them than if you had stayed in your office waiting for the phone to ring. And, of course, once you get that assignment, you have to do good work for the client and for that partner—even if they never work with you again, if you impress them, they will remember you and can help to facilitate your next big break.

When I think about how networking works, I go back to the one big advantage that I think we have as minority lawyers in a big law

firm setting—we are unusual; we stand out. And being memorable can really work for you if you know how to take advantage of it. If you do a bad job, being memorable is a problem, but if you do good work, then the people you work with—who could very well have underestimated you to being with—will remember your contributions and advocate for you in the future.

The second thing I would encourage you to do in the context of the firm is to seek out both mentors and sponsors. These are different things and you should know the difference. A mentor is a person who will teach you the ins and outs – they will train you – perhaps they are a senior associate who is on a project that you are working on, or a young partner who will give you frank feedback and will help you learn what you need to know in terms of getting the work done well. I attribute some of my writing style today to a mid-level associate I worked with at Goodwin Proctor who would print out my memos and take a red pen to mark up and remove all of the passive voice in every place he saw it. He was like the grammar police— I sometimes still see his markings in my head when I write—and I ultimately really appreciated that! *That* is mentor.

A sponsor is someone with power at the firm who takes you under his or her wing and essentially claims you as one of his own, whether you are working directly for him or not. This person might not know the day-to-day details of your work, but they help you to navigate the firm dynamics more broadly and with a few well-placed phone calls, can make sure that you are not getting overlooked. One of my good friends,

who is a law professor and who consults with law firms on diversity issues, describes a sponsor as that established partner whose best friend from law school has a kid who joins the firm, and when the best friend calls and says, 'hey, junior is coming to your firm!" and the partner says, "great, I'll look out for him"! *That's* a sponsor. Junior might not work for him directly, but he has his eye out for what good opportunities there might be for Junior to learn and advance. He'll make it known that he is looking out for Junior; will help Junior avoid pitfalls and problems; and will generally take care of him when it comes to the dynamics of the workplace.

Sponsors are not easy to find, especially for associates who don't walk in the door with those kinds of connections, but they worth their weight in gold if you have one. Indeed, my friend, who does diversity consulting, is of the opinion that if each partner at Husch or any other firm made a personal commitment to sponsor one associate of color in this way, it would make a *huge* difference in terms of the lived experiences of young minority lawyers in big law firms. So on her behalf let me use this opportunity to carry the water for that idea: if you are a senior associate or partner, consider sponsoring an associate of color; your doing so could very well be the big break that that associate needs to progress in the firm at this point in their career. And if you are an associate and you think that you might want to stay at the firm for a while, look out for such a person, try to develop that kind of relationship, and perhaps even consider switching departments to be linked with a sponsor who has committed to looking out for you.

In any event, remember that hard work is only one piece of the success puzzle in a law firm setting—it also takes solid professional relationships, and good advice and counsel—so I encourage you to begin to start making the connections that you will surely need to rise through the ranks of the firm.

Tough Skin

The third and final takeaway is the most difficult to articulate, and the one that I think might ultimately might be the hardest for some folks to follow. Let me start by saying that I recognize full well that I have something of an advantage when it comes to the quality that I am about to encourage you to have, because I sincerely believe that the greatest gift that my parents bestowed upon me at a very early age is think skin. As a dark-skinned black girl who was often the only person of color in my class, club, or social environment, my parents knew that it was *essential* that I develop a sense of my own self worth that was in no way dependent on what others thought about my abilities. My parents actively and intentionally built me up from a very early age to believe that I could do anything I wanted to do, and I have actually been reflecting on this extraordinary gift over the past few years as I now raise my own daughters. I cannot recall a single time in my childhood in which I *cared* about the slights and misperceptions and underestimations that came my way. What I *do* remember is often thinking "hmm; well, I'll show them." Whether it was running for class president, or becoming a champion orator, or even applying to Harvard after my guidance counselor helpfully suggested that I not set my sights

so high, I recall distinctly not being phased by the slings and arrows of implicit, or even explicit, bias, and making the conscious decision to push forward nonetheless.

What I think this means for you today, and what I hope to leave with you as the third and final take away, is my certainty that minority lawyers really have to develop a thick skin—and keep their eyes on the prize—as they progress in a law firm or really in any professional environment. We have to know and believe that we deserve to be where we are, and that we have the skills to do what it takes. And with this belief firmly in mind *do not be distracted* by the naysayers! I absolutely know and understand that you will face prejudice and other obstacles that other people in your environment do not have to endure. Life is not fair, and I totally get that the microaggressions that you are observing are real. The question I am encouraging you to think about is whether being confrontational will actually solve the problem, and even more important, whether it is worth your time?! Having a thick skin means recognizing when you're being disrespected but also understanding that marshalling a response each time something happens is a big distraction that takes your mind and attention away from what *really* matters, which is doing the best job that you can possibly do so that you can rise to a level in which you will actually be able to address the kinds of issues that you've witnessed.

Let me give you a concrete example from my college days. At Harvard, the freshmen all live in dorms in the Yard, which is in the heart of the campus, and my freshman year, one of my classmates chose

to hang a confederate flag outside of his dorm room window—right there; in the middle of campus, for all to see. I was an active member of the Black Students Association, and of course, this was a huge affront: we organized rallies; we passed out flyers; we circulated petitions; we planned sit-ins. And, of course, while we were busy doing all of those very noble things, we were *not* in the library studying. I remember thinking how *unfair* it was to us that in addition to having to be victimized by the sentiments that that symbol expressed and by what we perceived to be the unacceptably lax response of the university, we were *also* missing classes, and could not just ne regular students, focusing on the work we had to do, like the rest of our peers. And of course, that's exactly what the student who had hung the flag really wanted: for us to be so distracted that we failed our classes and thereby reinforced the stereotype that we couldn't cut it at a place like Harvard.

I am telling you that story to reinforce for you that the best thing that you can do for yourself and your community is to *stay focused*. You have work to do—hard work—and the most productive use of your time and talent is to tackle the task at hand with all of your mental energy, which means you have to let go of the additional burden of having to internalize, signal, and react every time you perceive that you've been slighted. And don't just take *my* word for that. Think about the living greats: Serena Williams, Simone Biles, Maxine Waters, Oprah Winfrey, Barack Obama, or any other person of color who is at the top of their game professionally: would they be where they are today if they allowed people who thought they were imposters to make them feel that

way about themselves? I would be willing to bet you that at some point in their lives each of them had to consciously aside their grievances—saying, "hmm, I'll show them"—and then, they *focused*, not on the injustices, but on doing whatever it took to be smarter, faster, more diligent, and more competent than anyone else. So what *does* it take to rise through the ranks despite those who don't think you have it in you and will remind you of their feelings at every turn? It *demands* that you to tune out those voices, block out their little flags, and *ignore* the haters, rather than indulging them.

In closing, I just want to be clear about how I envision thick skin: I am not asking you to put on blinders. You will see and experience social injustices, and you will feel wronged by them, legitimately and unfortunately wronged. As a professional of color, there will inevitably be times when you will feel singled out, challenged, questioned, undervalued, and misinterpreted, and you will very much want to call out or cancel people who say and do discriminatory things that make you feel unworthy. But doing so takes time and effort, and if we are going to get to where we belong on the ladder of our professional lives, we can't keep stopping and fretting over random ridiculousness! When you hear and see the bias, what I am asking you to do is not to be *distracted* by it, and thereby, ultimately defeated. Don't get mired down by the inequities—lift yourself up; rise above them; push them to the back of your mind; and don't let them get in your way!

I have already read to you part of one of my favorite poems, and I will close with another. In "Still, I Rise," the late poet Maya Angelou

eloquently summarizes the mindset that many African-Americans have had to adopt in order to survive and thrive, despite how we have been treated historically and what we still experience in our professional lives and beyond. What I love about this poem, and what I will end with here this afternoon, is the reminder of the *power* that comes from withstanding difficulties and emerging like a phoenix from the ashes. As people of color, we cannot allow our challenges to prevent us from achieving greatness, whoever we are, whatever we do.

> You may write me down in history
> With your bitter, twisted lies,
> You may trod me in the very dirt
> But still, like dust, I'll rise.
>
> Does my sassiness upset you?
> Why are you beset with gloom?
> 'Cause I walk like I've got oil wells
> Pumping in my living room.
>
> Just like moons and like suns,
> With the certainty of tides,
> Just like hopes springing high,
> Still I'll rise.
>
> Did you want to see me broken?
> Bowed head and lowered eyes?
> Shoulders falling down like teardrops,
> Weakened by my soulful cries?
>
> Does my haughtiness offend you?
> Don't you take it awful hard
> 'Cause I laugh like I've got gold mines
> Diggin' in my own backyard.

You may shoot me with your words,
You may cut me with your eyes,
You may kill me with your hatefulness,
But still, like air, I'll rise.

Does my sexiness upset you?
Does it come as a surprise
That I dance like I've got diamonds
At the meeting of my thighs?

Out of the huts of history's shame
I rise
Up from a past that's rooted in pain
I rise
I'm a black ocean, leaping and wide,
Welling and swelling I bear in the tide.

Leaving behind nights of terror and fear
I rise
Into a daybreak that's wondrously clear
I rise
Bringing the gifts that my ancestors gave,
I am the dream and the hope of the slave.
I rise
I rise
I rise.

Thank you for listening – I am happy to take questions.

NATURALIZATION CEREMONY SCRIPT

Good morning! My name is Ketanji Brown Jackson, and I am a District Judge on the United States District Court for the District of Columbia. It is my pleasure to welcome each of you to today's Naturalization Ceremony! It truly is an honor and a privilege for me to be able to preside over this proceeding today, during which I will administer to you the oath of allegiance and admit you as citizens of the United States. This is a memorable day and a true milestone in each of your lives, and I am very grateful to be a part of it!

The Court would like to begin by recognizing Ms. Marcia Guzauskas, who is State Regent of the D.C. Daughters of the American Revolution. Thank you for being here, Ms. Guzauskas.

* * *

Thank you for those remarks, Ms. Guzauskas, and thank you to the DAR for sending such an able representative.

ROLL CALL & MOTION FOR ADMISSION

Ms. Cruz, when you are ready, you may introduce the ladies and gentlemen who are here today and who seek to become new citizens.

YOUR MOTION IS GRANTED

[stand]

It is now my honor to administer the oath to all of you who have come here from all over the world to pledge allegiance to the United States.

PLEASE RAISE YOUR RIGHT HAND AND REPEAT AFTER ME:

I hereby declare, on oath

That I absolutely and entirely

Renounce and abjure

All allegiance and fidelity

To any foreign prince, potentate, state or sovereignty

Of whom or which

I have heretofore been

A subject or citizen

That I will support and defend the Constitution and the laws

Of the United States of America

Against all enemies, foreign and domestic

That I will bear true faith and allegiance to the same

That I will bear arms on behalf of the United States

When required by the law

That I will perform noncombatant service in the Armed Forces of the United States

When required by the law

That I will perform work of national importance under civilian direction

When required by the law

And that I take this obligation freely

Without any mental reservation

Or purpose of evasion.

So help me God.

We will now say the Pledge of Allegiance together.

INTRODUCTION OF D.C. BOARD OF ELECTIONS REPRESENTATIVE

The Court would now like to recognize Ms. Rachel Elizabeth Coll, who is an attorney and Public Information Officer for the D.C. Board of Elections. Ms. Coll was previously an associate at the law firm Stein Sperling, where she practiced personal injury law, and also formerly served as an Assistant State's Attorney for the State's Attorney's Office for Baltimore City, prosecuting felony cases involving violent crime and special victims, and as an Assistant State's Attorney in the Gang Prosecution Unit of the State's Attorney's Office for Montgomery County.

Thank you for being here, Ms. Coll.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, Delegate Lily Qi, who represents Maryland's 15th District in the House of Delegates. Delegate Qi is the first Chinese-born state legislator to serve in Maryland's House of Delegates.

Delegate Qi was born and raised in Shanghai, China. She came to the United States to attend college, earned two master's degrees while raising a family, and built a career as an administrator in higher education. She was previously Vice President of Business Development for the Washington, D.C. Economic Partnership, and she also served as spokesperson for the D.C. Department of Insurance, Securities and Banking, an entity dedicated growing economic opportunities for the capital city. During the administration of Maryland Governor Martin O'Malley, Delegate Qi served as chair of the Governor's Commission on Asian American Affairs. In 2016, Delegate Qi became the first Asian American appointed Assistant Chief Administrative Officer in Montgomery County, overseeing economic and workforce matters. And she was elected by the people of her district to her current position, as a representative in Maryland's House of Delegates in the mid-term elections this past year, in 2018.

Delegate Qi writes and speaks on community integration issues, and was formerly a columnist with *Asian Fortune*. She has also served on numerous boards including Leadership Montgomery, Montgomery Hospice, and Suburban Hospital. I personally became aware of her story from a wonderful NPR news profile about her that aired this past June, and I cannot wait to hear more about her, and from her, this morning. Thank you for being here, Delegate Qi. The Court now recognizes you, and we look forward to your remarks.

* * *

Thank you, Delegate Qi, for giving all of us, American Citizens, those tremendous thoughts and insights. We have a lot to be grateful for, and you have given us a lot to think about.

KBJ REMARKS ON NATURALIZATION

Now it is my turn to congratulate you on this great accomplishment and to emphasize how happy I am to be here this morning! Most of what I do in court involves dealing with unhappy people in conflict, so this is really a great opportunity for me to look out and see so many smiling faces for a change.

At this point in the naturalization ceremony, the judge ordinarily gives additional remarks about the meaning and privilege of citizenship. I will do that in a moment, but first I thought that I would try something a bit different by showing you a video that is designed to capture the *feeling* of becoming a new citizen of the United States. This video features people who, just like all of you, have taken the oath and have been admitted as citizens of the United States. There is no speaking in the clip, but if you look carefully you will see quotations from many of these people and, of course, the looks on their faces speak volumes about the experience of raising one's hand and pledging allegiance to the United States for the first time.

I really love this video—and they say that a picture is worth a thousand words—so I will be quiet, and ask you to watch this.

******VIDEO (CLIP #1) *******

Thank you. As you saw, the various statements from people who have become naturalized citizens say much more than I ever could about what it means to them to become an American. Each of you has your own story about the experience, and I suspect that the fact that you took your oath of office in a court in our Nation's capital makes it a very special experience.

Washington D.C. is the seat of our federal government, but the true power and greatness of America is in its citizens, wherever they are all over this great nation. As President Harry Truman once said,

> We Americans are a diverse people. Part of our respect for the dignity of the human being is the respect for his or her fight to be different. That means different in background, different in beliefs, different in customs, different in name, and different in religion. *That* is true Americanism; that is true democracy. It is the source of our strength. It is the basis of our faith in the future. And it is our hope of the world.

Those words by our former president, which were spoken in 1948, are still every bit as true today. America benefits from your citizenship, and because of each of you (and those who have come before you, and those who will come after), American will be a stronger and better place.

From my vantage point up here on the bench, I can see how happy you all are to have taken the oath and I know that each of you will treasure the freedom, rights, and privileges of United States citizenship. Please know that you must also take care to *exercise* those rights as a matter of civic responsibility. As American citizens, you now can, and should, vote; serve as jurors; inform yourselves about civic matters; participate in local and national affairs; petition the government on issues of concern; volunteer to help others; and become full members of your community. Only by engaging fully with other Americans in this great exercise that we call democracy will you truly be able to take full advantage of your new citizenship. And, as President Truman suggested, it is only because the diverse citizens of the United States come together as one nation—to believe in the rule of law and to work for the common good—that the

United States of America is, and continues to be, the greatest nation in the world.

Again, let me say congratulations on your entry into the privilege of United States citizenship. I invite you all, my fellow countrymen, to attend the reception across the hall that is sponsored by the D.C. Daughters of the American Revolution. I hope to see you there!

Attorney Admission

September 9, 2019, 9:30 AM

Good morning to all and welcome. My name is Ketanji Brown Jackson, and I am a District Judge on the United Stated District Court for the District of Columbia.

Before we have the roll call and motion for admission, I would like to introduce you to one our guest speakers. First, we have Mr. Jonathan Lasken, who is here to speak on behalf of the D.C. Chapter of the Federal Bar Association. Mr. Lasken began his legal career as a law clerk for the Hon. William T. Moore, Jr. of the U.S. District Court for the Southern District of Georgia. Mr. Lasken has worked on both government and private antitrust litigation and other complex civil proceedings and has been designated a "rising star" in Super Lawyers Magazine. He currently practices as an senior trial attorney for the Federal Trade Commission's Bureau of Competition.

* * *

Thank you very much, Mr. Lasken. We appreciate your being here.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, Susan M. Hoffman, the current President of the D.C. Bar and Crowell & Moring LLP's Public Service Partner. Ms. Hoffman has dedicated the bulk of her career to pro bono work, and in 1988, she became the nation's first law-firm attorney dedicated to full-time pro bono representation. Ms. Hoffman has also served on many public interest group boards that benefit our community, including Legal Counsel for the Elderly, the Washington Legal Clinic for the Homeless, the Domestic Violence Legal Empowerment and Appeals Project, the Support Center of Greater Washington, the National Law Center on Homelessness and Poverty, the United Way Law Firms Division, the Center for Dispute Resolution and the Washington Council of Lawyers.

As you might imagine, Ms. Hoffman is active in local bar activities, and in addition to her current service as D.C. Bar President, she has served as president of the D.C. Bar Foundation, and as a member of the D.C. Bar Board of Governors, the D.C. Bar Nominations Committee, and the D.C. Bar Public Services Activities Review Committee. Ms. Hoffman has also served as co-chair of the D.C. Circuit's Standing Committee on Pro Bono Representation, and has been a mediator in alternative dispute resolution programs of both the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit.

Ms. Hoffman is a graduate of George Washington University Law School, and began her legal career right here in this courthouse as a law clerk to U.S. District Judge Harold H. Greene. Ms. Hoffman, the floor is yours; thank you for being here.

* * *

Thank you, Ms. Hoffman, for your service and for those insights. You have given us all a lot to think about.

ROLL CALL AND OATH

Ms. Ragland—are we ready for roll call and the oath of Admission?

Now that you all have taken the oath, it is my turn to welcome you into the Bar of this Court, and I sincerely hope that I will see each and every one of you practicing here—vigorously representing your clients—in the not-too-distant future! How many of you have already been admitted into another federal court? Some of you may have had years of federal practice, but some of you are relatively new, and I remember well when I first became a member of the federal bar. I felt a sense of accomplishment, but also one of responsibility. It was hard to believe, in a way, that I had been entrusted with the duty to represent others in bringing and defending their cases, and making arguments, to this esteemed Court!

Now that you are members of the Bar of this Court, you too should feel accomplished, and you also bear the weight of that responsibility. It carries with it the duty to act ethically in your filings and arguments; to have good judgment; to do you very best work on behalf of your clients; and to be mindful of the needs of those in our community who may not be able to afford legal services even though they need them.

In this regard, you should know that =>

REMARKS- PRO SE AND PRO BONO COMMITEES

Lawyers of this Bar have a long tradition of providing pro bono legal service to the economically disadvantaged. Attorneys of the Bar of this Court are expected to assist or represent the needy in civil matters when asked to do so by the Court. In addition, a resolution that the D.C. Circuit Judicial Conference specifically adopted encourages each lawyer to provide 50 hours of pro bono legal service each year to an indigent or disadvantaged client.

One way for you to accomplish this goal is through service on the District Court's Civil Pro Bono Panel. Volunteer attorneys on this panel assume representation of previously pro se litigants. ·Cases handled represent the broad spectrum of civil litigation in this District, and include prisoner cases, workplace disputes, and Freedom of Information Act cases, among others. The court has established an Indigent Civil Litigation Fund to reimburse panel members for expenses incurred in handling such cases. The lawyers on the Civil Pro Bono Panel provide extremely valuable service to the court and to the clients they represent. I urge you to consider joining; forms to sign up are in the blue pamphlet distributed today.

If you are interested in other pro bono opportunities, you can obtain information from local legal services providers, through local bar associations, or

through the pro bono website www.probono.net/dc. A sheet outlining local pro bono opportunities is available today—please pick up a copy before you leave. I urge you to explore these options and encourage you to carry on this Bar's outstanding tradition of service.

I also urge you to take time to celebrate your admission to the Bar! As your program notes, there is a reception sponsored by this Court and the D.C. Chapter of the Federal Bar Association, in Room 6602 (the historic judges' dining room) following this ceremony.

I hope to see you there, and congratulations again!

KBJ Reflections on Courts & Legal Process Article
"Is Judicial Bias Inevitable?"

Thank you – I am delighted to be a part of this conversation, and I have scripted my comments to make sure that I get everything in so I hoe you will bear with me. The article (which, to my mind, might be better titled "Anonymizing Justice") is very interesting, which makes it even harder to be the bearer of bad news! In my view, there are fundamental flaws in the analysis that stem from questionable premises about judicial decision making, and I hope they can be addressed to make the article's core thesis a reasonable or workable or workable proposal.

To be specific, as I see it, this article does three things: first, it identifies a problem (disparity in case outcomes that appear to relate improperly to demographic characteristics such as race, age, and gender); second, it points to bias as a potential significant cause of these disparities, and then third, it devises a novel solution to combat such bias; namely, "online courts" that effectively obscure the salience of group identity features. I am not a statisticiant, so I cannot really say whether the data presented in the article is sufficient to demonstrate that anonymizing court processes actually results less biased (more consistent) case outcomes. My concern is that the article both ***overestimates*** the extent to which disparate outcomes are in fact attributable to bias (unconscious or otherwise), and ***underestimates*** the importance of human interaction as an indispensable feature of a fair and justice dispute resolution system. Consequently, in my view, it offers a solution that is far more radical (in terms of unintended consequences) than I think is warranted given the true scope and nature of the problem.

I. Overestimating the Problem

A. Bias Is Not Necessarily The Cause Of Observed Disparity

With respect to my concerns about overstatement of the problem, the article repeatedly indicates that, despite the core norms of "impartiality" — i.e., the negative principles regarding what judges should *not* do (such as not deciding cases in which they have some personal interest) and the positive principles pertaining to procedural and substantive fairness—we *still* observe disparity in our justice system. On pages 5 and 6, for example, the article states that [QUOTE]

> If the arrangements guaranteeing both positive and negative aspects of impartiality are successful in producing unbiased decision making, then we would expect that similar cases resulting similar (that is, consistent) legal proceedings and outcomes. In this sense, consistency can serve as a strong indicator of judicial commitment to impartiality, and the lack thereof can serve as an indicator that a judicial decision was based on irrelevant and/or inappropriate considerations. [END QUOTE]

Thus, to these authors, the lack of "consistency" is indicative of biases in judicial decision making, and perhaps most especially unconscious biases. Now, I don't dispute the social science research that has been done regarding implicit biases, and the fact that, as the authors state, these forces [QUOTE] "operate in subtle, often untraceable ways and are tied inextricably to the identities of the judges and the parties." [END QUOTE] (p. 7). There is no question that implicit bias exists and can sometimes influence judicial decision making. What I am challenging is the suggestion that, if disparity or inconsistency in case outcomes is observed, such biases are likely *the cause*, or at least they substantially contribute to the observed disparate outcomes. The article does acknowledge that "variation in outcomes across similar cases" can occur from "impartial application of judicial

discretion"; yet, it strongly suggests that the *primary* reason for such variation is judges' inappropriate and perhaps unconscious consideration of identity-based categories.

I think that the reality is a lot more complex, and in my experience, the observed inconsistencies actually have more to do with the nature of judicial decision making than anything else. In that sense, I am questioning the scope or extent of the "bias" problem that the article identifies, and I am doing so based on my own experiences as a judge as well as my expertise with respect to a particularly discretionary area of the law, which is federal sentencing.

Before I explain how I arrived at this conclusion, let me highlight the bottom line: the article assumes—and plainly states—that "the most likely explanation for the existence and prevalence of disparities in outcomes is that they stem from cognitive and behavioral biases of which the judges themselves are unaware" (p. 7), when the reality is that disparities will exist regardless, because inconsistency is inherent in the nature of judicial decision making. Deciding cases does not involve a mathematical formula – there is no 'right' or 'wrong' answer such that one can rightly *expect* similar cases to be resolved similarly; instead, judges make decisions by balancing various factors, including each judges' own judicial philosophy and understanding of the law, and to some extent, his or her values, which means that two entirely unbiased jurists looking at precisely the same facts and acting in good faith can reasonably reach different results. The best example that I have in regard to this crucial concept is an actual murder case—a true story—and if you'll indulge me, I would like to tell it to you. I think it will help you to understand what I mean when I say that some disparity in case outcomes is inevitable and that a lack of

consistency is not primarily attributable to bias, as the authors of this article suggest.

B. Example: Crow Dog's Case

The year is 1881. A tribe of Native Americans known as the Rosebud Sioux tribe lived and hunted in bands on the great plains of central South Dakota. This migratory people survived by hunting and gathering within land that the government had set aside for a reservation, but at that point in our nation's history, the relationship between the nascent United States government and the long-established Indian nations was still very tenuous.

The head chief of the Rosebud Sioux tribe was a man known as Spotted Tail. Spotted Tail was handsome and manly and generally well-liked, but he was also known to rule over the lower chiefs with an iron fist and to demand absolute obedience from members of the tribe. Spotted Tail believed in keeping peace with white men, which meant that the Rosebud Sioux tribe did not participate in the Great Sioux-American wars, and it also meant that Spotted Tail worked part-time as an agent of the federal Bureau of Indian Affairs, which compensated him handsomely for his influence in calming his people.

Another leader within the Rosebud Sioux tribe—a man who went by the name of Crow Dog—was more traditional and substantially less accommodating. Crow Dog was a Sioux warrior and he felt strongly that encroachments by white people and the United States government into the lands and customs of the Sioux nation must be resisted. Crow Dog led a faction of the tribe that was in strong opposition to what they believed was the arbitrary, dictatorial, and traitorous leadership of Spotted Tail.

In the afternoon of August 5, 1881, Crow Dog crouched along the side of a road that led to Spotted Tail's (government-constructed) house, purportedly fixing the wheel of his carriage. When Spotted Tail came riding along on a horse, Crow Dog leapt up, pulled out his rifle, and shot Spotted Tail through the side, with the bullet exiting out his chest. Spotted Tail fell off his horse onto the ground, stood up, staggered a few steps, went for his own pistol in his waistband, but fell dead before he could get off a shot.

Now, the significance of this true story is not so much the crime itself, but its aftermath, which is an interesting tale of two punishments. In the wake of Spotted Tail's death, Crow Dog was, at first, subjected to the Rosebud Sioux tribe system of justice. These native people had a dispute-resolution system that was controlled by a council of appointed leaders. This tribal council didn't care about punishment or retribution or enforcement of a moral code, but instead were focused primarily on *survival*, so the ultimate value for them was to terminate the conflict and to reintegrate everyone peacefully back into society. In Crow Dog's case, the council met not to "convict" or "acquit" but to arrange a peaceful reconciliation of the affected families. The council determined that Rosebud Sioux tribe law required Crow Dog's family to give Spotted Tail's family $600, eight horses, and a blanket, which Crow Dog's people promptly paid and Spotted Tail's family accepted. (For his part, Crow Dog purified himself in a sweat lodge and shot his rifle into sacred rocks to assuage the spirit of Spotted Tail). And, with that, under tribal law, the matter was settled.

Now, needless to say, *that* system of dispensing justice for murder was radically different than the one that existed in the broader United States at the time. Indeed,

when the federal authorities in South Dakota heard about the murder and the way it had been resolved, they stormed the reservation, arrested Crow Dog, prosecuted him for murder in federal court, convicted him (in spite of his claims of self-defense), and, ultimately, a judge sentenced him to hang for the killing of Spotted Tail. *One crime—two dramatically different penalties*.

In the end, Crow Dog was ultimately spared by the Supreme Court, which reversed his conviction on the narrow ground that tribal sovereignty precluded federal prosecution. And *that* Supreme Court ruling was later overturned by Congress, when it enacted the Major Crimes Act of 1885, which is a federal statute that provides the federal courts with jurisdiction over major crimes committed on Indian reservations. But for present purposes, what I hope you take away from this story is an understanding that, at bottom, the decision about what the appropriate sentence is in any given case is a question of *values*, and as a result, it matters who is making the sentencing decision, and which purposes of sentencing he or she sets out to achieve.

This is apparent even if we set aside the state versus tribe aspect of the Crow Dog story. Instead of state authorities and tribal authorities, imagine two sentencing judges who are reviewing the exact same set of facts and diligently trying to determine what should be done. They could be acting in all good faith when considering Crow Dog's circumstances, and *still* reach dramatically different results, depending on their own views about the purposes of punishment and their own assessments regarding which facts about the crime or the defendant should be treated as most significant. One judge might value Crow Dog's skills and his contributions to the tribe, and as a result, rationally conclude that, despite the heinous nature of the crime, a sentence of execution or a lengthy period of

incarceration is not warranted. And the other judge might be equally rational in deciding that, despite Crow Dog's hunting prowess, his murderous act was so heinous that only execution or life imprisonment will do.

C. Takeaways

So, I hope you now understand why, if we a going to have a system in which cases are to be decided by different judges, then it is unlikely that we will ever achieve consistency with respect to case outcomes, and I believe that the observed inconsistencies are largely attributable to factors other than group-based bias by judicial decisionmakers.

I will also add that disparities in judicial outcomes can also occur when judges consider *legitimate* and *relevant* factors that Congress or other policymakers have made to correlate with certain group identities. Who can forget the tragic 100-to-1 crack-powder disparity, in which Congress mandated that defendants who were convicted of possession with intent to distribute crack cocaine be sentenced to a term of imprisonment that is one hundred times longer than a defendant who was dealing in an equivalent amount of powder cocaine? Unbiased judges who merely took into account the nature of the drug at issue and the requirements of the law were constrained to impose substantially longer prison sentences to crack defendants, the vast majority of whom were black, which created huge disparities. But that unfairness was not rooted in the cognitive of behavioral biases of the sentencing judges themselves.

Similarly, unbiased good-faith jurists often rightly and legitimately consider the criminal histories of the individuals who appear before them for sentencing—criminal history is a well-established and entirely rational sentencing

consideration, because individuals who have engaged in prior crimes are at higher risk of recidivism and have a greater need for deterrence and rehabilitation. But given the demonstrated biases of other criminal justice stakeholders and the dynamic of law enforcement and prosecution in many areas of this country, African American and Latino males tend to have more criminal history—more arrests, more prosecutions, and more convictions—than any other demographic group as a statistical matter. This means that if judges are taking criminal history into account at sentencing—and most people would say that it's legitimate for them to do so—then the defendants in these demographic groups are likely to get longer sentences for committing the same crimes, in a manner that does not related to either implicit or explicit bias on the part of the sentencing judge.

So, in the end, while implicit bias is definitely a risk and a problem as far as judicial discretion is concerned, I think it is problematic for the article to suggest that the observed differences in case outcomes for similarly-situated parties is *necessarily* caused by implicit bias of judges. Put another way, the article does not adequately grapple with the extent to which there are other things at play—perhaps inconsistency is just inherent in judicial decision making processes, and/or the unfortunate variation in case outcomes with respect to identity-based categories is largely arising from judges' appropriate consideration of relevant factors that happen to correlate with those categories—such that setting negative and positive norms to promote impartiality is really the best that we can do to promote impartiality in our legal system. At the very least, this observation suggests that the bias problem may not be as great or dire as the authors believe, and thus may not warrant the extreme solution that they propose.

II. Underestimating the Importance of Human Interaction

My second observation pertains to the other flawed premise on which this article rests, which is its suggestion that fair and just outcomes can actually be achieved through an online system in which the parties' salient identifiers have been withheld from the judge. Again, drawing from my background and experience with sentencing, I simply cannot imagine having to determine the appropriate sentence to impose without knowing *who* the defendant is and without giving him or her the opportunity to meet me face-to-face. Now, in fairness, the article discusses an entirely different context—minor moving violations and similar civil proceedings—but even so, to be honest, I really don't understand how a judge could possibly make the necessary assessments of the facts (including the credibility of witnesses) without bringing the parties into court and hearing from them *in person*.

I do gather that there are some state courts that have this model now, and I guess I would say: more power to them. It is certainly more efficient to get the parties' statements in writing, without having to bother with live testimony or arguments. But in the world that I inhabit, justice often *demands* that I consider more than the briefs and attachments that the parties submit before I make my decision. And perhaps even more important, in order to be *perceived* as having heard and understood the issues and arguments, and to be *viewed* as rendering a just verdict that will be accepted by the parties and the public, I have to interact with the parties directly and explain my ruling clearly in a manner that all can understand. I simply cannot fathom that the purposes and goals of a system that dispenses justice can truly be achieved without such face-to-face encounters, whether the case at issue is a minor traffic violation, a simple contract dispute, or the criminal prosecution of a murder.

At the risk of sounding like a one-trick pony, let me return to the sentencing context to explain why, in my view, online courts are anathema to justice, even if they are marginally less biased. A responsible sentencing judge has to engage fully with all of the facts of the crime and consider all of the characteristics of the defendant to arrive at a just result. In this regard, the work of the sentencing judge actually starts in chambers, well before the hearing date, when the judge consults the Federal Sentencing Guidelines (a set of rules that judges have to consider) and reviews the case record, hoping to find answers to two nearly impossible questions: who is this person, really? and how should I think about what he has done? To get a handle on these issues, the judge does the opposite of taking factors off the table; in fact, I gather as much information as possible: I read not only the parties' sentencing memoranda, but also the Probation Office's Pretrial Sentence Report that provides additional information about the crime and the defendant, and any letters that have been submitted on his behalf. And then, I attempt to figure out how and to what extent all those facts matter.

And of course, that's the hard part. For me, sorting through the facts and issues and trying to determine what to make of them feels a little like having to scale a huge rock formation: you can go in any direction because the criminal statutes ordinarily authorize an impossibly wide range of punishment for most criminal violations (say, 0 to 20 years), and there are really no guiderails to speak of. So you're always worried about free fall, and you try to seek out footholds in the facts; pegs upon which to rest your reasoning, like whether the defendant has a job and a family, or has a significant criminal history, or used a weapon, or someone was injured, or a

host of other aggravating or mitigating factors that might justify moving in one direction or another. And all the while you're *balancing* these various concerns and threading the needle between two very different societal interests: on the one hand, the acknowledgement that *all* of us are more than just the worst thing we've ever done, and on the other, the need to ensure that the thing *this* defendant has done is adequately addressed so that the purposes of punishment are satisfied.

Because sentencing requires this type of heavy lifting, I have had many sleepless nights when I am in the process of figuring out the sentence to be imposed. But even after a judge has assessed the facts and resolved any legal or guidelines issues, *another* challenge awaits: the judge has to take the bench and explain to an array of interested parties—and especially the defendant—what justice requires and why.

In a law review article aptly titled "Speaking In Sentences," federal district judge Brock Hornby captures the nature and significance of the public sentencing ceremony. His article begins with reminder that

> [QUOTE] Federal judges sentence offenders face-to-face. The proceedings showcase official power vividly[,] and [also] sometimes, individual recalcitrance, repentance, outrage, compassion, sorrow, occasionally forgiveness—[all of which are] profound human dimensions that cannot be captured in mere transcripts or statistics.[1] [END QUOTE]

[1] D. Brock Hornby, "Speaking in Sentences," 14 Green Bag 2d 147, 158 (Winter 2001).

Judge Hornby further provides much-needed advice about how to manage the task of addressing so many different audiences during what he calls "these public communal rituals." He says:

> [I]t is imperative that judges rise to the occasion, and conduct sentencing proceedings in plain English, so that courtroom audiences can comprehend and evaluate the sentence and its rationale. . . .
>
> Speak to the victims, affirming their hurt.
>
> Address the lawyers, accepting or rejecting their arguments.
>
> Speak to the family, recognizing their concerns, and perhaps positive qualities of a parent or offspring[.]
>
> Speak to the community, emphasizing that the rule of law matters[.]
>
> [And] [s]peak to the defendant, explaining the punishment, sometimes in the language of retribution or reproof, sometimes encouragement. [But] respect[ing] the defendant's dignity nevertheless.

All of these interactions are crucial to the administration of justice in a civil society, and *none* of them can occur with online court processes. We have to decide what we want—if we want defendants to be reformed, victims to be healed, plaintiffs to be made whole, and the public to accept that justice has been served in any case, then, litigants and the court must see, speak, and relate to one another, however biased those participants might be. Face-to-face interactions are simply indispensable when it comes to seeking and achieving lasting peace in disputes between real human beings.

I think it is also important to note that, if the point of "anonymizing justice" is to achieve fairer outcomes from the standpoint of marginalized minorities and other disadvantaged groups, the proposal is likely to fall short of this goal. One can

easily imagine that online court processes could be less biased but give birth to *other* forms of unfairness. For example, what about disputes that are so intertwined with the identity-based characteristics of the parties that such characteristics cannot be separated out without unfairly skewing the analysis? How about the masking effect of an anonymous justice system, which would appear on its face to be producing totally fair results without a hint of bias, but might not in fact be doing so because of the role bias plays at other stages in the process, which can make the inputs unequal from the start. Wealthy people with fancy lawyers will have markedly better online filings in disputes with pro se litigants. The pre-litigation discretionary decisions of law enforcement officers, prosecutors, and policy makers can be infused with bias, and anonymizing courts to cleanse judicial bias might hide these impacts in a manner that actually makes matters worse for the people and communities that one is trying to help.

One other really interesting potential impact of the removal of group identifiers is the possibility that online processes that withhold identifier information might result in more punitive outcomes or, perhaps, no change at all. Information is important, as criminal justice stakeholders who have recently experienced the shift from mandatory to voluntary guidelines will tell you. Indeed, many defense counsel would say that being able to provide more information about their clients, and having judges who can to take everything into account, makes a big and positive difference in their client's sentencing outcomes. And this is also reflected in various studies in the realm of psychology that confirm that human beings routinely met out harsher penalties for law breakers when they have less information about the person whose fate they are deciding.

One such study, which was conducted in Denmark in 2006, involved a poll of ordinary citizens who, in the abstract, maintained that Denmark's punishments were far too lenient. But when the researchers described four criminal cases in great detail, ordinary citizens proved to be considerably less severe, and when they created a video describing those same four cases, viewers became even more lenient. Nils Christie, a Norwegian professor and victims rights advocate had this takeway: "[t]he more they got to know about the crimes and the offenders, the more reduced were their wishes for the delivery of pain." Against this backdrop, the article's suggestion that through online processes decision makers will know *less* about the individuals whose fate they are deciding has troubling implications.

Finally, we need to face the possibility that online courts might well lead to more consistency in case outcomes but for reasons that we might not expect. It could turn out that, in an anonymous environment, marginalized groups receive the *same* case outcomes (the same level of fines or the same incarceration rates) but the gap closes because traditionally favored groups lose their preferred status. Research from the Sentencing Commission bears this phenomenon out: when the guidelines changed from mandatory to voluntary post-*Booker*, the Commission documented that the disparity between the sentences that black males and white males received in similar cases grew. But it was not because black males were getting longer sentences than before; instead, white males were getting shorter sentences in the new discretionary environment—a phenomenon that is colloquially dubbed 'discrimination *in mercy*.' It is at least possible that online courts will successfully stamp out the inconsistencies, but that those who have long been considered the losers in the biased and discretionary system of today will actually experience no change.

So, I will stop here and, in summary, answer the question posed in the title of the article at issue—"Is Judicial Bias Inevitable?" I think that the answer is probably yes, but in my view, implicit or for that matter explicit bias may not be as big a problem as this article suggests, and the costs of have an anonymized system far outweigh the benefit of reducing or even eliminating the bias. Consequently, the proposed online courts solution feels a lot like throwing out the baby with the bathwater. I thank you again for your time and for letting me offer these thoughts.

UNPRECEDENTED 'TRIAL' OF AARON BURR AND SCHOLARLY DISCUSSION HIGHLIGHT ALEXANDER HAMILTON'S LEGACIES IN LAW AND CULTURE



November 16, 2018

Founding father Alexander Hamilton's historic and legal relevance came into vivid focus at events the law school sponsored at the Thomas R. Kline Institute of Trial Advocacy and the National Constitution Center on Nov. 15.



Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia presided over a mock trial that was intended, finally, to determine if Vice President Aaron Burr was guilty of murdering Hamilton, whom he shot to death in an 1804 duel. Burr was never tried.

The prosecution was led by Kline & Specter partner Andrew Stern, former U.S. Solicitor General Gregory Garre (now a partner Latham and Watkins) and 3L Elizabeth Bertolino.

The defense was led by Senior Training Adviser Patricia McKinney of the Philadelphia District Attorney's Office, former acting Solicitor General Neal Katyal (now a partner at Hogan Lovells) and 3L Robert Goggin.

The half-day trial unfolded in the institute's grand courtroom, where witnesses played by law students and attorneys wearing period costumes testified for the prosecution and the defense in proceedings inspired by the blockbuster Broadway phenomenon, "Hamilton."

"Some might say that this trial is long overdue," Tom Kline, founding partner of Kline & Specter and law school benefactor said, welcoming alumni and other attorneys who took part in the unique CLE program as "jurors."

The trial shone a spotlight on towering figures in American history whose bitter political rivalry altered its course as well as their own fortunes: Hamilton, Gen. George Washington's treasured aide during the Revolutionary War who went on to promote the U.S. Constitution and craft the nation's financial system died in his 40s, and Burr, who proved his mettle in battle before becoming a revered and influential U.S. Senator from New York and Thomas Jefferson's vice president brought his own political trajectory to an end with the duel.

Witnesses for the prosecution included Judge Nathaniel Pendleton, who aided Hamilton as his second in the duel and was played by 2L Robert Waeltz, Eliza Hamilton, the slain treasury secretary's widow – played by Professor Rachel López – and pistol manufacturer Robert Wogdon, played by attorney Guy D'Andrea of Laffey, Bucci and Kent.

The three, echoing arguments made by Garre and Stern, portrayed Hamilton as a dizzyingly ambitious and accomplished striver, a devoted if conflicted husband and a heroic Revolutionary War marksman whose respect from Washington inspired the enmity of Burr, who envied his proximity to power. As the duel began, they said, Hamilton shot his pistol into the air, signaling that he had no desire to harm Burr.

Burr, played by Kline & Specter partner David Williams, was joined in his defense by attorney and political ally William Van Ness, played by 3L Michael Wentz, and pistol manufacturer John Barton, played by Anthony Carissimi, judicial clerk for Judge Theodore McKee of the U.S. Court of Appeals for the Third Circuit.

The witnesses joined McKinney and Katyal in portraying Burr as a man betrayed when his one-time protegé, undone by the death of his son and the taint of a highly publicized affair, published critiques that undermined his former mentor's presidential ambitions. Hamilton's heralded skill at marksmanship combined with signs that he'd set a hair trigger on his pistol, forced Burr to shoot in self-

defense, they claimed.

The jury returned a 25-24 verdict exonerating Burr in the trial, which was organized and planned by Professor Lisa Tucker, Professor and Trial Advocacy program Director Gwen Roseman Stern, Trial Advocacy program Assistant Director Abbie Heller and Andrew Stern.

In the evening, the law school co-sponsored a panel discussion at the National Constitution Center that explored Hamilton's enduring legacy.

Moderated by National Constitution Center CEO Jeffrey Rosen, the discussion featured Judge Jackson, Berkeley Law Dean Erwin Chemerinsky, University of Kentucky College of Law Professor Joshua Douglas and Vanessa Nadal, legal counsel for 5000 Broadway Productions and the wife of "Hamilton" creator Manuel Lin Miranda.

Hamilton deserves tremendous credit for shaping our system of government and considerable blame for permitting vulnerabilities in our electoral processes, Chemerinsky said. The constitution that was ultimately adopted largely reflected Hamilton's vision, Chemerinsky said, noting that the federalism he promoted has enhanced interests such as national security and desegregation and that the judicial review he promoted helped ensure that laws found to violate the constitution will be struck down. On the other hand, Chemerinsky said, Hamilton's "elitist disdain of the people" drove him to support the Electoral College, which has allowed presidents to take office even though they have not won the popular vote.



"No other country allows a presidential candidate who comes in second to win," Chemerinsky said. "Alexander Hamilton deserves a lot of blame for that."

Noting that the Electoral College ensures that presidents have received support from diverse parts of the country, Douglas said some states are pursuing "popular vote plans" that direct electors from their state to support the winner of the popular election. It's not clear that this "workaround" is constitutional, Douglas said, adding that the states that have enacted such laws to date are all led by Democrats.

The panelists agreed that Hamilton's legacy has gained a massive infusion of new interest, thanks to the play that has become an international phenomenon since opening on Broadway in 2015.

The Hamilton Education Program is helping high school students around the globe to develop a keen interest in American history and government, Nadal said, noting that 20,000 teens in New York City alone have seen the play, while others are gaining access as the show opens in a growing number of cities. The musical puts the founders' strengths and frailties on vivid display, bringing them to life as real people, Nadal added.

Hamilton's thinking as captured in the musical has even found its way into judiciary, Jackson said, adding that she cited lyrics from the "The Room Where It Happens" to expound on an issue of standing in a 2016 ruling: "You don't get a win unless you play in the game."

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NATURALIZATION CEREMONY SCRIPT

Good morning! I am Ketanji Brown Jackson, a U.S. District Court Judge for the District of Columbia and it is my pleasure to welcome each of you to today's Naturalization Ceremony. It is truly an honor and a privilege for me to be able to preside over this proceeding today, during which I will administer to you the oath of allegiance and admit you as citizens of the United States. This is a memorable day and a true milestone in each of your lives, and I am very grateful to be a part of it!

The Court would like to begin by recognizing Mr. Richard V. Rodriguez, who is the President of the Hispanic Bar Association of D.C. and an Assistant Attorney General at the Office of the Attorney General for the District of Columbia, the Office of Consumer Protection. Thank you for being here, Mr. Rodriguez.

* * *

Thank you for those remarks, Mr. Rodriguez. We appreciate them.

ROLL CALL & MOTION FOR ADMISSION

Ms. Bledsoe, when you are ready, you may introduce the ladies and gentlemen who are here today and who seek to become new citizens.

YOUR MOTION IS GRANTED

[stand]

It is now my honor to administer the oath to all of you who have come here from all over the world to pledge allegiance to the United States.

PLEASE RAISE YOUR RIGHT HAND AND REPEAT AFTER ME:

I hereby declare, on oath

That I absolutely and entirely

Renounce and abjure

All allegiance and fidelity

To any foreign prince, potentate, state or sovereignty

Of whom or which

I have heretofore been

A subject or citizen

That I will support and defend the Constitution and the laws

Of the United States of America

Against all enemies, foreign and domestic

That I will bear true faith and allegiance to the same

That I will bear arms on behalf of the United States

When required by the law

That I will perform noncombatant service in the Armed Forces of the United States

When required by the law

That I will perform work of national importance under civilian direction

When required by the law

And that I take this obligation freely

Without any mental reservation

Or purpose of evasion.

So help me God.

We will now say the Pledge of Allegiance together.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, Mr. Neal Katyal, who is a partner at the law firm of Hogan Lovells. Mr. Katyal received his undergraduate degree from Dartmouth College and his law degree from Yale University. Mr. Katyal has a long career in public service, including serving as a law clerk to Judge Guido Calabresi on the U.S. Court of Appeals for the Second Circuit, and Justice Stephen G. Breyer on the U.S. Supreme Court. He later worked in the Department of Justice as a Special Assistant to the Deputy Attorney General and as a National Security Advisor. In 2010, President Obama appointed Mr. Katyal Acting Solicitor General of the United States, and in that position, he was responsible for representing the federal government of the United States in all appellate matters before the U.S. Supreme Court and the Circuit Courts of Appeal.

To date, Mr. Katyal has argued a total of 37 cases before the Supreme Court, including his successful defense of the constitutionality of the Voting Rights Act of 1965 and the Affordable Care Act, and has already argued more Supreme Courts cases in U.S. history than has any minority attorney, recently breaking the record held by Thurgood Marshall.

Mr. Katyal is a tenured professor at Georgetown University Law Center, where he focuses on Constitutional Law, Criminal Law, and Intellectual Property and has served as a visiting professor at both Harvard and Yale Law Schools. He is also the recipient of the U.S. Department of Justice's highest civilian award, the Edmund Randolph Award.

Thank you for being here, Mr. Katyal. The Court now recognizes you, and we look forward to your remarks.

* * *

Thank you, Mr. Katyal, for giving all of us, American Citizens, those tremendous thoughts and insights. We have a lot to be grateful for, and you have given us a lot to think about.

KBJ REMARKS ON NATURALIZATION

Now it is my turn to congratulate you on this great accomplishment and to emphasize how happy I am to be here this morning! Most of what I do in court involves dealing with unhappy people in conflict, so this is really a great opportunity for me to look out and see so many smiling faces for a change!

At this point in the naturalization ceremony, the judge ordinarily gives additional remarks about the meaning and privilege of citizenship. I will do that in a moment, but first I thought that I would try something a bit different by showing you a video that is designed to capture the *feeling* of becoming a new citizen of the United States. This video features people who, just like all of you, have taken the oath and have been admitted as citizens of the United States. There is no speaking in the clip, but if you look carefully you will see quotations from many of these people and, of course, the looks on their faces speak volumes about the experience of raising one's hand and pledging allegiance to the United States for the first time.

I really love this video – and they say that a picture is worth a thousand words – so I will be quiet, and ask you to watch this.

******VIDEO (CLIP #1) *******

Thank you. As you saw, the various statements from people who have become naturalized citizens say much more than I ever could about what it means to them to become an American. Each of you has your own story about the experience, and I suspect that the fact that you took your oath of office in a court in our Nation's capital makes it even more special.

Washington D.C. is the seat of our federal government, but the true power and greatness of America is in its citizens, wherever they are all over this great nation.

As President Harry Truman once said,

> We Americans are a diverse people. Part of our respect for the dignity of the human being is the respect for his or her fight to be different. That means different in background, different in beliefs, different in customs, different in name, and different in religion. *That* is true Americanism; that is true democracy. It is the source of our strength. It is the basis of our faith in the future. And it is our hope of the world.

Those words by our former president, which were spoken in 1948, are still every bit as true today. America benefits from your citizenship, and because of each of you (and those who have come before you, and those who will come after), American will be a stronger and better place.

From my vantage point up here on the bench, I can see how happy you all are to have taken the oath and I know that each of you will treasure the freedom, rights, and privileges of United States citizenship. Please know that you must also take care to *exercise* those rights as a matter of civic responsibility. As American citizens, you now can, and should, vote; serve as jurors; inform yourselves about civic matters; participate in local and national affairs; petition the government on issues of concern; volunteer to help others; and become full members of your community. Only by engaging fully with other Americans in this great exercise that we call democracy will you truly be able to take full advantage of your new citizenship. And, as President Truman suggested, it is only because the diverse citizens of the United States come together as one nation—to

believe in the rule of law and to work for the common good—that the United States of America is, and continues to be, the greatest nation in the world.

Again, let me say congratulations on your entry into the privilege of United States citizenship. I invite you all, my fellow countrymen, to attend the reception across the hall that is sponsored by the Hispanic Bar Association. I hope to see you there!

Attorney Admission

October 1, 2018, 9:30 AM

Good morning to all and welcome. My name is Ketanji Brown Jackson, and I am a District Judge on the United Stated District Court for the District of Columbia.

Before we have the roll call and motion for admission, I would like to introduce you to one of our guest speakers, Mr. Jonathan Lasken, who is here to speak on behalf of the D.C. Chapter of the Federal Bar Association. Mr. Lasken began his legal career as a law clerk for the Hon. William T. Moore, Jr at the U.S. District Court for the Southern District of Georgia. He has worked on both government and private antitrust litigation and other complex civil proceedings and was designated a "rising star" in Super Lawyers Magazine. He is currently practicing as an appellate attorney for the Antitrust Division of the U.S. Department of Justice.

* * *

Thank you very much, Mr. Lasken. We appreciate your being here.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, James. J. Sandman, who has a wealth of experience in public service and in the private bar in the DC area, and has received numerous award for his pro bono work. Mr. Sandman is currently president of the Legal Services Corporation. Prior to this he was both a partner and the managing partner of Arnold & Porter and general counsel of D.C. Public Schools. Mr. Sandman has also served as president of the D.C. Bar, and he is currently the chair of the District of Columbia Circuit Judicial Conference Committee on Pro Bono Legal Services. He is a member of the District of Columbia Access to Justice Commission (by appointment of the District of Columbia Court of Appeals), the Advisory Council of the American Bar Association's Center for Innovation, and of the Pro Bono Institute's Law Firm Pro Bono Project Advisory Committee. He is chairman of the boards of the Meyer Foundation and the DC Campaign to Prevent Teen Pregnancy, vice chairman of the board of Washington Performing Arts, and a member of the boards of the College of Saint Rose, Albany Law School, and Tahirih Justice Center.

Mr. Sandman previously served as a member of the American Bar Association's Standing Committee on Pro Bono and Public Service, as chairman of the board of Whitman-Walker Health, and as a member of the boards of the University of Pennsylvania Law School, the Neighborhood Legal Services Program of the District of Columbia, the International Senior Lawyers Project, the NALP Foundation for Law Career Research and Education, and Wilkes University. He also has served on the scholarship selection committee of the Minority Corporate Counsel Association.

Mr. Sandman is a *summa cum laude* graduate of Boston College, where he was elected to Phi Beta Kappa, and received his law degree *cum laude* from the University of Pennsylvania, where he served as executive editor of the law review and was elected to the Order of the Coif. He began his legal career as a law clerk to Judge Max Rosenn of the U.S. Court of Appeals for the Third Circuit.

* * *

Thank you, Mr. Sandman, for those moving thoughts and insights. You have given us a lot to think about.

ROLL CALL AND OATH

Mr. Brown—are we ready for roll call and the oath of Admission?

Now that you all have taken the oath, I would like to welcome you into the Bar of this Court, and I sincerely hope that I will see each and every one of you practicing here—vigorously representing your clients—in the not-too-distant future! How many of you have already been admitted into another federal court? Some of you may have had years of federal practice, but some of you are relatively new, and I remember well when I first became a member of the federal bar. I felt a sense of accomplishment, but also one of responsibility. It was hard to believe, in a way, that I had been entrusted with the duty to represent others in bringing and defending their cases, and making arguments, to this esteemed Court!

Now that you are members of the Bar of this Court, you too should feel accomplished, and you also bear the weight of that responsibility. It carries with it the duty to act ethically in your filings and arguments; to have good judgment; to do you very best work on behalf of your clients; and to be mindful of the needs of those in our community who may not be able to afford legal services even though they need them.

In this regard, you should know that =>

WASHINGTON COUNCIL OF LAWYERS



Litigation Skills Training Program

Luncheon Presentation

May 3, 2018, 12:30 PM

Judge Ketanji Brown Jackson

MUSINGS AT THE MIDWAY POINT: REFLECTIONS ON MY JOURNEY AS A MOTHER AND A JUDGE

Good afternoon—I am delighted to be here and to be able to spend the next few minutes introducing myself and talking about some of the values and thought processes that have led me to dedicate my professional life to public service. First, though, I want to commend and congratulate the Washington Council of Lawyers for convening such a great program, and for consistently assembling dedicated members of the bar who are committed to pro bono representation. Please know that the work that you do (or that you all are here training to do) to help indigent people is important, and it is appreciated—and I am not just saying that as someone who works in the court system and therefore benefits from your services. I mean that what you do is crucial, because our adversarial justice system can only work well if the position of every litigant or participant is adequately represented. No one wins if our system only generates just outcomes for people who can afford to pay for counsel, so I am grateful for your continued commitment to making justice a reality for everyone.

Now, that said, this speech is mostly about something that I happen to know a great deal about -- myself. I am often asked about my background, my professional journey, and work-life balance issues, so I hope these remarks will interest at least *some* of you, which I suppose is the best that any judge can ever hope for when giving a speech, as Justice Samuel Alito recently observed two years ago.

Some of you may have read the story in the ABA Journal magazine in which Justice Alito is quoted recounting a conversation that he had with his wife after the two of them attended a speech given by another judge. Apparently, Justice Alito and his wife got into their car at the conclusion of the event, and wife said "you know, that was a very boring speech." Justice Alito agreed, and then attempted explain to his wife *why* he thought that was so. He suggested that, due to all of the confidentiality concerns related to their work, judges are really constrained—they "can't talk about what they did" and "[t]hey can't talk about what they are going to do[,]"—so, he reasoned, that "makes it very difficult for them to give an interesting speech."[1] Well, Justice Alito's wife apparently took a moment to think about that explanation, and then responded—no, 'judges are just very boring people.'

Well, at the risk of fitting that bill today, this speech is about my upbringing and my career, and perhaps most important, about how have I managed to keep it all together as a judge in the federal trial system who moonlights as a mother of two daughters—one who is thirteen but thinks she is 22, and the other who just turned seventeen this past January and is in the full throws of teenager-dom. Now, some of you may have children, and those of you who don't have at least been children at some point, so you

[1] Mark Walsh, "Alito's First Decade," ABA Journal, The Docket (Supreme Court Report), February 2016, at p. 21.

can imagine what I mean: one moment, you have this beautiful, sweet baby, and then suddenly, as if out of nowhere, you look around and she is taller than you are and absolutely certain that she knows much more than you do. About *everything*. Right now, in fact, I am in that peculiar stage of life in which I experience near daily whiplash from the jarring juxtaposition of my two most significant roles: United States District Judge, on the one hand, and mother of teenage daughters on the other. During the work day, I am a federal judge, which means people generally treat me with respect—I have people who work for me in my chambers; litigants look to me to give them answers to complex legal questions, and *I* control what happens in my courtroom —when I say things, people listen, and they generally do what I order them to do. But in the evenings, when I leave the courthouse and go home, in the course of that transition, all of my wisdom and knowledge and authority essentially evaporates, and my daughters make it very clear that, as far as they are concerned, I know *nothing* and should not tell them anything; much less, given them any orders—that is, if they talk to me at all.

But I try not to get discouraged. I choose to believe that somewhere (deep down) they appreciate this journey that we're on together, and it's that abiding hope that led me to an interesting thought experiment when preparing for this speech. My relationship with my two precocious kids became the framing, if you will, for what I hope will be an interesting (or at least a not

entirely boring) presentation. You see, I wondered: what if my two worlds collided and my daughters were called upon to tell the truth, the whole truth, and nothing but the truth about their mother's life and career and the practical advice that she has given them thus far? Assuming, of course, that we could get past the heavy sighing, the eye rolling, and their natural impulse to reject any suggestion that I make, what if my daughters were called to the stand as character witnesses to talk about their mother, I wondered, what would they say???

BACKGROUND

I think they would be likely to begin with my personal background. Leila (my 12 year-old) would explain that I was born in Washington D.C., in 1970, to two public school teachers at the time. My parents had both been raised in Miami, Florida, and they came to D.C. to start their married lives and careers, as so many people do. In the early 1970s, my parents had just emerged along with the rest of our country from the dramatic reshaping of law and society known as the Civil Rights Movement, and they decided to express their pride in my family's African ancestry by asking my aunt—who was in the Peace Corps in West Africa when my mother was pregnant with me—to send a list of African girl names for their consideration. They selected the name "Ketanji Onyika," which they were told translated into "Lovely One," and for the first 26 years of my life, I was known as Ketanji Onyika Brown.

Now, at this point in my daughters' testimony, Talia (my 16 year old) would certainly jump in to correct any impression that her sister may have left about my upbringing, pointing out that is not entirely accurate to suggest that I am a "D.C. native" because, when I was three years old, my parents and I moved to Miami, Florida and I was actually raised there. In fact, my earliest memories are of our apartment in the married students housing complex on the campus of the University of Miami, where my father was a law student. My parents are from Miami—we returned so that my father could go to law school—and even now, when people ask me why I decided to go into the legal profession, I often tell the story of how, when I was in preschool, I would sit at the dining room table doing my "homework" with my father—he had his law books all stacked up and I had my coloring books all stacked up—and when I think back on those times, there really is no question that that my interest in the law began that early on.

Now, at this point, Leila—my impatient one—would jump in and insist that we fast forward past what was, by all accounts, a terrific, but normal, childhood. My dad got his law degree and worked as in-house corporate counsel for a series of businesses and then became the principal attorney for the Dade County School Board. My mom rose through the ranks in the public school system in Miami, starting as a middle school science teacher, then becoming a high-school Assistant Principal, and she eventually served 14 years as the Principal of Miami's premier public magnet

school for the Arts. I had a close extended family in the greater Miami area (*e.g.*, lots of aunts and uncles and cousins), and got to spend time with my beloved grandparents, who worked extremely hard to ensure that their children and grandchildren got the education and opportunities that they never had.

When I was growing up, my parents and I lived in a predominantly Jewish suburb of South Miami, and I went to very good public schools that gave me a strong academic foundation. And between all the bar and bat mitzvahs, I got involved in student government and was elected President of my very large high school senior class (800+ students strong)—go Panthers! But my primary extracurricular activity was Speech and Debate, and it was an experience that I can say without hesitation was the one activity that best prepared me for future success in law and in life. I learned how to reason and how to write, and I gained the self confidence that can sometimes be quite difficult for women and minorities to develop at an early age. Indeed, of all the various things that I've done, it was my high school experience as a competitive speech writer and speaker that taught me to *lean in* despite the obstacles—to stand firm in the face of challenges, to work hard, to be resilient, to strive for excellence, and to believe that anything is possible.

Competitive speech and debate was also the experience that literally paved the way for me to go to a great college. Our debate team travelled a fair amount to various meets and competitions,

mostly within the state of Florida, but one of the few national debate tournaments that we went to every year was at Harvard. In February. Now, I don't know if any of you have ever been to Cambridge, Massachusetts in February, but I can tell you first hand, that being there at that time of year is not an easy for a Miami girl! But I loved it. I loved everything about it, and when I applied to Harvard for college—and got in—I knew that there was no place I'd rather go. I matriculated there in 1988 and continued as an undergraduate student there through 1992, despite the unbearable winters. And it was unquestionably the right place for me—I had fabulous friends, took challenging courses, and participated in a range of interesting extracurricular activities, including drama and musical theater, during which I made several notable connections; the most notable of which is Matt Damon, who was assigned to be my scene partner during a drama course we took together one semester (as a side note, although I was pretty good, I doubt he'd remember me now).

In any event, while at Harvard, I also met and dated my first serious boyfriend, who later became my husband, and to whom I have been happily married for 20 years. It's interesting because my husband, Patrick, is a quintessential "Boston Brahmin"—his family can be traced back to England before the Mayflower and has been in Massachusetts for centuries; he and his twin brother are, in fact, the 6th generation in their family to graduate from Harvard College. By contrast, I am only the second generation in

my family to go to *any* college, and I'm fairly certain that if you traced my family lineage back past my grandparents—who were raised in Georgia, by the way—you would find that my ancestors were slaves on both sides. In addition, my husband was a pre-med science and math student, while I was a full-on government major, so we were an unlikely pair in many respects. But, somehow, we found each other, and we dated continuously for six-and-a-half years—through the end of college and the entirety of his Columbia Medical School experience and my Harvard Law School experience—before we got married in 1996.

CAREER TRACK

Now, as you will remember, I am telling this story through the eyes of my daughters, and I am certain that Talia would break in to announce at this point that her sister Leila had been going on *WAY TOO LONG*, and that it was her turn to say something about my career as a lawyer. By the way, I don't recall this same dynamic between me and my brother—I have only one brother who is nine years younger than me—but my daughters compete for attention (when they are not ignoring us) and at this point in my fantasy testimony scenario, Talia would grab the microphone and start talking vigorously about my career, starting with my work in several law firms during and after the three federal clerkships that I had the privilege of undertaking.

I always knew that I was interested in criminal law, but as a newlywed, I also realized that I needed to pay rent and bills and pay off law school loans, so I did what many young lawyers do—I joined a law firm. In my case, it was a series of law firms: in 1998, fresh off of my clerkships with the Honorable Patti Saris on the District Court of Massachusetts and the Honorable Bruce Selya on the First Circuit, I took a job as an associate at a phenomenal white-collar defense boutique firm in Washington D.C. And I am sure that I would have stayed at that small firm for much longer than the 9 months I worked there, had it not been for the incredible opportunity to clerk for Associate Justice Stephen Breyer on the Supreme Court of United States, which arose during October Term of 1999. All three of my clerkships were very different and very interesting—but being at the Supreme Court was also *amazing*; and even today, I feel so lucky to have had the chance to work inside an institution that has such a significant impact on our lives as Americans, and that few people even get to see, much less be part of. After my time at the Supreme Court, I would have loved to stay in D.C. and launch my career, but in the professional give-and-take that is often required of newlyweds, I thought it best to accompany my husband back up to Boston for the completion of his surgical residency, primarily because, at that point, I was three months pregnant.

And so began the delicate balancing that many young lawyers face in their professional lives: how *does* one manage the demands

of your career and also the needs of your family? When we returned to the Boston area, I took a position as a general litigation associate at the large commercial law firm of Goodwin Proctor—and like many young women who enter Big Law, I soon found it extremely challenging to combine law firm work with my life as a wife and new mother. Talia was born a few months after I starting working at Goodwin, and although the firm was very supportive, I think it is not possible to overstate the degree of difficulty that many young women, and especially new mothers, face in the law firm context. The hours are long; the work flow is unpredictable; you have little control over your time and schedule; and you start to feel as though the demands of the billable hour are constantly in conflict with the needs of your children and your family responsibilities. I do want to be clear, though—this is *not* an indictment of Goodwin Procter; it's a great law firm—it just seems that the *nature* of big firm law practice is difficult to manage when you have a family, no matter how nice the firm's partners might be. There are many women who can make it work (some are quite well-suited to the pressures, in fact); I discovered early on that I was not.

And, unfortunately, researchers have established that I am not alone. A recent report published by the National Association of Women Lawyers studied women's experiences in large law firms, and the statistics are bleak. For example, the NAWL survey found that, while 50 percent of the graduates of law schools each

year for the past 15 years have been women, "only about 15 percent of law firm equity partners and chief legal officers have been women[,]" despite substantial recruitment efforts by law firms over the past two decades.[2]

Drilling down even further, the survey authors announced that "virtually no progress has been made by the nation's largest firms [in the past decade] in advancing minority partners and particularly minority women partners into the highest ranks of firms"; and indeed, the few minority women who advance continue to play the role of "pioneers"[3] because "[l]awyers of color"—male *and* female—"constitute only 8 percent of law firm equity partners" nationwide.[4] Putting these statistics into context, the report notes that in a typical large firm, say, one that consists of 129 equity partners, there would be 105 white male partners, seven minority male partners, 20 white female partners, and only two minority female partners.[5]

Now I have to tell you that these kinds of statistics and other reports related to the experience of minority women in big law firms were very discouraging for me as a young lawyer. And the many barriers to the advancement of women at lower levels of law

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[2] Lauren, Stiller Rikleen, "Women Lawyers Continue To Lag Behind Male Colleagues," Summary of the 2015 NAWL Ninth Annual Survey, at 1.
[3] *Id.* at 6.
[4] *Id.*
[5] *Id.*

firms[6] taught me some hard, but very important, lessons early on. For example, I learned that, as much as I had enjoyed developing *trial*-practice skills in law school—and, in my mind, I had many Perry Mason moments—if I was going to make life as a lawyer work for me and my family, I needed to do something worthwhile, that is, use my legal skills to help real people (not just corporations), and I needed to have a more predictable, more controllable working environment. *That* was a big realization for me—the understanding if I was going to leave my baby and go to work outside the home, I needed to find a job in the law that was not only fulfilling but also compatible with the needs of my family. And armed with that realization, I then began what I can only characterize as a professional odyssey of epic proportions.

As anyone who knows me well can tell you, there were a number of years in which I literally moved from job-to-job-to-job! I guess you can say I was something of a 'professional vagabond,' moving around from place-to-place, as my family's needs and circumstances changed. There were times when we lived in Boston and times when we lived in D.C. There were times when I went into government—for example, I worked on the staff of the Sentencing Commission, and later as an Assistant Federal Public Defender, both in D.C. And there were times when, primarily for financial reasons, I went back into private practice, but I did so at

[6]Issues such as the lack of top-tier women to serve as role-models and mentors, and firm cultures that can isolate women associates, and especially those who negotiate part-time or reduced-hours schedules

a more senior level than in the early days, and by that time, I had become an appellate lawyer, rather than a trial lawyer, which meant that (1) I had discrete, manageable projects that could be handled without a lot of travel; (2) I worked with the same core group of great people, so there were few, if any, surprises; and (3) I got to do a lot of interesting and important pro bono work—representing poor people with respect to significant legal issues the treatment of evidence extracted by torture overseas and its potential use with respect to Guantanamo detainees, and the legal standards that should apply to the warrantless search of an automobile when the occupants are arrested.

In fact, by 2007, I thought I had finally nailed it—the perfect combination: I was doing challenging, interesting, and significant work as an Of Counsel in the D.C.-based Supreme Court and Appellate practice group at Morrison and Foerster ("MoFo" for short), which meant I could also help to support my family financially, and by doing appeals and opting out of the partnership track, I still had some control over my schedule. I was at MoFo for a little more than 2 ½ years, perfectly content, when my circumstances got even better—in 2009, the White House called, and I got the chance to be considered for nomination to a fulltime seat on the United States Sentencing Commission, the judicial branch agency in which I had worked as a staffer just a few years before.

Now, as I am sure you can guess, this was, for me, the opportunity of a lifetime. And it was well worth enduring the extremely nerve wracking nomination and confirmation process—I actually taught myself to knit as a way to channel my nervous energy during that time (if anybody wants a scarf, I'm your source!). Many yarn skeins later, in February of 2010, the Senate confirmed me, and President Obama appointed me as a Vice Chair of the Commission, and I was back working in an agency that I had previously been a part of, among the extraordinarily talented and committed group of people who staff the Commission.

Being on the Commission also paved the way for me to be considered for an appointment as a United States District Judge—an appointment process that began in the early winter of 2012. I spent most of the winter, spring, and summer in the vetting process, and President Obama formally nominated me in September of 2012—which was a mere two months before the presidential election that would determine whether or not I would actually be able to take the bench.

Now, to the extent that Talia has been guiding the testimony regarding the course my career thus far, Leila would take over at this point in the story, to make sure that you fully comprehend how *stressful* it was for me to be given a shot at my dream job—being a federal judge—but to have my chances of actually getting that job hinge on circumstances that were completely out of my control; specifically, whether or not the country voted to reelect

President Obama. And when you add to this the fact that I am related by marriage to House Speaker Paul Ryan—who was then running for Vice President, *against* President Obama—you get the sense of what that period of time was like for me. And if you didn't, Leila would make sure of that. She would recall, for example, that I was unusually jumpy and started so many scarves I could have outfitted a small Army.

Well, I am happy to report that all's well that end's well; I was confirmed by the Senate in March of 2013, and I was able to take a seat among the fabulous judges on the District Court Bench that spring. And I can say with confidence now five years later that I really *love* my job. I am very busy with a number of complex cases, but also VERY satisfied with my work, and my life. I guess you could say that my center of gravity on the work-life balance continuum has actually shifted—I now probably work even longer hours than I did at the firm, but not because I'm billing time; instead, it's because I care deeply about reaching the right result and doing my best to render reasoned rulings for the benefit of the people who come before me.

POSITIVE QUALITIES/ADVICE

And having finally found work that suits me—work that is challenging, and interesting, and that I care about enormously—I hope that I am able to provide a good role model for my daughters, and I try to give them useful advice based on my own experiences. I would be interested to hear what my daughters' testimony would

be about that—if Leila was called as a character witness, I am pretty sure that she would give me a largely positive review. And if you could get Talia to look up from her phone for a moment, she'd no doubt have a one-word answer to the question of what she thinks about her mother—"good"—but if pressed, she might go on to describe certain things that I have told her over the years about how to be and what to do.

For example, Talia might say that both her parents tell her to work hard at everything that she is called upon to do—that is, give it your best effort—whether it be a homework assignment or a basketball game or a household chore. She would admit the indomitable spirit of hard work is a shared value that united her parents from the beginning, long before she was born, and would say that sustains them in their personal and professional lives even today. Patrick and I are, in fact, those long-suffering, "early-to-bed, early-to-rise" kind of people, and in our family, we have a mantra that emphasizes prioritization of work over play as one of our first principles: as the girls would testify, "do what you *need* to do before what you *want* to do" is a constant refrain in our house.

Talia might also say that her parents require and exhibit respect for other people—anyone and everyone—no matter who they are or what they do. I think of it this way: I feel so fortunate to have had the opportunities that I have had in life, I believe it is my obligation to teach my children to refrain from casting aspersions on others because of their life circumstances; in other

words, as is often said in religious circles, I *know* that "there but for the grace of God go I." I teach my children that this means that we approach the world with a grateful spirit; we don't look down on, or talk down to, others; and we show respect for all mankind.

Leila would probably hasten to add that her parents instruct her to keep an open mind—to be open to new ideas and experiences, because you never know when someone else will have an interesting thought, or when a new door will open that takes you on the journey of your dreams.

And, finally, both of my daughters might emphasize that their mother is always telling them to look for mentors and role models in each new situation that they encounter: someone who can look out for them and help them to navigate the challenges that lie ahead in whatever field they choose to go into. For me, many of the women—and men!—that I have been privileged to get to know throughout my life have served that function: my mother, my grandmother, my aunt, certain teachers, special coaches, and the judges for whom I clerked, as well as many of those with whom I now work.

CONCLUSION

I want to end this trip down memory lane as told through the imagined testimony of my daughters with a relatively recent "real life" testimony that came up in an interesting context and in a

manner that, for the first time in a long time, made me feel like those sassy sisters really do know who I am and what I do. As you all well know, early in 2016 a tremendously influential and extraordinary jurist—Associate Justice Antonin Scalia—passed away unexpectedly, and the Obama Administration undertook the process of evaluating potential candidates for appointment to the Supreme Court. This was certainly a dramatic turn of events for our country, especially in the midst of a presidential election cycle, and it captivated the attention of most people in the legal community. But my husband and I thought that our teenage daughters were totally oblivious to Supreme Court politics and the process of nominating Justices. Well, it became clear that we were wrong, when my youngest daughter came to us maybe three weeks or so after Justice Scalia passed and asked us (very earnestly) whether we had heard that Justice Scalia had died and that there was a vacancy on the Supreme Court? We assured her that we had, and she said that some of her middle-school friends had been talking, and they said to her "you know, *your* mom's a judge—she should really apply for that position." Leila apparently thought that was a pretty good idea, and so she had come to tell me that I should submit an application for the open Supreme Court seat.

Well, Patrick and I explained to her that getting to be on the Supreme Court really isn't the kind of job that you *apply* for—you just have to be lucky enough to have the President find you among all of the thousands of lawyers who might want to do that job, to

which Leila responded, "well, if the President has to *find* you, I am going to write him a letter to tell him who you are!" She trotted off, and came back a little while later, with the following handwritten note:

"Dear Mr. President:

While you are considering judges to fill Justice Scalia's seat on the Supreme Court, I would like to add my mother, Ketanji Brown Jackson of the District Court, to the list.

I, her daughter Leila Jackson of eleven years old, strongly believe she would be an excellent fit for the position. She is determined, honest, and never breaks a promise to anyone, even if there are other things she'd rather do. She can demonstrate commitment, and is loyal and never brags. I think should would made a great Supreme Court justice, even if the workload will be larger on the court, or you have other nominees. Please consider her aspects for the job.

Thank you for listening!

Leila Jackson"

Well, it is difficult to put into words how it felt to get such a ringing endorsement from my own daughter—it was an *actual* testimony that was, by far, more meaningful than any make-believe account of how my daughters feel. In that moment, I realized not only that am I raising an assertive girl who is not afraid to speak her mind, even to the President of the United States, but also that my daughters are *not* oblivious to my work, and are proud of me, as I am of them and of my entire family. It has been a lot of hard work—trying to balance work and motherhood—and like so many people, I often feel as if I am failing

in both arenas. But in that one brief shining moment, as I read Leila's letter, I got a glimpse of my professional and personal life combined, and what I saw, made me feel that my husband and I are well on our way to achieving success in both worlds.

It has been a pleasure to be here and to speak with you today: thank you for listening!

Questions for Judge Jackson at the Burke School Assembly--March 23, 2018

Thank you for inviting me to be here—I am delighted to have this opportunity to answer the questions you have prepared and to share my experiences with you!

1) *Could you tell us about your academic and professional trajectory as a woman pursuing a legal career and what it means now for you to serve as a United States District Judge?*

- Early days=> My professional trajectory actually started when I was *very* young (like, kindergarten!), because my father went *back* to law school after I was born.
    - Born here in D.C., and my parents were teachers. When I was 3 years old, my dad decided to go to law school
    - We moved to Miami / lived in married students' housing on campus
    - Earliest memories are of doing my homework with my dad
    - Always knew I wanted to be a lawyer!

- Academic
    - My parents really valued education
    - Both were public servants, but made sure I went to a great public high school
    - Speech & debate (orator)
    - Harvard college – government major
    - Gap year=>worked at TIME magazine
    - Harvard law school

- Professional (lots of lucky breaks and emotional support)
    - Clerked for 3 federal judges
    - Worked for different types of law firms (private practice)
    - Was also a govt lawyer (AFPD and member of the USSC)

- What it means to be a judge?
    - An extraordinary honor and responsibility! I am the second AA female judge ever appointed to the federal district court in D.C.

    - It is significant because I get to use the skills I have developed for public service, and because I hope to be able to inspire others to do the same. It is important for me to work hard and do well.

2) *In your legal work for the firm of Morrison and Foerster, you served as attorney for several cases before the U.S. Supreme Court. What were some of the highlights of that work and the most important issues you addressed?*

- Worked on a team of lawyers who handled matters in the Supreme Court (both cases that the Court had already decided to hear, and cases that the Court was considering taking)
    - SCt gets to *choose* the cases it decides to hear, so much of the work of a SCt advocate is trying to convince the Ct to take and hear the case!

- Highlights=> work we did as an "amicus" (friend of the Court)
    - Explain "principal" versus "amicus" briefs

- Two briefs were especially memorable:
    - *Arizona v. Gant*
        - Criminal case involving the Fourth Amendment right against unreasonable searches and seizures by the police
        - Issue: whether the police could search a suspect's vehicle automatically if he or she was arrested outside of (and away from) the car, or whether a search warrant was needed?
        - Traditionally, Court recognized "search incident to arrest" principle that allows a search of the area within the wingspan of an arrestee to protect the police or prevent destruction of evidence. But police were searching regardless, claiming that automatic searches were necessary.
        - My client was the National Association of Federal Defenders.
        - We looked at empirical evidence from 9 states that did not allow automatic searches, and argued that the evidence showed no greater risk to police safety and that evidence was still being preserved without the automatic search rule

    - *Boumediene*
        - One of a series of cases in which the SCt addressed various aspects of the processing of prisoners at Guantanamo Bay
        - Complicated background, but after 9/11, the federal govt started detaining people who were captured overseas on suspicion of terrorist activity.
        - Lawyers and activist groups pushed to represent many of these people, to ensure that they were being treated humanely and

consistent with the law, and cases involving them got all the way up to the SCt.

- In *Boumediene*, the SCt was deciding whether the procedures that the U.S. govt had adopted for determining whether to bring charges or release those prisoners were fair. And among the many potential problems with the process was the concern that some of the evidence that had been collected included confessions that other governments may have extracted through torture.
- I worked with a nonprofit to find 20 former federal judges who were willing to submit an amicus brief discussing fair process and arguing that any procedure that would allow reliance on evidence extracted by torture or other impermissible coercion was inadequate and should not be authorized.

3) *Could you tell us about your work as an editor of the Harvard Law Review? How does this position help to shape American legal thought and what was it like, as an African American woman, to serve as a top editor of the publication?*

- The *Law Review* is essentially an honor society within the Law School. Every law school has one, and it's a privilege to be selected as an Editor.
  - It means you have good grades in your first year and/or the demonstrated ability to do the work of the journal.

- Law journals are periodicals that publish legal scholarship by professors and students. It used to be that the only way to get your ideas out was to have them published, and law journals were a vehicle to do that.

- *HLR* is influential because many top professors and scholars submit their work for publication. So the journal gets creative, interesting new ideas and groundbreaking scholarship.

- A wonderful experience for a law nerd like me! Editors read a lot of legal scholarship, work with authors to improve their pieces, and check the citations to make sure that they are correct in form and substance.
  - Especially significant and formative period in my career
  - In addition to helping me to develop important analytical skills, the credential opened doors to other opportunities (e.g., my clerkships)

4) *As a former member of the United States Sentencing Commission, what were some of the biggest issues you addressed, and what important work remains to be done?*

- Important issue=>the crack-powder disparity w/r/t the sentencing of drug offenders.
    - Has anyone heard of mandatory minimum sentences? They are the floor (the lowest) sentence that a court can give when someone is convicted of the crime to which they apply.

    - In the mid-1980s, just as the USSC was formed, Congress set 5- and 10-year man mins for various drug distribution crimes. These man mins were based on the *amount* of a drug that is involved in the crime, and they vary depending on the drug.

    - The differences in drug amounts lead to an inequity that became known as the "100-to-1 crack/powder disparity":
        - By law, it took selling 100 grams of power cocaine to get a 5-year penalty, but you'd get that same penalty from selling only 1 gram of crack cocaine

    - This disparity was not justified by the properties of the two types of drugs (same chemical formula), and it had a disproportionate impact on African Americans
        - Some 90% of crack dealers/users are black

    - The USSC spent years documenting the effects of the policy decision to treat these drugs differently and lobbying Congress to change the law. Congress finally did in 2010 (while I was a Commissioner), and the Commission made various conforming changes to the guidelines to try to make drug penalties more fair.

- Work yet to be done

    - Fundamental changes to the federal sentencing system

    - Adjusting the prescribed penalties in a variety of areas to better reflect the fair and just sentence (not too harsh).

5) *Could you describe your work as a public defender and why this role is so crucial to the workings of our justice system? What were some highlights of your work as a public defender?*

- <u>What I did</u>
    - Public defenders represent criminal defendants who cannot afford to pay for legal services ("indigent" people)
    - I worked in the appellate division of the FPDs office—my clients were convicted, and we were trying to convince the appeals court that there was an error in the trial proceedings and they needed to be redone
- <u>Why it is important</u>
    - Public defenders make sure that people who cannot afford to pay for counsel still get a fair shake in our criminal justice system.
        - People who are accused of crimes have the right to Due Process (notice of the charges and an opportunity to be heard);
        - The Constitution also protects freedom by requiring the government to prove its case against people who are accused of crimes.
    - We are a constitutional democracy, and having a lawyer is *essential* to making sure that these rights are protected. The rule of law requires that everyone's rights are respected, even people who can't afford a lawyer.

6) *Having served for so many years as a judge, a public defender, and a lawyer, how do you assess issues surrounding racism and the U.S. justice system? Do you believe the law operates in a "colorblind" fashion, or do you see vestiges of segregation era treatment for people of color?*

- Hard question. We have the fairest system of justice in the world, but it's not perfect. And there are vestiges of discrimination, mostly when discretion comes into play.

- Examples=> Statistics demonstrate that there are racial disparities in who gets arrested and prosecuted for committing the same crime, and also disparate impacts re how harshly certain crimes are punished (e.g., drug crimes have mandatory minimums while fraud crimes do not. History of marijuana. The death penalty.)

- Also, implicit bias can occur at many stages of the process

- Not sure what can be done except to be aware and try to counteract its effects ("equal treatment under law")

7) What advice would you give to students about our roles as citizens and the need for civic engagement with issues of the law, the courts, and the U.S. justice system?

- We are in an extraordinary era of civic engagement. Learn as much as you can! Understand history and your rights as a citizen of this great nation.

- Study law in particular. It is a great profession! You can really make a difference in your own life, and in the lives of others.

Four Lessons My Mother Taught Me

ALI Council Dinner Talk
October 19, 2017

Good evening. I very much appreciate the chance to introduce myself to all of you—this is a *great* tradition for new council members—but if I'm being honest, it's not an *easy* one, because it's actually kind of hard to give interesting remarks about *yourself*. In fact, I have only given one other speech about my background since I became a judge, and I started it by telling a story that Justice Samuel Alito recently told and that was related in the ABA Journal about 18 months ago now. Justice Alito is quoted recounting a conversation that he had with his wife after the two of them attended a speech given by another judge. Apparently, Justice Alito and his wife got into their car at the conclusion of the event, and his wife said "you know, that was a very boring speech." Justice Alito agreed, and then attempted explain to his wife *why* he thought that was so. He suggested that, due to all of the confidentiality concerns related to their work, judges are really constrained—they "can't talk about what they did" and "[t]hey can't talk about what they are going to do[,]"—so, he reasoned, that "makes it very difficult for them to give an interesting speech."[1] Well, Justice Alito's wife apparently took a moment to think about that explanation, and then responded—no, the truth is that "judges are just very boring people."

[1] Mark Walsh, "Alito's First Decade," ABA Journal, The Docket (Supreme Court Report), February 2016, at p. 21.

And I think there's some truth to that, so I hope you will bear with me, because in order to try to avoid boring you this evening, I am relying on a framework that I hope will provide an interesting means of conveying some of the basic facts about my background relatively quickly. Here it is . . .

Like many of you, I was raised in a household with a very strong maternal influence—my mother is all of 5 feet 2, but she is a towering presence—and I decided it might be fun to tell you my story in the form of four lessons my mother taught me at an early age and that continue to guide me in my life and work even today. Alright? So, let's get started with Lesson #1, which is:

(1) **Lesson #1: Be Proud Of Who You Are And Where You're From.**

So, who am I? And where am I from? My name is Ketanji Brown Jackson, I am 47 years old, and I currently live in Washington, D.C., but I was raised in Miami, Florida. Now, I usually don't get that far before someone asks me about the origin of my name, and I explain that my mother and father came of age in the 1960s, during the Civil Rights Movement, so when I was born in 1970, my parents thought it important to express their pride in my family's African ancestry by asking my aunt—who was in the Peace Corps in West Africa when my mother was pregnant with me—to send a list of African girl names for their consideration. They selected the name "Ketanji Onyika," which they were told translated into "Lovely One," and for the first 26

years of my life, I was known as Ketanji Onyika Brown. So, perhaps my earliest life lesson pertains to be proud of who I am: the pride in my ancestry that my relatively unique name conveys.

I would say that another key part of who I am is my prior work as a lawyer and now as a federal judge. My legal career, which began in 1996, has been "varied" to say the least: setting aside my clerkships, which I will talk about in bit, I have been an associate or of counsel in the litigation units of three different law firms in both Boston and D.C.; I also worked briefly for Ken Feinberg, who has a small firm that focuses on the negotiated resolution of mass tort claims; I served as an Assistant Federal Public Defender in the appellate division of the D.C. Federal Public Defender's Office; and I was also appointed Vice Chair of the United States Sentencing Commission—an agency in the judicial branch of government—prior to receiving the honor of President Obama's nomination of me to the federal bench, which happened just about 5 years ago now.

So, if you're keeping track, that's two different types of private practice, agency work, public defense, and the judiciary all within a twenty-year timeframe. Now, I know what you're thinking: she can't hold a job. But I prefer to say that I have been privileged to have worn a lot of different hats over the past two decades, and that is certainly how my mother would put it, in keeping with the theme of being proud of who you are and what you've done.

The one other aspect of my being that I often highlight with considerable pride in response to the question 'who are you?' is my role as a mother, and in particular, as a mother of two *teenage* daughters. Now, some of you may have teenagers, or may have had teenagers once, so you will sympathize with me when I say that the experience is very disconcerting. It's as if one moment, you have this beautiful, sweet baby, and then suddenly, out of nowhere, you look around and she is taller than you are and absolutely certain that she knows much more than you do. About *everything*. And for me, this has been especially confusing because it leads to near daily whiplash from the jarring juxtaposition of my two most significant roles: United States District Judge, on the one hand, and mother of teenage daughters on the other.

During the work day, I am a federal judge, which means people generally treat me with respect—I have people who work for me in my chambers; litigants look to me to give them answers to complex legal questions, and *I* control what happens in my courtroom—when I say things, people listen, and they generally do what I order them to do! But in the evenings, when I leave the courthouse and go home, in the course of that transition, all of my wisdom and knowledge and authority essentially evaporates, and my daughters make it very clear that, as far as they are concerned, I know *nothing* and should not tell them anything; much less, given them any orders—that is, if they talk to me at all. But I try not to get discouraged—I cling to the hope that they will someday

come to appreciate my wisdom, as I now do with respect to my own mother. In any event, for tonight's purposes, I think that being able to manage a docket while simultaneously holding down the fort at home is a pretty big accomplishment.

Moving on to lesson #2 . . . which is, "to whom much is given, much is expected."

(2) <u>Lesson #2: To Whom Much Is Given, Much Is Expected</u>

So, as you may have guessed, my mother is a tour de force, and she is also a woman of faith, and one of her favorite life lessons comes right out of the New Testament; it's the idea that those who have been blessed with health and ability should work, and work *hard*, not only for themselves but also for the good of all mankind. This is a core value for my family—to a person, my family members on my mother's side have held service positions of various kinds, and we believe deeply in manifesting one's own gratefulness by tackling difficult tasks and working diligently to effect positive change in your community.

What I find really interesting is how my husband Patrick—who could not be more different from me in terms of background and upbringing—managed to learn that same lesson when he was growing up, and the fact that we both internalized it, and endeavor to put it into practice in our daily lives, actually makes us more alike than different. To understand what I mean, you have to know something about Patrick: Patrick is the

quintessential "Boston Brahmin"—his family can be traced back to England before the Mayflower and has been in Massachusetts for centuries; in fact, he and his twin brother are the 6th generation in their family to graduate from Harvard College. By contrast, I am only the second generation in my family to go to *any* college, and I'm fairly certain that if you traced my family lineage back past my grandparents—who were raised in Georgia, by the way—you would find that my ancestors were slaves on both sides. In addition, Patrick was a pre-med science and math student when we met, while I was a full-on government major, who definitely shunned math and science.

Thus, as college students, I don't think you could find a more *unlikely* pair. But somehow Patrick and I met, and became friends, and we quickly learned that we both have what my daughters would call the indomitable spirit of hard work—a Puritan-type work ethic—that is clearly a shared value been us, despite our obvious differences. You see, we are both those long-suffering, "early-to-bed, early-to-rise" no-rest-for-the-weary kind of people, who have high standards and sincerely believe in the prioritization of work over play in most circumstances. You might imagine that this is *agonizing* for my daughters—totally uncool—but it is who are: it united us from the outset, and has sustained us through medical school (Patrick is a surgeon), law school, and 21 years of marriage as of last week, which is a cause for celebration, of

course. My mother—who along with my father just celebrated her 49th wedding anniversary—would be very proud.

So, in a nutshell, that's who I am and where I'm from and what I believe in (hard work). Let me quickly pivot to the remaining two life lessons that my mother taught me and that I want to focus on tonight—the third one is to *learn something*.

(3) <u>Lesson #3: Learn Something</u>.

Until her retirement a few years ago, my mother was a high school principal, and no matter what happened at home, the most important thing to her was that I *learn* from it. My mother was (and still is) relentless in this regard, and what that meant for me growing up is that I could never rest on my laurels. Yes, I was an accomplished competitive orator; yes, I was President of my high school class, and you would think that would be enough to earn a restful period of unscheduled downtime during the summer. But no, at my mother's direction, my summers were filled with science camps, and poetry competitions, and writing projects. I grew up a stone's throw from the ocean in Miami, but I couldn't just go hang out at the beach with everyone else, if *I* was going, I had to have a net and bucket and flash cards with the scientific names of the various species of foliage and marine life that I was likely to encounter! Every situation presented a "teachable moment" – and boy did I learn.

Indeed, really my entire life can be characterized as one monumental learning experience! It started when I was very young—my father, who is a lawyer, went back to law school after I was born, and some of my earliest memories are of our apartment in the married students housing complex on the campus of the University of Miami. I was in preschool, and I would sit at the dining room table doing my "homework" with my father—he had his law books all stacked up and I had my coloring books all stacked up—and thus began my interest in the law. As I mentioned, my mother was a principal, and a science teacher before that, and for my parents, making sure that I had a good education was paramount, and so they did what they needed to do to ensure that I attended a top notch, suburban public high school, and that paved the way for my acceptance to Harvard College (where I met Patrick) and then eventually to Harvard Law School.

And my relative success in college and law school led to what I can only describe as the truly incomparable series of learning opportunities that were my clerkships—somehow I was able to persuade three different federal judges to hire me as a law clerk: I spent a year with the Honorable Patti B. Saris, who sits on the District Court of Massachusetts; a year with the Honorable Bruce Selya, who serves on the First Circuit; and a year clerking for Associate Justice Stephen Breyer on the Supreme Court of United States. To have been taught and mentored by these extraordinary judges (who also happen to be extraordinary people), and to learn

so much about how the common law sausage gets made, was truly the opportunity of a lifetime.

I completed my last clerkship 17 years ago now, but even today, in the context of my current work as a federal district judge, the learning continues. On a daily basis, I am juggling a diverse array of cases at what feels like warp speed, and new issues are constantly coming up—things I know nothing about—so I have to learn something fairly quickly in order to be able to rule. The experience is actually quite different than my prior work as an appellate lawyer; in that role, I valued expertise and staying in my lane (knowledge that was deep rather than wide). But now, I have to be something of a jack-of-all-trades, and I really do learn something new almost every day!

I can also report that, after nearly 5 years on the bench, I am starting to *enjoy* it, and I have no doubt that the *learning* aspect of my daily life has been a major contributor to these feelings. In that regard, I have come to identify fully with the sentiment captured in the following quote from T.H. White's novel, "The Once & Future King":

> "The best thing for being sad," replied Merlin, beginning to puff and blow, "is to learn something. That's the only thing that never fails. You may grow old and trembling in your anatomies, you may lie awake at night listening to the disorder of your veins, you may miss your only love, you may see the world about you devastated by evil lunatics, or know your honour trampled in the sewers of baser minds.

> There is only one thing for it then — to learn. Learn why the world wags and what wags it. That is the only thing which the mind can never exhaust, never alienate, never be tortured by, never fear or distrust, and never dream of regretting. Learning is the only thing for you. Look what a lot of things there are to learn."

This, I think, is what my mom was getting at when she made sure that my brother and I were always learning. And it is a lesson that I hope never to forget.

(4) Lesson #4: *Always* Show Respect For Others.

I am getting close to the end of my time, so the final life lesson—which is, always show respect for others—will be brief. My mother taught me that it is crucial to respect everyone we encounter, no matter who they are, or what they do. For my mother, this lesson goes well beyond the standard "do until others as you would have them do unto you," and extends to treating *everyone* – from the maintenance worker to the docket clerk—with genuine respect and kindness. This is a world view that I actually cherish, and I believe that it has made it possible for me to be able to relate to a variety of people from different backgrounds and cultures. I also think that it helps in my daily role, as I interact with the various people who come before me. It is my job to hear their concerns, and attempt to administer justice, and in my view that goal is simply unattainable unless you have respect.

I would also say that among the various life lessons that I have talked about and that I attempt to pass on to my own daughters, this one may very well be the most important. I think of it this way: I feel so fortunate to have had the opportunities that I have had in life, I believe it is my obligation to teach my children to refrain from casting aspersions on others because of their life circumstances; in other words, as is often said in religious circles, I *know* that "there but for the grace of God go I." I teach my children that this means that we approach the world with a grateful spirit; we don't look down on, or talk down to, others; and we show respect for all mankind.

To close, let me add that, as it turns out, modeling respect and kindness has also served me fairly well over the years. I have met and worked with scores of wonderful people in the various positions that I have had, and as far as I know, I haven't made many enemies. And I have also benefitted from the kindness of strangers—here is just one example: [SHOW PICTURE]. Do you recognize these people? This picture was taken in 1996—the year I graduated from law school—in Chicago, during the summer, at the wedding reception of a mutual friend. They were total strangers to me at the time, but as Harvard Law grads (and the only lawyers present at the event) we had something in common. I didn't have any further interaction with them after this wedding, but I have fond memories of talking to them, and was pleased and surprised

when my friend whose wedding this was forwarded me this picture many years later.

This was the only picture of Barack and Michelle Obama that the photographer took at her wedding, and there I am right in the middle of it! I now use this photo to teach my daughters that the world is much too small to disregard the people that you meet along the way. Who could possibly have known that the community organizer I met in the summer of 1996 would become the President of the United States twelve years later, and would go on to nominate me to the Sentencing Commission and then to the federal bench?! If nothing else, I say, *this* is why you must treat everyone with respect—you really never know who will go on to do what, and how they might eventually remember you (if at all). [TURN OFF]

* * *

So that's it. That is who I am, and what I do, and at least for one brief shining moment, who I had the pleasure of getting to meet. By the way, I am certain that when he was considering my nomination, President Obama did not actually remember having met me all those many years before. But I am undaunted: I say to my daughters that he didn't remember me *precisely because* I was respectful and kind at the wedding—and therefore did not make a memorably *bad* impression on him—and for that, I am grateful. I am also grateful to be a part of this august group, and to have the

opportunity to meet and talk with all of *you* as a member the ALI Council. Thank you for being so welcoming during my first year, and I look forward to continuing to engage with you in the years to come.

Bradley Hills Adult Education Program

THE CONCEPT OF JUSTICE

I. Introduction

I am delighted to be here with you all this morning, although I must say that it is VERY daunting to be asked to speak about a topic that is as intangible as "the concept of justice." I suppose that I do have some familiarity with "justice"—people say I do justice—as a federal judge, but what does that really mean? It really is hard to get ones arms around it, so in preparation for today's discussion, I did what most people in the secular world do when they are searching for meaning . . . I opened the dictionary!

You will not be surprised to learn that Dictionary.com defines the noun "justice" as "the quality of being just; righteousness, equitableness, or moral rightness." It is also defined as the "moral principle determining just conduct" and "conformity to this principle, as manifested in conduct." But the definition of justice that is most familiar to me in terms of my work is "justice" as "the administering of deserved punishment or reward." I think that *that* idea—the notion of justice as a deserved response to human conduct—is what is meant when we think of the justice system that is at work in our society. In this sense, justice is what society demands (how it reacts) primarily in response to wrongdoing. We have all heard the calls for "justice!" when terrible things happen caused by criminal behavior—say, when Dylan Roof opens fire inside Mother Emmanuel and kills 9 people, or when Bernie Madoff steals millions of dollars from thousands of people through an elaborate pyramid scheme. And as Pastor David will no doubt explain in the weeks to follow, the Bible is also filled with stories that have as their subtext the fact men must face consequences in the wake of their

moral failings. The notion of justice as punishment is one concept of justice.

But as I was thinking about the concept of justice, it also occurred to me that "justice" can take on a different meaning at times—one that in some ways is less about making sure that society responds to wrongdoing, and more about *equality*; that is, fairness in the treatment of certain members of our society, both in the context of the criminal justice system and elsewhere. You've heard the refrain: *"No Justice? No Peace!"* It commonly rings out at marches and sit-ins, and is identified with civil rights struggles here and around the world. In this regard, you should notice that, while the "justice" that is being called for in the civil rights context sometimes relates to a demand for punishment, it also carries with it an insistence that our society live up to its founding creed—that all men, and women, are created equal.

So, what I thought might be interesting as a focus for the discussion today is to think about these two different aspects of "justice" as it relates to a topic that I happen to know something about, which is sentencing in the federal criminal justice system. If we start with the premise that "justice" generally pertains to the proper response to criminal wrong doing—it is good to do justice—then I hope you will come to agree with me what it means to do "justice" can vary, and that it may very well depend upon whose perspective one is taking when the question of "what do we do with this person who has committed a crime?" is asked.

So where to begin? Let's start by taking a look at justice broadly, from the standpoint of our society.

II. Society's View (Justice As Punishment)

As a general matter what it means to "do justice" in the criminal justice context from society's perspective is to ensure that sufficient consequences are imposed for misbehavior.

A. The Philosophy Behind The Need To Punish

Now, it would certainly be fair to ask—why? That is, why do we need a system that is geared toward meting out punishments for violations of the law? To that I would answer, as many philosophers have, that the imposition of justice as punishment is a corollary of liberty that is indispensable in a free society.

I know that that seems entirely counter-intuitive: *how could locking people up, thereby restricting their liberty, advance the cause of freedom?* Well, for some of you who may have studied political science, you will probably recall learning about the various forms of government and the philosophies behind them, and you might remember Hobbes' state of nature, where life is "nasty, brutish, and short." Hobbes hypothesized a world in which human beings have total freedom, their behavior is entirely unregulated—there are no rules to govern us, and everyone can basically do whatever they want. That sounds great in theory, until you realize that in order for many human beings to have long lives and to live together in relative harmony, there have to be rules and standards to live by. The people in Hobbes's state of nature aren't truly free, because they are constantly looking over their shoulders and guarding their stuff, and the political science student learns that real liberty can only be achieved when human beings enter into a social compact and decide that they will give up

some of their freedoms in order to be governed by a set of rules that we all live by. If everyone follows the rules, then individual members of society can be free to pursue their own ends during a peaceful and hopefully extended period of life.

Here is how justice as punishment plays into all of this: when there are rules, as is necessary to live in civil society, then there *must* be consequences for breaking the rules or else there really are no rules at all. Think about that for a moment: in a free society, human beings are autonomous, meaning that they are free to make choices, and one of those choices is whether or not to follow the rules. If nothing happens to an individual who decides not to follow the rules, then everyone would rationally make that choice, meaning that no one would follow the rules and there would be anarchy! So, you see how this works—from society's perspective, the call for "justice" as punishment is, at bottom, about the need to enforce the rules that have to be in place and in full force if we are going to live in harmony in our free society.

B. <u>The Role of The Judge In Administering Justice</u>

So, with that philosophy in mind, I thought it might interest you to hear a bit about how this notion of justice and the imposition of punishment as a necessary aspect of a civil society plays out in terms of what I do as a federal trial judge. As you heard, I currently have the privilege of serving as a federal trial judge in the District of Columbia. In contrast to my prior work as an appellate litigator, which, if I'm being honest, was kind of like performing an autopsy, being a trial judge is a very *active* process, primarily because a trial level case is like a living organism—it is constantly moving and changing and responding to new stimuli. So, trial judges have to be

very responsive and flexible; we use our discretion to make judgment calls in the moment to the best of our ability and within the boundaries of the law. As it relates to doing justice in criminal cases, one of the most dynamic areas of a trial judge's work is sentencing criminal defendants—that is, using one's discretion deciding what the consequences for a defendant's criminal conduct should be—and as you might imagine, sentencing can be extraordinarily challenging, both in practice and in theory.

So how does it work? Let me start by describing what it is like to have—and to exercise—the power to sentence, which, again, one can characterize as the power to "do justice" as society conceives of that term. In the typical federal case, the trial judge will only have seen the defendant (who I will refer to as "he" because federal criminal defendants are almost always male) on two or three occasions prior to sentencing date. Approximately 97% of federal criminal defendants plead guilty, and so the reality is that the sentencing process is usually the first time that the trial judge will really engage with the facts of the crime and consider the characteristics of the defendant.

And there is a lot to consider. The work of the sentencing judge actually starts in chambers, well before the hearing date, when the judge consults the Federal Sentencing Guidelines (a set of guidelines for judges that I will talk about a bit later) and reviews the case record, hoping to find answers to two nearly impossible questions: who is this person, really? and how should I think about what he has done? To get a handle on these issues, the judge gathers as much information as possible: I read the Probation Office's Pretrial Sentence Report, the parties' sentencing

memoranda, any letters that have been submitted, and of course, the applicable notes and policy statements in the Sentencing Guidelines Manual. And then, I attempt to figure out how and to what extent all these facts matter, and whether and to what extent the guidelines take into account all of the relevant considerations.

For me, sorting through the facts and issues and trying to determine what to make of them is the most demanding part of determining the sentence. It feels a little like having to scale a huge rock formation: you can go in any direction, and because the criminal statutes ordinarily authorize an impossibly wide range of punishment for most criminal violations (say, 0 to 20 years), there are really no guiderails to speak of. So you're always worried about free fall, and you try to seek out footholds in the facts; pegs upon which to rest your reasoning, like whether the defendant has a job and a family, or has a significant criminal history, or used a weapon, or someone was injured, or a host of other aggravating or mitigating factors that might justify moving in one direction or another. But while you're balancing these various concerns, you are also threading the needle between two very different societal interests: on the one hand, the acknowledgement that *all* of us are more than just the worst thing we've ever done, and on the other, the need to ensure that what *this* defendant has done is adequately addressed so that the purposes of punishment are satisfied.

Because sentencing requires this type of heavy lifting, it's no wonder that trial judges often say that sentencing is the most difficult part of their jobs, and many report having sleepless nights when they are in the process of figuring out the sentence to be imposed. But wait; there's more! Even after the judge has assessed the facts and resolved any legal or guidelines

issues, *another* challenge awaits: the judge has to take the bench and explain to an array of interested parties—and especially the defendant—what justice requires and why.

In a law review article aptly titled "Speaking In Sentences," federal district judge Brock Hornby captures the nature and gravity the sentencing ceremony. His article begins with reminder that

> [QUOTE] Federal judges sentence offenders face-to-face. The proceedings showcase official power vividly[,] and [also] sometimes, individual recalcitrance, repentance, outrage, compassion, sorrow, occasionally forgiveness—[all] profound human dimensions that cannot be captured in mere transcripts or statistics.[1] [END QUOTE]

Judge Hornby further provides much-needed advice about how to manage the task of addressing so many different audiences during what he calls "these public communal rituals." He says:

> [I]t is imperative that judges rise to the occasion, and conduct sentencing proceedings in plain English, so that courtroom audiences can comprehend and evaluate the sentence and its rationale. . . .
>
> Speak to the victims, affirming their hurt.
>
> Address the lawyers, accepting or rejecting their arguments.
>
> Speak to the family, recognizing their concerns, and perhaps positive qualities of a parent or offspring[.]
>
> Speak to the community, emphasizing that the rule of law matters[.]
>
> [And] [s]peak to the defendant, explaining the punishment, sometimes in the language of retribution

[1] D. Brock Hornby, "Speaking in Sentences," 14 Green Bag 2d 147, 158 (Winter 2001).

> or reproof, sometimes encouragement. [But] respect[ing] the defendant's dignity nevertheless.

I try to do all of these things in my sentencings, and I am especially careful to adhere to Judge Hornby's admonition to treat the defendant with respect. I guess you could say that I am persuaded by the theories of punishment that accept all human beings as responsible moral agents who are capable of rational thought, and thus view punishment as a necessary consequence of the defendant's decision to engage in criminal behavior. In other words, in my view, it is precisely because the defendants who come before me are autonomous individuals who have made choices that consequences must be imposed, however difficult it may be for me to look into a defendant's eyes and announce that he is going to have to go to prison, sometimes for a very long time. I address each defendant directly, and I try to explain as clearly as I can what the punishment is and why it is required. And I honestly believe that a defendant will only be able to recognize the error of his ways, and decide to make different choices in the future, if he is made to feel as though he has been treated with respect at sentencing.

So, earlier in my remarks, I mentioned that the sentencing process is a manifestation of "justice" from society's perspective, and I hope you see why that is that case, and have a better sense of how that type of justice is administered. I also noted that sentencing was challenging *both* in practice *and* in theory. Let me pivot now to talk a bit about how deciding which sentence to impose in response to criminal wrongdoing raises *philosophical* challenges that pertain to the concept of justice. The short answer is that "just" sentencing outcomes can vary dramatically, even for the same crime,

depending on one's values and the goal that one is trying to achieve with the consequence that is being imposed.

To illustrate this, I will now do what my high school speech and debate coach used to say was the best way to get an audience to follow you—she would say, "tell them a story!" So I have one. The facts that I will be recounting are those of a true case involving a serious crime that took place in the late nineteenth century, and I invite you to come with me back to that time.

C. Crow Dog's Case

The year is 1881. A tribe of Native Americans known as the Brule Sioux lived and hunted in bands on the great plains of central South Dakota. This migratory people survived by hunting and gathering within land that the government had set aside for a reservation, but at that point in our nation's history, the relationship between the nascent United States government and the long-established Indian nations was still very tenuous.

The head chief of the Brule Sioux was a man known as Spotted Tail. Spotted Tail was handsome and manly and generally well-liked, but he was also known to rule over the lower chiefs with an iron fist and to demand absolute obedience from members of the tribe. Spotted Tail believed in keeping peace with whites, which meant that the Brule Sioux did not participate in the Great Sioux-American wars, and it also meant that Spotted Tail worked part-time as an agent of the federal Bureau of Indian Affairs, which compensated him handsomely for his influence in calming his people.

Another leader within the Brule Sioux tribe—a man who went by the name of Crow Dog—was more traditional and substantially less accommodating. Crow Dog was a Sioux warrior and he felt strongly that encroachments by whites and the United States government into the lands and customs of the Sioux nation must be resisted. Crow Dog led a faction of the tribe that was in strong opposition to what they believed was the arbitrary, dictatorial, and traitorous leadership of Spotted Tail.

In the afternoon of August 5, 1881, Crow Dog crouched along the side of a road that led to Spotted Tail's (government-constructed) house, purportedly fixing the wheel of his carriage. When Spotted Tail came riding along on a horse, Crow Dog leapt up, pulled out his rifle, and shot Spotted Tail through the side, with the bullet exiting out his chest. Spotted Tail fell off his horse onto the ground, stood up, staggered a few steps, went for his own pistol in his waistband, but fell dead before he could get off a shot.

Now, I have told you this true story, not so much because of the crime but because of the aftermath, which is an interesting tale of two punishments. In the wake of Spotted Tail's death, Crow Dog was, at first, subjected to the Brule Sioux system of justice. These native people had a dispute-resolution system that was controlled by a council of appointed leaders. This tribal council didn't care about punishment or retribution or enforcement of a moral code, but instead were focused primarily on *survival*, so the ultimate value for them, in civil and criminal matters, was to terminate the conflict and to reintegrate everyone peacefully back into society. In Crow Dog's case, the council met not to "convict" or "acquit" but to arrange a peaceful reconciliation of the affected families. The council determined that Brule law

required Crow Dog's family to give Spotted Tail's family $600, eight horses, and a blanket, which Crow Dog's people promptly paid and Spotted Tail's family accepted. (For his part, Crow Dog purified himself in a sweat lodge and shot his rifle into sacred rocks to assuage the spirit of Spotted Tail). And, with that, under tribal law, the matter was settled.

Now, needless to say, *that* system of dispensing justice for murder was radically different than the one that existed in the broader United States at the time. Indeed, when the federal authorities in South Dakota heard about the murder and the way it had been resolved, they stormed the reservation, arrested Crow Dog, prosecuted him for murder in federal court, convicted him (in spite of his claims of self-defense), and, ultimately, a judge sentenced him to hang for the killing of Spotted Tail. *One crime—two dramatically different penalties*.

In the end, Crow Dog was ultimately spared by the United States Supreme Court, which reversed his conviction on the narrow ground that tribal sovereignty precluded federal prosecution. And *that* Supreme Court ruling was overturned by Congress, when it enacted the Major Crimes Act of 1885, which is a federal statute that provides the federal courts with jurisdiction over major crimes committed on Indian reservations.

But for present purposes, what I hope you take away from this story is an understanding that, at bottom, the decision about what the appropriate sentence is in any given case is a question of *values*, and as a result, it matters who is making the sentencing decision, and which purposes of sentencing he or she sets out to achieve. This is apparent even if we set

aside the state versus tribe aspect of the Crow Dog story. Instead of state authorities and tribal authorities, imagine two sentencing judges who are reviewing the exact same set of facts and diligently seeking footholds for their reasoning. They could be acting in all good faith when considering Crow Dog's circumstances, and *still* reach dramatically different results, depending on their own views about the purposes of punishment and their own assessments regarding which facts about the crime or the defendant should be treated as most significant.

For example, one judge might value Crow Dog's skills and his contributions to the tribe, and believe in restorative or compensatory justice. As a result, that judge might rationally conclude that, despite the heinous nature of the crime, a sentence of execution or a lengthy period of incarceration is not warranted. The other judge might believe in deterrence as the purpose of punishment, or might believe in just deserts as a punishment philosophy, and thus could be equally rational in deciding that, despite Crow Dog's hunting prowess, his murderous act was so heinous that only execution or life imprisonment will do.

And it is important to note that I am highlighting the disparity not to spark a debate about whether the sweat lodge or the gallows is the better outcome, but to ask an even more fundamental question, which is: whether a justice system that permits such a wide variation of possible outcomes is really a system of justice at all?

III. The Individual's View (Justice is "fair" treatment)

That question actually brings me to the final part of my prepared remarks, which pertains to the other perspective on the concept of justice that I mentioned at the outset and that I think is very important to acknowledge: the concept of justice as *fairness*. We have been talking about justice as punishment, but even in the context of the administration of a penal system, we can see that sentencers exercise discretion regarding what punishment to impose, which means that *fairness* in the exercise of sentencing discretion crucial, and it is an especially important aspect of justice, from the standpoint of the individual who is being subjected to the immense penal power of the State.

I want to end by observing that ensuring "justice" as fairness among criminal defendants during the administration of "justice" as punishment is actually much more difficult than it might seem. There are many people who look at the federal criminal justice system, for example, and think that the only way to be fair to individual defendants is to let judges be judges, and that any restrictions on the exercise of judicial discretion leads to terrible unfairness for defendants, because judges are constrained in their consideration of factors particular to the individual defendant. These critics believe that justice in sentencing requires that a judge have discretion and the flexibility to undertake individualized assessments of a defendant and his crime. In light of our national experience with statutes requiring mandatory minimum sentences and mandatory guidelines, I think that the concern about binding judges is an entirely rational critique. But there is also a justice as fairness concern that arises when a system of justice does *not* constrain judicial discretion, and as a result, different judges end up sentencing similarly-situated criminal defendants differently.

Let me give you a bit of related history, and then I'll open it up for questions. Judge Marvin Frankel, a federal district judge who served in the Southern District of New York from 1965 to 1978, wrote an influential book that was published in 1972, and was entitled "Criminal Sentences: Law Without Order." Judge Frankel argued quite forcefully that [QUOTE] "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."[2] [END QUOTE] The thrust of his analysis was that one of the core promises of our system of government—that we are "a government of laws and not men"—is broken when the sentence imposed on a defendant can "range from zero to up to thirty or more years in the unfettered discretion of miscellaneous judges," and when the sentencing system produces "a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[3]

At around the same time as Judge Frankel was expressing these concerns, Massachusetts Senator Edward Kennedy was voicing a slightly different critique, but with similar ferocity. Senator Kennedy is quoted in a 1977 report as referring to the federal sentencing scheme as a "national scandal," and describing it as a "non-system" in which judges can "formulate and apply their own personal theories of punishment" with the result being that "similar offenders guilty of similar crimes commonly receive grossly disparate sentences."[4] In Senator Kennedy's view, the result was systemic unfairness to defendants, often along racial and socioeconomic

[2] Marvin E. Frankel, Criminal Sentences: Law Without Order (1972), at 5.
[3] Id. at 6, 7.
[4] Toward a Just and Effective Sentencing System, at 3.

lines, and also an undermining of law enforcement because he believed that uncertainty about sentencing effectively incentivized criminal offenders—who might already tend to view "the criminal justice system . . . as a game of chance"—to commit crimes and "gamble" on the outcome.

These types of critiques of unfettered judicial discretion galvanized a sentencing reform movement that came to a head in the early 1980s, when a bipartisan group of law makers from both ends of the political spectrum—including such unlikely allies as Senator Kennedy, then-Senator Joe Biden, Senator Orin Hatch, and Senator Strom Thurmond—came together to enact a piece of legislation that reshaped the federal sentencing system and changed the nature of sentencing discretion in fundamental ways.

With the Sentencing Reform Act of 1984, Congress established an independent agency within the judicial branch of government—the United States Sentencing Commission—and tasked the Commission with drafting an implementing Sentencing Guidelines, which are essentially a detailed set of rules that guide federal judges in the exercise of their discretion at sentencing. By statute, the Commission was a permanent body that was to formulate and amend these rules, and also gather information about every sentence that federal judges hand down nationwide.

Some of you may be familiar with the sentencing guidelines—it is a big book of rules pertaining to different federal crimes, and they require a judge to look at various relevant factors that are weighted numerically, so judges are literally doing arithmetic relating to the crime and the offender at issue. The judge determines an offense level, and then calculates a

defendant's criminal history score, and then uses those numbers to arrive a particular range of punishment in terms of months of imprisonment.

You should also know that the Sentencing Guidelines have been very controversial throughout their history, and among other things, are often criticized for being too rigid and for resulting in penalties that many stakeholders legitimately and rightly believe are much too harsh for the offenses at issue. Judge Brock Hornby, for example, has been a vocal critic of guidelines, and his critique relates in part to what he believes is the "public communal ritual" that is the sentencing process. The same article of his that instructs judges about how to speak at sentencings comments that "[m]andatory guidelines frustrate [the sentencing] process, with their overemphasis on numbers and categories." The reality, Judge Hornby says, is that "sentences can *never* be uniform. . . . [because] [s]entencing is not *only* about outcomes, statistics, and uniformity." In his view, fair punishment can only be achieved in the midst of "[u]ncertainty, subtlety, debate, and public discussion[,]" and it "calls for individualized wisdom exercised by the community's arbiters in a public ceremonial process conducted in language that everyone understands[.]"

He makes a good point. But I do sometimes wonder whether justice as fairness really demands that we toss the entire guidelines framework, along with any other effort to restrain judicial discretion at sentencing? I worry that without *some* mechanism for making sure that all of the judges who are exercising their discretion to sentence people within a particular system are generally pointing toward the same set of goals, and are weighing the various factors at issue in a similar fashion in similar cases, then inequality will inevitably creep in, and we will find ourselves

administering unjust—and by this I mean unfair—sentences for certain defendants, when compared to the sentences that other similar defendants receive.

So, it is quite a complicated thing—the concept of "justice" as it applies to the criminal justice system. And at the very least, I can confidently say that both 'justice as punishment' and 'justice as fairness' are North Stars for judges who are tasked with sentencing defendants and are trying to do the right thing, both for the individual defendants who come before us, and for the society at large.

What do you think? I am happy to take questions—does anyone have any thoughts about the concept of justice in our criminal justice system? How can we best achieve justice as fairness—constrain judicial discretion or let it be?

Attorney Admission

July 7, 2017 9:30 AM

Good morning to all and welcome. My name is Ketanji Brown Jackson, and I am a District Judge on the United Stated District Court for the District of Columbia.

Before we have the roll call and motion for admission, I would like to introduce you to one of our guest speakers, Mr. Jonathan Lasken, who is here to speak on behalf of the D.C. Chapter of the Federal Bar Association. Mr. Lasken began his legal career as a law clerk for the Hon. William T. Moore, Jr at the U.S. District Court for the Southern District of Georgia. He has worked on both government and private antitrust litigation and other complex civil proceedings and was designated a "rising star" in Super Lawyers Magazine. He is currently practicing as an appellate attorney for the Antitrust Division of the U.S. Department of Justice.

* * *

Thank you very much, Mr. Lasken. We appreciate your being here.

NATURALIZATION CEREMONY SCRIPT

Good morning! I am Ketanji Brown Jackson, a U.S. District Court Judge for the District of Columbia and it is my pleasure to welcome each of you to today's Naturalization Ceremony. It is truly an honor and a privilege for me to be able to preside over this proceeding today, during which I will administer to you the oath of allegiance and admit you as citizens of the United States. This is a memorable day and a true milestone in each of your lives, and I am very grateful to be a part of it!

The Court would like to begin by recognizing Ms. Joanna Gohmann, who will speak to you as a representative of the District of Columbia Daughters of the American Revolution and as Chairperson of the DAR's Americanism Committee.

* * *

Thank you Ms. Gohmann, and thank you to the Daughters of the American Revolution for sending such an able representative. [The program says that we are going to have the Roll Call next, but I am going to delay that just for a bit, . . .]

I will now ask Mr. Pra-KASH KHA-tri to come forward to provide remarks on behalf of the D.C. Chapter of the Federal Bar Association. From July of 2003 until March of 2008, Mr. Khatri served as the nation's first Ombudsman for Citizenship and Immigration Services in the newly formed Department of Homeland Security. Thank you for being here, Mr. Khatri.

* * *

Thank you for those remarks, Mr. Khatri. We appreciate them.

ROLL CALL & MOTION FOR ADMISSION

Ms. Bledsoe, when you are ready, you may introduce the ladies and gentlemen who are here today and who seek to become new citizens.

YOUR MOTION IS GRANTED

[stand]

It is now my honor to administer the oath to all of you who have come here from all over the world to pledge allegiance to the United States.

PLEASE RAISE YOUR RIGHT HAND AND REPEAT AFTER ME:

I hereby declare, on oath

That I absolutely and entirely

Renounce and abjure

All allegiance and fidelity

To any foreign prince, potentate, state or sovereignty

Of whom or which

I have heretofore been

A subject or citizen

That I will support and defend the Constitution and the laws

Of the United States of America

Against all enemies, foreign and domestic

That I will bear true faith and allegiance to the same

That I will bear arms on behalf of the United States

When required by the law

That I will perform noncombatant service in the Armed Forces of the United States

When required by the law

That I will perform work of national importance under civilian direction

When required by the law

And that I take this obligation freely

Without any mental reservation

Or purpose of evasion.

So help me God.

We will now say the Pledge of Allegiance together.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, Vice Admiral Vivek H. Murthy, who served from December of 2014 to April of 2017, as the 19th Surgeon General of the United States. As Surgeon General, Dr. Murthy oversaw the operations of the United States Public Health Service Commissioned Corps, which is comprised of approximately 6,700 uniformed health officers who serve in nearly 800 locations around the world to promote, protect, and advance the health and safety of our nation and our world. Among other things, the Corps that Dr. Murthy led helped to protect our nation from Ebola and Zika and responded to the Flint water crisis, major hurricanes, and frequent health care shortages in rural communities.

Dr. Murthy is our honored guest at this ceremony today because of his special connection to our nation's immigration system—he was born in England and is the son of immigrants from India. During his early in his childhood, Dr. Murthy spent time in his father's medical clinic in Miami, Florida, and I will say that, although Dr. Murthy holds a number of distinguished degrees, including a Bachelor's degree from Harvard and both an M.D. degree and an M.B.A. from Yale, the thing that *I* find most compelling about his very impressive educational background is the fact that he is a graduate of a large public high school in Miami, which happens to be my alma mater as well—Miami Palmetto Senior High School, Go Panthers!

I am delighted that we have at least that in common, because I can say with certainty that Dr. Murthy's professional resume is unparalleled, even for a Panther! After getting his various degrees, Dr. Murthy completed his residency training program at the Brigham and Women's Hospital and

Harvard Medical School in Boston, Massachusetts, and he later joined the Harvard Med School faculty as an internal medicine physician and instructor, caring for thousands of patients and training hundreds of residents and medical students as a clinician-educator.

Dr. Murthy also has more than two decades of experience in improving human health in communities around the world. He co-founded an HIV/AIDS education program in India and the United States, and also a community health partnership in rural India, which trains women to be health providers and educators, and provides medical research and direct care programs that reach tens of thousands of rural Indian residents.

In addition to being a research scientist and a healthcare entrepreneur, Dr. Murthy is also a technology innovator! As if healing the world was not enough, I in his spare time, he co-founded and chaired a successful software technology company that improves research collaboration and enhances the efficiency of clinical trials around the globe!

It is also important to emphasize that, during his time as Surgeon General, Dr. Murthy used his considerable talent and energy to build partnerships within communities and across numerous sectors of our society in order to address the epidemics of obesity and tobacco-related disease; to reduce the stigma associated with mental illness; to improve vaccination rates; and to make prevention and health promotion the backbone of a strong and healthy America. Dr. Murthy's extraordinary devotion to improving public health in every dimension has been evident in everything he has done, and we are truly honored that he is here to speak with us today.

Dr. Murthy: Thank you for being here; we look forward to your remarks.

* * *

Thank you, Dr. Murthy, for giving all of us, American Citizens, those tremendous thoughts and insights. We have a lot to be grateful for, and you have given us a lot to think about.

KBJ REMARKS ON NATURALIZATION

Now it is my turn to congratulate you on this great accomplishment and to emphasize how happy I am to be here this morning! Most of what I do in court involves dealing with unhappy people in conflict, so this is really a great opportunity for me to look out and see so many smiling faces for a change!

At this point in the naturalization ceremony, the judge ordinarily gives additional remarks about the meaning and privilege of citizenship. I will do that in a moment, but first I thought that I would try something a bit different by showing you a video that is designed to capture the *feeling* of becoming a new citizen of the United States. This video features people who, just like all of you, have taken the oath and have been admitted as citizens of the United States. There is no speaking in the clip, but if you look carefully you will see quotations from many of these people and, of course, the looks on their faces speak volumes about the experience of raising one's hand and pledging allegiance to the United States for the first time.

I really love this video – and they say that a picture is worth a thousand words – so I will be quiet, and ask you to watch this.

******VIDEO (CLIP #1) *******

Thank you. As you saw, the various statements from people who have become naturalized citizens say much more than I ever could about what it means to them to become an American. Each of you has your own story about the experience, and I suspect that the fact that you took your oath of office in a court in our Nation's capital makes it even more special.

Washington D.C. is the seat of our federal government, but the true power and greatness of America is in its citizens, wherever they are all over this great nation.

As President Harry Truman once said,

> We Americans are a diverse people. Part of our respect for the dignity of the human being is the respect for his or her fight to be different. That means different in background, different in beliefs, different in customs, different in name, and different in religion. *That* is true Americanism; that is true democracy. It is the source of our strength. It is the basis of our faith in the future. And it is our hope of the world.

Those words by our former president, which were spoken in 1948, are still every bit as true today. America benefits from your citizenship, and because of each of you (and those who have come before you, and those who will come after), American will be a stronger and better place.

From my vantage point up here on the bench, I can see how happy you all are to have taken the oath and I know that each of you will treasure the freedom, rights, and privileges of United States citizenship. Please know that you must also take care to *exercise* those rights as a matter of civic responsibility. As American citizens, you now can, and should, vote; serve as jurors; inform yourselves about civic matters; participate in local and national affairs; petition the government on issues of concern; volunteer to help others; and become full members of your community. Only by engaging fully with other Americans in this great exercise that we call democracy will you truly be able to take full advantage of your new citizenship. And, as President Truman suggested, it is only because the diverse citizens of the United States come together as one nation—to

believe in the rule of law and to work for the common good—that the United States of America is, and continues to be, the greatest nation in the world.

Again, let me say congratulations on your entry into the privilege of United States citizenship. I invite you all, my fellow countrymen, to attend the reception across the hall that is sponsored by the D.C. Chapter of the Federal Bar Association. I hope to see you there!

District of Columbia Chapter

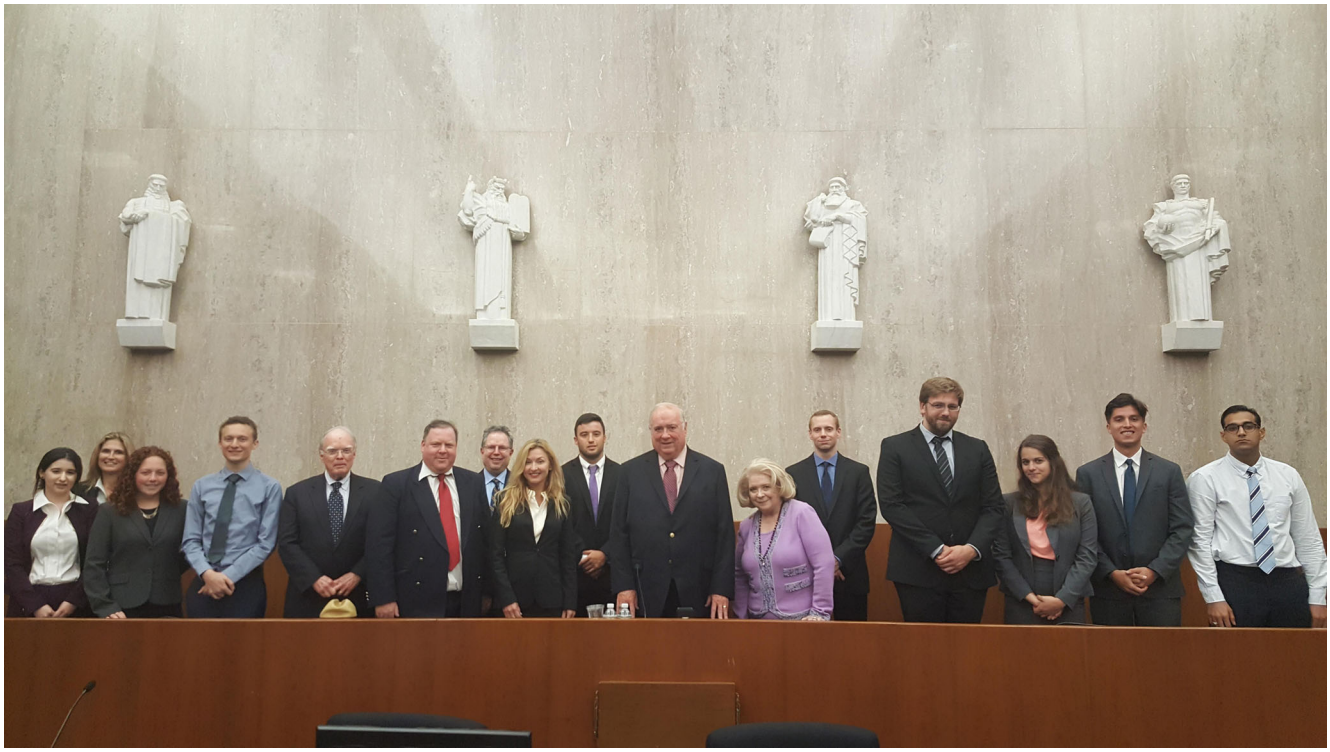
The Honorable Royce C. Lamberth Receives Honorary FBA Membership



The Honorable Royce C. Lamberth, former Chief Judge and now Senior Judge, U.S. District Judge for the District of Columbia, accepts Honorary FBA Membership, and Honorary Membership on the Board of Directors of the FBA District of Columbia Chapter. Pictured with Judge Lamberth (left to right) are DC Chapter board member Prakash Khatri, Co-Vice President for the DC Circuit Steven R. Miller, Incoming DC Chapter President Brian C. Murphy, immediate Past Chapter President Frances Sclafani, Past Chapter President and host Cary Devorsetz, and Adam Pearlman, law clerk to Judge Lamberth.

Meeting with The Honorable Royce C. Lamberth

On July 19, the District of Columbia Chapter sponsored a tour of the U.S. District Court for the District of Columbia. The tour was led by Aaron Adaway of the Court. Attendees also had the opportunity to attend a portion of an ongoing criminal trial presided over by Judge Royce Lamberth and meet with Judge Lamberth afterward.



2017 Immigration and Naturalization Ceremony

The DC Chapter hosted an immigration and naturalization ceremony for new citizens at the US District Court for the District of Columbia. Prakash Khatri, Board Member of the DC Chapter, gave moving remarks about how he achieved his dream of becoming a lawyer. Judge Ketanji Brown Jackson presided over the ceremony. Former Surgeon General, Vivek Murthy, was the key note speaker. Steven Miller, Circuit Vice President for the DC Circuit, was in attendance and facilitated the event including the breakfast sponsored by the DC Chapter.



Attendees at the Immigration and Naturalization Ceremony for new citizens at the US District Court for DC



Prakash Khatri, DC Chapter Board Member, with attendees from the Immigration and Naturalization Ceremony



Steve Miller, Circuit Vice President for the DC Circuit, and former Surgeon General, Vivek Murthy, with attendees from the Immigration and Naturalization Ceremony, in the Judges Dining Room

2017 DC Court Camp

On April 25, 2017, the DC Chapter sponsored the Chapter's first court camp, as part of a FBA national effort to do civics-related community service activities during April as pre-law day activities. The DC court camp brought together over 40 DC high school students from two schools and law student volunteers from the **Marshall Brennan Program** at American University's Washington College of Law as well as several volunteers from the Federal Bar Association, including Nicole Bacon, Chapter Secretary; Steven Miller, our Circuit Vice President; Brian Murphy, our Chapter Vice President, Ken Lemberg, and Patrick (Mac) Kennedy who met with Judge Scott Stucky of the Court of Appeals for the Armed Forces and Judge Emmit Sullivan of the U.,S. District Court for the District of Columbia. In

addition, Steven Miller, Brian Murphy, and Mac Kennedy also attended a hearing on a Guantanamo detainee which Judge Royce Lamberth presided over. The DC court camp program was planned and organized by a committee of representatives of the DC Chapter, including the above FBA members and Ron Crump, Ashley Akers, Jonathan Lasken, Chapter Board Member and Diana Wielocha, Chapter Board Member.

The participants first attended two morning criminal sentencing proceedings at the Court of Appeals for the Armed Forces. One of the judge's law clerks gave the participants background information on the two cases. Judge Stucky, one of the five judges on that court's panel, spoke to the participants after the second proceeding. Judge Stucky explained the scope of the cases, the role of the court, and his background and career path.

After leaving the Court of Appeals for the Armed Forces, the participants walked to the U.S. District Court for the District of Columbia where the enjoyed a pizza lunch, courtesy of the Federal Bar Association and a grant from the Federal Bar Foundation.

Following the lunch, participants were escorted by Aaron Adaway from the court's administrative office to Judge Sullivan's chambers for a half hour talk and question and answer session by Judge Emmit Sullivan about the scope of the jurisdiction of the U.S. District Court for DC.

At the end of the meeting with Judge Sullivan, Aaron Adaway led the participants on a brief tour of the courthouse building, including the ceremonial court room.

At the end of the tour, the high school students and the law student volunteers from the Marshall Brennan program that accompanied them left to return the students to their high schools. Steven Miller, Brian Murphy, and Mac Kennedy attended a proceeding concerning a Guantanamo detainee which Judge Royce Lamberth, a longtime FBA DC Chapter member presided over. Following the completion of the proceeding, Steven Miller and Mac Kennedy spoke to Judge Lamberth in his chambers about the proceeding.

Each of the judges agreed to serve as honorary members of the board of the DC Chapter and to assist the FBA DC Chapter in other ways, including speaking at a distinguished luncheon series, talking to FBA members following a future tour of the courthouse, and allowing a profile of each of them to be included in *The Federal Lawyer* magazine.



The Honorable Emmet G. Sullivan, U.S. District Court for the District of Columbia

Immigration Leadership Monthly Luncheon Series with David Shahoulian

On September 21, 2016, the DC Chapter and Immigration Law Section hosted the FBA Immigration Leadership Luncheon with David Shahoulian, the Deputy General Counsel at the US Department of Homeland Security as the guest speaker. Mr. Shahoulian discussed a wide variety of topics being handled by his office and responded to questions from the audience on numerous topics including the structure of his office, DACA, asylum law and immigration policy priorities, among other topics. The next FBA Immigration Leadership luncheon will be held at Carmines Restaurant, 425 7th St, NW, Washington, DC on October 12, 2016 at 11:30am. The speaker will be Michael McGoings, the Acting Chief Immigration Judge.







(l to r): Prakash Khatri, DC Leadership Luncheons Chair, and David Shahoulian, Deputy General Counsel, U.S. Department of Homeland Security



(l to r): Prakash Khatri, DC Leadership Luncheons Chair; Elizabeth Stevens, Immigration Law Section Secretary; David Shahoulian, Deputy General Counsel, U.S. Department of Homeland Security; Patricia Ryan, DC Chapter Board Member; and Ozlem Barnard, DC Chapter Member

Constitutional Evolution of U.S. Territories

On March 27, 2014 Federal Bar Association National President, Hon. Gustavo A. Gelpi, Jr. spoke at the American Univeristy's Washington College of Law in San Juan, PR on the topic of Constitutional Evolution of U.S. Territories. The event was sponsored by the D.C., Puerto Rico & Hawaii Chapters. View the **image gallery**.

5th Annual Alan B. Levenson Symposium

March 29th Reception for Supreme Court Justice Clarence Thomas

Attorney Admission

May 1, 2017 at 9:30 AM

Good morning to all and welcome. My name is Ketanji Brown Jackson, and I am a District Judge on the United Stated District Court for the District of Columbia.

Before we have the roll call and motion for admission, I would like to introduce you to one of our guest speakers, Ms. Shelia Hollis, who is a Board Member of the D.C. Chapter of the Federal Bar Association and is here to speak on behalf of that organization.

* * *

Thank you very much, Ms. Hollis. We appreciate your being here.

Ms. Bledsoe—are we ready for roll call and the oath of admission?

KIMBERLY JENKINS ROBINSON'S CLASS

ON RACE, RACISM & AMERICAN LAW

Visiting Speaker Notes

4/10/2017

Good afternoon—I am here to tell you a little about the federal sentencing system and the ways in which it has been found to have demographic effects. My background in this includes my work as a judge, and also a former member of the United States Sentencing Commission, which is an independent agency within the judicial branch of the federal government that is run by a 7-member board. The Commission's purpose is to gather data and establish sentencing policy for use by the federal courts.

My goal in the brief time that I have is, first, to explain basically how the Sentencing Guidelines—which are the sentencing rules that the Commission establishes—work; second, to discuss how sentencing is one of a host of criminal justice policy choices that have documented demographic impacts (I will demonstrate this through a discussion of the crack-powder disparity that you might have heard about), and third, to explain what the Commission's research shows about the demographic impacts of mandatory minimum sentences.

What you should remember as we go through this is that sentencing involves policy choices, and as with so many other aspects of law, the choices that

are made by institutional and case-level actors can have significant consequences on various minority groups.

I. GUIDELINE MECHANICS

- Have any of you ever seen the Sentencing Guidelines Manual before?

- <handout> I am giving you a copy of a typical guideline as it appears in the manual, as well as the Sentencing Table, which is the key to the guidelines' operation.

- <Talk through the basic operation>
  - start with the index (statute of conviction)
  - go to the applicable guideline
  - work through the calculation (base offense level plus any specific offense characteristics)
  - make other adjustments (e.g., mitigating role? Sophisticated means? Acceptance of Responsibility?)→ <u>total adjusted offense level</u>
  - Calculate criminal history score: the typical prior felony yields three points, with adjustments for crime of violence, committed the instant offense while on parole, etc. → <u>total criminal history score</u>
  - Find the applicable range in the table! <ask them to do this>

- The federal sentencing system has received *a lot of criticism* since it was adopted in 1984! Among the various critiques are the concerns
    - that this system has contributed to a dramatic increase in the overall federal prison population, AND
    - that the system may be having significant *demographic* effects; that is, many people are concerned that, unlike the society *outside* of prison—where the majority of the population is white—*inside* our prisons today the overwhelming majority of the population is black or brown!

So let's pivot to a discussion about the state of affairs in terms of the racial makeup of the federal prison population and how the criminal justice system operates to affect that makeup in modern times, and then we'll discuss some of the potential causes, including sentencing-related policy choices such as the crack-powder distinction.

II. DISPROPORTIONATE IMPACT OF SENTENCING POLICY CHOICES

A. What We Know (Data Re Disparate Impact)

--Although African Americans have consistently comprised approximately 13% of the overall population of the United States, more than 50% of prison inmates (state and federal) are black.

--African Americans have nearly 7 times the likelihood of being incarcerated as white people in the United States (it is likely that the rate for Hispanics and Native Americans is at least that high, but those figures were not the focus of the reports that I consulted).

--Young black males are extraordinarily highly likely to be under the control of the criminal justice system—a study in 1989 found that, on any given day, 23 percent of black males (1 in 4) between the ages of 20 and 29 nationally are in prison or jail, on probation, or under the supervision of the government after release. A follow up report in 1995 found the likelihood had jumped to 1 in 3.

--A black boy born in 1991 has a 29 percent chance of being imprisoned at some point in his life, compared to a 16 percent chance for an Hispanic boy and a 4 percent chance for a white boy.

--Looking only at the federal system, the alien would see a slightly different demographic pattern lately, but one that is out-of-proportion nonetheless: federal cases involving Hispanic offenders now comprise a majority of the federal docket (45.4%), perhaps because of the rise in immigration cases and the fact that Hispanic offenders are likely to be prosecuted in federal court.

--Although relatively recent statistics show that more of the federal caseload involves white offenders (28.5%) than black offenders (22.1%), blacks are more likely than whites to receive a sentence of imprisonment (87.6% of blacks compared to 78.0% of whites). And the average sentences for black offenders in the current federal system are approximately 10% longer than the sentences given to white offenders.[1]

B. Potential Causes? Five factors that help to explain the development of the incarceration disparity

So, it is clear that African Americans are disproportionately sent to jails and prisons nationwide (some 50% of prison admissions); are disproportionately represented in the prison population; and receive longer sentences on average than white offenders. But any criminologist will tell you that the *fact* of that racial disparity tells us little about *the cause* of the disparity! It could be that blacks

[1] [[[--It is also interesting to note that relative sentence lengths have varied recently, in possible correlation with the fluctuating federal sentencing structures: MULTIVARIATE REPORT'S CONCLUSIONS ABOUT VARYING SENTENCING SYSTEMS]]]

commit crimes at seven times the rate of whites. Or, perhaps blacks commit crimes that are seven times as severe as the crimes committed by whites, warranting substantially longer periods of imprisonment.

Criminologist Marc Mauer has written a very interesting book with a chapter on African Americans and Criminal Justice which explains that "if we are to understand the means by which disparities in imprisonment have developed, five areas of inquiry are most relevant: *crime rates, criminal histories, racial bias in prosecution and sentencing, racial bias in responses to crime and criminal justice policy [choices that] impact [] African Americans.*" I want to quickly touch upon each of these areas now.

1. **Crime Rates**

   The inquiry into crime rates asks whether African Americans exhibit higher rates of violent offending than other groups. (If yes, we would expect to see higher representation in the prison population.)

   a. Stats from 1996 show that, yes, black offending rates were considerably higher than other groups=>accounting for **43% of arrests for violent offenses** (blacks also accounted for 32 percent of arrests for property crimes)

   b. But:

      --arrest rates are not always the most accurate proxy for crime rates, given law-enforcement discretion (other groups may be less likely to get *arrested* and thus be attributed with lower crime rates), and

      --the percentage of violent offending attributable to black offenders has remained stable for twenty years (between

43 and 47 %), while the prison population has nearly tripled in that same span of time.

d. Nevertheless, researchers have found that some 76% of the higher black rate of imprisonment may be accounted for by higher rates of arrest (i.e., more crime), while 24% might be explained by race bias or other factors.

2. Criminal Histories

To what extent is prior criminal history an explanation for the disparity in rates of imprisonment?

a. You have seen that under the guidelines, the length of imprisonment imposed is largely driven by criminal history; thus, those with substantial priors serve longer prison sentences.

b. Research does suggest that blacks, on average, have more prior arrests and convictions than other offenders (in a higher criminal history category).

c. But "whether one acquires a criminal record is itself very much a function of race, geographic location, and other factors." Mauer, at 128. *E.g.*, pretextual traffic stops and racial profiling are prevalent law enforcement techniques in many areas of the country, which increase the likelihood of prior convictions

3. Racial bias in prosecution and sentencing

a. Bias in prosecution

⇨ Prosecutors have a lot of discretion in making decisions that influence sentencing outcomes. Research has been done that suggests that certain discretionary decisions of

prosecutors are possibly being employed unevenly and in a manner that contributes to sentencing disparities

- **anyone know what discretion I am talking about?:**

  --the discretion to bring or drop charges
  --the discretion to prosecute in federal court vs. state court
  --the discretion to offer pleas to charges that do or do not carry mandatory minimum penalties
  --the discretion to file motions for substantial assistance (which permit a sentence below the man min)

- One study looked at 700,000 criminal cases that were matched by crime and criminal history of the defendant. "[A]t virtually every stage of pretrial negotiation, whites are more successful than non-whites." [2]

- A report produced by the Commission several years ago, concluded that whites were being offered plea bargains that lead to sentences below the mandatory minimum sentence more often than blacks or Hispanics (disputed by the Justice dept)

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[2] Indeed, of the 71,000 felony cases involving adults with no prior record, 1/3rd of whites got the charges reduced to misdemeanors or infractions, while only one quarter of blacks and Hispanics got that disposition. (Mauer, at 138)

⇨ Also a potential for bias in the vigor that is employed when cases are prosecuted=>prosecutors make judgment calls about the strength of a case, often based on stereotyped assessments of the credibility of the witnesses, victim, and offender. Blacks and Hispanics typically fare less well in re such assessments.

b. Bias in sentencing

⇨ not overtly so, but some aspects of a structured sentencing system tend to favor whites and the wealthy, *e.g.*—

- the GLs themselves restrict consideration of an offender's full background, by saying that certain things (like addiction or a bad upbringing) ordinarily should not be considered. This narrows allowance for mitigating factors, as with women.

- Under the guidelines, imprisonment is the presumptive sentence, even for low-level offenders (does not encourage consideration of non-prison sentences and encourages work-arounds that are viewed as "reasonable" for those who can afford it).

- The fact that the guidelines are now advisory means that offender characteristics do get considered by a judge, and research shows that judges may be valuing characteristics that disadvantage certain racial/socioeconomic groups (e.g., family support and can demonstrate prior good works)→ "discrimination in mercy"

- ⇨ A number of studies have demonstrated a *lack* of judicial sentencing discretion bias when controlling for relevant variables, if the crime is a serious one:
    - For serious offenses there was little racial difference in the sentences handed down, but for property offenses and misdemeanors, minorities were considerably more likely to receive jail terms (4,000 additional prison sentences).

- ⇨ This may speak to the nature of discretion and sentencing: violent offenders regardless of race will receive jail time. But less serious offenders (for whom prison is only one option) have to be evaluated individually, and such evaluations typically benefit whites (who have more resources to devote to the problem?)

4. Racial bias in responses to crime

This inquiry examines *which crimes* our society view as serious—are the types of crimes that whites are more likely to commit considered to be as serious as the types of crimes committed by others?

a. Some studies suggest that the size of the minority population in a state is the best predictor of which crimes will be considered most seriously and pursued most vigorously by law enforcement!

b. Example: tax evasion and misrepresentation is a crime, but it is rarely detected (the system depends on tax payer honesty), weakly enforced, and punished administratively – *why*? Is it because of the types of people who are most likely to commit this kind of fraud?

c. Another example: shifting marijuana policy.

- In the early part of the 20th century, marijuana use was thought to be confined to blacks (jazz musicians and hipsters) and Mexicans. Legislation in the 1950s penalized first-time possession of marijuana or heroin with 2-to-5 years in prison.

- By the 1960s, marijuana began to be more widely used by the white middle class (on college campuses, etc). Public attitudes about the seriousness of the offense changed, as did legislation criminalizing its use and prescribing tough sanctions.

d. Yet another example: drunk driving. As compared to drug possession, drunk driving is responsible for 22,000 deaths annually—on par with the 21,000 annual drug-related deaths. And many more drunk drivers are arrested than people who possess drugs (1.8 million versus 700,000). But the typical mandatory sentence for drunk driving is only 2 – 10 days, far from the *years* that are currently imposed in drug cases.
   - [*Who* is being arrested for drunk driving? And why is the response to keep such persons functional in society and deal with dangerous behavior by providing treatment, while the response to drug possession is law enforcement and incarceration?]

Bottom line=>The public's perception of the appropriate societal response may be shaped by the racial composition of the user population! Public policy responses to crime change in correlation to who is most affected.

5. Criminal justice policy changes

Finally, and relatedly, we need to look at *how* our society has chosen to respond to crimes that are most prevalent in minority

communities. Are more severe sentences being prescribed for crimes that are committed by blacks? At least two general policy determinations are implicated . . .

a. Determinate sentencing

There is some evidence that determinate sentencing schemes—which were designed to reduce racial disparity at sentencing—may *contribute* to it in certain respects. This is because, by restricting the judge, such systems heighten the degree of prosecutorial discretion, which may be employed in uneven ways (as described earlier).

b. Mandatory Minimums

There are 171 individual mandatory minimum statutes in the federal code. *But most are not charged.* Statistics demonstrate that the ones that are most used are for the types of crimes that minority offenders are more prone to undertake.

a. In FY2008, cases involving white offenders constituted 29.8 % of all federal cases (20,770), and 26% of all cases in which mandatory minimums were charged (5,439).

b. By contrast, cases in involving black offenders constituted 24% of all cases (16,767), but 35% of all man mins (7,466). While there are fewer black offenders than whites being prosecuted overall, more blacks are charged under mandatory minimum statutes than whites.

c. The most prevalent man min statutes involve **drugs** and **firearms**—types of crimes in which minorities dominate. At some point, a policy decision was made to make these

types of crimes—and not other types of crimes—subject to man min penalities.

And speaking of policy determinations –

Historians, academics, and commentators are in unanimous agreement that the specific decision to undertake a "War on Drugs" in the 1980s is, by far, the policy determination that has had the most severe impact on racial disparity in sentencing.

III. THE CRACK-POWDER DISPARITY

I want to spend the time that I have remaining discussing one of the most clear examples of racial disparity in sentencing: which is widely referred to as the crack-powder disparity.

- How many of you are familiar with this phenomenon?
- Who here has ever heard of Len Bias?

A. The History

- Congress created the Sentencing Commission in 1984, and right away the Commissioners began researching, reviewing cases, and drafting the guidelines, and at that point in time, drug crimes were the largest category of offenses in the federal system, so the early Commission focused much of its attention on how drug crimes in particular should be sentenced.

- Len Bias was a famous basketball player who played for the Boston Celtics, and he died of a drug overdose while the Commission was in the process of drafting the guidelines. His death was huge news, and partly as a result of his tragic and well-publicized death, Congress promptly enacted the Anti-Drug Abuse Act, which established mandatory minimum penalties for certain types of drug crimes, including offenses involving crack and powder cocaine.

- Also at around this same time, crack cocaine was relatively new, and even though Len Bias died from ingesting *powder* cocaine, not crack, legislators—including members of the Congressional Black caucus—saw it as a scourge that was decimating minority neighborhoods and communities and needed to be addressed!

B. The Policy Choices

1. Congress made significant policy choices . . . .

   a. In the Anti-drug Abuse Act, set the man mins at 5 and 10 years of imprisonment, but these minimum penalties apply to different *amounts* of various types of drugs (not all were treated equally):
      - a person convicted under federal law of a crime involving 100 grams or more of heroin, or 500 grams or more of powder cocaine, or 5 grams or more of crack was subject to a minimum 5-year term of imprisonment.
      - The statute also designated the triggering drug amounts for a 10-year mandatory: a person convicted of an offense involving 1 kilogram of heroin, or 5 kilograms of powder cocaine or 50 grams of crack would be subject to the 10-year mandatory minimum.

   b. The statute thus embodied a crack-powder disparity that was 100-to-1, because a defendant could have 100 times more power cocaine than crack cocaine to get the same mandatory penalty.

c. And the demographic effects were obvious, because more than 90% of crack cocaine offenders were African American. In effect, then, the statute treated African American drug offenders more harshly as a systemic matter.

2. The Commission also made a significant policy choice . . . .

   a. It decided to link the guideline penalties that it was prescribing to the statutory mandatory minimums.

   b. The very first set of guidelines included the ratios that Congress had established:

      - the Commission developed a drug table that was crafted by plugging in the 5- and 10-year statutory amounts for heroin, powder cocaine, crack cocaine, marijuana and other narcotics, and then scaling up and down so that incremental increases or decreases in the amount of a drug resulted in proportionate increases or decreases in the guideline penalty. In other words, the drug table that enables a judge to find the base offense level for any amount of any kind of drug is a mathematical algorithm that was built around the statutory mandatory minimums enacted in the wake of Len Bias's death
      - Thus, the drug guidelines reflected Congress's 100-to-1 ratio.

3. These policy choices have shifted again more recently . . . .

a. After years of lobbying by the Commission and other stakeholders, Congress enacted the Fair Sentencing Act of 2010, which, among other things, changed the ratio to be more equitable.
b. Under the FSA, instead of 5 grams of crack cocaine (the size of a sugar packet) triggering the 5-year mandatory minimum, it now takes 28 grams of crack cocaine to get a 5-year minimum, and it takes 280 grams of crack (rather than 50) to get to the 10-year mandatory threshold.
c. The powder thresholds stayed the same, so the ratio now is effectively 18-to-1 (28 grams of crack versus 500 grams of powder).
d. Also, eliminated the man min penalty that had previously existed for simple possession of crack cocaine (as opposed to distribution).

IV. EFFECTS OF MANDATORY MINIMUMS

The Commission has done a fair amount of research on the demographic impacts of mandatory minimums, which appear to be the primary driver of the disparate racial statistics that we see in the federal prison population. The Commission issued a report in October of 2011 that had some very interesting takeaways in terms of the data:

1. First, only about one-quarter of all federal criminal defendants are convicted of an offense that carries a mandatory minimum penalty.

   So, the Commission asked, who are these offenders?

   - The vast majority of the offenders who were faced with mandatory minimums **committed drug offenses**.

     - 77.4% of the 19,896 offenders convicted of a statute carrying a mandatory minimum were convicted for drug trafficking offenses (other mandatory minimum offenses include firearms, child pornography, and aggravated identity theft).

   - These offenders were overwhelmingly male (90%) and U.S. Citizens (73.6%).

   - In addition, Hispanics comprise the largest portion of the group of offenders convicted of an offense carrying a man min (38%), while 31.5% were Black, 27.4% were White, and 2.7% were Other Race.

2. Second big takeaway: nearly half of those offenders who were convicted of an offense carrying a mandatory minimum penalty were ***relieved*** of the mandatory minimum because they either provided substantial assistance to the government or qualified for what is called "the safety valve" (a provision that exempts offenders with no violence or criminal history) or both.

   - Of the 19,000-plus offenders facing a man min, **46.7%** received relief from the mandatory penalty

   - In terms of demographics, Other Race offenders received relief the most often (in 58.9% of their cases), while Black offenders received relief the ***least*** often (in 34.9% of their cases).[3]

   - When we look just at the safety valve mechanism, we see that Hispanic offenders qualify for the safety valve at the highest rate, while Black offenders qualify at the lowest rate (this is likely due to either criminal history or the involvement of a dangerous weapon in connection with the offense)[4]

   - We also see that drug offenders are much more likely to receive relief from a mandatory minimum than other types of offenders facing mandatory minimum penalties (which makes sense because the safety valve is only available for drug offenses).

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[3] Hispanic rate: 55.7% of their cases; White rate: 46.5% of their cases.

[4] Hispanics qualify for safety valve in 42.8% of their cases

Other Races:	36.6% qualify for safety valve
White:	26.7% qualify for safety valve
Blacks:	11.1% qualify for safety valve

3. Third, as a result of the mechanisms for relief from mandatory minimums, at the end of the day, only 14.5 % of all federal offenders are ultimately subject to a mandatory minimum penalty.

- Not surprisingly, male offenders remained subject to the mandatory minimum penalty at sentencing more often than female offenders (males remained subject to the man min in 55.3% of their cases, compared to 34.5% of the cases involving female offenders).

- And Black offenders (who as you will recall have the lowest overall rate of relief) remained subject to a mandatory minimum penalty at the highest rate of any racial group; that is, in 65.1 percent of their cases, followed by White (53.5%), Hispanic (44.3%), and Other Race (41.1%).

4. Three other noteworthy data points that I wanted to mention:

- The data demonstrates that receiving relief from a mandatory minimum sentence made a significant difference in the sentence ultimately imposed:
  - Offenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty received an average sentence of 139 months, compared to 63 months for those offenders who receive relief from a mandatory penalty.

- The data also shows that, overall, offenders who were facing a mandatory minimum penalty pled guilty at a slightly lower rate than offenders who were not charged with an offense carrying a mandatory minimum (94.1% versus 97.5%)

- Nearly 40% of the current federal prison population is comprised of offenders who remained subject to a mandatory

minimum penalty and are serving mandatory minimum sentences (39.4% of the 191,757 offenders in BOP custody)

DISPARITY, DISCRETION, AND DEBATE: UNDERSTANDING THE FEDERAL SENTENCING DILEMMA

Ketanji Brown Jackson
HLR Keynote
April 2017

I. INTRODUCTION

Thank you very much for that very gracious introduction, Rachel; I appreciate it! And thanks to the Board for inviting me to be here tonight. I remember my own *Law Review* graduation dinner; it was very exciting to get all dressed up and to celebrate our hard work over the year. But truth be told, I really don't remember our keynote speaker, which actually doesn't bode well for my presentation tonight, but I will try to do my best to give a memorable speech.

Before I get started, as a point of personal privilege, I want to acknowledge my mother-in-law and father-in law—Pamela and Gardner Jackson—who are here joining me at this dinner tonight – they have a special connection to the *Harvard Law Review* because Pamela's late father, William Covington Hardee, was an Editor of Volume 59, which was published in 1946. Rachel and I worked on Volume 109, exactly 50 years later, and in my time at Gannett House, it was amazing to me to know that I was working in the same spot where my then-boyfriend's grandfather had served exactly one-half century before.

As you heard, I currently have the privilege of serving as a federal trial judge in the District of Columbia. You should know that, in contrast to my prior work as an appellate litigator, which, if I'm being honest, was kind of like performing an autopsy on a case this is over and done with, being a trial

judge is a very *active* process, primarily because a trial level case is like a living organism—it is constantly moving and changing and responding to new stimuli. So, trial judges have to be very responsive and flexible; we use our discretion to make judgment calls in the moment to the best of our ability and within the boundaries of the law.

My plan here tonight is to focus on one particular duty of a trial judge that is especially dynamic. It is one in which the exercise of discretion is at its apex, and as a result, it actually has proven to be extraordinarily challenging both for trial judges who have to make these decisions in real time, and for appellate judges who have to pick through the cold record to determine what, if anything, went wrong. Given my background and that of Professor Barkow, you have probably already guessed that I am talking about the trial judge's duty to sentence people who have been convicted of federal crimes. What I hope to accomplish here tonight is to help you understand *why* sentencing presents such significant challenges, but not only in terms of its mechanics; it is also difficult as a matter of legal theory and philosophy. If I am successful, you will leave here with a basic understanding of federal sentencing *both* in practice *and* in theory, and with any luck, some of you will be intrigued enough to join me and Professor Barkow in the current ongoing national discussion about the nature and consequences of judicial discretion, and the extent to which there can be, or even should be, regulation of federal sentencing practices.

II. EXERCISING THE POWER TO SENTENCE (PRACTICAL REALITIES)

Let me start by describing what it is like to have—and to exercise—the power to sentence. In the typical federal case, the trial judge will only have

seen the defendant (who I will refer to as "he" because federal criminal defendants are almost always male) on three or four occasions prior to sentencing date. Approximately 97% of federal criminal defendants plead guilty and then go straight to sentencing, and so the reality is that the sentencing process is usually the first time that the trial judge will really engage with the facts of the crime and consider the characteristics of the defendant.

And there is a lot to consider. The work of the sentencing judge actually starts in chambers, well before the hearing date, when the judge consults the Federal Sentencing Guidelines (a set of rules that I will talk about a bit later) and reviews the case record, hoping to find answers to two nearly impossible questions: who is this person, really? and how should I think about what he has done? To get a handle on these issues, the judge gathers as much information as possible: I read the Probation Office's Pretrial Sentence Report, the parties' sentencing memoranda, any letters that have been submitted, and of course, the applicable notes and policy statements in the Sentencing Guidelines Manual. And then, I attempt to figure out how and to what extent all these facts matter.

For me, sorting through the facts and issues and trying to determine what to make of them is the most demanding part of determining the sentence. It feels a little like having to scale a huge rock formation: you can go in any direction, and because the criminal statutes ordinarily authorize an impossibly wide range of punishment for most criminal violations (say, 0 to 20 years), there are really no guiderails to speak of. So you're always worried about free fall, and you try to seek out footholds in the facts; pegs upon which to rest your reasoning, like whether the defendant has a job and

a family, or has a significant criminal history, or used a weapon, or someone was injured, or a host of other aggravating or mitigating factors that might justify moving in one direction or another. And all the while you're *balancing* these various concerns and threading the needle between two very different societal interests: on the one hand, the acknowledgement that *all* of us are more than just the worst thing we've ever done, and on the other, the need to ensure that the thing *this* defendant has done is adequately addressed so that the purposes of punishment are satisfied.

Because sentencing requires this type of heavy lifting, it's no wonder that trial judges often say that sentencing is the most difficult part of their jobs; I have had many sleepless nights when I am in the process of figuring out the sentence to be imposed. But wait; there's more! Even after the judge has assessed the facts and resolved any legal or guidelines issues, *another* challenge awaits: the judge has to take the bench and explain to an array of interested parties—and especially the defendant—what justice requires and why.

In a law review article aptly titled "Speaking In Sentences," federal district judge Brock Hornby captures the nature and gravity of the sentencing ceremony. His article begins with reminder that

> [QUOTE] Federal judges sentence offenders face-to-face. The proceedings showcase official power vividly[,] and [also] sometimes, individual recalcitrance, repentance, outrage, compassion, sorrow, occasionally forgiveness—[all of which are] profound human dimensions that cannot

> be captured in mere transcripts or statistics.[1] [END QUOTE]

Judge Hornby further provides much-needed advice about how to manage the task of addressing so many different audiences during what he calls "these public communal rituals." He says:

> [I]t is imperative that judges rise to the occasion, and conduct sentencing proceedings in plain English, so that courtroom audiences can comprehend and evaluate the sentence and its rationale. . . .
>
> Speak to the victims, affirming their hurt.
>
> Address the lawyers, accepting or rejecting their arguments.
>
> Speak to the family, recognizing their concerns, and perhaps positive qualities of a parent or offspring[.]
>
> Speak to the community, emphasizing that the rule of law matters[.]
>
> [And] [s]peak to the defendant, explaining the punishment, sometimes in the language of retribution or reproof, sometimes encouragement. [But] respect[ing] the defendant's dignity nevertheless.

I try to do all of these things in my sentencings, and I am especially careful to adhere to Judge Hornby's admonition to treat the defendant with respect. I guess you could say that I am persuaded by the theories of punishment that accept all human beings as responsible moral agents who are capable of rational thought, and thus view punishment as a necessary consequence of the defendant's decision to engage in criminal behavior. In other words, in my view, it is precisely *because* the defendants who come before me are autonomous individuals who are worthy of respect and who have made

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[1] D. Brock Hornby, "Speaking in Sentences," 14 Green Bag 2d 147, 158 (Winter 2001).

choices, that the consequences of those choices have to be imposed, however difficult it may be for me to look into a defendant's eyes and announce that he is going to have to go to prison, sometimes for a very long time. And I honestly believe that a defendant will only be able to recognize the error of his ways, and decide to make different choices in the future, if the judge has addressed him directly at sentencing in a respectful way, to explain what the punishment is and why it is required.

III. THE DISCRETION DILEMMA

So, with that description of my thought processes both in chambers and during sentencing hearings in mind, in the time that I have remaining, I hope to explain why federal sentencing not only presents the practical difficulties of execution that I have just described, but is also one of the biggest *legal* and *philosophical* challenges that exists in federal law. The key question is whether trial judges should be *regulated* in the exercise of their sentencing discretion, and if so, how so; and answering that question requires a basic understanding of the nature of the problem that sentencing discretion presents, and the key historical developments that have brought us to where we are today.

My high school speech and debate coach used to say that the best way to get an audience to follow you is to tell them a story. So I have one. The facts that I will be recounting are those of a true case involving a serious crime that took place in the late nineteenth century, and I invite you to come with me back to that time.

A. The Nature of the Problem

1. Crow Dog's Case

The year is 1881. A tribe of Native Americans known as the Brule Sioux lived and hunted in bands on the great plains of central South Dakota. This migratory people survived by hunting and gathering within land that the government had set aside for a reservation, but at that point in our nation's history, the relationship between the nascent United States government and the long-established Indian nations was still very tenuous.

The head chief of the Brule Sioux was a man known as Spotted Tail. Spotted Tail was handsome and manly and generally well-liked, but he was also known to rule over the lower chiefs with an iron fist and to demand absolute obedience from members of the tribe. Spotted Tail believed in keeping peace with white men, which meant that the Brule Sioux did not participate in the Great Sioux-American wars, and it also meant that Spotted Tail worked part-time as an agent of the federal Bureau of Indian Affairs, which compensated him handsomely for his influence in calming his people.

Another leader within the Brule Sioux tribe—a man who went by the name of Crow Dog—was more traditional and substantially less accommodating. Crow Dog was a Sioux warrior and he felt strongly that encroachments by white people and the United States government into the lands and customs of the Sioux nation must be resisted. Crow Dog led a faction of the tribe that was in strong opposition to what they believed was the arbitrary, dictatorial, and traitorous leadership of Spotted Tail.

In the afternoon of August 5, 1881, Crow Dog crouched along the side of a road that led to Spotted Tail's (government-constructed) house, purportedly fixing the wheel of his carriage. When Spotted Tail came riding along on a horse, Crow Dog leapt up, pulled out his rifle, and shot Spotted Tail through the side, with the bullet exiting out his chest. Spotted Tail fell off his horse onto the ground, stood up, staggered a few steps, went for his own pistol in his waistband, but fell dead before he could get off a shot.

Now, I have told you this true story, not so much because of the crime but because of the aftermath, which is an interesting tale of two punishments. In the wake of Spotted Tail's death, Crow Dog was, at first, subjected to the Brule Sioux system of justice. These native people had a dispute-resolution system that was controlled by a council of appointed leaders. This tribal council didn't care about punishment or retribution or enforcement of a moral code, but instead were focused primarily on *survival*, so the ultimate value for them was to terminate the conflict and to reintegrate everyone peacefully back into society. In Crow Dog's case, the council met not to "convict" or "acquit" but to arrange a peaceful reconciliation of the affected families. The council determined that Brule law required Crow Dog's family to give Spotted Tail's family $600, eight horses, and a blanket, which Crow Dog's people promptly paid and Spotted Tail's family accepted. (For his part, Crow Dog purified himself in a sweat lodge and shot his rifle into sacred rocks to assuage the spirit of Spotted Tail). And, with that, under tribal law, the matter was settled.

Now, needless to say, *that* system of dispensing justice for murder was radically different than the one that existed in the broader United States at the

time. Indeed, when the federal authorities in South Dakota heard about the murder and the way it had been resolved, they stormed the reservation, arrested Crow Dog, prosecuted him for murder in federal court, convicted him (in spite of his claims of self-defense), and, ultimately, a judge sentenced him to hang for the killing of Spotted Tail. *One crime—two dramatically different penalties*.

In the end, Crow Dog was ultimately spared by the Supreme Court, which reversed his conviction on the narrow ground that tribal sovereignty precluded federal prosecution. And *that* Supreme Court ruling was overturned by Congress, when it enacted the Major Crimes Act of 1885, which is a federal statute that provides the federal courts with jurisdiction over major crimes committed on Indian reservations.

2. Takeaways

But for present purposes, what I hope you take away from this story is an understanding that, at bottom, the decision about what the appropriate sentence is in any given case is a question of *values*, and as a result, it matters who is making the sentencing decision, and which purposes of sentencing he or she sets out to achieve.

This is apparent even if we set aside the state versus tribe aspect of the Crow Dog story. Instead of state authorities and tribal authorities, imagine two sentencing judges who are reviewing the exact same set of facts and diligently seeking footholds for their reasoning. They could be acting in all good faith when considering Crow Dog's circumstances, and *still* reach dramatically different results, depending on their own views about the

purposes of punishment and their own assessments regarding which facts about the crime or the defendant should be treated as most significant. One judge might value Crow Dog's skills and his contributions to the tribe, and as a result, rationally conclude that, despite the heinous nature of the crime, a sentence of execution or a lengthy period of incarceration is not warranted. And the other judge might be equally rational in deciding that, despite Crow Dog's hunting prowess, his murderous act was so heinous that only execution or life imprisonment will do.

And it is important to note that I am highlighting the disparity not to spark a debate about whether the sweat lodge or the gallows is the better outcome, but to ask an even more fundamental question, which is: whether a justice system that permits such a wide variation of possible outcomes is really a system of justice at all?

3. The Discretion "Problem" Can Be Viewed From Different Angles

Judge Marvin Frankel, a former federal district judge who served in the Southern District of New York, did not think so. He wrote an influential book that was published in 1972, and was entitled "Criminal Sentences: Law Without Order." Judge Frankel argued quite forcefully that [QUOTE] "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."[2] [END QUOTE] The thrust of his analysis was that one of the core promises of our system of government—that we are "a government of laws and not men"—is broken when the

[2] Marvin E. Frankel, Criminal Sentences: Law Without Order (1972), at 5.

sentence imposed on a defendant can "range from zero to up to thirty or more years in the unfettered discretion of miscellaneous judges," and when the sentencing system produces "a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[3]

At around the same time as Judge Frankel was expressing these concerns, Massachusetts Senator Edward Kennedy was voicing a slightly different critique, but with similar ferocity. Senator Kennedy is quoted in a 1977 report as referring to the federal sentencing scheme as a "national scandal," and describing it as a "non-system" in which judges can "formulate and apply their own personal theories of punishment" with the result being that "similar offenders guilty of similar crimes commonly receive grossly disparate sentences."[4] In Senator Kennedy's view, the result was systemic unfairness to defendants, often along racial and socioeconomic lines, and also an undermining of law enforcement because he believed that uncertainty about sentencing incentivized criminal offenders—who already tend to view "the criminal justice system . . . as a game of chance"—to commit crimes and "gamble" on the sentencing outcome.

B. The Sentencing Reform Act Solution

These types of critiques of unfettered judicial discretion galvanized a sentencing reform movement that came to a head in the early 1980s, when a bipartisan group of law makers from both ends of the political spectrum—including such unlikely allies as Senator Kennedy, then-Senator Joe Biden,

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[3] Id. at 6, 7.

[4] Toward a Just and Effective Sentencing System, at 3.

Senator Orin Hatch, and Senator Strom Thurmond—came together to enact a piece of legislation that reshaped the federal sentencing system and changed the nature of sentencing discretion in fundamental ways.

With the Sentencing Reform Act of 1984, Congress established an independent agency within the judicial branch of government—the United States Sentencing Commission—and tasked the Commission with drafting an implementing Sentencing Guidelines, which are essentially a detailed set of rules that guide federal judges in the exercise of their discretion at sentencing. By statute, the Commission was a permanent body that was to formulate and continually amend these rules, and also gather information about every sentence that federal judges hand down nationwide.

On the table in front of you is a handout that is an example of a typical sentencing guideline as it appears in the Guidelines Manual, and on the back, I have also given you the pièce de résistance of the guideline scheme, which is the range-of-sentences table that one judge gets to at the end of the guideline process. You can skim these at your leisure—for now, you should know that the Guidelines Manual currently has scores of these types of instructions (the manual runs more than 550 pages long); that each guideline looks at various relevant factors and weights them numerically so judges are literally doing arithmetic regarding the crime and the offender at issue; and that once you have calculated the offense level, which is on the "y-axis" of the table, and the defendant's criminal history score, which is on the "x-axis," you land on a particular range of punishment in terms of months of imprisonment.

You should also know that the Sentencing Guidelines have been very controversial throughout their history, and among other things, are often criticized for being too rigid and for resulting in penalties that many stakeholders believe are much too harsh for the offenses at issue. What is also important for present purposes is the fact that the guideline system was *mandatory* when Congress adopted it in 1984, and that the guidelines effectively constrained judicial discretion because judges were *required* to impose a sentence within the applicable guideline range as it appears in that table, except in a small set of very unusual circumstances.

III. THINGS FALL APART

A. The Booker "Fix"

As many of you know, the Supreme Court addressed—and eliminated—the mandatory nature of the guidelines in 2005, in the landmark case of *United States v. Booker*. Some of you will no doubt recall that *Booker* was a highly unusual case, because there were *two* 5-4 majority opinions issued in that matter at one time: the "constitutional majority," which was authored by the late Justice Scalia (for whom Rachel clerked) held that the mandatory guideline system was an unconstitutional violation of the Sixth Amendment's right to trial by jury, while in the "remedial" majority opinion, my former boss (Justice Breyer) decided that the best way to fix this constitutional problem was not to invalidate the entire guideline system but to make the system *advisory*, so that it no longer binds the judges who use it.

B. Where We Are Now (An Era Of Almost Unfettered Discretion, But Worse)

And that is where we sit today—pursuant to the *Booker* "fix," judges are now required to do the guideline calculation and thereby reach the sentencing range in the table, but that is only *the starting point* in the judge's determination of the sentence now; judges then go on to consider whatever other factors might be relevant to the offense in his or her personal view, and can ultimately impose a sentence that bears little or no relationship to the guideline range. What this means—and at this point I am getting away from the history and into my own views—is that we have essentially come full circle with respect to the question of whether, and to what extent, sentencing discretion should be regulated. In effect, we are essentially back to an era of unfettered sentencing discretion, but some would argue that we are even *worse off* today than before, because trial judges are required to navigate a complex set of guidelines before they set them aside and exercise their discretion however they want.

I would also add that, in today's environment, appeals courts don't really serve a meaningful regulating function; yes, they do police the guideline calculation to ensure that trial courts are jumping through all of the required hoops, but if an error is found and the case is sent back for resentencing, the corrected guideline range has no more force that the original erroneous one, so in the typical case, a trial judge can resentence the defendant to exactly the same penalty as before—and many do.

Now, with that kind of discretion, you can imagine that there are many trial judges who are quite happy with the current arrangement; when I served on the Commission, the data indicated that federal district judges generally

appear to appreciate having the freedom to fashion the sentence that they think is best. But from a policy perspective, I, for one, am very concerned that current scheme is too irrational to be sustainable, and I am deeply troubled that the time will soon come when the Sentencing Commission will have a difficult time justifying its continued maintenance of sentencing guidelines that are basically becoming irrelevant to the actual process of sentencing in many districts, and thus, are no longer serving the purpose of regulating discretion *or* reducing unwarranted sentencing disparity.

VI. WHERE ARE WE GOING?

So the question becomes what to do now? And the final message that I want to convey is that those of us who work in the criminal justice system need your help in forging the path forward. Generally speaking, the sentencing community is divided into two big camps: do nothing, or do *something* to change the current scheme.

As you may have guessed, I am in the "do something" group, but I have recently come to realize that what we do may very well be driven by core differences of opinion about the nature of the underlying problem. Do you remember when I mentioned that Judge Marvin Frankel viewed the issue as one in which the problem was that judges were exercising unfettered discretion, while Ted Kennedy saw it as unequal treatment of similarly-situated defendants, even though both were part of the sentencing reform movement? One could say that that same dynamic is surfacing again within the camp of stakeholders who think that something should be done.

The primary solution that has been put forward by those who believe that unfettered judicial discretion is the problem is to restructure the GLs to

solve for the constitutional problem that *Booker* identified so that their mandatory (or binding nature) can be reestablished. As proposed, this restructuring would involve broadening the ranges of punishment in the cells of the Guideline table and dramatically simplifying each of the GLs to highlight a handful of key facts that would be decided by a jury. Some of you may have heard Judge William Pryor, who serves on the Eleventh Circuit and is currently the Acting Chair of the Commission, speak about this recently, and I think it's fair to say that he is firmly behind this solution. I appeared on a panel with him a few weeks ago, and I critiqued his return-to-mandatory-guidelines proposal, which I think surprised him at bit because we are both reformers.

I don't have the time to recount my critiques of his proposal here, but I will say that, in my view, the problem is not necessarily that judges are exercising discretion at sentencing—after all that is our role in the constitutional design—but that judges are *human*, and thus, if left entirely to their own devices, there will be unwarranted disparity between the sentences that are prescribed for similarly situated defendants. And if disparity is the problem, I think we have to start from scratch (think outside of the box, if you will) and revamp the entire system rather than merely adjusting it.

My idea, which is still in formation, is to have a regulation system in which judges are given unweighted lists of factors that their counterparts have found significant in prior similar cases, and also real-time data about the sentences that other judges have imposed. Let's take the robbery guideline, for example: rather than the structure you see in the handout, the Commission could use its data-gathering prowess to evaluate actual robbery cases and determine the average sentences that judges have imposed when

certain facts are present—say, when a weapon is involved, a certain threshold amount of money is stolen, and no one was injured. If I knew these facts and had real time, average-sentence information as a sentencing judge, then I could look at the circumstances in the case before me and decide how my case compares to the sentences that other judges are giving in substantially similar cases. And I believe that, over time, as judges start taking into account what their colleagues are doing in similar cases, sentencing outcomes will start to cluster, and ultimately unwarranted disparity will be reduced.

During the panel that I mentioned, Judge Pryor strenuously objected to my vision, primarily because my plan focuses on reducing disparity, while his focuses on limiting discretion. At one point he got pretty exasperated and said: "look, the real difference between me and Ketanji is that she trusts judges and I don't!" And to some extent, that's true. I accept that the framers adopted a constitutional design in which Article III judges have the power to exercise their discretion to sentence within the broad ranges that Congress prescribes. Thus, in my view, the only regulatory scheme that has any hope of success is one that *helps* judges find a way to exercise that discretion responsibly.

I guess you could say that my vision recognizes and accepts the reality of the sentencing process that I spoke about at the beginning. I will end now by returning to Judge Hornby's article, and his argument that the sentencing process is a "public communal ritual" that serves many functions, and that "[m]andatory guidelines frustrate [the sentencing] process, with their overemphasis on numbers and categories." The reality, he says, is that fair sentences are *necessarily* individualized and "can *never* be uniform. . . .

[because] [s]entencing is not *only* about outcomes, statistics, and uniformity." In Judge Horny's experience—and mine—fair punishment can really only be achieved in the midst of "[u]ncertainty, subtlety, debate, and public discussion[,]" and it "calls for individualized wisdom exercised by the community's arbiters in a public ceremonial process conducted in language that everyone understands[.]"

My hope is that I have used language that YOU understand to explain the sentencing process that judges go through, and that I have also highlighted the contours of the challenging policy issues that continue to face us in the post-*Booker* sentencing environment. It was my honor to be here speaking with you tonight, and if you have an opportunity to engage in a debate about the future of federal sentencing, I hope that you will remember this speech(!), and that you will join in the discussion about how best to move forward.

THANK YOU!

NATURALIZATION CEREMONY SCRIPT

Good morning! I am Ketanji Brown Jackson, United States District Court Judge for the District of Columbia and I welcome you to this naturalization ceremony. It is an honor and a privilege for me to be able to preside over this happy ceremony today during which I will administer to you the oath of allegiance and admit you as citizens of the United States. This is a memorable day and a true milestone in all of your lives and I am very grateful to be a part of it!

The Court would like to begin by recognizing Ms. Sybil A. Strimbu, who will speak to you as a representative of the District of Columbia Daughters of the American Revolution and as Chairperson of the DAR's Americanism Committee.

* * *

Thank you Ms. Strimbu, and thank you to the DAR for sending such an able representative.

Mr. Douyon, are we ready for the roll call and motion for admission? When you are ready, you may introduce those ladies and gentlemen who seek to become new citizens.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, Mr. Neal Katyal, who is a partner at the law firm of Hogan Lovells. Mr. Katyal received his undergraduate degree from Dartmouth College and his law degree from Yale University. Mr. Katyal has a long career in public service, including serving as a law clerk to Judge Guido Calabresi on the U.S. Court of Appeals for the Second Circuit, and Justice Stephen G. Breyer on the U.S. Supreme Court. He later worked in the Department of Justice as a Special Assistant to the Deputy Attorney General and as a National Security Advisor. In 2010, President Obama appointed Mr. Katyal Acting Solicitor General of the United States, and in that position, he was responsible for representing the federal government of the United States in all appellate matters before the U.S. Supreme Court and the Circuit Courts of Appeal.

To date, Mr. Katyal has argued a total of 28 cases before the Supreme Court, including his successful defense of the constitutionality of the Voting Rights Act of 1965 and the Affordable Care Act. He also appeared on a season three episode of House of Cards, playing a lawyer arguing a case before the Supreme Court.

Mr. Katyal is a tenured professor at Georgetown University Law Center, where he focuses on Constitutional Law, Criminal Law, and Intellectual Property and has served as a visiting professor at both Harvard and Yale Law Schools. He is also the recipient of the U.S. Department of Justice's highest civilian award, the Edmund Randolph Award.

Thank you for being here, Mr. Katyal. The Court now recognizes you, and we look forward to your remarks.

INTRODUCTION OF FEDERAL BAR ASSOCIATION REPRESENTATIVE

Thank you, Mr. Katyal for being here today and for giving all of us, American Citizens, those thoughts and insights.

The Court would now like to recognize Mr. Prakash Khatri, who is a Board Member of the D.C. Chapter of the Federal Bar Association, and the Chief Executive Officer of the Khatri Law Firm, where he specializes in immigration law. Mr. Khatri is a graduate of Stetson University and Stetson College of Law in Florida.

From July 2003 until March 2008, Mr. Khatri served as the nation's first Ombudsman for Citizenship and Immigration Services in the newly formed Department of Homeland Security. Prior to his appointment by then-DHS Secretary Tom Ridge as Ombudsman, Mr. Khatri managed the Immigration Compliance Department for Walt Disney World Co. in Lake Buena Vista, Florida.

Thank you for being here, Mr. Khatri.

KBJ REMARKS ON NATURALIZATION

Thank you, Mr. Khatri, for those remarks.

Now it is my turn to congratulate you on this great accomplishment and to emphasize how happy I am to be here this morning! Most of what I do in court involves dealing with unhappy people in conflict, so this is really a great opportunity for me to look out and see so many smiling faces for a change!

At this point in the naturalization ceremony, I ordinarily play a video that features people who, just like all of you, have taken the oath and have been admitted as citizens of the United States. There is no speaking in the clip, but if you look carefully you see quotations from many people from all walks of life, and, of course, the looks on their faces speak volumes about the experience of raising one's hand and pledging allegiance to the United States for the first time. Unfortunately, because I am sitting in trial in my own courtroom today, I do not have the resources to show it to you now, but I can describe it. It opens with a soaring orchestra score. You see people arriving at Ellis Island, in the shadow of the Statue of Liberty, in the early twentieth century. There are pictures of smiling children, some holding dolls, others waving tiny American flags, and still others holding a copy of the Declaration of Independence. You see a man from Germany wearing traditional lederhosen and a brother and sister in traditional Russian dress. There is a photograph of a boat adorned with American flags, teeming with people who are smiling and waving, arriving on the shores of this country. There are pictures of naturalization ceremonies—like your ceremony here today—large and small, that have taken place across the country. The newly-minted citizens are shown smiling and cheering, holding children and waving flags.

Overlaid on the pictures are quotes from various naturalized citizens, such as one from Pelageya Ichencko, who emigrated from Russia and describes America as her "peaceful refuge." Sergeant Carmen Villa, who came to this country from Honduras, states, "My fellow soldiers made me feel like I was an American. I definitely stand proud and Army strong as ever." Some quotes and pictures underscore how America is a land of opportunity. Eduardo Aguirre, Jr., who emigrated from Cuba and was the first Director of the United State Citizen and Immigration Services, is quoted as saying, "I am grateful to give back to my adopted country." And Wilford Young, a naturalized citizen from Honduras, aptly states that, in America, "[o]pportunities are only limited by your determination and faith."

I really love the video that I am describing, because it is designed to capture the *feeling* of becoming a new citizen of the United States. The various statements I have quoted, and others from people who have become naturalized citizens, say much more than I ever could about what it means to become an American. And now each of you has your own story about the experience—the experience of taking your oath of office in a federal court in our nation's capital. Washington D.C. is the seat of our federal government, but I want you to know that the true power and greatness of America is in its citizens, wherever they are all over this great nation. As President Harry Truman once said,

> "We Americans are a diverse people. Part of our respect for the dignity of the human being is the respect for his or her fight to be different. That means different in background, different in beliefs, different in customs, different in name, and different in religion. *That* is true Americanism; that is true democracy. It is the source of our strength. It is the basis of our faith in the future. And it is our hope of the world."

Those words by our former president, which were spoken in 1948, are still every bit as true today. America benefits from your citizenship, and because of each of you (and those who have come before you, and those who will come after), American will be a stronger and better place.

From my vantage point up here on the bench, I can see how happy you all are to have taken the oath and I know that each of you will treasure the freedom, rights, and privileges of United States citizenship. Please know that you must also take care to *exercise* those rights as a matter of civic responsibility. As American citizens, you now can, and should, vote; serve as jurors; inform yourselves about civic matters; participate in local and national affairs; petition the government on issues of concern; volunteer to help others; and become full members of your community. Only by engaging fully with other Americans in this great exercise that we call democracy will you truly be able to take full advantage of your new citizenship. And, as President Truman suggested, it is only because the diverse citizens of the United States come together as one nation—to believe in the rule of law and to work for the common good—that the United States of America is, and continues to be, the greatest nation in the world.

Again, let me say congratulations on your entry into the privilege of United States citizenship. I invite you all, my fellow countrymen, to attend a reception across the hall that is sponsored by the Federal Bar Association. Unfortunately, I will not be able to join you because I must resume a jury trial that I had placed on a brief hold so that I could be a part of this ceremony today.

It is now my honor to administer the oath to all of you who have come here from all over the world to pledge allegiance to the United States.

RAISE YOUR RIGHT HAND AND REPEAT AFTER ME

I hereby declare, on oath

That I absolutely and entirely

Renounce and abjure

All allegiance and fidelity

To any foreign prince, potentate, state or sovereignty

Of whom or which

I have heretofore been

A subject or citizen

That I will support and defend the Constitution and the laws

Of the United States of America

Against all enemies, foreign and domestic

That I will bear true faith and allegiance to the same

That I will bear arms on behalf of the United States

When required by the law

That I will perform noncombatant service in the Armed Forces of the United States

When required by the law

That I will perform work of national importance under civilian direction

When required by the law

And that I take this obligation freely

Without any mental reservation

Or purpose of evasion.

So help me God.

We will now say the Pledge of Allegiance together.

Attorney Admission

April 4, 2016 at 9:30 AM

Good morning to all and welcome. My name is Ketanji Brown Jackson, and I am a District Judge on the United Stated District Court for the District of Columbia.

Before we have the roll call and motion for admission, I would like to introduce you to one of our guest speakers, Mr. Jonathan H. Lasken, who is a Board Member of the D.C. Chapter of the Federal Bar Association and is here to speak on behalf of that organization.

* * *

Thank you very much, Mr. Laskin. We appreciate your being here.

Mr. Douyon12w—are we ready for roll call and the oath of admission?

MUSINGS AT THE MIDWAY POINT: REFLECTIONS ON MY JOURNEY AS A MOTHER AND A JUDGE

Good afternoon—I am delighted to be here in celebration of National Women's History Month and to have this opportunity to share with you some reflections about my life and career. I was very honored to have been approached by the Administrative Office coordinators and asked to give a speech, and I thought "great! There is so much I could talk about, like the sentencing guidelines, or compliance and ethics standards for organizations, or trial practice," but the AO staff made very clear that the topic that they really wanted me to talk about today is ME—my background, heritage, and path to the bench—and, I must say, I find that assignment really daunting. I mean, the *last* thing you want to do is give a boring speech, especially when it's about yourself, and as a judge, it's already difficult to avoid being a boring speaker, as Justice Samuel Alito recently observed.

Some of you may have read the story in last month's ABA Journal magazine in which Justice Alito is quoted recounting a conversation that he had with his wife after the two of them attended a speech given by another judge. Apparently, they got into their car at the conclusion of the event, and Justice Alito's wife said "you know, that was a very boring speech." Justice Alito agreed, and then attempted explain to his wife *why* he thought that was so. He suggested that, due to all of the confidentiality concerns related to their work, judges are really constrained—they

"can't talk about what they did" and "[t]hey can't talk about what they are going to do[,]"—so it "makes it very difficult for them to give an interesting speech."[1] Well, according to the article, his wife apparently took a moment to think about that explanation, and then responded—no, the truth is that 'judges are just very boring people.'

Well, at the risk of droning on today, I am here to tell you a little bit about my background and career, and perhaps most important, about how have I managed to keep it all together as a judge in the federal trial system who moonlights as a mother of two daughters—one who is eleven but thinks she is 18, and the other who just turned fifteen this past January, and is in the full throws of the teenager mentally. Now, if any of you have teenagers, you know what I mean: one moment, you have this beautiful, sweet baby, and then suddenly, as if out of nowhere, you look around and she is taller than you are and absolutely certain that she knows much more than you do. About *everything*. Right now, in fact, I am in that peculiar stage of life in which I experience near daily whiplash from the jarring juxtaposition of my two most significant roles: United States District Judge, on the one hand, and mother of teenage daughters on the other. During the work day, I am a federal judge, which means people generally treat me with respect—I have people who work for me in my

[1] Mark Walsh, "Alito's First Decade," ABA Journal, The Docket (Supreme Court Report), February 2016, at p. 21.

chambers; litigants look to me to give them answers to complex legal questions, and *I* control what happens in my courtroom — when I say things, people listen, and they generally do what I order them to do. But in the evenings, when I leave the courthouse and go home, in the course of that transition, all of my wisdom and knowledge and authority essentially evaporates, and my daughters make it very clear that, as far as they are concerned, I know *nothing* and should not tell them anything—much less, given them any orders—and that is, if they talk to me at all.

But I try not to get discouraged. I choose to believe that somewhere (deep down) they appreciate this journey that we're on together, and it's that abiding hope that led me to an interesting thought experiment when preparing for this speech. My relationship with my two precocious kids became the framing, if you will, for what I hope will be an interesting (or at least a not entirely boring) presentation. You see, I wondered: what if my two worlds collided briefly and my daughters were called upon to tell the truth, the whole truth, and nothing but the truth about their mother's life and career and the advice that she has given them thus far? Assuming , of course, that we can get past the heavy sighing, the eye rolling, and their natural impulse to reject any suggestion that I make, if my daughters were called to the stand as character witnesses to talk about their mother, I wondered, what would they say???

BACKGROUND

I think they would be likely to begin with my personal background. Leila (my 11 year-old) would explain that I was born in Washington D.C., in 1970, to two public school teachers at the time: my father, who had recently graduated from North Carolina Central University, started his post-college career teaching history at Ballou High School in Southeast, D.C., and my mother—who happens to be visiting and is here with us today—was a graduate of the Tuskegee Institute in Alabama, who taught science to middle school student at Alice Deal in Northwest. My parents were both originally from Miami, Florida, and they had come to the District to start their married lives and careers, as so many people do. At that time, in the early 1970s, they had also just emerged along with the rest of our country from the dramatic reshaping of law and society known as the Civil Rights Movement, and they decided to express their pride in my family's African ancestry by asking my aunt—who was in the Peace Corps in West Africa when my mother was pregnant with me—to send a list of African girl names for their consideration. They selected the name "Ketanji Onyika," which they were told translated into "Lovely One," and for the first 26 years of my life, I was known as Ketanji Onyika Brown.

Now, at this point in my daughters' testimony, Talia (my 15 year old) would certainly jump in to correct any impression that her sister may have left about my upbringing, pointing out that is

not entirely accurate to suggest that I am a "D.C. native" because, when I was three years old, my parents and I returned to Miami, Florida—where the rest of my family on both sides lived—and I was raised there. In fact, my earliest memories are of our apartment in the married students housing complex on the campus of the University of Miami, where my father was a law student. We returned to Miami so that my father could go to law school there, and even now, when people ask me how I ended up getting into the legal profession, I often tell the story of how, when I was in preschool, I would sit at the dining room table doing my "homework" with my father—he had his law books all stacked up and I had my coloring books all stacked up—and when I think back on those times, there really is no question that that my love of the law began in that formative period. Indeed, it honestly never occurred to me that I would do anything else when I grew up.

Now, at this point, Leila—my impatient one—would jump in and insist that we fast forward past what was, by all accounts, a terrific, but normal, childhood. My dad got his degree and worked, first, as in-house corporate counsel for a series of businesses and then became the principal attorney for the Dade County School Board, while my mom rose through the ranks in the public school system in Miami, starting as a science teacher, then becoming an Assistant Principal, and eventually served 14 years as the Principal of Miami's premier public magnet school for the Arts. I had a close extended family (*e.g.*, lots of aunts and uncles and

cousins) in the greater Miami area, and got to spend time with my beloved grandparents, who lived in North Miami and worked extremely hard to ensure that their children and grandchildren got the education and opportunities that they didn't have.

My parents and I lived in a predominantly Jewish suburb of South Miami, and I went to very good public schools that gave me a strong academic foundation. And between all the bar and bat mitzvahs, I got involved in student government, becoming President of my very large high school class (800+ students strong) my senior year—go Panthers! But my primary extracurricular activity was Speech and Debate, which is sometimes called forensics; it was an experience that I can say without hesitation was the one activity that best prepared me for future success in law and in life. An extraordinary woman named Fran Berger was my coach and mentor, and she had an enormous influence on me. In addition to being like a second mother on team trips, she taught me how to reason and how to write, and through forensics I gained the self confidence that can sometimes be quite difficult for women and minorities to develop at an early age. I have no doubt that, of all the various things that I've done, it was my high school experience as a competitive speaker that taught me to *lean in* despite the obstacles—to stand firm in the face of challenges, to work hard, to be resilient, to strive for excellence, and to believe that anything is possible.

Competitive speech and debate was also the experience that literally paved the way for me to go to a great college. Our team travelled a fair amount to various meets and competitions, mostly within the state of Florida, but one of the few national debate tournaments that we went to every year was at Harvard. In February. Now, I don't know if any of you have ever been to Cambridge, Massachusetts in February, but I can tell you first hand, that being there at that time of year is not an easy for a Miami girl! But, I loved it. I loved everything about it, and when I applied to Harvard for college—and got in—I knew that there was no place I'd rather go. I matriculated there in 1988 and continued as an undergraduate student there through 1992, despite the unbearable winters. And it was unquestionably the right place for me—I had fabulous friends, took challenging courses, and participated in a range of interesting extracurricular activities, including drama and musical theater, during which I made several notable connections. Among them, comedian and commentator Mo Rocca, who played Seymour Krelborn in a *Little Shop of Horrors* production in which I played a 'doo-wop' girl, and Matt Damon, who was assigned to be my scene partner during a drama course we took together one semester (as a side note, although I was pretty good, I doubt he'd remember me now).

In any event, while at Harvard, I also met and dated my first serious boyfriend, who later became my husband, and to whom I will be happily married 20 years this fall. It's interesting because

my husband is a quintessential "Boston Brahmin"—his family can be traced back to England before the Mayflower and has been in Massachusetts for centuries; he and his twin brother are, in fact, the 6th generation in their family to graduate from Harvard College. By contrast, I am only the second generation in my family to go to *any* college, and I'm fairly certain that if you traced my family lineage back past my grandparent—who were raised in Georgia, you would find that my ancestors were slaves on both sides. In addition, while in college, my husband was a pre-med science and math student, while I was a full-on government major, so we were an unlikely pair in many respects. But, somehow, we found each other, and we dated continuously for six-and-a-half years—through the end of college and the entirety of his Columbia Medical School experience and my Harvard Law School experience—before we got married in 1996.

CAREER TRACK

Now, as you will recall, I am telling this story through the eyes of my daughters, and I am certain that Talia would break in to announce at this point that her sister Leila had been going on *WAY TOO LONG*, and that it was her turn to say something about my career as a lawyer. I don't know whether there is something inherent in the relationship between sisters that makes them compete for attention (I have only one brother who was nine years younger than me, and I don't recall this same dynamic when we were growing up). But even if it's not a sisters thing, perhaps

there is something in the minds of teenagers that allows them to seem disengaged and entirely uninterested one moment, and then suddenly, they become *so* engaged that they are bursting at the seams, can't possibly wait, and insist on dominating the conversation!

My daughters are masters of this, and in my fantasy testimony scenario, Talia would grab the microphone and start talking vigorously about my career, starting with my work in several law firms during and after the three federal clerkships that I had the privilege of undertaking. I always knew that I was interested in criminal law, but as a newlywed, I also realized that I needed to pay rent and bills and pay off law school loans, so I did what many young lawyers do—I joined a law firm. In my case, it was a series of law firms: in 1998, fresh off of my clerkships with the Honorable Patti Saris on the District Court of Massachusetts and the Honorable Bruce Selya on the First Circuit, I took a job as an associate at a phenomenal white-collar defense boutique firm here in the District of Columbia, a firm called Miller, Cassidy, Larroca and Lewin. And I am sure that I would have stayed with Miller Cassidy for much longer than the 9 months I worked there, had it not been for the incredible opportunity to clerk for Associate Justice Stephen Breyer on the Supreme Court of United States, which arose during October Term of 1999. All three of my clerkships were different and interesting—but I being at the Supreme Court was also *amazing*; and even today, I feel so lucky

to have had the chance to work inside an institution that has such a significant impact on our lives as Americans, and that few people even get to see, much less be part of.

I did my best, and learned a lot, while at the Supreme Court, and as much as I would have loved to stay in D.C. and launch my career right out of my clerkship, I thought it best to accompany my husband back up to Boston for the completion of his residency in general surgery at the Mass General, primarily because at that point was three months pregnant. And so for me began the delicate balancing that many young lawyers face in their professional lives: how *does* one manage the demands of your career and also the needs of your family? When we returned to the Boston area, I took a position as a general litigation associate at the large law firm of Goodwin Proctor—and like many young women who enter Big Law, I soon found it extremely challenging to combine law firm work with my life as a wife and new mother. Talia was born a few months after I starting working at Goodwin, and the firm was very supportive, but I think it is not possible to overstate the degree of difficulty that young women, and especially new mothers, face in the law firm context. The hours are long; the work flow is unpredictable; you have little control over your time and schedule; and you start to feel as though the demands of the billable hour are constantly in conflict with the needs of your children and your family responsibilities. I do want to be clear, though—this is *not* an indictment of Goodwin Procter in

particular; it's a great law firm—it just appears the *nature* of big firm law practice is difficult to manage when you have a family, no matter how nice the firm's partners might be. And there are many women who can make it work (some are quite well-suited to the pressures, in fact); I discovered early on that I was not.

And, unfortunately, researchers have established that I am not alone. A recent report published by the National Association of Women Lawyers studied women's experiences in large law firms, and the statistics are bleak. For example, the survey found that, while 50 percent of the graduates of law schools each year for the past 15 years have been women, "only about 15 percent of law firm equity partners and chief legal officers have been women[,]" despite substantial recruitment efforts by law firms over the past two decades.[2] For some reason, there are more male associates than female associates in the U.S. offices of major law firms to begin with, and when it comes to rising through the law firm ranks, the NAWL survey showed that, of the total number of non-equity partners who graduated from law school in 2004 or later, only 38 percent are women, and the number of female equity partners has remained essentially flat over the past ten years.[3]

Drilling down even further, the survey announced that "virtually no progress has been made by the nation's largest firms [in the past 10 years] in advancing minority partners and

[2] Lauren, Stiller Rikleen, "Women Lawyers Continue To Lag Behind Male Colleagues," Summary of the 2015 NAWL Ninth Annual Survey, at 1.
[3] *Id.* at 2-3, 6.

particularly minority women partners into the highest ranks of firms"; and indeed, the few minority women who advance continue to play the role of "pioneers" because "minority lawyers are not achieving partnership at the rate they are entering law firms."[4] Specifically, according to the report, "[l]awyers of color"—male *and* female—"constitute only 8 percent of law firm equity partners" nationwide, and "among this [already] small percentage of equity partners of color, even fewer are women."[5] And the report put these statistics into a concrete context—it noted that "the typical [large] firm has 105 white male equity partners, seven minority male equity partners, 20 white female equity partners, and two minority female equity partners."[6]

And I suppose statistics such as these regarding who remains in the top-tier of law firms are not all that surprising when one considers research that has been done about the experience of minority women in big law firms. The cover story of the March 2016 addition of the ABA Journal featured one such study, in a story that is entitled "Invisible Then Gone." The ABA discovered that, in many law firm environments, minority women lawyers are often left alone, without mentorship, to idle in stagnant practices. As a result, some feel excluded from the centers of power and influence within the firm; the ABA reported that a whopping

[4] *Id.* at 6.
[5] *Id.*
[6] *Id.*

"[85%] of minority female attorneys in the United States will quit large firms within seven years of starting their practice."

Now, it is certainly true that causation is always difficult to ferret out meaningfully, but the report from the NAWL highlights specific statistics that hint at some of the potential causes of the law firm retention problem with respect to women overall. Specifically, the report notes that "the typical female equity partner earns [only] 80 percent of what a typical male partner earns."[7] Similarly, although the total hours women equity partners work actually exceeds those of their male counterparts, the data suggests that committee assignments, hourly billing rates, and the distribution of pro bono hours contributes to disparities in actual client billables, such that "[t]he typical woman equity partner ends up billing only 78 percent of what a typical male equity partner bills."[8]

Furthermore, in addition to these disparities in compensation and work load at the top, the NAWL report and others like it have identified other barriers to the advancement of women at lower levels of firms, such as the lack of top-tier women who are in a position to serve as role-models and mentors, and firm cultures that isolate women associates and prevent the advancement of those who negotiate part-time or reduced-hours schedules. According to those who study retention rates, all this might

[7] *Id.* at 3.
[8] *Id.*

explain why large numbers of women move away from big law firm practice each year, and, at the very least, it "suggest[s] that women may be turning elsewhere for greater professional fulfillment."[9]

In my case, it was the inflexibility of the work schedules and assignments that became the deal-breaker, as I struggled with being a young mother in a big law firm. That period of my life taught me some hard lessons, but also important ones. I learned that, as much as I enjoyed had developing trial-practice skills in law school—and, in my mind, I had many Perry Mason moments—if I was going to make life as a lawyer work for me and my family, I needed to use my legal skills in a more predictable, more controllable working environment, and also one that permitted me to thrive in a context that I truly enjoyed. *That* was a realization for me—the understanding if I was going to leave my baby and go to work outside the home, I needed to find a job in which I could use my law degree to work that I found fulfilling and that was also compatible with the needs of my family. And armed with that realization, I then began what I can only characterize as a professional odyssey of epic proportions.

As anyone who knows me well can tell you, there were a number of years in which I literally moved from job-to-job-to-job! Looking back on it now, I suppose that it might have made more sense for me to take the time to do the research, finding one great

[9] *Id.* at 2, 3.

post and sticking with it, but instead, I guess you can say I was something of a 'professional vagabond,' moving around from place-to-place, as my family's needs and circumstances changed. There were times when we lived in Boston and times when we lived in D.C. There were times when I went into government—for example, I worked on the staff of the Sentencing Commission, and later as an Assistant Federal Public Defender here in D.C. And there were times when, primarily for financial reasons, I went back into private practice, but I did so at a more senior level than in the early days, and by that time, I had become an appellate lawyer, rather than a trial lawyer, which meant that I had discrete, manageable projects that could be handled without a lot of travel, and I worked with the same core group of great people, so there were few, if any, surprises.

In fact, by 2007, I thought I had finally nailed it—the perfect combination: I was doing challenging and interesting work as an Of Counsel in the D.C.-based Supreme Court and Appellate practice group of a wonderful California firm called Morrison and Foerster ("MoFo" for short). Being a MoFo lawyer meant that I could support my family financially, and by doing appeals and opting out of the partnership track, I still had some control over my schedule. And I was at MoFo for a little more than 2 ½ years, perfectly content, when my circumstances got even better—in 2009, the White House called, and I got the chance to be considered for nomination to a fulltime seat on the United States

Sentencing Commission, the judicial branch agency in which I had worked as a staffer just a few years before.

Now, as I am sure you can guess, this was, for me, the opportunity of a lifetime. And it was well worth the extremely nerve wracking nomination and confirmation process—I actually taught myself to knit as a way to channel my nervous energy during that time (if anybody wants a scarf, I'm your source!). Many yarn skeins later, in February of 2010, the Senate confirmed me and the President appointed me as a Vice Chair of the Commission, and I was back working in an agency that I had previously been a part of, among the extraordinarily talented and committed group of people who staff the Commission—which is an agency that really is a model of good governance. As many of you may know, the Sentencing Commission is a bi-partisan, independent agency here in the judicial branch that Congress has tasked with the responsibility of developing federal sentencing policy. From my perspective as a Commissioner, it was sort of like being part of a vibrant think-tank, and I was grateful for the time that I got to spend analyzing federal sentencing, which is a dynamic and fascinating field.

Being on the Commission also paved the way for me to be considered for an appointment as a United States District Judge—an appointment process that began in the early winter of 2012. I spent most of the winter, spring, and summer in the vetting process, and was formally nominated by President Obama in

September of 2012—just two months before the presidential election that would determine whether or not I would actually be able to take the bench.

Now, to the extent that Talia has been guiding the testimony regarding the course my career thus far, Leila would take over at this point in the story, to make sure that you fully comprehend how stressful it was for me to have been given a shot at my dream job—being a federal judge—but to have my chances of actually getting that job hinge on circumstances that were completely out of my control; specifically, whether or not the country voted to reelect President Obama. When you add to this the fact that I am related by marriage to Representative Paul Ryan—who was then running for Vice President, *against* President Obama—you get the sense of what that period of time was like for me. And if you didn't, Leila would make sure of that. She would recall, for example, that I was unusually jumpy and started so many scarves I could have outfitted a small Army. And on election night, in November of 2012, I spend every penny that I had getting a variety of services at the one place I knew would have no phones, no internet and no television access—Elizabeth Arden's Red Door Spa.

Well, I am happy to report that all's well that end's well; I was confirmed by the Senate in March of 2013, and I was able to take a seat among the fabulous judges on the District Court Bench that spring. And I can say with confidence three years later that I

really love my job. I am very busy with a number of complex cases, but also VERY satisfied with my work, and my life. I guess you could say that my center of gravity on the work-life balance continuum has actually shifted—I now probably work even longer hours than I did at the firm, but not because I'm billing time; instead, it's because I care deeply about reaching the right result and doing my best to render reasoned rulings for the benefit of the people who come before me.

POSITIVE QUALITIES/ADVICE

And having finally found work that suits me—work that is challenging, and interesting, and that I care about enormously—I hope that I am not only providing a good role model for my daughters, but also that I am able to give them useful advice based on my own experiences. And I would be interested to hear what my daughters would say about that—if Leila was asked her opinion of me and my character, I am pretty sure that she would give me a largely positive review, most likely describing me as hardworking, but also fun, open-minded, friendly, and respectful. If you could get Talia to look up from her iPad for a moment, she'd probably have a one-word answer to the question of what she thinks about her—"good"—but if pressed, she might go on to describe certain things that I have told her over the years about how to be and what to do, from which a reasonable factfinder might infer her mother's own best qualities.

For example, she would say that both her parents tell her to work hard at everything that she is called upon to do—that is, give it your best effort—whether it be a homework assignment or a basketball game or a household chore. She would probably say, the indomitable spirit of hard work is a shared value that united her parents from the beginning, long before she was born, and that sustains them in their personal and professional lives even today. Patrick and I are, in fact, those long-suffering, "early-to-bed, early-to-rise" kind of people, and in our family, we have a mantra that emphasizes prioritization of work over play as one of our first principles: as the girls would testify, "do what you *need* to do before what you *want* to do" is a constant refrain in our house.

Talia might also say that her parents require and exhibit respect for other people—anyone and everyone—no matter who they are or what they do. I think of it this way: I feel so fortunate to have had the opportunities that I have had in life, I believe it is my obligation to teach my children to refrain from casting aspersions on others because of their life circumstances; in other words, as is often said in religious circles, I *know* that "there but for the grace of God go I." I teach my children that this means that we approach the world with a grateful spirit; we don't look down on, or talk down to, others; and we show respect for all mankind.

Talia would probably hasten to add that her parents instruct her to keep an open mind—to be open to new ideas and

experiences, because you never know when someone else will have an interesting thought, or when a new door will open that takes you on the journey of your dreams.

And, finally, she would emphasize that her mother is always telling her to look for mentors and role models in each new situation that she encounters: someone who can look out for her and help her to navigate the challenges that lie ahead in whatever field she chooses to go into. For me, many of the women—and men!—I have been privileged to get to know throughout my life have served that function: my mother, my grandmother, my aunt, certain teachers, special coaches, and the judges for who I clerked, as well as those with whom I now work. There are also women I never met, but who are recorded in the pages of history, and whose lives and struggles inspire me and thousands of other working women to keep putting one foot in front of the other every day: women like Sojourner Truth, Harriet Tubman, Belva Lockwood, Susan B. Anthony, Constance Baker Motley, Amelia Earhardt, Marie Curie, Indira Gandhi, Barbara Jordan, Shirley Chisolm, and Eleanor Roosevelt. Learning about these and other historical figures has been crucial to my development, and to the development of girls like my daughters, who should learn that they have opportunities in America today—opportunities that don't exist for girls in many other countries—largely because so many strong and committed women from generations past have done the

heavy-lifting to pave the way and to open doors for us and for those who will come after.

CONCLUSION

I want to end trip down memory lane as told through the imagined testimony of my daughters with recent "real life" testimony that came up in an interesting context and in a manner that, for the first time in a long time, made me feel like those sassy girls actually do know who I am and what I do. As I am sure you all are aware, the President announced yesterday that he intends to nominate Judge Merrick Garland, the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, to serve on the Supreme Court of the United States; I know Judge Garland (you could even say he's my supervisor) and I am thrilled for him and for our country. I bring this up this now because my husband and I had thought that our daughters were totally oblivious to the Supreme Court and the process of nominating Justices, but we realized we were wrong, when my youngest daughter came to us maybe three weeks ago now and asked whether we had heard that Justice Scalia had died and that there was a vacancy on the Supreme Court? We assured her that we had, and she said that some of her friends had been talking, and they said to her "you know, your mom's a judge—she should really apply for that position." Leila apparently thought that was a pretty good idea, and so she came to tell me that I should submit an application for the open Supreme Court seat.

Well, Patrick and I explained to her that getting to be on the Supreme Court really isn't the kind of job that you *apply* for—you just have to be lucky enough to have the President find you among all of the thousands of lawyers who might want to do that job, to which Leila responded, "well, if the President has to *find* you, I am going to write him a letter to tell him who you are!" She trotted off, and came back a little while later, with the following handwritten note:

> "Dear Mr. President:
>
> While you are considering judges to fill Justice Scalia's seat on the Supreme Court, I would like to add my mother, Ketanji Brown Jackson of the District Court, to the list.
>
> I, her daughter Leila Jackson of eleven years old, strongly believe she would be an excellent fit for the position. She is determined, honest, and never breaks a promise to anyone, even if there are other things she'd rather do. She can demonstrate commitment, and is loyal and never brags. I think should would made a great Supreme Court justice, even if the workload will be larger on the court, or you have other nominees. Please consider her aspects for the job.
>
> Thank you for listening!
>
> Leila Jackson"

Well, it is difficult to put into words how it felt to get such a ringing endorsement from my own daughter—it was an *actual* testimony that was, by far, more meaningful than any make-believe account of how my daughters feel. In that moment, I not only knew that I am raising an assertive young woman who is not afraid to speak her mind, even to the President, but also that my

daughters are not oblivious to my work, and are proud of me, as I am of them and of my entire family. It has been a lot of hard work—trying to balance work and motherhood—and like so many people, I often feel as if I am failing in both arenas. But in that one brief shining moment, as I read Leila's letter, I got a glimpse of my professional and personal life combined, and what I saw, made me feel that my husband and I are well on our way to achieving success in both worlds.

It has been a pleasure to be here and to speak with you today: thank you for listening!

FAIRNESS IN FEDERAL SENTENCING: AN EXAMINATION

Good afternoon. I am delighted to be here and to be able to share with you a few remarks about what has been my passion in the law for the better part of the past two decades: federal criminal sentencing policy. Now, I know that all of you work with judges who sentence people, so you are generally familiar with how federal sentencing works. But have you ever taken the time to reflect on the history and development of sentencing policy and procedure in the federal system? It's actually pretty fascinating – I mean, why is it that the Sentencing Guidelines are what they are? And how did we manage to evolve from a completely unregulated sentencing system, to one that had mandatory guideline sentences, and now, as you know, we exist in a world in which there are BOTH sentencing guidelines AND judicial discretion at sentencing?

These are the kinds of questions that I have grappled with for years – first, early on in my career in my role as a staffer of the United States Sentencing Commission; then, as a Vice Chair and appointed member of the Sentencing Commission; and even now, in my current gig as a U.S. District Judge. I have also had the good fortune of being able to teach a seminar on federal sentencing as an adjunct professor at a law school in my area, and in my class, I have one basic goal—to persuade my students to think about federal sentencing not as an oddly narrow area of focus that is tacked on to criminal law, but instead, as a vast area of inquiry that is well worth studying all on its own. In fact, if you were to take my class, you would hear me tout criminal sentencing as among the "don't-miss" courses and subjects in law school, not just because I

teach it, but because I, for one, believe that sentencing law and policy is one of the most important things that any budding lawyer—~~or~~ and, for that matter, any seasoned practitioner—can study.

Why is that? Well, there is the practical reason that, as you know, no fewer than 97% of the cases in the federal criminal justice system are now resolved by guilty pleas, so in the vast majority of criminal cases, sentencing is really all there is. But even beyond that, learning about sentencing is important for *all* lawyers, even if criminal law is not your thing, because, at bottom, the sentencing of criminal offenders is the authorized exercise of the power of the government to subjugate the free will of individuals—which in and of itself has *enormous* implications in a society in which the government derives its power from the will of the people. Dostoevsky put it this way: "you can judge a society by how well it treats its prisoners." So, as I see it, becoming well-versed in how our government exercises its power over people who breach its commandments is essential to sustaining our very democracy.

I also try to convince my students that sentencing is just plain interesting on an intellectual level, in part because it melds together myriad types of law—criminal law, of course, but also administrative law, constitutional law, critical race theory, negotiations, and to some extent, even contracts. And if *that's* not enough to prove to them that sentencing is a subject is worth studying, I point out that sentencing policy implicates and intersects with various *other* intellectual disciplines as well, including philosophy, psychology, history, statistics, economics, and politics.

In my time here this afternoon, I hope you will indulge me as I attempt to provide you with a bird's eye view of federal sentencing as a subject—a course nutshell, if you will—that I hope will re-ignite in some of you a particular interest in a legal subject matter that, in my view, is too often too little emphasized. This brief overview will track what I have come to realize are the two fundamental inquiries that lie at the heart of our federal sentencing system and that animate every aspect of the sentencing organism. If you take away nothing else from what I say here today, remember this: *all* of federal sentencing—the history, the structure, the policy, the procedure, *the entire discipline*—always and inevitably reduces to two essential questions, first, what is fairness? and, second, who decides?

Now, I learned early on that when you make a sweeping statement like 'all aspects of our federal sentencing system can ultimately be traced back to the questions of fairness and control,' one should really provide the audience with an example, and so, luckily, I have one!

My example today is a true story that takes us back to the late nineteenth century. . . .

I. Crow Dog's Case

The year is 1881. A tribe of Native Americans known as the Brule Sioux were living and hunting in bands on the great plains of central South Dakota. This migratory people survived by hunting and gathering within land that the United States government had set aside for a

reservation, but at that point in history, the relationship between the nascent United States government and the long-established Indian nations was still very tenuous.

The head chief of the Brule Sioux was a man known as Spotted Tail. Spotted Tail was handsome and well-liked by many, but he was also known to be aggressive and he demanded absolute obedience from members of the tribe, ruling over the lower chiefs with something of an iron fist. Spotted Tail also generally believed in keeping peace with whites, which meant that he often served as an intermediary between the tribe and the federal government. Spotted Tail's power within the tribe and his relationship with federal authorities meant that the Brule Sioux did not participate in the Great Sioux-American wars of the mid-1880s, and it also resulted in Spotted Tail's becoming an agent in the federal Bureau of Indian Affairs, which compensated him handsomely for his influence in calming his people.

Another leader within the Brule Sioux tribe—a man who went by the name of Crow Dog—was more traditional and substantially less accommodating. Crow Dog was a Sioux warrior who had been closely associated with Crazy Horse and had once joined Sitting Bull in exile in Canada. Crow Dog felt strongly that encroachments by whites and the U. S. government into the lands and customs of the Sioux nation must be resisted. Crow Dog led a faction of the Brule Sioux that was in strong opposition to what they believed was the arbitrary, dictatorial, and traitorous leadership of Spotted Tail.

In the afternoon of August 5, 1881, Crow Dog crouched along the side of a road that led to Spotted Tail's (government-constructed) house, presumably fixing the wheel of his carriage. When Spotted Tail came riding along on a horse, Crow Dog leapt up, pulled out his rifle, and shot Spotted Tail through the side, the bullet exiting out of his chest. Spotted Tail fell off his horse onto the ground, stood up, staggered a few steps, went for his own pistol, but fell dead before he could get off a shot.

Now, I tell you this true story, not so much because of the crime but because of the aftermath, which is an interesting tale of two punishments. In the wake of Spotted Tail's death, Crow Dog was, at first, subjected to the Brule Sioux system of justice. These native people had a dispute-resolution system that was controlled by a council of appointed leaders. This tribal council didn't care about retribution or enforcement of a moral code, but instead were focused primarily on *survival*, so the ultimate value for them, in civil or criminal matters, was to terminate the conflict and to reintegrate everyone peacefully back into society. In Crow Dog's case, the council met not to "convict" or "acquit" but to arrange a peaceful reconciliation of the affected families. The council determined that Brule law required Crow Dog's family to give Spotted Tail's family $600, eight horses, and a blanket, which Crow Dog's people promptly paid and Spotted Tail's family accepted. (For his part, Crow Dog purified himself in a sweat lodge and shot his rifle into sacred rocks to assuage the spirit of Spotted Tail). And, with that, under tribal law, the matter was settled.

Now, needless to say, *that* system of dispensing justice for murder was radically different than the one that existed in the broader United States at the time. Indeed, when the federal authorities in South Dakota heard about the murder and the way it had been resolved, they stormed the Brule Sioux reservation, arrested Crow Dog, prosecuted him for murder in federal court, convicted him (in spite of his claims of self-defense), and a judge sentenced him to hang for the killing of Spotted Tail. *One crime—two dramatically different punishments.*

In the end, Crow Dog was ultimately spared by the Supreme Court of the United States, which reversed his conviction on the narrow legal ground that tribal sovereignty precluded federal prosecution. Congress subsequently overturned the Supreme Court's ruling for future cases through the passage of legislation that gave federal courts jurisdiction over major crimes committed on tribal lands,[1] but for present purposes, Crow Dog's case is the perfect illustration of the primary points that I hope to leave with you today.

What I really love about this story is that it highlights the central tensions that are at work throughout all of federal sentencing and, as I have said, in my view all of these tensions ultimately relate to the issues of fairness and control. So, for example, the Crow Dog tale raises the obvious question: which of the two penalties was the "fair"—and by that

[1] Crow Dog went on to live out the remainder of his days as a traditional leader among the Brule Sioux. The Court decision bearing his name was ultimately rendered obsolete as a result of Congress's enactment of the Major Crimes Act in 1885, which imposed federal criminal law on all those who violated the laws of the U.S.

I mean "the just"—sentence for Crow Dog's crime? On the one hand, Crow Dog paid a significant fine, the victim's family received compensation, and the tribe continued to have the services of a valued member of the community when one had already been taken from it—what more could hanging Crow Dog have accomplished? On the other hand, Crow Dog had done the unspeakable—he had actually *killed* the leader of the tribe—didn't he deserve to be hung or otherwise punished severely and, if not, how could the tribe prevent this sort of thing from happening again? One could certainly say that *both* of the penalties were rooted in legitimate fairness concerns.

Also important in the context of the Crow Dog example, is the question of *who*—that is, which entity—should make the penalty determination? As you heard in the story, a respected panel of Crow Dog's peers, the elders of his community, had examined local values and customs and had come to what they believed to be a fair result. Thereafter, the United States government looked at the same set of facts and applied its own criminal justice considerations, which went beyond Crow Dog's particular circumstances and the needs of the Brule Sioux, and took into account what was considered necessary and appropriate punishment in the context of the broader federal criminal justice system. This raises the question: if fairness is our goal, should criminal sentencing be done on a local, individualized case-by-case basis OR more systematically, through the application of a centralized process that advances broader conceptions of justice?

These are really tough questions for which there are no clear answers. But as we fast forward to the modern era and I talk for a bit about how the federal sentencing system has developed over the past half century, I hope you will see that federal sentencing policy has been driven largely by these two quests: to achieve fair sentencing outcomes and to be the institution that has the power to decide what fairness in sentencing really is.

II. What Is Fairness In Sentencing?

A. Unfettered Discretion (The Pre-Guidelines Era)

Let me begin at the beginning—which, for our purposes, is the 1970s—a decade in which the crime rate was extremely high nationally, and, at sentencing, federal judges had nearly unfettered discretion to impose any sentence within the broad range of punishment that the Federal Criminal Code prescribed. Those of you who have studied criminal law know that, in the federal system, the typical criminal statute says something to the effect of 'whoever engages in the specified conduct'—for example, whoever steals money from a federally insured bank by force, violence, or intimidation—'shall be imprisoned for not more than [x],' a specified term of years—for bank robbery, that statutory maximum term is 20 years. This means that, under the statutes, a federal judge traditionally had an enormous amount of discretion to select a sentence from between zero and twenty years, and it's not surprising that, under these circumstances, defendants who were convicted of the same bank robbery crime, and had engaged in

substantially the same conduct—but who were sentenced by different judges—could end up with dramatically different sentences.

In 1972, for example, a standard robbery offender in what was then the N.D.N.Y. received an average sentence of 39 months of imprisonment, while the average sentence for similar robbery offenders in the nearby E.D.N.Y. was 130 months in prison. And this kind of extreme difference was not limited to robbery: for example, forgery and counterfeiting violators received an average of 12 months of imprisonment in the N.D.N.Y., 49 months in the E.D.N.Y., and 77 months in the W.D. of Virginia.

In light of such glaring disparities, it's no wonder that ardent critiques of our sentencing system emerged. An influential report published in 1977 referred to federal sentencing as a "national scandal," and described it as a "non-system" in which individual judges "formulate and apply their own personal theories of punishment." That, by the way, was the cause of the sentencing disparities—not inept or corrupt judges, but different, sincerely-held beliefs about the purposes of punishment and how those purposes should be manifest in the context of individual cases. You have all studied criminal law, so you know that philosophers throughout history have had different views about the purposes of punishment, and in fact, where each one of us stands on the fairness question depends, in large part, on the philosophical camp in which we sit!

The retributivists—including Hammarabi, Kant, and Henry Wadsworth Longfellow—argue that punishment is justified simply and solely because the offender has done something wrong. This retrospective view posits that morality demands punishment of the guilty, and that it would in fact be disrespectful of men as responsible moral agents not to punish them in proportion to their wrongdoing. As Longfellow put it,

> "Every guilty deed / Holds in itself the seed / Of retribution and of underlying pain". . .

The utilitarians—like Plato, Bentham, and Hobbes—had a totally different perspective regarding the purpose of punishment. Utilitarians believe that punishment is justified only if it will promote good and/or prevent evil in the future. In this forward-looking perspective, one considers only what punishment will accomplish, and it is immoral to punish someone if doing so does not achieve a greater good. Plato said it this way, in defense of deterrence as the purpose of punishment:

> "Not that he is punished because he did wrong, for that which is done can never be undone, but in order that in future times, he, and those who see him corrected, may utterly hate injustice . . . [and] abate much of their evil-doing."

And there are other philosophies as well, including those that view punishment as a means of repairing the harm to the victim and the community—in this view, the point of sanctions is to provide compensation and to restore harmony.

Now, it is not difficult to see how applying these very different punishment philosophies to the same set of facts could lead to dramatically different sentencing results. That happened in Crow Dog's case, didn't it? If you believe, as the Sioux elders did, that the purpose of punishment is reconciliation and restoration, then a heavy fine to compensate the victims is a rational sentencing result. But if retribution (something like Hammarabi's "an eye for an eye") is your guiding punishment principle, then nothing short of execution would do.

With respect to the huge sentencing disparities that were being observed in the 1970s and were driven by different philosophies of punishment, many people on both sides of the political aisle were troubled. One of the most vocal critics was a federal judge on the S.D.N.Y.—Judge Marvin Frankel—who did a series of lectures in the early 1970s and published a book entitled: CRIMINAL SENTENCES: LAW WITHOUT ORDER. Judge Frankel argued that the traditional federal sentencing structure—in which a single judge had "almost wholly unchecked and sweeping powers" to impose any sentence he wished—was "terrifying and intolerable for a society that professes devotion to the rule of law" because it essentially elevated judges to the role of kings and thus is fundamentally inconsistent with the basic tenant that we are "a government of laws and not men." Conservative judges and commentators, such as Chief Justice Warren Burger echoed this sentiment, but the criticisms did not only come from those who disliked the fact that unelected, unaccountable judges had such power—progressive Senator Edward Kennedy voiced similar concerns during

this same timeframe. In fact, Kennedy went *even further*, arguing that "the absence of principled sentencing policy" actually *caused* crime! This was because, in Kennedy's view, deterrence requires certainty and unfettered sentencing discretion turns the criminal justice system into "*a game of chance* in which the potential offender may 'play the odds' and gamble on receiving a lengthy term of imprisonment or . . . no jail sentence at all," depending on the judge.

B. Enter: Regulation (The Sentencing Guidelines)

By the end of the 1970s, there was so much concern about the state of federal sentencing that Senator Kennedy worked closely with conservative senators Strom Thurmond and Orin Hatch to develop an entirely new federal sentencing system, the cornerstone of which was the perceived need for regulation of sentencing discretion. The Sentencing Reform Act was enacted in 1984, and it not only created the bipartisan Sentencing Commission, it also specifically required the Commission to develop sentencing guidelines that balanced two (sometimes competing) fairness principles: uniformity, on the one hand, and proportionality, on the other.

Now, please don't miss the fact that I have called both uniformity and proportionality "fairness principles." I think that the latter makes intuitive sense to most people, because proportionality essentially means punishing people in proportion to not only the category of crime they have committed but also based on mitigating and aggravating facts about the individual that arguably relate to culpability—this view is sometimes referred to as "individualized" sentencing. But given what I

have already said about disparity, it is important to understand that many supporters of sentencing regulation—those who generally believe in equality in sentencing outcomes and who disfavor the individualized sentencing approach—see uniformity as promoting fundamental fairness as well. Imagine two bank robbers: if they each go into a bank in their community with a gun and steal $15,000 in cash, and they are both prosecuted in federal court, should one to get 9 months of incarceration and the other 15 years just because of the judge they happened to be assigned to? There is no question that disparity of sentencing outcomes with respect to similarly situated defendants was a fairness concern that the guidelines were supposed to address.

But Congress also understood that the sentencing exercise cannot be solely about achieving uniform results across the board, because no two crimes are truly created equal, and it is not fair to ignore salient differences regarding the offense or the offenders! So, if one of those bank robbers pistol-whipped the teller causing serious injury and held her hostage, while the other never showed the gun at all, are those two bank robbery crimes really equivalent in terms of culpability, and should we have a system that assigns the same punishment simply both was charged as bank robberies? At least in theory, then, the mandatory guidelines system was supposed to advance both fairness concerns—it would regulate sentencing discretion (promoting uniformity) while also ensuring that truly different crimes were treated differently.

Now, I don't have the time here today to explain in detail how the guidelines were structured to promote this goal, and there is

considerable ongoing debate about whether the guidelines have, in fact, achieved their intended purpose. The take away, I guess, is that there is more than one way to perceive of fairness in sentencing, and when Congress opted for regulation, it attempted to craft a system that would generate fair sentencing outcomes. I hope you *also* see that, with the enactment of the Sentencing Reform Act and the advent of the federal sentencing guidelines scheme, sentencing determinations were no longer being made solely by judges in the exercise of their own discretion, and the issue of control—that second factor I originally said lies at the heart of everything—looms large. Put another way, if the judge is no longer the "king" of sentencing outcomes, then who is???

III. Who Decides?

A. The Sentencing Discretion Model

Turning briefly to this second point, I direct your attention to a model that Professor Kevin R. Reitz, who is currently at the University of Minnesota Law School developed and that explains more clearly than I ever could the interaction between the many different discretionary decision makers at work in modern sentencing systems.

Figure 1 on Side A of your handout, shows all of the various participants in the criminal justice system who potentially influence sentencing outcomes, and what you should notice is that they operate on two different levels: the systemic level and the case-specific level. The systemic level actors don't involve themselves with sentencing particular cases; they make rules that apply to the downstream case-

specific actors and that constrain how those actors exercise their sentencing discretion. On the case-specific level, the diagram reads from left to right in succession, with each participant making sentencing-related discretionary judgment calls that constrain subsequent participants and ultimately impact the final sentence an offender receives. So, for example, the prosecutor (who fits into the "parties" bubble) decides what crime to charge in the indictment, and the probation officer investigates that crime to determine the facts that relate to its commission. The trial court then looks at both the applicable law with respect to the crime of conviction and the facts as determined by the probation officer and presented by the parties, and imposes a sentence that appellate courts review and corrections officers implement. And in jurisdictions that have parole, the parole board ultimately determines how much time a defendant spends in jail.

If you flip over to Side B, you can see that sentencing systems can actually be structured in different ways, depending upon which parties have sentencing discretion and how much influence those parties have over sentencing outcomes. So, as figure 2 shows, if the sentencing system is one in which the legislature enacts a criminal statute that requires the judge to impose a particular sentence for anyone convicted of the particular crime (say, 10 years for bank robbery), there are only two relevant decision makers: the legislature, which establishes the mandatory penalty, and the parties, who determine (through charge and fact bargaining) whether the crime will be charged or has been committed in any given case such that mandatory penalty is going to be

imposed. None of the other ~~parties~~ factors have anything more than ministerial roles as far as influence over sentencing outcomes, so they are crossed out.

Figure 3 shows a system in which the legislature has opted to take a back seat to the case-specific participants—by adopting only statutory maximum sentences for broadly-defined crimes. There is no commission to guide or cabin judicial discretion, and thus, the case-specific actors exercise the most discretion over sentencing outcomes, and especially the trial court and the parole board because, in this scheme, the judge sentences offenders to a range of imprisonment (say, 5 to 15 years) based on whatever factors the judge determines are relevant, and the parole board repeatedly revisits the sentence after the minimum period to determine whether the offender should be released.

B. The Federal Sentencing Guidelines System & The Epic Struggle For Control Over Sentencing Outcomes

Figure 4 is the diagram that depicts the federal sentencing system in the mid-1980s, when the mandatory federal sentencing guidelines were first adopted. The systemic-level actors—Congress and the Commission—suddenly had enormous power to dictate sentencing outcomes by determining the factors that every federal judge had to consider and apply when sentencing offenders, and how much weight was to be given to each one. Because judges were required by law to impose a sentence within the guideline range except in extraordinary circumstances, the power to influence sentencing—what Reitz calls "sentencing discretion"—was essentially shifted from the district court judge to the Sentencing Commission and, to some extent, to

prosecutors, who decided what to charge and what to bargain away, and thus what guideline factors apply in any given case.

With this kind of a shift in power, you can imagine that many federal judges were not at all happy with the mandatory guidelines system, which effectively constrained their ability to select and impose fair sentences based on the facts as they saw them. Perhaps even more important, if you were to take my sentencing course, you would learn that each of the significant developments in federal sentencing law and policy that have occurred since the guidelines were instituted can be characterized as bouts in an ongoing and epic struggle between the systemic and the case-specific actors for control over sentencing outcomes!

The guidelines themselves were Round 1, and as we see from Figure 4, the systemic level actors gained a significant amount of power—*they* were the deciders when it came to the values that were to be promoted at sentencing, not individual judges—and their interest in uniformity was the prevailing fairness principle. The Supreme Court struck back in the early aughts, in case called *Koon v. United States*, in which the Court permitted judges to take into account the individual circumstances of an offender and to depart from the mandatory guidelines more freely than Congress had apparently intended, thereby shifting some of the sentencing power away from the Commission and back to the judges. Congress responded with the Protect Act in 2003—which was a statute that, among other things, nearly eliminated departures; required the Justice Department to keep track of the cases

in which judges did not follow the guidelines and report them to Congress; and started a practice whereby Congress now specifically directs the Commission to increase guideline penalties to a particular level with respect to certain crimes.

In short, this back-and-forth between the systemic level participants and the case-specific level participants resulted in seismic shifts in the locus of control over federal sentencing outcomes in a relatively short period of time, but none more dramatic than what happened in 2005, with the Supreme Court case of *United States v. Booker*. As you well know, a 5-member majority decided that the federal sentencing guidelines system was an unconstitutional violation of the 6th Amendment right to trial by jury based on a legal principle that the Court first fully articulated five years earlier, in *Apprendi v. New Jersey* (a case that, interestingly enough, was decided the year I clerked for Justice Stephen Breyer). But rather than striking down the entire sentencing system, in *Booker*, a *different* set of 5 Justices (known as the "remedial" majority) decided to fix the constitutional problem, by striking the provision of the Sentencing Reform Act that had made the guidelines mandatory and requiring sentencing judges merely to consult the guidelines as the starting point for sentencing determinations made pursuant to general principles Congress had laid out in the Sentencing Reform Act that are codified at 18 U.S.C. § 3553(a). By rendering the guideline system voluntary, the Supreme Court had, in effect, wrestled control over sentencing determinations away from the system-level participants and put it back into the hands

of individual judges, who now not only decide what sentence to impose in the vast majority of cases but also determine how much weight, if any, to give to the sentencing guidelines manual.

IV. Conclusion

Needless to say, we are in interesting times. Some federal judges still adhere closely to the now- voluntary guidelines manual, and rarely impose a sentence *outside* the guideline range. Others calculate the guidelines as required, but treat them as a jumping off point rather than a landing pad, and thus rarely impose a sentence that is *within* the guideline range. And as the rate of within-guideline range sentences slowly but steadily decreases, many worry that our system could be returning to the pre-guideline era, which might ultimately trigger a response from Congress (another seismic shift, if you will) because it appears that, as Justice Breyer said in *Booker*, "the ball is now in Congress's court" to decide what the future of federal sentencing will be.

In the meantime, I, like many other federal judges, carry on, doing the best I can to promote fairness in sentencing by taking into account the guideline calculation and also all of the evidence and arguments that are presented to me in each case for assessment under § 3553(a). As the judges you work with would probably tell you, sentencing people is really difficult—and I think it is made primarily so because the exercise of sentencing itself is a multi-faceted, value-laden endeavor that is part of a bigger scheme but in any given case has an acute impact on the lives of specific individuals. Judges meet those

individuals face-to-face, and we bear the heavy burden of not only executing our own moral judgment about the gravity of the offense in light of the characteristics of the offender but also conveying society's opprobrium for that particular offender's violation of the law. All this considered, then, is it any wonder that no one can say with certainty what a "fair" sentencing outcome really is?

For what it's worth, it seems to me that the best we can do is focus on the sentencing *process*, and that fairness in federal sentencing requires *both* the flexibility to take into account the variety of individual characteristics that legitimately relate to culpability *and* the sense of community and common purpose that views achieving rough uniformity as essential to fundamental fairness. And whether regulation from the top down, some other unifying structure, or every sentencer to himself best promotes the ends justice is an ongoing policy discussion that I urge YOU who work on the front lines in the federal criminal justice system to join as we move into the future.

THANK YOU!!!

[I am happy to take questions, if there are any; otherwise, I hope you have a great night!]

Side A

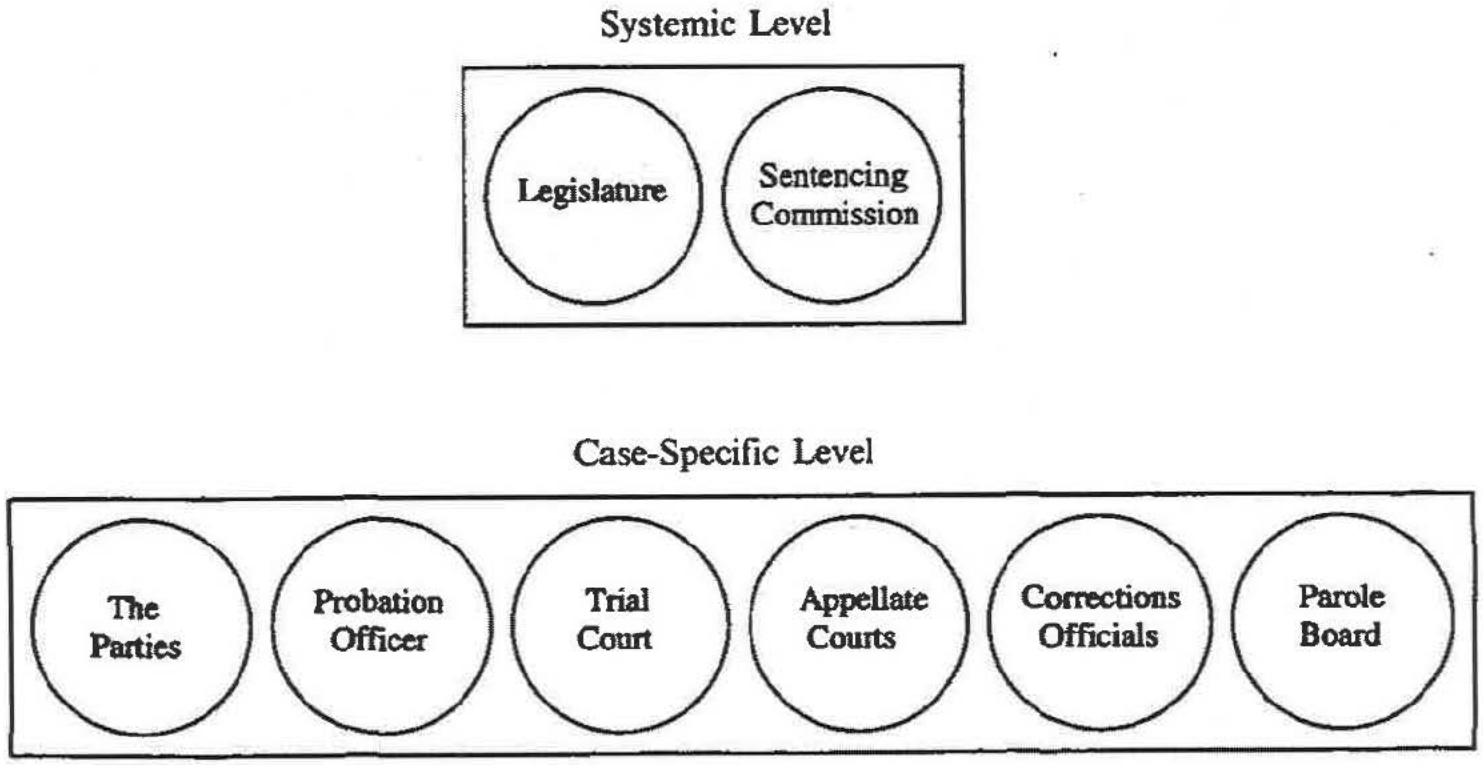


Figure 1. A Discretion Diagram for Sentencing Systems

~~~ Adapted from Kevin R. Reitz, "Modeling Discretion in American Sentencing Systems," 20 *Law & Pol'y* 389 (1998) ~~~
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Side B

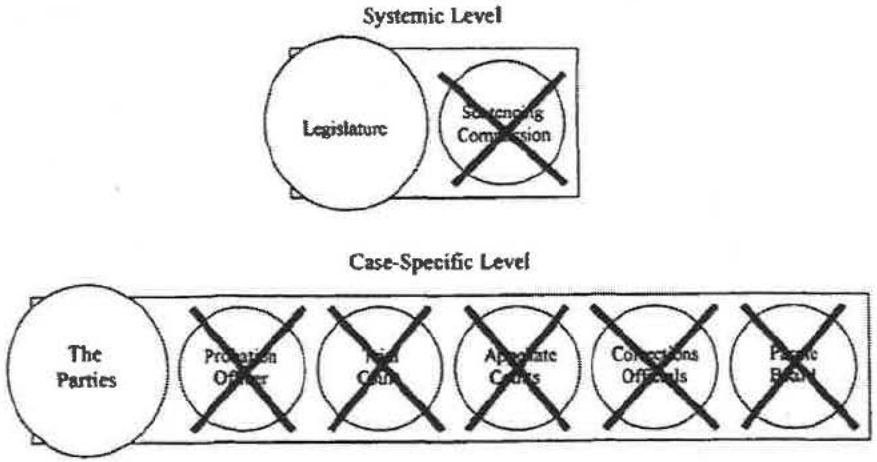


Figure 2. A Discretion Diagram of Mandatory Sentencing

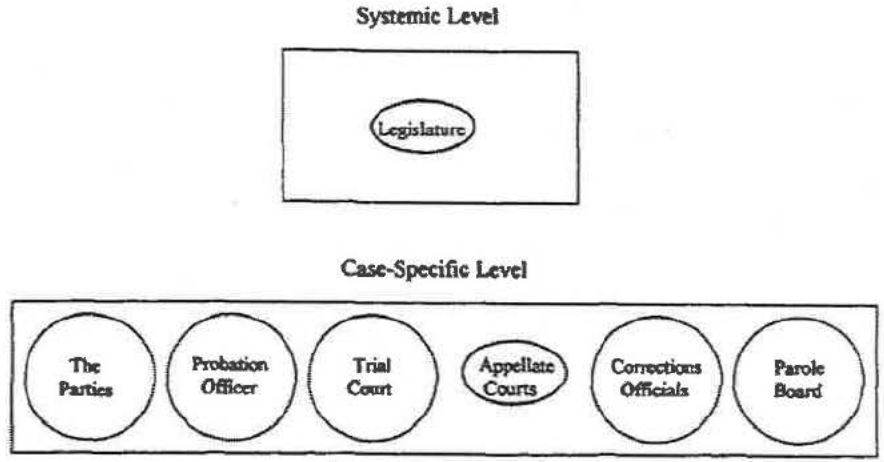


Figure 3. A Discretion Diagram of Indeterminate Sentencing

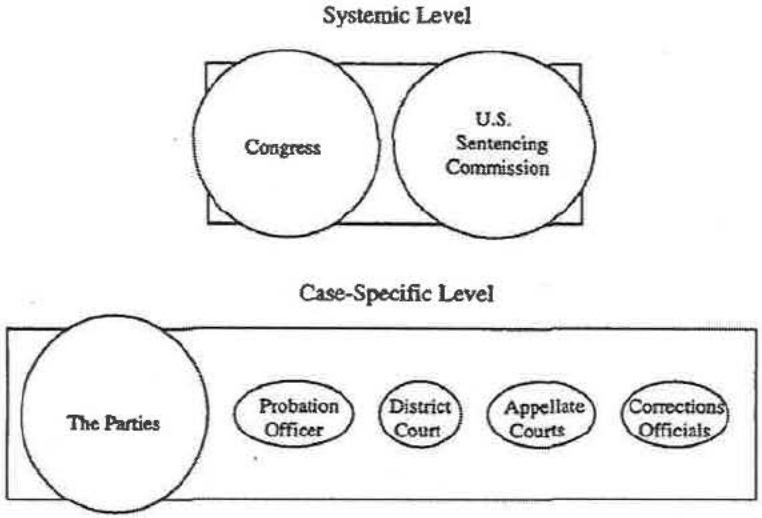


Figure 4. A Discretion Diagram of the Federal System

FAIRNESS IN FEDERAL SENTENCING: AN EXAMINATION

Good afternoon. I am delighted to be here and to be able to share with you a few remarks about what has been my passion in the law for the better part of the past two decades: federal criminal sentencing policy. Now, I know what some of you must be thinking—that federal criminal sentencing policy is an oddly narrow area of focus—but I hope to prove to you that it is not, and instead, that sentencing is a vast area of inquiry that is well worth studying all on its own. In fact, if you were to ask me to list "don't-miss" courses and subjects in law school, I would definitely put criminal sentencing on that list, because I, for one, believe that sentencing law and policy is one of the most important things that any budding lawyer can study.

Why? Well, if you think you might practice criminal law, there is the practical reason that no fewer than 97% of the cases in the federal criminal justice system are now resolved by guilty pleas, so in the vast majority of criminal cases, sentencing is really all there is. But even beyond that, learning about sentencing is important for *all* lawyers, even if criminal law is not your thing, because, at bottom, the sentencing of criminal offender is the authorized and ultimate exercise of the power of the government to subjugate the free will of individuals—which has *enormous* implications in a society in which the government derives its power from the will of the people. And it is true that, as Dostoevsky once said, "you *can* judge a society by how well it treats its prisoners." So, in my view, there is nothing more important to sustaining our very democracy than that soon-to-be legal experts such

as yourselves become well-versed in how our government exercises its power over people who breach its commandments. There is also the simple fact that sentencing policy melds together myriad types of law—criminal law, of course, but also administrative law, constitutional law, critical race theory, negotiations, and to some extent, even contracts—so sentencing is just plain interesting on an intellectual level. And if *that's* not enough to convince you that this is a subject is worth studying, I would also point out that sentencing policy implicates and intersects with various *other* intellectual disciplines as well, including philosophy, psychology, history, statistics, economics, and politics.

In my few minutes here today, I would like to attempt to provide you with a bird's eye view of federal sentencing as a subject—a course nutshell, if you will—that I hope will ignite in some of you an interest in a legal area that too often is too little emphasized. This brief overview will track what I have come to realize are the two fundamental inquiries that lie at the heart of our federal sentencing system and that animate every aspect of the sentencing organism. If you take away nothing else from what I say here today, remember this: *all* of federal sentencing—the history, the structure, the policy, the procedure, *the entire discipline*—always and inevitably reduces to two essential questions, first, what is fairness? and, second, who decides?

Now, I learned early on that when you make a sweeping statement like 'all aspects of our federal sentencing system can ultimately be traced back to the questions of fairness and control,' one

should really provide the audience with an example, and so, luckily, I have one!

My example today is a true story that takes us back to the late nineteenth century. . . .

I. Crow Dog's Case

The year is 1881. A tribe of Native Americans known as the Brule Sioux were living and hunting in bands on the great plains of central South Dakota. This migratory people survived by hunting and gathering within land that the United States government had set aside for a reservation, but at that point in history, the relationship between the nascent United States government and the long-established Indian nations was still very tenuous.

The head chief of the Brule Sioux was a man known as Spotted Tail. Spotted Tail was handsome and well-liked by many, but he was also known to be aggressive and he demanded absolute obedience from members of the tribe, ruling over the lower chiefs with something of an iron fist. Spotted Tail also generally believed in keeping peace with whites, which meant that he often served as an intermediary between the tribe and the federal government. Spotted Tail's power within the tribe and his relationship with federal authorities meant that the Brule Sioux did not participate in the Great Sioux-American wars of the mid-1880s, and it also resulted in Spotted Tail's becoming an agent in the federal Bureau of Indian Affairs, which compensated him handsomely for his influence in calming his people.

Another leader within the Brule Sioux tribe—a man who went by the name of Crow Dog—was more traditional and substantially less accommodating. Crow Dog was a Sioux warrior who had been closely associated with Crazy Horse and had once joined Sitting Bull in exile in Canada. Crow Dog felt strongly that encroachments by whites and the U. S. government into the lands and customs of the Sioux nation must be resisted. Crow Dog led a faction of the Brule Sioux that was in strong opposition to what they believed was the arbitrary, dictatorial, and traitorous leadership of Spotted Tail.

In the afternoon of August 5, 1881, Crow Dog crouched along the side of a road that led to Spotted Tail's (government-constructed) house, presumably fixing the wheel of his carriage. When Spotted Tail came riding along on a horse, Crow Dog leapt up, pulled out his rifle, and shot Spotted Tail through the side, the bullet exiting out of his chest. Spotted Tail fell off his horse onto the ground, stood up, staggered a few steps, went for his own pistol, but fell dead before he could get off a shot.

Now, I tell you this true story, not so much because of the crime but because of the aftermath, which is an interesting tale of two punishments. In the wake of Spotted Tail's death, Crow Dog was, at first, subjected to the Brule Sioux system of justice. These native people had a dispute-resolution system that was controlled by a council of appointed leaders. This tribal council didn't care about retribution or enforcement of a moral code, but instead were focused primarily on *survival*, so the ultimate value for them, in civil or criminal matters, was to terminate the conflict and to reintegrate everyone peacefully back into society. In

Crow Dog's case, the council met not to "convict" or "acquit" but to arrange a peaceful reconciliation of the affected families. The council determined that Brule law required Crow Dog's family to give Spotted Tail's family $600, eight horses, and a blanket, which Crow Dog's people promptly paid and Spotted Tail's family accepted. (For his part, Crow Dog purified himself in a sweat lodge and shot his rifle into sacred rocks to assuage the spirit of Spotted Tail). And, with that, under tribal law, the matter was settled.

Now, needless to say, *that* system of dispensing justice for murder was radically different than the one that existed in the broader United States at the time. Indeed, when the federal authorities in South Dakota heard about the murder and the way it had been resolved, they stormed the Brule Sioux reservation, arrested Crow Dog, prosecuted him for murder in federal court, convicted him (in spite of his claims of self-defense), and a judge sentenced him to hang for the killing of Spotted Tail. *One crime—two dramatically different punishments.*

In the end, Crow Dog was ultimately spared by the Supreme Court of the United States, which reversed his conviction on the narrow legal ground that tribal sovereignty precluded federal prosecution. Congress subsequently overturned the Supreme Court's ruling for future cases through the passage of legislation that gave federal courts jurisdiction over major crimes committed on tribal lands,[1] but for present purposes,

[1] Crow Dog went on to live out the remainder of his days as a traditional leader among the Brule Sioux. The Court decision bearing his name was ultimately rendered obsolete as a result of

Crow Dog's case is the perfect illustration of the primary points that I hope to leave with you today.

What I really love about this story is that it highlights the central tensions that are at work throughout all of federal sentencing and, as I have said, in my view all of these tensions ultimately relate to the issues of fairness and control. So, for example, the Crow Dog tale raises the obvious question: which of the two penalties was the "fair"—and by that I mean "the just"—sentence for Crow Dog's crime? On the one hand, Crow Dog paid a significant fine, the victim's family received compensation, and the tribe continued to have the services of a valued member of the community when one had already been taken from it—what more could hanging Crow Dog have accomplished? On the other hand, Crow Dog had done the unspeakable—he had actually *killed* the leader of the tribe—didn't he deserve to be hung or otherwise punished severely and, if not, how could the tribe prevent this sort of thing from happening again? One could certainly say that *both* of the penalties were rooted in legitimate fairness concerns.

Also important in the context of the Crow Dog example, is the question of *who*—that is, which entity—should make the penalty determination? As you heard in the story, a respected panel of Crow Dog's peers, the elders of his community, had examined local values and customs and had come to what they believed to be a fair result.

Congress's enactment of the Major Crimes Act in 1885, which imposed federal criminal law on all those who violated the laws of the U.S.

Thereafter, the United States government looked at the same set of facts and applied its own criminal justice considerations, which went beyond Crow Dog's particular circumstances and the needs of the Brule Sioux, and took into account what was considered necessary and appropriate punishment in the context of the broader federal criminal justice system. This raises the question: if fairness is our goal, should criminal sentencing be done on a local, individualized case-by-case basis OR more systematically, through the application of a centralized process that advances broader conceptions of justice?

These are really tough questions for which there are no clear answers. But as we fast forward to the modern era and I talk for a bit about how the federal sentencing system has developed over the past half century, I hope you will see that federal sentencing policy has been driven largely by these two quests: to achieve fair sentencing outcomes and to be the institution that has the power to decide what fairness in sentencing really is.

II. What Is Fairness In Sentencing?

A. Unfettered Discretion (The Pre-Guidelines Era)

Let me begin at the beginning—which, for our purposes, is the 1970s—a decade in which the crime rate was extremely high nationally, and, at sentencing, federal judges had nearly unfettered discretion to impose any sentence within the broad range of punishment that the Federal Criminal Code prescribed. Those of you who have studied criminal law know that, in the federal system, the typical criminal

statute says something to the effect of 'whoever engages in the specified conduct'—for example, whoever steals money from a federally insured bank by force, violence, or intimidation—'shall be imprisoned for not more than [x],' a specified term of years—for bank robbery, that statutory maximum term is 20 years. This means that, under the statutes, a federal judge traditionally had an enormous amount of discretion to select a sentence from between zero and twenty years, and it's not surprising that, under these circumstances, defendants who were convicted of the same bank robbery crime, and had engaged in substantially the same conduct—but who were sentenced by different judges—could end up with dramatically different sentences.

In 1972, for example, a standard robbery offender in what was then the N.D.N.Y. received an average sentence of 39 months of imprisonment, while the average sentence for similar robbery offenders in the nearby E.D.N.Y. was 130 months in prison. And this kind of extreme difference was not limited to robbery: for example, forgery and counterfeiting violators received an average of 12 months of imprisonment in the N.D.N.Y., 49 months in the E.D.N.Y., and 77 months in the W.D. of Virginia.

In light of such glaring disparities, it's no wonder that ardent critiques of our sentencing system emerged. An influential report published in 1977 referred to federal sentencing as a "national scandal," and described it as a "non-system" in which individual judges "formulate and apply their own personal theories of punishment." That, by the way, was the cause of the sentencing disparities—not inept or

corrupt judges, but different, sincerely-held beliefs about the purposes of punishment and how those purposes should be manifest in the context of individual cases. Those of you who have taken criminal law know that philosophers throughout history have had different views about the purposes of punishment, and in fact, where each one of us stands on the fairness question depends, in large part, on the camp in which we sit!

The retributivists—including Hammarabi, Kant, and Henry Wadsworth Longfellow—argue that punishment is justified simply and solely because the offender has done something wrong. This retrospective view posits that morality demands punishment of the guilty, and that it would in fact be disrespectful of men as responsible moral agents not to punish them in proportion to their wrongdoing. As Longfellow put it,

> "Every guilty deed / Holds in itself the seed / Of retribution and of underlying pain" . . .

The utilitarians—like Plato, Bentham, and Hobbes—had a totally different perspective regarding the purpose of punishment. Utilitarians believe that punishment is justified only if it will promote good and/or prevent evil in the future. In this forward-looking perspective, one considers only what punishment will accomplish, and it is immoral to punish someone if doing so does not achieve a greater good. Plato said it this way, in defense of deterrence as the purpose of punishment:

> "Not that he is punished because he did wrong, for that which is done can never be undone, but

> in order that in future times, he, and those who see him corrected, may utterly hate injustice . . . [and] abate much of their evil-doing."

And there are other philosophies as well, including those that view punishment as a means of repairing the harm to the victim and the community, in which sanctions are designed to provide compensation and to restore harmony.

Now, it is not difficult to see how applying these very different punishment philosophies to the same set of facts could lead to dramatically different sentencing results. That happened in Crow Dog's case, didn't it? If you believe, as the Sioux elders did, that the purpose of punishment is reconciliation and restoration, then a heavy fine to compensate the victims is a rational sentencing result. But if retribution (something like Hammarabi's "an eye for an eye") is your guiding punishment principle, then nothing short of execution would do.

With respect to the huge sentencing disparities that were being observed in the 1970s and were driven by different philosophies of punishment, many people on both sides of the political aisle were troubled. One of the most vocal critics was a federal judge on the S.D.N.Y.—Judge Marvin Frankel—who did a series of lectures in the early 1970s and published a book entitled: **CRIMINAL SENTENCES: LAW WITHOUT ORDER**. Judge Frankel argued that the traditional federal sentencing structure—in which a single judge had "almost wholly unchecked and sweeping powers" to impose any sentence he wished—was "terrifying and intolerable for a society that professes devotion to

the rule of law" because it essentially elevated judges to the role of kings and thus is fundamentally inconsistent with the basic tenant that we are "a government of laws and not men." Conservative judges and commentators, such as Chief Justice Warren Burger echoed this sentiment, but the criticisms did not only come from those who disliked the fact that unelected, unaccountable judges had such power—progressive Senator Edward Kennedy voiced similar concerns during this same timeframe. In fact, Kennedy went *even further*, arguing that "the absence of principled sentencing policy" actually *caused* crime! This was because, in Kennedy's view, deterrence requires certainty and unfettered sentencing discretion turns the criminal justice system into "*a game of chance* in which the potential offender may 'play the odds' and gamble on receiving a lengthy term of imprisonment or . . . no jail sentence at all," depending on the judge.

B. Enter: Regulation (The Sentencing Guidelines)

By the end of the 1970s, there was so much concern about the state of federal sentencing that Senator Kennedy worked closely with conservative senators Strom Thurmond and Orin Hatch to develop an entirely new federal sentencing system, the cornerstone of which was the perceived need for regulation of sentencing discretion. The Sentencing Reform Act was enacted in 1984, and it not only created the bipartisan Sentencing Commission, it also specifically required the Commission to develop sentencing guidelines that balanced two (sometimes competing) fairness principles: uniformity and proportionality. "Okay, so, what does *that* mean?" you ask.

Well, given what I have already said about disparity, it should not come as a surprise that supporters of sentencing regulation viewed uniformity of sentencing outcomes as a *fairness* principle. Imagine two bank robbers: if they each go into their respective banks with a gun and come out with $5,000 in cash, and they are both prosecuted in federal court, should one to get 6 months in jail and the other 15 years just because of the judge they happened to be assigned to? There is no question that this type of disparity was a concern that the guidelines were supposed to address.

But Congress also understood that the sentencing exercise cannot be solely about achieving uniform results across the board, because no two crimes are truly created equal, and it is not fair to ignore salient differences regarding the offense or the offenders! So, if one of those bank robbers pistol-whipped the teller causing serious injury and held her hostage, while the other never showed the gun at all, are those two bank robbery crimes actually equivalent in terms of culpability, and should we have a system that assigns the same punishment simply both was charged as bank robberies? At least in theory, then, the mandatory guidelines system was supposed to advance both fairness concerns—it would regulate sentencing discretion (promoting uniformity) while also ensuring that truly different crimes were treated differently.

Now, I don't have the time here today to explain in detail how the guidelines were structured to promote this goal, and there is considerable ongoing debate about whether the guidelines have, in fact, achieved their intended purpose. The take away, I guess, is that there

is more than one way to perceive of fairness in sentencing, and when Congress opted for regulation, it attempted to craft a system that would generate fair sentencing outcomes. I hope you *also* see that, with the enactment of the Sentencing Reform Act and the advent of the federal sentencing guidelines scheme, sentencing determinations were no longer being made solely by judges in the exercise of their own discretion, and the issue of control—that second factor I originally said lies at the heart of everything—looms large. Put another way, if the judge is no longer the "king" of sentencing outcomes, then who is???

III. Who Decides?

A. The Sentencing Discretion Model

Turning briefly to this second point, I direct your attention to a model that Professor Kevin R. Reitz, who is currently at the University of Minnesota Law School developed and that explains more clearly than I ever could the interaction between the many different discretionary decision makers at work in modern sentencing systems.

Figure 1 on Side A of your handout, shows all of the various participants in the criminal justice system who potentially influence sentencing outcomes, and what you should notice is that they operate on two different levels: the systemic level and the case-specific level. The systemic level actors don't involve themselves with sentencing particular cases; they make rules that apply to the downstream case-specific actors and that constrain how those actors exercise their sentencing discretion. On the case-specific level, the diagram reads

from left to right in succession, with each participant making sentencing-related discretionary judgment calls that constrain subsequent participants and ultimately impact the final sentence an offender receives. So, for example, the prosecutor (who fits into the "parties" bubble) decides what crime to charge in the indictment, and the probation officer investigates that crime to determine the facts that relate to its commission. The trial court then looks at both the applicable law with respect to the crime of conviction and the facts as determined by the probation officer and presented by the parties, and imposes a sentence that appellate courts review and corrections officers implement. And in jurisdictions that have parole, the parole board ultimately determines how much time a defendant spends in jail.

If you flip over to Side B, you can see that sentencing systems can actually be structured in different ways, depending upon which parties have sentencing discretion and how much influence those parties have over sentencing outcomes. So, as figure 2 shows, if the sentencing system is one in which the legislature enacts a criminal statute that requires the judge to impose a particular sentence for anyone convicted of the particular crime (say, 10 years for bank robbery), there are only two relevant decision makers: the legislature, which establishes the mandatory penalty, and the parties, who determine (through charge and fact bargaining) whether the crime will be charged or has been committed in any given case such that mandatory penalty is going to be imposed. None of the other parties have anything more than ministerial roles as far as influence over sentencing outcomes.

Figure 3 shows a system in which the legislature has opted to take a back seat to the case-specific participants—by adopting only statutory maximum sentences for broadly-defined crimes. There is no commission to guide or cabin judicial discretion, and thus, the case-specific actors exercise the most discretion over sentencing outcomes, and especially the trial court and the parole board because, in this scheme, the judge sentences offenders to a range of imprisonment (say, 5 to 15 years) based on whatever factors the judge determines are relevant, and the parole board repeatedly revisits the sentence after the minimum period to determine whether the offender should be released.

B. The Federal Sentencing Guidelines System & The Epic Struggle For Control Over Sentencing Outcomes

Figure 4 is the diagram that depicts the federal sentencing system in the mid-1980s, when the mandatory federal sentencing guidelines were first adopted. The systemic-level actors—Congress and the Commission—suddenly had enormous power to dictate sentencing outcomes by determining the factors that every federal judge had to consider and apply when sentencing offenders, and how much weight was to be given to each one. Because judges were required by law to impose a sentence within the guideline range except in extraordinary circumstances, the power to influence sentencing—what Reitz calls "sentencing discretion"—was essentially shifted from the district court judge to the Sentencing Commission and, to some extent, to prosecutors, who decided what to charge and what to bargain away, and thus what guideline factors apply in any given case.

With this kind of a shift in power, you can imagine that many federal judges were not at all happy with the mandatory guidelines system, which effectively constrained their ability to select and impose fair sentences based on the facts as they saw them. Perhaps even more important, if you were to take my sentencing course, you would learn that each of the significant developments in federal sentencing law and policy that have occurred since the guidelines were instituted can be characterized as bouts in an ongoing and epic struggle between the systemic and the case-specific actors for control over sentencing outcomes!

The guidelines themselves were Round 1, and as we see from Figure 4, the systemic level actors gained a significant amount of power—*they* were the deciders when it came to the values that were to be promoted at sentencing, not individual judges—and their interest in uniformity was the prevailing fairness principle. The Supreme Court struck back in the early aughts, in case called *Koon v. United States*, in which the Court permitted judges to take into account the individual circumstances of an offender and to depart from the mandatory guidelines more freely than Congress had apparently intended, thereby shifting some of the sentencing power away from the Commission and back to the judges. Congress responded with the Protect Act in 2003—which was a statute that, among other things, nearly eliminated departures; required the Justice Department to keep track of the cases in which judges did not follow the guidelines and report them to Congress; and started a practice whereby Congress now specifically

directs the Commission to increase guideline penalties to a particular level with respect to certain crimes.

In short, this back-and-forth between the systemic level participants and the case-specific level participants resulted in seismic shifts in the locus of control over federal sentencing outcomes in a relatively short period of time, but none more dramatic than what happened in 2005, with the Supreme Court case of *United States v. Booker*. In a nutshell, a 5-member majority decided that the federal sentencing guidelines system was an unconstitutional violation of the 6th Amendment right to trial by jury based on a legal principle that the Court first fully articulated five years earlier, in *Apprendi v. New Jersey* (a case that, interestingly enough, was decided the year I clerked for Justice Breyer). But rather than striking down the entire sentencing system, in *Booker*, a different set of 5 Justices (known as the "remedial" majority) decided to fix the constitutional problem, by striking the provision of the Sentencing Reform Act that had made the guidelines mandatory and requiring sentencing judges merely to consult the guidelines as the starting point for sentencing determinations made pursuant to general principles Congress had laid out in the Sentencing Reform Act that are codified at 18 U.S.C. § 3553(a). By rendering the guideline system voluntary, the Supreme Court had, in effect, wrestled control over sentencing determinations away from the system-level participants and put it back into the hands of individual judges, who now not only decide what sentence to impose in the vast majority of

cases but also determine how much weight, if any, to give to the sentencing guidelines manual.

IV. Conclusion

Needless to say, we are in interesting times. Some federal judges still adhere closely to the voluntary guidelines manual, and rarely impose a sentence outside the guideline range. Others calculate the guidelines as required, but treat them as a jumping off point rather than a landing pad, and thus rarely impose a sentence that is within the guideline range. And as the rate of within-guideline range sentences slowly but steadily decreases, many worry that our system could be returning to the pre-guideline era, which might ultimately trigger a response from Congress (another seismic shift, if you will) because, as Justice Breyer said in *Booker*, "the ball is now in Congress's court" to decide what the future of federal sentencing will be.

In the meantime, I, like many other federal judges, carry on, doing the best I can to promote fairness in sentencing by taking into account the guideline calculation and also all of the evidence and arguments that are presented to me in each case for assessment under § 3553(a). As any judge will tell you, sentencing people is really difficult—and I think that is made primarily so because sentencing itself is a multi-faceted, value-laden endeavor that is part of a bigger scheme but in any given case has an acute impact on the lives of specific individuals. Judges meet those individuals face-to-face, and we bear the heavy burden of not only executing our own moral judgment about the gravity of the offense in light of the characteristics of the offender but also

conveying society's opprobrium for that offender's violation of the law. All things considered, then, is it any wonder that no one can say with certainty what a "fair" sentencing outcome really is?

For what it's worth, it seems to me that the best we can do is focus on the sentencing *process*, and that fairness in federal sentencing requires *both* the flexibility to take into account the variety of individual characteristics that legitimately relate to culpability *and* the sense of community and common purpose that sees achieving rough uniformity as essential to fundamental fairness. And whether regulation from the top down, some other unifying structure, or every sentencer to himself best promotes the ends justice is an ongoing discussion that I hope YOU will now join as we move into the future.

THANK YOU!!!

Side A

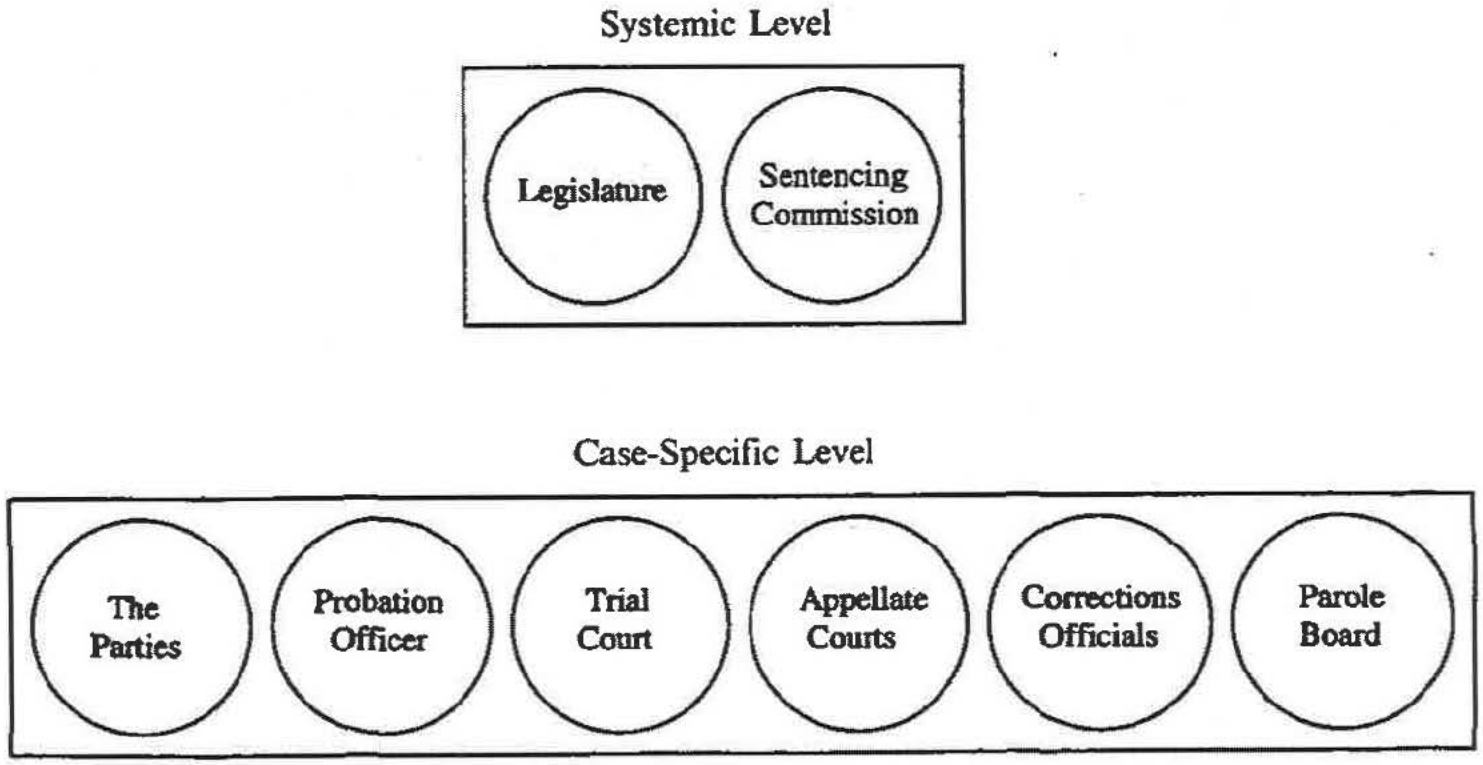


Figure 1. A Discretion Diagram for Sentencing Systems

~~~ Adapted from Kevin R. Reitz, "Modeling Discretion in American Sentencing Systems," 20 *Law & Pol'y* 389 (1998) ~~~
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Side B

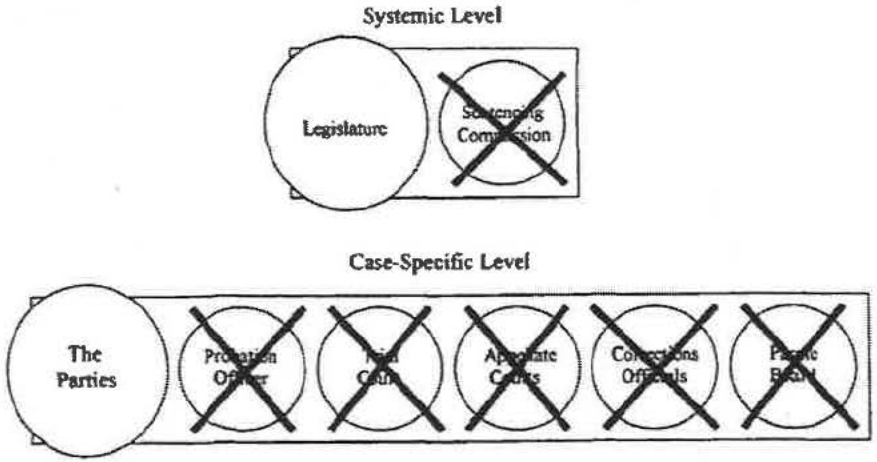


Figure 2. A Discretion Diagram of Mandatory Sentencing

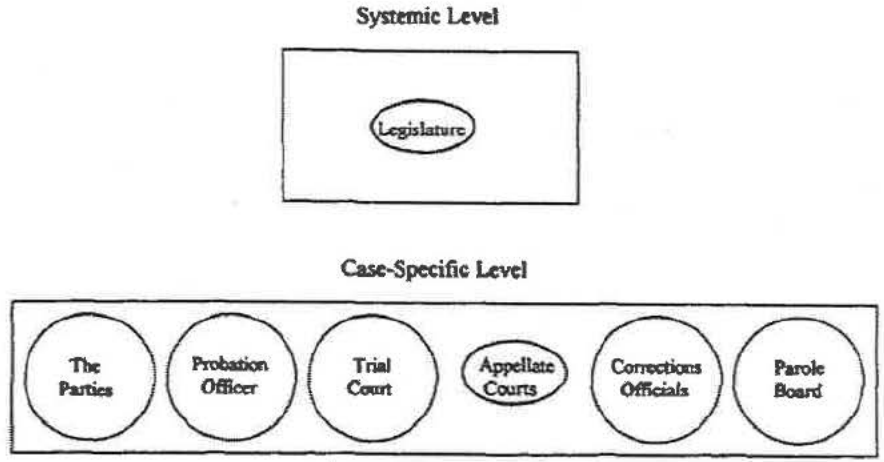


Figure 3. A Discretion Diagram of Indeterminate Sentencing

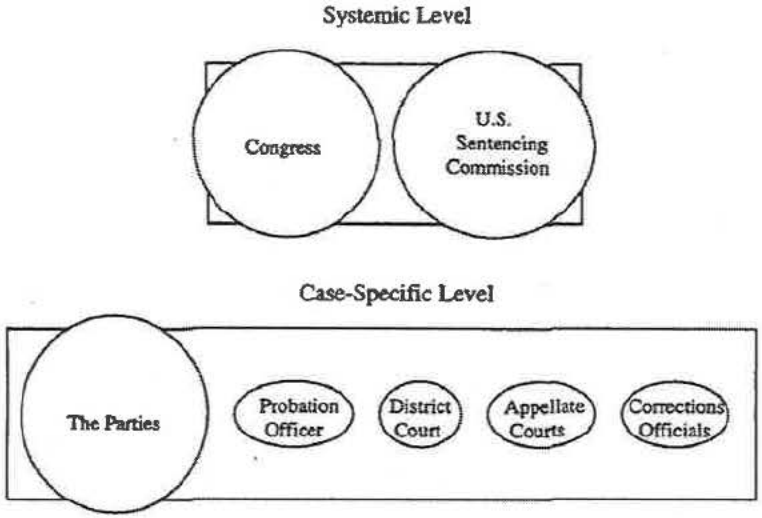


Figure 4. A Discretion Diagram of the Federal System

Mark Wojcik Bestowed the 2015 AALS Section Award, continued

Mark is the founder of the Global Legal Skills Conference, an international event that has attracted hundreds of presenters and participants and which will meet for its tenth year in Chicago in May 2015. Through his work, Mark has raised awareness throughout the global legal community of the importance and the value of what we do as legal writing professors who teach in U.S. law schools. By so doing, he has helped to break down stereotypes about legal writing professors and our role within legal academia.

Mark has published extensively in our field. He authored the first US coursebook on Legal English. He is the author of a state-specific research guide, *Illinois Legal Research*. He authored a research guide for Legal Writing professors that is distributed annually at the LWI One Day Workshops. He is a contributing author to the *ABA Sourcebook on Legal Writing Programs*, focusing on "Law Students Who Speak English as a Second Language." Mark is also the co-editor of the Legal Writing Prof Blog. This blog was named to the ABA Journal Blawg Hall of Fame and named as the "Reader Favorite" in the Legal Research and Writing category.

Mark has served actively and with distinction in a leadership position in virtually every legal writing organization, including three separate, four-year terms on the Legal Writing Institute Board. He is also a Board Member and Treasurer of Scribes, the American Society of Legal Writers. In the Association of American Law Schools he has chaired the Section on Legal Writing, Reasoning, and Research, the Section on International Law, the Section on International Exchange, the Section on North American Cooperation, the Section on Graduate Programs for Non-U.S. Lawyers, and the Section on Sexual Orientation and Gender Identity Issues.

Mark has been a strong advocate of diversity within the Legal Writing community. He was an early promoter of "Pink Ink," the LGBT caucus of the Legal Writing Institute, and has repeatedly helped others to view attention to diversity as a legal skill and an effective teaching tool. Mark also acts as an advocate through his participation in many local, state, national, and international organizations. He has twice been elected to the Board of Governors of the Illinois State Bar Association and served on the Board of Managers of the Chicago Bar Association.

Simply put, Mark is always there to lend a hand to his colleagues, and to both cheerlead and educate about our profession. He is an innovator, a mentor, and a leader in the Legal Writing field.

In his remarks accepting the award, Mark thanked the previous winners of the award who inspired him to become active in the field of legal writing, reasoning, and research.



Dean Corkery proudly displaying Mark's award.

"Simply put, Mark is always there to lend a hand to his colleagues…"

LRWW-Sponsored Presentations at AALS

[Editor's Note: The LWRR Section sponsored two programs at the AALS Annual Meeting in January. The presenters have summarized their talks in the following two articles.]

Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty

Professors Kristen Tiscione, Lisa McElroy and Amy Vorenberg organized a panel presentation entitled, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty,* that confronted the unequal status often faced by LRW professors. Other panelists included The Honorable Ketanji Jackson, of the United States District Court for the District of

Podia & Pens, Continued



Kristen Tiscione
Professor of Legal Research and Writing, Georgetown Law



Lisa McElroy
Associate Professor of Law, Drexel



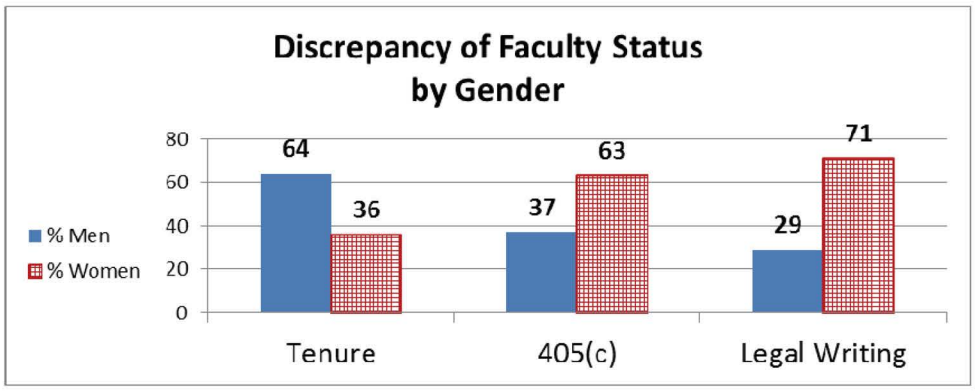
Amy Vorenberg
Professor of Law
Director of JD Legal Writing, UNH

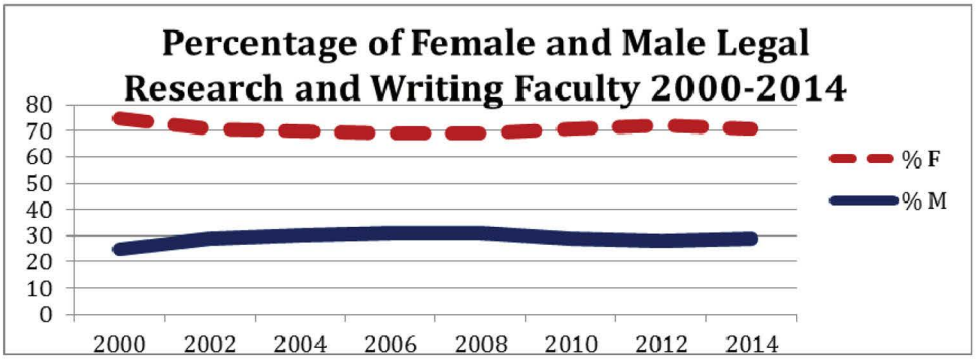
Columbia; Professor Lyrissa Lidsky, Stephen C. O'Connell Professor and Associate Dean for International Programs, University of Florida College of Law; and Professor Orin Kerr, Fred C. Stevenson Research Professor of Law, George Washington University Law School. To stimulate a robust discussion on the topic, panelists were selected to provide a cross-section of perspectives –the federal bench, tenured faculty, contract faculty and hybrid (405c) status.

Panelists discussed whether the status of LRW faculty makes a difference to students, whether separate tracks and lower status for legal research and writing faculty make sense given the current demand for legal educators to better train students for practice, what obstacles exist for changing the system, and what solutions could be offered.

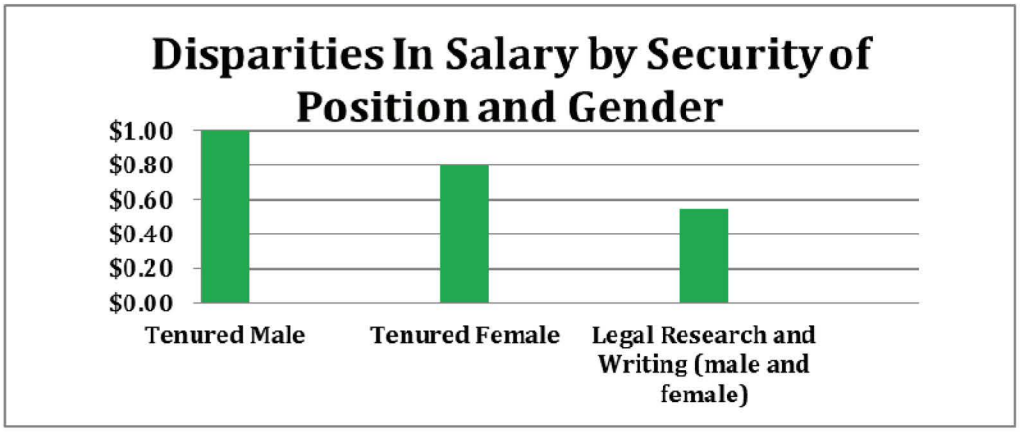
There was little disagreement that LRW status matters to students. Secure status leads to stable programs with invested faculty. Panelists agreed that, given the need for better skills training, the two-track system likely does not make sense anymore but acknowledged that addressing the obstacles is challenging. Obstacles identified included economic constraints due to lower class sizes, ingrained gender bias, and simple institutional inertia. Ideas for solutions centered on recognizing that LRW faculty typically have the same credentials as doctrinal faculty and therefore there is no real basis for the unequal status and salary. Scholarship expectations should also be similar, panelists argued, but the type of scholarship required should be flexible and more encompassing of topics outside the theoretical topics typically embraced by the legal academy.

Panelists discussed how the two-track system results in significant gender and pay disparities. Kristen Tiscione had prepared a series of charts to demonstrate this inequality.





Podia & Pens, Continued



These disparities represent a major problem that law schools must address. In addition, panelists noted that current economic pressures to attract law students prompt law schools to market their "practice ready" programs. Legal research and writing, as well as other skills programs, are typically featured in these marketing materials and on websites. However, even as they are prominently represented in marketing efforts, LRW faculty continue to be underrepresented as full faculty members and suffer as a result, in terms of job status and salary.



Amy Vorenberg moderated Podia & Pens at the AALS Conference in January 2015

Panelists discussed the ABA's current Rule 405, which essentially codifies the disparate treatment. The ABA accreditation rules permit law schools to maintain the unequal status quo. While legal research and writing is one of only two specific courses required for ABA accreditation, and law schools must also provide "at least one additional writing experience after the first year," the rules regarding faculty provide no incentive for law schools to provide better security of position for faculty teaching those courses. This is largely a function of ABA Standard 405 that directs law schools to establish a faculty policy "with respect to academic freedom and tenure," but exempts LRW faculty. LRW faculty are covered under a different rule, 405(d), which states that law schools need only provide "such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified . . . and (2) safeguard academic freedom."

In conjunction with this panel, the authors and Professor McElroy were invited to and did make a statement at the Crosscutting Program at the same annual meeting, entitled *The More Things Change...: Exploring Solutions to Persisting Discrimination in Legal Academia*. This program along with the panel formed the basis of an article by Tiscione and Vorenberg for a forthcoming symposium issue of the Columbia Journal of Gender and Law.



Pens & Podia Panel: (*l to r*) The Honorable Ketanji Brown Jackson, Kristen Tiscione, Orin Kerr, Lyrissa Lidsky, Lisa McElroy, Amy Vorenberg & Jennifer Romig

NATURALIZATION CEREMONY SCRIPT

Good morning! I am Ketanji Brown Jackson, United States District Court Judge for the District of Columbia and I welcome you to this naturalization ceremony. It is an honor and a privilege for me to be able to preside over this happy ceremony today during which I will administer to you the oath of allegiance and admit you as citizens of the United States. This is a memorable day and a true milestone in all of your lives and I am very grateful to be a part of it!

The Court would like to begin by recognizing Ms. Sybil A. Strimbu, who will speak to you as a representative of the District of Columbia Daughters of the American Revolution and as Chairperson of the DAR's Americanism Committee.

* * *

Thank you Ms. Strimbu, and thank you to the DAR for sending such an able representative.

Mr. Davis, are we ready for the roll call and motion for admission? When you are ready, you may introduce those ladies and gentlemen who seek to become new citizens.

SPEAKER INTRODUCTION

We are honored to have with us today, as our featured speaker, Ms. Jeannie S. Rhee, who is a partner at the law firm of Wilmer Hale. Ms. Rhee received her undergraduate and law degrees from the Yale University. Ms. Rhee has a long career in public service, including serving as a legislative fellow in the office of then Senate Majority Leader Tom Daschle and as a law clerk to two judges in this very courthouse – first to Judge Stanley Sporkin on the District Court and then to Judge Judith Rogers on the Court of Appeals. She also worked as an Assistant US Attorney in the US Attorney's Office for the District of Columbia, and later as a Deputy Assistant Attorney General in the Office of Legal Counsel for the US Department of Justice.

Thank you for being here, Ms. Rhee. The Court now recognizes you, and we look forward to your remarks.

KBJ REMARKS ON NATURALIZATION

Thank you, Ms. Rhee for being here today and for giving all of us, American Citizens, those thoughts and insights.

[I also want to take a moment to extend a special welcome to Ms. Rhee's mother, _____, who emigrated to the United States from ____ and became a naturalized citizen of the United States in the _____'s].

Now it is my turn to congratulate you on this great accomplishment and to emphasize how happy I am to be here this morning! Most of what I do in court involves dealing with unhappy people in conflict, so this is really a great opportunity for me to look out and see so many smiling faces for a change!

At this point in the naturalization ceremony, the judge ordinarily gives additional remarks about the meaning and privilege of citizenship. I will do that in a moment, but first I thought that I would try something a bit different by showing you a video that is designed to capture the *feeling* of becoming a new citizen of the United States. This video features people who, just like all of you, have taken the oath and have been admitted as citizens of the United States. There is no speaking in the clip, but if you look carefully you will see quotations from many of these people and, of course, the looks on their faces speak volumes about the experience of raising one's hand and pledging allegiance to the United States for the first time.

I really love this video – and they say that a picture is worth a thousand words – so I will be quiet, and ask you to watch this.

********VIDEO (CLIP #1) *********

Thank you. As you saw, the various statements from people who have become naturalized citizens say much more than I ever could about what it means to them

to become an American. Each of you has your own story about the experience, and I suspect that the fact that you took your oath of office in a federal court in our nation's capital makes it even more special. Washington D.C. is the seat of our federal government, but the true power and greatness of America is in its citizens, wherever they are all over this great nation. As President Harry Truman once said,

> "We Americans are a diverse people. Part of our respect for the dignity of the human being is the respect for his or her fight to be different. That means different in background, different in beliefs, different in customs, different in name, and different in religion. *That* is true Americanism; that is true democracy. It is the source of our strength. It is the basis of our faith in the future. And it is our hope of the world."

Those words by our former president, which were spoken in 1948, are still every bit as true today. America benefits from your citizenship, and because of each of you (and those who have come before you, and those who will come after), American will be a stronger and better place.

From my vantage point up here on the bench, I can see how happy you all are to have taken the oath and I know that each of you will treasure the freedom, rights, and privileges of United States citizenship. Please know that you must also take care to *exercise* those rights as a matter of civic responsibility. As American citizens, you now can, and should, vote; serve as jurors; inform yourselves about civic matters; participate in local and national affairs; petition the government on issues of concern; volunteer to help others; and become full members of your community. Only by engaging fully with other Americans in this great exercise that we call democracy will you truly be able to take full advantage of your new citizenship. And, as President Truman suggested, it is only because the diverse citizens of the United States come together as one nation—to believe in the rule of

law and to work for the common good—that the United States of America is, and continues to be, the greatest nation in the world.

Again, let me say congratulations on your entry into the privilege of United States citizenship. I invite you all, my fellow countrymen, to attend a reception across the hall that is sponsored by the Hispanic Bar Association. Unfortunately, I will not be able to join you because I must put on my other hat—that of a member of the United States Sentencing Commission— and return to a meeting that I had left so that I could be a part of this ceremony today.

It is now my honor to administer the oath to all of you who have come here from all over the world to pledge allegiance to the United States.

RAISE YOUR RIGHT HAND AND REPEAT AFTER ME

I hereby declare, on oath

That I absolutely and entirely

Renounce and abjure

All allegiance and fidelity

To any foreign prince, potentate, state or sovereignty

Of whom or which

I have heretofore been

A subject or citizen

That I will support and defend the Constitution and the laws

Of the United States of America

Against all enemies, foreign and domestic

That I will bear true faith and allegiance to the same

That I will bear arms on behalf of the United States

When required by the law

That I will perform noncombatant service in the Armed Forces of the United States

When required by the law

That I will perform work of national importance under civilian direction

When required by the law

And that I take this obligation freely

Without any mental reservation

Or purpose of evasion.

So help me God.

We will now say the Pledge of Allegiance together.

Attorney Admission

December 1, 2014 at 9:30 AM

Good morning to all and welcome. My name is Ketanji Brown Jackson, and I am a District Judge on the United Stated District Court for the District of Columbia.

Before we have the roll call and motion for admission, I would like to introduce you to one of our guest speakers, Mr. Jonathan H. Lasken, who is a Board Member of the D.C. Chapter of the Federal Bar Association and is here to speak on behalf of that organization.

* * *

Thank you very much, Mr. Laskin. We appreciate your being here.

Ms. Horn—are we ready for roll call and the oath of admission?

Remarks for the PBS Portrait Unveiling
Moakley Courthouse, Boston, MA
June 6, 2014

Thank you—I am truly delighted to have this opportunity to provide a few remarks at this special ceremony. As many of you know, I clerked for Chief Judge Saris in 1996, just a few years after she started on the District Court, and I have incredibly fond memories of my time working for her, so much so that I jumped at the opportunity to be here today to express my appreciation and affection. I am occasionally asked to speak at various events, which is always an honor, but this type event is especially thrilling to me because, in addition to the wonderful speeches about a person whom we all admire, it is accompanied by <drumroll please> a "Big Reveal". Now, we have all been to plenty of other kinds of ceremonies, and they tend to follow a predictable pattern; there are relatively few surprises. But at a *portrait* ceremony, for me at least, there is *palpable* suspense—no matter what people say at the podium, the truly interesting thing that often has me on the edge of my seat is getting to see *how* the honored individual has been depicted!

It really is *very* dramatic! And for those of us who know Chief Judge Saris well, today's Big Reveal is especially intriguing because, when you stop to consider all of the incredible things she has done thus far in her career and in life, one can't help but wonder: what poor artist had the nearly impossible task of capturing the essence of an individual who has given so much of herself in so many different roles as Patti Saris?!

Now, I am sure that the chosen artist is an excellent one, and I have no doubt that the picture will be accurate and endearing in every respect. But Patti-worshippers like myself will agree that *this* portrait assignment, in particular, was not an easy one! Honestly, when you think about it, this picture could have gone in any direction—and I must say, that is not always the case. There are certain judges who you know without question will be depicted riding on a horse, with a gavel in one hand and a volume of Wright & Miller in the other. Indeed, there are quite a few jurists who seem to have only a few dimensions, so when their portraits are revealed, one expects to see a formal, straight-laced depiction of their judicial character, with hands folded and gaze fixed far off in the distance—presumably at the Constitution.

But Chief Judge Saris? Patti Saris can be the master of 'judicial demeanor,' on the one hand, and on the other, she has that brassy, hands-flailing, back-slapping 'eat-eat bubbula' *'Ack!*, can you believe what that guy just said out there in court!' type of down-to-earthness in her personality as well, and everything in between. So, when I thought about what *I* expected to see in Judge Saris's portrait today, I literally drew a blank—no one image came to mind because there are, in fact, *scores* of different ways she could be depicted. She could be the Chief; the Chair; a mother; a mentor; a friend; a colleague; a confidante—just to name a few. Over the years, Patti Saris has managed somehow to take on all of these responsibilities and more—and to do it all so effortlessly—that I cannot even imagine how difficult it must have been to get her to sit for a portrait, much less capture her on paper!

Like so many of you, I have watched with awe and admiration as Chief Judge Saris goes about her many different types of business, and quite frankly, ever since I first worked with Patti Saris in 1996, all I have ever wanted to do professionally is to emulate her astonishing ability to do so many significant things at once and to do it all so well and with such grace. I remember when I first started practicing in a law firm after finishing my clerkships and I was pregnant with my first child. My husband was a surgical resident at the time and we had very little free time as it was, so I really couldn't imagine what adding a baby was going to do to our family dynamic. I was, in fact, terrified at the prospect of becoming a mom and of having to juggle work and family, and I remember very distinctly how much of a beacon of hope Chief Judge Saris was for me in that moment. Here was a woman who had not only reached the stratosphere professionally but had done so while also managing a household and raising four children. She had seemingly done the impossible—and was *still* unfailingly positive and optimistic about her work and her family and her life—and seeing that experience gave me hope that, when the baby came, perhaps I could manage too.

I also deeply admired Chief Judge Saris's passion for public service and I have sought to model myself after that aspect of her career as well. I have been so fortunate to have had Patti Saris as a mentor ever since my clerkship, and with her help and encouragement, I have literally followed in her footsteps. When I called her to say that I was interested, first, in a presidential appointment as a full-time member of

the United States Sentencing Commission, and later, in a presidential appointment as a U.S. District Court Judge, she didn't laugh at me—at least not that I heard!—and, indeed, she could not have been more supportive, taking time out of her busy schedule to strategize with me and offering to help in any way she could.

And even now, as we work together on the Sentencing Commission, I continue to enjoy her support and I also have the pleasure of being able to witness her strong leadership skills, her commitment to the institution and its goals, and her interest in bringing people together. I am the lucky recipient of a front-row seat from which to observe and admire the skillful manner in which Chief Judge Saris has taken the helm of that agency and steered it through rocky terrain. I also know the personal sacrifices that she has made in her role as Chair — traveling around the country to different cities almost every week as the primary ambassador of Sentencing Guidelines—and I am amazed that she has been able to be such a good shepherd of the Commission while at the same time remaining focused on her day job (as Chief Judge of this District Court) AND also being ever mindful of the particular progress and perils of various members of her family (yes, she talks about you all the time): the graduations, the business start-ups, the graduate schools, the trips, the surgeries, what is going on with Arthur, and this past year, The Wedding.

As I stated at the outset, I can personally attest to the fact that Patti Saris has an astonishing array of different responsibilities, and wears too many different hats to *count*, not to mention *paint*, so for me, today's

portrait unveiling is even more suspenseful than usual! I mean, is it really possible to create one portrait that somehow captures the many different aspects of Patti Saris? No disrespect intended, but is there really any artist anywhere who is talented enough to pull off all of her many facets in one picture?

And as I think about it, even if the perfect pose is identified, what about the face? Will it reflect her enduring energy and optimism—that sparkle in her eye when she thinks of a good idea or asks a litigant an insightful question punctuated with a pun? Can a portrait really capture that deep-in-thought look that Chief Judge Saris sometimes gets when she's listening intently to someone else, or the steely determination (some would call it grit) that she conveys when there is a tough call to be made and when it's up to her to make it? Is it even possible to depict her genuine humility and warm-hearted compassion on canvas, and if so, how so? To my mind, painting Judge Saris is kind of like being asked to copy the Mona Lisa: many have tried, but few can deliver because there is only one original.

I hope you all know—and especially the artist—that I don't mean to be irreverent, and that I too will be awed by the portrait that is presented here today because I am certain that what will be revealed will be worthy of the wonderful Judge and person I have come to know and love. You all here in Boston will have the great privilege of seeing Chief Judge Saris's beautiful portrait regularly and thinking of her. But I want you to know that when *I* think of Patti Saris depicted, I will always think of the simple drawing—the caricature—that my co-clerks

and I commissioned the your of our clerkship, a copy of which hangs in my chambers now and constantly reminds me of who she truly is: active, vibrant, brilliant; constantly in motion and in thought; surrounded by supporters (okay, groupies); giving fully of herself to others; and always ready to tackle the next big thing!

I am so happy to be here to share this celebratory moment with you, Chief Judge Saris. Thank you all for your attention, and this opportunity.

KBJ Remarks For Breyer Twentieth Reunion

Good evening – It is an honor and a pleasure to have been asked to add my voice to the chorus of well-wishers at this celebration of Justice Breyer's twentieth year as an Associate Justice of the Supreme Court. I clerked for him in O.T. '99, which was just five years into his tenure on the Court, and having spoken to more recent clerks, it appears that the current clerkship experience is in many ways the same but there are also aspects of that are actually quite different. What remains the same is the fact that, as many of you will recall, the Justice's brilliant mind is always processing arguments and that he ordinarily starts talking to you about them somewhere in the middle of his stream of consciousness on the issue, which, for me, meant a significant amount of head nodding, smiling, and furiously scribbling notes while he talked in the hopes that I would be able to go back at some point and catch up to understand fully what he was trying to convey. That experience, apparently, is a constant. What is different is that I am told that the Justice has recently given up riding his bicycle to work, which means that today's clerks don't have the added challenge of having to engage in the midstream argument analysis dialogue *while* the Justice is standing there in bicycle shorts!

Perhaps the biggest difference, though, is the fact that, when I clerked, we were not allowed to use the internet in the courthouse because of security concerns, so our chambers computers did not even connect to the outside world. I am pleased to learn that the Court has been modernized in this respect, and that the Justice actually has an email address! And I suppose that Toni even lets him use it, which I am sure Marsha would tell you probably would not have been the case when she was here.

In any event, in thinking back to my time as a clerk, I know that I was enthralled, and at times overwhelmed, by the work of the Court and by the

enormity of the decisions that the Justices were called upon to make here every day. During the Term that I was here, alone, the Justices decided a number of landmark legal issues, and like many of you, I worked hard to do the legal research, to write the draft opinion or memo, and to advise the Justice to the best of my ability as to what I thought the right answer was to whatever question was being posed. But it was certainly comforting to me to know that the buck stopped with *him*. That is, to the extent that I slept at all that year, I slept secure in the knowledge that—at the end of the day, right or wrong—thankfully, it was HIS opinion that was being drafted and presented, not mine.

Well, as a relatively new district court judge who has the privilege of issuing my own opinions, I now understand how difficult—and frankly, how stressful—it is to be the one who has to make the necessary judgment calls. To mix metaphors: "separating the balls from the strikes," as the Chief Justice would put, is really no picnic! The problems are often intractable; both parties are generally pretty good; although it's your instinct to want to please everybody, someone is inevitably going to be disappointed with you and your decision making; and the stakes are high in almost every case because what you decide has an enormous impact on the lives of real people. I've only been at this a short time and certainly what I do *pales* in comparison to what happens here at the Court, but I can already attest to the fact that the Justice's twenty years of being a "decider" at the Supreme Court level—and his fourteen years as a circuit judge before that—is an extraordinary personal feat and a tremendous accomplishment that speaks to his stamina as well as his character and judgment. I now understand why his mind is always processing arguments and how difficult it is to stop and rewind the thought process so that others can catch up to where you are. I also know the importance of finding good law clerks, and how proud you are when they go on to do bigger and better

things. As you all know, judges—and I'm sure Justices as well—find it crucial to have bright law clerks who can do the heavy lifting of legal research and writing in order to support the chambers' case load and get the hard work done. But from a judge's perspective let me also point out that there is a downside to having spectacular clerks: that is, there are at least some times when ignorance is bliss. I am thinking in particular of the times when, you, as a judge, spend hours thinking about a case and developing a nuanced viewpoint, and just when think you have finally worked through all of the angles and gotten it all pinned down, some genius law clerk who you fought for in the hiring process but now wish you hadn't pops up with an issue that no one briefed or argued and that causes your carefully crafted and intricately woven web of legal assumptions and conclusions to completely unravel! That is not a happy moment. And if it has ever happened to you, Justice, let me just say that, at least in some small degree, I feel your pain!

In any event, now, more than ever, I am in awe of what you have been able to accomplish in your time on the bench. I have the utmost appreciation for the hard work that you do, for the burdens that you bear, and for the frustrations that you have endured—with grace—all of these years. You have been a true role model for those of us who have followed you into the judiciary, and for all of us who have had the pleasure and the privilege of working for you as clerk. Thank you for doing this job, and thank you for showing us all how its done.



FEDERAL JUDICIAL CENTER

PHASE II ORIENTATION FOR NEWLY APPOINTED DISTRICT JUDGES

REMARKS FOR DINNER AT THE SUPREME COURT

February 26, 2014

Judge Ketanji Brown Jackson

REMARKS FOR THE PHASE TWO DINNER
AT THE SUPREME COURT

Thank you, Judge Fogel, and good evening to all of you. I am truly honored to represent this group of "baby" judges in saying "thank you" to Justice Scalia for that wonderful welcome; thank you to the Chief Justice and to Justices Scalia, Breyer, Sotomayor and Kagan for taking time out of your busy schedules to join us here tonight; and thank you to *all* of the Justices for their hospitality in hosting us here this evening.

I also represent this class of new judges in extending our collective gratitude to Judge Fogel and the FJC staff for skillfully guiding us through two phases of the new judge orientation program. The mentor judges too deserve our thanks—not only for taking time to teach us during these programs—but also for giving us your permission to contact you directly when issues arise: I don't know about the rest of you, but I have Judge Huvelle on my speed dial.

I would also like to take this opportunity extend a personal note of thanks to the FJC Orientation program staff for giving me an excuse to take the time to reflect on what it has been like to serve as a new district judge on the federal bench. And I must say, it has been quite an experience! Like many of you, I was warned from the outset that it would be a little like drinking from a fire hydrant in many ways, and not surprisingly, I have found that to be entirely true. It has been humbling, fascinating, overwhelming, and exhausting all rolled into one, and even though it has been less than a year since I took the bench, there are already so many stories that I could tell you about some of the things I've learned. But I only have a few minutes, and in the interest of time, I thought that I would organize a few of my reflections into something of an abbreviated "countdown" – David Letterman style.

So, here are the "**Top Five Things That I Wish I Had Known Before I Took The Bench (But Somehow Did Not)**":

5 – **No matter what happens, always act the part**! This I learned early on when, frankly, I was a bit unsure of exactly who people were addressing when they said "good afternoon, Judge" or "hello, Your Honor." I had to keep reminding myself that ***I*** was the judge they were talking to and stifle the impulse to look around and say—"who? ME?"—in response, which would not have been very judicial. And I've since learned that it is especially important to act the part when something unexpected happens in court—you know, when there is that particular, awkward moment where the parties are staring up at you, looking to you to guide them through uncharted territory. I now realize that, even if I don't have any idea what I'm doing, it's much better to lean in and take charge than to sit back, shrug, and say something like, "your guess is as good as mine!"

Number 4 – **Even though we are all part of one justice system, there is an amazing amount of diversity and depth on the federal bench**. Gatherings such as this one, make it abundantly clear that there are many significant and magnificent *differences* among us. We, in this group alone, come from 24 different districts and 13 circuits, representing at least 18 states and the District of Columbia, as well as one island country. As a group, we truly do reflect the diversity of the litigants who come before us. And our experiences as judges also vary widely: our different case loads, the different nature of the matters we consider in our various districts, how we manage our dockets, and of course, for the district judges, the various circuits we are in and therefore the different precedents and practices we follow. I have learned so much from hearing about the experiences of other new judges from around the country during Phase One and now Phase Two of the FJC Orientation program, and we should all value this

opportunity to connect with judges who may be unlike ourselves in many different ways.

Lesson #3 – **Although time waits for no man, the *parties* wait for you!** I learned this lesson the hard way, when I was assigned my first preliminary injunction in an enormous high-profile matter just a few months after I took the bench. Nobody told me that the parties could wait, and I immediately felt guilty that, due to the sheer complexity of the issues involved, I didn't have the answer when the PI hearing started. So, I sheepishly announced at the outset of the hearing that the parties would not be getting an oral ruling today, but I would issue an opinion within 14 days of the hearing. Well, after 14 days of all-nighters that involved takeout food, little sleep, and even fewer showers, I issued a 75-page opinion in the case, which, of course, was so convincing that the losing party immediately appealed. My more experienced colleagues found this hilarious, and said to me: "Don't ever publicly set a deadline for yourself! Always remember that YOU set the timeframe! YOU are the judge!" To which I responded, "who? ME?" because I had not yet mastered lesson # 5.

Number 2 – **Yes, Victoria, federal District Judges and Court of Appeals Judges *DO* get along!** One of the things that shocked me the most was that district judges can be personal friends with, and can relate well to, court of appeals judges in their circuit! Who knew? This was astonishing to me, because as some of you know I was an appellate lawyer in practice, whose sole objective was to scrutinize everything the district judges did and report back to the court of appeals. To my mind, how much greater would the divide be between district judges and circuit judges when I—who played for the court of appeals—switched jerseys and joined the district court team? I envisioned an iron curtain, armed encampments staked on inalienable principles of statutory interpretation! Granted, we were in the same

courthouse, but I was ready to hoist the barricades -- never the twain shall meet! Well, thankfully, that turned out not to be so. District judges and court of appeals judges eat together in the judges' dining room; we serve on court committees together; we mingle at holiday parties and retirement celebrations—and as far as the law goes, we sometimes disagree without being disagreeable. And it is one of the best parts of my job. So, to the circuit judges out there: promote world peace and take a district judge to lunch.

And, finally, the number one thing that I wish I had known before I took the bench but somehow didn't is that:

#1 – **Even though we are all incredibly busy trying to do justice, judges also need to take the time to enjoy the ride.** This one, I must admit, I am still working on. Perhaps it's the enormity of the task at hand, or the seriousness of the issues we face, or the significance of our decisions to the people whose cases we consider, but at this stage, for me at least, I think the job has been more *stressful* than I expected. But I am happy to report that I'm moving in the right direction. For the first six months, when people asked me "are you having *fun* yet?" I invariably paused and thought, "well, truth be told, I kind of feel like I'm in a long tunnel and can definitely see ahead to how it *could* be fun . . . *some*day . . . particularly when I stop feeling like a deer in the headlights whenever I encounter something new!" But I'd say that within the past two months or so, my answer to the "are you having fun yet" question has been, "yes! This is *great* job!" Because it is. I get to learn something new every day. I encounter fascinating legal issues; I have a decent amount of discretion; and I have extraordinary colleagues who offer me guidance and support and are willing to take my phone calls. Underneath it all, I really am enjoying myself and perhaps even more important, I am feeling so

grateful to have this position because, however difficult at times, it is a true honor and a privilege to have been entrusted with the responsibility to administer justice.

New Judges—I hope you too have seen the light at the end of the tunnel and that you're embracing it along with the duties of your oath and your office.

Experienced Judges and Justices—thank you again for taking us under your wing and leading us in the right direction at the outset. And if we soar in our new posts, please know that it is largely because you have inspired us by word and deed, to follow your example.

Thank you!

ABA Sixth Annual Fall Institute:
Update on Federal Sentencing Law & Policy Panel
November 1, 2013 at 11:00 AM

I. Introductory Comments

Thank you for having me back as a participant in this panel again this year; I always appreciate this opportunity to provide an update regarding the Sentencing Commission and its work.

This is an especially exciting time to be on the Commission, not only because of the renewed national and public focus on criminal justice issues and sentencing policy in particular, but also because we now have a full slate of Commissioners. For those of you who don't know, Congress confirmed three new Sentencing Commissioners over the summer: the Honorable William Pryor, a judge on the 11th Circuit, the Honorable Chuck Breyer of the U.S. District Court for the Northern District of California, and Professor Rachel Barkow, who teaches criminal justice administration at NYU Law School. For the first time in a long time, we now have seven voting members of the Commission and it is really wonderful to be part of an organization that is finally operating at full strength.

In terms of our work, let me just say for the benefit of those who aren't familiar with the agency that the Commission has many statutory responsibilities related to federal sentencing, including reviewing and updating the Sentencing Guidelines Manual, collecting and analyzing federal sentencing data, issuing reports, and advising

Congress on federal sentencing matters. My update for these panel focuses on three areas in which there has been recent activity:

1. The 2013 Guideline amendments;
2. The Commission's recent symposium on economic crime; and
3. The Commission's other priorities for the upcoming amendment cycle.

* * *

So, I will just jump right in with a discussion of the recent amendments . . .

2013 GUIDELINE AMENDMENTS

In April, the Commission promulgated proposed amendments to the federal sentencing guidelines addressing several areas. These amendments have a designated effective date of November 1, 2013 – that's *TODAY* – and they ~~will go~~ went into effect ~~unless~~ because Congress did not affirmatively ~~(and now quickly)~~ acts to modify or disapprove them. In the interest of time, rather than going through all of the promulgated 2013 amendments, I thought I would take a few minutes to highlight three of them.

between when we submitted them in May and today.

The first one I wanted to address is in the area of pre-retail medical products . . .

I. Pre-retail Medical Products

In response to a directive in a new federal statute called the SAFE DOSES Act,[1] the Commission amended §2B1.1 as it applies to fraud and theft offenses that involve what Congress calls "pre-retail medical products," which are medical products that have not yet been made available for purchase by a consumer. The SAFE DOSES Act makes theft of a pre-retail medical product in a variety of different ways—e.g., embezzling it, stealing it by fraud or deception, altering the labeling or documentation—a new federal offense, and as I mentioned, the statute

[1] SAFE DOSES stands for "Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety."

also directs the Commission to review and amend the guidelines, if appropriate, to account for the new offense.

The guideline Amendment responds to the SAFE DOSES Act in three ways:

First, the Commission references the new offense of stealing pre-retail medical products to §2B1.1.

Second, the Commission has created a new specific offense characteristic in §2B1.1 that provides a two-tiered enhancement for offenses that involve pre-retail medical products:

a. There is a 2-level enhancement if the offense involved conduct described in the new statute that prohibits stealing pre-retail medical products; and

b. There is a 4-level enhancement if the offense involved conduct described in the new statute *and* the defendant committed the offense while employed in the supply chain for the pre-retail medical product.

    i. The amendment provides that if the 4-level enhancement applies, the defendant should not also receive the adjustment at §3B1.3 for abuse of a position of trust or use of a special skill.

The third way that the guideline responds to the Act is that it inserts a new example of an upward departure that would apply in cases involving theft of pre-retail medical products that result in serious bodily injury or death.

i. The new example clarifies that, in a case in which serious bodily injury or death results from the victim's use of a pre-retail medical product that had previously been obtained by theft or fraud, the upward departure would be warranted.

II. Counterfeiting

The next amendment that I wanted to highlight here today was the Commission's response to recent statutory changes relating to counterfeiting. Congress recently enacted legislation to increase the penalties for offenses involving counterfeit military goods and services, and it also increased the penalties for offenses involving counterfeit drugs, and in that latter statute, included a directive to the Commission. As a result, the Commission amended §2B5.3, which is the guideline that is generally applicable to counterfeiting offenses.

1. Counterfeit Military Goods and Services:

The amendment adds a new specific offense characteristic that provides a 2-level increase and a minimum offense level of 14 if the offense involves a counterfeit military good or service "the use, malfunction or failure" of which would "likely cause" one of a listed series of harms (such as disclosure of classified information or impairment of combat operations).

i. In order to apply the enhancement, the counterfeit must be of a good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to combat operation, a member of the Armed Forces, or to national security.

2. Counterfeit or Adulterated Drugs

The Commission also added a new specific offense characteristic to §2B5.2 that provides for a 2-level increase if a counterfeiting offense involves a drug, and it adds to the list of departure considerations whether the counterfeiting offense "resulted in death or serious bodily injury."

III. Trade Secrets

Finally, in regard to the 2013 Amendments, I wanted to touch briefly on our amendment regarding theft of trade secrets. Congress has recently expressed a concern about the damage that is done to American businesses as a result of stolen trade secrets and economic espionage. In a 2012 statute entitled the "Foreign and Economic Espinoage Penalty Enhancement Act," Congress directed the Commission to amend the guidelines, if appropriate, to increase penalties to address this concern. The resulting amendment revises the existing specific offense characteristic regarding theft of trade secrets, which is in the primary fraud guideline, §2B1.1.

1. The previous specific offense characteristic provided an enhancement of two levels "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent."

2. The new specific offense characteristic expands this trade secret enhancement in two ways:

    a. First, it provides a 2-level increase for a trade secret offense in which the defendant knew or intended that the trade secret would be transported or transmitted out of the United States.

    b. Second, it provides a 4-level enhancement and a minimum offense level of 14 for trade secret offenses in which the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.

Consistent with the directive, the Commission also considered whether the guidelines appropriately account for the simple misappropriation of a trade secret without any of these other aggravating circumstances. The Commission determined that existing guideline provisions, such as the loss table and the sophisticated means enhancement in §2B1.1 and the adjustment for abuse of position or trust or use of special skill at §3B1.3, adequately address simple misappropriation cases.

IV. Other Amendments

That's where I'll stop in terms of describing our amendments this cycle. The Commission did promulgate several others, including

resolving circuit splits related to calculating the amount of "tax loss" when interpreting the tax guideline (§2T1.1),[2] and whether the defendant's failure to waive his right to an appeal can be grounds for the government's refusal to move for the third point for acceptance of responsibility (the Commission concluded that the government's motion should not be withheld for that reason). The agency posts a reader-friendly version of all of its promulgated amendments on its website – ussc.gov – so, if you are interested, you can find them all there.

* * *

I also wanted to take this opportunity to mention the Commission's recent Economic Crimes Symposium, which we hosted at John Jay College of Criminal Justice in New York City, primarily because the Southern District of NY is among the districts with the most fraud cases and we wanted to draw upon the expertise of people in that region . . .

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[2] The circuits disagreed about whether, when calculating the amount of tax loss, the court could reduce the amount of loss to take into account legitimate, unclaimed credits, deductions or exemptions that the defendant could have claimed had he or she filed an accurate tax return. The Commission resolved the conflict by providing that certain exemptions and deductions, such as the standard deduction, should always be accounted for. It also provides that other credits, exemptions and deductions should be accounted for if certain conditions are met, such as (i) when the credit, exemption or deduction could have been claimed at the time of the original filing; (ii) when the defendant's entitlement to it is reasonably and practicably ascertainable, and (iii) when the defendant has presented sufficient information to support the determination that he or she would have been entitled to it. The application note also provides that certain categories of credits, deductions or exemptions should never be considered to reduce the tax loss in a case, such as expenses incurred to obstruct justice (for example, paying a preparer to file the fraudulent tax return).

ECONOMIC CRIME SYMPOSIUM

The symposium was part of the Commission's multi-year review of the primary fraud and theft guideline, §2B1.1. The gathering gave the Commission an opportunity both to publicly acknowledge that we have heard the criticisms of the fraud guideline and to discuss how to address the problems.

- During the 1 ½ day program, we heard from various stakeholders in the federal criminal justice system, including judges, prosecutors, defense attorneys, and probation officers.
- Here is some of what we learned:
    1. Not surprisingly, opinions differ on whether the fraud guideline is completely broken and needs to be totally revised, or simply in need of adjustment as it relates to certain types of cases.
    2. There are no easy solutions.
    3. Loss is an area of particular concern to many people because many believe that it is not the best measure of culpability. But again, not everyone agrees that loss is problematic, and there is a difference of opinion about what would be a better measure of culpability or whether that measure should vary depending on the type of fraud involved.
- We also learned the value of engaging people who care deeply and think hard about these issues and asking that they join

with us to evaluate how best to determine the severity of a fraud offense—is it loss? Is it the number of victims? Is it the amount of harm done to the victims? And in this regard, I at least think that the symposium was enormously interesting and successful.

- Of course, evaluating the feedback that we received and coming up with a workable guideline construct to address all of the concerns is no simple matter. We expect to continue our study of these issues during the current amendment cycle and possibly into the next, and we will continue to solicit public input on these complicated issues.
- In the meantime, we will be posting the transcripts of this recent event on the Commission's website in the near future, and I encourage those of you who are interested to review them.

PRIORITIES

In closing, I wanted to point out that the Commission has published specific priorities for this coming amendment cycle. I have already discussed economic crime.

Before listing the others, I would like to note that the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons with respect to *each* of its upcoming priorities, to the extent that issue is relevant. The Commission has already received a significant amount of public comment on this aspect of its priorities.

The other priorities include:

Mandatory Minimums: In 2011, the Commission issued a report to Congress regarding the operation of mandatory minimums in the current system, and the Commission intends to continue to work with Congress and other interested parties on the issues raised in that report.

Drug Guideline: The Commission is considering a possible amendment to the Drug Quantity Table in §2D1.1 across drug types.

***Booker* Report**: In 2012, the Commission issued a report to Congress regarding the continuing impact of the Supreme Court's *Booker* decision on the federal sentencing system, and the Commission intends to continue to work with Congress and other interested parties on the issues raised in that report.

Categorization of Prior Offenses for Career Offender/ACCA purposes ("Categorical Approach"): The Commission is also in the midst of a multi-year study of the problems that have arisen in regard to categorizing prior offenses for the purpose of establishing career offender status (*i.e.*, identifying crimes of violence and the use of the categorical approach).

Recidivism: The Commission is also in the midst of a multi-year, comprehensive study of recidivism, including examination of circumstances that correlate with increased or reduced recidivism; possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

Revocation: The Commission has begun a multi-year review of federal sentencing practices pertaining to violations of conditions of probation and supervised release.

Compassionate Release: The Commission is considering possible amendments to the policy statement regarding "compassionate release," particularly in light of the recent changes in the Bureau of Prisons' program statement on this issue.

Child Pornography Report: In 2012, the Commission issued a report to Congress regarding the sentencing of child pornography

offenses, and the Commission intends to continue to work with Congress and other interested parties on the issues raised in that report.

Circuit Conflicts: Finally, I wanted to note that the Commission is considering addressing a number of circuit conflicts that have arisen when courts interpret various guideline provisions. Among the circuit conflicts that are on the table now are two circuit conflicts regarding the retroactivity guideline, §1B1.10, and how that guideline is being interpreted where defendants seek to get the benefit of the recently reduced guideline penalties related to crack cocaine offenses after the Fair Sentencing Act. The circuit conflicts are a little complicated to understand, but basically courts have different views regarding the effect of statutory mandatory minimums and guideline sections 5G1.1 and 5G1.2, which makes the mandatory minimum the guideline sentence. Problems have arisen, and courts are split, in circumstances in which a defendant who received a substantial assistance departure at his original sentencing (and therefore got out from under the man min) now seeks a similar substantial-assistance reduction as a result of the retroactively-applied change to the crack guideline. As I said, this is quite complicated, but the Commission is deciding whether to address it in light of the different outcomes in the circuits in regard to similar cases involving these retroactivity-related issues.

* * *

I have most certainly taken more time than I should have, but there is a lot going on! If we have time for questions at the end, I would be happy to answer any that you might have.

Thank you.

Speaker Introduction

We are honored to have with us today, as our featured speaker, Mr. Kannon Shanmugam.

Mr. Shanmugam is a partner at Williams & Connolly focusing on Supreme Court and appellate litigation. He has argued 13 cases before the Supreme Court—tying him with the legendary Edward Bennett Williams for the most by a lawyer in the firm's history.

Mr. Shanmugam has been recognized by numerous publications as one of the nation's leading Supreme Court and appellate advocates. He has handled significant matters before the Supreme Court in a number of areas, including securities, patent, and antitrust litigation. He has also argued some of the highest-profile criminal cases decided by the Court in the last few years. Most recently, he presented oral argument on behalf of the defendant in *Maryland* v. *King*, the landmark case on the constitutionality of DNA testing of arrestees that one justice described as "perhaps the most important criminal procedure case that this Court has heard in decades."

Mr. Shanmugam joined Williams & Connolly in 2008 after serving as an Assistant to the Solicitor General in the Department of Justice. He was the first lawyer to join the firm directly as a partner for 22 years. Born and raised in Lawrence, Kansas, he received his A.B. *summa cum laude* from Harvard College; his M. Litt. from the University of Oxford, where he was a Marshall Scholar; and his J.D. *magna cum laude* from Harvard Law School, where he was executive editor of the *Harvard Law Review*. He clerked for Supreme Court Justice Antonin Scalia and for Judge J. Michael Luttig on the U.S. Court of Appeals for the Fourth Circuit.

Lawdragon magazine has named Mr. Shanmugam one of the 500 leading lawyers in America, and *Washingtonian* magazine has selected him as one of the top lawyers practicing before the Supreme Court and as one of 20 people in Washington to watch. The Associated Press featured him in a story on "The Supreme Court of Tomorrow." In addition, before he turned 40, he was listed by *The National Law Journal* as one of the top 40 lawyers under 40 in Washington and also as one of the top 40 minority lawyers under 40 in the country.

USSC Regional Training Seminar

Miami, FL—September 4, 2013

Thank you and good morning. In that gracious intro, Pam told you a lot about me but she omitted one thing that might be of importance to many of you... Miami is my hometown—I grew up here (go Palmetto Panthers!)—my parents are still here, and it's always good to be home.

I am here today to bring you greetings from the members of the United States Sentencing Commission. Some of you may not be familiar with our agency, so let me just give you a few basics:

- The Commission is an independent agency within the judicial branch of the federal government (we are NOT within DOJ).
- There are seven Commissioners who are nominated by the President and confirmed by the Senate, and several of us have other day jobs as well—
- By statute at least three of the Commissioners have to be federal judges, and the Commission is bipartisan because no more than four Commissioners can be from any one political party.
- There are currently five judges on the Commission, and it is chaired by Patti Saris, who is the chief judge of the U.S. District Court for the District of Massachusetts.
- The lifeblood of the Commission, though, is its staff. The Commission has a staff of appropriately 100 people who are divided into various divisions—

including training, which Pam heads, and also the general counsel's office, as well as Research and Data.

- Research and Data is actually the largest of the divisions because data collection and analysis is so much of what the Commission does. Every year, the Commission collects information on each of the 83,000-plus federal criminal cases that are sentenced in a given year, and that data is not only collected, but is also coded and analyzed by a brilliant team of PhD criminologists who are able to track and assess and explain what is actually going on in the federal sentencing system at any given time.

- The Commission uses this data to inform the public in a variety of ways, including by issuing comprehensive reports on various topics, and it also mines the data for the Commission's consideration of making amendments to the Guidelines Manual.

Which brings me to my assigned topics for this morning . . . Pam asked me to focus my comments on two subjects, and I am happy to do so. First, I will briefly touch upon the Commission's priorities for this upcoming amendment cycle, and second, I will provide a very brief overview of a report that the Commission issued a few years ago regarding the timely topic of mandatory minimums.

Priorities for the 2013-14 Amendment Cycle

With respect to priorities—the Commission met recently to determine what our priorities are going to be. On August 15, 2013, the Commission unanimously voted on its list of final priorities for the 2013-14 amendment cycle. This year, the Commission received more than 14,000 letters of public comment in response to our tentative priorities which were published in the federal register in May, 2013.

Specific Priorities

Mandatory Minimums

One of the Commission's top priorities this year is to continue working with Congress to implement the recommendations in a report that the Commission issued in 2011 regarding federal mandatory minimum penalties—and I will say more about this report in a moment—but the Commission made several recommendations to Congress, including the suggestion that Congress consider reducing the severity and scope of mandatory minimum penalties and consider expanding the safety valve statute.

Drug Guidelines

Another priority of the Commission this year is to review the sentencing guidelines applicable to drug offenses (§2D1.1 of the Guidelines manual), including consideration of changing the guideline base offense levels for various drug quantities. Drug offenders account for nearly half of all federal inmates, and an

adjustment to the Drug Quantity Tables in the sentencing guidelines could have a significant impact on sentence lengths and prison populations.

Economic Crimes

The Commission also will continue our multi-year study of the guidelines governing economic crimes (primarily §2B1.1). This review will include (A) a comprehensive, multi-year review of §2B1.1 and related guidelines, including examination of the loss table and the definition of loss, and B) consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study.

As a part of our consideration of 2B1.1, the Commission will be holding an Economic Crime Symposium in New York on September 18th-19th, which will focus on issues related to economic crimes. There will be over 125 invited guests, including 27 federal judges from across the country and others representing a broad array of views and roles in the federal sentencing system. (I am told that Michael Caruso, the Federal Defender for the Southern District of Florida, is one of speakers at the Symposium—and we are delighted that he will be joining us!).

Crimes of Violence

Another Commission propriety involves one of the more complicated areas of federal sentencing today: that is, the complicated legal issues related to the "categorical approach" that the Supreme Court established and that courts must use when they have to determine the nature of a defendant's prior conviction. As many of you know, the categorical approach comes into play when there is a

recidivist enhancement either in a statute or a guideline, and a court has to determine, for example, whether one of the prior crimes committed by a particular defendant is a "crime of violence." The Commission is examining both statutory and guideline definitions relating to the nature of a defendant's prior conviction (*e.g.* crime of violence, violent felony) and the impact of such definitions on the relevant statutory and guideline provisions (*e.g.* career offender, illegal reentry, and armed career criminal). This work could include recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.

Recidivism

We are also continuing our multi-year study of recidivism, which will include A) an examination of circumstances that correlate with increased or reduced recidivism, B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and C) consideration of any guideline amendments related to the information obtained from such a study. The Commission will be holding an expert roundtable next month where we will hear from recidivism experts concerning the best practices for recidivism research.

Violations of Conditions of Probation and Supervised Release

In conjunction with our recidivism study, the Commission will also be undertaking a multi-year review of federal sentencing practices as they relate to violations of the conditions of probation and supervised release, including possible

consideration of amending the policy statements in Chapter Seven of the guidelines manual.

Other priorities

Finally, in the category of other, miscellaneous priorities, the Commission will be considering issues such as:

1. Whether to amend the policy statements pertaining to *compassionate release* (§1B1.13),
2. How to resolve selected *circuit conflicts* involving differing interpretations of the guidelines by federal courts,
3. How best to implement the *Violence Against Women Reauthorization Act* of 2013 and any other recently enacted crime legislation, and
4. What can be done to continue our work related to our recently released *Booker* Report and *Child Pornography Offenses* Report (both issued earlier this year).

So, that is what the Commission is up to these days and what we are planning to work on in the coming months. Our staff will be researching these various areas, and if guideline changes are being considered, the Commission will be publishing proposed guideline language for public comment – so stay tuned.

In the meantime, while I am here and have your attention, I want to give you a slightly more in-depth overview of the Commission's relatively recent work related to mandatory minimums. As you know, mandatory minimums have become a hot topic of late both nationally and in the criminal justice community.

Remarks on Mandatory Minimum Report

The Commission issued a report in October of 2011 that was entitled "Mandatory Minimum Penalties in the Federal Criminal Justice System." The report was prepared in response to a specific congressional directive, and the Commission spent several years studying mandatory minimum penalties and seeking the views of various stakeholders. In addition to reviewing data, legislation, and literature, the Commission held a hearing specifically devoted to mandatory minimums. It also consulted with advisory groups and representatives from government, academia, and the scientific community; and conducted detailed interviews with prosecutors and defense attorneys in 13 districts throughout the country.

For the purpose of this overview, I wanted to discuss:

- the general content of the mandatory minimum report
- three important data points regarding mandatory minimums, and
- the Commission's overall observations and recommendations.

I. Content of the Report

With respect to content, the report provides a comprehensive overview of mandatory minimum penalties in the federal system. The final printed report and its appendices are several hundred pages long, but it does have an executive summary that distills the primary takeways. The body of the report begins with a chapter that summarizes the history of mandatory minimums, and it is interesting to note, as the report recognizes, that these types of penalties have been around since the beginning of our Republic (many of the early man mins were in the form of mandatory death sentences), and at various points in time, Congress has

earnestly enacted, and also repealed, federal statutes that contain mandatory minimum penalties.

Building on the history, the report contains chapters that seek to provide an overview of the interaction between mandatory minimum penalties and the sentencing guidelines, and that also describe the impact of more recent systemic changes related to such matters as the scope and magnitude of the federal criminal justice system, the size and composition of the federal prison population, and the number and severity of the prescribed mandatory minimum penalties for federal crimes. Of course, in light of the dramatic shifts that have occurred regarding federal sentencing, it is not surprising that differing policy views about the propriety of mandatory minimums exist, and the report also lays out the primary arguments—those in favor of, as well as those against—criminal statutes that establish mandatory minimum penalties.

The bulk of the report, though, is devoted to an analysis of data. The report looks first at the information that the Commission gleaned from an evaluation of sentencing practices in 13 selected districts. In general, this evaluation revealed *inconsistent application* of certain mandatory minimums within and among districts. After describing that evaluation, the report then provides general statistics related to the operation of mandatory minimum penalties both in the federal criminal justice system overall and specifically in regard to each of the four major offense types in which mandatory minimums play a significant role: drug offenses, firearms offenses, child pornography offenses, and aggravated identity theft offenses.

Which brings me to the second area that I wanted to discuss – the data . . .

II. Data re Mandatory Minimums

Here are three big picture statistical takeaways from the report:

1. First, more than one-quarter of all federal criminal defendants are convicted of an offense that carries a mandatory minimum penalty.

    - The Commission examined **72,239 offenders** sentenced in federal court in Fiscal Year 2010,[1] and found that **19,896 offenders (27.2%)** were convicted of an offense carrying a mandatory minimum.

    So, the Commission asked, who are these offenders?

    - The vast majority of the offenders who were faced with mandatory minimums **committed drug offenses**.

        - 77.4% of the 19,896 offenders were convicted for drug trafficking offenses.

    - These offenders were overwhelmingly male (90%) and U.S. Citizens (73.6%).

    - In addition, Hispanics comprise the largest portion of the group of offenders convicted of an offense carrying a man min (38%); followed

[1] We had received data on 83,946 offenders in FY 2010, but 11,068 were excluded for missing data for purposes this study.

by Black offenders (31.5%); White offenders (27.4%); and Other Race offenders (2.7%).

- Finally, 27% of the offenders facing man min penalties came from seven districts: the Southern and Western Districts of Texas, the Southern and Middle Districts of Florida, the S.D. California, the D. Arizona, and the D. South Carolina.

2. Second big takeaway: nearly half of those offenders who were convicted of an offense carrying a mandatory minimum penalty were ***relieved*** of the mandatory minimum because they either provided substantial assistance to the government or qualified for the safety valve, or both.

    - Of the 19,000-plus offenders facing a man min, **46.7%** received relief from the mandatory penalty

    - In terms of demographics, Other Race offenders received relief the most often (in 58.9% of their cases), while Black offenders received relief the least often (in 34.9% of their cases).[2]

    - When we look just at the safety valve mechanism, we see that Hispanic offenders qualify for the safety valve at the highest rate, while Black offenders qualify at the lowest rate (this is likely due to either criminal history or the involvement of a dangerous weapon in connection with the offense)[3]

[2] Hispanic rate: 55.7% of their cases; White rate: 46.5% of their cases.
[3] Hispanics qualify for safety valve in 42.8% of their cases

- We also see that *drug offenders* are much more likely to receive relief from a mandatory minimum than other types of offenders facing mandatory minimum penalties (which makes sense because the safety valve is only available for drug offenses).

3. Third, as a result of the mechanisms for relief from mandatory minimums, at the end of the day, only 14.5 % of all federal offenders are sentenced subject to a mandatory minimum penalty.

- Not surprisingly, male offenders remained subject to the mandatory minimum penalty at sentencing more often than female offenders (males remained subject to the man min in 55.3% of their cases, compared to 34.5% of the cases involving female offenders).

- And Black offenders (who as you will recall have the lowest overall rate of relief) remained subject to a mandatory minimum penalty at the highest rate of any racial group; that is, in 65.1 percent of their cases Black offenders who were convicted of an offense that carried a mandatory minimum penalty remained subject to that penalty at sentencing; followed by White offenders (who remained subject to the penalty in 53.5% of their cases), Hispanic offenders (44.3%), and Other Race (41.1%).

Other Races:	36.6% qualify for safety valve
White:	26.7% qualify for safety valve
Blacks:	11.1% qualify for safety valve

4. Three other noteworthy data points that I wanted to mention:

- The data demonstrates that receiving relief from a mandatory minimum penalty makes a significant difference in the sentence ultimately imposed:

  - Offenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty received an average sentence of 139 months, compared to 63 months for those offenders who receive relief from a mandatory penalty.

- The data also shows that, overall, offenders who were facing a mandatory minimum penalty pled guilty at a slightly *lower* rate than offenders who were not charged with an offense carrying a mandatory minimum (94.1% versus 97.5%)

- Nearly 40% of the current federal prison population is comprised of offenders who remained subject to a mandatory minimum penalty and who are serving mandatory minimum sentences (39.4% of the 191,757 offenders in BOP custody in 2010).

III. Conclusion and Recommendations

So, what did the Commission make of the information that it gathered about the history and operation of mandatory minimums? Well, ultimately, there was a spectrum of views among the Commissioners about the propriety of mandatory minimum penalties. But the Commissioners were able to agree on a few key

things, first, that "a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act." And the Commissioners also agreed that mandatory minimum penalties (1) should not be excessively severe, (2) should be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) should be applied consistently.

The Commission also unanimously suggested certain specific reforms to improve the current system of mandatory minimums, and these are the reforms that the Commission hopes to work on as part of its priorities this year, as I mentioned earlier. These suggestions to Congress include that:

- Congress should consider (A) **expanding the *offenses* eligible for the safety valve** and also should consider (B) marginally **expanding the group of offenders who are eligible for safety valve** to include certain non-violent offenders who receive 2 or perhaps 3 criminal history points.

- Congress should **request prison impact analyses** from the Commission as early as possible in its legislative process whenever it considers enacting or amending mandatory minimum penalties.

    - The Commission believes that early analyses of prison impact may assist Congress in focusing increasingly strained federal prison resources on offenders who commit the most serious offenses.

- Congress should **reassess both the severity and scope of the recidivist provisions** at 21 U.S.C. §§ 841 and 960, which tend to be applied inconsistently.

- Sentencing data and interviews with prosecutors and defense attorneys indicate that mandatory minimum penalties that are considered excessively severe tend to be applied inconsistently.

- Congress should consider **amending 18 U.S.C. § 924(c)** (Possessing firearm in connection with drug trafficking or crime of violence) so the enhanced mandatory penalties for second or subsequent offenses apply only to prior convictions and should consider amending those penalties to lesser terms.

- Congress should **eliminate the "stacking" requirement** and give discretion whether to impose sentences for multiple violations of 924(c) concurrently with each other.

- Congress should consider **more finely tailoring the definitions of the predicate offenses that trigger the ACCA** (Armed Career Criminal Act) mandatory minimum (15 year minimum)

- The Commission also noted, as a prelude to our Child Porn report, that the mandatory minimums related to certain non-contact sex offenses may be excessively severe and might be applied inconsistently.

* * *

CONCLUSION

In conclusion, these reforms are among the efforts that the Commission believes that Congress should undertake, and we hope to work with Congress as it considers not only these suggested reforms but also the state of mandatory minimum penalties in general and the federal criminal justice system overall. The Commission is optimistic that real reforms are possible and, in light of recent news reports, a congressional review already seems well underway.

THANK YOU, again, for letting me have this time to address you. I hope you have a terrific seminar, and I will be around and happy to answer whatever questions you might have as the day progresses.

USSC Regional Training Seminar
Washington, D.C.—August 2, 2013

USSC Plenary Panel: Remarks on Mandatory Minimum Report

Thank you and good morning. I am going to talk *briefly* about the report that the Commission issued in October of 2011 regarding "Mandatory Minimum Penalties in the Federal Criminal Justice System." Judge Saris mentioned this report, and mandatory minimum penalties are certainly a timely topic. For those of you who may not be familiar with the USSC, we thought you might be interested in hearing about or work in that area. The report was prepared in response to a specific congressional directive, and the Commission spent several years studying mandatory minimum penalties and seeking the views of various stakeholders. In addition to reviewing data, legislation, and literature, the Commission held a hearing specifically devoted to mandatory minimums. It also consulted with advisory groups and representatives from government, academia, and the scientific community; and conducted detailed interviews with prosecutors and defense attorneys in 13 districts throughout the country.

For the purpose of this overview, I wanted to report on:

- the general content of the mandatory minimum report
- three important data points regarding mandatory minimums, and
- the Commission's overall observations and recommendations.

I. Content of the Report

With respect to content, the report provides a comprehensive overview of mandatory minimum penalties in the federal system. The final printed report and its appendices are several hundred pages long, but it does have an executive

summary that distills the primary takeways. The body of the report begins with a chapter that summarizes the history of mandatory minimums, and it is interesting to note, as the report recognizes, that these types of penalties have been around since the beginning of our Republic (many of the early man mins were in the form of mandatory death sentences), and at various points in time, Congress has earnestly enacted, and also repealed, federal statutes that contain mandatory minimum penalties.

Building on the history, the report contains chapters that seek to provide an overview of the interaction between mandatory minimum penalties and the sentencing guidelines, and that also describe the impact of more recent systemic changes related to such matters as the scope and magnitude of the federal criminal justice system, the size and composition of the federal prison population, and the number and severity of the prescribed mandatory minimum penalties for federal crimes. Of course, in light of the dramatic shifts that have occurred regarding federal sentencing, it is not surprising that differing policy views about the propriety of mandatory minimums exist, and the report also lays out the primary arguments—those in favor of, as well as those against—criminal statutes that establish mandatory minimum penalties.

The bulk of the report, though, is devoted to an analysis of data. The report looks first at the information that the Commission gleaned from an evaluation of sentencing practices in 13 selected districts. In general, this evaluation revealed inconsistent application of certain mandatory minimums within and among districts. Then, the report provides *statistics* related to the operation of mandatory minimum penalties both in the federal criminal justice system overall and specifically in regard to each of the four major offense types in which mandatory

minimums play a significant role: drug offenses, firearms offenses, child pornography offenses, and aggravated identity theft.

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    So, the Commission asked, who are these offenders?

    - The vast majority of the offenders who were faced with mandatory minimums **committed drug offenses**.
        - 77.4% of the 19,896 offenders were convicted for drug trafficking offenses.
    - These offenders were overwhelmingly male (90%) and U.S. Citizens (73.6%).
    - In addition, Hispanics comprise the largest portion of the group of offenders convicted of an offense carrying a man min (38%); followed by Black offenders (31.5%); White offenders (27.4%); and Other Race offenders (2.7%).
    - Finally, 27% of the offenders facing man min penalties came from seven districts: the Southern and Western Districts of Texas, the

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Southern and Middle Districts of Florida, the S.D. California, the D. Arizona, and the D. South Carolina.

2. Second big takeaway: nearly half of those offenders who were convicted of an offense carrying a mandatory minimum penalty were ***relieved*** of the mandatory minimum because they either provided substantial assistance to the government or qualified for the safety valve, or both.

   - Of the 19,000-plus offenders facing a man min, **46.7%** received relief from the mandatory penalty

   - In terms of demographics, Other Race offenders received relief the most often (in 58.9% of their cases), while Black offenders received relief the least often (in 34.9% of their cases).[2]

   - When we look just at the safety valve mechanism, we see that Hispanic offenders qualify for the safety valve at the highest rate, while Black offenders qualify at the lowest rate (this is likely due to either criminal history or the involvement of a dangerous weapon in connection with the offense)[3]

   - We also see that *drug offenders* are much more likely to receive relief from a mandatory minimum than other types of offenders facing mandatory minimum penalties (which makes sense because the safety valve is only available for drug offenses).

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- The data also shows that, overall, offenders who were facing a mandatory minimum penalty pled guilty at a slightly lower rate than offenders who were not charged with an offense carrying a mandatory minimum (94.1% versus 97.5%)

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So, what did the Commission make of the information that it gathered about the history and operation of mandatory minimums? Well, ultimately, there was a spectrum of views among the Commissioners about the propriety of mandatory minimum penalties. But the Commissioners were able to agree that "a strong and effective sentencing guidelines system best serves the purposes of the Sentencing

Reform Act." And the Commissioners also agreed that mandatory minimum penalties (1) should not be excessively severe, (2) should be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) should be applied consistently.

The Commission also unanimously suggested certain specific reforms to improve the current system of mandatory minimums, including that:

- Congress should consider (1) **expanding the offenses eligible for the safety valve** and should consider (2) marginally expanding the group of offenders eligible for the safety valve to include certain non-violent offenders who receive 2 or perhaps 3 criminal history points.

- Congress should **request prison impact analyses** from the Commission as early as possible in its legislative process whenever it considers enacting or amending mandatory minimum penalties.

    - The Commission believes that early analyses of prison impact may assist Congress in focusing increasingly strained federal prison resources on offenders who commit the most serious offenses.

- Congress should **reassess both the severity and scope of the recidivist provisions** at 21 U.S.C. §§ 841 and 960, which tend to be applied inconsistently.

    - Sentencing data and interviews with prosecutors and defense attorneys indicate that mandatory minimum penalties that are considered excessively severe tend to be applied inconsistently.

- Congress should consider **amending 18 U.S.C. § 924(c)** (Possessing firearm in connection with drug trafficking or crime of violence) so the enhanced mandatory penalties for second or subsequent offenses apply only to prior convictions and should consider amending those penalties to lesser terms.

- Congress should **eliminate the "stacking" requirement** and give discretion whether to impose sentences for multiple violations of 924(c) concurrently with each other.

- Congress should consider **more finely tailoring the definitions of the predicate offenses that trigger the ACCA** (Armed Career Criminal Act) mandatory minimum (15 year minimum)

- The Commission also noted, as a prelude to our Child Porn report, that the mandatory minimums related to certain non-contact sex offenses may be excessively severe and might be applied inconsistently.

These reforms are among the efforts that the Commission believed that Congress should undertake, and among the Commission's priorities is its intention to work with Congress in its consideration of not only these suggested reforms but also its evaluation of mandatory minimum penalties overall, and we have every reason to believe, based on some of the legislative proposals that have been issued recently, that a Congressional reevaluation of mandatory minimum penalties is well underway.

THANK YOU.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTITURE CEREMONY
OF THE
HONORABLE KETANJI BROWN JACKSON

Thursday, May 9, 2013
4:00 p.m.

Ceremonial Courtroom, Sixth Floor
333 Constitution Avenue, N.W.
Washington, D.C. 20001

THE HONORABLE ROYCE C. LAMBERTH
CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
PRESIDING

SPEAKERS:

HONORABLE ROYCE C. LAMBERTH, Chief Judge,
United States District Court for the District of Columbia

TONY WEST, ESQUIRE, Acting Associate Attorney General,
United States Department of Justice

HONORABLE STEPHEN BREYER, Justice,
United States Supreme Court

HONORABLE ELEANOR HOLMES NORTON, Representative,
United States House of Representatives

A.J. KRAMER, ESQUIRE, Federal Public Defender for the
District of Columbia

BRIAN MATSUI, ESQUIRE, Partner,
Morrison & Foerster, LLP

HONORABLE BRUCE SELYA, Senior Circuit Judge,
United States Court of Appeals for the First Circuit

HONORABLE PATTI SARIS, Chief Judge,
United States District Court for the District of Massachusetts

P R O C E E D I N G S

CHIEF JUDGE LAMBERTH: Ladies and gentlemen, it's my pleasure to welcome all of you here today. The Court has convened today to administer the oath of office to our newest district judge, the Honorable Ketanji Brown Jackson.

It's a pleasure to welcome the Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States, the judges of the United States Court of Appeals for the District of Columbia Circuit, the judges of the District of Columbia Court of Appeals, the judges of the Superior Court of the District of Columbia, our magistrate judges, and Judge Teel of our bankruptcy court.

Among the many other dignitaries here, I'd like to recognize a special friend of the Court, Congresswoman Eleanor Holmes Norton, who will speak today; the Honorable Tony West, Acting Associate Attorney General, who will present the commission; and the United States Attorney for the District of Columbia, Ron Machen.

There are also some special guests I want to recognize, starting with, of course, the family. The husband, Dr. Patrick Jackson; the children, Talia and Leila Jackson, who we'll see later; Johnny and Ellery Brown, the parents of the new judge; Ketajh Brown, the brother; Calvin and Carmela Ross, the uncle and aunt of the new judge; Gardner and Pamela Jackson, the father-in-law and mother-in-law we're happy to have here; and William and Dana Jackson, the brother-in-law and sister-in-law, we're also happy to have here today.

Other special guests include Catherine Player, Sylvan and Sandy Seidenman, and Wanda and Herman Rambo. All of them are close family friends who traveled quite a distance to be here.

Also special guests are the distinguished colleagues and staff of the United States Sentencing Commission, former colleagues of the D.C. Public Defender's Office, attorneys and

staff from the D.C. office of the law firm of Morrison & Foerster, and members of the Department of Surgery at Georgetown University Hospital where Dr. Jackson practices. I thank all of you for coming, especially our special guests who are here today. I'd also like to recognize Judge Jackson's staff: her first law clerk, Young Lee, Julia Mehlman, Jeremy Merkelson, and coming this summer, Krysten Connon.

So if all of you would please stand, Deputy Marshal Bowden will lead us all in the pledge of allegiance to the flag.

(Congregation recites the pledge of allegiance.)

CHIEF JUDGE LAMBERTH: Thank you. For those of you who have been to one of these investiture ceremonies before, we're going to do things a little out of order today in the hopes of imposing as little as possible on our special guest, Justice Breyer, who kindly agreed to be here today under some obviously difficult circumstances.

Thank you, Justice Breyer, for coming.

First I'll ask the Honorable Tony West, the Acting Associate Attorney General for the Department of Justice, to step forward and present the commission.

Mr. West?

MR. WEST: Thank you, Your Honor. Let me briefly say that it is really my honor and my privilege to participate in this ceremony for Ketanji, for Judge Ketanji Jackson. I first met Judge Jackson when she joined my former law firm of Morrison & Foerster.

I was really proud to call this brilliant and talented attorney a colleague, and in the years since she's entered public service, on the U.S. Sentencing Commission and now on the bench, I know she's continuing to prove a force for fairness, and I know she will build a legacy of justice.

With that, let me read this commission. Be forewarned, the language has not changed much since it was first drafted in the late 18th century:

Barack Obama, President of the United States of America.

To all Who Shall See These Presents - Greeting.

Know Ye, That reposing special Trust and Confidence in the Wisdom, Uprightness and Learning of Ketanji Brown Jackson of Maryland, I have nominated, and by and with the advice and consent of the Senate, do appoint her United States District Judge for the District of Columbia and do authorize and empower her to execute and fulfil the Duties of that Office according to the Constitution and Laws of the United States; and to have and to hold the said Office with all the Powers, Privileges and Emoluments to the same of Right appertaining unto her the said Ketanji Brown Jackson, during her good Behavior.

in Testimony whereof, I have caused these Letters to be made Patent and the Seal of the Department of Justice hereunto affixed.

Done at the City of Washington this Twenty-Sixth Day of March; in the Year of our Lord two thousand thirteen, and of the Independence of the United States of America the Two Hundred Thirty Seventh.

By the President, Barack Obama,
Attorney General, Eric Holder.

CHIEF JUDGE LAMBERTH: Thank you very much, Mr. West.

Judge Jackson, are you prepared to take the oath?

JUDGE JACKSON: I am.

CHIEF JUDGE LAMBERTH: I'll ask Justice Breyer to step forward to administer the oath and that Judge Jackson's family step forward to hold the Bible.

JUSTICE BREYER: Good. I can't resist saying something.

(Laughter in the Court)

First of all, everyone in this room, certainly, and many well beyond it, agree with the wisdom of President Obama. This was a wise decision, and the Senate was correct to give its advice and consent to this decision.

Moreover, this is a family affair. It's a judicial family affair. Ketanji was my law clerk. I see Patti here, Patti Saris. She was Patti's law clerk. It's our family and more

of a family affair than you would think, because it's the Georgetown surgery department that did this... (Laughter) No, Ketanji's going to make a good judge, and I better go ahead with this oath because you never know when a few minutes of extra seniority may come in handy, (laughter in the court) and she'll be wonderful. You'll hear from other people, but it's not just the intelligence and hard work, though that's part of it. She sees things from different points of view, and she sees somebody else's point of view and understands it. We all feel that's our judicial family. That's what we're here for.

Moreover, I know her dad was a lawyer for the school board, and this watch is from my father in 1973, after 40 years as a school board attorney in San Francisco. So we all know what we're doing here, right? This is a very, very, happy event.

So, Ketanji, are you ready to take the oath? Good.

(Whereupon, Hon. Ketanji Brown Jackson repeats the oath as administered by Hon. Justice Breyer:)

JUDGE JACKSON: I, Ketanji Brown Jackson, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.

JUSTICE BREYER: Congratulations, Judge. (Applause)

(The Honorable Ketanji Brown Jackson is officially robed.)

CHIEF JUDGE LAMBERTH: Talia and Leila did a very good job of robing you. (Laughter)

It's now my pleasure to recognize our first speaker, Congresswoman for the District of Columbia, the Honorable Eleanor Holmes Norton. Ms. Norton, we're glad to have you here.

CONGRESSWOMAN NORTON: Chief Judge Lamberth, members of the

Court, Judge Jackson, now that you have been sworn, you all can all go home now. (Laughter) The rest of this is all fluff, believe me.

First, may I offer my best wishes to Chief Judge Lamberth, who is about to take senior status after more than 25 years of especially distinguished service to the court and to this city. Thank you very much, Judge Lamberth. (Applause)

My special congratulations, of course, to Judge Jackson and to her family.
Judge Ketanji Jackson, who was born in the District of Columbia, marks yet another highly qualified addition to this distinguished District Court.

I want to express my special appreciation to our seventeen-member District of Columbia Federal Nominating Commission led by Pauline Schneider, who I see is here.
The commission continues with a perfect record of fully vetting and forwarding to me extraordinary candidates from which to choose and to recommend to the President. Judge Jackson is emblematic of the excellence of the candidates the commission has forwarded to me. All six -- and she is now the sixth since this president was elected -- have been nominated by the president, and all six have been confirmed.

Judge Lamberth, this court, I'm pleased to say, has a full complement of judges, and we intend to keep it that way.

When Dick the Butcher said in Shakespeare's Henry VI, Part 2, "The first thing we do, let's kill all the lawyers," many of my colleagues in the House would have chimed right in. However, I would assure them that Dick the Butcher did not have in mind the outstanding lawyers who have been forwarded to me.

Dr. Brown is herself a standard bearer for the excellence of the candidates of whom I have been privileged to speak with and who have given me a very difficult time because of the quality of those who have sought to be nominated to this court. But I have to tell you, a lawyer has to really shine to stand out among the lawyers who in fact have sought a seat on this court

since I have had senatorial courtesy.

Among the candidates forwarded to me this time, I can only tell you that *shine* is exactly what Judge Jackson did. Her top qualifications across the board in all areas of federal jurisdiction, Federal Public Defender, civil practice, even sitting alongside federal judges to decide weighty criminal law issues as vice chair of the U.S. Sentencing Commission before she herself would become a judge, sitting even with the U.S. district judge, Judge Patti Saris of Massachusetts, for whom Judge Jackson served as a law clerk.

It looks as though Judge Jackson spent a lifetime clerking -- (laughter) -- since she has clerked at every level of the federal court, for a District Court judge, for a Court of Appeals judge, and for a Supreme Court justice. She has practiced law both at esoteric levels and in the real world, where many who will come before her live.

As the judges of this court get to know Judge Jackson, I believe they will agree that we are fortunate that Judge Jackson has chosen to become one of you and one of us all. Congratulations to Judge Jackson and to the entire family. (Applause)

CHIEF JUDGE LAMBERTH: Thank you very much, Congresswoman Norton, and I would say on behalf of my colleagues on the court, as well as the public, we appreciate your efforts to get us at full strength, and we appreciate what you've done to give us some superb judges. So we thank you very much.

It's now my pleasure to recognize Mr. A.J. Kramer, Federal Public Defender for the District of Columbia.

MR. KRAMER: Chief Judge Lamberth and members of the District Court, members of other federal courts, members of other courts, Congresswoman Norton, and most of all, of course, friends and family of Ketanji who are here, it's really a pleasure and an honor for me to speak, because having worked with Ketanji, I know her judgment to be impeccable, except for when she asked me to speak. (Laughter)

I was never quite clear about that, but I think she wanted somebody to balance off the other brilliant speakers who are going to be talking so that it seemed she knew some people who are not so smart and not such great lawyers, and won't be quoting Shakespeare. (Laughter) I can't quite figure out how I fit in with these other speakers, and I'm sure you can't either. So I'll leave that.

I think that other people will talk about her credentials. There are two judges who she clerked for. You heard Justice Breyer, so I won't talk too much about her credentials. I know when she came to work in our office and I interviewed her, I noticed that she had spent seven years at a school in Cambridge, which I think is known as the Stanford of the East to most people. (Laughter)

I noticed two main things on her resume that caught my eye and I asked her about, and I'm sure this will give you an idea of my intellectual quality. She was in an improv comedy group while she was an undergraduate at that school, and what really caught my eye, she was a semifinalist for Glamour Magazine 's Top 10 College Women competition. (Laughter). I just assumed that's something like the TV show *Wipeout*.

While she was in our office, she worked on some great cases. She had a case involving a car search, and she lost, and she -- big surprise in this circuit. (Laughter) So she lost the case, and she went around the office telling everybody she was sure that she was going to get cert granted in this case, that there had been some opinions in the Supreme Court, and she told us all how she was going to get cert granted and argue to the Supreme Court.

And sure enough, cert was granted, but it was about a year later in a different case with a different lawyer. Same issue. I think Justice Breyer just didn't want to listen to her argue, is what I guess. (Laughter) She also had a case -- and I don't mean to make light of it, but it was a case involving threats against the archivist. Who even knew there was an archivist, or what the archivist does, but she handled that one.

She also handled a case with a lawyer with some tax problems and did one of the most brilliant briefs I've ever seen on an immunity issue, won that case, and was rewarded for that by the lawyer calling her repeatedly for the next three or four years asking for her help in his bar discipline problems. (Laughter)

But let me tell you what we really missed about her when she left, and that was her talk around the water cooler. Most of you probably do not know David Cook or Lee DeWyze. You may have heard of Carrie Underwood or Kelly Clarkson. They are all winners on *American Idol*. Ketanji would come in the next morning after every show -- she's quite a student of music, actually -- and she would critique them to great lengths on their performance the night before, including the one she would never let go of, a loser, Elliott Yamin's "A Song For You," which she repeatedly told us about.

But if you think her fascination with *American Idol* was something, her fascination with *Survivor* is at another level. (Laughter) Her discussions, her *lengthy* discussions of the strategy of the people on *Survivor* that would go on and on and on, she'd gather a big audience and talk about why do you think someone did this, or why do you think someone did that. I'm sure right now she always wanted to be on *Survivor*. She's been preempted by a little nerd from that college up in Cambridge, named Cochran, who actually, to show you the academic quality of that college, I believe has written a thesis on the strategy of *Survivor*. So she will not be the first one from that college.

Her hero on *Survivor*, of course, is Sandra Diaz-Twine, the only two-time winner of *Survivor*. And she did volunteer, actually; she wanted to take the appeal of Richard Hatch, who was the first winner of *Survivor* and ran into some tax problems with his prize. (Laughter) That's what she'll really be missed for, *Survivor* and *American Idol,* and almost any other reality show that's on TV. (Laughter)

She then eventually went back to the sentencing commission, where I'm told that she

really had an interest in 5K, the guideline which has to do with cooperation, and I'm told by her brother that's because she spent most of her childhood snitching him off and tattling on him, (laughter) and I think was rewarded such that she thought 5K was just a wonderful guideline. When I asked him for some stories, he said, "All she did was snitch me out my whole childhood." (Laughter) And Justice Breyer is right. It is a family affair, because we've had a Brown in our office now for a long time, although he's about to leave for law school too, but it is a family affair in many ways.

But let me just say that she is an incredibly smart lawyer, far smarter than I am. I know that's a low bar. She is a wonderful writer. She will be a wonderful colleague for the judges on the District Court. She was also a great editor for us. She did primarily appeals, but she's also a fierce advocate. On the rare occasions she was at District Court, she would advocate more eloquently than almost anybody -- not in our office, of course, but almost any other lawyer.

She was a great editor. When I would get my briefs back from her, it would look like somebody had been shot, there was so much red ink on them. She was always willing to help and always willing to help at the last minute. She would take on whatever was asked of her and more. She helped other lawyers. She helped however she could.

She was unflappable. She is unflappable. When one of the secretaries begged her not to go over to the courthouse at 11:45 p.m. to file a brief and instead just file it the next morning with a motion, she insisted on trudging over there at 11:45 at night. This was seven or eight years ago, so it wasn't as good an area as it is now, and she walked over and filed her briefs. She was going to do that.

She will be a model of a district judge. She has integrity, intelligence. She will just be a model of a district judge. More importantly, though, I think she's just a wonderful person. That great smile and that great laugh, a testament to her parents, who did a good job with at least one of your kids. (Laughter) She's a testament to her parents, but most of all, of course, I know

because we would often talk about our kids -- my kids are older, but we went through many of the same things, and I know that Talia and Leila, and Patrick, of course, are the loves of her life, and she will just be an incredible asset to the District Court bench. (Applause)

CHIEF JUDGE LAMBERTH: Thank you very much, A.J. Now I'd like to recognize Mr. Brian Matsui, a partner at the firm of Morrison & Foerster.

MR. MATSUI: Thank you, Your Honor. It's an honor to be here today to share this important day with Judge Jackson and her family, except that it's really hard to follow A.J. I have to figure out how that happened.

I had the pleasure of working with Judge Jackson in private practice at Morrison & Foerster. Judge Jackson, everybody at the firm is thrilled to have been a part of your legal career for the time we had to work with you. When Ketanji joined the firm, she already was an accomplished attorney. Her credentials and clerkships were impressive, to say the very least. She'd argued a number of times before the Court of Appeals. She had already had a chance to see the nuts and bolts of litigation from the very beginning to the very end, and she was steeped in the nuances of the sentencing guidelines. Her background and accomplishments were just, frankly, quite intimidating.

At the same time, her demeanor was always warm, inviting, and carried with it a certain humility, which just made her a joy to work with. Now that she's on the bench, I know she wants brevity from counsel, so I'd like to just note three wonderful traits about Judge Jackson:

First, knowledge of the law. Ketanji and I worked together on numerous cases on a broad number of issues. They ranged from regulatory matters to patent law, to criminal law, and to the surprising robust body of law involving ski lifts. (Laughter) Sometimes we were trying to sort all this out at once, but nothing ever phased Ketanji. As a general rule, she knew the issue well enough right away to point us in the right direction, and if she didn't, it was only a matter of time before she figured it out.

Second, incisiveness. Ketanji always had the remarkable ability to see all sides of the issues but still get to the very heart of the matter right away. In one case she led, the specific question presented to us was a challenge to a regulatory fine, but rather than just litigate that case on that ground and on those facts, Ketanji convinced the court to set aside the entire statutory authority for the agency action. She had the wisdom to step back and look at the big picture.

Finally, friendship, collegiality, and just a little willingness to take the time for others. My children are just a little younger than Talia and Leila, and anyone who knows kids knows that you're always entering into uncharted territory every day, and you always just want someone you can look to for advice.

Judge Jackson always has been one of those people for me. I would say to her, I think my son has a food allergy; what am I going to do? Ketanji had a recommendation not only for an allergist but for an egg-free pancake recipe, and she could tell me the No. 1 nut-free dessert for all children, which just happens to be Oreos, if anyone wants to know. (Laughter) I would also go and say, My kids watch too much television; what do I do? She would say, Here's a link to the newest studies that you should take a look at.

I think that's really important, because everybody in the legal profession is very busy. All of us in private practice spend a lot of hours at work. People in public service spend a lot of hours at work. We know that the judiciary just has an overwhelmingly large caseload, but Ketanji always made time for her colleagues, no matter how busy she was, no matter what else was going on, and it was just a wonderful trait. Thank you. (Applause)

CHIEF JUDGE LAMBERTH: Thank you very much, Mr. Matsui. It is my pleasure now to welcome via videotape -- and my technical expert John Cramer tells me this is going to work -- the Honorable Bruce Selya, Senior Circuit Judge for the U.S. Court of Appeals for the First Circuit.

JUDGE SELYA: Normally, all the king's horses and all the king's men couldn't keep me from being at this investiture in Washington today; but the First Circuit is in session, and on May 9 I will be sitting in Boston. So I appreciate the opportunity to join you all remotely.

For those of you in the audience who are yourselves judges, you know that the law clerk hiring process has a ritualistic character. Federal judges receive literally hundreds of applications for clerkships each year. I first met Ketanji Jackson during the application process for clerkships in the 1996-1997 term. I checked my records before making this appearance, and I found that that year I received 837 clerkship applications, many from highly qualified people. It was a quirk of good fortune and perhaps instinct that led me to offer one of the three available slots to Ketanji Jackson. It was a decision that I never regretted for a moment.

She proved to be hard-working, dependable, intelligent, and most important, sensible. She understood, even as a young woman, the role of the law in the courts and our society, and her perceptions were mature. Indeed, her performance was so impressive that I recommended her in the strongest possible terms to Justice Breyer for a clerkship on the United States Supreme Court.

Upon her completion of her clerkship, Ketanji became an important member of our extended law clerk family. I have followed both her career and her life with interest as our relationship and our friendship has matured. She has proven to be a woman for all seasons: a fine lawyer, a loving wife and mother. She is literally a person who can do it all.

I want to congratulate you, Ketanji, today. You have worked very hard to get where you are now, but I want to warn you that the hard work is just beginning: Service as an Article III judge assures the holder of the office a privileged life, but it is a life of responsibility and one that will require your continued dedication and application of your enormous talents.

I want to say a final word to my friends and colleagues who currently sit on the

distinguished bench of the United States District Court for the District of Columbia. Yours is a court that is respected throughout the nation. It is an important component of our federal judicial system. I want to assure you, based on my firsthand experience and long observation, that Ketanji Jackson will make a strong bench even stronger. Thank you for affording me this opportunity to participate in this glorious occasion. (Applause)

CHIEF JUDGE LAMBERTH: It's now my pleasure to recognize a good friend of our court, the Honorable Patti Saris, Chief Judge of the United States District Court for the District of Massachusetts. Patti?

JUDGE SARIS: Thank you. Good evening, and greetings from Boston. Imagine Ketanji Brown Jackson as a 25 year-old, fresh out of Harvard Law School, an editor at the *Harvard Law Review*. She was full of energy and enthusiasm for the law. She had a sharp intellect and a warm, infectious smile. It was a no-brainer to hire her as a law clerk, and thus started a clerkship and a friendship for life.

As a law clerk, Ketanji loved the courtroom, the trial, and the drama of the litigation. She shone in her writing and analytic abilities. She had cases involving constitutional challenges to the sex offender registry, and a challenge under the Americans with Disabilities Act involving students with learning disabilities at Boston University. In fact, our opinion was so good that no one appealed it, and it became the landmark case for schools of higher education. She learned early on about the slippery slope of the law and binding precedent. When this young clerk had to write jury instructions for a product liability suit involving faulty ski bindings, this Florida girl was a long way from home. (Laughter)

It was an unusual office back then. I had three female law clerks, one of whom was doing a job-share because she just had her first baby. The office sizzled with intellectual debate and friendship. Of course, Ketanji was young and in love with Patrick, a doctor who sometimes came from Mass. General to come watch the trials.

After me, Ketanji clerked for Judge Selya and then Justice Breyer, as you heard. With each clerkship, I would hear back from those judges with questions -- the same question: Do you have any more clerks like Ketanji? (Laughter) Over the years, we stayed in touch. Of course, I'm a little bit of a yenta and had to give advice on having children and about the work-life balance as she worked at Goodwin Procter, Morrison & Foerster, and at the Federal Defender's Office.

But where our relationship really changed was at the United States Sentencing Commission where we morphed from that judge-clerk relationship to being colleagues. At the commission, where she was vice chair, Ketanji continued to show her meticulous attention to detail and her outstanding writing abilities, combined with -- you've heard a lot about her common sense and practical approach. She has a big-picture take on sentencing policy, which seeks to balance the policies of eliminating unwarranted disparity with the need to think in new ways about the proportionality of sentencing.

I remember so well the hearing when the commission decided to make the reduction in crack penalties retroactive in the guidelines. Ketanji's voice rang out with conviction in explaining that the decision really epitomized Martin Luther King's famous metaphor: "The arc of the moral universe is long, but it bends toward justice." I have no doubt that Judge Jackson will be the kind of judge who blends common sense and pragmatism with this overarching sense of justice.

When I hit my 15th year as a judge, she spearheaded the efforts among the law clerks to get me a Judge Saris bobblehead. (Laughter) Imagine my surprise when I walked into this party, seeing all of my former clerks with bobbleheads. So I can't wait to see Judge Jackson 15 years from now and hope to be around to celebrate her bobblehead year. (Laughter) I'm already so proud about her contribution to the judiciary, and I can only hope for her that she has relationships with her clerks that will be as wonderful as mine with her. Thank you very much.

(Applause)

CHIEF JUDGE LAMBERTH: At this time I'd like to recognize our guest of honor, Judge Jackson. (Applause)

JUDGE JACKSON: Thank you very much.

Thank you so much, Chief Judge Lamberth, judges of the District Court, and all of our distinguished guests. Thank you for being here. I have spent a fair amount of time recently reflecting on how I, of all people, ended up with this incredible honor and opportunity.

It is amazing to me, really, that I am actually standing here in this moment. It's kind of like an out-of-body experience. Most unbelievable to me is that somehow, within the last two and a half years, I went from not even being able to admit publicly that I really wanted to do this, to throwing my hat in the ring, opening myself up to public scrutiny, and actively seeking advice from anyone who had it to give about navigating the judicial nomination and confirmation process.

I was fortunate to have many friends and acquaintances to reach out to, most of whom told me essentially some variation of *Keep calm and carry on*. But there was one invaluable insight that was imparted to me early in this process. When I reached out to this person and could finally bring myself to say *I really want to do this; how should I proceed?* this judge reminded me in no uncertain terms that this type of professional success is a joint endeavor.

This judge confirmed that I am credentialed enough and accomplished enough and well-spoken enough. But if you make it through this process, she said, it won't be based on you and you alone. It takes a village to make a judge. She was right. Many of you are a part of the village that has made this judgeship possible, and in the few minutes that I have here now, I hope that I can adequately convey my sincerest thanks and appreciation to the many special people that I wish to acknowledge.

I'm going to start by thanking the President of the United States for his confidence in me

and for bestowing on me this tremendous honor.

Thank you, Congresswoman Norton, not only for your gracious words in my honor here today but also for your leadership in this community and for selecting me for recommendation to the President, with the help of your distinguished nominating commission.

Thank you as well to Tony West for slogging through the commission text, and to A.J. Kramer and Brian Matsui for your speeches here today, also for your guidance, leadership and sound advice when I worked with you in days past.

The judges who have spoken today and for whom I clerked deserve a special note of thanks, which I will turn to momentarily, but for now I want to make clear that my village of support is not of recent vintage. Indeed, its foundation was established more than 40 years ago with my parents, Johnny and Ellery Brown, who are here today, and their parents before them. I'm grateful that they understood the value of an education and, at great sacrifice, made sure that I had a good one.

In addition, my mother, my father, my aunts and uncles -- two of them are here as well -- and my beloved late grandparents prayed for me, instilling the values of faith and family, and nurtured and guided me in my youth, a time in which so many often go astray. I am eternally grateful for their encouragement which manifests itself as a consistent message that no obstacle was too great to be overcome. It is often said that success in fact depends upon a spirit of resilience and self-confidence, that little voice inside your head that says to keep working, keep trying, keep going, you'll get there. For me, that spirit was kindled at an early age by parents who believed in me, and it was an extraordinary gift, a gift that keeps on giving even here today.

That support that began with family continued with many of the educators that I was fortunate enough to have in high school and in college and in law school. Some of them have passed on: Fran Berger, Richard Marius, Phillip Areeda. But I remember so well how they,

among others, graciously provided me with unique opportunities to learn and grow. Then, when I left the security of school and ventured out into the real world of work, I could not have asked for better mentors than my judges, and they will always be my judges.

Thank you, Judge Saris not only for traveling here today to speak on my behalf but also for taking the risk of hiring me fresh out of law school back then to serve in a position on your staff, a position that I now recognize is crucial to your own success as a jurist. You have been a role model and a friend, someone I can always count on to give me an honest assessment and your best advice. I've learned so much from you about how to balance work and family, about how to be a decisive judge, and most important, about how to be a good and well-respected person.

As a law clerk for Judge Selya, who you saw and who graciously agreed to provide his reflections by video, I learned, above all, the importance of language and thought and precision in tho endeavors. I have never seen such fastidiousness employed when writing an opinion. Every word mattered, and he left no stone unturned, although for those of you who have read his opinions, he does leave quite a few words undefined. (Laughter) I am so grateful for the training that Judge Selya provided, and I can only hope to come close to his level of care that he demonstrates not only with respect to his written opinions but also in regard to his clerks.

While I'm speaking of clerks, my new law clerks are already owed a debt of gratitude for putting up with my shaky, not so Selya-like attempts at running a chambers and making decisions. So thank you, guys.

Turning to Justice Breyer, my justice. I am truly honored that he made the effort to be here today at what is undoubtedly a busy and difficult time for him in many respects. We've kept in touch over the years since I clerked for him, and there really are no words to express how grateful I am to have had the opportunity to get to know him, to be able to marvel at how his mind works, and to be a part of the small group of lawyers who have had the

privilege of learning about the law directly from one of our country's greatest legal minds.

I'm privileged to know so many other great people who have become a part of my village over the years. Many of my close personal friends and current and former colleagues are here today. I won't mention you all by name, but you know who you are: folks who grew up with me in Miami, especially Miami Palmetto debaters; my college and law school roommates who I think of as my sisters; federal defenders who gave me my own cases and taught me how to be a lawyer; the commissioners and staff of the United States Sentencing Commission, which for those of you who are not familiar with that institution, is an extraordinary agency filled with extraordinary people; and the many people I worked with and reviewed documents with and billed time with at the various law firms that were generous enough to hire me over the years.

I have indeed had the great fortune of being counted a member of a number of tribes since law school, and I must say that I am very much looking forward to settling down and settling in to this new one, the judges of the United States District Court for the District of Columbia.

Thank you, Chief Judge Lamberth and the judges of the District Court and the judges of the Court of Appeals. You have all been tremendously helpful, warm, and welcoming. I already look forward to our lunches, and I am comforted by the knowledge that if I face a thorny legal or procedural issue, help is but a phone call away.

Finally, when I think about the village that contributed to the making of this judge, the members of my immediate family play a central role. I've already spoken of my parents, without whom I would literally not be here today. (Laughter) I also have a younger brother who tolerated his bossy big sister and never once told me to leave him alone. He's a former police officer and a current military officer, and in addition to expressing my pride, I want to thank him for being a model of service and duty.

I also have a fantastic mother-in-law and father-in-law who danced at my wedding and

have embraced me like a daughter from day one. For that I'm grateful. And to my brothers-in-law and my sisters-in-law, thank you for being constant cheerleaders through every step of this journey.

Now a word to my sweet daughters, who are on the verge of tweendom but are still too young to complain about handing out programs and holding their mother's robe at her boring ceremony. I sincerely hope that you will look back on this occasion with pride and wonder. If there are lessons to be learned from my experience, I hope you will learn them well, that you will work hard, be kind, have faith, and remember that all things are possible.

I have, of course, saved the best for last. Those who know me know that as driven as I am and as focused as I am and as accomplished as I may be, none of this would have been possible without the love and support of my husband of nearly 17 years, Dr. Patrick Jackson. Indeed, if I wasn't in this marriage, living this life, I'm not sure I would have believed that a human being could be so giving, so selfless, so intent on doing everything he possibly can to make this world a better place for those around him and especially for me.

Patrick, thank you for being my best friend and my biggest fan, for being reasonable and compassionate and hard-working and decent. (Pause) Okay, we need a moment.

(Laughter)

For always believing in me and for never failing to be that external voice of encouragement, the voice that says over and over again, *keep working, keep trying, keep going, you'll get there*. We've come a long way, and I look forward to facing the years to come together.

So that's it. I am thankful to each and every one of you for your time and effort in being here today. I'm humbled by this opportunity and hopeful that so many people expressing such confidence in my abilities can't all be wrong. (Laughter) As to how I plan to tackle this new challenge, I can only promise this: that I will always remember that to whom much is given,

much is expected, and that I will work hard every day to safeguard the trust that you all, my village, have placed in me. Thank you. (Applause)

CHIEF JUDGE LAMBERTH: Judge Jackson, on behalf of the United States District Court for the District of Columbia, it's my great pleasure to welcome you to our bench. You've just become a judge on one of the most important courts in the United States. The Court is proud and delighted to have you as its newest member, and we look forward to working with you in the coming years. Again, we extend our sincerest congratulations to you and your family. We already know from the judges' lunch room that we're going to have many good times with you; we can already tell.

You know, the lawyers go down to the cafeteria and have lunch, but the judges go to the judges' dining room. We figure y'all all talk about the judges, so we can talk about the lawyers. (Laughter) We do have a good time at lunch, and we can already tell Judge Jackson is going to be a livewire in the lunch room. So we're already looking forward to many lunches over many years with Judge Jackson as our new colleague.

Ladies and gentlemen, at the conclusion of this ceremony, there will be a reception in the atrium in honor of Judge Jackson. All of you are welcome to join Judge Jackson, her family and her friends, on this joyous occasion. Before we adjourn, I'll ask the audience to refrain from entering the well of the court until the judges have an opportunity to come down and greet and offer their congratulations to Judge Jackson and her family.

With respect to everyone else, I ask you to adjourn to the atrium so that Judge Jackson can meet her guests in the atrium at the reception. I do want to thank all of you for joining us here today. It's a great day for our court. And thank you, Congresswoman Norton, for getting us to full strength for the first time in many years.

Marshal, you may adjourn the court.

(Proceedings adjourned at 5:31 p.m.)

Bryan A. Wayne, RPR, CRR
Official Court Reporter
U.S. District Court, District of Columbia

ABA Fifth Annual Fall Institute:

Sentencing – Reentry – Juvenile Justice – Legal Education

Update on Federal Sentencing Law & Policy Panel

Thank you. As many of you know, the U. S. Commission is an agency of the Judicial Branch that has many statutory responsibilities, including reviewing and updating the Guidelines, collecting and analyzing federal sentencing data, issuing reports, and advising Congress on federal sentencing matters. There are quite a few people on this panel with interesting things to say and not much time, and much of what I have to offer is technical (and tedious), so I will try to keep my remarks about the Commission's activities relatively brief.

My update for these purposes focuses on three areas in which there has been recent Commission activity:

1. The 2012 Guideline amendments;

2. The Commission's upcoming reports, one on the impact of the Supreme Court's *Booker* decision on federal sentencing law, and another on child pornography offenses; and

3. The Commission's other priorities for the upcoming amendment cycle.

2012 GUIDELINE AMENDMENTS

In April, the Commission promulgated proposed amendments to the federal sentencing guidelines addressing several areas. These amendments have a designated effective date of November 1, 2012, unless Congress affirmatively acts to modify or disapprove them. We don't have time to go through all of the promulgated amendments, but I want to take a few minutes to highlight three of the proposed 2012 amendments: the amendments related to fraud, human rights offenses, and drug offenses

I. Fraud

First, the Commission promulgated a multi-part amendment to the Guideline that governs fraud offenses (§2B1.1). The amendment responded to two directives to the Commission from Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act, and it relates only to certain fraud offenses, ~~including~~ **securities fraud, mortgage fraud, insider trading, and financial institution fraud**.

1. Securities Fraud

   A. New Loss Rule (§2B1.1, app. Note 3(f)(ix))

   In the context of securities fraud, the amendment creates a new rule for the determination of "loss" in offenses involving fraudulent inflation or deflation in the value of securities.

   a. The Commission was aware that determinations of loss in cases involving securities fraud can be complex and that a variety of inconsistent methods were being used by courts to make loss determinations in these types of cases.

b. The amendment amends the application notes to 2B1.1 to provide a special rule that establishes a rebuttable presumption that the "modified rescissory method" of loss calculation should be used to determine the loss.

Under the modified rescissory method as set forth in the rule, loss is determined by

a. calculating the difference between (a) the average price of the security during the period that the fraud occurred, and (b) the average price of the security during the 90-day period after the fraud was disclosed to the market, and then
b. multiplying that difference in average price by the number of shares outstanding

c. This new special rule is intended to provide courts with a workable and consistent formula for making the "reasonable estimate of the loss" that the guidelines require. And because the amount of loss calculated pursuant to the new rule may be *rebutted*, ~~it~~ the rule also provides sufficient flexibility for a court to consider the extent to which the amount determined under the special rule is appropriate in a particular case.[1]

B. Departure – Also in the context of securities fraud, the amendment adds an example to the departure provision at Section 2B1.1, Application Note 19(C).

[1] One instance in which the loss amount calculated using the modified rescissory method could be inappropriately overstated is where it includes significant changes in value not resulting from the offense—e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events.

a. That application note states generally that there may be cases in which the offense level determined under 2B1.1 "substantially overstates the seriousness of the offense."

b. The proposed amendment provides as an example the situation in which "a securities fraud involves a fraudulent statement made publicly to the market" that results in a substantial aggregate loss amount but only because relatively small losses are suffered by a relatively large number of victims. The proposed departure language states that, "in such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense."

2. Mortgage Fraud (§2B1.1):

As it relates to mortgage fraud, the proposed amendment amends the credits against loss rule in Application Note 3(E) of the commentary to §2B1.1.

a. Under the credits against loss rule in the mortgage fraud context, the loss amount is reduced by the fair market value of the property returned to the victim. But in a case in which the property has not been disposed of by the time of sentencing, its fair market value can be very difficult to assess and can require frequent updating even after it has been determined.

b. To avoid these difficulties, the new Application Note 3(E)(iii) creates a rebuttable presumption that in a mortgage fraud case in which the property has not been disposed of at the time of sentencing, the most recent tax assessment on the date of conviction or guilty plea is the fair market value.

c. Significantly, this presumption is rebuttable. And the note also makes clear that, in determining whether the tax assessment is a reasonable estimate of the fair market value, the court may consider factors such as the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

3. Insider Trading (§2B1.4):

The 2012 amendments also include two changes to the Insider Trading guideline. (2B1.4)

a. First, there is a new specific offense characteristic in 2B1.4 that sets a minimum offense level 14 if the offense involved "an organized scheme to engage in insider trading."

i. The guideline provides several factors that the court may consider in determining whether this minimum offense level applies, including the number of transactions, the number of securities involved, the duration of the offense, and the extent of the defendant's concealment efforts.

b. The amendment also amends the commentary in the insider trading guideline to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases.

i. The commentary now clarifies that the §3B1.3 enhancement should be applied if the defendant was employed in a position that involved regular participation in securities trading, and used that position to facilitate significantly the commission or concealment of the offense.

4. Financial Institution Fraud

Finally, with respect to financial institution fraud, there are amendments that are intended to assist the court in evaluating the extent to which the offense caused significant risks to the safety and soundness of a financial institution. The new language generally establishes that:

a. In a situation in which the offense seriously threatened the soundness of a financial institution, and thus would be eligible for the 4-level enhancement at 2B1.1(b)(15)(B), but the risk did not materialize because of federal intervention (such as a bailout), the enhancement may nevertheless still apply, and

b. The proposed amendment also adds upward departure language to account for a situation in which the offense caused a "risk of a significant disruption of a national financial market."

II. Human rights

In the area of human rights, the Commission conducted a multi-year study of federal human rights offenses and promulgated a two-part amendment to the federal sentencing guidelines.

1. First, the amendment addresses defendants who are convicted of a violating a federal statute that prohibits substantive human rights crimes, including genocide, torture, war crimes, and the use or recruitment of child soldiers.

a. Because the Commission's review demonstrated that serious human rights offenses can be committed in a wide variety of ways (e.g., through murder, assault, or kidnapping), the Commission promulgated a new Chapter Three adjustment that applies to substantive human rights violators after the

court calculates the applicable offense level for the underlying conduct under Chapter 2.

b. The new Chapter Three ~~enhancement~~ adjustment provides two tiers of ~~adjustments~~ enhancements, corresponding to the differing statutory maxima that apply to human rights offenses:

   i. The adjustment generally provides a 4-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted.

   ii. But if the defendant was convicted of the offense of inciting genocide, which has a lower statutory maximum, the adjustment provides a 2-level increase rather than the 4 levels applicable to other offenses covered by this enhancement.

2. The second aspect of the new proposed human rights amendment addresses defendants who are convicted of immigration or naturalization fraud in an attempt to conceal involvement, or possible involvement, in a human rights offense.

   a. The amendment adds a new specific offense characteristic to §2L2.2 at subsection (b)(4), and that new specific offense characteristic contains two subparagraphs.

      i. Subparagraph (A) provides a 2-level increase and a minimum offense level of 13 if the defendant committed immigration fraud to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense.

      ii. If, however, the defendant committed immigration fraud to conceal the defendant's *participation* in a

serious human rights offense, subparagraph (B) applies, and provides a 6-level increase if the offense was incitement to genocide, or a 10-level increase and minimum offense level of 25 if the offense was any other serious human rights offense.

III. Drugs

Finally, the Commission promulgated two amendments related to drug offenses.

1. BZP: First, the Commission promulgated an amendment to the federal sentencing guidelines to address concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving the drug BZP.

    a. BZP is a Schedule I stimulant that is used both alone and in combination with other chemicals to produce effects that mimic those of the drug "Ecstasy."

    b. The proposed amendment adds BZP to the list of chemicals covered by the federal sentencing guidelines by establishing a marijuana equivalency for BZP offenses in the Drug Equivalency Table provided in Application Note 10(D) of §2D1.1.

        i. The amendment establishes that 1 gram of BZP = 100 grams of marijuana.

    c. The Commission made this determination after a hearing and it is consistent with available scientific literature.

2. Safety Valve: The Commission also promulgated an amendment to §2D1.11 – the guideline that applies to the unlawful distribution of drug-precursor chemicals.

    a. The amendment incorporates the established "safety valve" criteria in Chapter 5 of the guidelines, which currently reduce penalties under the guidelines for certain low-level, non-violent offenders convicted of drug offenses sentenced under 2D1.1

    * * *

So I will leave you with that as a brief summary of three of the proposed amendments that the Commission enacted this year. There are several others – a complete listing of the 2012 Amendments is available on the Commission's website!

UPCOMING REPORTS

The Commission anticipates issuing two major reports in the next few months. Both of these reports rely heavily on the Commission's data-gathering functions, so just as background for those of you who are not familiar with the agency, the Commission collects detailed information about each of the 80,000-plus cases in which defendants are sentenced in federal court every year. One of our upcoming reports synthesizes the data and provides information about the manner in which *United States v. Booker* and subsequent Supreme Court cases—which have rendered the guidelines effectively advisory rather than mandatory—have affected federal sentencing practices. The other report relies on the data to explain the state of federal sentencing in regard to child pornography offenses.

➢ Booker Report

- It has been nearly eight years since the Supreme Court issued the *Booker* decision (in 2005) and it is important to review the system again now because we now have a wealth of information about the operation of the system since the guidelines became advisory and also the Supreme Court has decided *seven* additional cases that impact the operation of advisory guidelines since our first *Booker* report (in 2006).

- In preparing this upcoming *Booker* report, the Commission is reviewing case law, analyzing sentencing data and studying scholarly literature. The Commission has sought the views of stakeholders in the federal criminal justice system in a variety of ways, including:

  - Conducting seven regional public hearings;
  - Holding an additional hearing on post-*Booker* sentencing in February of this year;
  - Formally surveying federal district judges;
  - Consulting with its advisory groups and representatives from all three branches of government.

hearings, surveys, and consultation

- The upcoming report will compare data across four distinct time periods, marked by significant developments in federal sentencing law—~~the Supreme Court's decision in *Koon*, the enactment of the PROTECT Act, the Supreme Court's decision in *Booker*, and the Supreme Court's decision in *Gall*.~~

- It will also analyze the data that the Commission has collected with respect to the sentencing of cases falling into five major offense categories: immigration, drug trafficking, fraud, firearms, and child pornography.

- Significantly, the report will include district-level analysis, which was not included in the Commission's 2006 *Booker*

report. The report will also include multivariate analyses to examine whether differences in the length of sentences imposed on offenders are correlated with demographic characteristics of those offenders.

- O~~ther aspects of the report~~t include: data and case law specific to appellate review; a discussion of the viewpoints of the various stakeholders in the criminal justice system who have testified before the Commission, written opinions, or made statements regarding the current state of federal sentencing; and a ~~recounting~~ reporting of the recommendations to Congress that the Commission's chair laid out in testimony to Congress earlier this year.

As I said, this is intended to be a comprehensive analysis — there will be much in there,

➢ **Child Pornography Report**

The Commission is also working on a report on child pornography offenses, one area that has a very high variance rate. (The data indicate that in fiscal year 2011 the departure/variance rate for child pornography offenses was **44.9 percent**.)

- Child pornography offenses, some of which have lengthy mandatory minimum penalties, are of great interest to the criminal justice community right now.
- In our January 2010 survey of federal judges, about 70 percent of judges responding felt that the guideline range for

possession of child pornography was too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high.

- The report studies the offenders, the conduct involved in the offenses, the role of technology in these cases, and victims of these crimes.

PRIORITIES

In closing, I wanted to point out that the Commission has published specific priorities for this coming amendment cycle. I have already discussed the two reports. The other priorities include:

Mandatory Minimums: In 2011, the Commission issued a report to Congress regarding the operation of mandatory minimums in the current system, and the Commission intends to continue to work with Congress and other interested parties on the issues raised in that report.

Economic Crime & Fraud Guideline: The Commission is in the midst of a multi-year study of the operation of the guidelines that cover fraud and other economic crimes, and plans to continue this study, including examination of the loss table and the definition of loss used in these guidelines.

Categorization of Prior Offenses for Career Offender/ACCA purposes ("Categorical Approach"): The Commission is also in the midst of a multi-year study of the problems that have arisen in regard to categorizing prior offenses for the purpose of establishing career offender status (*i.e.*, identifying crimes of violence and the use of the categorical approach).

Recidivism: The Commission is beginning a multi-year, comprehensive study of recidivism, including examination of circumstances that correlate with increased or reduced recidivism,

possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

Also listed: circuit conflicts; implementing crime legislation; responding to *Setser*; other application issues.

* * *

White Collar Crime Prof Blog

This panel was moderated by James Felman (Kynes, Markman & Felman, P.A.). The opening panelist, Hon. Ketanji Brown Jackson, Vice-Chair, U.S. Sentencing Commission, spoke about the 2012 Guideline Amendments which go into effect soon if Congress does not modify the changes. Some of these changes are in the white collar crime arena. Specifically, there are modifications to certain frauds – insider trading, mortgage fraud, securities fraud, and financial institution fraud. Many of these changes regard the determinations of loss. In some instances the commission changed the application notes.The speaker also noted that the Sentencing Commission is in a multi-year study of economic crimes. (proposed amendments can be found here)

Providing a congressional perspective was Bobby Vassar (Chief Minority Counsel, Subcommittee Crime, Terrorism, and Homeland Security, U.S. House of Representatives) who reminded us that no one gets defeated in an election by being tough on crime. Providing an executive perspective was Michael Rotker, Criminal Appellate Division, U.S. Department of Justice. From the defense side was Amy Baron Evans, Federal Defenders Sentencing Resource Counsel.

Two individuals provided international perspectives: Clarisse Moreno (Kynes, Markman & Felman, P.A.) and Stephan Terblanche (University of South Africa, Pretoria, South Africa). Ms Moreno noted that in France if you get two years or less, very rarely will you serve prison time. Absent it being a human rights violation, in Norway the maximum penalty is 21 years. Ms. Moreno also noted that the recidivism rate is low in Norway. Stephan Terblanche noted that where movies and other items from the U.S. are looked at elsewhere, the sentencing guidelines do not export very well. Having the international perspective offered by these speakers was particularly fascinating and offered a welcomed dimension to this sentencing discussion.

(esp)

https://lawprofessors.typepad.com/whitecollarcrime_blog/2012/10/aba-fall-institute-sentencing-panel.html

Healthcare Best Compliance Practices Forum

Alexandria, VA, October 23, 2012

"Carrot & Stick Philosophy": The History of the Organizational Sentencing Guidelines

Good morning. I am delighted to have been invited back to this year's Best Compliance Practices Forum. When I spoke with you all last year, I talked generally about the United States Sentencing Commission (my agency), about the Federal Sentencing Guidelines for Organizations, and about the compliance program standards that are established in Chapter 8 of the Federal Sentencing Guidelines Manual.

This morning, I thought you might be interested in getting more detailed information about *how* the compliance program standards that you are so familiar with came into being – that is, I am going to speak about the *historical development* of the organizational guidelines and their philosophical underpinnings. Now, this is actually a really good time to look back at the creation and evolution of the organizational guidelines because last year the Federal Sentencing Guidelines for Organizations celebrated their twentieth anniversary. And while I ordinarily don't dwell on timeframes, I recently (and reluctantly) acknowledged a twentieth anniversary of my own – a college reunion – so I can say with certainty that twenty years is a *long* time! The organizational sentencing guidelines have, indeed, reached a milestone, and I am happy to have this opportunity to be here with you—compliance professionals—to discuss how organizational sentencing

policy has developed and why it includes the promotion of effective compliance and ethics programs. This history is important not only because it informs the creation of effective compliance programs today, but also because it provides a good foundation for the consideration of future changes to Chapter 8 of the Guidelines Manual.

So, let's begin at the beginning . . . what *is* this agency called the United States Sentencing Commission, some of you may ask, and *why* did it develop sentencing guidelines for organizations?

I. The USSC & the Need for Organizational Guidelines

The United States Sentencing Commission is a bipartisan, independent agency within the Judicial Branch of the federal government. Congress created the Commission in the Sentencing Reform Act of 1984, and the agency consists of seven voting commissioners who are nominated by the President, confirmed by the Senate, and supported by a staff of experts in various aspects of federal sentencing policy. As a general matter, the Commission was created to address concerns about inequitable sentencing practices in the federal courts, and, to that end, the Commission's primary statutory responsibility is to develop guidelines that federal judges use to impose similar sentences on defendants who commit similar crimes.

Now, as it turned out, the original Sentencing commissioners (the ones who were first appointed when the Commission was created in the mid-1980s) produced *two* sets of sentencing guidelines—one that applies to *individual* criminal defendants, and another that applies to all types of defendant *organizations*, including corporations, partnerships, trusts, unions, funds, non-profits, and governmental entities. The Commission worked from its creation in 1984 until 1987 to produce the guidelines that apply to individuals, and it took an additional *four years* to develop the guidelines that apply to organizations. Ultimately, in the fall of 1991—nearly twenty-one years ago—the Federal Sentencing Guidelines for Organizations were born.

Now, before I go any further, it is important to understand *why* it was so crucial to have sentencing guidelines that focused on organizations. The first reason is a *legal* one: as a matter of law, a corporation can be held criminally liable for the illegal conduct of its employees if those agents commit crimes within the scope of their employment and if they intend for their illegal activity to benefit the organization. The organization doesn't even have to *know* about the criminal activity, much less bless it; and indeed, the company can be held criminally responsible even if the employee acted without authorization or in defiance of the company's express policies and procedures. Of course, organizations can have different levels of knowledge and complicity, and one significant benefit of sentencing guidelines is that they help federal judges distinguish between different levels of culpability among legally responsible organizations.

The second reason why organizational guidelines were an important endeavor is rooted in fact. The fact is that lawlessness and unethical behavior within corporations was a serious problem before the 1990s era of sentencing reform. In many industries—including healthcare—fraud, misrepresentation, kickbacks, conspiracies, and the presentation of false claims were not uncommon, and the federal enforcement and penalty scheme was simply insufficient to address this criminal behavior. Fines were relatively low and were not imposed consistently on all of the organizations that deserved them. Indeed, so many companies got such minor sanctions, that it often made more sense for a company just to pay the criminal penalty – as "the cost of

doing business" – than to make the investments necessary to prevent their employees from engaging in illegal behavior in the first place. In addition, there really was no incentive for companies to cooperate with government investigators who suspected criminal wrongdoing. So when government agents came around asking questions, a rational company was often much better off by just 'circling the wagons' and refusing to play ball. Congress made clear in the Sentencing Reform Act that there should be sentencing guidelines directed at organizations, and that a stiff fine or a term of corporate probation (or both) were important in order to address the dual difficulty of serious crimes that were being committed for the benefit of organizations, and companies that weren't being at all helpful in dealing with it.

Okay, so we know that the Commission created the organizational guidelines to respond to these types of problems. Let's drill down and look specifically at the historical development of the policies that underlie the organizational guidelines. The remainder of my presentation will focus on the original Commission's process for developing the organizational guidelines, the "first principles" that the organizational guidelines are based upon (which are clearly reflected in the well-known seven elements of effective compliance and ethics programs), and the two sets of amendments that have been made to the organizational guidelines since their creation in 1991.

II. The First Commission's Process for Developing Organizational Sentencing Policy

With respect to the process that the original Commission undertook, you can imagine that devising a set of rules for a previously unregulated activity – in this case, federal criminal sentencing – is no small task. As I mentioned, the first Commission thought it best to prioritize, and it primarily addressed itself to developing guidelines for individual defendants *first*, before it turned to the policy that would govern the sentencing of organizations. But even in the early days, the Commission understood that part of its statutory mandate was to develop guidelines for sanctioning organizations, and it did a fair amount of work to lay the foundation for its future consideration of appropriate organizational sanctions.

To begin with, within a year after the appointment of the first members of the Commission, the agency held a public hearing devoted exclusively to consideration of organizational sanctions. Witnesses included representatives from the Department of Justice and the American Bar Association, as well as corporate defense attorneys specializing in tax and antitrust offenses.

The Commission also set out to conduct extensive empirical research on the sentencing of organizations. For example, it collected detailed information regarding nearly 2,000 cases involving organizational defendants, and looked at more than 80 relevant

variables in those cases, including the types of offenses and offenders prosecuted in federal courts; the sentences imposed; and the factors that had influenced the court to reach the fine level it imposed.

The Commission also formed various advisory and working groups to assist in the development of the guidelines. There was an attorney working group that met regularly and ultimately submitted written recommendations regarding criminal penalties for organizations. There was an advisory group comprised of federal judges that reviewed and commented on draft proposals. And the overall workability of the proposed organizational guideline scheme was evaluated by a large and diverse group of federal probation officers (who are the judicial agents tasked with gathering facts and making sentencing recommendations to federal judges). And the Commission did not simply and solely rely on the recommendations of the working groups that it had formed; it also solicited views on punishing and preventing organizational offenses from various federal agencies with expertise in this area, including DOJ, Health and Human Services, the Environmental Protection Agency, and the Federal Trade Commission, just to name a few.

Now, it is important to note that, throughout the five-year data and information gathering process, the Commission also actively sought public input regarding the development of sanctions for organizations. Every report and draft proposal was published for public comment, and the Commission held public hearings not only initially but also following the publication of each of three major sets of draft guidelines. I am sure that it comes as no surprise that the business community was among the

interested members of the public who made its feelings known early on, when it urged the Commission *not* create binding rules for sanctioning organizations. Business representatives recommended that the Commission focus only on sanctions for individuals defendants and that it keep out of the highly complex legal arena that is organizational liability. As a fallback, the business community registered its strong preference that the Commission issue general, non-binding policy statements about organizational punishment, rather than guidelines that judges would be required to follow when determining the sentence for organizations convicted of federal crimes. But at the end of the day, Congress had made its intention that the Commission issue binding rules governing the sanctions to be imposed for corporate criminality very clear, and the Commission rose to the challenge in November of 1991.

Which brings me to "first principles" – that is, with all of the public input and research and information-gathering that was done, what did the Commission *learn* about how organizational offenses should be sanctioned?

III. First Principles

A review of the guideline development history reveals several overarching themes—

The Commission learned, first of all, that it had to find a way to **reconcile society's interests in retribution** (also known as "just deserts"), on the one hand, a**nd the need for deterrence** (or preventing future crimes), on the other. These are two competing theories of punishment, both of which could be applicable to organizational penalties, and in early drafts of the proposed sanctions, the Commission laid out two completely different approaches based on these different philosophies. The just deserts approach emphasized an organization's culpability (or blameworthiness) , which the Commission thought could be measured by factors such as whether the crime resulted from a conscious plan of top management or by the independent actions of lower echelon employees and whether the organization took steps to discipline responsible employees prior to indictment. The deterrence approach, by contrast, focused on the harmfulness of the criminal conduct and whether the organization had taken steps to detect or prevent the crime. Taken to their logical conclusions, and without reconciliation, the two theories of punishment could lead to two different results regarding the appropriate penalty for an organization that had been convicted of a federal crime.

The Commission's research also revealed that, unlike the guidelines geared toward individual defendants, the guidelines for

organizations needed to promote the establishment of crime control mechanisms *within* the organization itself. In other words, due to the unique nature of organizational crime (which involves a principal-agent relationship) *internal* organizational controls were going to be key! Witnesses at Commission hearings repeatedly testified about the importance of internal corporate monitoring as a means of deterring organizational crime, and the flipside was also referenced, as witnesses discussed the significance of "tone from the top" and observed that criminal misconduct often manifested itself in organizations where the upper management had created an atmosphere encouraging that type of behavior. Indeed, one important takeaway from much the Commission's early research was that a corporation itself is in the best position to police the activities of its employees and that it can effectively deter criminal conduct by establishing an environment that demands legality rather than one in which employees are encouraged to engage in criminal behavior that benefits the organization.

Now, this realization—that the organization's own efforts are the key to preventing corporate crime—was crucial but not inevitable. That is, despite the near consensus that an organization can effectively prevent employee misconduct (and certainly more so than external law enforcement), witnesses and commentators also agreed that a rational organization would not necessarily undertake to put prevention mechanisms into place unless incentives to do so were somehow built into the sentencing system. And this is where the philosophy of

punishment began to coalesce around the role that compliance programs could play in organizational sentencing.

Now, before I explain this interaction, it is important to note that the general idea of compliance programs long preceded the sentencing guidelines, but had previously been applied only in the context of companies on probation. So, for example, when an organization found itself in court facing criminal liability, courts often considered whether to place the company on probation for a period of time, and as part of the probation requirement, mandate that the organization put in place a program that could minimize the prospect of repeating the same or similar criminal behavior. It was only after the Commission began working on the organizational guidelines that the concept of compliance programs shifted from being solely a condition of probation for organizations that were already in trouble to a mechanism for all organizations to implement as a means of preventing corporate malfeasance in the first place. Compliance programs were generally viewed as a good preventative measure for smart companies, even those that had managed to avoid criminal mischief in the past, but the question remained—could a sentencing system be constructed to encourage companies to make the necessary investments in such programs?

At the Commission's second hearing on the organizational guidelines, in October of 1988, several witnesses provided an answer: Yes. Under the new guideline scheme, the sentences imposed on organizations could take into account the extent to which a corporation

through its internal governance processes had taken on the responsibility at the highest level to forestall criminal activity. In other words, ©**compliance programs could, and should, be a *mitigating* factor during consideration of punishment**. This view was nearly unanimous. Many commentators maintained that treating compliance as a mitigator would provide an incentive for organizations to adopt compliance programs and would encourage the creation of a value system within a corporation that says it is more important to stop criminal activity than it is to maximize profits. Others suggested that the guidelines provide for *substantial* mitigation – perhaps even total amelioration of any fine – for an organization that maintained effective policies and practices reasonably designed to prevent crime (assuming, of course, the illegal conduct was unknown, and reasonably unknowable, by high-level management). The commissioners' comments and follow up questions indicated considerable interest in this idea, so it is not at all surprising that the final guideline was constructed to permit a significant reduction in the applicable fine amount for organizations that had put in place effective programs to prevent and detect violations of the law.

Going back to "first principles"—in the end, and speaking generally now, the early Commission learned that it needed to develop a guideline scheme for sanctioning organizations that accomplished more than one goal: to punish organizational defendants more severely and uniformly but also to encourage business practices that prevented and deterred corporate criminal activity. The final product was a guideline system that simultaneously serves as both a front-end and a back-end

mechanism for dealing with criminal behavior. On the front-end, the guidelines encourage companies to police themselves; that is, to establish their own internal systems for preventing and detecting criminal or unethical activity within the organization. On the back-end, the guidelines provide for serious financial penalties if an organization is convicted of criminal conduct, but they also provide *mitigating* credits—leniency, if you will—for convicted organizations that have in place the kinds of front-end systems that the guidelines encourage. Commentators often characterize rules that involve such a combination of penalties and incentives as a "carrot-and-stick" approach, and when I was thinking about this while preparing a speech I gave earlier this year, it occurred to me that this way of handling misconduct is really not unlike the manner in which authorities approach human behavior in *other* aspects of life.

Let me give you an example . . . Like many of you, I am a parent. And when my children were young, I really wanted to be the best parent I could be. So I read all of the books, and I took all of the parenting courses, and I learned *a lot*. One thing I learned is that "to discipline" actually means "to teach," and that, at least in the view of some parenting experts, parents should strive to establish rules that incentivize children to make good choices *themselves* rather than rely on structures designed solely to penalize children harshly after they have misbehaved. Okay, sure, you can teach a child a lesson by abruptly sending him to his room with no dinner, but some say that *real* learning only happens when the expectations are clear, and the logical

consequences of misbehavior are spelled out in advance so as to encourage the child to take it upon himself to alter his conduct where appropriate. A quote by German physicist and author Johann Wolfgang von Goethe puts it this way: "Correction does much, but *encouragement* does more."

That same principle is applied in the organizational guidelines in order to promote *corporate* "discipline." The sentencing guidelines were designed to make clear that corporations face severe financial penalties for the criminal wrongdoing of their employees. But organizations don't have to be mere passive recipients of the severe financial penalties that the guidelines prescribe. Rather, under the guideline scheme, smart companies can act affirmatively to mitigate potential punishment by taking concrete steps to prevent, detect, and remedy illegal and unethical conduct—which, by the way, also amply demonstrates the company's own antipathy toward lawbreaking. The fines that are calculated under the guidelines can be *substantial* when imposed on convicted companies in heavily-regulated industries such as healthcare, so the early Commission understood that the ability to mitigate the potential punishment would give many organizations all the incentive they need to invest in systems that promote legal and ethical behavior on the part of their employees.

Okay, so we have touched upon the early Commission's reasons for structuring the Chapter 8 organizational sentencing guideline system as it did—to encourage organizations to invest in self-policing by

implementing compliance programs. But no discussion of the historical development of the guidelines would be complete without examining the principles that gave rise to the well-known seven elements of an effective compliance and ethics program. Put another way, we now know why the Commission thought it important to encourage effective compliance programs and also how it went about doing so (by giving mitigating credit to organizations that had such programs). But what about the specifications for such programs? How did the early Commission address the question of what criteria organizations had to meet in order to get that mitigating credit?

IV. Effective Compliance and Ethics Programs

The historical record reveals that once the Commission recognized the potential of compliance programs as a component of the organizational sentencing structure, the agency began to consider information about what such programs should contain. At the 1988 hearing, one witness offered a framework for analyzing the key objectives and elements of an effective compliance program, which to his mind included regular and timely reporting about the operation of the program from the operating line through senior management and on to the board of directors; prompt identification and resolution of issues; establishment of preventive programs and procedures; and identification of developing issues or trends. In subsequent public forums, other witnesses, too, touched upon various elements that they thought should be included in a successful compliance program, such as an audit function, an ombudsman or other system to protect employees who report corporation wrongdoing, and support of upper management and managers to monitor and execute the program.

Significantly, though, the Commission's own initial drafts of the organizational guidelines refrained from spelling out the specific types of compliance policies or procedures that would qualify for the proposed fine reduction. The Commission's hesitancy to dictate the specific terms that compliance programs must meet in order to be deemed effective was clear, and this reluctance made sense, given that the organizational guidelines were intended to apply to a variety of organizations—

organizations that would need flexibility to tailor their compliance programs to fit the industry and the size of the institution. As time passed and drafts were subjected to further scrutiny, the Commission yielded a bit, adding language that defined a compliance program as "a program that has been reasonably designed, implemented, and enforced so that it will generally be effective in preventing and detecting criminal conduct," and also stating that "[t]he hallmark of [such a program] is that the organization exercised, prior to the offense, and continues to exercise due diligence in seeking to prevent and detect criminal conduct by its agents." What the Commission developed at the end of the day, however, was less a recipe for an effective compliance program and more of a roadmap containing seven "effective program" signposts. As you well know, these benchmarks are that, at a minimum, an organization must:

(1) Establish standards and procedures to achieve and maintain compliance with the law;

(2) Ensure high-level responsibility for implementing the compliance program;

(3) Avoid delegating responsibility to known problem persons;

(4) Communicate and train all employees and agents effectively;

(5) Periodically audit the program and continually monitor employee activities, including establishing an internal reporting system, such as a hotline;

(6) Discipline violators appropriately; and

(7) Respond promptly when criminal or unethical conduct is discovered, including remedying any harm and revising the compliance program to make it more effective in the future.

In the Commission's view, each of these elements speaks directly to an organization's *culpability* in the sense that they permit an evaluation of, first, what did the organization do to prevent criminal conduct by its employees?; second, what role did high-ranking personnel within the organization play with respect to involvement in, or tolerance of, the offense?; and, third, what did the organization do after the fact to report and remedy the offense? The elements also define a model of good corporate citizenship in the larger scheme of things, because when an organization takes preventive and remedial steps such as these, it is much more likely to be able to ferret out misconduct *itself* – before the authorities come knocking – so that the behavior can be dealt with internally without outside intervention. And *this*, we know now, is the essence of deterrence and the true triumph of the federal sentencing guidelines for organizations.

To extend my parenting analogy a bit, as a young mom, I remember being told that encouraging self-policing as an aspect of discipline was difficult to accomplish but well worth the effort. I was advised to be firm and to establish rules that included clear consequences, but to also give my children the ability to have input and the freedom to disagree and to make mistakes. Doing so, I was told, would ultimately benefit us *all* because it would hasten the tricky transition from my always having to serve as an *external* source of

control over my children's behavior, to my children *themselves* becoming *internally* motivated to act appropriately.

Looking back over these past twenty years, it is clear that the tricky transition from a world in which corporate criminality was mainly the concern of government authorities to a world in which companies *themselves* engage in internal, self-initiated campaigns to root out unlawful and unethical behavior is well underway. Today, in accordance with the federal sentencing guidelines, companies routinely set high ethical standards, review their own practices and cultures, and make the investments that are necessary to promote the lawful behavior of their employees. They cooperate with government authorities when they are required to do so, and—perhaps most important to *you*—they hire compliance professionals such as yourselves, who take seriously the important work of assessing risk, training employees, conducting audits, and avoiding problems. In other words, the guidelines have ushered in an unprecedented era of compliance and ethics in the healthcare industry and elsewhere, and they are universally viewed as a model that companies use to develop effective systems of internal control that ultimately reduce crime.

And *that's* the *real* payoff: we *all* benefit, because when a company assumes responsibility for monitoring and addressing the behavior of its employees, the federal government doesn't need to do so. Corporate crime is reduced *and* scarce societal resources are saved.

V. The Org Guideline Amendments

In the time I have left, I wanted to highlight a few interesting post-scripts that one should be aware of in the history of the development of the organizational sentencing guidelines. As I mentioned, the Chapter Eight organizational sentencing guidelines were originally enacted in 1991, complete with mitigating credit for compliance programs and a general discussion of the minimal elements of an effective compliance program embedded in the application notes. Ten years later, the Commission became aware of the broad impact that the organizational guidelines have had on in influencing corporate culture quite apart from criminal sentencing, and it formed an ad hoc advisory group to review the organizational guidelines with a particular emphasis on the inclusion of ethics, as well as compliance with the law.

In April of 2004, following both a comprehensive report from the advisory group and a directive from Congress to study the operation of the organizational sentencing guidelines as part of the Sarbanes-Oxley Act of 2002, the Commission voted to revise Chapter Eight in a number of important respects. First, the Commission moved the criteria for an effective compliance program out of the endnotes and into a separate guideline—the current section 8B2.1—"[i]n order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program." As part of this restructuring, the Commission also crafted a new Chapter

Eight introduction that featured the importance of ethical behavior in addition to exercising due diligence to prevent and detect criminal conduct, and maintained that an organization must also "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."

The 2004 amendment contained other notable changes, including clarification of many of the effective compliance program elements; the imposition of significantly greater compliance responsibilities on the organization's governing authority and executive leadership; and the inclusion of a requirement that the organization "periodically assess the risk of the occurrence of criminal conduct" and target their compliance resources on "those potential criminal activities that pose the greatest threat in light of the risks identified."

Other than this 2004 refocus and restructuring, the Commission revisited the organizational guidelines and compliance program standards only one additional time in the history of Chapter Eight – two years ago, in 2010. That year, the Commission responded to public comment and Commission data, and the resulting amendment was relatively narrow in scope. In a nutshell, the 2010 amendment had three parts.

First, the Commission homed in on the seventh minimal requirement for an effective compliance program – that the organization respond appropriately to criminal conduct once it has occurred. Members of the public sought clarification regarding what steps the seventh element required, and the Commission added a new application

note to clarify that the organization need only take "reasonable steps," as warranted under the circumstances, to remedy the harm and prevent such conduct in the future, and that such steps could include providing restitution to identifiable victims, cooperating with authorities, and engaging outside professional advisors to ensure assessment and implementation of any modifications.

The second aspect of the 2010 Amendment was the Commission's decision to reconsider the automatic preclusion for compliance program credit in §8C2.5(f) when high-level personnel are involved in the criminal conduct. Commission data demonstrated that, at that point in the history of the organizational guidelines, only a handful of organizations had actually received the culpability score reduction for having an effective compliance and ethics program, and it appeared that this low rate was primarily because most organizations facing sanctions were small companies in which high-level personnel had been involved with the criminal offense (that circumstance alone triggered a bar to receiving compliance credit under the original guidelines). Because the Commission was concerned that the general prohibition against receiving credit if high-level personnel were involved was sweeping to broadly to prevent companies with otherwise effective programs from getting the mitigating credit, it created a limited exception that permitted organizations to receive compliance credit despite the involvement of high-level personnel in the offense under certain circumstances.

Third, and finally, the amendment also sought to augment and simplify the recommended conditions of probation for organizations. Moving away from a previous construct that made probation available only to enforce a monetary penalty, the Commission amended the guideline so that all conditional probation terms are available for the court's consideration in determining an appropriate sentence.

Notably—and here's the takeaway on the Amendments—the Commission was keenly aware that "even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities [of] virtually every organization"; therefore, with respect to the 2010 Amendments, the Commission actively solicited input from groups known to have an interest in Chapter Eight—including government agencies, ethics and compliance industry professionals, and non-profit research organization. And as a direct result of the Commission's effort to reach out and seek feedback from interested stakeholders before it made any guideline changes, the proposed changes to Chapter Eight received more public comment than any other proposed amendment in 2010!

And I hope that you're starting to notice a pattern . . .

VI. Conclusion

That is, the story that I have been relating to you regarding the development of the organizational guidelines over the past twenty years has been as much about the Commission's interest in, and responsiveness to, public comment as anything else! The Commission is acutely aware that Congress, government agencies, industry professionals and all sorts of people engaged in collective activity rely on the federal sentencing guidelines for organizations and the principles that they embody, and the agency takes public comment about the work that it does and the operation of the guidelines extremely seriously. The Commission's statutory mandate is not only to *create* a guideline system but to *maintain* one—and we can only do that by getting feedback from people in field. People who are charged with the responsibility of evaluating risk and developing actual effective compliance programs—people like *you*!

Going forward, I hope that we will hear from you. Armed with this new sense of the history of the sentencing guidelines and the role that they have played in the development of compliance and ethics generally, I hope that you will engage in the process of providing the Commission with feedback about your experiences with the guidelines. Please know that the Commission does listen to your comments, and we welcome them. Please look out for future guideline amendments in this area, and, regardless, please let us know how it's going. In the meantime, I wish you all the best in your work! *Thank you.*

National Sentencing Policy Institute
Memphis, Tennessee—October 2, 2012

USSC Plenary Panel: Mandatory Minimum Report

Thank you and good morning. I am going to talk *briefly* about the report that the Commission issued in October of 2011 regarding "Mandatory Minimum Penalties in the Federal Criminal Justice System." The report was prepared in response to a specific congressional directive, and the Commission spent several years studying mandatory minimum penalties and seeking the views of various stakeholders. In addition to reviewing the data, legislation, and literature, the Commission held a hearing specifically devoted to mandatory minimums; consulted with advisory groups and representatives from government, academia, and the scientific community; and conducted detailed interviews with prosecutors and defense attorneys in 13 districts throughout the country.

For the purpose of this overview, I wanted to report on

- the general content of the mandatory minimum report
- three important data points regarding mandatory minimums, and
- the overall Commission's observations and recommendations.

I. Content of the Report

With respect to content, the report provides a comprehensive overview of mandatory minimum penalties in the federal system. The final printed report and its appendices are several hundred pages long, but it does have an executive summary that distills the primary takeways. The body of the report begins with a chapter that summarizes the history of mandatory minimums, and it is interesting to note, as the report recognizes, that these types of penalties have been around

since the beginning of our Republic (many of the early man mins were in the form of mandatory death sentences), and at various points in time, Congress has earnestly enacted, and also repealed, federal statutes that contain mandatory minimum penalties.

Building on the history, the report contains chapters that seek to provide an overview of the interaction between mandatory minimum penalties and the sentencing guidelines, and that also describe more recent systemic changes related to such matters as the scope and magnitude of the federal criminal justice system, the size and composition of the federal prison population, and the number and severity of the prescribed mandatory minimum penalties for federal crimes. Of course, in light of the dramatic shifts that have occurred regarding federal sentencing, it is not surprising that differing policy views about the propriety of mandatory minimums exist, and the report also lays out the primary arguments—those in favor of, as well as those against—criminal statutes that establish mandatory minimum penalties.

The bulk of the report, though, is devoted to an analysis of data. The report looks first at the information that the Commission gleaned from an evaluation of sentencing practices in 13 selected districts. Then, the report provides statistics related to the operation of mandatory minimum penalties both in the federal criminal justice system overall and specifically in regard to each of the four major offense types in which mandatory minimums play a significant role: drug offenses, firearms offenses, child pornography offenses, aggravated identity theft.

This brings me to the second area that I wanted to discuss – the data . . .

II. Data re Mandatory Minimums

Commissioner Carr's clicker presentation has already provided you with some of the most significant data points (he has managed to steal my thunder!), but here are three big picture statistical takeaways from the report:

1. First, only about one-quarter of all federal criminal defendants are convicted of an offense that carries a mandatory minimum penalty.

    - The Commission examined **72,239 offenders** sentenced in federal court in Fiscal Year 2010,[1] and found that **19,896 offenders (27.2%)** were convicted of an offense carrying a mandatory minimum.

    So, the Commission asked, who are these offenders?

    - The vast majority of the offenders who were faced with mandatory minimums **committed drug offenses**.
        - 77.4% of the 19,896 offenders convicted of a statute carrying a mandatory minimum were convicted for drug trafficking offenses (other mandatory minimum offenses include firearms, child pornography, and aggravated identity theft).
    - These offenders were overwhelmingly male (90%) and U.S. Citizens (73.6%).
    - In addition, Hispanics comprise the largest portion of the group of offenders convicted of an offense carrying a man min (38%), while 31.5% were Black, 27.4% were White, and 2.7% were Other Race.
    - Finally, 27% of the offenders facing man min penalties came from seven districts: the Southern and Western Districts of Texas, the Southern and Middle Districts of Florida, the S.D. California, the D. Arizona, and the D. South Carolina.

[1] We had received data on 83,946 offenders in FY 2010, but 11,068 were excluded for missing data for purposes this study.

2. Second big takeaway: nearly half of those offenders who were convicted of an offense carrying a mandatory minimum penalty were ***relieved*** of the mandatory minimum because they either provided substantial assistance to the government or qualified for the safety valve, or both.

- Of the 19,000-plus offenders facing a man min, **46.7%** received relief from the mandatory penalty

- In terms of demographics, Other Race offenders received relief the most often (in 58.9% of their cases), while Black offenders received relief the least often (in 34.9% of their cases).[2]

- When we look just at the safety valve mechanism, we see that Hispanic offenders qualify for the safety valve at the highest rate, while Black offenders qualify at the lowest rate (this is likely due to either criminal history or the involvement of a dangerous weapon in connection with the offense)[3]

- We also see that drug offenders are much more likely to receive relief from a mandatory minimum than other types of offenders facing mandatory minimum penalties (which makes sense because the safety valve is only available for drug offenses).

3. Third, as a result of the mechanisms for relief from mandatory minimums, at the end of the day, only 14.5 % of all federal offenders are ultimately subject to a mandatory minimum penalty.

- Not surprisingly, male offenders remained subject to the mandatory minimum penalty at sentencing more often than female offenders (males remained subject to the man min in 55.3% of their cases, compared to 34.5% of the cases involving female offenders).

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[2] Hispanic rate: 55.7% of their cases; White rate: 46.5% of their cases.

[3] Hispanics qualify for safety valve in 42.8% of their cases

Other Races:	36.6% qualify for safety valve
White:	26.7% qualify for safety valve
Blacks:	11.1% qualify for safety valve

- And Black offenders (who as you will recall have the lowest overall rate of relief) remained subject to a mandatory minimum penalty at the highest rate of any racial group; that is, in 65.1 percent of their cases, followed by White (53.5%), Hispanic (44.3%), and Other Race (41.1%).

4. Three other noteworthy data points that I wanted to mention:

- The data demonstrates that receiving relief from a mandatory minimum sentence made a significant difference in the sentence ultimately imposed:

  - Offenders who were convicted of an offense carrying a mandatory minimum penalty and remained subject to that penalty received an average sentence of 139 months, compared to 63 months for those offenders who receive relief from a mandatory penalty.

- The data also shows that, overall, offenders who were facing a mandatory minimum penalty pled guilty at a slightly lower rate than offenders who were not charged with an offense carrying a mandatory minimum (94.1% versus 97.5%)

- Nearly 40% of the current federal prison population is comprised of offenders who remained subject to a mandatory minimum penalty and are serving mandatory minimum sentences (39.4% of the 191,757 offenders in BOP custody)

III. Conclusion and Recommendations

So, what did the Commission make of all of this information about the history and operation of mandatory minimums? Well, ultimately, there was a spectrum of views among the Commissioners about mandatory minimum penalties. But the Commissioners were able to agree that "a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act." If Congress does continue to enact mandatory minimum penalties, however, the Commissioners also agreed that such penalties (1) should not be excessively

severe, (2) should be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) should be applied consistently.

The Commission also suggested certain more specific reforms to improve the current system of mandatory minimums, including that:

- Congress should consider **expanding the offenses eligible for the safety valve** and should consider marginally expanding the safety valve to include certain non-violent offenders who receive 2 or perhaps 3 criminal history points.

- Congress should **request prison impact analyses** from the Commission as early as possible in its legislative process whenever it considers enacting or amending mandatory minimum penalties.

    - The Commission believes that early analyses of prison impact may assist Congress in focusing increasingly strained federal prison resources on offenders who commit the most serious offenses.

- Congress should **reassess both the severity and scope of the recidivist provisions** at 21 U.S.C. 841 and 960 (§ 851 is the mechanism).

    - Sentencing data and interviews with prosecutors and defense attorneys indicate that mandatory minimum penalties that are considered excessively severe tend to be applied inconsistently.

- Congress should consider **amending 18 U.S.C. § 924(c)** (Possessing firearm in connection with drug trafficking or crime of violence) so the enhanced mandatory penalties for second or subsequent offenses apply only to prior convictions and should consider amending those penalties to lesser terms.

- Congress should **eliminate the "stacking" requirement** and give discretion whether to impose sentences for multiple violations of 924(c) concurrently with each other.

- Congress should consider **more finely tailoring the definitions of the predicate offenses that trigger the ACCA** (Armed Career Criminal Act) mandatory minimum (15 year minimum)

- Certain non-contact sex offenses may be excessively severe and might be applied inconsistently.

As you have heard from Judge Saris in regard to the Commission's upcoming priorities, the Commission intends to work with Congress in its consideration of these suggested reforms and its evaluation of mandatory minimum penalties overall.

THANK YOU.

National Association of Black Narcotics Officers
35th Annual Training Conference
July 26, 2012

OPENING REMARKS OF VICE CHAIR KETANJI BROWN JACKSON UNITED STATES SENTENCING COMMISSION

Thank you very much for inviting me to participate in this panel—I am delighted to be here. My brother is a former undercover Baltimore City police narcotics detective, so I am familiar with your work, both professionally and personally, and I appreciate your dedication and service. I am also particularly grateful for the opportunity to address you as a member of the United States Sentencing Commission and to discuss the agency's role in establishing sentencing policy for the federal courts with respect to federal crimes, including drug trafficking offenses.

For those of you who are not familiar with the Commission, let me give you a quick overview. The Sentencing Commission is an independent, bipartisan agency in the Judicial branch of the federal government. There are seven voting Commissioners who are nominated by the President and confirmed by the Senate, and the Commission also has a staff of approximately 100 employees. The agency's primary purpose, as I mentioned, is to establish sentencing policies and practices for the federal courts. To this end, we collect data and information about the 80,000-plus federal criminal cases that are sentenced every year, and we analyze that data to produce reports and also to produce the Sentencing Guidelines Manual, which federal judges use to impose sentences on criminal defendants.

As it relates to this panel, it is important to note that the Commission's creation of the first sentencing guidelines related to federal drug offenses reflects the Len Bias effect. Briefly, Congress created the Sentencing Commission in 1984, and right away the Commissioners began researching, reviewing cases, and drafting the

guidelines, which are, essentially, the factors that judges were to consider at sentencing and the penalty ranges for particular crimes. At that point in time, when the Commission first undertook to draft a set of guidelines, drug crimes were the largest category of offenses in the federal system, so the early Commission focused much of its attention on how drug crimes in particular should be sentenced.

As we know, Len Bias died in 1986— two years after the Commission was established and while the Commission's guidelines were still in production. Partly as a result of his tragic and well-publicized death, Congress promptly enacted the Anti-Drug Abuse Act, which established mandatory minimum penalties for certain types of drug crimes, including offenses involving crack and powder cocaine. Of course, the enactment of statutory mandatory minimum penalties at the same time the Commission was developing the guidelines had a *huge* impact on the Commission's ongoing work. The agency decided that, whatever the penalty levels it had thought appropriate for drug crimes originally, once Congress set a mandatory minimum that judges had to adhere to, the guidelines needed to be tailored to fit that minimum penalty. So, when the first set of guidelines for drug offenses were enacted in 1987, they incorporated the statutory mandatory minimum penalty levels.

What does that mean? The Anti-Drug Abuse Act stated, among other things, that a person convicted under federal law of a crime involving 100 grams or more of heroin, or 500 grams or more of powder cocaine, or 5 grams or more of crack would be subject to a minimum 5-year term of imprisonment. The statute also designated the triggering drug amounts for a 10-year mandatory minimum: a person convicted of an offense involving 1 kilogram of heroin, or 5 kilograms of powder

cocaine, or 50 grams of crack cocaine would be subject to a 10-year ~~mandatory~~ term of imprisonment. ~~minimum~~. As you well know, drugs are not always trafficked in those specific amounts, and the purpose of the sentencing guidelines was to give judges advice about the appropriate penalty to impose at *every* drug amount—not just the five and ten-year statutory thresholds. So, the Commission developed a drug table that was crafted by plugging in the 5- and 10-year statutory amounts for heroin, powder cocaine, crack cocaine, marijuana and other narcotics, and then scaling up and down so that incremental increases or decreases in the amount of a drug results in proportionate increases or decreases in the guideline penalty. In other words, because the drug table was built around the statutory mandatory minimums enacted in the wake of Len Bias's death, the guidelines reflect Congress's determination of what the appropriate punishment should be for different drugs in light of the Bias tragedy.

So, getting back to the theme of this panel, when the question is asked: did what happened to Len Bias have an impact on national drug policy? – I think you can see that it most certainly did. Even apart from changing the public's perspective about the dangerousness of drug use, Len Bias's death impacted *lawmakers*, who enacted tough sentencing measures to address drug crimes in the hopes that such new laws would deter drug trafficking and would ultimately prevent future drug-related deaths.

I look forward to giving you more insight into the policy work of the Commission in this area and to answering your questions.

* * *

Q. "After Len's death it was reported that use of cocaine was decreased (although, I have no statistics to substantiate this information) but does that stand today? Moreover, has crack-cocaine become the most popular choice between the two because of cost and addictiveness?"

(1) Commission data is not especially useful in addressing this question!

(a) The Sentencing Commission collects data only in regard to the *cases* that are sentenced every year in federal court. The case numbers don't tell us much about *usage* though because, as you know, not everyone who uses drugs is caught or prosecuted.

(b) Also, the Commission doesn't have statistics that go back as far as 1986 because the Commission was created only shortly before Len Bias's death.

(2) Nevertheless, there is data from *other* sources that indicates a decrease in cocaine usage over time:

(a) Recent New York Times article (July 16, 2012) stated that "the most recent National Survey on Drug Use and Health found that an estimated 1.5 million people had used cocaine in June of this year, down from 2 million in 2002 and, according to an earlier government survey, 5.8 million in the mid-1980s."

(b) Data from the Substance Abuse and Mental Health Services Administration demonstrates that admissions to substance abuse treatment in which cocaine was the primary substance of abuse decreased from somewhat from 278,400 in 1995 (17 percent of all admissions) to 256,500 (14 percent of all admissions) in 2005.

(c) The National Institute on Drug Abuse, together with social scientists from the University of Michigan, has reported that overall cocaine use among high school seniors increased rapidly in the late 1970s, remained fairly stable through the first half of the 1980s "before starting a precipitous decline after 1986."

The National Institute on Drug Abuse report is especially interesting because it notes that the decline in adolescent drug use began "after 1986."

(3) Overall, Commission statistics show that there has been a substantial *increase* in the number of criminal cases *of all types* brought in federal court, including drug cases (but, as I said, the increased number of cases doesn't necessarily mean increased *usage*)—

(a) The Commission's annual report for 1989 indicated that there were 9,653 identifiable drug cases sentenced in the federal system that year.

(b) The data with respect to last year, 2011, showed a total of 25,275 drug cases were sentenced (a 161% increase!).

- Of the 2011 drug cases, marijuana was the most prevalent drug type (6,961 cases)
- Then powder cocaine (6,037)
- Then methamphetamine (4,557)
- Then crack cocaine (4,361)

"Do we have enough law enforcement, regulatory guidelines and sentencing to deter the usage and sales of cocaine and crack? If not, what do you believe will create an impact for both drugs?"

1. Deterrence is a worthy goal

The Sentencing Reform Act—the statute that created the Commission—makes clear that "adequate deterrence" is one of the primary purposes of sentencing.

Moreover, the existing mandatory minimum penalties with respect to federal drug offenses are designed, in part, to ensure that people who commit drug crimes face severe penalties so as to deter people from committing drug crimes in the future.

2. Hard to say if we've achieved it!

Deterrence is very difficult to measure objectively (we just don't know how many people would have committed a crime but don't). Consequently, whether we have "enough law enforcement, regulatory guidelines and sentencing to deter" cannot be answered with certainty.

I can say that I am not aware of any complaints to the Commission on the grounds that the guideline penalties for drug crimes are insufficient and should be increased for deterrence purposes or otherwise.

3. Recidivism study

Relevant to the question of what might make an impact is whether the penalty structure that we have in place operates to deter drug offenders who have been caught and prosecuted from repeating their crimes (*specific* deterrence). We do have some data that bears on this issue.

Last year, the Commission undertook a small study related to recidivism, in which the agency evaluated the re-arrest and re-conviction rates of crack offenders who had benefitted from a prior Commission decision to reduce the guideline penalties for crack offenses and to apply the penalty reduction retroactively. The Commission compared the recidivism rates of the 16,00-plus crack offenders who had received a decrease in sentence—the average decrease was 26 months or 17%—and were released early, with the recidivism rates of similar crack offenders who served their entire original sentence.

What we found is that there is no statistically significant difference between the two groups:

- 30.4% of the early release crack offenders re-offended within two years, compared to 32.6% of the full-term crack offenders (69.6% of the early release group did NOT re-offend within two years , while that rate was 67.4% of the full term group)

- Moreover, the same four types of crimes were committed by both groups of re-offenders (drug possession, distribution, assault, DWI). Of those in the early release group who were re-arrested, 21.8 percent of the new arrests were for drug possession and 13.7 percent were for drug distribution. Among the re-arrested full-term group, 20.7 percent of the re-arrests were for drug possession and 9.9 percent were for drug distribution.

This small study suggests that modest changes in sentence length have little if any impact on whether offenders will be deterred from committing future crimes.

Q. "Some of you may remember programs like Scared Straight; does this type of program work in decreasing drug offenses?"

[comment left to other panelists]

Q. "Let's go back in time - The Anti-Drug Abuse Act of 1986 was passed shortly after Len's death, which established mandatory minimum sentences for possession of specific amounts of cocaine. However, according to a report by the American Civil Liberties Union, it also established a 100 to 1 disparity between distribution of powder and crack cocaine. The report referenced that because of crack's relative low cost it was more accessible to poor people, many of whom were African Americans. The report further stated that African Americans were 15 percent of the country's drug users, yet they made up 37 percent of those arrested for drug violations. Consequently, more than 80% of the defendants which were African Americans were sentenced for crack offenses, despite the fact that more than 66 percent of crack users are white or Hispanic.

Now to the more recent - In 2009, according to the US Sentencing Commission, 79% of 5669 sentenced crack offenders were African Americans. Has the signing of the Fair Sentencing Act in 2010 begun to impact these numbers?"

In 2011, the number is 83%

I would like to address several aspects of your question—

1. <u>100-to-1 Crack-Powder Disparity</u>

   (a) The 100-to-1 crack-powder disparity was the result of the federal statute that established mandatory minimum penalties in 1986. As I said at the beginning, by statute, a person with 500 grams of powder was treated the same in terms of the minimum penalty as a person with 5 grams of crack.

   (b) Because one of the purposes of the Commission is to study sentencing policy, the agency was among the first group to recognize that the 100-to-1 disparity was problematic in that there did not appear to be a valid justification for such a huge difference in the treatment of crack and powder offenders—especially because the drugs are chemically identical and because the impact of the more severe sentences appeared to fall

primarily on African Americans (who are most often the defendants in crack cases).

- Beginning in 1995, the Commission wrote four separate reports over a period of twelve years that questioned the crack-powder disparity and asked Congress to address the statutory penalties.
- Commission members also testified before Congress on numerous occasions regarding the issue.
- In 2007, the Commission took a modest step toward addressing the disparity on its own, by changing the guideline penalties related to crack cocaine and making the change retroactive to permit previously sentenced defendants to apply for a sentence reduction.
- In 2010, the Commission made an additional change to the crack guideline – this time in response to the statutory changes that were made in the Fair Sentencing Act.

2. Fair Sentencing Act

You mentioned the Fair Sentencing Act of 2010, and I just want to make sure that everyone is clear about what that legislation did.

(a) The 2010 Act reduced the statutory penalties for cocaine base offenses. It –

- ➢ Eliminated the prior statutory mandatory minimum sentence for simple possession of crack
- ➢ Directed the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases on an emergency basis, and
- ➢ Increased the quantity threshold required to trigger the 5-year mandatory minimum penalty for cocaine base offenses from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum penalty increased from 50 grams to 280 grams.

(b) What was the basis for the new statutory threshold levels for crack? The legislative history indicates that Congress reached an agreement about the amount of crack cocaine that was consistent with a more active (and culpable) role in cocaine distribution.

- The new quantity threshold levels are consistent with the Commission's 2007 report to Congress in which the Commission defined crack offenders who deal in quantities of one ounce (approximately 28 grams) or more in a single transaction as "wholesalers."
- The Commission's report also suggested that a crack to powder ratio of no more than 20 to 1 would be appropriate.

(c) Commission response:

- The Commission temporarily changed the guideline penalties for crack cocaine on an emergency basis in November of 2010 – three months after the Fair Sentencing Act passed.
- The Commission readopted these changes (made them permanent) in May of 2011 with an effective date of November 2011, assuming no action from Congress.
- In June 2011, the Commission voted unanimously to give retroactive effect to the reduced penalties.
    - The retroactivity determination was based on the agency's conclusion that these changes were rooted in fundamental fairness and affected a substantial number of defendants, and that retroactivity would not be administratively difficult to apply.
    - As a result, approximately 12,500 current federal inmates can petition a court for a reduced sentence, and if the court determines the defendant meets certain specified criteria, such as presenting no risk to public safety, the court may grant a sentence reduction.

(d) Impact=> the predicted impact of Congress's decision to narrow the crack-powder disparity in the FSA is that the average sentences of federal

crack offenders will be reduced going forward. We have already seen some evidence of this—

2009: avg sentence for crack offenders= 122 months
2011: avg sentence for crack offenders= 106 months
16-month reduction

3. Demographics

(a) You also mentioned some statistics about the racial makeup of various drug crimes. Data in this area has long demonstrated that different racial groups are more likely than others to be convicted of offenses involving certain types of drugs.

- Crack cocaine is one such type. For whatever reason, the vast majority (83%) of the defendants who are sentenced for an offense involving crack are African American. By contrast, the majority of defendants who are sentenced for an offense involving powder cocaine are Hispanic (58.4%). (24.5% of powder cocaine offenders are Black, and 15.8 % are White).

- We see a similar racial pattern with methamphetamine. Whites and Hispanics comprise the vast majority of the offenders sentenced for meth offenses (47.5% White and 45.1% Hispanic), and only a very small number of meth defendants are Black (2.3%).

- We have not seen a change in the racial breakdown regarding who commits which drug offenses after the Fair Sentencing Act, nor would we necessarily expect to. That Act addressed sentence *length*, but that has little bearing on which demographic groups are more likely to be involved with which kinds of drug crimes.

(b) Notably, the Commission's statistics do demonstrate racial differences with respect to the imposition of mandatory minimums in many types of cases, including drug cases.

- In a 1991 Special Report to the Congress, the Commission found that the 1986 Anti-Drug Abuse Act's mandatory minimum penalties were not applied uniformly: a greater proportion of Black defendants received sentences at or above the indicated mandatory minimum (67.7%), compared with Hispanics (57.1%) and Whites (54.0%).

- The 1991 report also found that downward departures below the mandatory minimum were most frequently granted to Whites (25% of their cases), compared to Blacks (18.3%) and Hispanics (11.8%). [1991 Report, Chap. 5].

- This trend continues today. In its 2011 Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, the Commission found that Black offenders continue to receive relief from a mandatory minimum penalty—through a substantial assistance departure or safety valve—least often (in 34.9% of their cases), compared to White (46.5%), Hispanic (55.7%) and Other Race (58.9%) offenders. [2011 Report, Executive Summary, p. xxviii]. This means that Black offenders remain subject to mandatory minimums at a rate that is higher than any other racial group.

"Do you believe that this country has enough rehabilitation centers to treat people?" / "Do you believe rehabilitation centers are effective?"

1. The statutes that govern sentencing recognize that rehabilitation and treatment are an important sentencing consideration, and the sentencing guidelines include provisions that permit a judge to consider ordering treatment as part of the sentence imposed.

   (a) Some treatment programs are provided to inmates in prison (*e.g.*, RDAP)

   (b) In the federal system, courts often also order treatment by community providers during the period of post-imprisonment supervision

2. New research demonstrates that there are court-based intervention programs that can be effective for drug-dependent defendants who have been caught up in the criminal justice system.

   (a) Drug courts=> a number of courts, both state and federal, have implemented what is known as the "drug court" model, in which a defendant is closely monitored by a "team" of professionals, including the judge, the lawyers in the case, a probation officer, and various treatment providers, as needed.

   - Drug courts have been defined as "specialized court-based programs that target criminal offenders who have alcohol and other drug addiction and dependency problems." The hallmarks are: offender assessment, judicial interaction, monitoring (drug testing) and supervision, graduated sanctions and incentives, and treatment services.

   - Drug courts have used both deferred prosecution and post-adjudication case-processing approaches

   - As of Jun 2012, there were over 2,500 drug courts operating throughout the U.S., 1,140 of which target adult offenders.

   (b) Early studies demonstrate that drug court programs can be successful in reducing recidivism.

Q. "What else can the Administration do to stop this poison on our streets, in our homes, in our communities?"

[comment left to other panelists]

The Commission can continue the important work of collecting data and information regarding federal sentencing and of advising law makers regarding how the federal sentencing system can best meet the purposes of sentencing, including just punishment and the advancement of public safety through deterrence, incapacitation, and rehabilitation.

NATIONAL TRAINING SEMINAR

PLENARY SESSION: *U.S. SENTENCING COMMISSION: A YEAR IN REVIEW*

Discussion of Sentencing Issues/2012 Amendment Highlights

Commissioner Jackson (Amendment Highlights) (5-10 minutes)

This past Amendment Cycle, the Commission promulgated proposed amendments to the federal sentencing guidelines addressing several areas. The 2012 guideline amendments have been submitted to Congress and have a designated effective date of November 1, 2012, unless Congress affirmatively acts to modify or disapprove them. In the interest of time, I will just take a few minutes to highlight three of the 2012 proposed amendments: the amendments relating to **fraud**, **human rights offenses**, and **drugs**.

II. Fraud

First, with respect to the fraud section of the guidelines manual, the Commission

- Promulgated a multi-part amendment relating to certain fraud offenses in response to two directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act
- Specifically, the proposed amendment addresses **securities fraud**, **insider trading**, **mortgage fraud**, and **financial institution fraud**

1. Securities Fraud

   A. New Loss Rule (§2B1.1, app. Note 3(f)(ix))

   In the context of securities fraud, the amendment creates a new rule for the determination of "loss" in offenses involving fraudulent inflation or deflation in the value of securities.

   a. The Commission was aware that determinations of loss in cases involving securities fraud can be complex and that a variety of inconsistent methods were being used by courts to make loss determinations in these types of cases.

   b. The amendment amends the application notes to 2B1.1 to provide a special rule that establishes a rebuttable presumption that the "modified rescissory method" of loss calculation should be used to determine the loss.

      Under the modified rescissory method as set forth in the rule, loss is determined by

      a. calculating the difference between (a) the average price of the security during the period that the fraud occurred, and (b) the average price of the security

during the 90-day period after the fraud was disclosed to the market, and then

b. multiplying that difference in average price by the number of shares outstanding

c. This new special rule is intended to provide courts with a workable and consistent formula for making the "reasonable estimate of the loss" that the guidelines require. And because the amount of loss calculated pursuant to the new rule may be *rebutted*, it also provides sufficient flexibility for a court to consider the extent to which the amount determined under the special rule is appropriate in a particular case.[1]

B. Departure – Also in the context of securities fraud, the amendment adds an example to the departure provision at Section 2B1.1, Application Note 19(C).

a. Application note 19(C) states generally that there may be cases in which the offense level determined under 2B1.1 "substantially overstates the seriousness of the offense."

b. The proposed amendment provides as an example the situation in which "a securities fraud involves a fraudulent statement made publicly to the market" that results in a substantial aggregate loss amount but only because relatively small losses are suffered by a relatively large number of victims. The proposed departure language states that, "in such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2)

[1] One instance in which the loss amount calculated using the modified rescissory method could be inappropriately overstated is where it includes significant changes in value not resulting from the offense—e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events.

may combine to produce an offense level that substantially overstates the seriousness of the offense."

2. Mortgage Fraud (§2B1.1):

As it relates to mortgage fraud, the proposed amendment amends the credits against loss rule in Application Note 3(E) of the commentary to §2B1.1.

a. Under the credits against loss rule in the mortgage fraud context, the loss amount is reduced by the fair market value of the property returned to the victim. But in a case in which the property has not been disposed of by the time of sentencing, its fair market value can be very difficult to assess and can require frequent updating even after it has been determined.

b. To avoid these difficulties, the new Application Note 3(E)(iii) creates a rebuttable presumption that in a mortgage fraud case in which the property has not been disposed of at the time of sentencing, the most recent tax assessment on the date of conviction or guilty plea is the fair market value.

c. Significantly, this presumption is rebuttable. And the note also makes clear that, in determining whether the tax assessment is a reasonable estimate of the fair market value, the court may consider factors such as the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

3. Insider Trading (§2B1.4):

The 2012 amendments also include two changes to the Insider Trading guideline.

a. First, there is a new specific offense characteristic in 2B1.4 that sets a minimum offense level 14 if the offense involved "an organized scheme to engage in insider trading."

    i. The guideline provides several factors that the court may consider in determining whether the minimum offense level applies, including the number of transactions, the number of securities involved, the duration of the offense, and the extent of the defendant's concealment efforts.

b. The amendment also amends the commentary in the insider trading guideline to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases.

    i. The commentary now clarifies that the §3B1.3 enhancement should be applied if the defendant was employed in a position that involved regular participation in securities trading, and used that position to facilitate significantly the commission or concealment of the offense.

4. Financial Institution Fraud

Finally, with respect to financial institution fraud, there are amendments that are intended to assist the court in evaluating the extent to which the offense caused significant risks to the safety and soundness of a financial institution. The new language generally establishes that:

a. In a situation in which the offense seriously threatened the soundness of a financial institution and thus would be eligible for the 4-level enhancement at 2B1.1(b)(15)(B) but the risk did not materialize because of federal

intervention (such as a bailout), the enhancement may nevertheless still apply, and

b. The proposed amendment also adds upward departure language to account for a situation in which the offense caused a "risk of a significant disruption of a national financial market."

III. Human rights

The Commission conducted a multi-year study of federal human rights offenses and promulgated a two-part amendment to the federal sentencing guidelines.

1. First, the amendment addresses defendants who are convicted of a violating a federal statute that prohibits substantive human rights crimes, including genocide, torture, war crimes, and the use or recruitment of child soldiers.

    a. Because the Commission's review demonstrated that serious human rights offenses can be committed in a wide variety of ways (e.g., through murder, assault, or kidnapping), the Commission promulgated a new Chapter Three adjustment that applies to substantive human rights violators after the court calculates the applicable offense level for the underlying conduct under Chapter 2.

    b. The new Chapter Three enhancement provides two tiers of adjustments, corresponding to the differing statutory maxima that apply to human rights offenses:

        i. The adjustment generally provides a 4-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted.

        ii. But if the defendant was convicted of the offense of inciting genocide, which has a lower statutory maximum, the adjustment provides a 2-level increase rather than the 4 levels applicable to other offenses covered by this enhancement.

2. The second aspect of the new proposed human rights amendment addresses defendants who are convicted of

immigration or naturalization fraud in an attempt to conceal involvement, or possible involvement, in a human rights offense.

a. The amendment adds a new specific offense characteristic to §2L2.2 at subsection (b)(4), and that new specific offense characteristic contains two subparagraphs.

    i. Subparagraph (A) provides a 2-level increase and a minimum offense level of 13 if the defendant committed immigration fraud to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense.

    ii. If, however, the defendant committed immigration fraud to conceal the defendant's *participation* in a serious human rights offense, subparagraph (B) applies, and provides a 6-level increase if the offense was incitement to genocide, or a 10-level increase and minimum offense level of 25 if the offense was any other serious human rights offense.

IV. Drugs

Finally, the Commission promulgated two amendments related to drug offenses.

1. BZP: First, the Commission promulgated an amendment to the federal sentencing guidelines to address concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving the drug BZP.

    a. BZP is a Schedule I stimulant that is used both alone and in combination with other chemicals to produce effects that mimic those of the drug "Ecstasy."

    b. The proposed amendment adds BZP to the list of chemicals covered by the federal sentencing guidelines by establishing a marijuana equivalency for BZP offenses in the Drug Equivalency Table provided in Application Note 10(D) of §2D1.1.

        i. The amendment establishes that 1 gram of BZP = 100 grams of marijuana.

    c. The Commission made this determination after a hearing and it is consistent with available scientific literature.

1. Safety Valve: The Commission also promulgated an amendment to §2D1.11 – the guideline that applies to the unlawful distribution of drug-precursor chemicals.

    a. The amendment incorporates the established "safety valve" criteria in Chapter 5 of the guidelines, which currently reduce penalties under the guidelines for certain low-level,

non-violent offenders convicted of drug offenses sentenced under 2D1.1

* * *

So I will leave you with that as a brief summary of three of the proposed amendments that the Commission enacted this year. A complete listing of the 2012 Amendments is available on the Commission's website!

SENTENCING FORUM: HOT TOPICS IN FEDERAL SENTENCING

USSC NATIONAL TRAINING PROGRAM

JUNE 14, 2012

Okay, let's get started. Thank you all for being here -- this is the breakout session entitled "Sentencing Forum: Hot Topics In Federal Sentencing," and I am Ketanji Jackson, the moderator. I am a Commissioner on the Sentencing Commission, and I am very much looking forward to what I hope will be a lively discussion with our distinguished panelists. We have just about an hour and a half, and there's is a lot to talk about, so I am going to move quickly through the introductions so that we can get into the substance of this forum.

As a prelude to the introductions, I think it is important to recall that the Sentencing Commission is often described as sitting at the intersection of the legislative, executive, and judicial branches of government when it comes to the development of sentencing policy. The five gentlemen on the panel today have experiences that, collectively, give them significant insight into each of these institutional perspectives, and we are so pleased that they have been able to arrange their busy schedules to join us here today.

INTRODUCTION OF PANELISTS

DRAFT 6/1/2012

UNITED STATES SENTENCING COMMISSION
ANNUAL NATIONAL SEMINAR
ON THE FEDERAL SENTENCING GUIDELINES

SENTENCING FORUM: HOT TOPICS IN FEDERAL SENTENCING

PANELIST BIOGRAPHIES

Honorable William Sessions III
District Judge
Burlington, VT

The Honorable William K. Sessions is a district judge on the United States District Court for the District of Vermont. He served as chief judge of that district from 2002 to 2010. Judge Sessions has also been a Commissioner on the United States Sentencing Commission, and in fact, he served as Vice Chair of the Commission for 10 years--from 1999 to 2009--and he was nominated be the President and confirmed by the Senate to serve as Chsir of the acommission from 2009 to 2010.

Richard Hertling, Esq.
Staff Director & Chief Counsel
United States House Judiciary Committee

Richard Hertling is an attorney who is currently the Staff Director and Chief Counsel for the House Judiciary Committee. He assumed that position in February 2012. Mr. Hurtling previously served as Republican deputy chief of staff and policy director of the House Judiciary Committee, and for more than a decade, he served in numerous other positions in both the House and the Senate, including as Republican chief counsel to three Judiciary Subcommittees, chief counsel to Sen. Arlen Specter and deputy chief of staff and legislative director to Sen. Lamar Alexander.

Mr. Hurtling has also served in various positions in the Department of Justice. For example, in 2003, he was the deputy assistant attorney general in the Office of Legal Policy, and in that capacity, he handles a variety of issues, including leading the DOJ-wide working group established to respond to *Booker*.

Bobby Vassar, Esq.
Chief Counsel to the Minority

Subcommittee on Crime, Terrorism, and Homeland Security
United States House Judiciary Committee

Bobby Vassar is currently Chief Counsel for the Minority members of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. In this position, he is responsible for, among other things, all legislative assistance to Subcommittee Ranking Member Robert C. "Bobby" Scott and other Members of the Subcommittee. Mr. Vassar has previously served as Chief Counsel for the Subcommittee Majority, and has been serving in various positions in the federal House of Representatives since 1994. Before coming to Congress, Mr. Vassar was an appointee in various capacities in the Virginia State government, including service as Acting Secretary for Health and Human Resources (a state cabinet post) and Chairman of the Virginia Parole Board.

Prof. Lucian E. Dervan
Assistant Professor of Law
Southern Illinois University School of Law
Carbondale, IL

Lucian E. Dervan is a law professor at the Southern Illinois University School of Law. He began his career as a law clerk to the Honorable Phyllis Kravitch on the U.S. Court of Appeals for the Eleventh Circuit, and in private practice working in part on cases involving government investigations. He now focuses his teaching and scholarship on both domestic and international criminal law, and was recently awarded the SIU School of Law Scholar of the Year Award.

Matthew Miner, Esq.
White & Case LLP
Washington, DC

Matthew Miner, is a partner in the law firm of White & Case, LLP in Washington, DC. He focuses his practice on white collar, compliance, and congressional investigations, drawing on his prior experiences as an AUSA in the Middle District of Alabama and his recent prior service as counsel to U.S, Senate committees. Indeed, just prior to joining the firm, Mr. Miner served in many senior roles in the U.S. Senate, including as minority staff director and majority chief crime counsel for the Senate Judiciary Committee. In these roles, he handled key criminal law reforms, including the Fair Sentencing Act.

II. CURRENT SENTENCING ISSUES IN CONGRESS

A. Background/Lead-In:

O.k., so the plan for this forum is to try to have a discussion that touches upon various "hot topics" in sentencing right now. Not surprisingly, the first issue is a matter of daily concern at the Commission, that is, "what is happening in Congress!?". Our Legislative Affairs team does a great job trying to read the tea leaves, and there is much water cooler conversation about the latest bill or potential enactment, but now that we have representatives of Congress here with us, let's make the most of it!

B. Questions:

1. Mr. Hurtling, let me start with you: the Judiciary Committee is always very busy with a number of issues--can you give us a sense of what is on the mind of Judicial Committee members right now related to federal sentencing?

2. Mr. Vassar, as a follow up: did you have anything further to add to that description of current congressional activity from your perspective? Are there any new key pieces of legislation coming down the pike?

3. Mr. Miner: Do you have any reaction based on your legislative experience? I suspect that some of these same issues were also floating around during your time with the Senate Judiciary Committee. Do you have any thoughts regarding the potential legislation? What is the likelihood that any of the proposals will move forward?

4. Can any of the panelists give us a good sense of the overall mood of the members of Congress related to sentencing nowadays?

II. MANDATORY MINIMUMS

A. Background/Lead-In:

Turning to our next topic: there have been few subjects that are more hotly debated than statutory mandatory minimums, especially now, after the Supreme Court's decision in *Booker.*

- Congress has enacted mandatory minimum penalties with respect to certain serious crimes but has not done so uniformly--raising the issue of which, if any, crimes should have mandatory minimum penalties
- The Justice Department has publicly supported certain mandatory minimums and has said that they are an indispensable tools of effective prosecution, and
- The Judiciary has generally expressed its distaste for mandatory minimum penalties, which at times call for the imposition of penalties that are greater than the judge presidingat sentencing may otherwise have imposed.

In October of last year, the Commission submitted to Congress a comprehensive report that contains up-to-date data regarding the application of mandatory minimum penalties and includes both the Commission's general findings and conclusions regarding mandatory minimum penalties an specific recommendations for congressional consideration.

So, let's talk a bit about mandatory minimums.

1. Mr. Vassar: From where you sit, has Congress done the right thing in enacting mandatory minimum penalties with respect to certain crimes? If not, why not?

2. Some would argue that man mins are important in the current advisory guideline system -- do any of the panelists have a reaction to that assertion? What do *you* think, Judge Sessions?

3. Mr. Hertling, Mr. Miner, and anyone else: something that have always been curious about is *how* Congress determines when a

mandatory minimum is appropriate and the appropriate level of severity -- can you give us some insight on this?

4. One of the Commission's general recommendations is that Congress should consider whether a statutory "safety valve" mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.

    - Recognizing that more than 40% of offenders who are convicted of a statute carrying a man min penalty are currently relieved of the penalty through operation or safety valve or substantial assistance, should the safety valve be expanded and would doing so further or impede the goals of the Sentencing Reform Act?
    - Could such an expanded statutory "safety valve" work or is "safety valve" uniquely tailored to drug offenses?

4. Several of the Commission's recommendations also address firearms offenses, and in particular the application of the mandatory minimums set forth in 18 U.S.C. 924(c) (use of a firearm in relation to a crime of violence or drug trafficking crime).

    Unlike other statutes and sentencing enhancements that apply based on an offender's prior convictions, section 924(c) requires the "stacking" of its mandatory minimum penalties based on multiple offenses charged in the same indictment. Thus, an offender convicted of an underlying offense and two counts of an offense under section 924(c) will receive consecutive mandatory minimum penalties of at least 5 years and 25 years of imprisonment, in addition to any term of imprisonment imposed for the underlying offense and other counts of conviction.

Judge Sessions: The Judicial Conference of the United States has historically opposed mandatory minimum penalties, and with respect to section 924(c), the

Judicial Conference has urged Congress on at least two occasions to amend the penalties established at section 924(c) by making it a "true recidivist statute, if not rescinding it all together."

- Can you discuss your experience and thoughts on the application of 924(c), and changes that might be made by Congress?

- Other Panelists: The Department of Justice has issued policies that allow prosecutors to refrain from charging multiple section 924(c) counts because of the particularly long sentences that stacking can produce. This, in turn, arguably has produced inconsistencies in the application of the penalties among judicial districts.

- Thoughts? Is this a problem that justifies changing the statute?

III. FEDERAL SENTENCING OPTIONS AFTER *BOOKER* [JUDGE SESSIONS/MATTHEW MINER]

A. Background/Lead-In:

Another hot topic is, of course, the status of federal sentencing post-*Booker*. More specifically, there is a great deal of debate regarding whether changes to the guideline system should be made to improve the advisory guideline system, and how to do so. There are also arguments that there should be legislative changes made that would result in a return to a mandatory guideline system.

This is, of course, an issue that is on the forefront of the Commission's work. Chair Saris testified on this issue before the House Subcommittee on Crime, Terrorism, and Homeland Security on October 12, 2011. The Commission held a hearing on the issue this past February, and the Commission is currently in the process of preparing comprehensive report discussing the system post-*Booker*.

B. Questions:

1. Judge Session: You have supported several changes for improving the advisory system. In particular, you have supported "presumptive guidelines." Would you mind explaining some of the highlights of your proposal, and discussing how those changes would improve the current system?

    - **NOTE:** Another variation of Blakelyization is the "presumptive guidelines" system proposed in Judge Sessions' recent article. Under this proposal, the Sentencing Table would be simplified to provide for fewer and broader ranges.[1] There would be two types of sentencing factors, (1) presumptive factors, which would be submitted to a jury and assigned a numeric value to determine where within the grid the defendant would be sentenced, and (2) advisory factors in application notes, which would be used to guide the sentencing judge's discretion within the broad range

[1] Sessions, *At the Crossroads of Three Branches*, 26 J. L. & POLITICS at 342 (suggesting a reduction from 258 ranges to 30-50 ranges similar to a state guideline grid, which would be accomplished by consolidating the 43 existing offense levels and reducing the six existing criminal history categories to four).

established by the grid. This proposal is sometimes called a hybrid proposal because it is "Blakelyized" with respect to the larger cell and "Bookerized" with respect to the judge's discretion within the larger cell.

2. Mr. Miner: You have also supported changes to the current system? What changes would you propose? Compare/Contrast with Judge Session's proposals/USSC's proposals?

3. During her recent testimony before Congress, Chair Saris laid out a number of Commission proposals to improve sentencing in the advisory guideline system.

   - For example, Chair Saris recommended that Congress require appellate courts to adopt a presumption of reasonableness for within range sentences. Should Congress do so? What impact would such a presumption carry?

   - The Chair's testimony also recommended that Congress strengthen the justification required for variance sentences. Should the sentencing court be required to provide a justification to support the degree of deviation from the range? What type of justification should the sentencing court be required to provide? For example, should the court be required to provide "sufficiently compelling" justification? Should the sentencing court be required to cite the 18 U.S.C. § 3553(a) factors it believes justify the sentence and explain why each factor justifies the imposition of the sentence? Should the sentencing court be required to provide a justification to support the degree of deviation from the range?

IV. TENSION BETWEEN DISPARITY AND SEVERITY IN THE SENTENCING OF INDIVIDUAL DEFENDANTS [PROF. DERVAN]

A. Background/Lead-In:

As originally drafted, the Sentencing Reform Act was largely motivated by Congress's desire to reduce unwarranted disparities in sentencing outcomes among similarly situated defendants. The goal of the guidelines was to usher in a more uniform system of sentencing, but in the Sentencing Reform Act, Congress also recognizes that courts need to have the ability to take the individual circumstances of a defendant into account.

Experience has shown that these two ideals--sentencing uniformity and individualized consideration--can be in tension. Some have argued that the more we seek to achieve uniformity in the sentencing system, the more we actually achieve sentences that are too severe for specific defendants. Likewise, Commission data reveals that if efforts to establish uniform sentences result in penalties that are viewed as too severe, prosecutors won't charge those offenses consistently, which reduces uniformity in the long run.

I would like to take this opportunity get panelist feedback on whether it is important to consider the dynamic of the apparent inverse relationship between severity and uniformity when deciding both the appropriate penalty levels and the extent to which uniformity can and should be achieved.

B. Questions:

1. Professor Dervan: You recently testified before Congress regarding the impact of the severity side of this dynamic. In particular, you discussed your research regarding the value of increasing severity of crimes (i.e, in the context of increasing statutory maximums) on deterrence, and whether purposes of sentencing are better achieved through other mechanisms, such as an increase in enforcement actions against those engaging in criminal offenses.

- Can you explain what you concluded from your research?

- Thoughts from other panelists? Mr. Hurtling or Mr. Vassar: does Congress think about the impact of severity on uniformity when penalties are prescribed for new offenses?

2. Professor Dervan: You have also written several articles about sentencing disparities and severity in terms of plea bargains. What is the impact on the plea bargaining process?

3. Many legal experts suggest that uniform sentencing (particularly through a mandatory sentencing system or mandatory minimum sentences) are especially detrimental to the American justice system. These experts argue that every person should have the opportunity to have his or her unique situation surrounding the offense considered during sentencing.

    - Does a uniform set of sentencing rules eliminate unwarranted disparity? Is such uniformity consistent with the principles of proportionate punishment ("sufficient but not greater than necessary")?

    - Do you see other pressures that may stem from this tension between disparity and severity? For example, what role do you think these tensions could play in overcrowding of prisons?

V. BACKEND SENTENCING SOLUTIONS [RICHARD HERTLING/BOBBY VASSAR]

A. Background/Lead-In:

The BOP reports that federal prisons are currently 37% oveercapacity, which places enormous pressures on the criminal justice system. To address some of the problems caused by prison overcapacity, there are several proposals and movements currently ongoing relating to changing or improving the system for dealing with prisoners at the backend of their prison terms. For example, the current Administration has set forth a proposal to increase the reductions available to prisoners for good behavior and for those defendants that complete certain BOP vocations or treatment programs.

B. Questions:

1. Mr. Vassar or Mr. Hurtling: Can you talk about some of these proposals and where they currently stand in the legislative process? For example, what changes would be provided by the Second Chance Reauthorization Act introduced by Senator Leahy or similar bills introduced by Representative Scott in the House?

2. What are the anticipated benefits of these proposed changes?

   - Reduced prison population resulting in cost savings;
   - Greater incentives for prisoners to participate in training fostering easier reentry;
   - According to recent testimony from Charles Samuels, the Director of the Federal Bureau of Prisons, before Congress, BOP research has demonstrated that inmates who participate in Federal Prison Industries (FPI) or vocational training are 24 percent less likely to recidivate than similar non-participating inmates; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to

recidivate and 15 percent less likely to relapse to drug use within 3 years after release.

3. There is also a renewed focus on so called "second look" mechanisms. These are processes, short of parole, that would allow for a limited opportunity to revisit a sentencing decision, especially towards the end of the sentence, and include a reexamination of the role of executive clemency, existing statutory sentence reduction mechanisms in federal law, including sentence reduction for "extraordinary and compelling reasons" under 18 USC 3582(c)(1)(A)(i), and "Second Look" provisions in the revised Model Penal Code/Sentencing Article.

   - In the current sentencing system, are there circumstances in which a prison sentence that has otherwise become final should be reconsidered and reduced?

   - Who should make the decision, and what should the criteria be?

   - If reform is needed, should we move toward a regularized "second look" authority resembling parole, as is suggested in the current draft of the revised Model Penal Code Sentencing Articles, or should we instead reserve early release for the extraordinary and compelling case that would traditionally be suitable for clemency?

   - If the former, how would such an authority be justified in a "truth in sentencing" paradigm?

   - What other mechanism are you aware of that have been proposed to achieve these "second look" principles? In particular, what changes have been proposed with regard to the review of the presidential pardon/commutation powers?

     - Increased authority to the DOJ Pardon Attorney – authority to report directly to the Attorney General;

- Creation of an independent body (as opposed to the DOJ) to review clemency requests;

- Conditional commutations that require completion of an appropriate period of supervised release.

- What role should prison authorities play in determining the term of incarceration?

  - Should the scope of what is considered an "extraordinary or compelling" reason under 18 U.S.C. § 3582(c) be expanded?

  - Should prisoners be allowed to petition for early release under § 3582(c), as opposed to only the BOP?

- Should prisoners have increased opportunities to earn good time credit?

- Can sentence reduction ever be justified by budget imperatives or prison overcrowding?

ANNOTATED OUTLINE FOR THE PRESENTENCE REPORT & DEPARTURES/VARIANCES PLENARY SESSION

1. The Probation Interview

a. Probation Questionnaires

i. Opportunity to present mitigating factors

b. Content of the PSIR; bases for variances

c. View from the Bench:

i. Counsel should not wait until the day before the sentencing hearing to parse out bases for variance

- The presentence interview and investigation is also an opportunity to think about departures that are available for specific offense and offender characteristics.
  - The Commission has included in this year's manual a handy listing of departure provisions. This was designed to make departure provisions easier to find and to increase awareness of the departures that exist in the Guidelines Manual.
  - In addition, in 2010, the Commission amended the guidelines to increase the availability of age, mental and emotional conditions, physical conditions, and military service as grounds for departure. Those provisions are found in Chapter 5, Part H of the *Guidelines Manual*.

2. How Best to "Run the Gears" When Seeking a Variance

a. Overview of Method Prescribed by Sentencing Commission

- The Commission has taken the approach that *Booker* and *Rita* require judges to follow a "three-step process" at sentencing, under which they must

  (1) calculate the appropriate guideline sentence;

  (2) consider any available departure provisions set forth in the *Guidelines Manual*; and

  (3) then consider whether to vary under 3553(a)--i.e., whether the sentence reached after steps one and two results in a sentence that is sufficient but not greater than necessary as mandated by § 3553(a).

- There is some disagreement among circuits as to the role that departures play post-*Booker*.

  - The Eighth and Third Circuits have expressly held that calculation of the guideline sentence post-*Booker* includes considering departures.

- Only the Seventh Circuit has held that departures are now obsolete, although other circuits have noted that departures do have diminished significant after *Booker*.

b. **Views from the Bench: Do the Gears Matter?**

- One important benefit to having a 3-step process from the USSC perspective: It enables the USSC to keep accurate *data* about the real impact of Booker varances when a court imposes a sentence outside the GL range.

  - Think about the alternative: if, post-*Booker*, a court only decided inside the GLs or out, we wouldn't know whether a defendant would have received the same sentence through the departure mechanism under mandatory GLs (and thus couldn't assess the difference between pre-Booker and post-Booker worlds). It is only because we have variances, as distinguished from departures, that we can more accurately determine what is going on!

  - Data collection and assessment of the system may not be important to practitioners, but it is one of the USSC's core functions, and the 3-step process facilitates that.

c. **Views from the Sentencing Commission: Impact of *Booker* on Rates of Departures**

- The USSC is working on a report about the impact of Booker, which we plan to release this year, and which involves synthesizing the data and really trying to analyze what is going on in e sentencing system now that the GLs are advisory.

- For now, focusing on the last full FY (2011), the data show an overall within-range rate of 54.5%. This number varies over time and by offense type, but we do see significant trends . . .

- First of all, the percentage of cases sentenced **within the guideline range** has dropped steadily since *Booker*—from 60.7% in the first quarter of FY 2007 to 53.6% in the first quarter of FY 2012. (table 4)

  - This drop in within-guidelines sentences is primarily attributable to the growth of non-government sponsored below range sentences.

    - For those not familiar with the terminology: the USSC categorizes sentences that are outside the GL range not only as

departures or variances (or both) but also as government-sponsored or not. "Non-govt sponsored below range" is the name for judicial downward variances.

- Our data show that non-government sponsored below range sentences have risen from 12.5% in the first quarter of FY 2007 to 17.5% in the first quarter of FY 2012. (table 4)

- During the same time period, the rate of government-sponsored below range sentences (e.g., substantial assistance departures) remained relatively stable (appx. 25% of the cases), as did the rate of above-range sentences (appx. 1.5% of the cases).

- We also see that, generally, the percentage of **outside-range sentences** that are attributable to *Booker* variances rather than departures has increased in every fiscal year since the Court's decision. That is, when courts impose a sentence outside the guideline range, they cite to departures less year-after-year— and cite to *Booker* more year-after-year—as the reason for doing so.

  - W/r/t departures: In fiscal year 2011, only 13.3% of non-government sponsored below range sentences were based solely on a departure, compared to 22.4% in FY 2007.

  - W/r/t *Booker*: Last year, in fiscal year 2011, 77.0% of non-government sponsored below range sentences were based solely on *Booker*, compared to 49.9% in fiscal year 2007.

  - A similar trend regarding the reasons given for going outside the range appears with respect to above-range sentences.

- Finally, despite the general shift away from departures and toward *Booker* as the reason for imposition of sentences outside the GL range, we have seen an increase in the use of certain departure provisions recently; specifically, the offender-related provisions that the USSC amended recently.

  - In 2010, the Commission changed some of the departure provisions in Chapter 5, Part H to increase the availability of departures based on age, emotional and mental conditions, physical conditions, and military service. Previously, the provisions stated that those offender characteristics were "not ordinarily" relevant; now, the Guidelines permit a departure to the extent the departure ground is present to an unusual degree and distinguishes the case from the typical case.

  - Commission data show that, after the amendments, courts are citing those departure provisions more frequently as a basis for sentence.

- For example, in the fiscal year *before* the amendments, courts cited the mental/emotion condition departure provision (§5H1.3) 601 times, compared to 741 times in the fiscal year after the amendments.

- Likewise, courts cited the physical condition departure provision (§5H1.4) 680 times in the fiscal year preceding the amendments, compared to 815 times in the following fiscal year.

- And courts cited the military service departure provision (§5H1.11) 186 times in the fiscal year preceding the amendments, compared to 383 times in the following fiscal year.

So, that's the basic landscape re departure and variance statistics, and we'll be providing substantially more information when we release our upcoming report.

d. Sentencing Commission's Primer

- The Commission's legal staff has produced a primer on departures and variances that discusses procedural aspects of departures and variances, the permitted and prohibited grounds for departure in the *Manual*, and each of the § 3553(a) factors.

- The primer is updated annually, and is included in the conference materials. It is also available on the Commission's website, at www.ussc.gov.

e. The Government's view

3. Sentencing Advocacy

a. Views from the Bench

i. Don't Want *Booker* Basics; tailor written advocacy instead

ii. Anecdotes regarding effective advocacy

iii. Federal Defender Resources

iv. Specific Issues

1. Post-Offense Rehabilitation as a Variance Factor: Analogy to §5K2.19

- As currently in force, the *Manual* provides at §5K2.19 that a court may not consider the defendant's post-sentencing rehabilitation upon resentencing. In *Pepper*, the Supreme Court held that courts

are not bound by the guideline, and may consider such evidence upon resentencing.

- The *Pepper* Court looked in part to 18 U.S.C. § 3661 in reaching its decision, which states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for purposes of imposing an appropriate sentence." How the use of this statute will affect sentencing going forward remains to be determined.

- The Commission has taken steps to ensure that the guidelines are consistent with Supreme Court precedent concerning post-offense rehabilitation. This past amendment cycle, the Commission excised §5K2.19, in response to the *Pepper* decision. Absent congressional action, that amendment will take effect on November 1st.

4. Role of the Probation Officer at Sentencing

a. View from the Bench

i. Confidential?

ii. Disclose Recommendation?

- There appears to be variation among districts with respect to the confidentiality of the probation officer's sentencing recommendation, owing to the discretion that Criminal Rule 32 gives courts in prescribing the procedure, either by local rule or by order in a specific case.

- The probation officer's recommendation is not listed among the materials that district courts must send to the Commission, whether sealed or not. *See* 28 U.S.C. § 994(w).

- To the extent the Commission does receive the recommendation, it does not do anything with it from a data perspective; no data is collected from it.

5. Race Bias Post-*Booker*

a. Sentencing Commission Studies

- Commission studies have indicated that, even controlling for certain variables, demographic factors—including race—may play a role in the length of the

sentences that offenders receive. The Commission has stated, however, that these studies should be viewed with an appropriate amount of caution.

- Caution is warranted because, among other things, there are factors that influence sentences that our data don't capture and thus we cannot control for them! (E.g., employment history, family ties and circumstances)

- In March 2006, the Commission issued a report on the impact of the *Booker* decision on federal sentencing. One analysis set forth in that report—what social scientists refer to as a multivariate regression analysis—examined whether several demographic factors including race, gender, citizenship, education or age were associated with sentence lengths after *Booker*.

  - The benefit of a multivariate analysis is that it controls for the effect of each factor--it isolates each factor and assesses it separately so that the extent to which each factor influences the outcome can be measured

- The original multivariate analysis that the Commission performed in 2006 determined that demographic factors were associated with sentence length after *Booker*, and that such an association was not present in other time periods used in the analysis.

  - The Commission found that black male offenders were associated with sentences that were 4.9% longer than those served by white male offenders. Such an association was not present during the post-PROTECT Act period.

  - The Commission also found that male offenders of "other" races were associated with sentences that were 10.8% longer than white male offenders during the post-*Booker* period.

  - The Commission found that Hispanic male offenders were associated with sentences that were lower than those served by white male offenders.

- The Commission updated that report using data through the end of FY 2009, and it ran the numbers using both the original methodology and a refined one. The results of this more recent multivariate are consist with the results in the earlier study; specifically, that sentence length is associated with some demographic factors.

  - Under both of the methodologies, the updated study found that non-citizen offenders received longer sentences than offenders who are U.S. citizens—and that the differences have increased steadily since *Booker*.

- Under both of the two methodologies used in the more recent report, the analysis indicates that for the time period between December 2007 through September 2009, black male offenders received sentences that were longer than those imposed on white males, to a greater degree than in the period immediately after *Booker*.

- The first methodology indicated that during the time period from December 2007 through September 2009, black male offenders received sentences that were 10% longer than those imposed on white offenders. The second methodology indicated that in the same time period, black male offenders received sentences that were 23.3% longer than those for white male offenders.

- The USSC multivariate analyses were peer reviewed by outside experts, and are generally consistent with the conclusions of subsequent studies done by other researchers!

b. Conflict Between the Guidelines and § 3553(a)

- As outlined in the Chair's October 2011 testimony to Congress, the Commission has taken the view that "tension" exists between the directions to the Commission found at 28 U.S.C. § 994 and the factors the court must consider in fashioning the appropriate sentence under 18 U.S.C. § 3553(a).

- This tension concerns the degree to which certain offender characteristics should affect the sentencing decision. Section 994(e) directs the Commission as to "assure" that the guidelines reflect the general inappropriateness of concerning the defendant's education, vocational skills, employment record, family ties, and community ties. Section 3553(a), by contrast, requires courts to consider the "history and characteristics of the defendant."

- The Commission has called on Congress to resolve this tension.

6. Departures/Variances in Context of Supervised Release Revocation Hearings

10/28/11

ABA Fourth Annual Sentencing & Reentry Institute

Update On Federal Sentencing Law Panel

Now that we've discussed the state of sentencing case law, at least as it pertains to the Supreme Court, my goal is to update you on the state of the law as it pertains to the Federal Sentencing Guidelines. As I'm sure you know, the Commission has many statutory responsibilities, including reviewing and updating the Guidelines, collecting and analyzing federal sentencing data, issuing reports and advising Congress on federal sentencing matters. My update for these purposes focuses on three areas in which there has been recent activity:

1. The 2011Guideline amendments;

2. The Commission's retroactivity determination with respect to the Fair Sentencing Act; and

3. Commission comments on the general state of federal sentencing (including Commission data, proposals, and priorities)

So, getting right into the 2011 guideline amendments . . .

2011 GUIDELINE AMENDMENTS

In April, the Commission sent an amendment package to Congress that included a number of amendments that will become law if Congress does not act to disapprove of them by Nov. 1st. These amendments—which I will touch upon very briefly—primarily address the guidelines for supervised release, illegal reentry, firearms, fraud, and of course, drugs.

Supervised Release

- The Commission addressed the standards for imposing supervised release in 5D1.1 and 5D1.2.
    - The amend **lowers the min recommended term of SR by one year** [from three to two, and from two to one, depending on the class of the felony]
    - The amend includes a provision stating that ordinarily supervised release should **not be imposed for deportable aliens**.
    - It also **references statutory factors** such as the circumstances of the offense and history and characteristics of the defendant, the need to protect the public, and the defendant's need for training and medical care to be considered when deciding whether to impose a term of SR.
- This amendment is intended to encourage judges to make a determination about the appropriateness of imposing supervised release in instances in which supervised release is not required by statute, rather than just automatically doing so.

- It is designed to help conserve the limited resources of courts and probation and to bring the supervised release guidelines more into conformity with congressional intent because supervised release will be focused on those who truly need it, thus ensuring public safety and deterrence, while protecting the essential resources of our courts and probation officers.

Illegal Reentry

- A somewhat related amendment is the change made to the Illegal Reentry guideline (2L1.2) in response to public comment about the magnitude of the prior conviction enhancement in that guideline in cases in which such convictions are very old.

- Under the amendment, **if a prior conviction is** so **old** that it is not counted elsewhere in the guidelines for the purpose of calculating the offender's Criminal History, then the conviction receives a **reduced enhancement for the purpose of 2L1.2**.

    - 12 levels instead of 16 for certain priors / 8 instead of 12 for others

- The amendment reduces—rather than eliminates—the enhancement for stale prior convictions because such crimes may nevertheless be serious and it also provides upward departure language permitting consideration of the seriousness or extent of the prior offense.

Firearms

- At the urging of the authorities including the Ambassador to Mexico, the Commission voted to promulgate an amendment to increase penalties for certain firearms offenses.

- Specifically, the Commission voted to provide **increased penalties for certain "straw purchasers"** and for **offenders who illegally traffic firearms across the United States border**.
    - For "Straw Purchasers" (individuals who buy firearms on behalf of others, typically prohibited persons who are not permitted to buy firearms themselves)=>**increase in the base offense level in 2K2.1**.
        - Different statutes are used to address straw purchasing behavior, and this increase was required to equalize the penalties and thereby ensure that defendants who have engaged in similar conduct receive equal punishment under the guidelines.
        - Amendment also recognizes that not all straw purchasers are equally culpable: thus includes downward departure language applicable to "the girlfriend cases"—defendants who purchase firearms for others motivated solely by intimate or familial relationship or threats or fear (a relatively small percentage—most straw purchases are made for profit)
    - For Trafficking across the border=>**new enhancement in 2K2.1** applicable to offenders who "possess a firearm or ammunition while leaving or attempting to leave the U.S." or "transfer a firearm or ammunition with the knowledge, intent, or reason to believe that such items will be transferred out of the U.S." Also, changes to the guideline applicable to the exportation of small arms and ammunition (2M5.2) to reduce the threshold number of weapons permitted and address ammunition-only cases.

Fraud

- During this amendment cycle, the Commission also responded to two specific directives from Congress concerning fraud.

- First, in **the Patient Protection and Affordable Care Act of 2010** (Pub. L. No. 111–148), Congress directed the Commission to review and increase penalties for *"Federal health care offenses involving a Government health care program."* This phrase is significant because the term "government health care program" was not defined in the statute.

    - The Commission had to determine the meaning of a "Government health care program"=> **new amendment defines it** as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government." Examples of such programs are expressly provided, and include the Medicare program, the Medicaid program, and the CHIP program.

        - Federally-funded programs (such as Medicare) are included because of the clear concern expressed in the legislative history of the Act about the costs to the federal government from health care fraud.

        - Jointly-funded federal-state programs are also included because many federally-funded programs, such as Medicaid and CHIP, are jointly paid for by the states and it would be impractical to disaggregate these funds for sentencing purposes.

        - State-funded programs included as well because the policy reasons for providing an enhancement for fraud against federally-funded programs are applicable to state-funded programs and state programs are subject to similar forms of fraud and abuse that place a drain on public funds.

    - Having identified the federal health care offenses that would be targeted for increased penalties as required by the Act, the

Commission then **provided tiered loss enhancements** for such offenses, as the Act directed us to do.

- **New specific offense characteristic at 2B1.1(b)(8)** that applies if the loss in such cases is more than $1,000,000. The enhancement is 2 levels if the loss was more than $1,000,000; 3 levels if the loss is more than $7,000,000; and 4 levels if the loss is more than $20,000,000.

- The Commission also amended the Guidelines to insert a **special rule,** as required by Congress, providing that the aggregate dollar amount of fraudulent bills submitted as part of a federal health care offense "shall constitute *prima facie* evidence of the amount of the intended loss by the defendant."

- And, consistent with the Commission's obligation to identify mitigating and aggravating circumstances, the Commission also **amended the Mitigating Role guideline** to make clear that certain fraud defendants, including nominal owners in health care fraud cases, are not *precluded* from consideration for mitigating role downward adjustments as a result of the size of the loss.

- Based on 2009 data . . .

  - the Commission anticipates that approximately 145 health care fraud cases will be affected by the new amendments annually, which is approximately 30% of health care fraud cases overall, and 2% of the cases sentenced under 2B1.1 each year.

  - The likely impact on such cases is a substantial increase in the term of imprisonment: whereas, currently, the average sentence for health care fraud cases is 41 months, the new average sentence is projected to be 61 months of imprisonment.

- The second directive, **the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010** (Pub. L. No. 111–203) directed the Commission to review the federal sentencing guidelines applicable to securities fraud and financial and mortgage loan fraud in light of the harms to the public and the financial markets associated with these types of frauds. The Act also created two new fraud offenses.

- In response, the Commission held a hearing in which these types of fraud were addressed and made appropriate references within the guidelines for the new offenses.

    - Both the Department of Justice and the SEC agreed that no further amendments were necessary during this past Amendment cycle; however, all parties agreed that the Commission should re-examine its guidelines in this area, which we have committed to do as part of a multi-year process.

    - So far, the Commission has heard mixed reviews about the operation of the fraud guideline.

        - In its January 2010, survey of federal district court judges, for example, 65 percent of those responding found the fraud guidelines appropriate, but we have heard a great deal of testimony during our regional and public hearings that the fraud guidelines are too complex and result in disproportionately high sentences.

* * *

Of course, the big news in sentencing this year – and the area that took up the bulk of our time and attention – was the change that was made to the drug guideline (2D1.1) pursuant to the enactment of the Fair Sentencing Act.

FAIR SENTENCING ACT (FSA) & RETROACTIVITY

A. Overview

- Enacted on August 3, 2010 (bipartisan, unanimous consent)
- Made substantial changes to the mandatory minimum penalties applicable to crack cocaine offenses:

  --**Increased the crack quantity thresholds** necessary to trigger the 5- and 10-yr man mins

  - Previously, 5 grams of crack cocaine triggered a 5-year mandatory minimum, now it takes 28 grams of crack (nearly six times as much) to get a 5- year mandatory minimum sentence. Moreover, 50 grams of crack triggered a ten-year mandatory minimum, now 280 grams of crack gets a minimum penalty of 10 years.

  - As a result, the prior "100:1" crack-powder disparity gave way to a ratio that is effectively 18:1 (28g of crack vs. 500g of powder)

  -- Also **eliminated the man min penalty** that had previously existed **for simple possession of crack**.

- The FSA specifically directed the Commission to add certain **specific aggravating and mitigating factors in guidelines w/r/t *all* drugs**, in order to focus penalties more on the conduct of the offender rather than the quantity of drug. These factors included:

  --offense level *increases* for offenders who (1) attempt to bribe law enforcement officials in connection with drug trafficking offenses; or (2) maintain an establishment for manufacture and distribution of drugs; or (3) receive aggravating role enhancement AND also engage in "super aggravating" conduct,

such as involving or selling to minors, pregnant people, seniors, or vulnerable individuals.

--an offense level *decrease* for offenders who receive the 4-level minimal participant mitigating role adjustment AND the offense was motivated by a familial or intimate relationship AND the defendant received no monetary compensation AND was unaware of the structure and scope of the enterprise.

B. The Temporary Guidelines Amendment

- The Commission's first step in responding to the FSA was to enact a temporary amendment. Congress gave the Commission "Emergency Amendment Authority" in the FSA—that is, the opportunity to amend the guidelines *immediately* to conform with the statutory changes and not have to wait for the ordinary amendment cycle to transpire.

    - This is important because it meant that crack offenders who committed their offenses after the FSA was enacted could potentially qualify for a reduced sentence under the guidelines much sooner than they otherwise would have been eligible to do so.

- The Commission issued its temporary amendment implementing the FSA on October 15, 2010, and the amendment went into effect on November 1, 2010.

- The Commission then undertook its ordinary process of assessing how the FSA should be permanently implemented in the guidelines, as part of this year's amendment cycle, including holding a hearing and receiving public comment.

C. Final Guideline Amendment

- The Commission voted on the final guideline amendment on April 6, 2011. The final version essentially repromulgated the temporary amendment with clarifying language relating to the maintenance of a premises for manufacturing and distributing drugs.

- A few key specifics:

  -- **A change in the drug guideline table**: the new triggering quantities for crack are included, and are set at offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months for an offender with little or no criminal history. (The 5- and 10-year man mins for all other drugs are also set at these levels.)

  --The amendment inserted the required aggravating and mitigating factors in the drug guideline, making adjustments to avoid double counting where necessary.

D. Projections—Prospective Application of the FSA Amendment

How will the FSA affect sentencing in these kinds of cases going forward?

Let me give you five take-aways regarding our predictions. Based what we know about the existing offender population and assuming that future crack offenders will look similar in terms of their offense, criminal history, etc., we project that—

(1) **No offender will see his or her sentence increase** (above what it otherwise would have been absent the FSA) based solely on the quantity thresholds in the new guideline.

(2) **Two-thirds of crack cocaine offenders (63.2%) will receive a lower sentence** than they otherwise would have received. [1]

(3) **Crack cocaine offenders** sentenced pursuant to the new guideline **will receive sentences that are, on average, 25% lower overall.**

(4) **More low level crack offenders** (those with less than 28 grams and no violence or aggravating role) **are helped by the amendment**—79% as opposed to 63% of offenders overall—**and they get an even greater benefit**: an average sentence reduction of 30.9% (compared to 25%).

(5) More than 1,500 prison beds will be saved in the 5th year after enactment, increasing to more than 3,800 beds saved in year 10.

- So that is our best projection regarding what is likely to happen when *future* crack offenders are sentenced. A separate issue is what to do about crack offenders who are *already* serving sentences that were calculated under the previous guideline incorporating the old mandatory minimum penalty thresholds.

E. Retroactivity

The Commission addressed *that* question (the retroactivity issue) on June 30th of this year, when it unanimously voted to permit courts to modify the sentences of currently incarcerated crack offenders who qualify for a reduced sentence under the new guideline (*i.e.*, it determined that the new guideline amendment was subject to retroactive application).

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[1] Figuring out who is likely to benefit is very complicated statistically. The take away is that many people (approximately 1/3 of all crack offenders) won't be helped by the FSA change because of other factors related to their sentence, *e.g.*, they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced at the mandatory minimum and have no place to go; or their drug amount falls within the overlapping amounts at different levels in t he drug table.

1. A few things to note about guideline retroactivity generally:

(a) **Guideline retroactivity is NOT statutory retroactivity** and the statutory mandatory minimum still applies unless Congress has made the statutory change retroactive. So, in this case, only defendants sentenced pursuant to the guidelines (i.e., given a sentence other than the applicable mandatory minimum term) could benefit from the USSC's decision to make the guideline amendment retroactive.

(b) The Commission and the courts are statutorily authorized to make retroactivity determinations.

- The Commission's statutory authority to consider retroactivity is found at 28 U.S.C. 994(u), which ***requires*** **retroactivity determinations** when guideline penalties are reduced

  - "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it *shall* specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

- A court's authority to modify a sentence pursuant to a Commission retroactivity determination is found at 18 U.S.C. § 3582(c), which permits sentence reductions **if they are consistent with applicable policy statements of the Commission**

  - Section 3582(c) states that, when a defendant's sentence is based on a sentencing range that has been subsequently lowered by the Commission, the court may reduce the term of imprisonment considering the 3553(a) factors, if reduction is "consistent with the applicable policy statements.

  - U.S. v. Dillon =>courts are bound by the Commission policy statements

(c) **§1B1.10 is the policy statement dealing with retroactivity**, and it merely states the circumstances under which a court *may* reduce a sentence (does not require reduction)

2. The Commission amended 1B1.10 as part of the crack retroactivity determination

(a) Why?

- to add Parts A and C of the FSA amendment to the list of guidelines eligible for retroactive application by the courts, and
- to clarify the circumstances and extent of any such modification

(b) The rule=> under 1B1.10, the dct may reduce the defendant's term of imprisonment to a term within the amended guideline range with only one exception (substantial assistance).

- In substantial assistance cases, the court may give the defendant a comparable reduction off the new guideline range

(c) Why this limitation?

Because retroactive consideration of an amended guideline is not a full resentencing! To the contrary, exercise is quite narrow in scope: to permit a defendant to receive the benefit of the new guideline. Substantial assistance aside, it is not intended to be a window whereby the entire sentence, including departures and variances applied originally, can be reassessed (policy affirmed by the SCt in *Dillon*).

3. What this means for the previously incarcerated crack defendant

(a) not every incarcerated crack offender is eligible (sentencing range must change)

- those sentenced under other unaffected provisions or pursuant to the man min don't qualify)

(b) even if eligible not an automatic entitlement (statutes and guidelines require other considerations, such as public safety)

- Judges often want to know about prison history

(c) an eligible defendant can receive a sentence at the new guideline level, assuming that the old statutory mandatory minimum does not trump

4. Our Projections

We reviewed the data to assess the impact of retroactivity on the current prison population (through fiscal year 2010):

- Our analysis estimates that **approximately 12,000 crack offenders** (n=12,040) sentenced between October 1, 1991 and September 30, 2010 would be eligible to receive a reduced sentence under the retroactive guideline amendment.
    - If the statute were made retroactive, an additional 8,000 offenders would be eligible.
- **The number of eligible offenders varies by jurisdiction.**
    - E.D. Virginia=>884 (7% of the overall total)
    - Hawaii=> only 2
- **The average sentence reduction for all eligible offenders is 22.6% or 37 months.**
    - More than 7,000 offenders (78%) would receive a reduction of 48 months or less, while approximately 280 (3%) would receive a reduction of more than 10 years.

GENERAL STATE OF FEDERAL SENTENCING GUIDELINES SYSTEM (FROM A COMMISSION PERSPECTIVE)

I'd like to conclude this update with a few remarks about the general state of the federal sentencing guidelines system from a Commission perspective. I think it's fair to say that these are challenging times for government agencies generally, but it's particularly challenging right now for the Commission because, in addition to the ordinary annual guideline amendment process, we are also in the midst of a larger discussion about the future of federal sentencing and the Federal Sentencing Guidelines after *Booker*.

The Commission is undertaking different activities as part of this larger examination. So, for example, Congress has asked us to produce a comprehensive report on mandatory minimums—everything from the history of mandatory minimum statutes to an analysis of the data regarding how such statutes are used—and that report is due to be delivered to Congress (and will be available to the public) this coming Monday, October 31st.

General Data

The Commission also working on a report that will be devoted to examining the current state of federal sentencing nationwide.

- The Commission issued a similar report in 2006, the year after the *Booker* decision.
- We think it is important to review the system again now because, **since *Booker*, the Supreme Court has decided *seven* cases** that impact the operation of advisory guidelines.

- Our upcoming *Booker* report will evaluate the system's evolution over the past six years and will provide extensive data and analysis on sentencing trends and practices. We anticipate that such information will be very informative to policymakers and stakeholders who are currently assessing the state of federal sentencing.

- Now, speaking of data, some of you will be interested in our most current data regarding the nearly 40,000 sentences that were handed down in the federal system over the past 6 months (from March 26th to September 26th). Our analysis indicates that:

    - The overall **within-range** sentencing rate is currently **54.9%** -- a slight uptick from previous 6-month analyses
    - Most of the non-guideline range sentencing is occurring pursuant to government motion=>the overall **government-sponsored below range** sentencing rate is **26.5%**.
    - The **non-government sponsored below-range** sentencing rate is currently 16.8 **%** (13.6 % of which is attributable to *Booker* variances and 3.2% to departures)
    - And, as has always been the case, **the rates of within-range sentences, departures, and variances vary significantly by offense type**

In general, the current combined within-guideline and government sponsored departure rate of **more than 81% is relatively high**, and that rate has remained at about 80% for the past two years or so, which suggests that the system is holding steady right now overall. But that observation should not be taken to suggest that the present guideline system is necessarily operating optimally from the Commission's perspective . . .

Proposals

Indeed, just two weeks ago, the Judiciary Committee of the House of Representatives held an oversight hearing in which the Commission's Chair, Judge Patti Saris, testified on behalf of the Commission that:

> " While sentencing data and case law demonstrate that the federal sentencing guidelines continue to provide gravitational pull in federal sentencing, the Commission has observed as increase in the numbers of variances from the guidelines in the wake of the Supreme Court's recent jurisprudence. There are troubling trends in sentencing, including growing disparities among circuits and district and demographic disparities which the Commission has been evaluating.
>
> The Commission believes that a strong and effective guidelines system is an essential component of the flexible, certain, and fair sentencing scheme envisioned by Congress when it passed the [Sentencing Reform Act]."

Of course, whether the current advisory guideline system can be considered "strong" or "effective" is **somewhat in the eye of the beholder**. But from the Commission's perspective, the current system is not as effective in reducing unwarranted sentencing disparity as it could be, and therefore, the Commission's testimony suggested several **steps that Congress could take to strengthen the current system** (these were discussed earlier at the previous panel so I'll just state them again here):

- Require appellate courts to apply a presumption of reasonableness to guideline-range sentences
- Require district courts to provide greater justification for greater variances

- Create a heightened standard of review for judicial [categorical] policy disagreements with the guidelines
- Clarify the statutory directives to the courts and the Commission, which are currently in tension
- Codify the three-step process

Many of these proposals reflect language in the Supreme Court opinions that have given rise to the sentencing system , *e.g.,*

- *Gall*=> (greater justification for larger degree of variance) "in assessing reasonableness, appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines." ; ""We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."

- *Kimbrough*=> (heightened scrutiny for policy disagreements) "While the Guidelines are no longer binding, closer review may be in order when the sentence judge varies from the Guidelines based solely on the judge's view that the Guideline range 'fails properly to reflect § 3553(a) considerations,' even in a mine-run case."

In any event, the proposals were made in furtherance of the Commission's statutory obligation to advise Congress on ways in which the sentencing system can be improved, and they are **part of an ongoing dialogue** among interested stakeholders about ways of ensuring that the policies and practices of our federal sentencing system effectively reflect the purposes and goals of sentencing. In my personal view, engaging in this dialogue is part of the Commission's statutory mission is extremely important.

Priorities

In closing, I wanted to point out that the Commission has published specific priorities for this coming amendment cycle, I have already mentioned the Mandatory Minimum Report and Booker Report. **Other priorities**:

Child Pornography Report

We plan to report on sentencing in child pornography cases—one area that has a relatively high variance rate! (The data indicate that in fiscal year 2010 the departure/variance rate for child porn offenses was **42.7 percent**.)

- Child pornography offenses, some of which have lengthy mandatory minimum penalties, are **of great interest to the criminal justice community right now**.
- In our January 2010 survey of federal judges, about 70 percent of judges responding felt that the guideline range for possession of child pornography were too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high.
- The Commission is currently undertaking a review of this issue including a review of the offenders, the conduct involved in the offenses, the role of technology in these cases, and victims of these crimes.
    - In its fiscal year 2010 Sourcebook, the Commission (for the first time) broke out child pornography offenses from other sex offenses in its data analysis.
    - Both the National Center for Missing & Exploited Children, the premier advocacy group for victims of these offenses, and the Department of Justice have indicated a willingness to explore potential changes to the guidelines applicable to these offenses.

Some of the other areas listed on the Commission's published priorities list:

Economic Crime & Fraud Guideline=>Commission hopes to look into aspects of the fraud guideline (2B1.1) in response to the directive ordering a review of the guidelines related to economic crimes in the Dodd-Frank act. We have heard from many sources that there are problems, especially in high loss fraud cases and mortgage fraud cases.

Drugs=>(a) continuation of the Commission's review of 2D1.1, including the original Commission's determination to link the guidelines to the statutory mandatory minimums such that the guideline base offense level is set *above* the mandatory minimums for drug crimes, and (b) continued analysis of safety valve operation.

Categorization of Prior Offenses as Crimes of Violence for Career Offender ("Categorical Approach")=>the Commission has also expressed concern about the problems that have arisen in regard to categorizing prior offenses for the purpose of establishing career offender status (*i.e.*, identifying crimes of violence and use of the categorical approach).

Also listed: continued review of departures (5K); the penalties for human rights violations and war crimes; potential inclusion of new drug types onto the Druge Quantity Table; resolution of circuit conflicts, etc.

* * *

So that's where things stand. A lot has been done and there is still much to do. I will yield the floor for what I'm sure will be a lively discussion.

10/24/11

Opening Statement for HealthEthics Best Practices Forum

I am delighted to be here this morning. Compliance and ethics programs have long been implemented in the health care industry, as you well know. And such programs will undoubtedly play an even bigger role going forward because, under the Patient Protection and Affordable Care Act, the Department of Health and Human Services is required to make compliance programs a condition of Medicare enrollment for certain health care providers. This means that, rather than being entirely voluntary, compliance programs for certain providers will now be mandatory. Moreover, the Act also specifies certain required components of an effective compliance program; for example, such program must have standards and procedures that are reasonably capable of reducing the likelihood of violations; the program should be overseen by high-level personnel within the organization; and the standards and procedures must be effectively communicated to all employees and agents. These criteria for an effective compliance program mirror the guidance ~~regarding~~ for compliance programs provided in Chapter 8 of the Sentencing Guidelines Manual—a tome that is promulgated by my agency, the U.S. Sentencing Commission.

It is because of this connection between the compliance program standards that are now being required in the healthcare industry and the guidelines in Chapter 8 that I have been asked to come here and to give you some insight into the U.S. Sentencing Commission and its role in establishing the guidelines that affect the compliance and ethics practices of a wide variety of corporations, including businesses involved in the healthcare industry.

Now, my understanding is that some of you have extensive experience with the organizational guidelines ~~in Chapter 8 of the Guidelines Manual,~~ while others have very little background with the federal sentencing guidelines for organizations.

Can I get a sense of those who have some experience with Chapter 8 (those who have worked with the Guidelines previously)?

To help get us all on the same page, I thought I would use my opening remarks to provide some general background information about the Commission and the organizational guidelines, and then during our discussion I can try to address more specific questions and the concerns of those who are knowledgeable in this area.

First, let me give you an overview of the agency . . .

I. OVERVIEW OF USSC

A. The Agency & Its Composition

- The U.S. Sentencing Commission is a bipartisan independent agency of the Judicial Branch of our government.
- Congress created the Commission in the Sentencing Reform Act of 1984—so the agency has been in existence for 27 years.
- The Commission consists of seven voting commissioners who are appointed by the President and confirmed by the Senate, and who serve staggered 6-year terms. There are also two *ex officio* (non-voting) members who represent the Department of Justice and the U.S. Parole Commission.
- The Commission has a staff of approximately 100 employees. These employees generally work within the agency's 5 divisions: the General Counsel's office, the Office of Education and Training, the Office of Legislative and Public Affairs, the Office of Research and Data, and the Office of Administration.

B. The Commission's Purpose – Why Were We Created?

1. As a general matter, the Commission was created to address concerns about inequitable sentencing practices in federal courts; primarily, the concern that defendants who had committed essentially the same crimes were receiving dramatically different sentences before the SRA.

lack of uniformity

2. The Commission's primary statutory purpose is to establish sentencing policies and practices for the federal courts that meet three objectives:

   (a) First, assure the meeting of the purposes of sentencing (as defined by Congress in the SRA) *(28 U.S.C. § 991(b)(1)(A))*;; (purposes include just punishment, deterrence + rehabilitation)

   (b) Second, avoid unwarranted sentencing disparities among similarly situated offenders while also providing sufficient flexibility to allow for individualized sentences where appropriate *(28 U.S.C. § 991(b)(1)(B))*; and

(c) Third, reflect advancements in knowledge about human behavior as it relates to the criminal justice process *(28 U.S.C. § 991(b)(1)(B))*.

3. Congress also gave the Commission the duty to develop means of measuring the degree to which the federal policies and practices are effective in meeting the purposes of sentencing. In this regard, ~~the~~ much of what we do revolves ~~Commission deals with~~ sentencing data and statistical analyses.

Additional Statutory Background, If Needed:

The SRA also gave the Commission the power to:

- *establish a research and development program within the Commission for the purpose of—*
  - ***(A)** serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and*
  - ***(B)** assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices; See 28 U.S.C. § 995(a)(12)*
- *collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process; See 28 U.S.C. § 995(a)(13)*
- *publish data concerning the sentencing process; See 28 U.S.C. § 995(a)(14)*
- *collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code; See 28 U.S.C. § 995(a)(15)*
- *make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.*

C. The Commission's Work

1. The primary work product of the agency is the Sentencing Guidelines Manual, which federal judges use to determine the sentences to impose in criminal cases. The Manual consists of guidelines and policy statements,

and the Commission first created them in regard to individual criminal defendants in 1987.

2. Under its statutory authority, the Commission has a duty to review and revise the guidelines and policy statements in the Manual on a continual basis. As I will explain in a few minutes, this review takes place annually as part of what we call the "yearly Amendment cycle."

3. At this point, I wanted to mention that the Commission does much more than just publish and update the Guidelines Manual. The Commission also serves as the expert agency that Congress and the courts consult on matters of sentencing policy, and it is the sole clearinghouse for data and information related to federal sentencing. (Having data is so important in this age of evidence-based practices!)

   a. To satisfy its mission regarding the collection, analysis, and dissemination of sentencing data, the Commission:

      - collects detailed information with respect to each and every sentence imposed in every federal criminal case (more than 81,000 cases every year);
      - analyzes and publishes this data and produces detailed reports concerning the operation of the federal sentencing system;
      - makes specific recommendations to Congress about modification or enactment of statutes relating to sentencing matters; and
      - operates a research and development program within the Commission for the purpose of doing studies that assist Congress, the Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices.

D. Corporate Criminal Liability

The bulk of the Guidelines Manual and the Commission's work relates to the sentencing of *individual* defendants by the federal courts. But an important component of the work that the Commission does is addressed to the sentencing of *organizations* that have been convicted of criminal wrongdoing.

Before I address the specifics of the organizational guidelines, I would like to touch upon *the law* that relates to corporate criminal liability in order to provide context for my explanation of why the Commission developed the organizational guidelines in the way that it did.

- As you may already know, under U.S. law, a corporation can be held criminally responsible for the illegal conduct of its employees. Indeed, a corporation can only act through its agents, so when there is criminal conduct by agents of a corporation in connection with the operation of the business, the responsible parties under U.S. law are *both* the individual employees *and* the corporation.
- Corporate criminal responsibility arises when an employee or agent commits a crime while acting within the scope of his employment.
    - Corporate criminal liability in the healthcare industry can arise in many circumstances, including when there is a fraud or misrepresentation in regard to billing for healthcare services, or a violation of government regulations.
- The employee who commits the crime faces criminal penalties that can include probation or prison time and a fine. A corporation cannot be imprisoned of course, so the penalty that it faces is a fine and it can also be subject to probation.
- The organizational guidelines, which are in Chapter 8 of the Guidelines Manual, assist federal judges in determining the degree of monetary penalty that is appropriate for a given corporate offense and corporate offender. The guidelines also assist courts in determining when corporate probation is appropriate + what conditions to impose

With that general background, let's talk about the organizational guidelines . . .

Org guidelines – and the rest of the Manual – also available at our website (ussc.gov).

II. OVERVIEW OF ORGANIZATIONAL GUIDELINES

A. What they are and how they were created

- The organizational guidelines are used in the sentencing of *all* organizations (*e.g.*, corporations, partnerships, trusts, unions, funds, non-profits, and governmental entities), as opposed to individuals.

- The organizational guidelines were created in 1991—four years *after* the first set of guidelines (which apply to individuals).

- The Commission took many steps over a period of years to create the organizational guidelines:

  - For 5 years—from 1986 to 1991—the Commission conducted empirical research on the sentencing of organizations.

    --The Commission collected information about the pre- and post-SRA sentencing of nearly 2,000 organizations and associated individual defendants, looking at more than 80 relevant variables, including the types of organizational offenses and offenders prosecuted in federal courts; the sentences imposed; and the factors that influenced fine level.

  - The Commission formed various advisory and working groups to help in the development of the guidelines:
    - an attorney working group of private defense attorneys conducted bi-weekly meetings from December 1988 to April 1989 and submitted "Recommendations regarding Criminal Penalties for Organizations;"
    - an advisory group of federal judges that reviewed and commented on the draft guidelines then under consideration; and
    - a group of federal probation officers from the judicial districts with the largest numbers of organizational sentencing, evaluated the workability of the draft guidelines.

  - The Commission also received informational briefings from government agencies, business groups, and practitioners, and

solicited views from various federal agencies, particularly with respect to organizational offenses occurring within the agencies" areas of expertise. Those agencies included SEC, DOJ, HHS, EPA and the FTC, among others.

- The Commission published and requested comment on three major drafts of the sentencing guidelines for organizations.

- The Commission conducted public hearings at the beginning of the guideline development process and following publication of each major draft. Witnesses at those hearings included federal prosecutors, defense attorneys, academics, representatives of federal agencies like the SEC, EPA, FDA, Probation officers, Industry representatives,[1] and advocacy groups.

- In 2001, ~~Then~~ ten years after the organizational guidelines were promulgated, the Commission formed an ad hoc advisory group—composed of industry representatives, scholars, and experts in business compliance and ethics—to review the guidelines and make recommendations. The group worked for 18 months, held its own hearings, requested and received public comment, and delivered a final report to the Commission.

- Commission amended the guidelines pursuant to the recommendation of the advisory group in 2004, and has made other amendments as recently as last year (2010). (I will address these amendments in the course of our discussion]

I will talk more about this later...

B. Why the organizational guidelines were created

- The Commission has a statutory duty to create policies for judges to use in sentencing so that there can be just and certain punishment and so that future criminal conduct can be prevented.

- Prior to Chapter 8, there was very little uniformity in how different judges were sentencing organizations.

[1] The list of witnesses who testified at the Commission's hearings on the organizational guidelines included a broad mix of professionals from major public and private organizations. *See* Supplementary Report on Organizational Guidelines, Appendix B.

- Moreover, many organizations were getting very minor fines (*less* than the amount that they would spend on preventing such crimes and far less than they sometimes benefitted from the illegal conduct!), so many corporations rationally preferred to pay the fine rather than take steps to prevent the criminal behavior.

- Also, given that corporate compliance efforts can be expensive, there were no consistent incentives for corporations either to encourage employees to follow the law or to cooperate with government officials who suspected wrongdoing (and the lack of corporate cooperation in government investigations made it difficult for the government to figure out what was really going on).

- In addition, the Commission had received specific requests from Congress asking that organizational penalties be established. And it was aware of a negative perception among the public that white collar criminals and corporations were receiving very lenient sentences.

C. The foundation of the organizational guidelines

1. How did the Commission address these concerns in the development of the organizational guidelines?

    a. It established a sentencing system designed primarily to incentivize organizations to monitor and police *themselves*!

    b. The primary principle that underlies the organizational guidelines is that the ultimate fine amount is dependent upon BOTH the seriousness of the offense (generally measured by the gain or loss/harm caused) AND the corporation's own culpability (measured by its own knowledge and encouragement of and the criminal offense and its efforts to prevent and detect criminal conduct).

    c. It's essentially a "carrot and stick" approach: a corporation has the potential of getting hammered but it also has an opportunity to mitigate its punishment substantially by demonstrating its own antipathy toward lawbreaking, usually in the form of concrete steps that is has taken to prevent, detect, and remedy criminal conduct.

2. Probation—Corporations may face a period of supervision (probation) in order to make sure that the monetary sanctions are implemented and to reduce the risk that they will act illegally again.

3. Fine calculation—In a nutshell, the fine under the guidelines is determined by multiplying a "base fine amount" by the corporation's "culpability score" . . .

    a. The base fine amount evaluates the offense conduct (the crime) and is designed to account for the seriousness of the offense and the harm caused by that conduct.

    b. The culpability score assesses the corporation's knowledge and encouragement of the illicit behavior. It begins with a factor of 5 and that number can increase or decrease based on various aggravating and mitigating factors, e.g.,

        - Whether a high-level employee condoned or was willfully ignorant of the offense
        - Whether the organization has a history of similar misconduct
        - Whether the organization willfully obstructed or impeded justice, and
        - Whether the organization self-reported the wrongdoing, cooperated fully in the investigation and accepted responsibility.

4. Effective Compliance and Ethics Programs—Significantly for present purposes, one key mitigating factor in terms of the calculation of an organization's culpability score is whether the organization had an "effective compliance and ethics program." Section 8B2.1 sets forth the requirements for having such a program:

    a. In general, an organization must: (1) exercise due diligence to prevent and detect criminal conduct, and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

b. There are 7 specific requirements to minimally satisfy this general due diligence and encouragement of ethics and compliance standard:

(1) Establishment of standards and procedures to prevent and detect criminal conduct

(2) Oversight of the compliance and ethics program by high-level personnel who ensure that the governing authority is knowledgeable regarding the content and operation of the program

(3) Due care in delegating substantial discretionary authority (screening out that those who have acted illegally or unethically in the past)

(4) Effective communication of standards and procedures to all levels of employees

(5) Reasonable steps to achieve compliance, including systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal

(6) Consistent enforcement of compliance standards including disciplinary measures

(7) Reasonable steps to respond appropriately to the criminal conduct and to prevent further similar offenses upon detection

c. An organization must also periodically assess the risk of criminal conduct and take steps to redesign/modify its program.

d. An organization that satisfies these criteria is eligible for a deduction from its culpability score. But note: in the calculation of an organization's culpability score ~~under the existing guideline~~, ~~the~~ an organization ~~may be~~ had historically been precluded from getting a deduction for having an effective compliance and ethics program if a high-level official within the organization participated in, condoned, or was willfully ignorant of the offense.

So, that is the Chap 8 scheme in a nutshell.

As mentioned earlier, the compliance program criteria in Chapter 8 have largely been incorporated into the program guidance that HHS provides and were recently adopted in the Patient Protection and Affordable Care Act (and thus will be required of certain health care providers under the Act going forward!)

* * *

O.K., so now that you have some background on the Commission and on the specific guidelines that directly impact the health care industry, I will address some of the specific questions that were provided to me and that I was asked to address in the context of this presentation. I have grouped the inquiries into two general categories: (1) questions related to the guideline amendment process, and (2) questions related to the future of the organizational guidelines and whether substantive changes are imminent:

1. **(Process Category) How do the guidelines change? How often does the Commission look at the organizational sentencing guidelines? How do working compliance professionals have input into the process?**
2. **(Substance Category): What areas are of current interest to the Commissioners? How likely is it that the guidelines as we have known them will change fundamentally?**

THE PROCESS FOR GUIDELINE CHANGES:

HOW DO THE GUIDELINES CHANGE? /HOW OFTEN DOES THE COMMISSION LOOK AT THE ORGANIZATIONAL SENTENCING GUIDELINES? /

A. The Amendment Process

1. **Yearly Amendment Cycle**—As I mentioned earlier, the Commission has a yearly amendment cycle. The process is subject to the notice and comment provisions of the Administrative Procedure Act, and it basically consists of the following steps:

   - Commissioners meet privately in the summer to develop a list of tentative priorities (areas of the guidelines that it would like to address). List is compiled from a variety of sources, including case law, public comment, Commission's own interests.

   - Commission publishes its priorities in the Federal Register with a 60-day notice and comment period.

   - Commissioners vote on the final priorities at a public meeting in August or September.

   - Interdisciplinary working groups of Commission staff begin work on the issues (legal research; data runs; meetings with affected groups; drafting amendment language)→ develop proposed amendments

   - Commissioners vote to publish proposed amendments in December or January. (60-day notice and comment period).

   - Public hearings on the proposed amendments are held in March.

   - Commissioners vote to promulgate new amendments in March or April.

   - Amendments must be delivered to Congress no later than May 1. Unless affirmatively disapproved, the new amendments take effect in 180 days or on November 1.

   - In early winter (december), the Commission publishes an updated version of the Manual that includes the amendments from the previous cycle.

2. **Commission Meetings**—The Commissioners generally meet once a month in Washington DC. During these meetings, we have staff briefings on the various issues, including detailed reports on data analyses regarding the operation of the specific guidelines and the sentencing system overall; legal evaluations related to particular issues; prison impact analysis; policy development proposals; and proposed amendment language. There are other meetings and teleconferences as necessary.

3. **Public Hearings**—We hold them every year – usually several of them, and there is at least one in March on the proposed amendments. Special interest issues may generate additional hearings (e.g. SRA Anniversary hearings, crack cocaine, mandatory minimum).

B. Compliance Professional Input – "How can compliance professionals have input?"

All members of the public, including compliance professionals can influence the substance of the Sentencing Guidelines. The opportunities for input are varied; i.e., one can:

- monitor the Commission's Federal Register notices regarding its upcoming priorities and submit written comment;
- attend public hearings and request participation as witnesses; and
- submit written comment on proposed amendments.

C. Specific Recent Changes to the Organizational Guidelines

~~Given that~~ Because there is an interest here in how often the Commission makes changes to the Organization Guidelines and the direction the Commission may go in the future ~~Chapter 8~~, I think it is helpful to briefly discuss the two significant substantive amendments that have been made since the Organization Guidelines were created in 1991.

1. 2004 Amendment

In 2004, the Commission voted to amend Chapter Eight of the Guidelines based primarily on several recommendations that were made by an Advisory Group that the Commission had formed to conduct a multi-year study of the organizational

guidelines. (The Advisory Group, which was comprised of industry representatives, scholars, and experts in compliance and ethics, served for 18 months, during which it received public comment, conducted a hearing, and issued a written report.) The 2004 amendment also responded to the Sarbanes-Oxley Act ("the Act"), Pub. L. 107-204, which had specifically directed the Commission to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct.

- Key Changes:
  - The introductory commentary was revised to highlight the importance of having an effective compliance and ethics program and the criteria for an effective compliance program were set forth in a separate guideline.
    - The Commission expected that an effective compliance and ethics program would not only prevent and detect criminal conduct, but also should facilitate compliance with *all* applicable laws (civil, regulatory, etc).
  - The amendment added the requirement that an organization "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." This addition was intended to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms.
  - The amendment imposed significantly greater responsibilities on the organization's governing authority and executive leadership.
  - The amendment added the requirement that an organization must periodically assess the risk of the occurrence of criminal conduct and identified various factors that should be addressed when assessing relevant risks.
  - The amendment added the requirement that an organization must periodically
    - update its compliance and ethics training; and
    - evaluate the effectiveness of its compliance and ethics program.
  - The amendment provided additional guidance with respect to the implementation of compliance and ethics programs by small organizations and encouraged larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those with which they conduct or seek to conduct business.

focus on small organizations

- The amendment changed the automatic preclusion for compliance program credit provided in § 8C2.5(f) (Culpability Score) for "small organizations."

Timeline of 2004 Amendment, If Needed:

- *In 2002, the Commission announced the formation of an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations. The Commission asked the group to place particular emphasis on examining the criteria for an effective program to ensure an organization's compliance with the law.*
- *The Commission explained its reasons for the formation of the group in a press release dated February 21, 2002. "In order to foster dialogue about possible refinements to the organizational guidelines, we formed this ad hoc advisory group. In light of the current focus on preventing large-scale corporate wrongdoing, we believe the group's work will be very timely."*
- *The advisory group – composed of industry representatives, scholars, and experts in compliance and business ethics – served for 18 months. Todd Jones, former United States Attorney for Minnesota and a partner at the law firm of Robins, Kaplan, Miller & Ciresi, chaired the group.*
- *On March 19, 2002, the Advisory Group requested public comment on "the application of the criteria for an effective compliance program, as listed in Application Note 3(k) to '8A1.2 of the Sentencing Guidelines, and the ways in which those criteria affect the operation of Chapter Eight as a whole. The Advisory Group will also consider whether there are other features of the organizational guidelines that merit review or change."*
- *The Advisory Group received public comment from the ABA, advocacy groups, the U.S. Office of Government Ethics, and industry representatives.*
- *Following receipt of review of the reference public comment, the Advisory group published another notice for comment, asking specific questions and advising that it intended to conduct a public hearing on these matters.*
- *The Advisory Group conducted a full day hearing, with witnesses representing a broad spectrum of interests.*
- *The Advisory Group delivered its final report to the Commission in 2003. The report concluded that "the organizational guidelines have induced many organizations to focus on compliance and to create programs to prevent and detect violations of the law," and recommended that the Commission amend "the existing organizational guidelines in order to reflect contemporary legislative, regulatory, and corporate governance requirements. Included in the proposed amendments are changes that –*
  - *promote an organizational culture that encourages a commitment to compliance;*
  - *require compliance training at all levels of the organization;*
  - *define high-level personnel's responsibilities for compliance programs;*
  - *require programs to provide anonymous reporting mechanisms for potential violations of law; and*
  - *require ongoing risk assessments as an essential component of the design, implementation, and modification of an effective program.*

2. The 2010 Amendment

The Chapter Eight guidelines were amended again during the amendment cycle that ended in 2010, partly in response to public comment and also to address certain concerns that the Commission had identified on its own.

The amendment had three parts.

(1) Remediation efforts--The first part responded to public comment seeking clarification of the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under §8B2.1 (Effective Compliance and Ethics Program) subsection (b)(7). Subsection (b)(7) requires an organization, after criminal conduct has been detected, to take reasonable steps (1) to respond appropriately to the criminal conduct, and (2) to prevent further similar criminal conduct.

The amended Commentary to §8B2.1 provides that:

> → the organization should take *reasonable* steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct, and that these steps may include providing restitution to identifiable victims and self-reporting/cooperation with authorities.
>
> →the organization should assess its compliance and ethics program in the wake of illegal conduct, and should make the modifications necessary to ensure the program is effective in *preventing* such conduct in the future. Such steps should be consistent with other guideline provisions that require assessment and modification of the program, and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

The amendment was adopted in the expectation that further guidance would encourage organizations whose compliance programs had failed to prevent criminal wrongdoing to take reasonable steps to remedy the harm upon discovery of the criminal conduct.

(2) Limited Exception for Involvement of High-Level Personnel—The second part of the 2010 amendment addressed a concern that was revealed by a review of the Commission's data.

- In the 20-year history of the organizational guidelines, only 5 organizations have received a culpability score reduction for having an effective compliance and ethics program.
    - Commission data indicated that the overwhelming majority of organizations convicted and sentenced are smaller organizations, and that many of the cases involved criminal conduct by high-level individuals in the organization. Under the guidelines, involvement of high-level personnel traditionally operated as a bar to getting credit for having an effective compliance program, and the Commission was concerned that the general prohibition against the involvement of high-level employees was sweeping too broadly to prevent companies with otherwise effective programs from getting the mitigating credit.
- Public comment and testimony suggested that internal and external reporting of criminal conduct could be better encouraged by providing an exception to the general prohibition against involvement of high-level employees in appropriate cases.

The Commission responded to these concerns by amending subsection (f) of §8C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an effective compliance and ethics program when an organization's high-level or substantial authority personnel are involved in the offense.

- Specifically, the amendment adds subsection (f)(3)(C), which allows an organization to receive the decrease if the organization meets four criteria:

(1) the individual or individuals with operational responsibility for the compliance and ethics program must have direct reporting obligations to the organization's governing authority or appropriate subgroup thereof;
(2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
(3) the organization promptly reported the offense to the appropriate governmental authorities; and
(4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

- The amendment also adds an application note that describes the "direct reporting obligations" necessary to meet the first criterion of the limited exception: an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing authority

"promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program."[2]

(3) Conditions of Probation—The third part of the amendment, which dealt with conditions of probation, was motivated by the Commission's desire to simplify guidelines whenever possible.

- In addition to addressing the amount of the fine to be imposed on convicted corporations, the guidelines also have historically addressed probation (i.e., the circumstances under which corporate probation may be appropriate and the conditions to be imposed).

- The 2010 amendment amends §8D1.4 (Recommended Conditions of Probation – Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. The amendment removes the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.

3. Impact on Healthcare Providers?

The impact of the relatively recent guideline changes are likely to be the same for healthcare providers as for any other organization.

- If criminal conduct is detected, the guidelines inform about the steps that need to be taken to remedy the harm caused. The necessary steps will be largely driven by the factual circumstances surrounding the criminal conduct.

- Healthcare providers will also want to ensure that they are eligible to receive credit for an effective compliance and ethics program because the individual (or individuals) with operational responsibility for the compliance and ethics

[2] The application note responds to public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.

program has "direct reporting obligations" to the organization's governing authority or appropriate subgroup thereof.

→Because "direct reporting obligations" require that the individual have express authority to communicate personally to the governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program," organizations may want to consider whether to amend position descriptions to provide for that express authority.
→Alternatively, organizations may want to adopt organizational changes to provide for that authority.

***It is important to note, however, that the Commission did not expressly mandate organizational chart changes. *The guidelines leave room for organizations to make individual assessments as to how best to establish effective compliance programs.* The Commission intentionally left decisions about such matters as the reporting structure open because of the vast differences in organizations potentially subject to the guidelines. Effective compliance and ethics programs *must* be individually tailored!

THE FUTURE OF THE ORGANIZATIONAL GUIDELINES :

WHAT AREAS ARE OF CURRENT INTEREST TO THE COMMISSIONERS? HOW LIKELY IS IT THAT THE GUIDELINES AS WE HAVE KNOWN THEM WOULD CHANGE FUNDAMENTALLY?

A. Not A Current Commission Priority

As mentioned previously, the Commission issues a list of priorities at the beginning of each amendment cycle; amendments to the organizational guidelines are *not* one of the Commission's priorities this year. While we always leave ourselves some room to address burning issues that arise, I don't expect that we will be revisiting the organizational guidelines in the near future for two primary reasons:

1. We amended the organizational guidelines just this past amendment cycle (2010) and, ordinarily, the agency likes to assess and review changes for several years before acting again.
2. I am not aware of any congressional directive requiring such review and amendment. (Recall that the 2004 amendment took place in light of the directive in the Sarbanes-Oxley Act.)

B. And The Current Organizational Guidelines Are Widely Viewed As A Success

I also think it is unlikely that there will be any fundamental changes made to the organizational guidelines as they are currently constituted precisely because Chapter 8 is widely heralded as 'the success story of the Guidelines Manual'!

- Corporations in many industries now have vibrant programs that work admirably to prevent and detect crime within the organization.

- Other government agencies have developed, or are developing, similar programs to encourage corporate compliance, self-reporting, and amnesty.

- And industry professionals, like many of you, now collaborate about best practices for compliance training and ethics awareness; indeed, it is my understanding that increasing compliance and ethics awareness within the healthcare industry is precisely what the Best Practices Forum is all about!

I, for one, am a proponent of the old saying "if it ain't broke, don't fix it!" The Commission has a lot of work to do right now in various other guideline areas – and this one doesn't appear to be broken.

C. But Not Necessarily Fixed In Stone Forever

This is not to say that the current organizational guidelines will be fixed in stone forever . . . . Consistent with its statutory mandate, the Commission has a continuing duty "to review and revise [the guidelines], in consideration of comments and data coming to its attention." 28 U.S.C. § 994 (o). The Commission's primary goals for implementing the organizational guidelines are to remedy harm, reasonably punish violators, and offer incentives for organizations to reduce and eliminate criminal conduct through compliance efforts and self-policing. With this in mind, the Commission will continue to review and amend the organizational guidelines periodically to reflect changes in the law and the emergence and evolution of compliance and ethical standards. The Commission has long recognized that "the organizational guidelines may need to be modified as circumstances change," and it has encouraged practitioners and industry

representatives "to share their thinking about the organizational guidelines and their effect."[3]

[3] Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 1291 PLI/Corp. 97, 128-29 (2002).

Conclusion of Remarks

And so, in conclusion, "sharing your thinking" about the organizational guidelines is precisely where you all come in! ~~what I am here to ask of you all!~~ You and other industry professionals can have a significant impact on whether changes are made to the existing guidelines. If there are problems – please let us know! Send letters; comment on our priorities; give us feedback. It is even at sessions such as this one that we are able to touch bases with the people who work with the guidelines on the ground in their respective industries and who are able to give us informed and extremely helpful reactions to guideline policy. We value this information. Thank you, again, for inviting me to represent the Commission in your discussion of these issues today, ~~and~~ I am very pleased to hear your experiences now and answer any questions that you might have.

James Strawley, Office of General Counsel, will assist me in keeping track of your comments

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One question for you → the inquiries about the USSC amend process can be interpreted in more than one way:

- either you don't want the guidelines to change (stability)

or

- you're eager to see changes made!

Which is it? ☺

Chicago District Judges Meeting
September 28, 2011

Good afternoon— I am delighted to be here with you. I came onto the Commission in February of 2010, so I've been at this for a year and a half or so. I had the pleasure of serving with Judge Castillo during the first 8 months of my time on the Commission, and as he certainly could tell you, this is a very interesting and, in many ways, very *demanding* time to be a Commissioner.

The challenge right now is that, in addition to the ordinary annual guideline amendment process that we have engaged in since 1987, we are also in the midst of a larger discussion about the future of federal sentencing after *Booker*. We are undertaking many different activities as part of this larger inquiry. So, for example, Congress has asked us to produce a comprehensive report on mandatory minimums—everything from the history to an analysis of the data regarding how such statutes are used—a huge undertaking that we are finishing up this month. We are also working on a *Booker* report that will be devoted to examining the current state of federal sentencing nationwide. It is our hope that these analyses will be informative to the public and to policymakers as we begin to set a course for the future.

Now, as I mentioned, we are writing these reports on the side, and we also continue to maintain the Guidelines Manual and to make amendments related to the guidelines. In April, we sent an amendment package to Congress that included a number of amendments that will become law if Congress does not act by Nov. 1st. These amendments—which I will touch upon very briefly—address the guidelines for supervised release, illegal reentry, firearms, fraud, and of course, drugs. Beginning with the non-drug offense-related amendments . . .

Supervised Release

- The Commission addressed the standards for imposing supervised release in 5D1.1 and 5D1.2.
    - The amend lowers the min term of SR by one year [from three to two, and from two to one, depending on the class of the felony]
    - The amend includes a provision stating that supervised release ordinarily should not be imposed for deportable aliens.
    - It also references statutory factors such as the circumstances of the offense and history and characteristics of the defendant, the need to protect the public, and the defendant's need for training and medical care to be considered when deciding whether to impose a term of SR.
- This amendment relies on the extensive research contained in the USSC's July 2010 report, *Federal Offenders Sentenced to Supervised Release.* It gives judges more discretion to determine the appropriateness of imposing supervised release in instances in which supervised release is not required by statute.
- The Commission's new policy will conserve the limited resources of courts and probation officers (e.g., by not requiring supervision of deportable aliens) and will bring the supervised release guidelines more into conformity with congressional intent. Supervised release can now be focused on those who truly need it, thus ensuring public safety and deterrence, while protecting the essential resources of our courts and probation officers.

Illegal Reentry

- Another, somewhat related, amendment is the change made to the Illegal Reentry guideline (2L1.2) in response to public comment about the magnitude of the prior conviction enhancement in that guideline in cases in which such convictions are very old.
- Under the amendment, if a prior conviction is so old that it is not counted elsewhere in the guidelines for the purpose of calculating the offender's Criminal History, then the conviction receives a reduced enhancement for the purpose of 2L1.2.

- Because stale prior convictions may nevertheless be serious and relevant to the seriousness of an unlawful reentry, the amendment reduces—rather than eliminates—the enhancement, and also provides upward departure language permitting consideration of the seriousness or extent of the prior offense.

- *Note*: One congressman – Representative Culberson (R-Tx) – recently introduced a bill that would disapprove of this amendment. If acted upon by Congress, the amendment would not take effect. The bill has no co-sponsors and no action has been taken on it at this time.

Firearms

- The Commission voted to promulgate an amendment to increase penalties for certain firearms offenses.

- Specifically, the Commission voted to provide increased penalties for certain "straw purchasers" and for offenders who illegally traffic firearms across the United States border.

    - Straw Purchasers (i.e., individuals who buy firearms on behalf of others, typically prohibited persons who are not permitted to buy firearms themselves)=>increase in the base offense level in 2K2.1.

        - Equalizes the penalties for the different statutes that are used to address straw purchasing behavior and thus ensures that defendants who have engaged in similar conduct receive equal punishment.

        - Amendment also recognizes that not all straw purchasers are the same: thus includes downward departure language applicable to "the girlfriend cases"—defendants who straw purchase motivated by intimate or familial relationship or threats or fear

    - Trafficking across the border=>new enhancement in 2K2.1 applicable to offenders who "possess a firearm or ammunition while leaving or attempting to leave the U.S." or "transfer a firearm or ammunition with the knowledge, intent, or reason to believe that such items will be transferred out of the U.S." Also, changes to the guideline applicable to the exportation of small arms and ammunition (2M5.2) to reduce the threshold number of weapons permitted and address ammunition-only cases.

- In consideration of this amendment, the Commission held a hearing related to firearms and ammunition offenses with respect to the problem of straw purchasers, which had been brought to our attention by the administration particularly in response to the problem of firearm trafficking across the border with Mexico.

Fraud

- The Commission also responded to two specific directives from congress during this amendment cycle.
- The first, the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111–148), directed the Commission to review penalties for certain health care fraud offenses involving a "government health care program" and adjust upward the penalties set forth in the federal sentencing guidelines for such offenses.
    - The Commission responded by providing tiered loss enhancements for offenses involving a government health care program that the Commission defines as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government."
    - The Commission also amended the Mitigating Role guideline to make clear that certain fraud defendants, including nominal owners in health care fraud cases, are not precluded from consideration for mitigating role downward adjustments as a result of the size of the loss.
- The second directive, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111–203) directed the Commission to review the federal sentencing guidelines applicable to securities fraud and financial and mortgage loan fraud. Specifically, Congress asked the Commission to review the harms to the public and the financial markets associated with these types of frauds. And the act also created two new fraud offenses.
- In response, the Commission held a hearing in which this type of fraud was addressed and made appropriate references within the guidelines for the new offenses.

- Both the Department of Justice and the SEC agreed that no further amendments were necessary at this time; however, all parties agreed that the Commission should re-examine its guidelines in this area, which we have committed to do as part of a multi-year process.
- So far, the Commission has heard mixed reviews about the operation of the fraud guideline. In its January 2010, survey of federal district court judges, for example, 65 percent of those responding found the fraud guidelines appropriate but we have heard a great deal of testimony during our regional and public hearings that the fraud guidelines are too complex and result in disproportionately high sentences.

* * *

Of course, the big news in sentencing this year – and the area that took up most of our time and attention – was the changes that were made to the drug guideline pursuant to the enactment of the Fair Sentencing Act.

FAIR SENTENCING ACT (FSA)

A. Overview

- Enacted on August 3, 2010 (bipartisan, unanimous consent)
- Made substantial changes to the mandatory minimum penalties applicable to crack cocaine offenses:

  --Increased the crack quantity thresholds necessary to trigger the 5- and 10-yr man mins

  - Previously, 5 grams of crack cocaine triggered a 5-year mandatory minimum, now it takes 28 grams of crack (nearly six times as much) to get a 5- year mandatory minimum sentence. Moreover, 50 grams of crack triggered a ten-year mandatory minimum, now 280 grams of crack gets a minimum penalty of 10 years.

  - The prior "100:1" crack-powder disparity gave way to a ratio that is effectively 18:1 (28g of crack vs. 500g of powder)

  -- Eliminated the man min penalty that had previously existed for simple possession of crack.

- The statute also directed the Commission to add certain **specific aggravating and mitigating factors in guidelines w/r/t *all* drugs**, in order to focus penalties more on the conduct of the offender rather than the quantity of drug. These factors included:

  --offense level *increases* for offenders who (1) attempt to bribe law enforcement officials in connection with drug trafficking offenses; or (2) maintain an establishment for manufacture and distribution of drugs; or (3) receive aggravating role

enhancement AND also engage in "super aggravating" conduct, such as involving or selling to minors, pregnant people, seniors, or vulnerable individuals.

--an offense level *decrease* for offenders who receive the 4-level minimal participant mitigating role adjustment AND the offense was motivated by a familial or intimate relationship AND the defendant received no monetary compensation AND was unaware of the structure and scope of the enterprise.

B. The Temporary Guidelines Amendment

- The Commission's first step in responding to the FSA was enactment of a temporary amendment. Congress had given the Commission "Emergency Amendment Authority" in the FSA—that is, the opportunity to amend the guidelines *immediately* to conform with the statutory changes and not have to wait for the ordinary amendment cycle to transpire.

    - This is important because it meant that crack offenders who committed their offenses after the FSA was enacted could potentially qualify for a reduced sentence under the guidelines much sooner than they otherwise would have been eligible to do so.

- The Commission issued its temporary amendment implementing the FSA on October 15, 2010, and the amendment went into effect on November 1, 2010.

- The Commission then undertook its ordinary process of assessing how the FSA should be permanently implemented in the guidelines, as part of this year's amendment cycle, including holding a hearing and receiving public comment.

C. Final Guideline Amendment

- The Commission voted on the final guideline amendment on April 6, 2011. The final version essentially repromulgated the temporary amendment with clarifying language relating to the maintenance of a premises for manufacturing and distributing drugs.

- A few key specifics:

  -- A change in the drug guideline table: the new triggering quantities for crack are included, and are set at offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months for an offender with little or no criminal history. (The 5- and 10-year man mins for all other drugs are also set at these levels.)

  --The amendment inserted the required aggravating and mitigating factors in the drug guideline, making adjustments to avoid double counting where necessary.

D. Projections—Prospective Application of the FSA Amendment

How will the FSA affect sentencing in these kinds of cases going forward?

Let me give you five take-aways regarding our predictions. Based what we know about the existing offender population and assuming that future offenders will look similar in terms of their offense, criminal history, etc., we project that—

(1) **No offender will see his or her sentence increase** (above what it otherwise would have been absent the FSA) based solely on the quantity thresholds in the new guideline.

(2) **Two-thirds of crack cocaine offenders (63.2%) will receive a lower sentence** than they otherwise would have received. [1]

(3) **Crack cocaine offenders** sentenced pursuant to the new guideline **will receive sentences that are, on average, 25% lower overall.**

(4) **More low level crack offenders** (those with less than 28 grams and no violence or aggravating role) **are helped by the amendment**—79% as opposed to 63% of offenders overall—**and they get an even greater benefit**: an average sentence reduction of 30.9% (compared to 25%).

(5) More than 1,500 prison beds will be saved in the 5th year after enactment, increasing to more than 3,800 beds saved in year 10.

* * *

Our analysis of what is likely to happen regarding *future* crack offenders raises the question of what is to be done about crack offenders who are already serving sentences that were calculated under the previous guideline incorporating the old man min penalty thresholds (retroactivity) . . . Pam will provide the details related to that aspect of the crack cocaine guideline changes.

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[1] Figuring out who is likely to benefit is very complicated statistically. The take away is that many people (approximately 1/3 of all crack offenders)won't be helped by the FSA change because of other factors related to their sentence, *e.g.,* they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced at the mandatory minimum and have no place to go; or their drug amount falls within the overlapping amounts at different levels in t he drug table.

SIXTH CIRCUIT JUDICIAL CONFERENCE PANEL
"SENTENCING IN THE 6TH CIRCUIT"
June 15, 2011

The Sentencing Commission completed its amendment cycle in April, and has submitted to Congress a number of guideline amendments dealing with a variety of issues. As you know, unless Congress acts to reject the amendments promulgated by the Commission, these changes will become effective on November 1st.

I thought that I would take a moment to touch upon the pending guideline amendments—beginning with the non-drug-offense-related provisions and then turning to those concerning the Fair Sentencing Act. I will then address retroactivity, and specifically the Commission's current consideration of whether the FSA guideline amendment should be made retroactive. Then, if there is time, I will talk a bit about the Commission's upcoming priorities.

So, first, the pending guideline amendments . . .

III. OTHER 2011 AMENDMENTS

Although the implementation of the FSA has been our primary focus this Amendment cycle, there are other significant amendments that are worthy of mention in the areas of **firearms, fraud, supervised release, illegal reentry, and role in the offense** (each is set forth fully in the materials and on our website):

Firearms

- In response to serious concerns raised by the Department of Justice and other officials related to the illegal flow of firearms across the Southwest border, the Commission voted to promulgate an amendment to increase penalties for certain firearms offenses.
- Specifically, the Commission voted to provide increased penalties for for offenders who illegally traffic firearms across the United States border and for certain "straw purchasers" of firearms (*i.e.,* individuals who buy firearms on behalf of others, typically prohibited persons who are not permitted to buy firearms themselves).
    - **Trafficking across the border**
        - new enhancement in 2K2.1 applicable to offenders who "possess a firearm or ammunition while leaving or attempting to leave the U.S." or "transfer a firearm or ammunition with the knowledge, intent, or reason to believe that such items will be transferred out of the U.S."
        - Also, changes to the guideline applicable to the exportation of small arms and ammunition (2M5.2) to reduce the threshold number of weapons permitted and address ammunition-only cases.
    - **Straw Purchasers**=>increase in the base offense level in 2K2.1 for offenders who buy a firearm with the knowledge, intent, or a reason to believe that the weapon will be transferred to a prohibited person.
        - The amendment ensures that such straw purchasers will be subject to the same base offense level as straw purchasers who are convicted of the actual transfer of a weapon to a prohibited person because purchasers with knowledge and those who actually transfer a weapon are similarly culpable.

- Of the straw purchasers cases in the 2009 data set, almost half (45.2%) involved circumstances in which the offender knew or had reason to believe that the weapon would be transferred to a prohibited person. Moreover, in 71.3 % of the straw purchaser cases, the offender received, or was promised, payment for the purchase.

- Because these cases sometimes involve a close personal relationship between the straw purchaser and the person to whom the firearm is transferred, downward departure language is provided, and may be applicable, if the straw purchaser was motivated to commit the offense by an intimate or familial relationship and received no monetary compensation from the offense.

- In consideration of this amendment, the Commission held a hearing related to firearms and ammunition offenses with respect to the problem of straw purchasers, which had been brought to our attention by the administration particularly in response to the problem of firearm trafficking across the border with Mexico.

Fraud

- The Commission also responded to two specific directives from Congress during this amendment cycle.

- The first, **the Patient Protection and Affordable Care Act of 2010** (Pub. L. No. 111–148), directed the Commission to review and increase penalties for "Federal health care offenses involving Government health care programs."

    - The Commission first had to define a "Government health care program" => "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government." Examples of such programs are expressly provided, and include the Medicare program, the Medicaid program, and the CHIP program.

- Federally-funded programs (such as Medicare) are included because of the clear concern expressed in the legislative history of the Act about the costs to the federal government from health care fraud.

- Jointly-funded federal-state programs are also included because many federally-funded programs, such as Medicaid and CHIP, are jointly paid for by the states and it would be impractical to disaggregate these funds for sentencing purposes.

- State-funded programs included as well because the policy reasons for providing an enhancement for fraud against federally-funded programs are applicable to state-funded programs and state programs are subject to similar forms of fraud and abuse that place a drain on public funds.

- The Commission also provided tiered loss enhancements for federal health care offenses involving such government programs, as required by the Act. (2 lvs if loss > 1 Million; 3 if > 7 Million; 4 if > 20 Million)

- The Commission amended the Guidelines to insert a special rule, as required by Congress, providing that the aggregate dollar amount of fraudulent bills submitted as part of such an offense "shall constitute prima facie evidence of the amount of the intended loss by the defendant."

- Consistent with its obligation to identify mitigating and aggravating circumstances, and in light of the testimony it received, the Commission also amended the Mitigating Role guideline to make clear that certain fraud defendants, including nominal owners in health care fraud cases, are not *precluded* from consideration for mitigating role downward adjustments as a result of the size of the loss.

- Based on 2009 data . . .

  - the Commission anticipates that approximately 145 health care fraud cases will be affected by the new amendments annually, which is approximately 30% of health care fraud cases overall, and 2% of the cases sentenced under 2B1.1 each year.

  - The likely impact on such cases is a substantial increase in the term of imprisonment: whereas, currently, the average sentence

for health care fraud cases is 41 months, the new average sentence is projected to be 21 months of imprisonment.

- The second directive, **the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010** (Pub. L. No. 111–203) directed the Commission to review the federal sentencing guidelines applicable to securities fraud and financial and mortgage loan fraud. Specifically, Congress asked the Commission to review the harms to the public and the financial markets associated with these types of frauds. And the act also created two new fraud offenses.
- In response, the Commission held a hearing in which this type of fraud was addressed and made appropriate references within the guidelines for the new offenses.
    - Both the Department of Justice and the SEC agreed that no further amendments were necessary at this time; however, all parties agreed that the Commission should re-examine its guidelines in this area, which we have committed to do as part of a multi-year process.
    - So far, the Commission has heard mixed reviews about the operation of the fraud guideline.
        - In its January 2010, survey of federal district court judges, for example, 65 percent of those responding found the fraud guidelines appropriate, but we have heard a great deal of testimony during our regional and public hearings that the fraud guidelines are too complex and result in disproportionately high sentences.

Supervised Release

- The Commission also addressed the standards for imposing supervised release for federal offenders.
- Relying on the extensive research contained in its July 2010 report, *Federal Offenders Sentenced to Supervised Release*, the Commission voted to amend the federal sentencing guidelines in order to encourage courts **to impose supervised release for only those who actually need it**, as Congress

envisioned when it passed the sentencing reform act of 1984. **The recommended minimum term was also lowered**, depending on the class of the underlying felony.

  - The Commission's actions give judges more discretion to determine the appropriateness of imposing supervised release in instances in which supervised release is not required by statute.

  - The Commission also determined that supervised release may not be appropriate for deportable aliens.

- The Commission's new policy will conserve the limited resources of courts and probation officers. The Commission's actions also bring the supervised release guidelines more into conformity with congressional intent. Supervised release can now be focused on those who truly need it, thus ensuring public safety and deterrence while protecting the essential resources of our courts and probation officers.

Illegal Reentry

- Another, somewhat related, amendment is the change made to the Illegal Reentry guideline (2L1.2) in response to public comment about the magnitude of the prior conviction enhancement in that guideline in cases in which such convictions are very old.

- Under the amendment, if a prior conviction is so old that it is not counted elsewhere in the guidelines for the purpose of calculating the offender's Criminal History, then the conviction receives a reduced enhancement for the purpose of 2L1.2.

- Because stale prior convictions may nevertheless be serious and relevant to the seriousness of an unlawful reentry, the amendment reduces—rather than eliminates—the enhancement, and also provides upward departure language permitting consideration of the seriousness or extent of the prior offense.

overstatement of criminal history is one of the biggest reasons for departure!

Mitigating Role

- Also noteworthy is a change that the Commission made to the Mitigating Role guideline, after public comment that made clear that the adjustment was being inconsistently and narrowly applied.

- The Commission deleted language in the application note that may have been contributing to the confusion regarding the extent to which the downward adjustment for mitigating role is to be applied.

- And, as previously noted, the Commission also made clear that offenders in fraud cases who have limited knowledge of the scope of the scheme and who are held accountable for a loss amount that greatly exceeds their personal gain are not precluded from consideration for a mitigating role adjustment.

I. FAIR SENTENCING ACT (FSA)

A. Overview

- Enacted on August 3, 2010 (bipartisan, unanimous consent)
- Made substantial changes to the mandatory minimum penalties applicable to crack cocaine offenses:

  --**Raised the amount of crack cocaine necessary to trigger a five- and ten-year mandatory minimum penalty.** Prior to the Act, 5 grams of crack cocaine triggered a 5-year mandatory minimum, now it takes 28 grams of crack (nearly six times as much) to get a 5- year mandatory minimum sentence. Moreover, 50 grams of crack triggered a ten-year mandatory minimum, now 280 grams of crack gets a minimum penalty of 10 years.

    - The prior statutory mandatory minimums had established the infamous "100:1" crack-powder disparity: whereas it originally took only 5 grams of crack, it took *500* grams of powder (100 times more) to trigger that same 5-year penalty under the statute.
    - The new statutory ratio between crack and powder—28 grams crack versus 500 grams powder—is effectively 18:1 (not 1:1 as many critics and advocates had hoped!).

  --In addition to increasing the crack quantity threshold, the FSA also **eliminated the mandatory minimum penalty that had previously existed for simple possession of crack.**

- The statute also directed the Commission to add certain specific aggravating and mitigating factors in guidelines w/r/t *all* drugs, in order to focus penalties more on the conduct of the offender rather than the quantity of drug. Congress specifically included:

  --offense level *increases* for certain offenders

- Those who (1) attempt to bribe law enforcement officials in connection with drug trafficking offenses; or (2) maintain an establishment for manufacture and distribution of drugs; or (3) receive aggravating role enhancement AND also engage in "super aggravating" conduct, such as involving or selling to minors, pregnant people, seniors, or vulnerable individuals.

--an offense level *decrease* for certain offenders

- Those who receive the 4-level minimal participant mitigating role adjustment AND the offense was motivated by a familial or intimate relationship AND the defendant received no monetary compensation AND was unaware of the structure and scope of the enterprise.

B. Commission Advocacy Over The Years—*how did we get to this point?*

- It is important to take every opportunity to express the Commission's thanks and appreciation to Congress and to the President for enacting the FSA, and also to mention that this new legislative development happened *long* after the Commission first urged Congress to address the crack-powder disparity.

- The history of Commission advocacy is *lengthy*, dating back more than 15 years, and I won't recount it in detail now, but it boils down to issuing four comprehensive "special" reports to Congress on cocaine sentencing policy, and the Chair's making no fewer than six separate appearances before House and Senate subcommittees on this issue.

- The Commission took each of these opportunities to assert that there was no basis for maintaining a 100:1 penalty distinction between crack and powder cocaine, and that in doing so, the statutory structure had needlessly increased penalties in a manner that, among other things, negatively impacted certain groups; in particular, racial minorities!

- There can be no question that the Commission has been a tireless advocate of change in regard to the statutory penalties for crack cocaine.

C. The Temporary Guidelines Amendment

- The Commission's first step in responding to the FSA was enactment of a temporary amendment.

  --Congress had given the Commission "Emergency Amendment Authority" in the FSA—that is, the opportunity to amend the guidelines *immediately* to conform to the statutory changes and not have to wait for the ordinary amendment cycle to transpire.

  --This is important because it meant that crack offenders who committed their offenses after the FSA was enacted could potentially qualify for a reduced sentence under the guidelines much sooner than they otherwise would have been eligible to do so.

- The Commission issued its temporary amendment implementing the FSA on October 15, 2010, and that amendment went into effect on November 1, 2010.

- The Commission then undertook its ordinary process of assessing how the FSA should be permanently implemented in the guidelines, as part of this year's amendment cycle.

D. FSA Hearing & Public Comment

- As part of its ordinary amendment process, the Commission held a hearing on the implementation of the FSA, among other things. The hearing involved a variety of witnesses, including a Department of

Justice representative, the director of the Bureau of Prisons, Federal Public defenders, and defense counsel in private practice.

- The Commission also received and reviewed hundreds of letters commenting on the proposed FSA amendments. These letters included correspondence from Senators Durbin and Leahy; a group of majority members of the House Judiciary Committee including Representatives Smith and Sensenbrenner; and group of members in the minority of the House Judiciary Committee, including Representatives Conyers and Scott.

E. Final Guideline Amendment

The Commission voted on the final guideline amendment on April 6th.

The final version essentially repromulgated the temporary amendment with clarifying language relating to the maintenance of a premises for manufacturing and distributing drugs.

The amendment is available on our website, but let me just address a few key specifics:

--The statutory change in the triggering quantities for 5- and 10-year mandatory minimums necessitated a change in the drug guideline table. The Commission voted to **set those triggering quantities at offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months for an offender with little or no criminal history.**

--The amendment also **inserted the required aggravating and mitigating factors in the drug guideline, making adjustments to avoid double counting where necessary**.

F. Projections

So, what is likely to happen? How will the FSA affect sentencing in these kinds of cases going forward? (The Commission hires an entire team of PhDs in statistical analysis whose job it is to analyze the very complicated projections data and make assessments of the impact of statutory and guideline changes!)

But let me give you five take-aways regarding our forecast of what the FSA is likely to mean going forward. Based on the most recent offender population that we have fully analyzed (FY 2009 data), and assuming that future offenders will look similar in terms of their offense, criminal history, etc., we project that—

(1) **No offender will see his or her sentence increase** (above what it otherwise would have been absent the FSA) based solely on the quantity thresholds in the new guideline.

(2) **Two-thirds of crack cocaine offenders (63.2%) will receive a lower sentence** than they otherwise would have received.[1]

(3) **Crack cocaine offenders** sentenced pursuant to the new guideline **will receive sentences that are, on average, 25% lower overall**.

(4) **More low level crack offenders** (those with less than 28 grams and no violence or aggravating role) **are helped by the amendment**—79% as opposed to 63% of offenders overall—**and they get an even greater benefit**: an average sentence reduction of 30.9% (compared to 25%).

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[1] Figuring out who is likely to benefit is very complicated statistically. The take away is that many people (approximately 1/3 of all crack offenders)won't be helped by the FSA change because of other factors related to their sentence, *e.g.*, they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced at the mandatory minimum and have no place to go; or their drug amount falls within the overlapping amounts at different levels in t he drug table.

(5) More than 1,500 prison beds will be saved in the 5th year after enactment, increasing to more than 3,800 beds saved in year 10.

24 v. 26?

Some of you may be familiar with the intricacies of the guidelines and the debate that took place this year over whether the new mandatory minimums should be set at level "24" or "26" . . .

- Promulgation of the FSA guideline amendment involved a narrow and nuanced determination regarding where within the existing Guideline drug table to peg the five and ten-year mandatory minimum drug amounts. The Commission voted unanimously to set the five- and ten-year triggering amounts at levels 26 and 32, and let me reiterate here essentially what I said at the time of that vote:

  --It is important to recognize that the drug table is a *scale* that the original commission created to provide proportional penalties for every quantity of controlled substance, not just the amounts that the trigger the 5- and 10-year mandatory minimum penalties.

  --On that scale, the quantity of substance that by statute trigger the 5-year and 10-year mandatory minimum penalties for *all* drugs has been set at levels 26 and 32.

  --In 2007, the Commission decided to move crack sentences out of proportion on the table, shifting them down to 24 and 30, in an attempt to prompt Congressional action on the disparity issue. The Commission made very clear that its action was only "temporary."

  -- Congress has now acted, and the determination to set the guidelines for crack back at 26 and 24 restores proportionality within the drug table.

  --This does not mean, however, that the original Commission's decision to set the triggering amounts for all drug penalties in the drug table *above* the 5- and 10-year mandatory minimums was correct. It may be that 26 and 24 is unnecessarily high for all drugs, and many Commissioners are interested in reexamining that determination.

- Why 26 is *not* "a step backward"

--No one gets an *increase* in their base offense level as a result of this amendment, and many offenders benefit substantially! This is because of the substantial increase in the amount of crack necessary to trigger the man min. A first-time offender who is charged with 100 grams of crack cocaine now has a range of 63 – 78 months under the guidelines. Before the amendment, that same defendant would have been facing a guideline range of 97-121 months.

--The only people the 24 v. 26 determination affects are those who may have benefitted if the level was 24 but who see no change in their sentence at 26 (some 500 people)—a relatively small pool compared to the thousands who are likely to benefit from the overall lowering of crack penalties under the amendment.[2]

--As guardian of the guidelines, the Commission has to ensure rationality and proportionality within and among drug types in the drug table. This amendment does that because it brings crack offenses back into line with other drugs and ensures consistency in the treatment of crack offenders across all quantities.

--It is very complicated—but also much more nuanced than an argument simply about excessive penalties in regard to crack!

[2] Again, figuring out how many are likely to benefit, and how many will increase or stay the same, is complicated statistically. The take away is that many people won't be helped by the FSA change because of other factors related to their sentence, e.g., they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced AT the mandatory minimum and have no place to go; or their crack amount falls within the overlap of the drug table amounts at different levels.

II. RETROACTIVITY

The next issue that the Commission has turned to, in the wake of the FSA implementation, is the question of retroactivity.

A. Rulemaking Activity

- By statute, the Commission must consider whether to give retroactive effect to any amendments that reduce a term of imprisonment (28 U.S.C. § 994(u)). The Commission's rulemaking activity in regard to retroactivity involves several steps . . .

- The Commission issued a request for public comment on the retroactivity question and received *thousands* of responses. The notice indicated the complexity of the question, given that the FSA contained aggravating factors, as well as mitigating. Also, the Commission sought comment on whether certain categories of defendants should be excluded—e.g., those who possessed a weapon, or those who were sentenced after *Booker/Kimbrough/Spears*?

- On June 1st, the Commission held an all-day hearing on the retroactivity issue.

    - Among other distinguished witnesses, the Attorney General testified on the retroactivity issue. The Department of Justice supports retroactivity, but would limit retroactive application to offenders in CHC I, II, and III who did not have a weapon enhancement.

    - The defense bar largely supported full retroactivity (no carve outs) of the changes to the drug table and the elimination of the man min for possession. They did not want the new aggravators or mitigators to be applied retroactively.

- The Criminal Law Committee (judges) had the same broad support, and emphasized that the administrative burden would not be insurmountable, given the prior experience with the 2007 crack cocaine amendment.

- The fraternal order of police and district attorneys expressed opposition to retroactivity, as have the Republican members of Congress, whose letter on this issue arrived at the Commission on June 10th.

- The Democrat leaders in Congress have also sent letters in support of retroactivity, as have members of many public and community interest groups, and representatives of some of these groups also testified at the hearing.

- Barring any unforeseen circumstances, the Commission is shooting for a June 30th vote on the retroactivity issue. If the Commission votes to make the amendment retroactive, the effective date would be November 1st, assuming congressional approval of the underlying amendment.



B. Data Analysis

We have published on our website a detailed analysis of the potential scope of retroactivity using data through fiscal year 2010.

- Based on an analysis of federal offenders who are currently incarcerated, our analysis estimates that **12,040 crack offenders** sentenced between October 1, 1991 and September 30, 2010 **would be eligible** to receive a reduced sentence if the new guideline amendment is made retroactive.[1]
    - This number may be lower than many expect for a variety of reasons. Most notably, because Congress has not made the statutory mandatory minimums retroactive, the old statutory mandatory sentences will still be in place for offenders who were sentenced pursuant to them, and they serve as a "floor" to any benefit such offenders might receive under the guidelines.[2] If Congress makes the statutory minimums retroactive, the Commission estimates that *an additional 8,000 currently incarcerated crack offenders would be eligible to receive a reduced sentences*.
- **The number of eligible offenders in each jurisdiction varies.** For example, there are an estimated 884 offenders in the Eastern District of Virginia (accounting for more the 7% of the overall number of eligible offenders), while the District of Hawaii has only two offenders.
    - With approximately 138 eligible offenders, Central California appears to be the district in the 9th Circuit with the most offenders who would be eligible for retroactive application.
- After controlling for a number of factors and making relevant statistical assumptions, the USSC estimates that **the average sentence**

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[1] The analysis posits that any crack offender sentenced pursuant to 2D1.1 who could benefit from the retroactive application of the FSA amendment (*i.e.*, anyone whose sentence could be adjusted downward) is "eligible."

[2] Other reasons so many offenders would not receive a benefit include the fact that many (nearly 6,000) were originally sentenced pursuant to the Career Offender or Armed Career Criminal provisions, and their guideline ranges are not controlled by changes to 2D1.1; and many others were sentenced **AT** the statutory minimum, and thus cannot go down any further.

reduction for all eligible offenders would be 22.6% or 37 months. More than 7,000 offenders (78%) would receive a sentence reduction of 48 months or less, while approximately 280 (3%) would receive a sentence reduction of more than 10 years.

C. Recidivism Study

Also pertinent to the Commission's consideration of whether to make the FSA Amendment retroactive is a new study regarding the recidivism of offenders who were released pursuant to retroactive application of the 2007 crack cocaine amendment . . .

- The point of the study was to determine whether early release due to retroactive application of the crack amendment had any effect on the recidivism rates of the offenders who benefitted.[3]

- Commission researchers compared a group of offenders who received retroactive application of the 2007 amendment and were released early, with a comparison group who were released just prior to the effective date of the amendment and had served their full sentences. The two crack cocaine offender groups were comparable across a range of characteristics: e.g., demographics, criminal history, sentences received.

- The study revealed that **there was no statistically significant difference in the recidivism rates of the two groups**. (2007 Amendment group had a 30.4% re-offend rate within 2 years, while the Comparison Group had a 32.6% re-offend rate in that same time period.) The group that was released early did *not* have a higher rate of recidivism, as might otherwise be expected.

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POTENTIAL PRIORITIES

The Commissioners are still working on determining our priorities for the next Amendment cycle. There are a few things that are carry-overs from our previous cycle that we are committed to doing, and there are other issues that more than one Commissioner has expressed an interest in addressing – although, again, we have not yet settled on a final list. (Once we do, it will be published for comment in our ordinary course of events.)

So, here is what I can say about our priorities at this point: our *first* priority is publishing several significant reports that we have been working on about aspects of the federal sentencing system . . .

1. Mandatory Minimum Report

- Congress has directed the Commission to conduct a comprehensive review of statutory mandatory minimum penalties and their role in federal sentencing particularly since *Booker*.

- This is an extraordinarily significant and daunting undertaking, and we are hard at work on this important mission. We anticipate that this report will involve a comprehensive review of the subject, including a detailed discussion of the historical development of federal statutory mandatory minimums, and a statistical analysis of their operation, past and present.

- We also foresee that the report will discuss a broad spectrum of policy issues and considerations, such as the original commission's drug quantity table determination and the potential expansion of the "safety valve" provision.

- We anticipate that the report will be released this fall.

2. **Booker Report**

- As you know, in 2006, the Commission released a review of federal sentencing in the year after the *Booker* decision.
- Since *Booker*, the Supreme Court has decided seven cases that further expound on the original *Booker* decision.
- This report will evaluate the system's evolution over the past five years and provide extensive data and analysis on sentencing trends and practices.
    - We anticipate examining, for example, variances and departures from the guidelines and the reasons behind these sentences.
    - We also anticipate addressing questions that have been raised about the current standard of appellate reasonableness review since *Booker*.
- Our current data and analysis for the last quarter (November 24th – May 24th) indicates that:
    - The overall **within-range** sentencing rate is currently **54.0%**
    - Most of the non-range sentencing is occurring pursuant to government motion=>the overall **government-sponsored below range** sentencing rate is **27.1%**.
    - The **non-government sponsored below-range** sentencing rate is **17.0%** (13.7% of which is attributable to *Booker* variances rather departures)
    - These rates vary significantly by offense type and other factors!
- The Commission also anticipates releasing its *Booker* Report in the fall as well.

3. **Child Pornography Report**

- On the heels of *Booker*, we plan to turn to our report on sentencing in child pornography cases—one area that has a relatively high variance rate.

- In our January 2010 survey of federal judges, about 70 percent of judges responding felt that the guideline range for possession of child pornography were too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high.
- Child pornography offenses and resulting penalties are of great interest to the criminal justice community.
  - In its fiscal year 2010 Sourcebook, the Commission (for the first time) broke out child pornography offenses from other sex offenses in its data analysis.
  - The data indicate that in fiscal year 2010 the departure/variance rate for child porn offenses was 42.7 percent.
- Given this overwhelming judicial sentiment that the guideline penalties are not appropriate in these offenses, the Commission is undertaking its review of this issue including a review of the offenders, the conduct involved in the offenses, the role of technology in these cases, and victims of these crimes.
- The Commission believes that this report will assist in the formulation of possible guideline and other penalty revisions that will bring these guidelines into the 21st century.
  - Both the National Center for Missing & Exploited Children, the premier advocacy group for victims of these offenses, and the Department of Justice have indicated a willingness to explore potential changes to the guidelines applicable to these offenses.

Other potential areas of interest:

4. **Economic Crime & Fraud Guideline**=>Commission is likely to look into aspects of the fraud guideline (2B1.1). Congress ordered a review of the guidelines related to economic crimes in the Dodd-Frank act, and we heard from many sources that there are problems, especially in high loss fraud cases and mortgage fraud cases.

5. **Drug Table Reexamination** =>some Commissioners have also previously expressed interest in a re-examination of the original Commission's construction of the drug table in 2D1.1, and, in particular, the decision to link the guidelines to the statutory mandatory minimums such that the guideline base offense level is set *above* the mandatory minimums for drug crimes.

6. **Operation of the Safety Valve**=>an interest has also been expressed in looking at whether the guideline safety valve should be expanded to include offenders who have more than 1 criminal history point.

Review of the "Etc.

7. **Categorization of ~~Prior~~ Offenses as Crimes of Violence ~~for Career Offender~~ ("Categorical Approach")**=>the Commission is also concerned about the problems that have arisen in regard to categorizing ~~prior~~ offenses ~~for~~ the purpose of establishing career offender status (*i.e.*, identifying crimes of violence and use of the categorical approach). There may be an interest in looking to this as well.

There is a lot of litigation and inconsistency re the categorization of offenses for guideline + statutory purposes

A lot of this work is done in the context of immigration cases + Career Offender

"crime of violence"

"aggravated felony"

"drug trafficking offense"

Ninth Circuit Federal Public Defenders Standing Committee Retreat

Bigfork, Montana

June 12 - 15, 2011

Ketanji Jackson
Vice Chair

Update on Key Issues before the United States Sentencing Commission and Criminal Rules Committee
(June 14, 2011 - 8:30 a.m.)

6/14/11

"UPDATE ON KEY ISSUES BEFORE THE USSC AND CRIMINAL RULES COMMITTEE"

I'm delighted to have been invited to participate in this panel. Five years ago, I was an AFPD in Washington, D.C., and in that capacity, I too questioned what new and "crazy" thing the Sentencing Commission was doing in its annual amendment cycle (as I'm sure many of you do). I can tell you from experience that the perspective of a policy maker—trying to reach the right answer as part of a bi-partisan board—is *very* different than that of a litigator or an advocate. And I'm happy to be here this morning to share with you some of the policy judgments that the Commission has had to make over this last year, to let you know what we've been working on, and to give you my perspective on some of the key issues.

A couple of overarching updates before I get into some of the specifics:

(1) New Chair—The Commission is now under the leadership of a new Chair, Judge Patti Saris who is a district court judge on the District of Massachusetts. Judge Saris was confirmed on December 23rd, and she has lead us through the remainder of this amendment cycle, ably taking up the torch that was passed to her by her predecessor, Judge Bill Sessions from the District of Vermont.

Judge Saris was appointed as a district court judge by President Clinton and has served on the federal bench since 1994. Prior to that, she was on the state court bench, and she has served as both a federal magistrate and an AUSA. She was also a legislative staffer for Senator Ted Kennedy on the Senate Judiciary Committee very early in her career, so she is very familiar with the guidelines, the legislative process, and with the work of the Commission as established the Sentencing Reform Act. On a personal note, I think of her not only as our "Chair" but also as "my

judge" because I clerked for her right out of law school and I consider her to be both a mentor and a friend.

(2) New Website—another relatively recent development that some of you may have noticed is the unveiling of the Commission's new website (www.ussc.gov). The new website is a complete transformation—a "facelift"—that we hope will be much more user-friendly in terms of providing information. One of the Commission's core statutory missions is to serve as a clearinghouse for sentencing data and information, and our website overhaul goes a long way toward helping us distribute the information that we collect and analyze in the most efficient manner possible.

(3) New Amendments—the last general update pertains to the Commission's promulgation of new amendments to the guidelines, the content of which I will address momentarily.

The Commission's amendment cycle ended on April 28th , when we submitted new guideline amendments to Congress. If Congress does not act, the 2011 amendments will become effective November 1st.

One of those amendments—the one that has garnered the most attention this cycle—is the amendment that permanently implements Congress's directives in the Fair Sentencing Act. . . .

I. FAIR SENTENCING ACT (FSA)

A. Overview

- Enacted on August 3, 2010 (bipartisan, unanimous consent)
- Made substantial changes to the mandatory minimum penalties applicable to crack cocaine offenses:

(1) increased the quantity threshold for each man min

--Prior to the Act, 5 grams of crack cocaine triggered a 5-year mandatory minimum, now it takes 28 grams of crack (nearly six times as much) to get a 5- year mandatory minimum sentence. Moreover, 50 grams of crack triggered a ten-year mandatory minimum, now 280 grams of crack gets a minimum penalty of 10 years.

--The prior statutory mandatory minimums had established the infamous "100:1" crack-powder disparity: whereas it originally took only 5 grams of crack to trigger a 5-year man min penalty, it took *500* grams of powder (100 times more) to trigger that same 5-year penalty under the statute.

--It should be noted that when Congress increased the amount of crack that is required to trigger a mandatory minimum under the FSA, the new statutory ratio between crack and powder—28 grams crack versus 500 grams powder—is effectively 18:1 (not 1:1 as many critics and advocates had hoped!).

(2) • In addition to increasing the crack quantity threshold, the FSA also eliminated the mandatory minimum penalty that had previously existed for simple possession of crack.

(3) • The statute also directed the Commission to add certain specific aggravating and mitigating factors in guidelines w/r/t *all* drugs, in

order to focus penalties more on the conduct of the offender rather than the quantity of drug. These factors included:

--offense level *increases* for offenders who (1) attempt to bribe law enforcement officials in connection with drug trafficking offenses; or (2) maintain an establishment for manufacture and distribution of drugs; or (3) receive aggravating role enhancement AND also engage in "super aggravating" conduct, such as involving or selling to minors, pregnant people, seniors, or vulnerable individuals.

--an offense level *decrease* for offenders who receive the 4-level minimal participant mitigating role adjustment AND the offense was motivated by a familial or intimate relationship AND the defendant received no monetary compensation AND was unaware of the structure and scope of the enterprise.

B. Commission Advocacy Over The Years → a tireless advocate for change

- I would be remiss if I did not take this opportunity to express the Commission's thanks and appreciation to Congress and to the President for enacting the FSA, and also mention that this new legislative development happened *long* after the Commission first urged Congress to address the crack-powder disparity.

- The history of Commission advocacy is *lengthy*, dating back more than 15 years, and I won't recount it in detail now, but it boils down to issuing four comprehensive "special" reports to Congress on cocaine sentencing policy, and the Chair's making no fewer than six separate appearances before House and Senate subcommittees on this issue.

- The Commission took each of these opportunities to assert that there was no basis for maintaining a 100:1 penalty distinction between crack and powder cocaine, and that in doing so, the statutory structure

had needlessly increased penalties in a manner that, among other things, negatively impacted certain groups; in particular, racial minorities!

- There can be no question that the Commission has been *a tireless advocate of change in regard to the statutory penalties for crack cocaine*!

C. The Temporary Guidelines Amendment

- The Commission's first step in responding to the FSA was enactment of a temporary amendment. Congress had given the Commission "Emergency Amendment Authority" in the FSA—that is, the opportunity to amend the guidelines *immediately* to conform with the statutory changes and not have to wait for the ordinary amendment cycle to transpire. This is important because it meant that crack offenders who committed their offenses after the FSA was enacted could potentially qualify for a reduced sentence under the guidelines much sooner than they otherwise would have been eligible to do so.

- The Commission issued its temporary amendment implementing the FSA on October 15, 2010, and the amendment went into effect on November 1, 2010.

- The Commission then undertook its ordinary process of assessing how the FSA should be permanently implemented in the guidelines, as part of this year's amendment cycle.

D. FSA Hearing & Public Comment

- As part of its ordinary amendment process, the Commission held a hearing on the implementation of the FSA, among other things.

- The hearing involved a variety of witnesses, including a Department of Justice representative, the director of the Bureau of Prisons, Federal Public defenders, and defense counsel in private practice.

- The Commission also received and reviewed thousands of letters commenting on the proposed FSA amendments. These letters included correspondence from Senators Durbin and Leahy; a group of majority members of the House Judiciary Committee including Representatives Smith and Sensenbrenner; and group of members in the minority of the House Judiciary Committee, including Representatives Conyers and Scott.

E. Final Guideline Amendment

The Commission voted on the final guideline amendment on April 6th.

The final version essentially repromulgated the temporary amendment with clarifying language relating to the maintenance of a premises for manufacturing and distributing drugs.

The amendment is available on our website, but let me just address a few key specifics:

--The statutory change in the triggering quantities for 5- and 10-year mandatory minimums necessitated a change in the drug guideline table. The Commission voted to set those triggering quantities at offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months for an offender with little or no criminal history.

--The amendment also inserted the required *aggravating* and *mitigating* factors in the drug guideline, making adjustments to avoid double counting where necessary.

F. Projections

So, what is likely to happen? How will the FSA affect sentencing in these kinds of cases? The Commission hires an entire team of PhDs in statistical analysis whose job it is to analyze the very complicated projections data and make assessments of the impact of statutory and guideline changes!

But let me give you five take-aways regarding our forecast of what the FSA is likely to mean going forward. Based on the most recent offender population that we have fully analyzed (FY 2009 data), and assuming that future offenders will look similar in terms of their offense, criminal history, etc., we project that—

(1) **No offender will see his or her sentence increase** (above what it otherwise would have been absent the FSA) based solely on the quantity thresholds in the new guideline.

(2) **Two-thirds of crack cocaine offenders (63.2%) will receive a lower sentence** than they otherwise would have received. [1]

(3) **Crack cocaine offenders** sentenced pursuant to the new guideline **will receive sentences that are, on average, 25% lower overall.**

(4) **More low level crack offenders** (those with less than 28 grams and no violence or aggravating role) **are helped by the amendment**—79% as opposed to 63% of offenders overall—**and they get an even greater benefit**: an average sentence reduction of 30.9% (compared to 25%).

[1] Figuring out who is likely to benefit is very complicated statistically. The take away is that many people (approximately 1/3 of all crack offenders)won't be helped by the FSA change because of other factors related to their sentence, *e.g.*, they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced at the mandatory minimum and have no place to go; or their drug amount falls within the overlapping amounts at different levels in t he drug table.

(5) More than 1,500 prison beds will be saved in the 5th year after enactment, increasing to more than 3,800 beds saved in year 10.

G. 24 v. 26?

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  --It is important to recognize that the drug table is a *scale* that the original commission created to provide proportional penalties for every quantity of controlled substance, not just the amounts that the trigger the 5- and 10-year mandatory minimum penalties.

  --On that scale, the quantity of substance that by statute trigger the 5-year and 10-year mandatory minimum penalties for *all* drugs has been set at levels 26 and 32.

  --In 2007, the Commission decided to move crack sentences out of proportion on the table, shifting them down to 24 and 30, in an attempt to prompt Congressional action on the disparity issue. The Commission made very clear that its action was only "temporary," and that it was done as an inducement to congressional action.

  -- Congress has now acted. The determination to set the guidelines for crack back at 26 and 24 restores proportionality within the

drug table b/c the man min penalty triggering amounts for *all* drugs are now set at 26 and 32.

--This does not mean, however, that 26 and 32 are the *right* levels, or that the original Commission's decision to set the triggering amounts for all drug penalties in the drug table *above* the 5- and 10-year mandatory minimums was correct. It may be that 26 and 24 is unnecessarily high for all drugs, and several Commissioners are interested in reexamining that determination.

--In other words, the drug table now squarely implicates a broader policy decision about whether the original Commission's judgment was correct.

- Why 26 is *not* "a step backward" (it's impact is not *that* extensive)

--No one gets an increase in their base offense level as a result of this amendment, and many offenders benefit substantially. A first-time offender who is charged with 100 grams of crack cocaine now has a range of 63 – 78 months under the guidelines. Before the amendment, that same defendant would have been facing a guideline range of 97 – 121 months!

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C. Recidivism Report Re 2007 Crack Amendment

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- **The number of eligible offenders in each jurisdiction varies.** For example, there are an estimated 884 offenders in the Eastern District of Virginia (accounting for more the 7% of the overall number of eligible offenders), while the District of Hawaii has only two offenders. (the Ninth Circuit overall is projected to have 4% of the cases (N=483)) / the Fourth has more than 3,000 (25%)
    - With approximately 138 eligible offenders, Central California appears to be the district in the 9th Circuit with the most offenders who would be eligible for retroactive application.

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[3] "Recidivism" for the purpose of the study means: a reconviction, a re-arrest, or revocation of an offender's supervised release (including revocation for technical, or non-criminal, violations).

2011 AMENDMENTS

There is no question that implementation of the Fair Sentencing Act has been the Commission's primary focus this Amendment cycle, but we also made other significant amendments in the areas of **firearms, fraud, supervised release, illegal reentry, and role in the offense**:

Firearms

- The Commission responded to serious concerns raised by the Department of Justice and other officials related to the illegal flow of firearms across the Southwest border. The Commission held a hearing on the penalties for firearms and ammunition offenses, particularly in response to the problem of firearm trafficking across the border with Mexico.

- Ultimately, the Commission voted to promulgate an amendment to increase penalties for certain firearms offenses. Specifically, the new amendments provide increased penalties for offenders who illegally traffic firearms across the United States border and also for certain "straw purchasers" of firearms (*i.e.*, individuals who buy firearms on behalf of others, typically prohibited persons who are not permitted to buy firearms themselves), a practice that substantially contributes to the flow of illegal firearms from the U.S. and into other countries.

    - **Trafficking across the border**

        - new enhancement in 2K2.1 applicable to offenders who "possess a firearm or ammunition while leaving or attempting to leave the U.S." or who "transfer a firearm or ammunition with the knowledge, intent, or reason to believe that such items will be transferred out of the U.S."

        - Also, changes to the guideline applicable to the exportation of small arms and ammunition (2M5.2) to reduce the threshold number of weapons permitted and to address ammunition-only cases.

- **Straw Purchasers**=>the new amendment results in an increase in the base offense level in 2K2.1 for offenders who buy a firearm with the "knowledge, intent, or reason to believe" that the weapon will be transferred to a prohibited person.
    - The amendment ensures that such straw purchasers will be subject to the same base offense level as straw purchasers who are convicted of the actual transfer of a weapon to a prohibited person. The Commission concluded that purchasers with knowledge and those who actually transfer a weapon are similarly culpable.
    - Of the straw purchasers cases in the 2009 data set, almost half (45.2%) involved circumstances in which the offender knew or had reason to believe that the weapon would be transferred to a prohibited person. Moreover, in 71.3 % of the straw purchaser cases, the offender received, or was promised, payment for the purchase.
    - New downward departure language is also provided. Because straw purchaser cases sometimes involve a close personal relationship between the straw purchaser and the person to whom the firearm is transferred, a downward departure may be appropriate if the straw purchaser was motivated to commit the offense by an intimate or familial relationship and received no monetary compensation from the offense.

Fraud

- In addition to addressing firearms, the Commission also responded to two specific directives from Congress related to fraud.
- First, in **the Patient Protection and Affordable Care Act of 2010** (Pub. L. No. 111–148), Congress directed the Commission to review and increase penalties for "Federal health care offenses involving a Government health care program." This phrase is significant because the term "government health care program" was not defined in the statute.
    - The Commission had to determine the meaning of a "Government health care program," which the new amendment defines as "any plan

or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government." Examples of such programs are expressly provided, and include the Medicare program, the Medicaid program, and the CHIP program.

- Federally-funded programs (such as Medicare) are included because of the clear concern expressed in the legislative history of the Act about the costs to the federal government from health care fraud.

- Jointly-funded federal-state programs are also included because many federally-funded programs, such as Medicaid and CHIP, are jointly paid for by the states and it would be impractical to disaggregate these funds for sentencing purposes.

- State-funded programs included as well because the policy reasons for providing an enhancement for fraud against federally-funded programs are applicable to state-funded programs and state programs are subject to similar forms of fraud and abuse that place a drain on public funds.

- Having identified the federal health care offenses that would be targeted for increased penalties as required by the Act, the Commission then provided tiered loss enhancements for such offenses, as the Act directed us to do.

  - New specific offense characteristic at 2B1.1(b)(8) that applies if the loss in such cases is more than $1,000,000. The enhancement is 2 levels if the loss was more than $1,000,000; 3 levels if the loss is more than $7,000,000; and 4 levels if the loss is more than $20,000,000.

- The Commission also amended the Guidelines to insert a special rule, as required by Congress, providing that the aggregate dollar amount of fraudulent bills submitted as part of a federal health care offense "shall constitute *prima facie* evidence of the amount of the intended loss by the defendant."

- And, consistent with the Commission's obligation to identify mitigating and aggravating circumstances, the Commission also amended the Mitigating Role guideline to make clear that certain fraud defendants, including nominal owners in health care fraud cases, are not *precluded* from consideration for mitigating role downward adjustments as a result of the size of the loss.

- Based on 2009 data . . .

- the Commission anticipates that approximately 145 health care fraud cases will be affected by the new amendments annually, which is approximately 30% of health care fraud cases overall, and 2% of the cases sentenced under 2B1.1 each year.

- The likely impact on such cases is a substantial increase in the term of imprisonment: whereas, currently, the average sentence for health care fraud cases is 41 months, the new average sentence is projected to be 21 months of imprisonment.

- The second directive, **the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010** (Pub. L. No. 111–203) directed the Commission to review the federal sentencing guidelines applicable to securities fraud and financial and mortgage loan fraud in light of the harms to the public and the financial markets associated with these types of frauds. The Act also created two new fraud offenses.

- In response, the Commission held a hearing in which these types of fraud were addressed and made appropriate references within the guidelines for the new offenses.

    - Both the Department of Justice and the SEC agreed that no further amendments were necessary during this past Amendment cycle; however, all parties agreed that the Commission should re-examine its guidelines in this area, which we have committed to do as part of a multi-year process.

    - So far, the Commission has heard mixed reviews about the operation of the fraud guideline.

        - In its January 2010, survey of federal district court judges, for example, 65 percent of those responding found the fraud guidelines appropriate, but we have heard a great deal of testimony during our regional and public hearings that the fraud guidelines are too complex and result in disproportionately high sentences.

Supervised Release

- The Commission also addressed the standards for imposing supervised release for federal offenders (5D1.1).

- Relying on the extensive research contained in its July 2010 report, *Federal Offenders Sentenced to Supervised Release*, the Commission voted to amend the federal sentencing guidelines in order to encourage courts **to impose supervised release for only those who actually need it**, as Congress envisioned when it passed the sentencing reform act of 1984. **The recommended minimum term was also lowered**, depending on the class of the underlying felony (5D1.2).

    - The Commission's actions were designed to allow judges to determine the appropriateness of imposing supervised release in instances in which supervised release is not required by statute.

    - The Commission also determined that supervised release may not be appropriate for deportable aliens.

- The new policy will conserve the limited resources of courts and probation officers. It will also bring the supervised release guidelines more into conformity with congressional intent. Supervised release can now be focused on those who truly need it, thus ensuring public safety and deterrence while protecting the essential resources of our courts and probation officers.

Illegal Reentry

- Another, somewhat related, amendment is the change made to the Illegal Reentry guideline (2L1.2) in response to public comment about the magnitude of the prior conviction enhancement in that guideline in cases in which such convictions are very old.

- Under the amendment, if a prior conviction is so old that it is not counted elsewhere in the guidelines for the purpose of calculating the offender's Criminal History, then the conviction receives a *reduced* enhancement for the purpose of 2L1.2.

- Because stale prior convictions may nevertheless be serious and relevant to the seriousness of an unlawful reentry, the amendment reduces—rather than eliminates—the enhancement, and also provides upward departure language permitting consideration of the seriousness or extent of the prior offense.

Mitigating Role

- Also noteworthy is a change that the Commission made to the Mitigating Role guideline, after public comment that made clear that the adjustment was being inconsistently and narrowly applied.

- The Commission deleted language in the application note that may have been contributing to the confusion regarding the extent to which the downward adjustment for mitigating role is to be applied.

- And, as previously noted, the Commission also made clear that offenders in fraud cases who have limited knowledge of the scope of the scheme and who are held accountable for a loss amount that greatly exceeds their personal gain are not precluded from consideration for a mitigating role adjustment.

* * *

Of course, the most significant amendment, and the one that has received the most attention, is the amendment that the Commission promulgated implementing the Fair Sentencing Act of 2010 . . .

IV. MANDATORY MINIMUM REPORT

- Congress has directed the Commission to conduct a comprehensive review of statutory mandatory minimum penalties and their role in federal sentencing particularly since *Booker*.

- This is an extraordinarily significant and daunting undertaking, and we are hard at work on this important mission. We anticipate that this report will involve a comprehensive review of the subject, including a detailed discussion of the historical development of federal statutory mandatory minimums, and a statistical analysis of their operation, past and present.

- We also foresee that the report will discuss a broad spectrum of policy issues and considerations, such as the original commission's drug quantity table determination and the potential expansion of the "safety valve" provision.

- We anticipate that the report will be released this fall.

I. BOOKER REPORT

- The Commission also anticipates releasing a *Booker* Report likely in the fall as well.
- As you know, in 2006, the Commission released a review of federal sentencing in the year after the *Booker* decision.
- Since *Booker*, the Supreme Court has decided seven cases that further expound on the original *Booker* decision.
- This report will evaluate the system's evolution over the past five years and provide extensive data and analysis on sentencing trends and practices.
    - We anticipate examining, for example, variances and departures from the guidelines and the reasons behind these sentences.
    - We also anticipate addressing questions that have been raised about the current standard of appellate reasonableness review since *Booker*.
- Our current data and analysis for the last quarter (November 24th – May 24th) indicates that:
    - The overall **within-range** sentencing rate is currently **54.0%**
    - Most of the non-range sentencing is occuring pursuant to government motion=>the overall **government-sponsored below range** sentencing rate is **27.1%.**
    - The **non-government sponsored below-range** sentencing rate is **17.0%** (13.7% of which is attributable to *Booker* variances rather departures)
    - These rates vary significantly by offense type and other factors!

VI. POTENTIAL PRIORITIES

- The Commissioners have met to discuss upcoming priorities and will continue to do so—I'm only one Commissioner and only have one vote!

- In addition to the reports on mandatory minimums and the current state of federal sentencing, the Commission is also committed to issuing a report about sentencing in child pornography cases—one area in which there is a relatively high variance rate.

Child Pornography

- The Commission is committed to working on a comprehensive report on child pornography offenses.
- In our January 2010 survey of federal judges, about 70 percent of judges responding felt that the guideline range for possession of child pornography were too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high.
- Child pornography offenses and resulting penalties are of great interest to the criminal justice community.
  - In its fiscal year 2010 Sourcebook, the Commission (for the first time) broke out child pornography offenses from other sex offenses in its data analysis.
  - The data indicate that in fiscal year 2010 the departure/variance rate for child porn offenses was 42.7 percent.
- Given this overwhelming judicial sentiment that the guideline penalties are not appropriate in these offenses, the Commission is undertaking its review of this issue including a review of the offenders, the conduct involved in the offenses, the role of technology in these cases, and victims of these crimes.
- The Commission believes that this report will assist in the formulation of possible guideline and other penalty revisions that will bring these guidelines into the 21st century.
  - Both the National Center for Missing & Exploited Children, the premier advocacy group for victims of these offenses, and the Department of Justice have indicated a willingness to explore potential changes to the guidelines applicable to these offenses.

- Another area that the Commission is likely to look at in the upcoming amendment cycle is aspects of economic crime and the fraud guideline (2B1.1)—Congress asked us to do so in Dodd-Frank, and

others have brought to our attention several problems with the guideline. Two areas that have been of particular concern: mortgage fraud + high loss fraud cases.

- There is also an interest in continuing to look at aspects of the drug table and operation of the safety valve.

- We have also been generally concerned about how the system is operating in regard to the categorization of prior offenses for the purpose of the guidelines—career offender—and ACCA (*i.e.*, the categorical approach and the ~~[illegible]~~ different means of assessing whether a prior offense is a crime of violence)

"TWO DIRECTIONS"
Montrose Christian School Graduation Speech
May 2011

Congratulations Graduates!

This is a very special time for you. The books are closed; the tests are done; the grades are in. And now the celebrations can begin! Did you ever think you'd make it to this point?

When I graduated from high school (which was quite some time ago), I was ***very*** excited. In addition to all of the fun stuff—the prom, PEP Rallies, Grad Night—I was thrilled to have accomplished something really big, something that not everyone is able to achieve: getting my high school diploma.

I can also remember being pretty nervous. High school had become a comfortable place for me, and it's always nerve-wracking to have to move out of your comfort zone. Now, we didn't have Facebook, or the internet, or cellphones when I was in high school—as hard as that is to imagine—but I did have friends, and we did have fun. I knew all the teachers and administrators, felt accepted by my peers, and, most importantly, I knew what to expect. So, although graduation was a happy time, I also felt some fear—fear of the unknown directions that I would be going toward, and the unfamiliar paths upon which I'd soon embark.

High school graduation is unusual like that. It is perhaps the first time in our life's journey when we have an opportunity to look in two directions at one time: both backward and forward. Generally speaking, we tend live our lives in the present—thinking about what we have to do *today*. But here you are, at this momentous

occasion, looking backward (with pride) at all that you've have accomplished, and also forward (perhaps with anxiety?) at what the future holds.

The title of this graduation address *is* "Two Directions." This phrase has a double meaning, which is fully intended, as it refers both to your perspective and to my advice. If you take away only one thing from what I say today, it should be this: look in two directions—back and also forward—as you progress from this point on. And it is remarkable that, as humans, we are fully capable of doing so! We are not horses wearing blinders. We have peripheral vision. We can look back even as we move forward, and I encourage you to do in the future.

(1)

O.K., so, graduates of the Class of 2011– go ahead and look back. I mean, literally – turn around right now and look behind you. . . . Look at your surroundings. Think about where you are. You are here in the sanctuary of Montrose Baptist Church, in the shadow of the Cross, where people come to worship and give thanks. Remember that it is here, in the church, that your teachers, friends, and loved ones prayed for you and wished you well as you began this next phase of your life.

This act of looking back symbolizes my first direction: that you draw upon your past as a source of encouragement as you move into the future. Often, graduates can't wait to leave the nest—to fly off on their own, to leave the past behind. But I say, keep connected to what has come before. The teachers who nurtured you. The coaches who challenged you. The parents who did everything they could to provide you with the tools to make your way in this world and beyond. Someone supported you—draw on that support. Someone loved you—focus on that love.

When you're out there, and you're struggling (as we all do), look back—recall that you have never been alone, and be grateful for what God has done for you.

The idea of looking back in order to move forward reminds me of my freshman year in college. My first day, freshman orientation, was the day after Labor Day; my 18th birthday was a mere two weeks later. Now, I was raised in Miami, Florida—which never gets below 60 degrees, even in the winter—and I went to college in Cambridge, Massachusetts, which barely reaches 60 degrees at any point in time. I remember very clearly sitting on the steps of the library on my birthday freshman year, wrapped in a scarf, with the hat pulled down over my head, trying to get through orientation paperwork, and sobbing—because I was in a strange place far from home, because no one knew it was my 18th birthday and certainly no one cared, and because I felt so *alone*. When I got back to my dorm room, I saw there was a message on my answering machine: it was my mother, in Florida, and she sang to me. For the first time in 18 years, my mother serenaded me on my birthday, reminding me that my parents—who were, admittedly, a lot warmer than I was at that point—remembered me, believed in me, were praying for me, and wanted me to be successful. Her song was the encouragement that I needed in that moment, and even in my loneliness, I thanked God for the opportunity he'd given me, for the firm foundation he had provided, and also for how far I had come.

It is said that every person who accomplishes anything stands on the shoulders of many who havve come before them. And sometimes what is trite is true: graduates, as you move ahead, don't forget to look back. Remember where you came from, no matter where you are.

(2)

O.K., so, now graduates, look forward. Out there, in front of you. What do you see? . . . The smiling faces of your friends and loved ones. That favorite teacher. A pesky sibling. Walls, windows, doors. There are, and will always be, lots of things to see—but your success will require *vision*, not just sight. Vision is the ability to see beyond the immediate circumstances and to look ahead—*far* ahead—to what can be.

This is a familiar lesson; indeed, there are many Bible stories that attest to the importance of having vision: Daniel in the Lion's Den; Job's trials and tribulations; Shadrach, Meshach, and Abednego's escape from the firey furnace. The Bible is filled with people who, through faith, were able to see beyond the present, to a world of hope and glory. Now, that is not to say that any one of us has any special insight—only God knows what lies ahead for each of us. The best that you can do, as you look forward, is to take the long view.

That is my second direction for you. Taking the long view means that, whatever is going on around you, you will focus and work hard. You will set your sights on a goal and commit to pressing forward. It also means making responsible choices. For some, this can be the hardest part. College is a *blast*. And there will be many times when you'll be tempted to live in the moment. Isn't it much more fun to hang out with your friends than to study? Who wouldn't rather sleep late than go to an early morning class? You may even reach a point when you just don't want to be a student anymore. And, as an adult, you will have that option.

I say, see beyond it. As an adult, you are now on a mission to do what it takes to make a better life for yourself and others as a stewart of the blessings you've

received. Remember that real achievement only comes to those who *strive* for it. As Henry Wadsworth Longfellow once wrote:

> The heights that great men reached and kept
> Were not achieved by sudden flight
> But they, while their companions slept,
> Were toiling upward through the night.

Graduates, you have achieved great heights today. Keep climbing. Envision a goal that you set for yourself, stay focused, and continue to put one foot in front of the other—marching ahead with the work that you've been called to do.

(3)

So there you have it. As high school graduates, you now have two directions—backward and forwars—and *I* have two directions: remember the past (to find sources of encouragement), and take the long view, which will help you to make the right choices and to work hard going forward.

There are no two ways about it: you're going to be fine. Actually, you will be *better* than fine. You're going to be great! We are behind you. God is with you. Now go, and do the things you're called to do.

MORRISON & FOERSTER REFLECTIONS AND REMARKS
D.C. DIVERSITY WORKSHOP

First, a few preliminaries:

- I like to know my audience: I know many of you already, but it's helpful to get a sense of the group—How many of you are litigators? Corporate lawyers? Are there any Of Counsel here? Any first-year associates? Associates in your 4th year or more? Has anyone done a clerkship?

- Please ask questions as they come to you! I'd like for this to be an interactive dialogue, as I give you whatever 'insights' I have into firm practice and beyond.

I've structured this discussion around a few questions that you may be asking right now as you think about whether the next hour is worth your very valuable (non-billable) time:

- Who is this person?
- What does she do?
- Where did she come from?
- And, most important, does she have anything useful to say that will help me in my legal career or with the case that I'm working on and thinking about right now? Well, we shall see. I hope that you can find *something* valuable in what I am about to say!

A. Who am I?

(a) Right now, I wear many hats: I am—

- an attorney (I graduated from Harvard Law School in 1996)
- a Vice Chair and Commissioner of the U.S. Sentencing Commission (I was nominated by President Obama in the summer of 2009 and confirmed in February of 2010)
- an adjunct professor of law at George Washington University Law School (I just finished my first semester of teaching a lively federal sentencing seminar)
- a mom (I have two bright and beautiful daughters)
- a wife (my husband and I will have been married 15 years this October)
- a daughter (my parents still live in Florida, where I grew up, and I love having a warm place to migrate to in the winter!)
- a sister (my brother is an officer in the Maryland Army National Guard; he served in Mosul Iraq and is currently deployed in the Sinai Peninsula in Egypt)
- an aspiring runner (I completed a half-marathon last September and I am trying to keep the momentum going)

  and

- a hopeful hobbyist (when I have time—which is rarely—I am trying to follow in my mom's footsteps by having taken up crochet)

(b) I have been out of law school for 15 years and in that time I've had 10 different positions=>

- 3 Clerkships=> DCt (Saris), 1st Cir. (Selya), SCt (Breyer→O.T. '99, the year *Apprendi* was decided)

- 3 Law Firms, as litigation counsel:
  - MoFo—of counsel in SCt & Appellate Practice
  - Goodwin Procter—associate in general litigation
  - Miller, Cassidy, Larroca & Lewin—associate in white-collar criminal defense boutique

- 1 Arbitration & Mediation practice:
  - The Feinberg Group (Special Master who administered the September 11th Victim's compensation fund and is now working on oil spill compensation). Was an associate in his private practice dealing with mass tort mediation, arbitration, and compensation schemes

- 3 government posts: Assistant Federal Public Defender, Assistant Special Counsel of the U.S. Sentencing Commission, & now Vice Chair of the Commission

B. <u>What do I do now?</u> (Discussion of the U.S. Sentencing Commission)

1. Independent agency in *judicial* branch (many people think we are in executive branch!) generally responsible for establishing "sentencing policies and practices for the Federal criminal justice system" and for collecting and analyzing data to measure the effectiveness of those sentencing practices (28 U.S.C. § 991).

   * The Commission sits at the intersection of all three branches of government (legislative, executive and judicial) with respect to sentencing policy and we work closely with all three!

2. Composition of the agency (28 U.S.C. § 991 et seq.):
   - Seven voting Commissioners, 2-non-voting (The voting Commissioners are nominated by the President and confirmed by the Senate).
   - at least 3 Commissioners must be judges
   - bipartisan (no more than 4 from any one political party)
   - among the voting members, there is a Chair and three Vice Chairs.

3. Approximately 100 employees on the agency's staff. Staff is divided into various divisions, including General Counsel, Office of Research & Data, and the Office of Education and Training.

4. The Commission's primary product is the *Sentencing Guidelines Manual*, a book that is used by the courts to determine the appropriate form and severity of punishment.

   (a) The guidelines are designed to:

   --take into account the purposes of sentencing (just punishment, rehabilitation, deterrence, incapacitation)

   –to promote fairness by establishing sentences proportionate to the crime; avoid unwarranted disparity of sentences given to similarly situated defendants; and permit judicial flexibility to acknowledge mitigating and aggravating circumstances in a particular case.

(b) The Manual was initially crafted in 1987—three years after the Commission was formed—and it gets updated (amended) every year.

--Our amendment cycle begins in the summer, when the Commissioners set the upcoming priorities.
--We hold hearings; do research; review data and public comment, and generally follow the Administrative Procedure Act for the promulgation of rules.
--The cycle continues through April, when the Commissioners vote on amended guidelines, which must be sent to Congress by May 1st. Absent congressional action, new amendments become effective November 1st.

(c) Some recent examples of amendments that the Commission has promulgated include (1) the amendment that reflects statutory changes in the crack-powder ratio, (2) new amendments related to the calculation of criminal history in immigration cases, and new (3) amendments related to firearms trafficking and the problem of straw purchasers.

5. The Commission also serves as a data clearinghouse—collecting detailed information on the 83,000+ sentences that are handed down by federal district courts every year, and using the information to generate statistical reports about the state of federal sentencing.

➢ We are currently working on two comprehensive reports: one on mandatory minimums, and another on the state of federal sentencing after *Booker*.

6. As a Commissioner, I have to make a number of decisions—including voting on sensitive issues related to federal criminal law. For example, we just made a decision about how crack cocaine should be treated under the guidelines, and we will be holding a hearing on June 1st regarding whether the crack amendment should be made retroactive. We anticipate having a vote on that issue this summer.

What else do I do?

➢ I sometimes go to the Hill to discuss policy issues with lawmakers;

- I go on trips with our training staff;
- I participate on panels and give speeches at conferences; and
- I spend a lot of time thinking about the operation of the guidelines and ways that we can improve the federal sentencing system overall.

C. Why am I here? To provide some advice . . .

These are my top ten tips, in reverse "countdown" order:

#10. Take the long view=>It is sometimes hard to see the forest for the trees! Understand that a career is a journey, and that you're in it for the long haul. You can be miserable in regard to a particular case, or client, or even partner, but you're not going to have to work with them forever. Focus on figuring out who you really are as a professional, and as a person, and that insight will help you to navigate through.

(a) For example, are you a person who likes stability or surprise? Do you prefer becoming an expert in a particular, narrow field or do you want to be a jack-of-all-trades?

(b) Once you have a vision of who you really are, you can keep marching forward—knowing that you go through stages and phases of a career, just as in life. And when professional missteps happen, and they will, you can set them aside and try not to dwell on them: there's always a light at the end of the tunnel, so do your best work and move on!

#9. Build your brand=>this tidbit was offered by someone on a panel that I was on recently, and it stuck with me. You can, and should, work actively to shape others' perceptions of you. As you know, how people view you is the key to success in this business – so why not do what you can to influence your professional image?

One way to do this is to imagine that you are a corporation=>you need to position yourself in the right marketplace, develop brand loyalty/integrity, and advertise to sell.

#8. *Position yourself:* figure out what you want to do and, as J. Lo. says frequently on *American Idol*, "stay in your lane." Not every opportunity will lead to your career goals; have the sense to identify, and accept, only those that do!

(a) The person on the panel who I referenced earlier wanted to do non-profit work and she turned down lucrative firm offers to work in house for various small groups until she finally ended up as an executive in the general counsel's office of the Bill and Melinda Gates Foundation.

(b) Do things that further your specific professional interests and goals. Join related professional groups. Write articles. Attend seminars and CLE courses on the subject. Become known for your interest/work in a particular area.

#7. *Develop brand integrity*: A good company has core values and sticks to them, even as it tries to turn a profit.

(a) I recently did a presentation on the organizational guidelines, and I was struck by the extent to which developing a corporate culture of ethics and compliance with legal standards is a key component of being a good corporate citizen under the guidelines. (So much so that a corporation that has failed to prevent wrongdoing by its employees can have its fine substantially mitigated if an appropriate culture has been developed!)

(b) Developing a culture of ethics and compliance should be a goal, in your professional life! Like any company, you, too, need to establish ethical standards (lines you won't cross) as a part of developing your brand. Understand legal ethics, and don't do anything that is even

remotely close to the line as you practice. Ask anyone who has been disbarred or has had his professional integrity questioned: it's not worth it in the long run.

#6. ***Market to Sell!*** You are your own biggest fan; make sure you know your strengths and be willing to advertise them to others (hardest thing for me to do). This is about having the self confidence to "market" yourself:

(a) if you hear about an interesting case, don't wait to be assigned to it, step up and explain why you're the right person for the job!

(b) Keep a "kudos" file—copies of congratulatory or praising emails or notes, offer letters, award-winning articles, successful briefs, etc.—that you can reference when you need encouragement.

(c) Seek opportunities for direct client contact, where authorized and appropriate. You want those who pay the bills to recognize your value (the best way to get repeat customers!).

#5. <u>Network</u>

It is *crucial* that you make connections & develop relationships. This is, perhaps, the biggest realization that I've had thus far in my career: networking is really how opportunities are created!

(a) Understanding the importance of networking is the one thing that I would have done differently as a law student and young lawyer (I largely kept my head down and tried not to be seen). I would literally panic at the thought of running into, and having to chat with, someone important—what to say? Would they even remember me? Would I make a fool of myself? I thought it much better to duck behind a column or an azalea bush—whatever was nearby and could shield me from being spotted and having to speak to people.

(b) The turning point for me in terms of understanding the importance of networking happened in1996—the summer after I graduated from law school. When in law school, I did not take advantage of the tremendous resources and opportunities to make connections that were available—I just focused on my work and tried to avoid being called on in class. I was not an outgoing student, but I was on Law Review, so I was very aware of a guy by the name of Barack Obama, who was elected the first Black President of the Harvard Law Review in 1992, my senior year in college.

In the summer of 1996, a very good friend of mine from Miami, an MIT-trained engineer, was getting married in Chicago, to a businessman real estate developer who did I lot of work with poor communities in the inner city. My friend invited me to their wedding and I went – it was my first time ever being in Chicago (I think you can see where this is going). There were a lot of guests, people from the Chicago community development world, and all I really remember was running around at her reception tugging on people's sleeves and saying, "hey, do you know who that guy over there is?!" That's Barack Obama, the first Black President of the *Harvard Law Review*! I was in *awe*, and everyone kept looking at me like I was crazy because none of the other guests were lawyers and no one cared. I honestly have no independent memory of speaking to Barack and Michelle but I must have, because 3 years ago, my friend sent me this picture . . .

My friend said that this is the only picture of Barack and Michelle at her wedding – even she and her husband did not take a photo with them. And I only spoke to them because of my connection to Harvard Law School.

I have no personal relationship with the President or the First Lady—I don't know them at all—and I am certain that they would have no memory of having met me at my friend's wedding 15 years ago. But this encounter taught me something very important: you never know what might come of making a connection with someone, however casual . . . At the very least, you could get a good picture out of it! :-)

#4. **Serve**

Representing paying clients is great, and important, but you will reach a point when the number of billable hours that you've logged in a single year is not enough to satisfy. You will need to find a way to make it all worthwhile. Really giving of yourself in some capacity is how one makes life truly fulfilling!

(a) Volunteer some of your time—your service can even be right here in the firm=>on firm committees, doing bar association or pro bono work, work for your alma mater (e.g., Harvard interviews and Alumni Association).

(b) If nothing else, serve as a mentor and role model to others! Giving back--especially if you have received many blessings--is what will make you feel *human*, and connected, and for me, it is what has made so much of what I do truly meaningful.

#3. **Stretch**

This is a hard one to explain, but I'll try . . . You need to be flexible. Adapt. Take on new challenges and open yourself up to new ideas (while at the same time sticking to your core values).

(a) This could mean trying an assignment in an area that you don't ordinarily work in. Or working with someone you ordinarily don't work with. Or employing technology that you've never used before.

(b) Try to bring original thought to your cases. Roteness and rigidity may be safe but you can't distinguish yourself in that manner. You need to be creative (think outside of the box), and the required vision only comes from letting yourself go.

(c) Don't cling to your safe, comfort zone too tightly—be willing to take risks along the way. (Not easy for risk-averse lawyers: "If I wanted

to take risks, I wouldn't have gone to law school!") Only by occasionally challenging yourself will you continue to learn and grow.

#2. <u>Don't burn bridges</u>!

When you move around professionally, there will be opportunities to look back and to say negative things about prior positions or the people you worked for. Sometimes it's tempting to trash the place on the way out the door—not literally, think Facebook.

(a) Don't do it. Loose lips sink ships. If you're leaving and you're asked why, say that "an opportunity that you've always wanted has presented itself" – even if it's really because you dislike the person you're talking to and you've hated every minute of every hour of the job that you are in!

(b) It is critical that you exit with grace. Don't slam the door on the way out—you never know when may have to walk through it again.

- My return to the Commission is a good example! I'm back working with the staff of the Commission years after I left. And one the judges for whom I clerked is now the Chair!
- You just never know, so *never* leave on a sour note.

#1. <u>Do your best work, on every assignment and in every position</u>

(a) You might think that slacking off on work assignments here or there can't hurt you, but it can. Your work ethic quickly becomes a part of how other people view you, and you never know when a prior position will become a factor in your advancement!

(b) Nothing I've done--from getting into Harvard, to clerking for the SCt, to getting a Presidential appointment—was part of my overall life

plan. It just happened. And happenstance favors those who have worked hard and done well in each thing they've done before. (As my husband likes to say, the best predictor of *future* success is *prior* success.)

- So, when a new opportunity arises, and you need a recommendation from someone who knows you, you'll be able to rely on the partners and the counsel you've worked for here in the firm.
- Or when someone for whom you've worked gets a call from the White House seeking a referral for a government post, you'll come to his or her mind as someone who might be good for the job.

(c) I practice this philosophy even now, in my current position:

- One benefit of my current post is the flexibility—the Commission meets for three days once a month; other than that, I work on my own. I like the flexibility of the schedule, but I also make an effort to *be in the office*.
- One of the Commission staff members approached me just the other day and said, "can I ask you a question?" "Why do you work on *Fridays*? I've seen you here several Fridays in a row!"
- I felt great about that exchange because it is important to me (to my brand) that I do good work and that I am viewed as a hard worker.

The bottom line is this: always work hard, and do your best work. You can only be "in the right place at the right time"—and thus be available to take advantage of any new opportunity—if you've made a positive impression all along the way!

Questions?

U.S. Sentencing Commission Annual National Seminar on the Federal Sentencing Guidelines

San Diego, CA

May 18 - 20, 2011

Ketanji Jackson
Vice Chair
United States Sentencing Commission:
A Year in Review
(May 19, 2011 - 8:30 a.m.)
Sentencing Forum
(May 19, 2011 - 2:45 - 4:15 p.m.)

In addition to the Fair Sentencing Act Amendment, the Commission promulgated amendments in other areas as well. So that you are up-to-date on what was done last cycle

REMARKS FOR PLENARY SESSION

Good morning. I am going to address the new amendments related to firearms and health care fraud.

WITH RESPECT TO FIREARMS . . .

- First, let me say that, like many Americans, the Commission has been following with great concern ~~the activity along~~ events near the southwest border ~~and~~ in Mexico related to illegal firearms trafficking. This year the Commission undertook to review the guideline penalties in this area, largely in response to specific requests from the Justice Department, the former U.S. Ambassador to Mexico, and U.S. Attorneys from southern border districts all of whom expressed concern that the illegal flow of firearms across the southwestern border of the United States is contributing to the violence along the border and, ultimately, is harming the national security of the United States.

- As a part of our review of the guidelines in this area, the Commission **analyzed data** regarding the primary firearms guideline (2K2.1) as well as the guideline for arms export violations (2M5.2). The Commission also **held a hearing** in which we heard testimony related to firearms and ammunition offenses, and we **received public comment** regarding firearms trafficking practices along the border and the related issue of "straw purchasers"—individuals who buy firearms ~~on behalf of~~ to be transferred to "prohibited persons"—which substantially contributes to the flow of illegal firearms in this area of the country.

- Ultimately, the Commission voted to increase the guideline penalties for certain firearm offenses sentenced under §2K2.1 and §2M5.2. These changes generally pertain to three aspects of these guidelines—firearms illegally leaving the U.S., straw purchasers, and arms exports:

    - First, the amendment creates a new specific offense characteristic in 2K2.1 that applies "if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States; or if the Δ possessed or transferred any firearm or ammunition with the knowledge, intent, or reason to believe that it would be transferred out of the United States." This SOC results in a 4-level enhancement, and a minimum offense level 18, and is designed to address the problem of firearms and ammunition being illegally transferred out of the country.
        - The Commission anticipates that approximately 6% of all cases sentenced under §2K2.1 will qualify for this enhancement, and the majority of those cases are, not surprisingly, concentrated in the southern border districts, with the intended destination of the weapon going into Mexico.

    - Second, the amendment ensures that certain "straw purchasers"—those who buy a firearm with the knowledge, intent, or a reason to believe that the weapon will be transferred to a prohibited person—will be subject to the same base offense level as purchasers who are convicted of the actual transfer of a weapon to a prohibited person. The Commission determined that such offenders are similarly culpable and thus should be punished similarly. The Commission's data also indicated a need for this penalty increase:

- Of the straw purchasers cases in the 2009 data set, almost half (45.2%) involved circumstances in which the offender knew or had reason to believe that the weapon would be transferred to a prohibited person.

- And in 71.3 % of the straw purchaser cases, the offender received, or was promised, payment for the purchase.

The amendment related to straw purchasers also recognizes that these cases sometimes involve a close personal relationship between the straw purchaser and the person to whom the firearm is transferred. Downward departure language is provided, and may be applicable, if there are no other aggravating circumstances, ~~and~~ if the straw purchaser was motivated to commit the offense by an intimate or familial relationship, ~~and~~ received no monetary compensation from the offense, and

- (Third, and finally for present purposes) The Commission promulgated an amendment regarding certain firearms and ammunition export offenses sentenced under §2M5.2. The amendment **reduces the threshold number of small arms** that an offender can have in order to qualify for the lower base offense level in that guideline (previously, an offender could have as many as ten such small arms, while under the amendment she can only have two). The amendment also provides that offenses involving **500 rounds or fewer of ammunition qualify for the lower base offense level**.

Moving on (quickly) to healthcare fraud . . .

WITH RESPECT TO HEALTH CARE FRAUD:

- The amendments made in regard to healthcare fraud offenses were a response to two specific directives that Congress included in the Patient Protection and Affordable Care Act:
    - Congress required the Commission to amend the guidelines to provide graduated loss enhancements for "Federal health care offenses involving Government health care programs," and
    - Congress also directed the Commission to amend the Guidelines and policy statements to provide that the aggregate dollar amount of fraudulent bills submitted as part of such an offense "shall constitute prima facie evidence of the amount of the intended loss by the defendant."

- These directives appear to have been born out of congressional concern over rising health care costs and the enormity of the health care fraud problem as a contributor to those costs. For years, government reports have estimated that there is fraud and abuse in the health care services industry, amounting to tens of billions of dollars in losses to taxpayers, and prior to the enactment of the health care law, several lawmakers from both sides of the aisle expressed a concern that the federal penalties for offenders who commit health care fraud were not sufficient to deter and punish such conduct.

- In response to the directive, the Commission studied the health care fraud issue; held a hearing; and received and reviewed public comment.

- The result was a guideline amendment that consists of **two (2) new provisions in §2B1.1**, both of which apply to cases in which "the defendant

was convicted of a Federal health care offense involving a Government health care program":

- **New specific offense characteristic** that applies in such cases if the loss is more than $1,000,000. The enhancement is 2 levels if the loss was more than $1,000,000, 3 levels if the loss is more than $7,000,000, and 4 levels if the loss is more than $20,000,000.

- **New special rule** in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of ~~a Federal health care offense involving a Government health care program.~~ such an offense. The new note makes clear that the aggregate dollar amount of the fraudulent bills is prima facie evidence of intended loss (~~i.e., is evidence~~ that is, it is sufficient to establish the amount of the intended loss if not rebutted.").

- Because Congress limits the prescribed penalty increases to "Federal health care offenses involving Government healthcare programs"—phrases that are not specifically defined by the Act—the guideline amendment also provides **two (2) new definitions** that are relevant to the application of the new penalty and evidence provisions:

  - **"Federal health care offense"** is defined to have the meaning given that term in 18 U.S.C. § 24 [as required by section 10606(a)(1) of the Patient Protection Act].

  - **"Government health care program"** is defined as any plan or program that provides health benefits, whether directly, through insurance, or

otherwise, ~~which~~ that is funded directly, in whole or in part, by federal or state government. Examples of such programs are ~~expressly~~ provided, and include the Medicare program, the Medicaid program, and the CHIP program.

Why did we choose this definition?

- Federally-funded programs (such as Medicare) are included because of the clear concern expressed in the legislative history of the Act about the costs to the federal government from health care fraud.
- Jointly-funded federal-state programs are also included because many federally-funded programs, such as Medicaid and CHIP, are jointly paid for by the states and it would be impractical to disaggregate these funds for sentencing purposes.
- State-funded programs included as well because the ~~policy~~ reasons for providing an enhancement for fraud against federally-funded programs are applicable to state-funded programs and state programs are subject to similar forms of fraud and abuse that place a drain on public funds.

- Finally, consistent with general language in the directive that requires the Commission to account for any aggravating or mitigating circumstances, the amendment **inserts language into the application notes related to the Mitigating Role guideline (§3B1.2)**.

that relate to these penalty increases

  - The new language clarifies that offenders who are held accountable for substantial fraud losses pursuant to relevant conduct calculations—including offenders subject to the new aggravated loss penalties for health care fraud, such as nominal owners in health care fraud cases—are not *precluded* from consideration for a mitigating role adjustment.

- The Commission has long maintained that the mitigating role adjustment is one mechanism for differentiating more culpable offenders from less culpable offenders, and that, whatever the overall loss amount in regard to a complex scheme or fraud, minor participants who have little knowledge of the scope of the scheme and who receive ~~very~~ little personal gain from it may be eligible for ~~such~~ the mitigating ~~an~~ role adjustment.

Overall, looking at our

- ~~Based on~~ 2009 data . . .
  - the Commission anticipates that approximately 145 health care fraud cases annually will be affected by the new amendments ~~annually~~, which constitutes approximately 30% of health care fraud cases overall, and 2% of the cases sentenced under 2B1.1 each year.
  - The likely impact on such cases is a substantial increase in the term of imprisonment: whereas, currently, the average sentence for health care fraud cases is 41 months, the new average sentence is projected to be 61 months of imprisonment.

Intro

Good afternoon — we are going to be doing something slightly different with this forum (something we've never done before), so please bear with us as we work through it. The idea was to take several of the questions that came up at this morning's plenary panel and to drill down a bit, going into them from the perspective of policymakers on Capitol Hill, and having a somewhat more informal discussion of the topic. Unfortunately, one of our two panelists — who was the former minority staff director and chief counsel for the Senate Judiciary Committee and chief counsel to Sen. Specter — could not be here, but we are delighted that our other panelist was able to make the trek, and I will be grateful that Professor Dreyfuss will be introducing him in a moment.

audience participation

I'm going to be asking for your insight + participation and

Let me just say, first, that we do want this to be more of an informal discussion than some of the other presentations, so feel free to jump in with questions or comments as they arise ... and I will do my best to keep the conversation flowing + to work the technology!

First, let me introduce you to our panelist - Bobby Vassar

BOBBY NORRIS VASSAR

EMPLOYMENT

Chief Minority Counsel, Subcommittee on Crime, Terrorism and Homeland Security, House Judiciary Committee (since 2007) - Responsible for all legislative assistance to Ranking Member Robert C. "Bobby" Scott and other Members of the Subcommittee, and to the Full Committee Ranking Member and other Full Committee Members as assigned. From 2007 to 2011 served as Chief Counsel to the Subcommittee and from 1999 to 2007 served as Counsel to the Minority for the Subcommittee.

PRIOR EMPLOYMENT

From 1994 to1999, served as Senior Counsel and Legislative Director, Office of Congressman Robert C. Scott; from 1982 - 1994, served as an appointee in the Virginia State government as Acting Secretary for Health and Human Resources (Cabinet position with responsibility for the oversight of 14 state agencies employing over 17,000 workers and administering budgets totaling over $4 billion; Deputy Secretary for Health and Human Resources, (Cabinet position with oversight responsibility of 9 state agencies); and Virginia Parole Board (appointed by the Governor as agency head and Board Chairman of a 5 member full-time board responsible for parole releases, arrests, revocations and discharges). I Also served as Deputy Commissioner, Department of Social Services.

Prior to 1982, served in the non-profit sector as General Counsel and Executive Director, Peninsula Legal Aid Center; Senior Assistant, Office of the Vice Chancellor for Administration, University of North Carolina at Chapel Hill; Staff Attorney and Virginia Coordinator, Pre-paid Legal Services Plan of the Laborer's District Council of D.C. and Vicinity; and Reginald Heber Smith Community Lawyer Fellow assigned to the Roanoke Legal Aid Society.

EDUCATION

J.D., University of Virginia School of Law; B.A., Norfolk State University

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Professor Doug Berman —
Professor of Law at

Forum Discussion

Below are the question numbers and the general topics that I hope to raise with Matt and Bobby:

Question 1=>USSC priorities: from the perspective of Congress, how is the sentencing system working? What sentencing areas need to be addressed? How (i.e., guideline or legislative fixes)? Fraud, Drugs, Child Porn, Firearms

Questions 2, 3, 7=> Fraud loss: Are the guidelines producing appropriate sentences in high-loss fraud cases? Given the number of directives that Congress has issued re fraud cases, does Congress believe that the guidelines are generating inappropriately low sentences? Which types of fraud are causing the greatest concern on the Hill? Is "loss" really the best metric anyway?

Question 5=>the role of victims: observations re the impact of victims' rights advocates/groups on the legislative process re sentencing

Questions 8A and 8B=> Crack v. Powder: discussion of the FSA (how it was implemented; what legislative compromises led to the deal; why it took so long to address this issue; whether this is likely to be the last we'll hear from Congress on this; and whatever other "inside baseball" they are willing to share)

Questions 11A, 11B, and 11C=>Retroactivity: any legislative efforts brewing in this regard? Any thoughts on the USSC determination or advice to the Commission?

Questions 9A and 9B=> Mandatory Minimums and Statutory Relief Therefrom: thoughts on the likelihood that Congress will continue to enact new man mins? Any interest in safety valve expansion?

Questions 15 A and 15B=> Child Pornography: Is this an area in which Congress and the Judiciary are headed for a collision? What, if anything, can the Commission do to bridge the gap between the branches on the question of the appropriate sentences for child pornography offenders?

Question 21=>The Future of the Guidelines: is the current system sustainable? What is the likelihood that we could see the return of a "presumptive" guideline system? Would having such a system be good or bad?

62% - current advisory

National Federal Sentencing Guidelines Seminar
Orlando, FL
May 4 - 6, 2011

Ketanji Jackson
Vice Chair

Update on Federal Sentencing Law
(May 6, 2011 - 12:00-1:30 p.m.)

FEDERAL BAR ASSOCIATION PANEL:
"USSC UPDATE"

I'm delighted to have been invited back to participate in this panel again. Last year during this event, I had only been on the Commission for a few months – now I have the perspective of having gone through an entire amendment cycle, and I'm very happy to be here to share that perspective with you today.

A couple of overarching updates before I get into some of the specifics:

(1) New Chair—The Commission is [redacted] under the leadership of a new Chair, Judge Patti Saris who is a district court judge on the District of Massachusetts. Judge Saris was confirmed on December 23rd, and she has lead us through the remainder of this amendment cycle, ably taking up the torch that was passed to her by her predecessor, Judge Bill Sessions from the District of Vermont, ~~who is at this conference and here with us now.~~ The Commission thrived under Judge Sessions' leadership, and it has continued to do so with Judge Saris at the helm.

she sends her regards — conflict w/ a scheduled appearance @ the 3rd Cir. Judicial conference

Judge Saris was appointed as a district court judge by President Clinton and has served on the bench since 1994. Prior to that, she was on the state court bench, and she has served as both a federal magistrate and an AUSA. Very early in her career she was a legislative staffer for Senator Ted Kennedy on the Senate Judiciary Committee, so she is very familiar with the guidelines, the legislative process, and with the work of the Commission as established the Sentencing Reform Act. On a personal note, I think of her not only as our "Chair" but also as "my judge" because I clerked for her right out of law school and I consider her to be both a mentor and a friend.

(2) New Website—another relatively recent development that some of you may have noticed is the unveiling of the Commission's new website (www.ussc.gov). The new website is a complete transformation—a "facelift"—that we hope will be much more user-friendly in terms of providing information. One of the Commission's core statutory missions is to serve as a clearinghouse for sentencing data and information, and our website overhaul goes a long way toward helping us distribute the information that we collect and analyze in the most efficient manner possible.

(3) New Amendments—the last general update pertains to the Commission's promulgation of new amendments to the guidelines, the content of which I will address momentarily. For those of you who are not familiar with our amendment process (we call it our "amendment cycle"), it is subject to the notice and comment requirements of the Administrative Procedure Act and basically consists of the following steps:

- Each year, Commissioners meet privately in the summer to develop a list of tentative priorities (areas of the guidelines that it would like to address). List is compiled from a variety of sources, including case law, public comment, Commissioner's own interests.

- Commission publishes its priorities in the Federal Register with a 60-day notice and comment period.

- Commissioners vote on the final priorities at a public meeting in August or September.

- Interdisciplinary commission staff form working groups that begin work on the issues (legal research; data runs; meetings with interested stakeholders; draft amendment language)

- Commissioners vote to publish proposed amendments in December or January. (60-day notice and comment period).
- Public hearings on the proposed amendments are held in March.
- Commissioners vote to promulgate new amendments in March or April.
- Amendments must be delivered to Congress no later than May 1. Unless affirmatively disapproved, the new amendments take effect in 180 days or on November 1.
- In early winter, the Commission publishes an updated version of the Manual that includes the amendments from the previous cycle.

For this year, the Commission submitted its new amendments to Congress just about one week ago (on April 28th). If Congress does not act, the 2011 amendments will become effective November 1st.

One of those amendments—the one that has garnered the most attention this cycle—is the amendment that permanently implements Congress's directives in the Fair Sentencing Act. . . .

I. FAIR SENTENCING ACT (FSA)

A. Overview

- Enacted on August 3, 2010 (bipartisan, unanimous consent)
- Made substantial changes to the mandatory minimum penalties applicable to crack cocaine offenses:

  --Prior to the Act, 5 grams of crack cocaine triggered a 5-year mandatory minimum, now it takes 28 grams of crack (nearly six times as much) to get a 5- year mandatory minimum sentence. Moreover, 50 grams of crack triggered a ten-year mandatory minimum, now 280 grams of crack gets a minimum penalty of 10 years.

  --The prior statutory mandatory minimums had established the infamous "100:1" crack-powder disparity: whereas it originally took only 5 grams of crack to trigger a 5-year man min penalty, it took *500* grams of powder (100 times more) to trigger that same 5-year penalty under the statute.

  --It should be noted that when Congress increased the amount of crack that is required to trigger a mandatory minimum under the FSA, the new statutory ratio between crack and powder—28 grams crack versus 500 grams powder—is effectively 18:1 (not 1:1 as many critics and advocates had hoped!).

- In addition to increasing the crack quantity threshold, the FSA also eliminated the mandatory minimum penalty that had previously existed for simple possession of crack.
- The statute also directed the Commission to add certain specific aggravating and mitigating factors in guidelines w/r/t *all* drugs, in

order to focus penalties more on the conduct of the offender rather than the quantity of drug. These factors included:

--offense level *increases* for offenders who (1) attempt to bribe law enforcement officials in connection with drug trafficking offenses; or (2) maintain an establishment for manufacture and distribution of drugs; or (3) receive aggravating role enhancement AND also engage in "super aggravating" conduct, such as involving or selling to minors, pregnant people, seniors, or vulnerable individuals.

--an offense level *decrease* for offenders who receive the 4-level minimal participant mitigating role adjustment AND the offense was motivated by a familial or intimate relationship AND the defendant received no monetary compensation AND was unaware of the structure and scope of the enterprise.

B. Commission Advocacy Over The Years

- I would be remiss if I did not take this opportunity to express the Commission's thanks and appreciation to Congress and to the President for enacting the FSA, and also mention that this new legislative development happened *long* after the Commission first urged Congress to address the crack-powder disparity.

- The history of Commission advocacy is *lengthy*, dating back more than 15 years, and I won't recount it in detail now, but it boils down to issuing four comprehensive "special" reports to Congress on cocaine sentencing policy, and the Chair's making no fewer than six separate appearances before House and Senate subcommittees on this issue.

- The Commission took each of these opportunities to assert that there was no basis for maintaining a 100:1 penalty distinction between crack and powder cocaine, and that in doing so, the statutory structure

had needlessly increased penalties in a manner that, among other things, negatively impacted certain groups; in particular, racial minorities!

- There can be no question that the Commission has been a tireless advocate of change in regard to the statutory penalties for crack cocaine.

C. The Temporary Guidelines Amendment

- The Commission's first step in responding to the FSA was enactment of a temporary amendment. Congress had given the Commission "Emergency Amendment Authority" in the FSA—that is, the opportunity to amend the guidelines *immediately* to conform with the statutory changes and not have to wait for the ordinary amendment cycle to transpire. This is important because it meant that crack offenders who committed their offenses after the FSA was enacted could potentially qualify for a reduced sentence under the guidelines much sooner than they otherwise would have been eligible to do so.

- The Commission issued its temporary amendment implementing the FSA on October 15, 2010, and the amendment went into effect on November 1, 2010.

- The Commission then undertook its ordinary process of assessing how the FSA should be permanently implemented in the guidelines, as part of this year's amendment cycle.

D. FSA Hearing & Public Comment

- As part of its ordinary amendment process, the Commission held a hearing on the implementation of the FSA, among other things.

- The hearing took place on [when], and involved a variety of witnesses, including a Department of Justice representative, the director of the Bureau of Prisons, Federal Public defenders, and defense counsel in private practice.

- The Commission also received and reviewed hundreds of letters commenting on the proposed FSA amendments. These letters included correspondence from Senators Durbin and Leahy; a group of majority members of the House Judiciary Committee including Representatives Smith and Sensenbrenner; and group of members in the minority of the House Judiciary Committee, including Representatives Conyers and Scott.

E. Final Guideline Amendment

The Commission voted on the final guideline amendment on April 6th.

The final version essentially repromulgated the temporary amendment with clarifying language relating to the maintenance of a premises for manufacturing and distributing drugs.

The amendment is available on our website, but let me just address a few key specifics:

--The statutory change in the triggering quantities for 5- and 10-year mandatory minimums necessitated a change in the drug guideline table. The Commission voted to set those triggering quantities at offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months for an offender with little or no criminal history.

--The amendment also inserted the required aggravating and mitigating factors in the drug guideline, making adjustments to avoid double counting where necessary.

F. Projections

So, what is likely to happen? How will the FSA affect sentencing in these kinds of cases? The Commission hires an entire team of PhDs in statistical analysis whose job it is to analyze the very complicated projections data and make assessments of the impact of statutory and guideline changes!

But let me give you five take-aways regarding our forecast of what the FSA is likely to mean going forward. Based on the most recent offender population that we have fully analyzed (FY 2009 data), and assuming that future offenders will look similar in terms of their offense, criminal history, etc., we project that—

(1) **No offender will see his or her sentence increase** (above what it otherwise would have been absent the FSA) based solely on the quantity thresholds in the new guideline.

(2) **Two-thirds of crack cocaine offenders (63.2%) will receive a lower sentence** than they otherwise would have received.[1]

(3) **Crack cocaine offenders** sentenced pursuant to the new guideline **will receive sentences that are, on average, 25% lower overall.**

(4) **More low level crack offenders** (those with less than 28 grams and no violence or aggravating role) **are helped by the amendment**—79% as opposed to 63% of offenders overall—**and they get an even greater benefit**: an average sentence reduction of 30.9% (compared to 25%).

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[1] Figuring out who is likely to benefit is very complicated statistically. The take away is that many people (approximately 1/3 of all crack offenders)won't be helped by the FSA change because of other factors related to their sentence, *e.g.*, they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced at the mandatory minimum and have no place to go; or their drug amount falls within the overlapping amounts at different levels in t he drug table.

(5) More than 1,500 prison beds will be saved in the 5th year after enactment, increasing to more than 3,800 beds saved in year 10.

G. 24 v. 26?

Some of you may be familiar with the intricacies of the guidelines and the debate that took place this year over whether the new mandatory minimums should be set at level "24" or "26" . . .

- Promulgation of the FSA guideline amendment involved a narrow and nuanced determination regarding where within the existing Guideline drug table to peg the new five and ten-year mandatory minimum drug amounts. The Commission voted unanimously to set the five- and ten-year triggering amounts at levels 26 and 32, and let me reiterate here essentially what I said at the time of that vote:

  I can only speak for myself

  --It is important to recognize that the drug table is a *scale* that the original commission created to provide proportional penalties for every quantity of controlled substance, not just the amounts that the trigger the 5- and 10-year mandatory minimum penalties.

  --On that scale, the quantity of substance that by statute trigger the 5-year and 10-year mandatory minimum penalties for *all* drugs has been set at levels 26 and 32.

  --In 2007, the Commission decided to move crack sentences out of proportion on the table, shifting them down to 24 and 30, in an attempt to prompt Congressional action on the disparity issue. The Commission made very clear that its action was only "temporary," and was done only as an inducement to Congressional action.

  -- Congress has now acted, ~~and~~ The determination to set the guidelines for crack back at 26 and 24 restores proportionality within the drug table because now the two mon penalty triggering Amounts for all drugs are set at 26 and 32.

that 26 and 32 are the right level or

--This does not mean, however, that the original Commission's decision to set the triggering amounts for all drug penalties in the drug table *above* the 5- and 10-year mandatory minimums was correct. It may be that 26 and 32 is unnecessarily high for all drugs, and many Commissioners are interested in reexamining that determination.

The table now implicates a broader policy decision about whether the original Commission was correct.

- Why 26 is *not* "a step backward" →

I was made more comfortable in voting as I did b/c the impact was not that extensive.

--No one gets an *increase* in their base offense level as a result of this amendment, and many offenders benefit substantially! This is because of the substantial increase in the amount of crack necessary to trigger the man min. A first-time offender who is charged with 100 grams of crack cocaine now has a range of 63 – 78 months under the guidelines. Before the amendment, that same defendant would have been facing a guideline range of 97-121 months.

--The only people the 24 v. 26 determination affects are those who may have benefitted if the level was 24 but who see no change in their sentence at 26 (some 500 people)—a relatively small pool compared to the thousands who are likely to benefit from the overall lowering of crack penalties under the amendment.[2]

--As guardian of the guidelines, the Commission has to ensure rationality and proportionality within and among drug types in the drug table. This amendment does that because it brings crack offenses back into line with other drugs and ensures consistency in the treatment of crack offenders across all quantities.

--It is very complicated—but also much more nuanced than an argument simply about excessive penalties in regard to crack!

---

[2] Again, figuring out how many are likely to benefit, and how many will increase or stay the same, is complicated statistically. The take away is that many people won't be helped by the FSA change because of other factors related to their sentence, e.g., they are career offenders or subject to ACCA; they are convicted of multiple drugs and the other drug type is really driving the sentence; they are sentenced AT the mandatory minimum and have no place to go; or their crack amount falls within the overlap of the drug table amounts at different levels.

II. RETROACTIVITY

The next issue that the Commission has to deal with, in the wake of the FSA implementation, is retroactivity.

- By statute the Commission must consider giving retroactive effect to any amendments that reduce a term of imprisonment. (28 USC § 994(u))
- This week we published an issue for comment in the *Federal Register* seeking input on retroactivity.
    - Among the specific aspects of retroactive application that we wish to explore, as noted in the issue for comment and prior public notices, are questions such as:

      (1) whether and to what extent a court must consider the retroactive application of the new *aggravating* factors as well as the mitigating factors when determining retroactive application in a particular case?, and

      (2) whether retroactivity should *not* be made applicable to certain categories of defendants, e.g., those who possessed a dangerous weapon in connection with the offense or received an aggravating role enhancement, or those who were sentenced after the SCt made clear that a sentencing judge can reject the crack/powder disparity and apply its own ratio under Booker/Kimbrough/Spears?
    - We already have received over 15,000 letters from members of the public the overwhelming majority of which support retroactivity.
    - The deadline for submitting public comment is June 2nd.
- On Wednesday, June 1, 2011, we have planned to hold an all-day hearing to explore the issue of retroactivity.
    - We will have a variety of witnesses representing the criminal justice stakeholders.

- We already have published on our website a detailed analysis of possible retroactivity using data from fiscal year 2009.

    - Based on an analysis of federal offenders who are currently incarcerated, our analysis estimates that **12, 385 crack offenders** sentenced between October 1, 1991 and September 30, 2009 would be eligible to receive a reduced sentence if the new guideline amendment is made retroactive.

    - This number may be lower than many expect for a variety of reasons. Most notably, because Congress has not made the statutory mandatory minimums retroactive, thus, the old statutory mandatory sentences will still be in place for offenders who were sentenced pursuant to them, and they serve as a "floor" to any benefit such offenders might receive under the guidelines.[3] If Congress makes the statutory minimums retroactive, the Commission estimates that *an additional 8,000 currently incarcerated crack offenders would be eligible to receive a reduced sentences*.

    - We anticipate updating our statistical analysis to include fiscal year 2010 numbers in time for consideration and comment during the public comment process.

- We anticipate the Commission will vote on retroactivity in the early summer with a likely effective date of November 1, 2011, assuming congressional approval of the underlying amendment.

[3] Other reasons so many offenders would not receive a benefit include the fact that many (nearly 6,000) were originally sentenced pursuant to the Career Offender or Armed Career Criminal provisions, and their guideline ranges are not controlled by changes to 2D1.1; and many others were sentenced AT the statutory minimum, and thus cannot go down any further.

III. OTHER 2011 AMENDMENTS

Although the implementation of the FSA has been our primary focus this Amendment cycle, there are other significant amendments that are worthy of mention here (each of these are set forth fully on our website): (*) Get the Reader Friendly Amendments document!

Firearms

- The Commission voted to promulgate an amendment to increase penalties for certain firearms offenses. (Also included downward departure language applicable to certain offenders)
- For example, the Commission voted to provide increased penalties for certain "straw purchasers" of firearms (i.e., individuals who buy firearms on behalf of others, typically prohibited persons who are not permitted to buy firearms themselves), and for offenders who illegally traffic firearms across the United States border.

    - Straw Purchasers=>increase in the base offense level in 2K2.1 (done to ensure that defendants who have engaged in similar conduct and who are convicted of similar straw purchaser statutes receive equal punishment)
    - Trafficking across the border=>new enhancement in 2K2.1 applicable to offenders who "possess a firearm or ammunition while leaving or attempting to leave the U.S." or "transfer a firearm or ammunition with the knowledge, intent, or reason to believe that such items will be transferred out of the U.S." Also, changes to the guideline applicable to the exportation of small arms and ammunition (2M5.2) to reduce the threshold number of weapons permitted and address ammunition-only cases.

- In consideration of this amendment, the Commission held a hearing related to firearms and ammunition offenses with respect to the problem of straw purchasers, which had been brought to our attention by the administration particularly in response to the problem of firearm trafficking across the border with Mexico.

Fraud

- The Commission also responded to two specific directives from congress during this amendment cycle.

- The first, the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111–148), directed the Commission to review penalties for certain health care fraud offenses involving a "government health care program" and adjust upward the penalties set forth in the federal sentencing guidelines for such offenses.

    - The Commission responded by providing tiered loss enhancements for offenses involving a government health care program that the Commission defines as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government."

    - The Commission also amended the Mitigating Role guideline to make clear that certain fraud defendants, including nominal owners in health care fraud cases, are not precluded from consideration for mitigating role downward adjustments as a result of the size of the loss.

- The second directive, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111–203) directed the Commission to review the federal sentencing guidelines applicable to securities fraud and financial and mortgage loan fraud. Specifically, Congress asked the Commission to review the harms to the public and the financial markets associated with these types of frauds. And the act also created two new fraud offenses.

- In response, the Commission held a hearing in which this type of fraud was addressed and made appropriate references within the guidelines for the new offenses.

    - Both the Department of Justice and the SEC agreed that no further amendments were necessary at this time; however, all parties agreed that the Commission should re-examine its guidelines in this area, which we have committed to do as part of a multi-year process.

    - So far, the Commission has heard mixed reviews about the operation of the fraud guideline. In its January 2010, survey of federal district

court judges, for example, 65 percent of those responding found the fraud guidelines appropriate but we have heard a great deal of testimony during our regional and public hearings that the fraud guidelines are too complex and result in disproportionately high sentences.

Supervised Release

- The Commission also addressed the standards for imposing supervised release for federal offenders.
- Relying on the extensive research contained in its July 2010 report, *Federal Offenders Sentenced to Supervised Release*, the Commission voted to amend the federal sentencing guidelines in order to encourage courts to impose supervised release for only those who actually need it, as Congress envisioned when it passed the sentencing reform act of 1984.
    - The Commission's actions give judges more discretion to determine the appropriateness of imposing supervised release in instances in which supervised release is not required by statute.
    - The Commission also determined that supervised release may not be appropriate for deportable aliens.
- The Commission's new policy will conserve the limited resources of courts and probation officers as they will no longer be required to regularly monitor inactive cases of deportable aliens. The Commission's actions also bring the supervised release guidelines more into conformity with congressional intent. Supervised release can now be focused on those who truly need it, thus ensuring public safety and deterrence while protecting the essential resources of our courts and probation officers.

Illegal Reentry

- Another, somewhat related, amendment is the change made to the Illegal Reentry guideline (2L1.2) in response to public comment about the magnitude of the prior conviction enhancement in that guideline in cases in which such convictions are very old.

- Under the amendment, if a prior conviction is so old that it is not counted elsewhere in the guidelines for the purpose of calculating the offender's Criminal History, then the conviction receives a reduced enhancement for the purpose of 2L1.2.

- Because stale prior convictions may nevertheless be serious and relevant to the seriousness of an unlawful reentry, the amendment reduces—rather than eliminates—the enhancement, and also provides upward departure language permitting consideration of the seriousness or extent of the prior offense.

Mitigating Role

- Also noteworthy is a change that the Commission made to the Mitigating Role guideline, after public comment that made clear that the adjustment was being inconsistently and narrowly applied.

- The Commission deleted language in the application note that may have been contributing to the confusion regarding the extent to which the downward adjustment for mitigating role is to be applied.

* (*) new language makes clear that offenders are not precluded based on loss amount!

IV. MANDATORY MINIMUM REPORT

- Congress has directed the Commission to conduct a comprehensive review of statutory mandatory minimum penalties and their role in federal sentencing particularly since *Booker*.

- We are hard at work on this important mission, and we anticipate that this report will involve a comprehensive review of the subject, including a detailed discussion of the historical development of federal statutory mandatory minimums, and a statistical analysis of their operation, past and present.

- We also foresee that the report will discuss a broad spectrum of policy issues and considerations, such as the original commission's drug quantity table determination and the potential expansion of the "safety valve" provision.

- The report will be released in the fall.

V. BOOKER REPORT

- The Commission also anticipates releasing a *Booker* Report likely in the fall as well.
- As you know, in 2006, the Commission released a review of federal sentencing in the year after the *Booker* decision.
- Since *Booker*, the Supreme Court has decided seven cases that further expound on the original *Booker* decision.
- This report will evaluate the system's evolution over the past five years and provide extensive data and analysis on sentencing trends and practices.
    - We anticipate examining, for example, variances and departures from the guidelines and the reasons behind these sentences.
    - We also anticipate addressing questions that have been raised about the current standard of appellate reasonableness review since *Booker*.
- Our current data and analysis for the last quarter (September 25 – March 25th) indicates that:
    - The overall within-rage sentencing rate is currently 54.7%
    - Most of the non-range sentencing is occuring pursuant to government motion=>the overall government-sponsored below range sentencing rate is 26%
    - The non-government sponsored below-range sentencing rate is 17.5% (12.9% of which is attributable to Booker variances rather departures)
    - These rates vary significantly by offense type and other factors!

VI. OTHER POTENTIAL PRIORITIES

--Commissioners will meet with summer to decide priorities—I'm only one Commissioner and only have one vote! But the kinds of things that are likely to be on the table as potential priorities are:

--drug table recalibration – an examination of the original commission's rationale for setting the penalties in the table above the mandatory minimums with an eye toward determining whether there is any justification for continuing in that fashion today

--multi-year review of economic crime under Dodd-Frank

--child pornography (including variance data)

Child Pornography

- The Commission is committed to working on a comprehensive report on child pornography offenses.
- In our January 2010 survey of federal judges, about 70 percent of judges responding felt that the guideline range for possession of child pornography were too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high.
- Child pornography offenses and resulting penalties are of great interest to the criminal justice community.
    - In its fiscal year 2010 Sourcebook, the Commission (for the first time) broke out child pornography offenses from other sex offenses in its data analysis.
    - The data indicate that in fiscal year 2010 the departure/variance rate for child porn offenses was 42.7 percent.
- Given this overwhelming judicial sentiment that the guideline penalties are not appropriate in these offenses, the Commission is undertaking its review of this issue including a review of the offenders, the conduct involved in the offenses, the role of technology in these cases, and victims of these crimes.
- The Commission believes that this report will assist in the formulation of possible guideline and other penalty revisions that will bring these guidelines into the 21st century.
    - Both the National Center for Missing & Exploited Children, the premier advocacy group for victims of these offenses, and the Department of Justice have indicated a willingness to explore potential changes to the guidelines applicable to these offenses.

--serious consideration of other, more systemic reforms? (e.g., Judge Sessions' proposal



Can hear more at the USSG National Training Program, May 18 – 20, in San Diego!

GUEST LECTURER on FEDERAL SENTENCING
for
GW Seminar on "Role Of The Federal Prosecutor"
(Professors Aitan Goelman & Adam Hoffinger)
March, 14, 2011

I am delighted to be here with you all this evening. I am teaching a Federal Sentencing Seminar here as an adjunct professor this semester, so it's particularly exciting to have a chance to review the many issues we've discussed over the past ten weeks and condense them down into a two-hour "greatest hits" presentation before a different audience! I really hope that I can do justice to one of the most dynamic areas of federal criminal law practice right now.

Here are the three things that I hope to accomplish:

First, to give you a sense of the essence of the sentencing determination;

Second, to provide some background on the institutional dynamics and history of federal sentencing;

and

Third, to give you a basic understanding of the operation of the Federal Sentencing Guidelines.

I then hope to have time to answer questions, and perhaps even directly address some of the "topics for discussion" that are in your syllabus for this class.

So, let's get started . . .

THE SENTENCING DETERMINATION

I. YOU BE THE JUDGE

I'd like for you to take a moment and imagine a sentencing system in which the judge bears *total* responsibility for deciding what sentence to impose on a defendant. The sentence that the judge selects *will* be the sentence that the defendant ultimately serves, and the judge's sentencing determination is based *solely* on the judge's view of the purposes of sentencing and what justice requires in the context of the particular case, constrained by the statutory maximum for the crime of conviction.

For the next fifteen-to-twenty minutes, *you* are that judge. Here is your case . . .

A. BACKGROUND BASICS

Alex Anderson was convicted of one count of Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (d).

1. The basic statutory **elements** of that offense are:

   (a) First, that the defendant took money that was in the care, custody, or possession of a bank from one of the bank's employees or while an employee was present;

   (b) Second, that the defendant used force and violence or intimidation while taking the money;

   (c) Third, that the defendant intentionally assaulted a person, or put the life of a person in jeopardy, by the use of a dangerous weapon or device while taking the money; and

   (d) Fourth, that the deposits of the bank were federally insured.

2. The **statutory maximum penalty** for the crime is **25 years of imprisonment** and the maximum fine is **$250,000**. Under the statute, a defendant is subject to up to **5 years of supervised release** following imprisonment.

3. In this case, Alex, who was wearing a ski mask to hide his identity, stole money from a branch of the First National Savings Bank, a federally insured bank, on September 14, 2010. He was apprehended six weeks later (on October 26th), and, within a few days of his arrest, he provided full information to the government about the robbery. He pled guilty shortly after his arraignment.

So, now, Alex has come before you to be sentenced. To assist you in making your sentencing determination, I am distributing copies of the statute and a Facts Worksheet that I've developed.
[*pass out copies*]

B. Additional Facts?

Does anyone think they have enough information now to pronounce a sentence? What more would you want to know about the case before deciding how to sentence the defendant?

1. Questions re nature of the crime

- What were the circumstances of the assault?
- Did anyone get injured?
- What sort of weapon did he use? Was it loaded? Operational? Did he fire a shot?
- How much money was stolen?
- Were there any other defendants involved (any co-conspirators)?

2. Questions re characteristics of the defendant

- How old is he?
- What was his family/childhood like?
- Did he graduate from high school? What level of education does he have?
- Does he have any work history or job skills?
- Was he gainfully employed at the time of the offense?
- Is he a substance abuser?
- Does he have a wife? Children?
- What are his living circumstances? Does he own or rent a house?

- Does he have any assets?
- Is there any evidence concerning what the defendant did with the stolen funds?
- Does he have a prior criminal record? For what offenses?
- Has he been incarcerated before?

Questions re the sentencing process

(a) Guilty plea

- Would you want to know what agreement, if any, the defendant had reached with the prosecution in regard to the sentence?
- Would expressions of contrition on the part of the defendant factor in?

(b) Treatment of defendants in other cases (*)

- Would it matter how other, similar cases have been resolved by other judges?
  How important would statistics about the handling of other similar crimes be?
  Would you value local case statistics more than national? Why or why not?
- Would it matter how *you've* sentenced other defendants in other kinds of cases, and your perception of the seriousness of those other crimes?

(c) Cost

- Would you want to know the cost to fed taxpayers of imprisoning Alex for various lengths of time?

(d) Other factors

- What importance would you place on your own personal view of the purposes of sentencing? (*e.g.*, rehabilitation, retribution (just punishment), deterrence, incapacitation)

C. Range of Sentencing Options

You would also need to know what types of sentences were authorized in this world . . .

1. Time-served

(a) By the time the case comes to you, the defendant has already spent nearly 6 months in jail.

(b) You could order immediate release, ruling that the time he has already been incarcerated is sufficient punishment for the crime committed.

2. Probation

(a) Immediate release into the community subject to conditions to be followed for a period of time under the supervision of the Probation Office

(b) The required conditions, which are specified at the time of sentencing, include regular meetings with probation officer, payment of restitution, drug testing, substance abuse treatment, no contact with victims, employment and training, community service, curfews, monitoring, and/or restrictions on movement

3. Intermediate Sanctions (home confinement, community confinement, intermediate confinement, treatment facility or program)

(a) Examples: home confinement with electronic monitoring; community confinement in a transitional facility ("half-way" house)

"A halfway house has an active rehabilitation treatment program run throughout the day, where the residents receive intensive individual and group counseling for their substance abuse while they establish a sober support network, secure new employment, and find new housing. Residents stay for one to six months."

4. Term of imprisonment

(a) Period of incarceration to be spent in federal prison (there is no parole and there are no local "jails" in the federal system)

(b) Must be a specific, determined term of years --NOT "indeterminate" (*i.e.*, ordering a range of years, with the actual amount served decided subsequently by parole officials)

5. Supervised Release

(a) If imprisonment is ordered, the court can also order a period of supervision following the prison term

(b) "Supervised release" is designed to help the offender transition back into society after imprisonment. When an offender is under supervised release, he is supervised by a probation officer and is subject to various conditions ordered by the judge.

(c) Conditions are similar to those imposed on probationers—*e.g.*, regular meetings with probation officer, drug testing, mental health and substance abuse treatment, employment and training, restrictions on travel and computer use, curfews, monitoring, and/or restrictions on movement

(d) The authorized maximum period of supervised release in this case is 5 years.

6. Fines and Restitution

(a) Monetary sanctions designed either as punishment (fine) or compensation to victims (restitution) or both.

(b) Monetary penalties are often imposed in conjunction with other penalties (not often imposed on individuals as stand alone sentences)

D. What specific sentence would you impose and *why*?

[*pass out form*] As directed, state the sentence and which facts & purposes were important to you in reaching that determination. You can skip the final question, which asks whether you ran into any difficulties in pronouncing the sentence. [*individual work*]

In the interest of time, let's go around and state the sentence each "judge" imposed, and then I'll pick a few people to follow up with explanation of their reasons.

Probation	1 – 12 m	12m – 5y	5y – 10y	10y – 15y	15y+
	[illegible] 6 months	5 yrs, 2 sh.	10 yrs		
		4 yrs, 5 h.	10 yrs		
			8 yrs		

E. Judicial Decisionmaking

Our exercise mirrors traditional criminal sentence determinations in the real world!

Basic ingredients of the sentencing decision:

(a) the Federal Criminal Code (broad ranges of punishment and sentencing options)

(b) the facts related to the crime and the offender

+ (c) the judge's own perspective and perception of what justice requires

Outcome= the sentence in a particular case

- Federal judges traditionally determined which facts were important to the sentencing decision in each case and what principles/purposes the sentence should achieve!

- In addition, individual judges made determinations regarding the seriousness of the crime of conviction and the significance of a defendant's background and characteristics, and they did so on a case-by-case basis.

- Moreover, there was NO obligation on the judge's part to provide reasons for the sentence imposed, and NO right to appeal a sentence determination.

Our exercise demonstrates that, when judges are free to make unfettered sentencing determinations, there is likely to be very little uniformity of sentencing outcomes, even in identical cases and even among the relatively small number of "judges" here!

Reitz diagrams

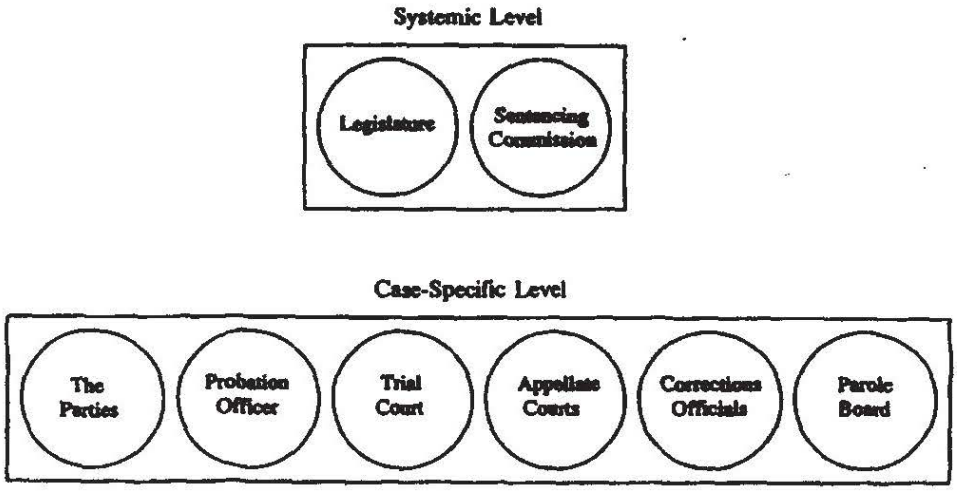


Figure 1. A Discretion Diagram for Sentencing Systems

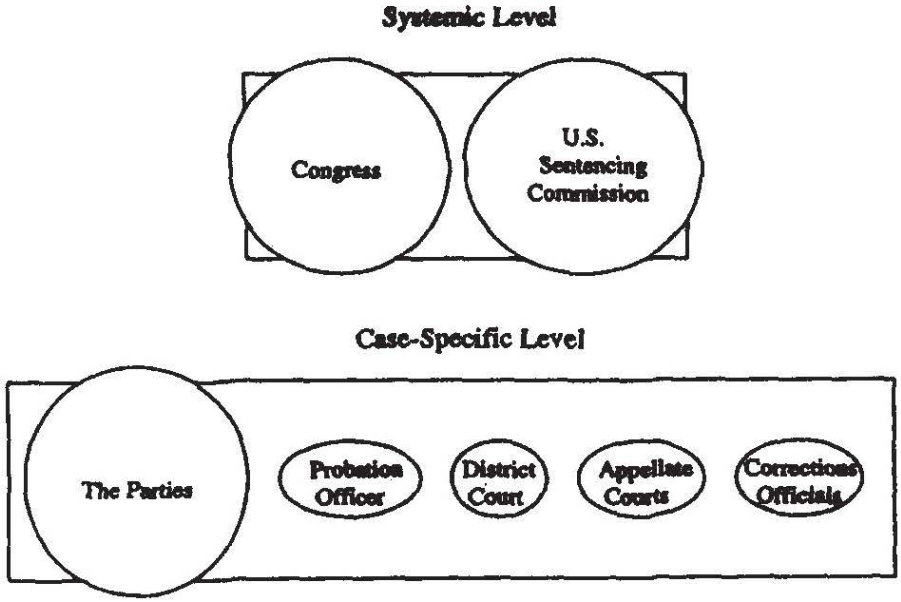


Figure 4. A Discretion Diagram of the Federal System

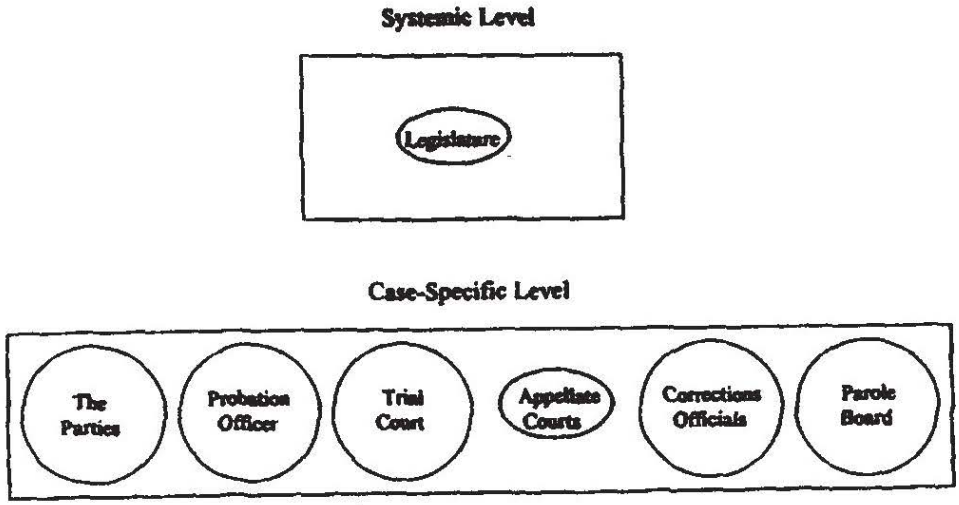


Figure 3. A Discretion Diagram of Indeterminate Sentencing

II. SYSTEMIC DECISIONMAKING

O.K., so, in our exercise, we posited that the judge had *total* discretion over the sentencing outcome: the judge was the *lone* actor, and there were *no rules* governing the judge's sentence determination within the range established by the statutory maximum.

A. **BUT MANY OTHER ACTORS**=> as the Reitz piece explains, the judge is not the *only* discretionary actor who makes decisions that affect sentencing outcomes!

In modern sentencing systems, there are different decision makers on different levels, each with varying degrees of influence, depending on the structure of the system. ("Any effort . . . to understand sentencing *must* take into account the existence of the many participants and decisions that together constitute 'sentencing' and the conflicting values, perspectives, and interests among them." Blumstein et al., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, Vol. 1, p. 41). Let's discuss—

Here
~~Who~~ are some of the discretionary decisionmakers in modern sentencing systems as identified in the readings, and ~~what was~~ the role of each? [*draw diagram—no circles*] . . .

1. Systemic Level

(a) Legislature=>considered the ultimate discretionary authority because it defines crimes and makes the basic policy determinations about the types of authorized sentences. It decides:

- Indeterminate or determinate sentencing
- System will be mandatory, fully discretionary, structured by guidelines
- Whether and under what circumstances the death penalty is available
- Whether and under what circumstances probation is allowed
- Maximum penalties or penalty ranges for offenses

(Notably, because the legislative pronouncements on punishment can only be realized through other, non-legislative officials, "[l]egislative influence in sentence is first and last." (Blumstein))

(b) Sentencing Commission=>Guides judicial discretion (a.k.a. the "Intermediate Function" (ABA Standards)). The expert agency that crafts specific guidelines to assist judges in the application of the laws related to penalties in particular cases.

--ABA Standards: "The legislature should create or empower a governmental agency to transform legislative policy choices into more particularized sentencing provisions that guide sentencing courts . . . Guidance of judicial discretion in sentencing and development of an information base about sentencing are the basic aspects of . . . 'the intermediate function.'"

--we will discuss the genesis and role of the Federal Sentencing Commission and the motivation behind establishing such commissions next week. Note here that not all sentencing systems have one [see Reitz's indeterminate and mandatory penalty example]

2. Case-by-Case Level

(a) "Parties"=>Victims, defendants, prosecutors, and defense counsel

- *Defendants* decide what crime to commit and whether or not to plead guilty.
- *Victims* (and to some extent witnesses) determine whether a crime will be reported and, thus, the case brought.
- *Lawyers* (prosecutors and defense counsel) make significant discretionary determinations that influence the sentence—*e.g.*, indictment or no? on what charges? terms of the plea bargain? plead or go to trial? what sentence recommendation? (It is hypothesized that NO attempt to concentrate all discretionary authority at the systemic level—to the exclusion of the parties—could be successful because of the parties' ability to tailor the particular case.)

(b) Probation Office=>Investigates the offense and offender to present relevant facts to the judge. Makes a sentencing recommendation (depends on the ct). Decision points:

- Which facts are relevant and should be put in the PSR
- What the guideline calculation should be (if any)

- Whether the defendant is substantially complying with conditions of supervision
- Whether to seek termination or revocation of a supervision period

(c) District court judge=>imposes the sentence in a particular case. He or she decides:

- Whether or not to accept a guilty plea and sentencing recommendation
- Whether to accept the presentence reports' version of the relevant facts
- Whether or to impose a prison sentence or probation (where authorized)
- The term of the sentence or sentencing range
- The term and conditions of probation or supervised release

(d) The Appellate Court=>Can overturn offenders' convictions or sentences. *Appeals courts tend not to be very aggressive in reversing sentences*, giving wide latitude to trial judges in this regard. Decision points:

- Whether the judge imposed a sentence within the stat max and min
- Whether the sentence imposed is legal and "reasonable"

(e) Corrections Officials=> "refine" the sentence imposed by the court. Decision points:

- Where the offender will serve sentence (max, med, or min security facility)
- Whether the defendant is eligible for treatment while incarcerated
- Where the defendant will serve half-way house or community corrections time
- Award or withdraw "good time" credits (shave time off the term)

(f) Parole Board=> in systems with indeterminate sentencing, parole officials determine when, exactly, a defendant is to be released (from *within the established range*). The determination is ordinarily made in light of the offender's criminal history, behavior while incarcerated, the wishes of the victims, and the success of treatment or rehabilitation efforts.

Where is "the jury"? Does the jury play a role in sentencing?
Ordinarily, the jury's role re sentencing outcomes is minor (other than the determination of whether the defendant is guilty of the offense in the small number of cases that go to trial)

>A handful of states have jury sentencing

>In capital cases, the jury has a direct role in deciding whether there are aggravating factors worthy of the death penalty

>The jury also may have a bigger role in non-capital cases after *Apprendi* (2000): as a matter of constitutional law, the jury must determine certain sentencing-related facts under certain circumstances. (The Reitz article was published before Apprendi, so presumably that's why the jury is not included.)

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3. Degrees of Discretionary Influence Can Vary

(a) Depending on the structure of the system, each of these decision makers may have more or less influence over final sentencing outcomes.

(b) In the current Federal System=>Congress and the Commission have huge roles; the parties are critical (especially the prosecutor); the judge pronounces a determinate sentence (and has more influence now than before 2005); there is NO parole board influence; and there is a relatively small role for probation officers and corrections officials. Appellate courts have the power to reverse dcts on sentencing issues, but the SCt has made clear that dct sentencing determinations are to receive great deference.

(c) A word about ***prosecutors***: many scholars and commentators argue that prosecutors have the most discretion to affect sentencing outcomes ("power") of all of the discretionary actors in the modern sentencing system!

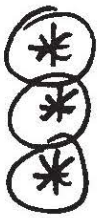
(1) Prosecutors have *many* crucial decision points:

What are they?

- Who will be charged (sentence is 0 if no charge filed!)
- What charges will be filed (stat maxes and guideline ranges vary)
- Who will be offered a plea bargain

- The type of bargain that will be offered (charge reduction to a less serious offence, sentence cap, concurrent sentences for separate charges)
- Whether to file a motion for substantial assistance (permitting a lower sentence than otherwise would have applied)
- What sentence to recommend

(2) And there are few limits imposed from above! (total discretion re selecting charges, making motions, and plea bargaining). **One way to think about the scope of prosecutorial discretion is that prosecutors are *less* constrained from above (at the systematic level) and their decisions place the *greatest* constraints on downstream actors in the sentencing process.**



In the part of the Reitz article not assigned, he explains "the telescoping quality of the succession of discretionary choices made within bounded limits" (p. 393):

"[M]any decision makers are at work, . . . their powers of choice are almost always exercised in light of preexisting constraints, and yet the typical effect of their choices is to tailor a new set of constraints for later systemic players."

(d) The Reitz paradigm is an extremely useful paradigm for examining the history and dynamics of federal sentencing policy. Indeed, some argue that federal sentencing is best understood as the institutional struggle for the power to determine sentencing outcomes and, thus, that developments in this legal arena are really about *where* (with which institutional actor) the most discretion lies!

[BREAK]=>erase USSC from structure . . .

THE SENTENCING REFORM ACT— (BRIEF) HISTORY & SPECIFICS

We have seen that, if left to their own devices, judges looking at identical cases are likely to have different opinions about which facts are relevant to sentencing as well as widely differing views about what ultimate sentence to impose.

Now, let me give you some *historical* context so you can understand why this matters in terms of federal sentencing today. . .

A. Pre-SRA

1. Before the mid-1980s, federal sentencing judges had *enormous* discretion to determine the sentence to impose

    a. From the founding of this country until the early 1900s other participants existed (*e.g.*, the Congress, the parties), but the trial judge "bore nearly the full burden of achieving a just sentence within the maxima set by statute."[1]

    b. The parole system was adopted in the early 20th century, and parole officials then shared some of the sentencing-outcome power. But federal judges still controlled the approximate length of the term of imprisonment because parole policies required that most federal prisoners serve between 1/3 and 2/3rds of the judicially imposed prison term (and the judges just did the math when they calculated the sentence!).

2. There were few constraints on the sentencing judges' exercise of discretionary authority

    a. The criminal statutes typically contained only broad ranges (e.g., 0 – 25 years) and there were no statutes or administrative rules governing sentencing – judges could weigh the factors however they wanted

    b. No appeal (the *only* circumstance in which an appeal was permitted was a sentence beyond stat max). This meant that:

[1] Stith, "Judging Under the Federal Sentencing Guidelines," 91 N.W.U. Law Rev. 1247, 1248 ( )

(a) judges did not need to make a clear record in regard to their sentencing determinations;
(b) "the unreasonable or inexplicable—or even bizarre—decision at this stage was beyond correction"; and
(c) "no common standards or principles were articulated to guide the exercise of judgment in sentencing."[2]

c. No other party had anywhere near the same degree of influence:

(a) Probation officers (who are employees of the judicial branch and who operated as confidential advisors to the court) served to facilitate, rather than diminish, the power of the sentencing judge.

(b) The parties (prosecution and defense) were important but their significance never approached that of the judge!
--Prosecutors generally refrained from recommending a specific sentence, only discussing the nature and extent a defendant's cooperation.
--Judges really policed the plea process – it was a rare occasion when a judge agreed to accept a binding sentence agreement between the parties.

* So, under the historical model of federal sentencing discretion, the judge had a very large sphere of influence, as compared to any other player in the sentencing process! [*reference diagram*]

3. Modern Critiques

Now, many people believed in individualized sentencing and thus supported the judge's role as ultimate sentencing authority, but it is not surprising (given our exercise) that the historical model—in which defendants who had committed similar crimes sometimes received dramatically different sentences—came under fire.

Beginning in the early the 1970s, a number of critics making several different arguments emerged:

[2] *Id.* at 1251-52.

a. It is undemocratic

There were those like Judge Marvin Frankel, a federal judge in New York, who maintained that the traditional federal sentencing structure essentially elevated judges to the status of kings and thus was fundamentally inconsistent with our democracy. In his influential book entitled **CRIMINAL SENTENCES: LAW WITHOUT ORDER**, Frankel argued that

> "[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." (p.5)

In his view, one of the core promises of our system of government—that we are "a government of laws and not men"—is broken when the sentence imposed on a defendant can "range from zero to up to thirty or more years in the unfettered discretion of miscellaneous judges" (p. 6).

b. It is fundamentally unfair

Another critique was pointed to the fundamental *unfairness* of the traditional model

(a) Judge Frankel decried a sentencing system that produces "a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice." (p.7)

(b) An influential report published in 1977 referred to federal sentencing as a "national scandal," and described it as a "non-system" in which individual judges can "formulate and apply their own personal theories of punishment" so that "similar offenders guilty of similar crimes commonly receive grossly disparate sentences." [3]

(c) Critics also amassed statistics that supported the contention that there was unjustified variation in sentences varied nationwide. In 1972, robbery offenders in what was then the N.D.N.Y. received

[3] *Id.* at 3.

an average sentence of 39 months while the average for robbery offenders in the nearby E.D.N.Y. was 130 months. Elsewhere, robbery defendants' sentences ranged from 60 months in Montana to 240 months in the N.D. of West Virginia. Forgery and counterfeiting violators received an average of 12 months in N.D.N.Y., 49 months in the E.D.N.Y. and 77 months in the W.D. of Virginia.[4]

3. It *causes* crime

One legislator at the forefront of the movement for change—a young Senator Edward Kennedy—not only saw the traditional system as unfair and inconsistent with core democratic principles, he maintained that *disparity in sentencing actually* ***causes*** *crime*:

--Sen. Kennedy pointed to the soaring crime rate that existed in the '70s and argued that "one underlying reason for the lack of success in our criminal justice system is the absence of principled sentencing policy."[5]

--In Sen. Kennedy's view, unless the system was structured in a manner that ensured fair and consistent punishment determinations, "the criminal justice system is seen as a game of chance in which the potential offender may 'play the odds' and gamble on receiving a lengthy term of imprisonment or, indeed, no jail sentence at all," depending on the judge. In his view, the problem with the traditional federal sentencing structure is that "[a]n important prerequisite to *any* crime-fighting program—certainty of punishment—is absent." "Disparity . . . undercuts the entire concept of sentencing as an effective deterrent."

Given these critiques, momentum developed in Congress for addressing sentencing disparities, though getting to an agreement on this issue took time and political maneuvering. In 1984, after more than a decade of work on this issue, a bi-partisan group of legislators was finally able to push through a reform bill—it was styled as an "anti-crime" measure and attached to a 'must pass' appropriations package—and the Sentencing Reform Act was born.

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[4] Toward a Just and Effective Sentencing System, at 4.
[5] *Id.* at vii.

B. SRA SPECIFICS

The Sentencing Reform Act of 1984 was a comprehensive piece of legislation that covered a number of different aspects of the federal sentencing system.

For our purposes, three major developments arose from the enactment of the legislation:

1. **The U. S. Sentencing Commission was created (§ 991 et seq.);**
2. **Parole (indeterminate sentencing) was eliminated (§ 3624);**
3. **Binding factors for judges to consider expressly when imposing a sentence were established (§3553(a))**

I. U. S. Sentencing Commission (21 U.S.C. § 991 et seq.)

1. Establishment and Composition

   (a) An independent agency in the judicial branch (991(a))

   (b) Consists of seven voting members nominated by the President and confirmed by the Senate and there is a non-voting ex officio representative of the Department of Justice (991(a))

   (c) Voting members serve staggered six-year terms (992)

   (d) Among the seven voting members, there is one Chair and three Vice Chairs (991(a))

   (e) Not more than four Commission members shall be members of the same political party (bipartisan) and at least three members must be federal judges (991(a))

2. Purpose

   (a) In general—to develop sentencing "policies and practices" for use in the federal justice system, and to serve as a clearinghouse for research and information about federal sentencing practices (collecting and analyzing data about how the policies are working and what judges are doing)

(b) Congress was *very* specific about the Commission's mission (18 U.S.C. 991 et. seq.): the Commission was to establish mandatory "guidelines" that—

i. "assure the meeting of the purposes of sentencing"

ii. "reflect advancement in the knowledge of human behavior as it relates to the criminal justice process," and

iii. "provide certainty and fairness in meeting the purposes of sentencing, avoiding 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" **[in other words, reduce disparity while at the same time permitting individualized sentencing determinations]**

3. Formulation of Guidelines (§ 994)

a. The SRA is also very specific about the form of the guidelines themselves. For example, Congress declared that

(a) The Guidelines shall "establish a sentencing range" "for each category of offense and each category of defendant" (994(b)(1)), and

(b) The maximum of the range cannot exceed the minimum by more than the greater of 25% or 6 months (a.k.a the "25% rule")

b. The SRA specifically lists certain factors that Congress considered irrelevant and/or generally inappropriate for use in sentencing determinations (and thus should not be permitted by the guidelines):

factors that are inappropriate or irrelevant

⇨ Race, sex, national origin, creed, and socioeconomic status: guidelines must be "***entirely neutral***" (994(d)) **[surprising to those of you thought Alex Anderson's status as a poor person was a mitigating factor in regard to the bank robbery**?]

- ⇨ education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant= "generally inappropriate" (994(e))

- ⇨ "imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant" or providing "educational or vocational training, medical care, or other correctional treatment"=inappropriate (994(k))

c. The SRA lists other factors that Congress *wanted* to see reflected in the guidelines:

- ⇨ appropriate to impose probation on first time offenders who have not committed a crime of violence or serious offense, (994(j)), and a substantial term of imprisonment for offenders with two or more prior convictions (994(i))

- ⇨ imposing a lower sentence than otherwise warranted based on "a defendant's substantial assistance in the investigation or prosecution of another"= appropriate (994(n))

d. The statute also specifically notes that, with respect to certain other factors, the Commission may make the determination about the relevance of such factors and include them in the guidelines to the extent they are relevant:

- ⇨ Grade of offense, mitigating and aggravating circumstances, nature and degree of harm, community view, public concern, deterrent effect, incidence of the offense in the community and nationwide (994(c)(1) – (7))

- ⇨ Age, education, vocational skills, mental and emotional condition, physical condition, previous employment, family ties and responsibilities, community ties, role in the offense, criminal history, extent of criminal livelihood (994(d))

The list of specific congressional prescriptions about the content of the Guidelines goes on and on! Indeed, many people are surprised by the degree of specificity regarding the Guidelines as set forth in the SRA. As Kate Stith (an ardent critics of guideline sentencing) observed in the beginning of her legislative history: "the Sentencing Reform Act itself—and not simply the Commission's implementation

of the statute—is a primary source of the rigidity and ~~harness~~ harshness in the Federal Sentencing Guidelines."

II. Abolition of Indeterminate Sentencing (Parole)

1. Critics had long argued that indeterminate sentencing undermines certainty (a key component of deterrence and equality).

2. The push to eliminate parole was part of a reform known as "truth in sentencing": instead of the exercise of the judge trying to estimate the ultimate term of imprisonment, what is ordered is what the defendant gets!

3. 18 U.S.C. § 3624(a): release at the expiration of the term, less good time

III. Establishment of Binding Purposes and Factors for Express Consideration By Judges

1. 18 U.S.C. § 3553(a)—important section that you'll be hearing a lot about!

   (a) Title: "Factors to be considered in imposing a sentence"

   (b) General Preamble=>The court shall impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)"

   (c) Lists seven factors for the court to consider "in determining the particular sentence to be imposed":

      (1) Nature and circumstances of the offense and history and characteristics of the offender

      (2) {purposes of sentencing} The need for the sentence imposed to—(A) provide just punishment; (B) afford adequate deterrence; (C) protect the public from further crimes of the defendant; and (D) provide the defendant with needed educational or vocational training

      (3) Kinds of sentences available

      (4) Kinds of sentence and sentence ranges established in the Guidelines

      (5) Policy statements issued by the Commission

      (6) Need to avoid unwarranted sentencing disparity

(7) Need to provide restitution to victims of the offense.

2. Looking at the factors, the Guidelines were historically 'first among equals' because imposition of a sentence within the guideline range was ***mandatory***:

   >Under 3553(b)(1), the judge "***shall***" impose a sentence within the guideline range, unless there is an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission when formulating the guidelines.

   >Judges could "depart" from the guidelines, but only in this limited situation (not because of a policy disagreement with the guidelines)

3. Judges must state in open court the reason for sentence, including the reason for imposing a sentence at a particular point within the range, and the reason for a departure. (3553(c))

4. Section 3742 provided an extra incentive for judges to impose a sentence within the guidelines: so long as the court selected a within-range sentence, reversal on appeal was not authorized!

   An appeal could proceed ONLY if the trial court imposed sentence above or below the guideline range; if there was no applicable guideline and the sentence was unreasonable; or if the guidelines had been incorrectly applied (3742 (a) and (b)).

   * * *

These provisions of the SRA underscore Congress's intent to substantially restrict judicial discretion and vest discretion at the systemic level—with the newly formed Sentencing Commission and an its own enhanced role in developing laws/rules for sentencing judges. *[adjust diagram]*

GUIDELINE SENTENCING

A. BACKGROUND

I've mentioned briefly some of the many restrictions that Congress placed on the Commission in regard to the formation of the guidelines. The original Commission's efforts to develop a guideline system took place between 1984 and 1987, and resulted in THIS book (hold up manual): "The Guidelines Manual".

1. Your reading for today included Chapter One, which discussed the underlying policy rationale for the guidelines, and I won't repeat it here in any detail. I do want to mention, however, the fundamental tension between **uniformity** and **proportionality** –

   a. Congress could easily have mandated, and the Commission could have established, a completely uniform system based on the offense of conviction: if a defendant is convicted of X, he receives Y as a sentences. But such a system (1) would have put all discretionary authority in the hands of prosecutors and (2) would not permit consideration of important characteristics that may warrant a different sentence for dissimilar offenders.

   b. On the other hand, the Commission could have created a system that was tailored to account for every possible fact related to an offense or an offender—to ensure individualized treatment—but (1) such a system would not be workable, and (2) uniformity would be undermined by that level of individualization.

   c. So we have something of a hybrid – the system begins with the offense of conviction and then directs the court to particular guidelines that account for various aggravating and mitigating facts. Ultimately, the court is directed to a table that provides a range of imprisonment based on the offense and the criminal history of the offender.

2. Also noteworthy=>the original commission arrived at the factors and the values to be attached to the nature of the offense and the offender *on the basis of empirical research* regarding the average sentences courts were giving various defendants. (The Commission did not, itself, make judgment calls re which purposes of sentencing should be pursued; rather, it set the levels based on what judges were actually doing!)

B. OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES

1. Generally speaking, the guidelines determine sentencing ranges on the basis of the **seriousness of the offense** and the **criminal history of the offender.**

   (a) There are 43 levels of offense seriousness. Each type of crime is given a "base" offense level, and then there are specific offense characteristics that can increase or decrease the base offense level. There are also other adjustments that are made to the offense level based such factors as the nature of the victim, the role of the offender, obstruction of justice, or acceptance of responsibility.

   (b) Re criminal history: a defendant is given a criminal history score that affects the ultimate sentencing range. Factors that increase the defendant's criminal history score include—the number and seriousness of prior offenses, and whether the def is on probation or parole when he committed the instant offense. The defendant's criminal history score places him in a Criminal History category of 1 to 6.

   (c) The guideline sentencing range appears in a table, in which the offense level is the vertical axis and the criminal history category is the horizontal axis. The table is the crux of federal guideline sentencing.

2. **Robbery Worksheet** => [use manual copies & worksheet to talk through how one would calculate the guideline sentence]

C. DEPARTURES (Chap 5, Part K)

Calculating the guideline range for a case was not the final step, even when the guidelines were mandatory! Both the SRA and the manual permit courts to "depart" from the guideline range under certain circumstances.

1. **What is a "departure"?** A means by which a judge can impose a sentence other than that called for by the guidelines despite the mandatory nature of the guidelines system at its founding. Two varieties of departures originally envisioned under the guidelines—

   a. A court could impose a sentence outside the specified guideline range if it found that there is "a circumstance of

a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). This type of departure *involves an exercise of judicial discretion* (*i.e.*, finding that there are circumstances that warrant a different sentence).

b. Both Congress and the USSC also authorized departures for "substantial assistance," the defendant's cooperation in the investigation and prosecution of others (§5K1.1 and 28 U.S.C. § 994n). This type of departure *does not reflect expanded judicial discretion*, because it must be initiated by a motion by the prosecution.

Judicial

2. The original Commission characterized departures as a means of dealing with the "atypical" case:

> The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure a warranted.
>
> – *Chapter One of the Manual, dated Apr. 13, 1987, at 1.6*

3. Why did the original Commission adopt such a departure policy?

a. The Commission recognized that its ability to foresee and capture the vast range of human conduct in the original guidelines was necessarily limited! The manner in which crimes are committed, and the factors deemed to be important at sentencing, are vast and varied. The original guidelines looked to what judges had traditionally found to be important and how judges weighed those factors, but left open the

opportunity for discretion to play a role in producing fair sentences as necessary in unusual cases.

b. The Commission envisioned a "feedback loop" => as judges departed, the Commission would get information about how to amend the guidelines to take those additional factors into account or adjust the value of a factor within the guidelines. Departures played a key role in giving the Commission information about what needed to be changed about the guidelines themselves.

c. The Commission believed that departures would be relatively rare because the guidelines themselves sought to account for the most important factors. Departures were appropriate—and would be reserved for—the *unusual* case, which, by definition, does not happen very often.

4. **How did the original Manual deal with departures based on an exercise of judicial discretion?** In various ways, relating both to (a) *factors* that the USSC may not have taken into account, and the (b) *degree* of factors that the guidelines do account for:

a. *Circumstances/factors not adequately taken into account in the guidelines*

- "Encouraged" departures—the Manual contains a section that specifically lists certain factors that the Commission "may not have adequately taken into consideration when determining the applicable guideline range" (§5K2).

  --*E.g.*, significant physical injury (5K2.2); extreme psychological injury (5K2.3); coercion or duress (5K2.12); diminished capacity (5K2.13)
  --If a listed factor is present in a case and the applicable guideline does not already account for it, the court is encouraged to depart upward or downward as suggested.
  -- There are also departure statements throughout the Manual in specific guidelines and at §4A1.3 (Departures Based on Inadequacy of Crim History Cat).

- "Discouraged" departures—There is language in particular guidelines to the effect that certain factors 'are not ordinarily relevant' or 'do not warrant a departure.' Most offender characteristics have traditionally fallen into this category (*e.g.*, age, educational and vocational skills, employment). In such a case, a departure would be appropriate only if such a characteristic is present to an "*exceptional*" degree.

- Prohibited Grounds for Departure—The guidelines also underscore the SRA statement that certain factors are prohibited and thus cannot be the basis for a departure. These include race, sex, national origin, creed, religion, socio-economic status (§5H1.10).

- Unmentioned factors ("unguided" departures)—Almost any factor that involves the nature or characteristics of a defendant or offense and that makes a case unusual or atypical can be addressed as a departure—with the exception of the prohibited grounds. To depart on the basis of an unmentioned factor, the court needs to determine whether the factor truly takes the case out of the heartland of other cases after considering the structure and theory of the applicable individual guideline and the guidelines as a whole. (Berman, et al. at 176; *Koon*).

What if the applicable guideline already takes the factor into account?

b. Circumstances present to a degree *not adequately taken into consideration*

If the court determines that a factor is accounted for in the guidelines already, the court may depart upward or downward on the basis of that factor only if the factor is present in the offense "to a degree substantially in excess of, or substantially below, that which is ordinarily involved in that kind of offense." (Again, evaluated in comparison to the "heartland" of cases.)

Departure Treatment Summary

Encouraged	O.k. to depart if particular guideline doesn't include it
Discouraged, or already taken into account	Must be present to an "exceptional" degree
Unmentioned	Must be sufficient to remove the case from the heartland

5. Rate of Judicial Departures –

***Departures have been a focal point for controversy from the inception of the guidelines! It is very important to get the balance between permitting and restricting departures right: if too many departures are allowed, the goal of sentencing uniformity will be defeated, but if too few departures are permitted, the system will be too rigid and inflexible and will produce unfair results (treating different cases similarly harshly).

In general –

>Over the decade between implementation of the guidelines in1987 and the mid-1990s, federal judges rarely used their departure authority. Indeed, judges exercised their independent authority to depart in only about 10% of all cases (prosecutors requested, and judges granted, substantial assistance departures in some 20% of cases).

>One reason for the sparing use of departures: the appeals courts typically reviewed decisions to depart *de novo*, while refusing to review any discretionary decision *not* to depart!

THE DEPARTURE DEBACLE

Despite the relatively small rate of judicial departures, controversy over the "departure" mechanism reached a boiling point and came to a head in the mid-1990s, with a Supreme Court case called *Koon v. United States* (1996).

A. *Koon v. U.S.*

1. Background=>The *Koon* case arose from the highly-publicized prosecution of four white Los Angeles police officers who were videotaped using excessive force in the beating of a black motorist (Rodney King). The officers' acquittal after a state-level trial lead to widespread and destructive rioting in the city of Los Angeles. The officers were re-tried for federal civil rights violations—leading to guilty verdicts for two of them—but instead of imposing a sentence within the 70-to-87 month guideline range (O.L. 27/ CH Cat I), the sentencing judge departed downward 8 levels and imposed a sentence of 30 months.

2. On appeal, the Ninth Circuit reviewed the sentence *de novo* and reversed the dct, holding that the factors that the judge considered in departing— the victim's wrongful conduct (5K2.10); susceptibility of abuse in prison due to widespread publicity; job termination; successive prosecution; and low risk of recidivism—were not proper grounds for departure.

3. The SCt agreed that some of the grounds were improper, but found others to be acceptable and reversed the court of appeals, sending the case back to the dct for resentencing. Most importantly, for present purposes, the SCt held that the appropriate **standard of review for departure determinations is *abuse of discretion* and dcts enjoy wide discretion to depart**.

    a. Congress did not intend to divest the dcts of their traditional sentencing discretion and did not alter the appeals court's traditional deference to the dct's exercise of that discretion.

    b. Because few sentencing cases are appealed, dcts have an "institutional advantage" over courts of appeals in determining whether a factor is present to an exceptional degree or is unusual enough to take the case outside the heartland.

B. Departures Post-Koon

Does anyone have a guess regarding the impact of *Koon* on the federal sentencing system?

1. **Did sentencing judges depart more after the Supreme Court's pronouncement?**
2. **What about the number of sentencing appeals—did they increase or decrease?**
3. **Was there a *Koon* effect, and if so, what was it?**

1. Frequency of Downward Departures

   a. Before *Koon*, dcts departed of their own volition (without govt motions for cooperation) in less than 10% of the cases. (In another 20% of the cases, the government sought a departure for substantial assistance.)

   b. The non-cooperation departure rate steadily *increased* after *Koon* such that, by 2001, that rate was nearly 20% (18.1% to be exact)—twice the rate that it had been in 1995, prior to *Koon*.

   c. The story of this rising departure rate is complicated, however; indeed, the Commission has reported that the *Koon's* impact on the downward departure rate is "unclear."

      (1) The departure rate actually started rising significantly two years prior to *Koon*

      >Why? The near simultaneous rise of immigration cases (many of which are subject to "fast track" rapid case-disposition processes) played a major role! The "fast track" was a determination by the government that, in certain jurisdictions, administrative concerns about the processing of immigration cases prior to deportation was paramount. In these places, *the government* moved for downward departures to speed the cases through, and many commentators believe that "fast track" had a much greater impact than *Koon* on the overall departure rate. Indeed, when all non-govt sponsored departures are excluded, the true judicial departure rate in 2001 was just under 11%.

(2) Also, the post-*Koon* departure rate varied dramatically depending upon the jurisdiction (thus not easily traced back to that decision).

> The percentage of downward departures ranged from a low of 1.4% in Eastern Kentucky to 62.8% in the District of Arizona in 2001. And the percentage of downward departures in Ninth Circuit cases that year was 38.7%, compared to the rate in the Fourth Circuit (5.2%).

2. Frequency of Appeals

1. D.O.J. complained mightily that *Koon*'s "abuse of discretion" standard inhibited sentencing appeals.

No clear impact b/c appeal rate was low even before Koon!

> **Why would this be so?**=>the govt will generally conserve its resources to appeal only those sentences that are likely to be overturned and the deferential std heightened the bar.

2. Yes, the government appealed only 25 downward departure decisions in 2001 (after *Koon*), but the government had historically appealed only a small fraction of departure cases, even prior to *Koon*! The historical average for the number of departure appeals in the four years prior to *Koon* was merely 38.

3. *Koon*'s Cultural and Institutional Impact

Even the most impartial look at the statistics of the period reveals that there was an uptick in judicial (non-government sponsored) departures post-*Koon*. Many commentators assert that the real *Koon* effect was that it sent a "norm-setting signal," which institutional players interpreted as the Supreme Court's desire to increase judicial discretion by making departures more readily available.

(*)

> If we harken back to the now-familiar Reitz discretion diagram: judicial sentencing power had been contained in 1984 through the SRA's creation of the Commission and the implementation of mandatory guidelines.

> Then, in 1996, 9 years after the guidelines went into effect, the Supreme Court interpreted the departure provisions of the statutes

and guidelines to give district courts broader discretion to sentence outside the guidelines, thereby increasing the judicial sphere of influence over sentencing outcomes!

C. THE PROTECT ACT AND THE FEENEY AMENDMENT

1. "War Within the War on Crime"

Whatever the truth about *Koon*'s impact on the rate of judicial (non-government sponsored) departures, by the end of the 1990s, there was an increasing perception on Capitol Hill and within D.O.J. that liberal judges were to blame for the downward pressure on federal sentences and that legislation was necessary to reign them in.

Some commentators have referred to the dispute between Congress and D.O.J. on the one hand, and the judiciary on the other, over departures and the scope of judicial discretion during this time period as the "war within the war on crime."

The House Judiciary Committee convened hearings and issued reports about the sentencing practices of particular judges, and the climate was very hostile regarding the use of the judicial authority to depart from the guidelines.

Ultimately, Congress enacted legislation to address what some legislators viewed as unchecked judicial authority in regard to sentencing.

2. Procedural History of the Protect Act

a. The "Prosecutorial Remedies And Tools Against the Exploitation of Children Today" Act (a.k.a. the PROTECT Act) originated in the Senate. It consisted primarily of a non-controversial "Amber Alert" Bill that focused on strengthening federal laws and procedures for detecting, investigating, prosecuting and punishing child kidnapping and sex abuse crimes. The Senate passed the popular Amber Alert bill on February 24th of 2003, and it was sent to the House the next day.

b. In the House, the bill was seen as an opportunity to go far beyond addressing sex crimes against children. Staffers of Republican members

of the House Judiciary Committee drafted a bill that targeted judicial discretion to depart from the sentencing guidelines, and a freshman Republican Representative named Tom Feeney attached the departure-stifling bombshell as a rider to the House version of the Amber Alert bill right before the vote.

c. On March 27th, 2003, after 15 minutes of debate and with no input from the judiciary, the Sentencing Commission or any other interested parties, the House passed the Amber Alert bill, including the Feeney Amendment.

d. At that point, the two bills—the Senate version and the House version—went to the conference committee for a two-week period of reconciliation, during which there was a storm of criticism and a concerted lobbying effort to limit the scope of the Amendment or at least to give interested parties a say regarding the bill.

e. Ultimately, there was some success in getting the most radical provisions taken out, but the final version of the bill, which President Bush signed into law on April 30th in form of the PROTECT Act, was still a significant blow to judicial discretion.

3. Initial Feeney Amendment

a. Eliminated nine grounds for departure that were specified in the guidelines

b. Prohibited downward departures on any ground not "affirmatively specified and identified" in the guidelines. (No longer would courts have authority to recognize a mitigating factor that was of a kind, or existed to a degree, not taken into consideration in the guidelines. This power would be limited only to recognition of *aggravating* factors for the purpose of an upward departure!)

c. Imposed procedural reforms related to congressional oversight of departures: (1) each district was to give a detailed sentencing report to the USSC within 30 days of a sentence, and the USSC would summarize and report to Congress annually; and (2) the Atty Gen *must report each and every non-cooperation downward*

departure (including the identity of the judge and the procedures the court used prior to departing) to the House and Senate Judiciary Committees within 15 days of issuance, as well as the SG's appeal determination.

d. Increased appellate review of departures by (1) expanding the grounds upon which an appellate court could reverse a departure (*e.g.*, if it is does not advance the purposes of sentencing or is "not justified by the facts of the case"); and (2) providing the appeals court with *de novo* authority to review departure determinations.

e. Limited downward departures on remand. (Such a departure would be authorized only if the basis was specifically included in the statement of reasons for the original sentence and the CTA had explicitly found it to be a permissible basis for departure. Thus, the dct could not take any "new" circumstances into account at resentencing! [mention *Pepper* case, which held that post-sentencing rehabilitation *can* be taken into account on remand]

f. Imposed a moratorium on the USSC's promulgation of new downward departure provisions for two years.

g. Provided prosecutors with increased authority over sentencing outcomes. **[How so?]** (1) Ordered creation of a specific "fast track" guideline for early disposition programs in certain border districts dependent upon a government motion, and (2) changed the requirements for the three-level reduction for acceptance of responsibility (required a government motion as well).

4. Final Feeney Amendment

Many of the most dramatic initial restrictions were revised prior to final passage of the PROTECT Act, including the total prohibition of judicially-inspired downward departures; the total elimination of the nine specific departure grounds; and the requirement that all downward departure grounds be specified in the guidelines (these limitations were limited to child sex abuse and obscenity cases only).

But significant restrictions/requirements remained:

a. *Koon*'s standard of review was legislatively overruled: appellate courts would have to review departure determinations *de novo*.

b. The Sentencing Commission (1) was prohibited from providing new grounds for downward departures for two years; (2) had to review all authorized downward departures in the guidelines and amend the guidelines to "ensure that the incidence of downward departures are substantially reduced"; and (3) had its fundamental statutory charter amended to provide that "*no more than 3 judges* could serve on the Commission" at any given time.

c. District Court Judges (1) were limited in their ability to provide the maximum sentencing adjustments for acceptance of responsibility without a government motion; (2) were prohibited from giving fast track immigration departures except by motion of the prosecutor, (3) were subject to being reported to DOJ and Congress for any downward departure determination; and (4) were subject to having their departure decisions overturned on appeal.

d. DOJ was required to (1) monitor and collect data on downward departures, (2) issue guidance to line prosecutors to reduce the number of judicial departures; (3) ensure appeals regarding departures; and (4) report downward departures in individual cases to Congress within 15 days unless DOJ issued a report setting forth the procedures that it would use to ensure that line prosecutors oppose departures and vigorously pursue appeals.

D. FEENEY'S AFTERMATH

The PROTECT Act was roundly and severely criticized after its enactment. The response of the various institutional actors is interesting and worth noting:

1. Members of Congress

→sponsors in both houses quickly introduced the "Judicial Use of Discretion to Guarantee Equity In Sentencing Act" (JUDGES Act): a bill to repeal the portions of the PROTECT Act that impact a judge's authority to depart

2. The Judiciary

→the Judicial Conference (incl. Chief Justice Rehnquist) issued a unanimous resolution calling for repeal of the Feeney Amendment provisions due to lack of notice

→individual judges across the nation began to speak out vociferously (and uncharacteristically) during oral arguments and in opinions, saying things like "judges aren't really responsible for sentencing anymore" in their jury charges, and questioning the newly augmented prosecutorial authority

→one district court judge issued a "blanket seal" on all sentencing-related documents, to prevent congressional examination of the materials without his express approval

→some judges found provisions of the amendment to be an unconstitutional violation of separation-of-powers principles (Congress's encroachment on powers of the judiciary)

→others refused to limit their departure authority as required, either by recusing themselves on remand, dissenting in sentencing cases being reviewed on appeal, or narrowly construing the PROTECT Act to limit their authority only in regard to sex crimes

→a few federal district court judges (incl. a judge sitting on the SDNY) retired/resigned in protest

3. The Executive Branch

The Department of Justice, which at that point was under the leadership of Attorney General John Ashcroft, embraced the new legislation—some say its provisions were indeed largely orchestrated by DOJ!—and undertook to respond with a series of changes to internal DOJ policies regarding reporting, charging, plea bargaining, and case processing.

In a nutshell, line prosecutors were required to "vigorously oppose" all downward departures and pursue appeals of any such decisions.

Moreover, prosecutors were required to charge "the most serious, readily provable offense," and were encouraged to seek statutory enhancements, including mandatory minimums.

4. The Sentencing Commission

The Commission issued a report as required by Congress in October of 2003, along with an emergency amendment to the guidelines that largely complied with the Act's directive to reduce the incidence of downward departures.

Among other things, the Commission eliminated six grounds for downward departures in the manual, restricted the courts' use of certain other departures, and revised the departure guideline to narrow its scope.

E. CONCLUSION

1. This is yet another critical chapter in the long-running saga of the battle between Congress and the judiciary regarding the scope of judicial discretion at sentencing, and another example of why federal sentencing law is really all about the question of "*who (which institutional actor) decides*?!"

   [**can anyone explain?**]=>*Koon* had augmented the power of the district courts to impose sentences outside the mandatory guideline range at the case-specific level; the PROTECT Act came roaring back to shut down this authority. And Congress went beyond just limiting the district courts by reversing *Koon*: it substantially augmented its *own* power by systematically affecting the authority of the other institutional actors as well!

   Not surprisingly, as a result of the Feeney Amendment, the frequency of judicial downward departures plummeted: to a mere 5% of all cases!

2. The PROTECT Act story is also about the relationship between Congress and the Commission, on the systemic level of our diagram—Congress *undercuts* the USSC for the first time!



1. Whereas, before, Congress would have ordered the Commission to study the departure issue and to enact amendments "if appropriate," Congress now demands that the Commission amend the guidelines so that the instances of departures are reduced and limits the Commission's ability to enact new departure grounds.

2. Also, Congress *directly amends the guidelines* by issuing "specific" directives that require the Commission to include certain language pertaining to new specific offense characteristics and increase particular offense levels in child porn cases

   --just as judges had complained that the guidelines had turned them into mere scribes (calculators) at sentencing, so too do specific directives remove the expertise/judgment-making authority of the Commission as the expert body in regard to the appropriate levels of severity within the guidelines

3. Moreover, Congress *changed the composition of the Commission itself* (limiting judicial involvement)→ a clear signal that its distrust of the judiciary has spilled over into a distrust of the Commission as the judicial branch agency designed to cabin judicial discretion at sentencing!

THE BOOKER REVOLUTION

I'm not going to continue on much longer because many of you already know how this story ends (or at least where we are at this point in history).

Beginning in the year 2000, seven years after enactment of the PROTECT Act and the Feeney Amendment to reign in federal judges, the Supreme Court began a federal sentencing "revolution" that has given judges nearly as much discretionary power as they had before the Sentencing Reform Act!

A. *Apprendi v. New Jersey* (2000) => (decided the year that I clerked)
The Court held on 6th Amendment grounds that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must to submitted to a jury and proved beyond a reasonable doubt (or admitted by the defendant).

Legal analysis is far too complicated for present purposes: bottom line? Called into question any sentencing system in which *judges* rather than *juries* decided disputes about facts that could be used to increase the defendant's penalty (e.g., the types of factors that the guidelines incorporate, such as the amount of money stolen or whether a weapon was used)

B. *Blakely v. Washington* (2004) => applied *Apprendi's* holding to a statutory scheme in which a judge was required to by law make findings in regard to aggravating factors and to increase a defendant's penalty *within* the maximum set by statute for the crime—*i.e.,* held that the real "statutory maximum" for *Apprendi* purposes is the maximum sentence that a judge could impose based solely on the facts as reflected in the jury's verdict (or defendant's admission).

C. *Booker/Fan Fan v. U.S. (2005)* =>two majority opinions:

--constitutional majority—the offense levels under the guidelines were the equivalent of statutory maxima for *Apprendi* purposes, so the factual findings necessary to move a defendant down the table (increasing the penalty range) had to be submitted to a jury *unless* the guidelines did not function as statutory maxima because they do not dictate the sentence

--remedial majority—o.k., fine; then the guidelines are rendered "advisory" rather than mandatory! The sentencing judge need only impose a reasonable

sentence in light of the sentencing factors that Congress set forth at 18 U.S.C. § 3553(a).

D. The Post-*Booker* Era

So, we are now going into our 6th year of "advisory" guidelines . . .

1. Courts must calculate the guideline sentence in every case, but need not impose a sentence within the range. Indeed, a court may "vary" based on its own view of how best to achieve the purposes of sentencing set forth in 3553(a), even if it's judgment conflicts with that of the Commission.

2. The Commission continues to update the manual and to collect data on all aspects of federal sentencing – including the degree to which courts are now imposing non-guideline sentences.

3. Appeals courts have been directed by the Supreme Court to review district court sentences only for "reasonableness." Appeals courts can presume that a within-guideline sentence is "reasonable" but cannot presume that a sentence outside the guidelines is "unreasonable." (Std is abuse of discretion)

4. And the parties have a reinvigorated sense of the importance of arguments related to sentencing.

Indeed, with judges now having wide discretion to determine sentencing outcomes, the discretionary model of sentencing now looks very similar to the one that we started with . . .

Xtra Large circle=>judges
Large circle=>congress & parties
Small circles=>commission, appeals ct, corrections officials

We are all now waiting to see how—if at all—Congress responds to this new sentencing reality!

CONCLUSION

So, that's where we are right now. In some ways, we are at another potential turning point—and we shall see how things play out.

I do hope that you now have a sense of how truly dynamic this area of the law is and has been, and that you have some insight to the larger institutional dynamics that are at work in federal sentencing, as well as a better understanding of a judge's sentencing determination and the operation of the guidelines.

I am available to answer questions in whatever time we have left!

Macon GA Training Introduction

February 11, 2011

Thank you Ms. Moore. I am delighted to have had the opportunity to come down to this training program—I have a flight to catch this afternoon, so I will only be here for this morning's session, but I hope to have the opportunity to hear from you all either in person or through your questions while I am here.

I realized just yesterday that today, February 11th, is the one year anniversary of my Senate confirmation and designation by the President as a Commissioner. So it is especially gratifying for me to be spending this day out on the road in furtherance of my official duties, traveling with our excellent training team, reflecting on what the Commission has done over the past year, and getting feedback about the operation of the system. Previously in my career, I was an assistant Federal Public Defender in Washington DC, so I know very well the important work that you do as participants in the federal criminal justice system. You each have a significant role in the process of administering justice at sentencing, which I am told is one of the most difficult responsibilities of a judge. As you do your sentencing-related jobs well, you are not only enhancing your own professional development, you are performing a very valuable service for the court.

Now, there can be no question that the Supreme Court's Booker decision has revitalized sentencing advocacy in a manner that, in some respects, it has made many of your jobs more difficult. Now, the court not only needs to have an accurate guideline calculation, but it also has to make an independent determination of the fairness of the sentence in light of the 3553(a) factors. This means that the court must have well articulated reasons for the sentence that it is

imposing, and these reasons are developed from the facts that you discover and the arguments that you make. Now, more than ever, it is crucial to understand the operation of the guidelines in order to be able to make effective arguments about the appropriate sentence in any case -- and that's where we come in with the presentation here today.

Now, before we get into the guidelines training, let me just give you a few brief updates in the bigger picture of what's going on at the Commission . . . UPDATES SLIDE: [New chair, natl seminar, regional hearings, judges survey]

I am going to hand it over to Rusty and Kealin to begin the training, but let me just emphasize that a lot of the work we do at the Commission goes beyond just evaluating and adjusting the guidelines on our own initiative. We also work with Congress and the Executive Branch to develop policy--efforts that came to fruition this past summer, for example, with Congress's enactment and the President's signing of the Fair Sentencing Act (the crack-powder recalibration law) after more than a decade of encouragement by the Commission. The Commission also has on its agenda various comprehensive reports to Congress, including a report on mandatory minimum penalties that Congress has asked us to prepare and that may inform legislative policy going forward.

There is a lot of activity and a number of priorities right now, and Rusty and Kealin will elaborate on current Commission projects briefly in this course of the presentation today. We encourage you to contact the Commission to tell us your thoughts and to let us know what is happening here, in this jurisdiction, so that that your concerns and issues can be taken into account.

ABA SENTENCING CONFERENCE
Friday, November 5th, 2010

UPDATE ON SENTENCING LAW PANEL

There is a lot going on in sentencing right now from the Commission's perspective. The Commission is having a plenary session following this panel, during which you will get to hear many of the details, but here I will touch upon four major areas of activity and pick up on some of what Bobby and Hannibal have already discussed this morning. The areas are:

I. Implementation of the Fair Sentencing Act
II. New 2010 Guideline Amendments
III. Pending Congressional Directives to the Commission
IV. Other Commission Priorities

First, the Fair Sentencing Act, the momentous legislation that we've heard quite a bit about already . . .

* * *

(I) Fair Sentencing Act

The Fair Sentencing Act's recalibration of the mandatory minimums for crack offenses was a welcome change that was essentially the culmination of nearly two decades of work on the Commission's part to urge Congress to address disparities in federal cocaine sentencing policy. Since 1995, the Commission has issued four comprehensive reports on this issue and Commission members testified over a dozen times about the need to change statutory penalties. The Commission is thankful that Congress moved on this matter this year and commends both Congress and the President for doing so.

The Commission is also grateful that Congress provided Emergency Amendment Authority, which permitted the Commission to make immediate changes to the guidelines to conform them to the new law rather than having to wait to do so during the regular amendment cycle. On October 15th, the Commission implemented the FSA (with an effective date of Nov. 1st), and the changes will be discussed in greater detail during the plenary session but can be summarized as follows:

(1) The **drug quantity table has been amended** to reflect the new 18-to-1 ratio that Congress established in the FSA in a manner that conforms crack cocaine to the approach generally followed by the table overall. The triggering amounts for the 5- and 10-year minimums in the statute are now 28 grams and 280 grams (rather than 5 and 50), and the crack cocaine amounts in the table are set so that the statutory minimum penalties accordingly correspond to levels 26 and 32. The other base offense levels are established by extrapolating upward and downward from these points.

This is the general approach followed by the other drugs in the table, and conformity with this approach maintains a proportionate representation of the drugs in the table as well as consistency in the congressionally-determined ratio of crack-to-powder.

(2) Congress also devised several **new specific offense characteristics** in the FSA and these are reflected in the new emergency amendment. There are both aggravating and mitigating factors that apply to *all* drugs, not merely crack. These new factors focus more on a defendant's role in the drug offense (such as his use of violence or bribery) rather than on drug quantity, which is consistent with Congress's intent to shift the system away from a quantity-based focus.

The Commission anticipates that if the existing emergency amendment is made permanent, there would be an overall 13.7 percent reduction in the average sentence length for crack cocaine offenses, and approximately 1,500 fewer federal prison beds would be needed after five years (3,800 fewer beds after 10 years). The qualifier—"if it is made permanent"—is necessary because the current emergency amendment is a temporary provision that will expire no later than November 1, 2011. The Commission will be working this year to craft and promulgate a permanent amendment addressing the FSA and Chapter 2D of the Manual by May of 2011, as part of its regular amendment cycle.

* * *

Setting aside the FSA, the Commission also made a number of other significant changes to the manual as part of the regular Amendment cycle that concluded in May of this year . . .

(II) 2010 Guideline Amendments

The recent guideline amendments that became effective this past Monday (November 1st) include:

A. Amendments that reflect the system's interest in providing **alternatives to incarceration**. The Commission held a symposium on alternatives in 2008 and published a paper in 2009 that reflected the data, literature, case law, and public comment that the Commission has reviewed, most of which indicates that there is now a widespread call for the use of alternatives. Briefly, the new amendments:

(1) Expand Zones B and C of the Sentencing table down by one level thus allowing more defendants to be eligible for alternatives such as split sentences and probation when such sentences are not statutorily prohibited; and

community confinement; home detention

(2) Clarifies that a departure from the types of sentences otherwise prescribed may be warranted in order to accomplish a specific treatment purpose. The departure is authorized if the defendant is a substance abuser and the criminality is related to the treatment problem to be addressed, and is designed to encourage judges to impose treatment in lieu of incarceration when warranted. This amendment recognizes that treatment of certain offenders is essential to preventing recidivism, and that under some circumstances treatment in lieu of incarceration promotes public safety.

B. Amendments that reflect the realities of the post-*Booker* era. These include:

(1) An **amendment to the application instructions** in Guideline 1B1.1 to recognize the three-step approach that judges must now follow in determining a sentence (*i.e.*, guideline calculation, consideration of departures, then vary or not under 3553(a)); and

(2) Amendments to the departure language of Chapter 5 to state that certain **specific offender characteristics** (age, mental and emotional condition, physical condition, and military service), if "present to an usual degree" that distinguishes the case, "may be relevant in determining whether a departure is warranted." This change reflects public comment that the Commission received during the regional hearings and judges survey. The Commission's intention was to provide judges with a clear standard for the use of such factors, and we hope to provide an ongoing stream of additional information about the use of such factors.

C. Other Amendments that you will hear more about at the plenary session:

(1) Elimination of the **recency** provision in 4A1.1– Commission data indicated that recency does not add much as a predictor of recidivism, and the provision was causing double counting problems when applied in conjunction with certain other guidelines.

(2) Changes to three aspects of the **organizational guidelines**: first, in regard to the requirements for an "effective compliance and ethics program," a clarification regarding the necessary remediation efforts; second, with respect to the "culpability score," the creation of an exception to the provision that prohibits applying the 3-devel decrease for having an effective compliance program when high-level personnel are involved in the offense; and third, simplification of the recommended conditions of probation for organizations.

(3) New departure for **cultural assimilation** in 2L1.2— In cases involving illegal reentry to the U.S., judges may now consider whether the defendant has "culturally assimilated" into this country. The factors are whether (a) the defendant has formed ties based on continuous residency here since childhood, (b) those ties are the motivation for his return, and (c) a departure is not likely to increase the risk to the public from further crimes by the defendant.

(III) Pending Congressional Directives

During the 111th Congress, there have been **43 bills introduced with directives**—either specific or general—that require the Commission to review and amend the guidelines. These bills cover every significant area of criminal law, including immigration, firearms, sex offenses against children, environmental crimes, and fraud. Several of these bills also require the Commission to produce reports on designated topics of interest to Congress.

Regardless of the form of the directive, before responding to the congressional request, the Commission follows a multi-step process that includes extensive analysis of the relevant data, case law, and academic literature; outreach to criminal justice stakeholders (including hearings as needed); preparation of affected population and prison impact estimates; and evaluation of the relevant legislative history.

Currently, the Commission is in the process of **responding to six public laws with specific directives** to the Commission:

(1) The directive to issue a comprehensive report regarding mandatory minimums after *Booker* in the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (an enormous undertaking, given the process I described);

(2) The directive to review and report to Congress on feasibility of new mandatory minimums in the Comprehensive Iran Sanctions, Accountability, and Divestment Act;

(3) The directive to increase certain specific offense characteristic levels for loss caused by health care fraud in the Patient Protection and Affordable Health Care Act;

(4) The directive to increase specific offense characteristic levels for securities and bank fraud in the Dodd-Frank Wall Street Reform and Consumer Protection Act;

(5) The directive that increases and decreases specific offense characteristic levels for activity related to drug-trafficking in the Fair Sentencing Act, as previously described; and

(6) The directive related to abuse of a position of trust in the Secure and Responsible Drug Disposal Act.

One of the things that I am curious about is Congress's determination regardion the language of a directive, because there is wide variation: sometimes the Commission is asked to "review and amend, if necessary" ; other times Congress orders us to "review and amend" *to include a specific level increase or decrease based on specified factors*. We certainly prefer the former because it better enables us to avoid technical and conceptual problems and craft a proportionate, workable sentencing system. But if we have time later, perhaps Bobby and Hannibal can enlighten us on the legislative thought process behind the language of directives.

(IV) Other Commission Priorities

In addition to work involved in the areas that I've already mentioned (1) crafting a permanent amendment that implements the FSA and addresses related issues, (2) completing the comprehensive mandatory minimum report that Congress mandated in the Shepard and Byrd Act, and (3) responding to myriad other congressional directives, the Commission has several other significant priorities for this amendment cycle. These include:

(A) Producing a report that assesses the state of federal sentencing now five years after *Booker*;

(B) Continuing its review of child pornography offenses;

(C) Continuing its review of departures within Chapter 5 and the extent to which various offender characteristics should be taken into account at sentencing; and

(D) Examining the policy statements that govern supervised release.

* * *

There is a lot on our plate, and we are looking forward to hearing from, and working with, Congress, the Justice Department, the Defenders, and other stakeholders in the federal criminal justice system to craft reasonable, just, and sound sentencing policies going forward.

KBJ PLENARY PANEL REMARKS

RECENCY

The new guideline amendments include the elimination of the "recency" provision that previously existed in Chapter 4 in regard to the calculation of a defendant's criminal history score.

In calculating the criminal history score, Chapter 4 requires the addition of a certain number of points for prior convictions, with more points added if a sentence of imprisonment of at least 60 days was imposed, and if the instant offense was committed while the defendant was on probation, parole, or escape status (we call these "status" points). Under the prior Guideline, additional points were also added if the defendant committed the instant offense within two years of being released from prison after serving at least a sixty-day sentence (we called those "recency" points).

Both status and recency increase the severity of the sentence under the Guidelines based upon essentially the same factor: the timing of the instant offense relative to a prior offense. The amendment eliminates the points added due to the recency of the offense following the defendant's release from prison for a prior offense, and leaves in tact status points and other components of the criminal history score.

Why Did The Commission Take This Action?

As a general matter, we concluded that eliminating recency points simplifies the process of calculating criminal history and reduces the risk that the same conduct will get counted multiple times.

(1) In regard to the second issue, the cumulative impact of recency points and status points and other counting of criminal history played a significant role in our determination:

- We found that a single prior offense could contribute ***up to four times*** in the determination of a sentencing range. A single prior offense could be counted in Chapter Two to increase the base offense level, then counted up to three more times in Chapter Four in regard to the prior conviction and incarceration, the status of the offender, and the recency of the offense.

- For example, in illegal reentry cases sentenced under USSG §2L1.2, we found that the same event was counted *four times* in 36% of the cases in one year. Similarly, we found that the same event was counted *four times* in almost 18% of firearms cases sentenced under USSG §2K2.1.

- This type of multiple counting contributes to a perception on the part of judges that the criminal history score may be overstating the seriousness of a defendant's criminal history. In the feedback that we've received from federal judges over the past 5 years, overstatement of criminal history leads the pack as the reason most cited for downward departures from the GL range. And such overstatement is cited as a reason more often when "recency" points alone were present—indicating that judges thought recency points, in particular, overrepresented the seriousness of the criminal history in the cases before them.

(2) Another factor influencing our decision to eliminate recency points was the ***recidivism data***, which showed that recency points had very little impact on predicting whether a defendant would recidivate.

- The most predictive value as far as risk of recidivism was concerned was already accounted for by including in Chapter 4 the *number and types of prior convictions*, and the *status* of the defendant (i.e., whether the defendant committed the offense while on probation for a prior offense). These parts of the criminal history score remain intact the criminal history calculation.

What About The Argument That Recency Points Address Culpability, Not Recidivism?

Opponents of the proposed recency amendment (including the Probation Officer's Advisory Group) argued forcefully that recency points really address the increased culpability of a defendant who did not learn his/her lesson from recent prison term and went ahead and re-offended within 2 years of release. Although valid, this argument ultimately did not carry the day because:

- The culpability of the recently released defendant is still addressed as a result of the increased penalty for re-offending that results from counting the prior conviction and prison term as part of the criminal history score.

- It is also the case that defendants who released from prison face a number of challenges— a factor that Congress has acknowledged in the Second Chance Act—thus, re-offending within two years of

release from imprisonment may merely reflect the difficulties of re-entry rather than increased culpability.

- Furthermore, to the extent that a sentencing judge believes that the recency of an offense after release from prison should be taken into account as an aggravating circumstance, the judge may decide to impose a sentence a higher point within GL range, or to upwardly depart. Upward departures are permitted if "reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history the likelihood that the defendant will commit other crimes." [See USSG §4A1.3(a)(1)].

Based upon our analysis of federal sentences in fiscal year 2009, we expect that the elimination of recency points going forward will reduce by one category the criminal history category for defendants in **30%** of the cases that otherwise would have received recency points.

- We estimate that this represents a potential savings over five years of about 1400 prison beds.

Notably, the benefit of this provision will be applied prospectively because the Commission decided not to make the recency amendment retroactive.

ORGANIZATIONAL GUIDELINES

Another notable guideline amendment, especially for present purposes, is the amendment to Chapter 8—the guideline that applies to the sentencing of organizations. Generally speaking, the changes to Chapter 8 relate to **three aspects of that guideline**: (1) the requirements for an Effective Compliance and Ethics Program; (2) the calculation of an organization's Culpability Score, and (3) the Recommended Conditions of Probation.

(1) *Effective Compliance and Ethics Program*—The amendment amends the Commentary to section 8B2.1 by adding an application note that clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). As many of you know, subsection (b)(7) requires an organization, after criminal conduct has been detected, to take reasonable steps, first, to respond appropriately to the criminal conduct and, second, to prevent further similar criminal conduct. The new application note *describes* these two aspects of subsection (b)(7).

- With respect to the first aspect, the application note provides that the organization should take *reasonable steps*, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. The application note further provides that such steps may include, where appropriate, providing restitution to identifiable victims, other forms of remediation, and self-reporting and cooperation with authorities.

- With respect to the second aspect, the application note provides that an organization should assess the compliance and ethics program and

make modifications necessary to ensure the program is effective. The application note also provides that such steps should be consistent with other guideline provisions that require assessment and modification of the program, and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

- This application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps after discovery of criminal conduct. The steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices.

(2) *Culpability Score*—the amendment amends subsection (f) of section 8C2.5 to create a limited exception to the general prohibition against applying the 3-level decrease for having an effective compliance and ethics program if an organization's high-level or substantial authority personnel are involved in the offense.

Specifically, the amendment adds subsection (f)(3)(C), which allows an organization to receive the decrease if the organization meets four criteria:

(1) the individual or individuals with operational responsibility for the compliance and ethics program have ***direct reporting obligations*** to the organization's governing authority or appropriate subgroup thereof;

(2) the compliance and ethics program detected the offense before it was discovered outside the organization or before such discovery was reasonably likely;

(3) the organization promptly reported the offense to the appropriate governmental authorities; and

(4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

The new subsection (f)(3)(C) responds to concerns expressed in public comment and testimony that the general prohibition in §8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases.

The amendment also adds an application note that describes the "direct reporting obligations" necessary to meet the first criterion under the new subsection (f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program". This application note responds to public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.

(3) *Recommended Conditions of Probation*—the amendment amends §8D1.4 to augment and simplify the recommended conditions of probation for organizations. The amendment also removes the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason, so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.

* * *

Priorities—At this point, we thought we would address some of the Commission's priorities in this upcoming amendment cycle . . . In our chair's absence, let me just say briefly that there is a lot to look forward to in terms of the Commission's work product. As you just heard, promulgation of a permanent amendment to the drug guideline as a part of the implementation of the Fair Sentencing Act is a priority for the Commission this year. And we will now address some of the other pending, published priorities.

BOOKER REPORT

The Commission has made it a priority to study and evaluate the state of federal sentencing after *Booker*. The Commission issued its first *Booker* report one year after that momentous decision, but now that we are five years out, there is sufficient additional information about the operation of the post-*Booker* system to warrant another review and evaluation.

In preparation for publishing such a report, the Commission has been gathering information from a variety of sources: for example, we held seven regional hearings in 2009 – 2010 in commemoration of 25th Anniversary of the Sentencing Reform Act, during which criminal justice system participants from all over the country testified. The Commission received a great deal of feedback through those hearings about how the guidelines operate, the impact of statutory mandatory minimums on the system, concerns about drug penalties for low level offenders, and concerns about severe penalties for some child pornography offenses. (Transcripts of the proceedings are available on our website for those interested in this source of substantial information about the current system.)

The Commission has also conducted a formal survey of federal district court judges, and this too, is a valuable source of information about the operation of federal sentencing post-*Booker*.

Briefly, here is some of what we now know from the hearings and survey:

- There are differing views of the post-*Booker* sentencing system: some criminal justice participants—including 75% of the judges who responded to the survey—that think the advisory guideline system is working, but others are hesitant to reach that same conclusion based on the increasing disparities in sentences that are emerging in the context of an advisory guidelines system.

- In regard to these disparities, 31% of judges felt that statutory mandatory minimums were the most significant contributing factor, but others, particularly prosecutors and law enforcement believe that mandatory minimums are necessary for an effective system of justice.

- The majority of judges surveyed felt that the guidelines provided the appropriate sentencing ranges for most offenses, and in general judges continue to believe in the utility and role of the guidelines and the work of the Commission, but

    - 70% thought the guidelines were too high for crack cocaine offenses,
    - 69% thought they were too high for the receipt of child pornography, and
    - 71% thought they were too high for possession of child pornography.

- Since *Booker*, the role of offender characteristics in the sentencing process has increased, with the majority of the surveyed judges responding that age, mental/emotional/physical condition, and stress related to military service are ordinarily relevant to a departure or variance consideration. Almost half of the judges responding said that drug dependence was relevant to a departure or variance consideration, while 50% said such dependence was relevant to determining a sentence within the range.

- Nearly every one we heard from in the survey and the hearings agrees that more alternatives to incarceration (probation, home confinement, split sentences) should be available for certain offenses.

In addition to this useful feedback, the Commission staff has also been tracking and scrutinizing data about different aspects of the system. Some of this statistical information has already been published, and additional data analyses will be generated for the *Booker* report. In general, and very briefly:

- the percentage of federal cases in which a within-range sentence was imposed in FY2005—immediately after the Booker decision—was 61.7%, and that rate stands at 54.8% now (through 3rd quarter of FY2010)

- the percentage of cases in which the sentence resulted from a non-government sponsored departure or variance was 12.1% immediately after Booker, and that rate is 17.6% now

- And the departure and variance rate varies by offense type: among immigration cases this year (in FY2010), the non-government

sponsored below-range rate is **8.3%** (3.8% departures & 4.5% variances); the rate for all drug offenses is **11.7%** (4.5% departures & 7.2% variances); the rate for fraud offenses is **22.5%** (3.3% departures and 19.3% variances); and the rate for child pornography offenses id 40.7% (5.1% departures & 35.6% variances)

The Commission has outlined what we hope the *Booker* report will accomplish in our statement of published priorities for this amendment cycle. In the end, what we plan to drill down in regard to the data, and synthesize the feedback that we have received about what is really going on from a number of different perspectives, in order to generate a report that can, at a minimum, explain where things currently stand. Our hope is that such a report will be useful to the Commission and to other policymakers in making assessments about how best to move forward.

CONGRESSIONAL DIRECTIVES

The priorities for this amendment cycle also include responding effectively to many congressional directives that we have received over the past few years. I was on a panel that touched upon this earlier, but it bears repeating that, during the 111th Congress, there have been **43 bills introduced with directives**—either specific or general—that require the Commission to review and amend the guidelines. These bills cover every significant area of criminal law, including immigration, firearms, sex offenses against children, environmental crimes, and fraud. Several of these bills also require the Commission to produce reports on designated topics of interest to Congress.

Currently, the Commission is in the process of responding to six public laws with specific directives to the Commission:

(1) The directive to issue a comprehensive report regarding mandatory minimums after *Booker* in the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act;

(2) The directive to review and report to Congress on feasibility of new mandatory minimums in the Comprehensive Iran Sanctions, Accountability, and Divestment Act;

(3) The directive to increase certain specific offense characteristic levels for loss caused by health care fraud in the Patient Protection and Affordable Health Care Act;

(4) The directive to increase specific offense characteristic levels for securities and bank fraud in the Dodd-Frank Wall Street Reform and Consumer Protection Act;

(5) The directive that increases and decreases specific offense characteristic levels for activity related to drug-trafficking in the Fair Sentencing Act, as previously described; and

(6) The directive related to abuse of a position of trust in the Secure and Responsible Drug Disposal Act.

With respect to these directives and any others, the Commission follows a multi-step process before it even begins to consider amendment language in response to the congressional request. This process includes extensive analysis of the relevant data, case law, and academic literature; outreach to criminal justice stakeholders (including hearings as needed); preparation of affected population and prison impact estimates; and synthesis of the relevant legislative history. This process is thorough, and it provides the most appropriate means of balancing

Congress's intent and prerogative in enacting the legislation with the Commission's expertise in sentencing.

* * *

Commissioner Friedrich will now say a bit more about the mandatory minimum report directive . . .

Virgin Islands Talk

October 20, 2010

Thank you for that kind introduction, Pam. I am delighted to be here today—I am originally from Miami Florida, so I am used to warm weather and beautiful surroundings but I have never been to the Virgin Islands before, and I've never seen anything like this! It is a real treat for me to be here in St. Thomas and to get to see this beautiful island. Thank you for having us and for giving us the opportunity to come and talk to you about the work that we do in federal sentencing and in formulating the Sentencing Guidelines.

I have been on the Commission for about 8 months now—I was nominated by the President last year and confirmed by the Senate in February. As Pam mentioned, in my prior life I was an assistant Federal Public Defender in Washington DC, so I know very well the important work that many of you do as participants in the criminal justice system. You each have a significant role in the process of administering justice at sentencing, which I am told is one of the most difficult responsibilities of a judge. As you do your jobs well, you are performing a very valuable service for the court.

It is important to recognize that the Supreme Court's Booker decision has revitalized sentencing advocacy in a manner that, in some respects, it has made many of your jobs more difficult. Now, the court not only needs to have an accurate guideline calculation, but it also has to make an independent determination of the fairness of the sentence in light of the 3553(a) factors. This means that the court must have well articulated reasons for the sentence that it is imposing, and these reasons are developed from the facts that you discover and the

arguments that you make. Now, more than ever, it is crucial to understand the operation of the guidelines in order to be able to make effective arguments about the appropriate sentence in any case—and that's where we come in with the presentation here today.

I also wanted to take a moment to emphasize that a lot of the work we do at the Commission involves not only the agency itself and the judiciary but also Congress and the Executive Branch (the Justice Department). So, for example, the Commission just enacted a temporary, emergency amendment to the guidelines in response to Congress's enactment and the President's signing of the Fair Sentencing Act (the crack-powder recalibration law). The Commission also has on its agenda various comprehensive reports to Congress, including a report on mandatory minimum penalties that Congress has asked us to prepare and that may inform legislative policy going forward.

There is a lot of activity and a number of priorities right now, and we will elaborate on current Commission projects briefly during the course of the presentation today. We encourage you to contact us to tell us your thoughts and to let us know what is happening here, in this jurisdiction, so that that your concerns and issues can be taken into account.

Pamela G. Montgomery

Pamela G. Montgomery, Director and Chief Counsel of the Office of Education and Sentencing Practice, has been on the staff of the United States Sentencing Commission, Washington, D.C. since 1990. In 2000 she was promoted to her current position where she is primarily responsible for planning and implementing the training mission of the agency. The Office of Education and Sentencing Practice provides educational programs and technical assistance to judges, probation officers, and attorneys on federal sentencing issues. In that position, she was primarily responsible for tracking and analyzing case law interpreting the guidelines and making presentations at federal sentencing guidelines seminars. She also played a major role in several of the Commission's policy development teams. Ms. Montgomery is a member of the Bar of Georgia and is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of Georgia. Prior to joining the Commission staff, Ms. Montgomery served as an attorney in the U.S. Army Judge Advocate General' s (JAG) Corps. During her tenure in the JAG Corps, she held several positions including appellate defense counsel and counsel for the Army Court of Military Review. Ms. Montgomery is a graduate of Carleton College and the University of Georgia School of Law.

"The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."

The U.S. Probation/ Pretrial Services Office District Court of the Virgin Islands

and the

U.S. Sentencing Commission

Present the:

United States Sentencing Guidelines Seminar

October 20, 2010

Wyndham Sugar Bay Resort
6500 Estate Smith Bay
St. Thomas, VI 00802

L. Russell "Rusty" Burress

L. Russell "Rusty" Burress, Principal Training Advisor in the Office of Education and Sentencing Practice, has been on the staff of the U.S. Sentencing Commission, Washington, D.C. since its inception in 1985. He is the Commission's principal trainer for judges, probation officers, and attorneys on the federal sentencing guidelines. From 1976 to 1992, Mr. Burress was a U.S. Probation Officer, serving the first nine years in the District of South Carolina and the last seven years on detail to the U.S. Sentencing Commission. He accepted a permanent position at the Commission in May 1992. A native of Greenville, South Carolina, Mr. Burress holds a Bachelor of Arts degree from the University of South Carolina and a Master of Arts degree in Probation and Parole Studies from Fordham University.



Scale of Justice

Agenda

8:45 am — Welcoming Remarks
The Honorable Curtis V. Gómez
Chief Judge

9:00 am-9:10 am — Intro and Opening Remarks

9:10 am -10:30 am — Sentencing Updates
(New Amendments, Supreme Court Cases, Circuit Case Law, Sentencing Statistics, etc.)

- ◊ *The Honorable Ketanji Brown Jackson, Vice Chair U.S. Sentencing Commission*
- ◊ *Pamela Gordon Montgomery, Esquire, Director & Chief Counsel of Training, U.S. Sentencing Commission*
- ◊ *L. Russell "Rusty" Burress, Principal Training Advisor U.S. Sentencing Commission*

10:30 am-10:45 am — Break

10:45 am-11:45 am — Sentencing Updates Continued

11:45 am-1:00 pm — Lunch

1:00 pm-2:30 pm — Fraud/Theft/ Relevant Conduct

2:30 pm-2:45 pm — Break

2:45 pm-4:00 pm — Continuation of the Topics

- ◊ *The Honorable Ketanji Brown Jackson*
- ◊ *Pamela Gordon Montgomery*
- ◊ *L. Russell "Rusty" Burress*

4:00 pm — Closing Remarks
Denise L. Donadelle-DeCosta
Chief U.S. Probation Officer

The Honorable Ketanji Brown Jackson

MS. KETANJI BROWN JACKSON served from 2007-2010 as a litigator at Morrison & Foerster LLP, with a practice that focused on appellate litigation in both state and federal courts, as well as litigation in the Supreme Court of the United States. From 2005 until 2007, prior to joining Morrison & Foerster LLP, Ms. Jackson worked as an assistant federal public defender in the Appeals Division of the Office of the Federal Public Defender in the District of Columbia. Ms. Jackson previously served as an assistant special counsel at the United States Sentencing Commission and as an associate with two law firms, one specializing in white-collar criminal defense, and the other focusing on the negotiated settlement of mass-tort claims. She also served as a law clerk to three federal judges, including Associate Justice Stephen G. Breyer of the Supreme Court of the United States. Ms. Jackson received an A.B., magna cum laude, in Government from Harvard-Radcliffe College, and a J.D., cum laude, from Harvard Law School, where she served as a supervising editor of the Harvard Law Review.

Remarks to the Fourth Circuit Clerks
Richmond Training Program
September 22, 2010

I'm delighted to be here this afternoon . . .

I remember very well what it was like to be in your shoes as a new law clerk – I was very nervous but also excited for the year ahead. You are fortunate to have an interesting and challenging legal job, and I congratulate each of you on what will surely be a period of phenomenal growth both professionally and personally.

One of the topics that you are likely to come across in your clerkship journey is federal criminal sentencing. Sentencing issues are often litigated in federal court and that's where we come in: the U.S. Sentencing Commission.

As you may hear shortly, the Commission is a 7-member body that is charged with the responsibility of establishing guidelines that reflect federal sentencing policy and collecting sentencing data for the federal courts. The point is to ensure unwarranted disparity in federal sentencing is reduced as well as to permit judges to consider and take into account the various circumstances of an offense and offender in any given case. Something that not too many people appreciate is that the Commission is an independent agency of the *judicial* branch, and the primary product of the Commission is the *Sentencing Guidelines Manual* (a book that will soon be very familiar to you). Although the guidelines themselves are advisory and not mandatory, as many of you know, federal sentences must be calculated in accordance with the guidelines as the first step in the sentencing process, so the *Manual* still plays a significant role at sentencing.

The Commission meets monthly throughout the year to discuss and vote upon amendments to the guidelines and other matters. This past amendment cycle, the Commission voted:

→ to encourage judges to impose drug treatment, where appropriate, as an alternative to incarceration in some cases;

→ to expand the zones of the sentencing table, which makes alternatives more widely available to certain offenders;

→ to eliminate "recency" points, which increased an offender's criminal history score; and

→ to change the departure language in regard to specific offender characteristics such as age and military history.

And this year, among the many priorities of the Commission are:

--to amend the guidelines in response to Congress' sentencing directives in the Fair Sentencing Act (the crack-powder recalibration law), and the health care and financial regulation laws

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We are so glad that you are here to hear more about federal sentencing under the sentencing guidelines, and we look forward to hearing your thoughts and comments about how the guidelines work and about sentencing in general.

Federal Sentencing

Law Clerks & Staff Attorneys of the Fourth Circuit
Richmond, VA
Wednesday, September 22, 2010

Hon. Ketanji Brown Jackson
Vice Chair, USSC

Pamela Montgomery
Director and Chief Counsel, Office of Education and Sentencing Practice

Rusty Burress
Principal Training Advisor, Office of Education and Sentencing Practice

U.S. Sentencing Commission

Revised 9/14/2010

1

Presentation & Discussion Topics

- Sentencing post-*Booker*
- Imposing sentence
- Appeals and remands
- Guideline application
- *Ex post facto*

2

U.S.S.C.

Web Site

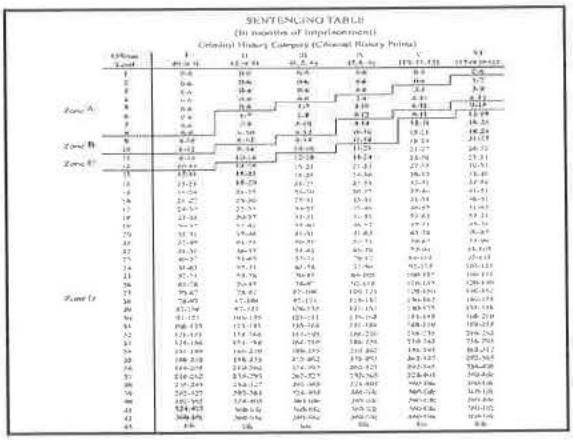
www.ussc.gov

(*E.g.*, Supreme Court Case Law and Selected Case Law by Circuit found at: http://www.ussc.gov/training/court.htm)

HelpLine

202-502-4545

3


SENTENCING TABLE
(in months of imprisonment)
Criminal History Category (Criminal History Points)

Advisory Guidelines

- The guidelines are advisory, not mandatory
  - *U.S. v. Booker*, 543 U.S. 220 (2005)
    - Remedied the 6th Amendment problem of mandatory guidelines
    - Struck 18 USC §§ 3553(b)(1) and 3742(e) of the Sentencing Reform Act of 1984 (SRA)
- Sentences are to be based on the factors at 18 USC § 3553(a)(1)-(7)

5

Advisory Guidelines (cont.)

- Correct guideline application is the required starting point in sentencing
  - *Gall v. U.S.*, 552 U.S. 38 (2007)
- Sentences are reviewed for "reasonableness"
  - Per *Gall*: Deferential abuse of discretion standard

6

§ 3553(a)(1) - (7)

- Factors that must be considered by the district court in imposing a sentence
  - Even for sentences within the guideline range
  - Rote recitation of each § 3553(a) factor is not required, however
- Factors that guide appellate courts in determining "reasonableness"

7

§ 3553(a)(1) - (7) Factors

The court is to impose a sentence *sufficient but not greater than necessary* to comply with the "purposes of sentencing"

The court shall consider:

(1) Nature & circumstances of offense; history & characteristics of defendant

(2) "Purposes of sentencing"

Punishment, deterrence, incapacitation, & rehabilitation

8

§ 3553(a)(1) - (7) Factors (cont.)

(3) Kinds of sentences available

(4) The sentencing guidelines

(5) The guideline policy statements

(6) Avoiding unwarranted sentencing disparities

(7) Need to provide restitution

9

3-Step Approach to Federal Sentencing

1. Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines (pursuant to § 3553(a)(4))

2. Consider the guidelines policy statements, including those addressing departures, that might warrant consideration in imposing sentence (pursuant to § 3553(a)(5))

10

3-Step Approach to Federal Sentencing (cont.)

3. Consider § 3553(a) taken as a whole, and determine if the appropriate sentence is

   - One within the advisory guideline system:
     - a sentence within the guideline range, or
     - a *"departure"*

   OR

   - One outside the advisory guideline system:
     - a *"variance"*

11

Notice for Sentences Outside the Applicable Guideline Range

- Notice is required for a <u>*departure*</u>
  - *Burns v. U.S.*, 501 U.S. 129 (1991)
  - Rule 32(h)
  - Can be satisfied if the ground is identified in the presentence report or in prehearing submissions
- Notice is NOT required for a <u>*variance*</u>
  - *Irizarry v. U.S.*, 128 S. Ct. 2198 (2008)

12

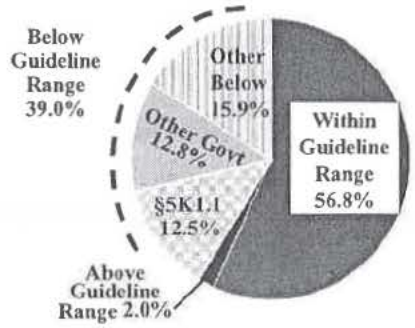
Variances Based on Policy Disagreements

Kimbrough v. U.S., 128 S. Ct. 558 (2007)
U.S. v. Spears, 129 S. Ct. 840 (2009)

District courts are entitled to reject and vary categorically from the crack-cocaine guidelines based on a policy disagreement with those guidelines

13

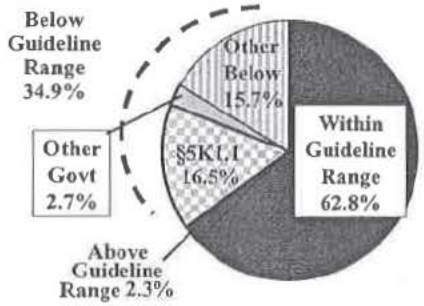
Position of Sentences in Relation to Guideline Range
National - FY 2009



14

SOURCE: U.S. Sentencing Commission, 2009 Datafile USSCFY09, Based on 79,153 total cases

Position of Sentences in Relation to Guideline Range
Fourth Circuit - FY 2009



15

SOURCE: U.S. Sentencing Commission, 2009 Datafile USSCFY09; Based on 5,467 total cases

Overview of the Sentencing Process

- Plea/verdict of guilty
- U.S. probation officer (USPO) does a presentence investigation (PSI) & presentence report (PSR)
  - Gathers facts
  - Applies guidelines
  - Provides PSR to parties

16

Overview of the Sentencing Process (cont.)

- Parties review PSR; advise USPO of any disputes
- USPO resolves disputes as possible; submits amended PSR and addendum of unresolved disputes to parties and the judge
- At the sentencing hearing the judge will resolve disputes as necessary

17

Pointers for the Application of Advisory Guidelines

- The sentencing judge still resolves disputed issues (§6A1.3)
  - Must articulate specific reasoning
- Standard of proof: preponderance (§6A1.3)
- Burden of persuasion: falls on party seeking the adjustment

18

Pointers for the Application of Advisory Guidelines (cont.)

- Rules of evidence do not apply (Fed. R. Evid. 1101(d)(3))
- Evidence must have sufficient indicia of reliability to support probable accuracy (§6A1.3(a))

19

Statement of Reasons for Imposing a Sentence

18 USC § 3553(c)

- Required in all cases
- Reasons for the point within the range required if range greater than 24 months (*i.e.*, ranges of 100-125 months or greater)
- In the case of a sentence outside the guideline range, the specific reasons why

20

Appeal of Sentence

18 U.S.C. § 3742(a) and (b)

- Greater than the applicable guideline range
- Less than the applicable guideline range
- Incorrect application of the guidelines
- No guideline and sentence is plainly unreasonable
- Illegal sentence

21

Appeal of Sentence Within the Guideline Range Post-*Booker*

- Not specifically addressed by statute
- Issue developed in the courts, based on the review for "reasonableness"

22

Waiver of Appeal

- Impact needs to be clarified to the defendant at Rule 11 colloquy
- Review may still result if an illegal sentence or violation of a constitutional right, *e.g.*,
  - Sentence in excess of statutory maximum
  - Ineffective assistance of counsel

23

Standards of Review: De Novo, Clear Error & Reasonableness

- Appellate courts are reviewing the guideline calculations using
  - **De novo** review for questions of law
  - **Clear error** review for factual determinations
- Then, the appellate courts are reviewing the ultimate sentence for **reasonableness**

24

Procedural Reasonableness and Substantive Reasonableness

- Sentences are first reviewed for procedural reasonableness, *e.g.*,
  - Correct guideline application
  - Proper consideration of the § 3553(a) factors
  - The guidelines were not treated as mandatory
  - All non-frivolous arguments by the parties were addressed
  - No clearly erroneous facts were relied upon
  - The chosen sentence was adequately explained

25

Procedural Reasonableness and Substantive Reasonableness (cont.)

- *If* procedural reasonableness has been met, then sentences are reviewed for substantive reasonableness
  - In reviewing for substantive reasonableness, "the appellate court will take into account the totality of the circumstances, including the extent of any variance from the Guidelines range" - *Gall*

26

The Presumption of Reasonableness Is for the Appellate Courts

- A court of appeals *may* presume that a within guideline sentence is "reasonable," but a sentencing judge cannot
  - *Rita v. U.S.*, 551 U.S. 338 (2007)
  - *Nelson v. U.S.*, 129 S. Ct. (2009)
  - Circuits with a presumption: 4th, 5th, 6th, 7th, 8th, 10th, & DC

27

Remands

- Guideline sentencing is a comprehensive package
  - Remands may affect calculations and sentences for counts not the basis of the appeal
- Remands may contain directives that will affect the nature and extent of response

28

Statistics on Appeals and Resentencings

- See handout packet
- Obtained from the Commission's 2009 Sourcebook of Federal Sentencing Statistics
- Includes statistics on
  - Types of appeals
  - Dispositions of appeals, government and defendant
  - Guideline involved in issues appealed
  - Offense and offender characteristics in appeals cases
  - Number of resentencings on remand

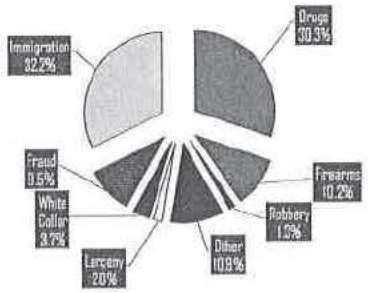
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Basic Guideline Application

30

Primary Offense Types

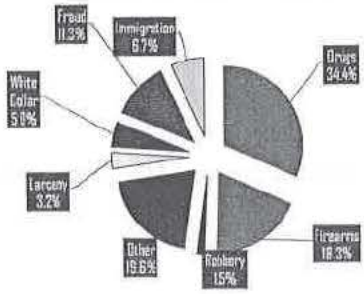
National - FY 2009



31

Primary Offense Types

Fourth Circuit - FY 2009



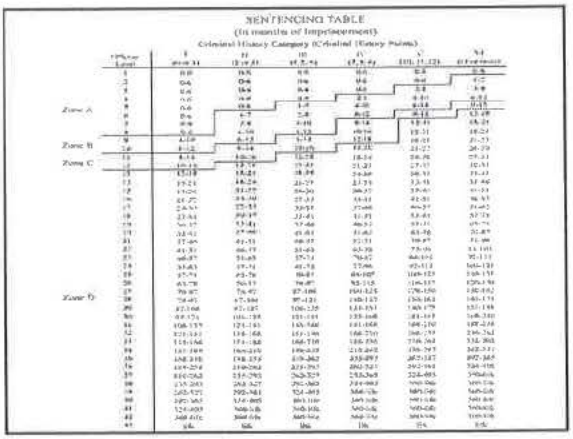
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The Nature of a Federal Sentence

The Sentencing Reform Act of 1984

- Determinate sentences; no parole
- Supervised release
  - Available for all felonies and Class A misdemeanors
  - See 18 USC § 3559(a) and § 3583(b)&(e)(3)
- Good time
  - Maximum of 54 days per year
  - Not available for sentences of one year or less, or for a life sentence
  - See 18 USC § 3624(b)(1)

33


SENTENCING TABLE

(In months of Imprisonment)

General Approach of the Federal Sentencing Guidelines

- Begins as an offense of conviction system
- Then considers many real offense characteristics

35

The Statutes "Trump" the Guidelines

Regardless of what sentence the guidelines may call for, the sentence imposed must fall within the restrictions set by statute

(*e.g.*, statutory maximums and mandatory minimums)

-*See* §§5G1.1 & 5G1.2

36

Single Count Application

Chapter Two
- Base Offense Level
- Specific Offense Characteristics
- Cross References

Chapter Three
- Victim
- Role
- Obstruction
- [Multiple Counts]
- Acceptance

37

Determining the Applicable Chapter Two Guideline

§1B1.2(a)

- Use the Chapter Two guideline applicable to the offense of conviction
- Refer to the Statutory Index (Appendix A) in this determination

Note: If no guideline is listed, use §§2X5.1 or 2X5.2

38

Appendix A

Statute	Guideline
18 U.S.C. § 2111	2B3.1
18 U.S.C. § 2112	2B3.1
18 U.S.C. § 2113(a)	2B1.1, 2B2.1, 2B3.1, 2B3.2
18 U.S.C. § 2113(b)	2B1.1
18 U.S.C. § 2113(c)	2B1.1
18 U.S.C. § 2113(d)	2B3.1

39

- §2B1.1 Larceny, Embezzlement, Fraud and Forgery
- §2B2.1 Burglary
- §2B3.1 Robbery
- §2B3.2 Extortion by Force or Threat of Injury or Serious Damage

40

Analysis of Relevant Conduct Acts

§1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction
- For certain offenses defendant accountable for certain acts beyond the offense of conviction (*e.g.*, course of conduct or common scheme or plan)

41

§2B3.1 Robbery

(a) Base Offense Level:	20
(b) Specific Offense Characteristics	Levels
(1) financial institution or post office	+2
(2) firearm, weapon, death threat	+2 to +7
(3) victim injury	+2 to +6
(max. of 11 offense levels from (b)(2) & (b)(3))	

42

(b) SOC's (cont.)	Levels
(4) abduction	+4
restraint	+2
(5) carjacking	+2
(6) taking of a firearm, destructive device, or controlled substance	+1
(7) loss of $10,000+ to $5 million+	+1 to +7

(c) Cross Reference

(1) if victim murdered, apply the guideline for First Degree Murder (§2A1.1)

43

Chapter Three Adjustments

- Victim-Related Adjustments
- Role in the Offense
- Obstruction
- Multiple Counts
- Acceptance of Responsibility

44

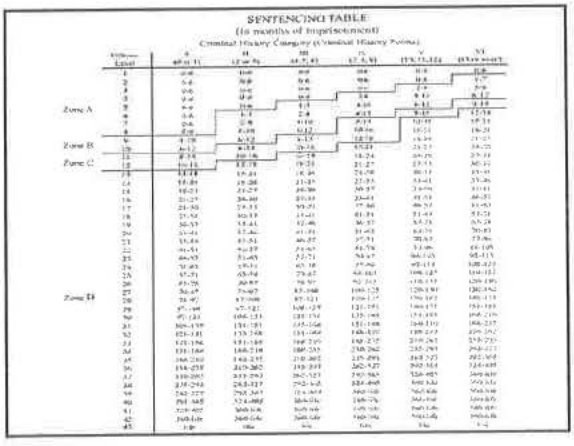
Pointers about Chapters Two and Three Application

- Offense levels are cumulative (§1B1.1, App. Note 4)
- Within sections, use greatest (§1B1.1, App. Notes 4(A) & 5)
- No issue of "double counting" unless directed by guidelines (§1B1.1, App. Note 4(B))
- "Adjustments" are distinct from "departures" and "variances" (Chapter Three & §5K2.0 & § 3553(a))

Chapter Four

Criminal History
and
"Overrides"

46



Criminal History

- ✓ "Prior Sentences" (1, 2, or 3 points each)
- ✓ "Status" (2 points)
- ✓ "Recency"* (2 or 1 point)

*Proposed deletion Eff. Nov. 1, 2010

48

Criminal History Points
Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

49

Chapter Three and Chapter Four "Overrides"

§3A1.4	Terrorism
§§4B1.1 - 4B1.2	Career Offender
§4B1.3	Criminal Livelihood
§4B1.4	Armed Career Criminal
§4B1.5	Repeat and Dangerous Sex Offender Against Minors

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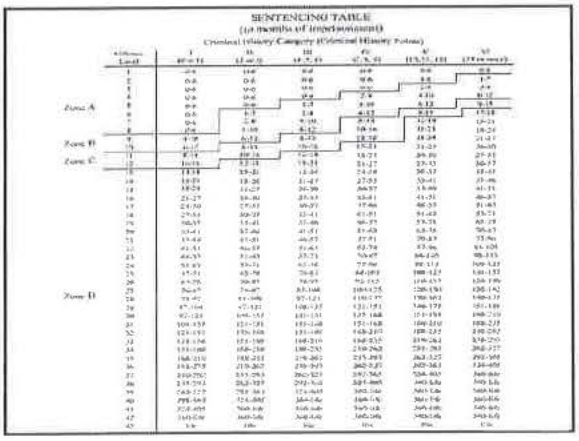
Developing Case Law: "Crimes of Violence" & "Violent Felonies"

- Involves various statutes and guidelines, *e.g.*,
  - 18 USC § 924(e) & §4B1.4 (Armed Career Criminal); §4B1.1 (Career Offender); § 2K2.1 (Firearms); § 2L1.2 (Illegal Entry)
- Involves determinations using the "Categorical Approach" resulting from case law, including
  - *Taylor v. U.S.*, 495 U.S. 575 (1990)
  - *Shepard v. U.S.*, 544 U.S. 13 (2005)
  - *Begay v. U.S.*, 553 U.S. 137 (2008)

51

Chapter Five

52



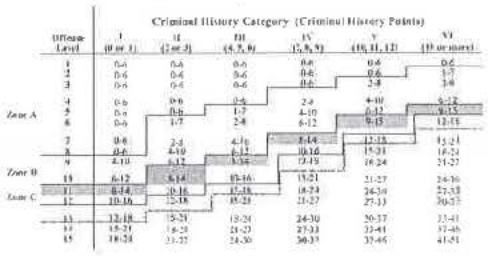
Sentencing Table

Criminal History Category

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	Zone A	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-	Zone B	6-12
5	0-6	0-6	1-7	4-	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	Zone C	10-16	15-21	21-27	24-30
11	8-14		12-18	18-24	Zone D	27-33
12	10-16	12-18	15-21	21-27		30-37

Proposed Amendment Eff. November 1, 2010

SENTENCING TABLE
(In months of imprisonment)



55

Ex Post Facto

56

Ex Post Facto

- 18 U.S.C. § 3553(a)(4)
  - Use guidelines in effect at sentencing
- *Miller v. Florida*, 482 U.S. 423 (1987)
- "Circuit split" as to whether *ex post facto* is implicated under advisory guidelines
  - Implicated in 4th Circuit: *U.S. v. Lewis*, 606 F3d 193 (4th Cir. 2010)
- §1B1.11
  - "One Book Rule"

57

"One Book Rule"

§1B1.11

Use the *Guidelines Manual*
in effect at the time of **sentencing**

If *ex post facto* is implicated,
use the *Guidelines Manual*
in effect at the time of the **offense**

58

Guidelines Amendments

- Cited at "Historical Notes" and found at Appendix C of the *Manual*
- Can resolve circuit conflicts
  - *Braxton v. U.S.*, 500 U.S. 344 (1991)

59

Use of a Clarifying Amendment

§1B1.11(b)(2) & App. Note 1

- In application of the *Guidelines Manual* in effect at the time of the **offense**, subsequent clarifying amendments are also used
- While the *Guidelines Manual* may characterize an amendment as clarifying, the courts must decide if clarifying or substantive

60

Please Submit an Evaluation

Thank You!

61

END

62

NOTE: Emergency Amendments Effective November 1, 2010 to Guidelines for Drugs Offenses

Pursuant to Fair Sentencing Act
Enacted August 3, 2010

63

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

	Level
(1) defendant convicted under 21/841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 960(b)(1), (b)(2), or (b)(3), and conviction establishes death/serious injury from drug use; and committed after similar prior conviction	43
(2) defendant convicted under 21/841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 960(b)(1), (b)(2), or (b)(3), and conviction establishes death/serious injury from drug use	38

64

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

	Level
(3) defendant convicted under 21/841(b)(1)(E) or 960(b)(5), and conviction establishes death/serious injury from drug use; and committed after similar prior conviction	30
(4) defendant convicted under 21/841(b)(1)(E), or 960(b)(5), and conviction establishes death/serious injury from drug use	26

65

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

Level

(5) the offense level from the Drug Quantity Table

except if mitigating role (§3B1.2) applies:

BOL	Reduction
32	-2
34 or 36	-3
38	-4

66

Drug Quantity Table
Base Offense Levels for Marijuana

30,000	KG	⇧	Level 38
10,000	KG	⇧	Level 36
3,000	KG	⇧	Level 34
1,000	KG	⇧	Level 32
700	KG	⇧	Level 30
400	KG	⇧	Level 28
100	KG	⇧	Level 26

67

80	KG	⇧	Level 24
60	KG	⇧	Level 22
40	KG	⇧	Level 20
20	KG	⇧	Level 18
10	KG	⇧	Level 16
5	KG	⇧	Level 14
2.5	KG	⇧	Level 12
1	KG	⇧	Level 10
250	G	⇧	Level 8
Less than 250 G		⇧	Level 6

68

Drug Quantity Table
Base Offense Levels for Cocaine

150	KG	⇧	Level 38
50	KG	⇧	Level 36
15	KG	⇧	Level 34
5	KG	⇧	Level 32
3.5	KG	⇧	Level 30
2	KG	⇧	Level 28
500	G	⇧	Level 26

69

400	G	⇧	Level 24
300	G	⇧	Level 22
200	G	⇧	Level 20
100	G	⇧	Level 18
50	G	⇧	Level 16
25	G	⇧	Level 14
Less than 25 G		⇧	Level 12

70

(b) Specific Offense Characteristics

	Level
(1) firearm, dangerous weapon possessed	+2

****

(11) if defendant meets the subdivision criteria (1)-(5) of §5C1.2(a) ("the safety valve")	-2

71

Handout Packet

- Letter from Pam Montgomery
- Commission/Commissioner information
- Speaker bios
- Slide show
- 18 USC § 3553(a)
- Robbery scenario
- Drug scenario

72

Handout Packet (cont.)

- Charts & tables handouts
- Categorical approach & violent felony
- Sentencing stats - national & 4th Cir.
- Appeals & resentencing stats - national & 4th Cir.
- Supreme Court case law
- 4th Circuit case law
- Evaluation form

73

END

74

THE REHABILITATION IMPERATIVE

How Current Criminal Justice Policy Promotes Offender Restoration And Why It Has No Choice But To Do So

Ketanji Brown Jackson, Vice Chair

United States Sentencing Commission

SEALS Annual Meeting
Palm Beach, Florida
August, 2010

INTRODUCTION

Good afternoon. I'm delighted to be here today to share some of my thoughts on rehabilitation and the perspective that I have as a policymaker in the area of criminal sentencing.

As you know, and as every first-year law school student learns, there are many different goals of criminal punishment: rehabilitation (of course), but also retribution, incapacitation, specific and general deterrence. The difficult work of modern criminal justice policy involves evaluating potential practices in light of these various goals and adjusting the system based on the object that we are trying to achieve.

Now, the premise of this panel is that some have alleged that the American criminal punishment system has effectively abandoned rehabilitation. To that I would concede that there may have been historical periods in which sentencing policy was driven primarily by a concern for promoting the goal of retribution (just deserts) and incapacitation of serious offenders, with less of a concern for restoring or rehabilitating those individuals. I am here today to report, however, that, fortunately, this is NOT one of those times!

Indeed, if we view development of sentencing policy over time as a pendulum, swinging between the primary punishment goal of retribution, on the one hand, and that of rehabilitation, on the other, there is no question that we are currently moving toward greater recognition of rehabilitation—that is, fashioning a system

that seeks to help offenders to reintegrate successfully into the community after they have served their prison sentences—and away from an approach that ignores rehabilitative goals in favor of increasingly harsher prison sentences.

Now, there is abundant evidence in the federal criminal justice system that all three branches of government—the legislature, the judiciary, and the executive—are committed to rehabilitation as a legitimate and laudable goal of the criminal justice policy.

But before laying out that evidence, I'd like to take a moment to make a broader point: which is that rehabilitation is, in my view, an *indispensible* requirement of sound criminal justice policy. Whatever the prevailing view might be about the extent to which current criminal justice policymakers value the rehabilitation of offenders, the fact of the matter is that in order to operate effectively in this day and age, a system of criminal justice has *no choice* but to pursue the rehabilitation of offenders!

Why do I say this???

Rehabilitation Is Indispensible

There are several fact-based reasons for the indispensability of rehabilitation as a goal of criminal sentencing policy that I hope will become clear from the following statistics . . .

- First is the simple fact that a prison term isn't the be-all-and-end-all for most offenders; that is, *most* offenders eventually get out of prison and are released back into the community. [slide 2]

  Thousands of people who have criminal histories and who are under supervision are out in the community right now—and that number has steadily increased over the past 20 years. [slide 3].

  A system that focuses solely on the incarceration phase of criminal punishment and ignores the challenges that these formerly incarcerated folks face in getting reestablished does so at its own peril.

- We also know that, unless offenders are rehabilitated, many who are released will reoffend. [slides 4 and 5]

  So, in a very real sense, rehabilitation is a *public safety* measure. If the system can assist released offenders in becoming law-abiding citizens, we can prevent many additional crimes from happening in the future.

- Another reason that rehabilitation is crucial for sound public policy is the staggering costs that are associated with arresting and incarcerating offenders:

From 1990 – 2008, the number of offenders in federal prison rose dramatically, from 59,000 to more than 190,000 [slide 6]. In 2009, 66.5% of those imprisoned federal offenders were recidivists.

Because each inmate housed in a federal facility costs more than $25,000 annually, [slide 7] we are spending more than $5 billion annually on federal prisons, much of which is attributable to the housing of recidivists.

It makes much more sense financially to spend a comparatively smaller amount of money on rehabilitation efforts, which, if successful, would dramatically reduce the numbers of offenders who return to prison.

- Finally, rehabilitation needs to be an integral part of modern criminal justice policy for the simple reason that rehabilitation is *possible*.

We know that certain people (many, if fact) are able to reenter society successfully after incarceration [slide 8].

We also know that programs specifically geared toward assisting offenders to reestablish themselves as law-abiding community members can be *effective*. [slide 9].

"Ready 4 Work" example:

--3-year national demonstration project

--Involved high recidivism-risk participant group (mostly African American males, ages 18 – 34, ½ had been arrested more than 5 times, ¼ had spent more than 5 years in prison)

--offered job training and placement, housing and treatment referrals, and mentors for emotional and practical support

--provided reasons for optimism re re-entry program potential

The bottom line is that, while some may argue that criminal justice policy makers have ignored rehabilitation and have little interest in the restoration of offenders, that assertion is not born out by criminal justice policymaking today. Rehabilitation is a real factor that is, and *must*, be considered . . .

--because most offenders will return to the community at some point and many will reoffend without assistance;
--because the costs of reincarcerating recidivists are much too high;
--because rehabilitation is a realistic and attainable objective; and
--because rehabilitation ultimately promotes public safety by preventing future crimes.

As a result, these days, there really is no dispute that a system of criminal justice should do whatever it can to rehabilitate released offenders.

* * *

So, one might ask, what ***is*** our system doing on the rehabilitation front???

Questions of this sort are entirely understandable because many of the rehabilitation efforts in the federal criminal justice system (the system with which I am most familiar) are not as well known than some of the barriers to full re-inclusion that still exist in many areas of the country (*e.g.,* disenfranchisement of felons; community notification; and difficulty securing education, housing, treatment). But they do exist. And in forums such as these it is important to acknowledge the various ways in which the system, particularly at the federal level, now recognizes and attempts to further rehabilitative goals.

Indeed, each of the three branches of government has demonstrated a clear commitment to rehabilitation as a goal worth pursuing . . .

CONGRESS

1. **18 U.S.C. § 3553(a)**—[slide 10]

   --requires sentencing judges to consider the need for rehabilitation

   --enacted as part of the Sentencing Reform Act

   --makes clear that rehabilitation is still to be considered, despite the abolishment of parole

2. **Supervised Release (18 U.S.C. § 3583)**

   --replaces parole in transitioning offenders back into the community

   --at sentencing, courts order a term of imprisonment to be followed by a period of supervised release

   --many conditions of SR are intended to rehabilitate offenders (*e.g.,* drug and mental health treatment, vocational training, employment)

3. **Second Chance Act of 2007**—[slide 11]

   --Signed into law in April 2008 (passed Congress by unanimous consent)

   --Object: to provide a steady source of funding for the development and maintenance of prisoner reentry and support programs

   --Reflects Congress's recognition that rehabilitation of offenders is a public safety issue; that transitional support services can reduce recidivism; and that local programs are best tailored to meet the needs of offenders and the community

   --To date, *millions* in federal grants have been distributed to support state and local re-entry organizations and initiatives pursuant to the Act.

   Grants have been provided for: demonstration programs, mentoring programs, substance abuse treatment, local reentry courts, educational programs, recidivism studies, children of incarcerated parents, etc.

THE JUDICIARY

1. **USSC Guidelines** — [slide 12]

   a. **Manual *always* recognized alternative sentencing arrangements**:

   --"community confinement" in treatment center, halfway house, etc.

   --"home detention" residential confinement through electronic surveillance

   --"intermittent confinement" of probationers (e.g., nights and weekends)

   How recognized in the manual? Through the "zones" in the sentencing table—[slide 13]

   Zone A=> permits alternative to term of imprisonment

   Zone B=>requires only 1 month of term in prison or probation with community confinement, home detention, etc. (mostly alternative)

   Zone C =>can split the min term between prison and alternative

   b. 2010 Amendments (Pending—will be become law unless Congress acts):

   (1) Expands the zones to permit alternatives for more people—[slides 14 and 15]

   (2) Encourages substance abuse and mental health treatment for Zone C offenders by permitting all or most of the prison term to be substituted for community confinement, intermittent confinement, or home detention in order "to accomplish a specific treatment purpose"

   (3) Eliminates additional recency points—[slide 16]:

--Manual has traditionally increased the criminal history score of an offender based on whether the instant offense was committed within 2 years of release from prison.

--USSC recognized that the "recency" does not have additional predictive value regarding likelihood of recidivism over time nor does it necessarily reflect increased culpability. Rather, such rapid re-offending may, in the words of our published Reason for Amendment, "reflect the challenges to successful reentry after imprisonment," which should not be held against the offender for Criminal History purposes.

2. "Problem-Solving" Re-Entry Courts — [slide 17]

The judiciary has also been experimenting with specialized court processes that are specifically designed to provide intensive support for certain offenders during the re-entry process. These "problem solving" courts were created on the judges' own initiative and are largely modeled after state drug courts largely in response to the revolving door of sentencing and resentencing certain offenders (primarily drug offenders). They are an attempt to break the pernicious recidivism cycle.

Basic features common to most federal problem-solving courts:

--voluntary program available to certain offenders under supervision
--"reentry team" (judge, AUSA, AFPD, probation officer, treatment specialists) *all* actively involved with the progress of supervisees
--active judicial involvement through regular hearings and meetings about individual supervision plans

--sanctions for violations are swift, tailored, progressive, and proportional

--praise provided for those who are achieving rehabilitative benchmarks

--successful completion results in a reduction of supervised release term

- Three examples chosen primarily for geographic diversity . . .

a. District of Oregon's Reentry Court
--established in 2005

--participants have history of substance abuse

--participants enter *voluntarily* (sign K re abstinence & attendance)

--monthly hearings in which team addresses progress and challenges

--judge provides encouragement, or sanction, as necessary

--success=12 months of sobriety & progress on other goals—grad ceremony

--reward=one-yr reduction of S/R term

b. W.D. Michigan's Accelerated Community Entry Program
--*mandatory* program for offenders at high risk of recidivism

--intensive reentry teams support ex-offender

--formal hearings presided over by judge involving status reports by probation, ½ way house managers, and treatment providers

c. District of Massachusetts's C.A.R.E. ("Court-Assisted Recovery Effort")
--*voluntary* program available to non-violent non-sex offenders with significant substance abuse histories

--*weekly* hearings with the participant, probation, attorneys, treatment providers and magistrate judge to review status and provide rewards or sanctions

--one-year program consisting of four three-month phases:

I—Early Recovery
II—Understanding and Taking Responsibility
III—Healthy Decision Making; and
IV—Relapse Prevention Planning

SUPREME COURT CASES

Finally, in regard to the overarching question of our system's commitment to fostering rehabilitation, two recent Supreme Court cases are worthy of a brief mention —[slide 20]

(1) *Graham v. Florida*: very high profile case from this past Term in which the Court considered the constitutionality of imposing a life-without-the-possibility-of-parole sentence on a juvenile offender.

--The Court heard from *amici* of all stripes, many of whom argued (based on personal experience) that the rehabilitation of juvenile offenders was possible, and in fact, had actually happened to them personally.

[6-3 decision]

--In an opinion issued on May 17, 2010 and written by Justice Kennedy, the Court held that LWOP sentences imposed on juveniles violated the 8th Amendment's prohibition against cruel and unusual punishment. In addition to going through the 8th Amend analysis, the Court spoke to rehabilitation in the context of nonhomicide juvenile offenders:

> "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the state must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

--The Court thus forcefully accepts that rehabilitation is a real factor that a State cannot ~~arbitrarily~~ reject or ignore in making sentencing policy in regard to juveniles who are facing life sentences and who have committed nonhomicide crimes.

(2) *Pepper*: pending cert grant—*one to watch*!

--USSC has long taken the position that post-sentencing rehabilitation efforts by the defendant should not be taken into consideration at resentencing.

--8th Cir. agreed, and held that, even after *Booker*, a court on resentencing cannot consider the positive changes that a defendant has made in his life (that evidence is "irrelevant" because it could not have been considered at the time of the original sentencing)

--The SG has conceded that the 8th Cir's view is erroneous now that courts have discretion to sentence directly under 3553(a):

> "No provision in 3553(a) prohibits a court from considering at resentencing a defendant's efforts at rehabilitation undertaken after his initial sentencing." Such evidence is part of the "history and characteristics" of the defendant, and it may also be relevant to the need for the sentence to protect the public.

--The Ct has appointed counsel to represent the 8th Cir's opinion, and it will be interesting to see what the Court says about the importance of a defendant's rehabilitation as a factor in determining the appropriate sentence at a resentencing.

CONCLUSION

In conclusion, it is demonstrably clear that current criminal justice policy in this country believes in rehabilitation and actively promotes the restoration of ex-offenders (who, in some localities, are referred to as "returning citizens"). Our system clearly embraces the idea that people *can* change. And it recognizes that, in order to be sustainable, the criminal justice process *must* assist former offenders in becoming law-abiding members of the community. We have made a substantial investment in the provision of support services and the reintegration of returning citizens back in their communities, and I think that this trend is a commendable development that is likely to continue for the foreseeable future.

THE REHABILITATION IMPERATIVE

How Current Criminal Justice Policy
Promotes Offender Restoration
And Why It Has No Choice But To Do So

Ketanji Brown Jackson, Vice Chair
United States Sentencing Commission

SEALS Annual Meeting
Palm Beach, Florida
August, 2010

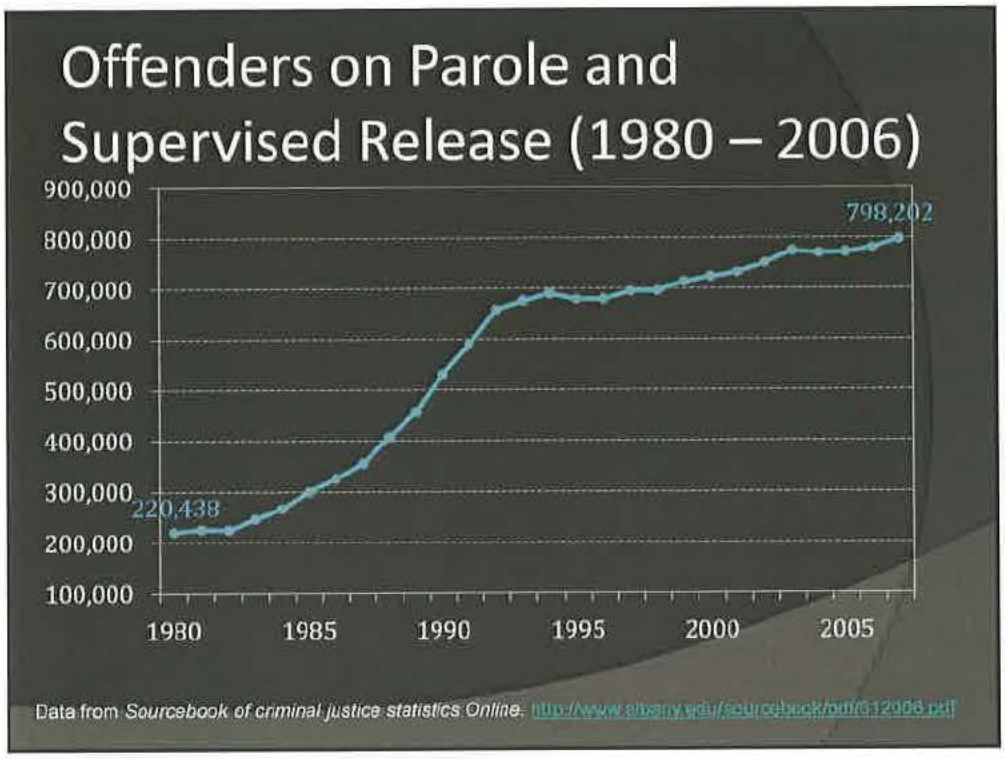


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II. Rehabilitation Is An Indispensible Requirement of Sound Criminal Justice Policy

Why?

(A) because most offenders eventually get out of prison and are released back into the community
(stats on avg length of sentence in fed system, # of fed offenders released each year, etc.)



Includes Federal and State Offenders.

The federal offenders in the totals account for pre- and post-SRA as the methodology section of the report states: "Federal parole as defined here includes supervised release, parole, military parole, special parole, and mandatory release."

1980 figure is 220,438

2006 figure is 798,202

State Recidivism Rates

Percent Rearrested Within Three Years					
	Total	Violent	Property	Drug	Public Order
1983	62.5%	59.6%	68.1%	50.4%	54.6%
1994	67.5%	61.7%	73.8%	66.7%	62.2%

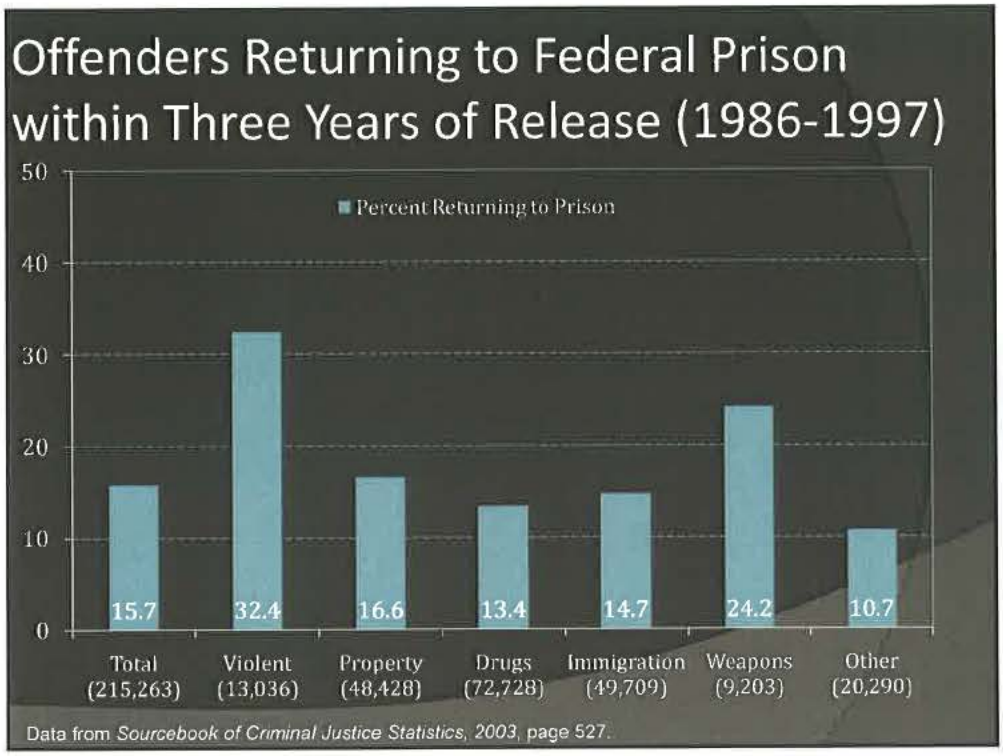
Percent Reconvicted Within Three Years					
	Total	Violent	Property	Drug	Public Order
1983	46.8%	41.9%	53.0%	35.3%	47.0%
1994	46.9%	39.9%	53.4%	47.0%	42.0%

Data from BJS reports: *Recidivism of Prisoners released in 1994*, June 2002, and *Recidivism of Prisoners Released in 1983*, April 1989.

These two studies of *state prisoners* come closest to providing "national" recidivism rates for the United States. Offense types indicate the *most serious offense for which the offender was released*; the original offense.

108,580 prisoners released from prison in 11 States in 1983

272,111 prisoners released from prison in 15 states in 1994



(B) Because many released offenders will reoffend unless rehabilitated (stats on recidivism rates, types of crimes that are committed by ex-offenders, etc.)

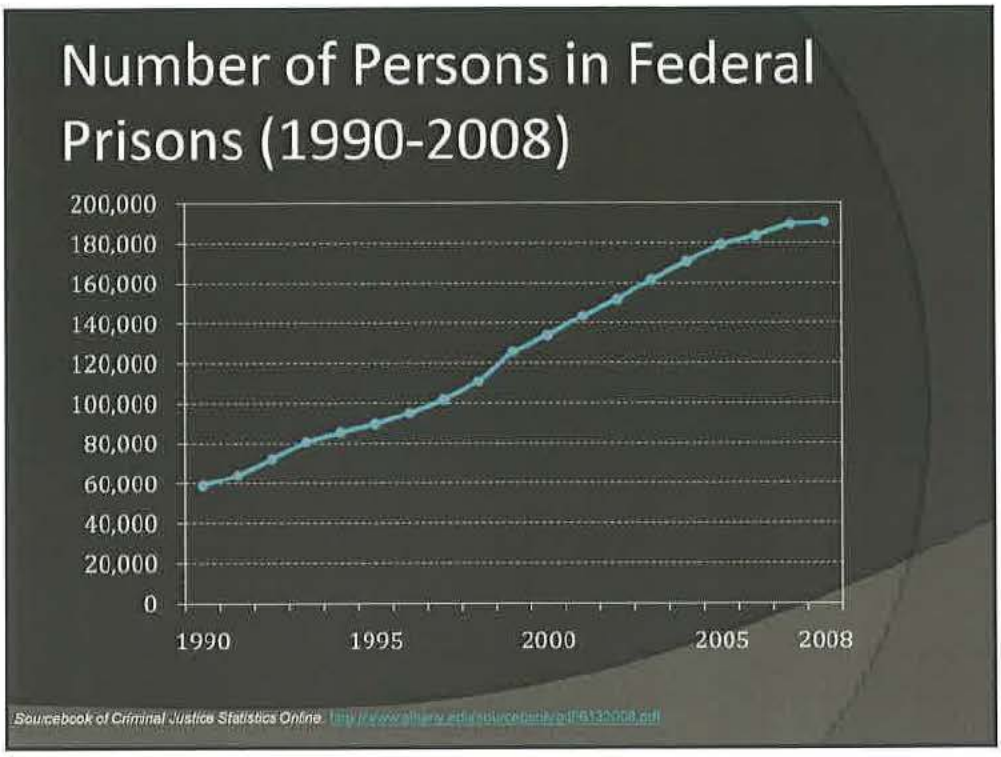
Offense types are for *original* conviction.

215,263 Federal offenders were released from prison between 1986 and 1997.

16% (33,855) of those released offenders were returned to Federal prison within three years.

The highest return rate is for violent offenders.

The largest number returning are drug offenders.



1990 prisoners: 58,838 2008 prisoners: 190,273

USSC Fiscal Year 2009: 66.5% of (64,389) <u>imprisoned</u> federal offenders had one or more criminal history points. (were recidivists)

(SOURCE: U.S. Sentencing Commission FY2009 Datafile, USSCFY09. Of the 81,372 offenders, 9,210 were excluded who were not sentenced to prison. An additional 7,770 offenders were excluded due to incomplete sentencing guideline application information. Of the remaining 64,392 federal offenders sentenced to prison, three were excluded due to missing information on Criminal History Category. Of the remaining 64,389 offenders, the 66.5 percent figure represents 37,702 offenders in Criminal History Categories II through VI and the 5,100 offenders in Criminal History Category I with one Criminal History Point.

Costs of Federal Imprisonment and Supervision (in 2008 dollars)

Federal Offenders	Number	Annual Cost (per person)	Total Annual Cost
Total Inmates in BoP Facilities	196,914	$25,894.50	Approximately $5 Billion
Total Persons Under Post-Conviction Supervision	125,414	$3,743.23	Approximately $4.7 Million

Inmate total from Bureau of Prisons Weekly Population Report, July 22, 2010. The number excludes Community Corrections Management Centers.
Supervision total from United States Courts Statistical Tables for the Federal Judiciary, December 31, 2009.
Cost figures (for fiscal year 2008) from United States Courts News Item May 12, 2009.

(C) Because our society cannot afford the costs associated with arresting and incarcerating re-offenders (cost to house an inmate in federal prison and % of current prison population that is comprised of re-offenders)

BoP 196,914 x 25,894.50 = $5,098,989,573 (billion)

Supervision = 125,414 x 3,743.23 = 469,453,447.22 (million)

Rates of Successful Reentry for Federal Offenders by Criminal History Category

U.S. Citizens, Two Years Post-Release			
Criminal History Category	Category I (Zero points)	Category I (one point)	Categories II-VI
No Rearrest, Supervision Violation, or Reconviction	88.3%	77.4%	63.5%
No Reconviction	96.5%	94.5%	89.7%

Data adapted from *Recidivism and the 'First Offender'* United States Sentencing Commission, May, 2004. Exhibit 6, Page 26.

(D) Because it is possible to achieve rehabilitation results through efforts (stats showing Cat I offenders are reachable; recidivism rates decrease with age; drug treatment and intervention programs work; success stories)

§4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A. (a)Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b)Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.

(f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points for this item.

Promising Rehabilitation Programs (Example)

- Ready4 Work Program (2003-2006)
  - More than 4,000 participants in 11 cities received job training, placement assistance, referrals for housing and treatment, and mentoring
  - Targeted 18- to -34-year old non-violent, non-sex offenders (primarily African American; 1/2 had been arrested 5 or more times; 1/4 had spent 5+ years in prison)
  - Services delivered via partnerships among local faith, justice, business, and social service organizations
  - Cost: $4,500 per participant
  - Participant Employment rate: 57%
  - Six month reincarceration rate: 2.5% (BJS National estimate: 5%)
  - One-year reincarceration rate: 6.9% (BJS National estimate: 10.4%)

Ready4Work statistics from presentation by Scott Shortenhaus at the USSC Symposium on Alternatives to Incarceration, July 2008. See pg 273 of proceedings (data adapted from presentation slides).

Also: Ready4Work In Brief: Update on Outcomes; Reentry May be Critical for States, Cities by Chelsea Farley and Wendy S. McClanahan, Issue 6, May 2007. Public Private Ventures

Rehabilitation in the Federal System: Congress

- 18 U.S.C. § 3553(a)
  - Factors to be Considered in Imposing a Sentence.—
  - ...(2) the need for the sentence imposed—
    - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    - (B) to afford adequate deterrence to criminal conduct;
    - (C) to protect the public from further crimes of the defendant; and
    - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- 18 U.S.C. § 3583 – Supervised Release

Rehabilitation in the Federal System: Congress

- Second Chance Act of 2007
  - Bi-partisan effort to provide federal seed money for successful local reentry programs
  - Federal grants provided to evidence-based interventions, including non-profit organizations, reentry courts, treatment programs, and recidivism researchers
  - Premise: successful reentry programs are tailored to the community and fashioned to meet the individual offenders' needs
  - Purpose: "to protect the public and promote law-abiding conduct by providing necessary services to offenders"

From the Second Chance Act:

PURPOSES.—The purposes of the Act are—

(1) to break the cycle of criminal recidivism, increase public safety, and help States, local units of government, and Indian

Tribes, better address the growing population of criminal offenders who return to their communities and commit new

Crimes;

(2) to rebuild ties between offenders and their families, while the offenders are incarcerated and after reentry into

the community, to promote stable families and communities;

(3) to encourage the development and support of, and to expand the availability of, evidence-based programs that

enhance public safety and reduce recidivism, such as substance abuse treatment, alternatives to incarceration, and comprehensive reentry services;

(4) to protect the public and promote law-abiding conduct by providing necessary services to offenders, while the offenders

are incarcerated and after reentry into the community, in a manner that does not confer luxuries or privileges upon such

Offenders;

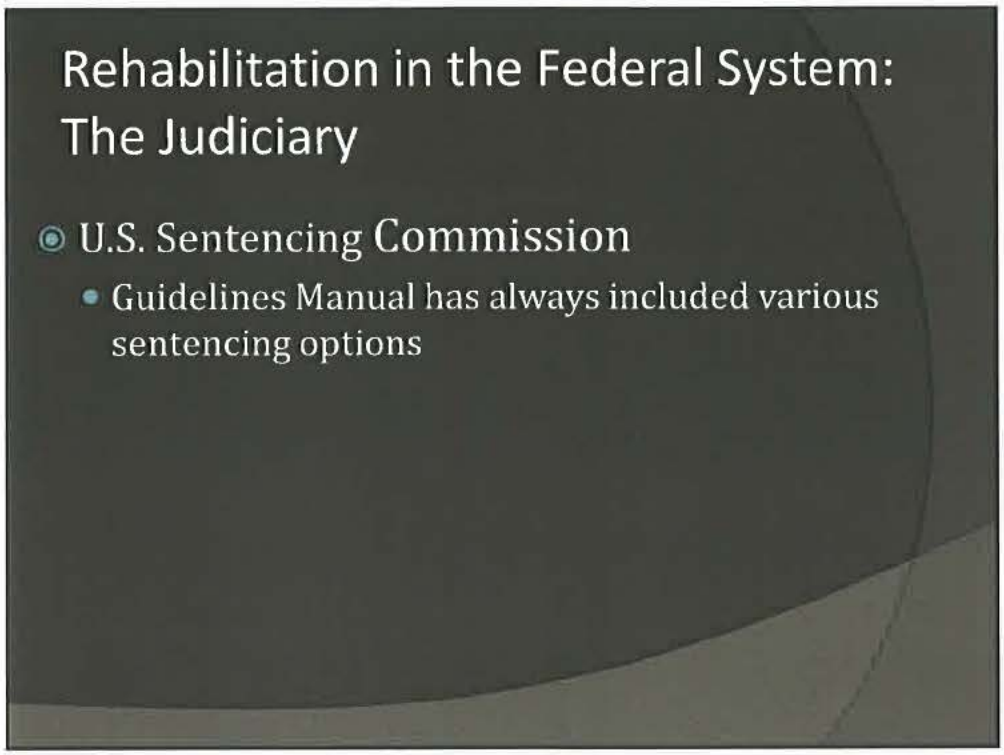
(5) to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life by

providing sufficient transitional services for as short of a period as practicable, not to exceed one year, unless a longer period

is specifically determined to be necessary by a medical or other appropriate treatment professional; and

(6) to provide offenders in prisons, jails or juvenile facilities with educational, literacy, vocational, and job placement services

to facilitate re-entry into the community.



§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.

Application Notes:

1. "Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours.

§5F1.2. Home Detention

Application Notes:

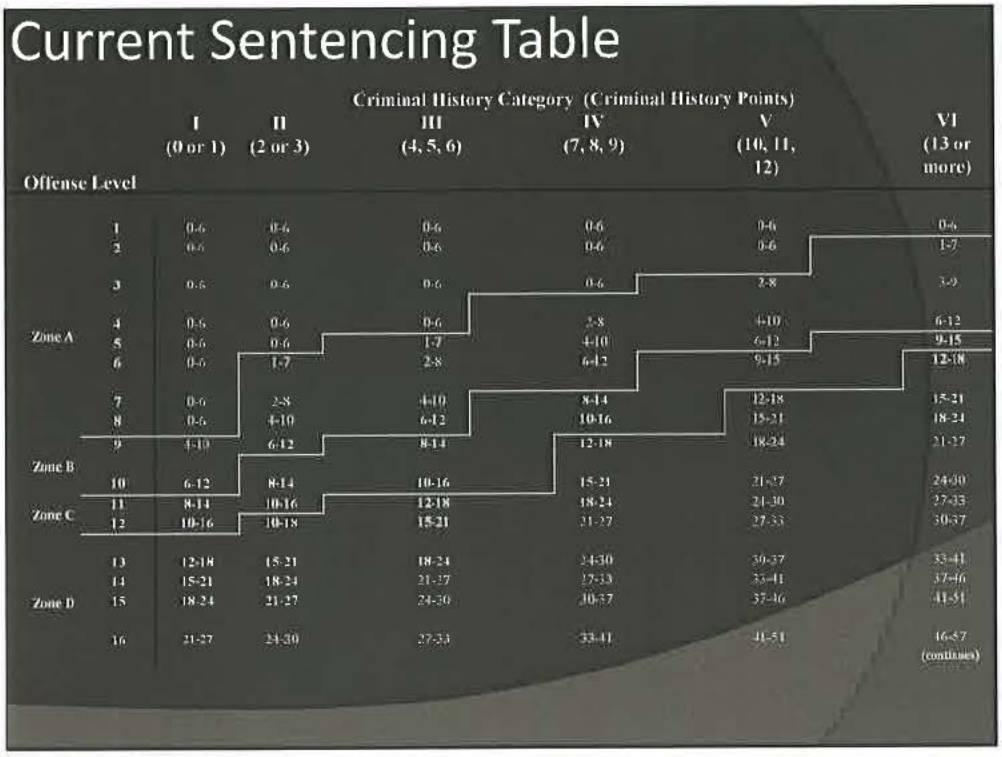
1. "Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring.

§5F1.8. Intermittent Confinement

Application Notes:

1. "Intermittent Confinement" means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. *See 18 U.S.C. § 3563(b)(10).*

Current Sentencing Table



Offense Level		Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
Zone A	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
Zone A	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	21-30	27-33
Zone C	12	10-16	10-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
Zone D	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57 (continues)

§5C1.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

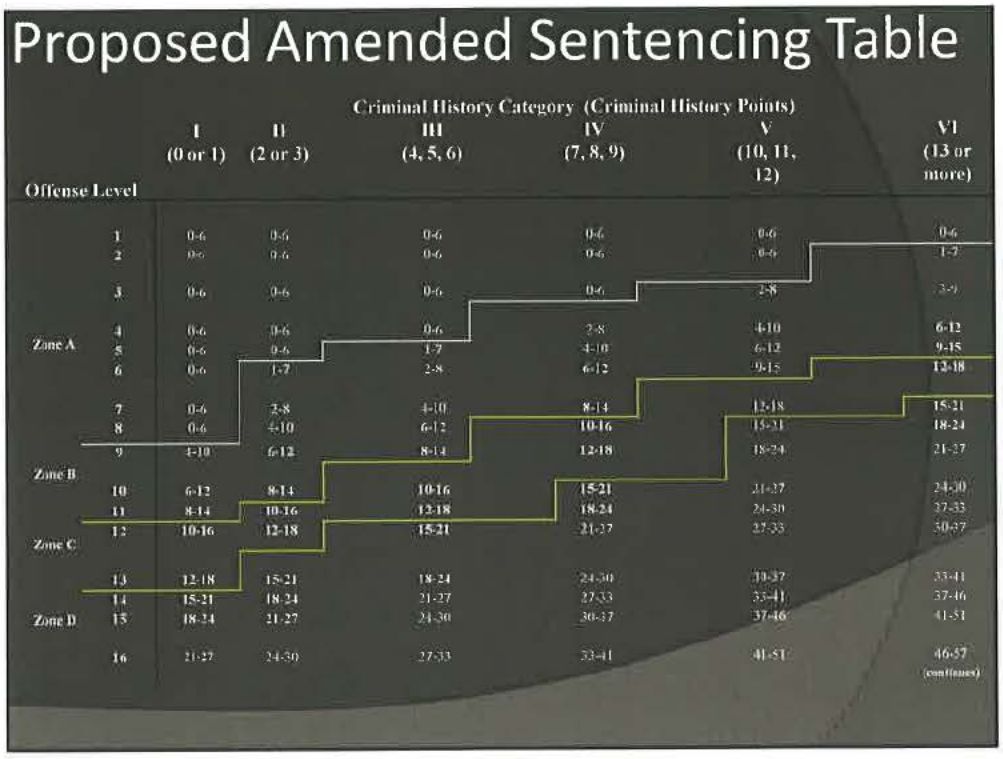
(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;

(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Rehabilitation in the Federal System: The Judiciary

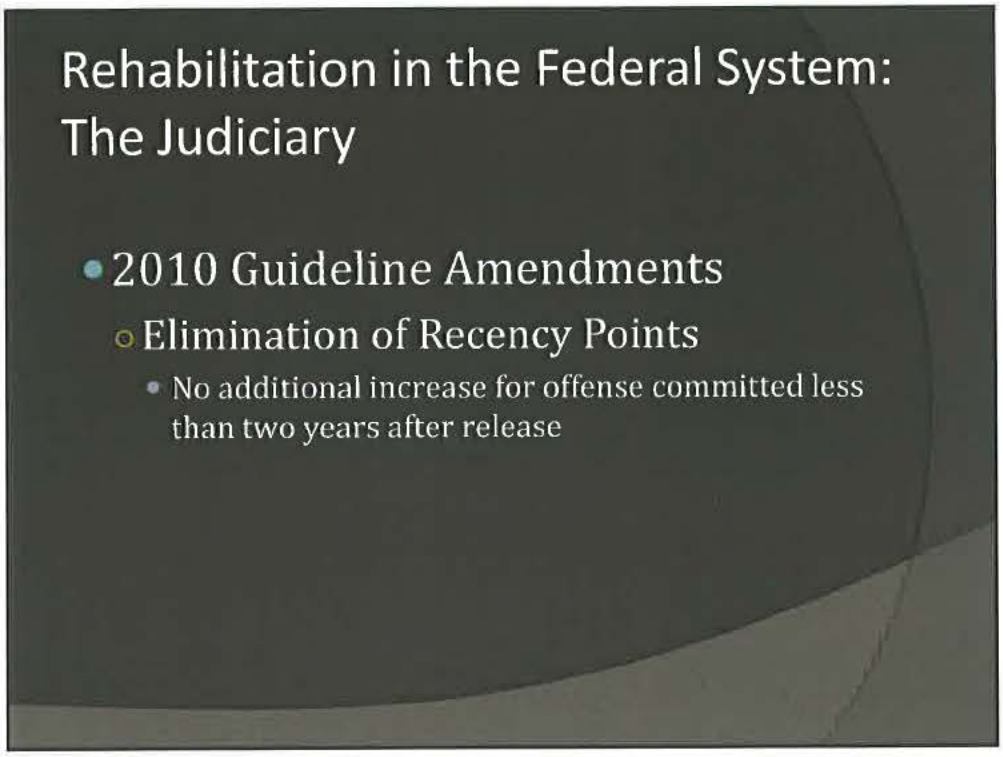
- 2010 Guideline Amendments
  - Expansion of Alternatives
    - Sentencing Zones
    - Treatment Options for Zone C



First, the amendment expands Zones B and C of the Sentencing Table in Chapter Five. It expands Zone B by one level for each Criminal History Category (taking this are from Zone C), and expands Zone C by one level for each Criminal History Category (taking this area from Zone D). Accordingly, defendants in Zone C with an applicable guideline rage of 8-14 months or 9-15 months are moved to Zone B, and defendants in Zone D with an applicable guideline range of 12-18 months are moved to Zone C

Second, it amends an existing departure provision at §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6. As amended, the application note states that

There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed. In determining whether such a departure is appropriate, the court should consider, among other considerations, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.



The recency amendment allows time for reentry by not increasing culpability by the fact of being under supervision (points added if offense committed less than two years after release). The Reason For Amendment (page 22 in the Reader Friendly version) states: "...defendants who recidivate do so relatively soon after being released from prison but...this may reflect the challenges to successful reentry after imprisonment rather than increased culpability."

§4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.

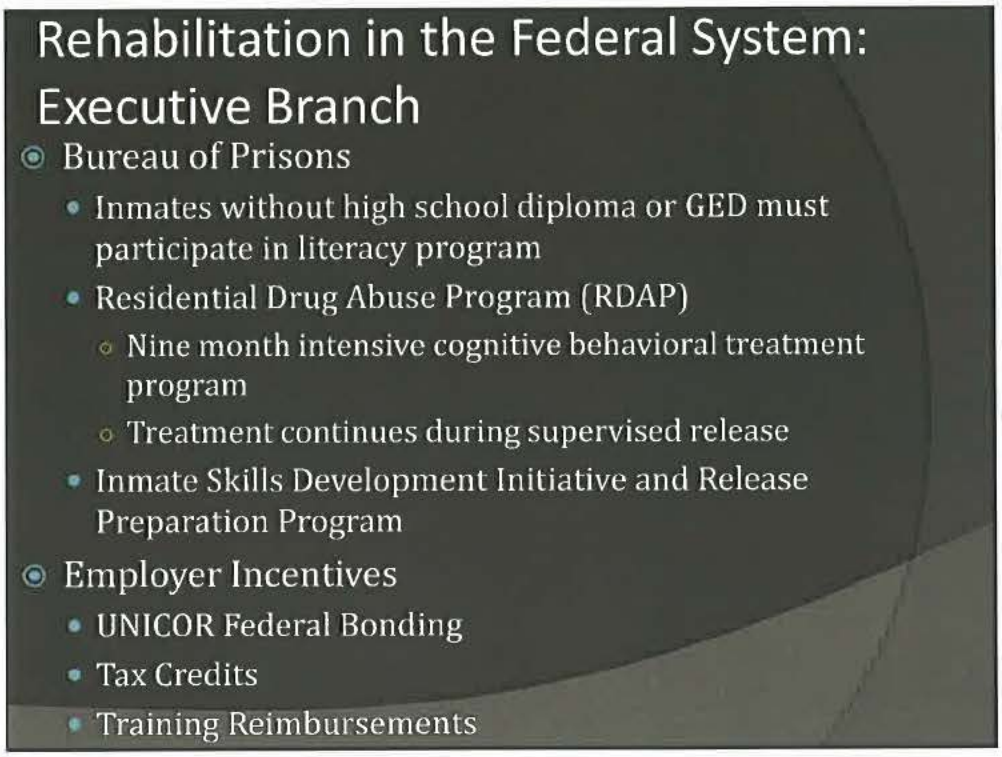
(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points for this item.

Rehabilitation in the Federal System: The Judiciary

- Problem Solving Courts
  - District of Oregon Reentry Court
  - W.D. Michigan Accelerated Community Entry Program
  - District Massachusetts CARE Program

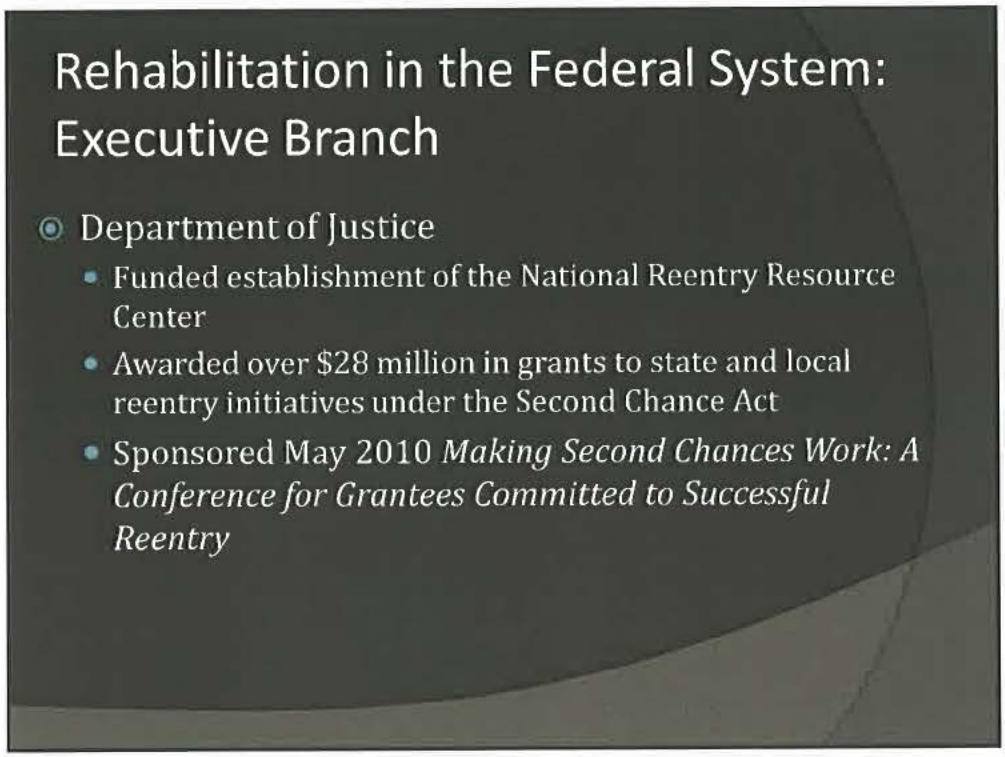


BOP Inmate Skills Development Initiative is described in Ms. Brezzanno's Symposium presentation (pg 280) *It's an inmate profile that begins with incarceration and identifies skills and other life needs for each individual upon release. It uses a complex, web based tool that is updated and easily tracked. It was developed based on extensive research findings about what offenders need at reentry.*

UNICOR is administered by the Inmate Transition Branch.

The Work Opportunity Tax Credit (WOTC) is a Federal tax credit incentive that the Congress provides to private-sector businesses for hiring individuals from twelve target groups who have consistently faced significant barriers to employment.

The Job Training Partnership Act provides funds to be administered by the Department of Labor to individuals facing serious barriers to employment.



2009 Second Chance Grantee Data from National Reentry Resource Center Website and testimony of Le'Ann Duran (Director, National Reentry Resource Center) July 21, 2010 at the hearing before the Senate Judiciary Committee: Second Chance Act: Strengthening Safe and Effective Community Reentry.

Recent Rehabilitation Recognition at the Highest Level: The Supreme Court

- Graham v. Florida (2010)
- Pepper v. U.S. (pending)

Conclusion


UNITED STATES SENTENCING COMMISSION
THE END

Update on Federal Sentencing Law: Supreme Court, Appellate and Legislation

Federal Bar Association
Annual National Sentencing Guidelines Conference

May 14, 2010
St. Petersburg, Florida

New to the Commission + new to this panel (having agreed to step in for Judge Castel 11/6)

INTRODUCTION

I'm delighted to be here today -- This is my first public panel appearance since I joined the Commission, which means I am relatively new to all of this and I hope that you will be kind in your questioning.

I joined the Commission in a post-confirmation flurry in mid-February and I jumped right into the busy amendment cycle, which at that point was already well underway. As many of you know, the Commission's work process begins in the summer, when the Commissioners set the priorities for the upcoming year, and the agency works from the summer until the next spring (2) analyzing the data, (3) reaching out to the public, (4) holding hearings, and (1) thoroughly reviewing the prioritized issues. The Commissioners vote on proposed amendments to the guidelines in April, and the agency submits the approved amendments to Congress by May 1st. So, when I arrived in the middle of February, I had to "hit the ground running" to get up to speed on the substantial amount of work that had already been done at that point in the amendment cycle.

Judge Sessions, the chair of the Commission, spoke earlier about the new guideline amendments that Commission enacted this April, and I will touch upon them again briefly as a part of this update. But before doing so, I really think that it is useful to reflect upon the core statutory purposes of the Commission (28 U.S.C. § 991) because an understanding of the agency's basic mission as dictated by Congress informs any discussion of what the Commission has done, how the Commission is doing, and where it may be headed in the future.

So, as you will recall, Congress specifically charged the Commission with two overarching responsibilities . . .

MISSION

(1) "establish sentencing policies and practices for the Federal criminal justice system," and

(2) "develop means of measuring the degree to which" these practices "are effective in meeting the purposes of sentencing" [28 U.S.C. 991]

Re (1), the statute specifies that the policies should be designed to:
(a) advance the purposes of sentencing
(b) provide certainty and fairness by "avoiding unwarranted disparities" and by maintaining sufficient flexibility to permit individualized sentences, and
(c) reflect advancements in the knowledge of human behavior.

I view the Commission's work with these touchstones in mind, and it makes sense to think about some of the more recent developments in light of the Commission's statutory mandate.

prevailing view → Commission as architect of guidelines

But it is important to note that the Commission performs many functions consistent with its overarching statutory purpose and mission beyond reviewing and amending the *Guidelines Manual*. The Commission staff has worked tirelessly with Congress and the other branches of government in the development of federal sentencing policy, and this work includes:

and maintenance of guideline system is its primary responsibility

Judge Sessions: Commission as Educator; Commission as policymaker

--using its expertise to assess proposed criminal justice legislation
--making recommendations about the structure and severity of new penalties
--taking policy positions on certain matters related to sentencing
--collecting and analyzing data to be used by legislators and the public
--producing reports (e.g., sentencing and prison impact reports), and
--informing the courts, not only through the guideline amendments but also as an *amicus* in specific cases involving federal sentencing policy

So, in this panel about "updates," I thought I would discuss recent developments that highlight the Commission's broader role and its interaction with other branches in the formulation of federal sentencing policy, and then I'll touch upon some of the specific guideline amendments that were enacted this year.

(*) ~~The Developments~~ that the Commission has been working on/involved in already can be grouped into four categories . . . (1) & (2)

over

(things the Commission has been working on / involved in)

Recent developments can be grouped into four general categories:

(1) Commission's work in influencing and implementing **directives** in federal criminal statutes and responding to Congress's creation of new crimes and penalties;

(2) **policy stances** that the Commission has taken in an effort to nudge Congress and the Court on matters of concern regarding sentencing;

(3) Commission's role as an **expert resource** ~~and developments that highlight~~ for the other branches and the other branches' continued reliance on the Commission's general expertise;

and

(4) Commission's service as a ~~repository for~~ central clearinghouse for **data and information** about what courts are doing (especially important in the post-*Booker* age), and its production of analytical reports about the state of federal sentencing.

DIRECTIVES

A. More than 20 public laws from the 110th and 111th Congresses required Commission action:

--In some cases, Congress created new offenses or new penalties=> Commission had to determine whether guidelines needed to be amended as a result.

--Other laws contained mandates that specifically directed the Commission to review and amend the guidelines as appropriate.

--In certain instances, the Commission worked *with* Congress to draft the language of a directive to the Commission.

*Important b/c specific directives can sometimes make it difficult to maintain proportionality

*More general language can preserve the Commission's ability to employ its expertise in developing the penalty under the guidelines scheme.)

B. Examples of Commission responses to congressional action from this past amendment cycle:

--Commission responded to the *Matthew Shepard and James Byrd Hate Crimes Prevention Act*

- Act created two new offenses and amended a prior directive that required an enhancement under the guidelines for hate crimes

- Commission (1) referenced the two new offenses to existing guidelines for offenses involving individual rights and assault, and (2) added "crimes motivated by actual or perceived gender identity" to the definition of a "hate crime" for the purpose of the existing hate crimes sentencing enhancement

--Commission also referenced new offenses created in the Children's *Health Insurance Program Reauthorization Act* and the *Omnibus Public Land Management Act* to existing guidelines

C. New Directive in Recently Enacted Health Care Bill:

In section involving "Health Care Fraud Enforcement" (Sec. 10606)—

(1) Commission must:

- Review the guidelines and policy statements

- Amend the guidelines to provide that the aggregate dollar amount of fraudulent bills submitted to govt = prima facie evidence of intended loss

- Amend guidelines to provide for incremental increases in offense level (between 2 and 4 levels) based on specified loss amounts

(2) Other duties of the Commission in implementing the directive are also addressed. Commission shall:

--ensure the guidelines reflect serious harms cause by health care fraud

--ensure that the guidelines meet purposes of sentencing

--provide increased penalties for persons convicted of this fraud

--consult with victims, law enforcement, health care industry and judiciary

--ensure reasonable consistency with other guidelines

--account for aggravating or mitigating circumstances that might justify exceptions

POLICY POSITIONS

I. Crack v. Powder

A. Commission has long advocated for a change in the 100:1 crack-to-powder ratio that is reflected in the statutory mandatory-minimum scheme

1. Issued four detailed reports asserting that that the 100-to-1drug quantity ratio significantly undermines the various congressional objectives of the Sentencing Reform Act

2. Testified numerous times before Congress on this subject—six times in the past four years—most recently in May of 2009

3. Amended the guidelines in 2007 to provide a retroactive 2-level decrease for ~~certain~~ most crack offenders. → 23,471 motions as of mid-Jan; 15,501 of these granted → relatively smooth process → Average reduction was 25 months

B. In March, the Senate Judiciary Committee unanimously approved a bill that establishes a 28:1 ratio and abolishes mandatory minimum for simple possession (others here will comment on the specifics and process of passage)

1. Commission provided sentencing and prison impact data that shows:

- Approximately 3,000 cases affected by the new legislation
- Average reduction of sentence length would be between 27 and 35 months
- Approx. 2,600 fewer prison inmates five years after the change
- CBO estimates that the cost savings from decreased prison population would be in the neighborhood of $42 million from 2011 to 2015

2. Commission will have to implement specific directives if current legislation is enacted, including:

--2-level increase for use of violence in connection with a drug offense,

--2-level increase if bribery used in connection with the offense, or defendant was organizer, leader, manager or supervisor AND offense involved "super-aggravators" such as coercive use of another person to purchase, sell, or transport drugs; distribution or involvement of a person under 18, over 64 or a pregnant person

--a cap and a 2-level decrease for offenders who qualify for minimal role or were motivated by intimate of familial relationships

II. Dillon v. United States

(A) Pending Supreme Court case (argued in March)

Case involves the district court's imposition of a modified sentence pursuant to a revised guideline that the Commission has made retroactive.

(B) Commission took a policy position in its *amicus* brief :

- modification proceedings pursuant to a revised guideline made retroactive do not constitute full resentencings (18 USC 3582)
- dct may only reduce the sentence to a term that is not less than the minimum of the amended guideline range & the Commission can predict the impact of the change with remarkable accuracy as a result
- If retroactive amendments afford Δs full resentencings, Commission will be unlikely to make retroactive reductions in the future & in large part bc it would be very difficult to assess the impact of retroactivity

(C) Δ argued that the modification proceeding must be treated as a full resentencing under Booker - with no mandatory limitations imposed by the Commission (full discretion) - they may discuss...

We'll see where the Ct comes out // good example of Comm'n taking policy position

GENERAL RESOURCE

Commission sometimes is viewed as a general resource, apart from any particular crime bill or specific criminal justice legislation—

A. **Senator Webb's bill**

Establishes a blue-ribbon "National Criminal Justice Commission" that will undertake a comprehensive 18-month review of the criminal justice system.

1. Bill expressly requires the new Commission *to consult with the Sentencing Commission to the extent that the new Commission's review addresses federal sentencing policy.* > Commission recognized as the expert; expertise is drawn upon here again
2. Bill has received widespread bipartisan support and has 37 cosponsors in the Senate.
3. The bill was recently introduced in the House and also has multiple bipartisan sponsors there.

B. Mandatory Minimum Report

Matthew Shepard Act contained a specific directive to the Commission to study mandatory minimum sentences and report back to Congress.

1. Report is a work-in progress and is due in October.
2. Commission will have a public hearing on May 27th to get feedback, views, and information from various stakeholders.
3. Not yet sure what form the report will take but is a good example of Congress turning to the Commission for its expertise in synthesizing information that Congress might use to formulate policy.

DATA COLLECTION & ANALYSIS

In addition to working on the policies themselves, the Commission also has the responsibility of developing means of measuring the effectiveness of federal sentencing policies – a duty that involves the rigorous collection, maintenance, and analysis of sentencing data.

A. Collection

1. All 94 federal districts now participate in the electronic submission system – Commission receives and codes information from 5 documents in every fed'l case (*) (all felony + class A misds) within 30 days after judgment
2. Commission maintains a "real time" database that permits immediate access to sentencing information
3. Commission releases the data quarterly and can generate data about what courts are doing (especially important in the post-*Booker* age!)
4. [Examples and conclusions] → most recent data continues to demonstrate relative stability + consistency

↓

81,372 cases in FY 2009

B. Reports

1. Mutivariate report—analysis of the impact of federal sentencing trends on various demographic groups (released earlier this year) → e.g., Black male offenders are receiving longer sentences than white male offenders + differences in sentence length has remained steady since Booker
2. Mandatory Minimum report (already mentioned)
3. Lots of statistical reports: *e.g.*, quarterly and annual cumulative data, prison impact studies

C. **Clearinghouse for other information** as well (e.g., views and opinions of criminal justice stakeholders) --All jurisdictions now on board re data submission

1. Regional hearings – (seven total) received helpful feedback on operation of guidelines + sentencing concerns
2. Survey of all Art. III district court judges nationwide –

Just completed!

- asked a variety of questions about different sentencing issues
- In the process of analyzing the results
- → • prelim results –

(a) (*) 75% of judges thought advisory guidelines best achieve purposes of sentencing

(b) – maj. thought penalties too high for crack (some for mj also)

(c) – wanted more alternatives to incarceration

(d) – maj. thought certain offender

(*) (1) the judgement + Commitment order
(2) the CTS statement of reasons
(3) the plea agreement, if any
(4) the indictment / charging doc
(5) the PSR

Recent Data show: Relative stability + consistency over time

- ~~[illegible]~~ Average length of sentences ~~[illegible]~~ not declining greatly after Booker

- More than 80% of cases are sentenced within the guideline range or outside pursuant to government recommendation
  - 81.3% in the 1st Quarter of FY 2010
  - 85.8% in 1st Quarter of FY 2006

Government-sponsored outside the range

- Sentencing practices throughout the circuits have remained relatively consistent for last 15 months

Such feedback, information, and data is essential to the Commission's ability to assess what is going on with the guidelines and to make changes, and it was information that the Commission received that prompted many of the substantive changes/amendments that the Commission voted for this year:

① Alternatives to Incarceration —

- expanded zones B + C by one level, which provides a greater range of sentencing options for certain offenders
- revised an application note to spell out the circumstances under which it may be appropriate for the court to depart from a sentence of imprisonment and impose other types of sentences "to accomplish a specific treatment purpose."

② Specific Offender Characteristics

- ~~established~~ established that certain offender characteristics "may be relevant" to the determination of a

departure —

> "if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines"

> ① age, ② mental and emotional condition, ③ physical condition, ④ military service

③ Recency

- eliminated the additional points for recency in the calculation of the CH score
  - > data indicated that recency had very little additional effect as a predictor of recidivism and did not reflect increased culpability
  - > recency points led to the double/triple counting of a single prior offense in certain instances

④ Cultural assimilation

- established a new departure in 2L1.2 for illegal reentry cases in which:
  - ⓐ Δ formed cultural ties to the U.S. primarily by having resided here since childhood
  - ⓑ those ties were the primary motivation for reentry
  - ⓒ departure is not likely to ↑ risk to the public

(5) Organizational Guidelines

- new application note to clarify what remedial steps an organization should take after detecting criminal conduct in order to have an effective compliance program —
  - > respond appropriately
  - > seek to remedy the harm (e.g., promptly restitution)
  - > self-report + cooperation
  - > assess program + modify to prevent further similar conduct (incl. possible use of an independent professional advisor)

- created a limited exception to the prohibition against getting a 3-level reduction in the culpability score if the organization's high-level management is involved in the offense. Now can still be eligible for the decrease if:
  - compliance officers can report directly to governing authority
  - the compliance program detected the offense before existing discovery was reasonably likely
  - organization promptly reported the offense
  - compliance personnel did not participate or condone

Future Plans

- Responses to Directives in the works —
  - ⊙ health care
  - ⊙ watching crack SRL
  - ⊙ ongoing review i/l/o new crimes/enactments ~~and the future review of the role of specific offender characteristics~~
- Mandatory Minimum Report
- ongoing Review/analysis of Specific Offender Characteristics (Chapter 5)
- setting priorities based on Other topics that emerge from Survey + public comment

In the interest of promoting uniformity + the elimination of unwarranted disparity, the Guidelines are still relevant, and the Commission hopes to continue to make them even more so!

Push Me, Pull You: Understanding and Diffusing Power Struggles At Home



Parent Encouragement Program (PEP) Workshop

Ketanji Jackson
Rachael Fleurence

November 10, 2009

Sponsored by ABC Corp's Working Parent Forum

Agenda

1. What is a power struggle?
2. Why does it happen?
3. What can we, as parents, do about it?



What Is A Power Struggle?

A clash of wills between you and your child

You want the child to do something he does not want to do	OR	The child wants to do something you are not willing to allow

A familiar scenario…

What is going on in a power struggle ?

Parent feels…

- Frustrated
- Disrespected
- Provoked
- Mad

Parent's goal:
get the child to listen and do what is required

Child feels…

- Frustrated
- Disrespected
- Defiant
- Small

Child's goal: to be independent and in control

(to win !)

Why Do Power Struggles Happen?

Common Triggers

- Tiredness
- Stress
- Hunger
- Sensitivity …

Why Do Power Struggles Happen?

DISCOURAGEMENT

(I only matter when I **Win** !)

What can we do to diffuse power struggles ?

THE STRATEGIES

A different approach

- Adlerian psychology
- "A misbehaving child is a discouraged child !"
- A different approach
- An encouraged child does not need to misbehave

Practical encouraging solutions: in the heat of the moment

- Remember who is the adult !
  - Watch for cues
  - Back away from the power struggle
- Limited choices
- Humor
- Sentence tool-kit
- Natural consequences

Practical long term solutions: fostering encouragement and respect

- Encourage !
- Empower
- Establish routines
- Problem-solve
- Train yourself (PEP)
  - special time and the encouragement council.

Wrap up



Thank you

"Push Me, Pull You: Understanding and Diffusing Power Struggles At Home"

Push Me, Pull You Script:

1. **Introduction (RACHAEL & KETANJI —1 minute & 30 secs)**
   [Slide 1 showing]

RACHAEL: I am very pleased to be here today to present "Push Me Pull You: Understanding and Diffusing Power Struggles at home".
My name is Rachael Fleurence and this is my friend and colleague Ketanji Jackson.
We belong to PEP, a parent based educational organization.
We appreciate you taking time out of your busy schedules to come here today.

KETANJI: How many of you have ever had an argument with your child when he or she refuses to do what you ask him to do at home? No matter how powerful or persuasive we can be in the workplace, sometimes we find that we are constantly struggling with our children at home. This presentation is designed to help you identify when you're in a parental power struggle and to know what to do about it.

RACHAEL: So let's get straight to business--this is what we will address with you today [Slide 2]:

1.What is a power struggle?

2. Why does it happen?

3. What can we, as parents, do about it?

2. **PART I (KETANJI –1 minute: what is a power struggle?)**
   [Slide 3]

3. **[Video clip—2 minutes]**

4. **Whiteboard exercise—feelings & goals (KETANJI --2 Minutes)**
   [Rachael writes on the board participant's answers]

5. **Part I, continued (KETANJI—2 minutes: what's going on and why?)**
   [Slides 4-7]

6. **Part II (RACHAEL—5 minutes or less: what to do?)**

Rachael Slides 8-9
The strategies I am going to recommend are not pulled out of thin air. For those of you who like to know the science behind the talk, all that we present here is based on the

framework of Adlerian psychology. Adler was a contemporary of Freud and worked in the 1930s.

- "A misbehaving child is a discouraged child !" Rudolf Dreikurs

To describe what is going on with power struggles, I'm going to use the words of Rudolf Dreikurs, a follower of Adler, because he put so succinctly and yet so well: **a misbehaving child is a discouraged child.** So if we think of power struggles as misbehavior, then a power struggle is really just an indication that the child is discouraged. Please note, not necessarily by you.

- Make the leap of faith:

This is where I need to ask you to make a leap of faith, because for most of us, this is not how we were brought up in our families of origin. What we propose is to move away from shame, blame and pain. Quit lectures, quit the moralizing, quit punishments and bribes.

- Remember ! An encouraged child does not need to misbehave.

Why ? because it works !!! And let me tell you why. Because an encouraged child does not need to misbehave… So what I will present in the next two slides are encouraging and encouragement strategies to diffuse power struggles.

Rachael Slide 10

In the heat of the moment , here are some things to do:

- Remember who is the adult !
  - First, you want to watch for cues (hunger, tiredness etc.) that will trigger power struggles. Be aware of these, you are the parent !
  - Second, the most simple advice we can give is to back away from the power struggle (it takes two to tango!) and remember again, you are the adult !
  -

Here are some strategies that you can implement in the heat of the moment:

- Give limited choices
  - For example, "Would you like to get the cereal for me or sit in the cart ?"
- Use humor
  - When your 4 year old is digging in his heels about eating his spinach (that he had agreed to eat before you cooked it, do the unexpected (hug, funny face etc).!
- Act don't talk and follow through (if you say you can eat your dinner now or go to bed, don't give second chances, "mean what you say"!)
- Have a little sentence tool kit ready to go:
  - "I'm sorry you feel that way"
  - "Good try. Wouldn't it be nice if that really worked"
  - "Thanks for letting me know how you feel about this".

Rachael Slide 11

We also recommend some long term solutions and the common thread here is to foster encouragement and respect in your home.

- Encouragement, encouragement ! Remember to appreciate your child for the positive daily acts, don't just notice the negative and the fights with his sister.

- Empower your child – help find ways for her to contribute in a meaningful way to family life – one good way is to involve children often and early with the household chores.

- Problem-solving – set up time to discuss issues with your child. Let them offer solutions and be part of the solution.

- Plug for PEP
  - PEP can provide you with lots more encouraging strategies, such as special time and the encouragement council. If chores, are a daily battle in your household, come to PEP and check out how this can actually be the opportunity for a highly encouraging and collaborative undertaking. I highly recommend you go and check out our website to look at the different options that we offer.

7. Exercise (RACHAEL & KETANJI -- 3 Minutes)

We have a little exercise for you today that you will complete in small groups. [Ketanji to divide up the participants in 3 groups]

You will have two minutes to discuss this in your group. We are asking you to devise some solutions to a power struggle -- both short term and long term. We will ask each group to give one or two strategies to the class.

[Ketanji to write on the board ? while I talk]

8. Wrap-up (RACHAEL--1 Minute)

Thank you for your time today. We hope you have learned some things about power struggles including what they are, why they happen and how you can handle them. Your packet contains a set of the presentation slides, some useful references and interesting articles. We encourage you to try out some of these strategies at home and we hope to see you soon, perhaps at PEP. Please don't hesitate to contact us with any further questions. Thank you. We will be around for a little more if you would like to ask us anything.

Ketanji Brown Jackson

Outline of Guest Lecture

Assistant Professor Roger A. Fairfax's
"Adjudicatory Criminal Procedure" Course,
George Washington University Law School

April 2, 2009

INTRODUCTION

I have had a number of experiences in the relatively short time since I graduated from law school, and some of those are directly related to what I have been asked to speak about today. So, I thought I'd use them today to discuss a few of the major sentencing-related events of the past decade.

As my mother always says, let's begin at the beginning: *Apprendi* (October Term 1999) . . .

I. APPRENDI

(A) My Perspective

=>Law clerk for Justice Breyer (who has a long and distinguished history in regard to sentencing issues)

=>Justice Breyer was one of the original architects of the federal sentencing guidelines and was a member of the first U.S. Sentencing Commission.

=>So, my boss knew a lot about sentencing. But until *Apprendi* was fully briefed and argued no one fully anticipated its potential impact! (I still consider it the "sleeper case" of our Term because it was not forecast to be the watershed moment that it became)

(B) Case Facts

1) The *Apprendi* scenario was not unusual: it was a state law hate crimes statute.

(a) There were lots of them, presumably in response to high profile criminal attacks on people because of race/sexual orientation. Legislatures around the country had undertaken to dictate that people who commit crimes with racial or gender or religious or ethnic malice should be punished more severely than those who commit the same crime without such motivation.

(b) New Jersey law permitted a court to impose an enhanced sentence, above the statutory maximum prescribed for the crime, if the judge found by a preponderance that the crime was committed with the intent to intimidate a person because of his race or other characteristics.

As applied to Mr. Apprendi, a stat max of 5-10 years for 2nd degree possession of a firearm could be increased to 12 years because it was a hate crime.

2) No one really doubted that legislatures had the power to enact such hate-crime legislation.

(a) Legislatures have power to decide what conduct is criminal and to establish the punishment (term of imprisonment) for crimes

(b) Traditionally there had always been a clear distinction between "elements" of a crime, as defined by the legislature, and facts that were pertinent only to sentencing (which the judge could decide and rely upon in selecting the sentence).

>the legislature identifies an actus reas and means rea (elements) and the judge considers mitigating and aggravating factors about the offender or how the crime was committed

>There were an infinite number of factors that the judge could take into account, and it was well settled that the sentencing judge could rely on whatever facts she thought relevant to the sentencing determination.

So, the questioning of the judge's ability to make findings and increase the sentence because of it in *Apprendi* came as something of a surprise.

(C) Holding & Lessons

1–In June of 2000, the SCt held that:

> "the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prio conviction, must be submitted to a jury and proved beyond a reasonable doubt."

It was a 5-4 decision: Stevens, Scalia, Thomas, Souter & Ginsburg for the majority; Rehnquist, O'Connor, Kennedy, Breyer in dissent.

2–The opinion represents a fascinating dialogue about whether there really is any distinction between "elements" and "sentencing factors," and the extent to which the legislature is constrained in its ability to designate certain facts as pertinent only to sentencing such that the judge could decide them rather than a jury

3–Very important debate b/c, as a practical matter, there was no way that a jury could decide all of the possible facts that judges had previously taken into account for sentencing purposes

Apprendi's 6th Amendment holding was not clearly a dealbreaker for sentencing schemes, however, because:

> (a) it appeared to affect only to statutes that were structured like the N.J. statute (most sentencing at the time was done pursuant to guidelines not statutes); and
>
> (b) legislatures seemingly could work around it. They could rewrite the statutes to increase the stat max unless the judge found the crime had not been committed with malicious intent

Time progressed, and in December of 2003, I found myself on the staff of the United States Sentencing Commission . . . .

II. BLAKELY/BOOKER

Commission was aware that *Apprendi* was out there, but we were dealing with the FEDERAL sentencing system, and the SCt had already upheld the guidelines (Mistretta, 1989)

(A) Background on the Commission and the Guidelines

(1) The Commission

unique governmental body: an agency of the judiciary but answers to Congress

(a) history => The Commission was created in 1984 as part of the Sentencing Reform Act

The SRA was a bi-partisan effort to address the problem of unfettered judicial discretion at sentencing (sponsored by Sens. Ted Kennedy and Orrin Hatch).

Goals of the Act and the Commission: to establish mandatory sentencing guidelines for judges to follow in federal sentencing in order to reduce unwarranted disparities and limit judicial discretion at sentencing

(b) Statutory regime => 21 U.S.C. § 991 et seq.

- Seven voting Commissioners (two ex officio non-voting)
- No more than 3 judges (now, after Patriot Act)
- A chair and 3 vice-chairs
- Nominated by Pres and confirmed by the Senate

Statutory purposes and goals (very detailed):

--establish guideline sentencing ranges for each category of federal offense and each category of offender

--consider the appropriateness of certain specific factors in developing the guideline sentence

--collect data from the courts on sentencing practices

--periodically review and revise the guidelines based on comments and data

--send reports to Congress

--advise Congress and make recommendations for legislation involving sentencing

(c) How the Commission operates:

--The Commissioners are the governing board & a staff of 100 or so report to the Staff Director (the chief executive)

>5 staff subdivisions=General Counsel, Education, Legislative Affairs, Data, and Administration

--Priorities are identified each cycle (e.g., problem guidelines) and staff members work on "policy development teams" to research and develop alternative proposals

--Proposed amendments are voted on by the Commissioners after a public hearing (monthly meetings).

--If passed, the amendments are reported to Congress. They take effect in November, *unless Congress intervenes to veto the change*

(d) Interesting dynamic between Congress and the Commission:

--At same time that the Commission is changing and updating the guidelines, Congress too may be issuing directives to the Commission to make specific guideline changes and/or passing legislation that impacts sentencing (e.g., mandatory minimums)

--Commission spends a fair amount of time evaluating and responding to such congressional moves

--Thus, even though USSC is an independent agency, Congress still continues to play a direct role in the development of sentencing policy

(2) The Guidelines

(a) Original concept was simple=>use data to establish guidelines that reflect what judges actually do

But not easy b/c of competing goals of a guideline system =>**uniformity** versus **proportionality**

(b) System could be based on either of two extremes:

Charge-based (crime of conviction=sentence) thus uniform

Or

Judicial discretion (judges decide what's important and select sentence) thus individualized

(c) Guidelines were a middle-ground:

begin with the charged offense to get a uniform base offense level, then add or subtract levels based on specific offense and offender characteristics

EXAMPLE=>Bribery: 18 U.S.C. 201 (b)

Guideline=2C1.1

BOL=14, if a public official; 12 otherwise

Add SOCs

Other Characteristics—Chap 3 (aggravating role, vulnerable victim, abuse of position of trust, use of a special skill)

Criminal History Categories (I - VI)

In the end, get a level that corresponds to a grid that provides a sentencing range

(d) the grid ranges were calibrated to keep with sentence below the statutory maximum for the crime, but

Functionally, the system was similar to operation of the N.J. hate crime statute: verdict alone gave you BOL and the judge determined additional facts that increased that level.

B. Blakely v. Washington

And so it was that the SCt applied *Apprendi* to a state's mandatory guideline system in OT 2003 (the year I got to the Commission) and struck it down.

Blakely challenges to the federal system started immediately and when the SCt granted cert in *Booker* that same year, people anticipated the end of the Guidelines and the Commission!

The Commission staff attended the Booker oral argument and tried to determine prospectively the impact of *Booker* on the guidelines and whether anything could be done to save the system.

We did what we could to anticipate what the Court might do in *Booker*, but NO ONE guessed what it actually did!

C. *Booker* and *Fan Fan*

Constitutional holding=>federal guidelines are unconstitutional insofar as they require a judge to find facts and increase the sentence that would have been prescribed based solely on the elements of the charged offense.

Remedial holding=>make the guidelines advisory, not mandatory

The guidelines only operated like the prohibited system of increased punishment above the "stat max" to the extent that the charged offense (the elements as found by the jury) yielded a specific, mandatory sentence that could be increased.

If there was no stat max created by the system because the BOL was a suggestion, problem solved. The Court (Justice Breyer) saved the guidelines by excising the offensive mandatoriness using a severability analysis.

Booker came down in Jan. of 2005 and in Feb., I accepted a position as an Assistant Fed Public Defender (out of the frying pan and into the fire!)

III. Post-*Booker* World

As a practitioner, post-*Booker* basically came down to categorizing my clients into 3 groups:

> *Category 1*: people who had been sentenced under mandatory guidelines and whose appeals were done, thus their convictions and sentences were final
>
> *Category 2*: people who had been sentenced under mandatory guidelines and were still on direct appeal
>
> And
>
> *Category 3*: people who were still at the trial level, having not yet been convicted or not yet sentenced

We focused our attention on Category 2 and 3, where we felt we could have the most immediate impact.

(A) Cases on Direct Appeal (Cat. 2)

(1) The FPD filed motions asking the D.C. Circuit to grant "Booker remands" to the people whose appeals were pending

Wanted total sentencing re-dos under the advisory regime

The world was dramatically different because the guidelines had often taken factors (age, health, employment) off the table and now those arguments were available.

The govt objected.

(2) D.C. Circuit ruled that it would allow the district court to determine whether it would have given a more lenient sentence under advisory guidelines. (like certifying a question)

If dct said yes, the case would be remanded for resentencing. If no, then no.

Problem: the defendants got no hearing and it wasn't clear whether new facts could be raised to influence the review. But the FPD put every possible fact into the memo to the district court.

(3) Some cases got a full *Booker* resentencing, others didn't.

Other Circuits handled the entire post-Booker process (either by remanding all cases to the dcts or the CTA looked at the record itself and made a decision about whether the advisory nature of the guidelines made a difference)

(B) Cases Still Before the Sentencing Court (Cat. 3)

Booker raised practical questions: how is the dct suppose select the sentence in an advisory guideline world? What factors can it consider? How does the appeals court review?

We've started to get some answers from the courts . . .

(1) Dct must rely on the Section 3553(a) factors, which *include* the Guideline sentence

> There was litigation as to which order the ct must follow (guidelines first?) but consensus is the guidelines must be calculated first.

(2) Dct must hear arguments for a "variance" from the Guidelines, and it can vary even based on factors that the guidelines have already taken into account.

> Kimbrough: judge can rely on own disagreement with the Guidelines' treatment of the crack-power ratio and rely on its own view in sentencing

(3) Appeals courts reviews the sentence imposed for "reasonableness"

> Rita: may apply a presumption of reasonableness if the dct gives a within guideline sentence
>
> Gall: must not require "extraordinary" circumstances to vary from the guideline range or employ a rigid mathematical formula in determining whether a sentence is reasonable. Review should be deferential (abuse of discretion), asking (1) if the dct judge committed abuse in believing that the 3553(a) factors support the sentence, and (2) if a substantial deviation was fully explained.

Still lots of questions=>e.g., what has become of the quest for uniformity? But the answers are slowly developing . . .

(C) Cases With Final Sentences (Cat. 1)

(1) We don't know yet whether the Supreme Court intends to apply *Booker* retroactively, but it's unlikely.

I believe every Circuit thus far has declined to do so.

(2) But, since my time as an AFPD, there have been some *Booker*-related changes with retroactive effects:

> The Commission has revisited the crack-powder distinction in recent years and has changed the relevant guideline to reduce crack sentences under the guidelines by 2 levels.
>
> The Commission has also made this change retroactive, and defendants with closed cases have filed a slew of motions with trial judges under § 3582 seeking discretionary, retroactive reductions in their sentences!

(3) Lots of current litigation on this right now, including

(a) the issue of whether the court can go below the recommended guideline range once it agrees to grant a new crack sentence,

and

(b) whether the reduction applies if the 2 levels makes a difference as to whether the person was labeled a career offender and got a big increase under the guidelines

BOTTOM LINE:

A lot has happened in the sentencing world over the past decade, and it looks as though there is still much more to come!

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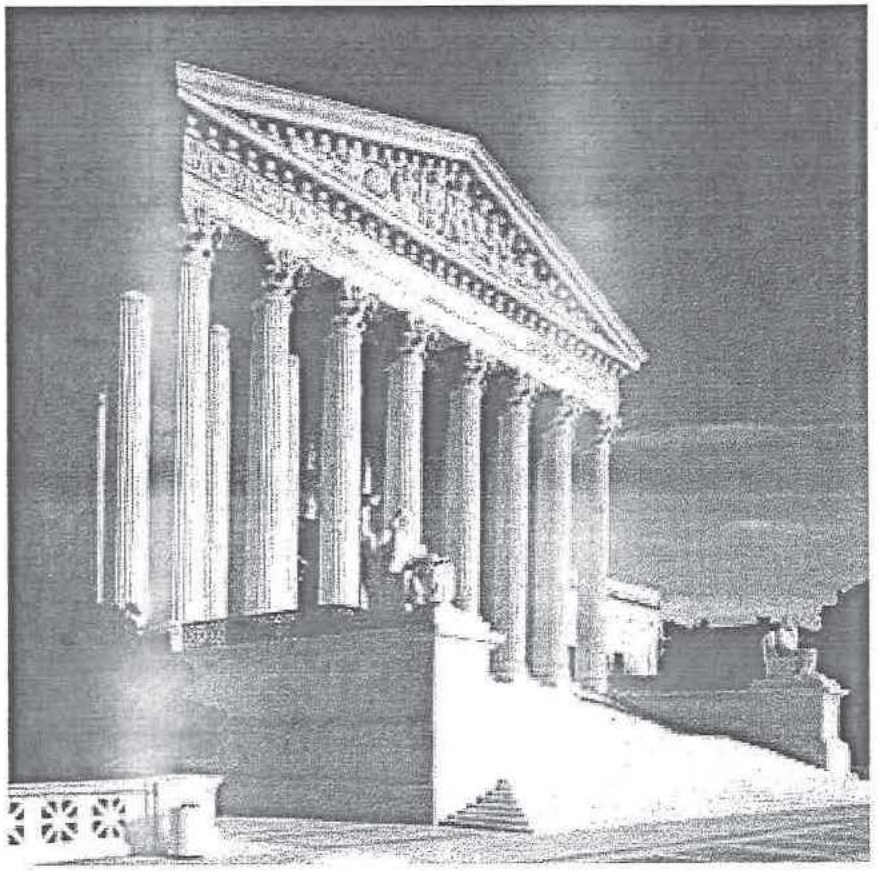
Inside The Supreme Court Of The United States: An Overview

Minority Corporate Counsel Association

8th Annual CLE Expo
March 19, 2009

Presenter:
Ketanji Brown Jackson

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- **The Roberts Court: Composition, Calendar, And Docket**
- **The *Certiorari* Process**
- **The Importance Of *Amici Curiae***
- **Pending And Recent Cases Of Particular Interest To Business (Panel Discussion)**

The Roberts Court Composition



Chief Justice John Roberts

(2005)



Justice John Paul Stevens
(1975)



Justice Antonin Scalia

(1986)



Justice Anthony Kennedy

(1988)



Justice David H. Souter

(1990)



Justice Clarence Thomas

(1991)



Justice Ruth Bader Ginsburg

(1993)



Justice Stephen Breyer

(1994)



Justice Samuel Alito, Jr.

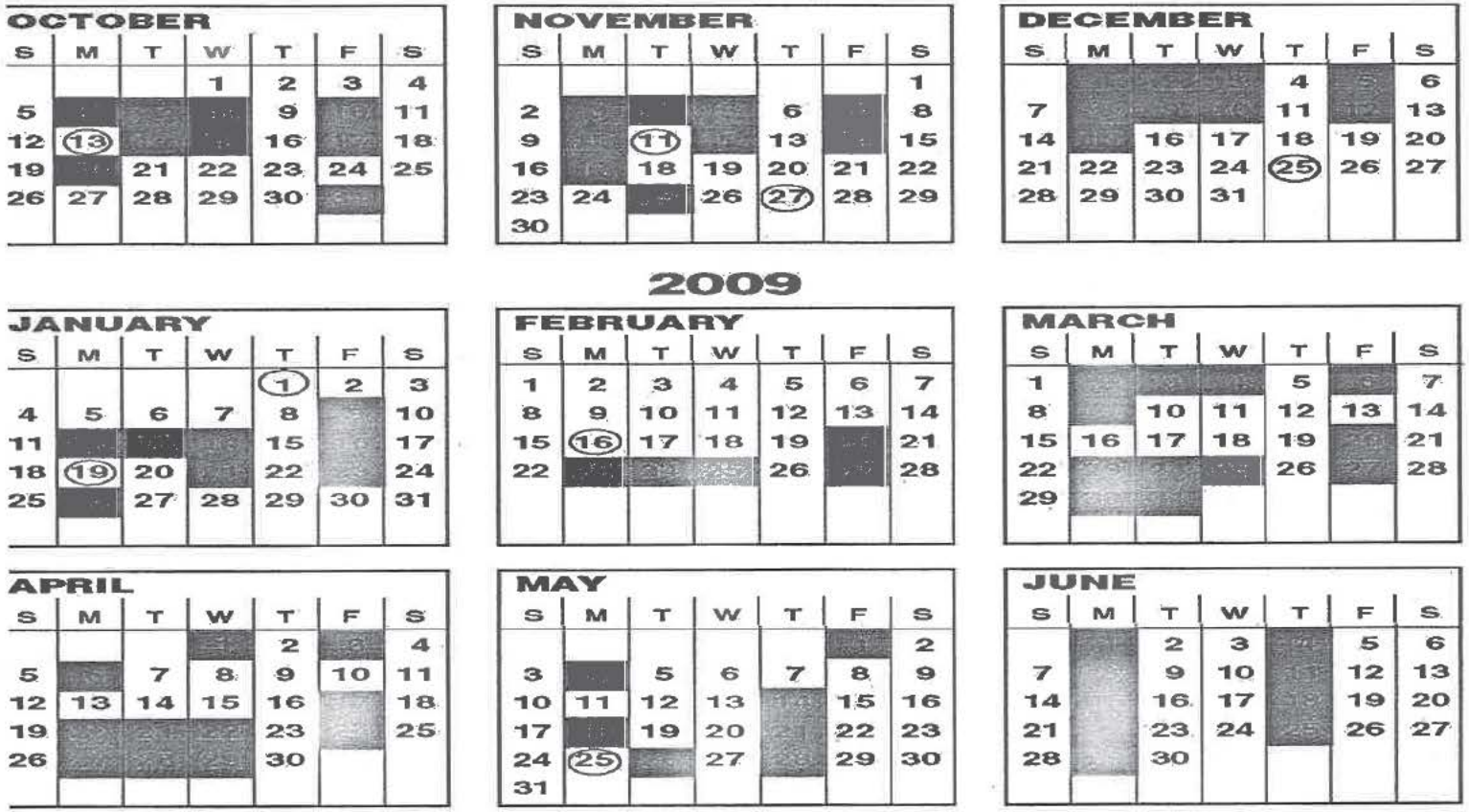
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The Roberts Court Calendar

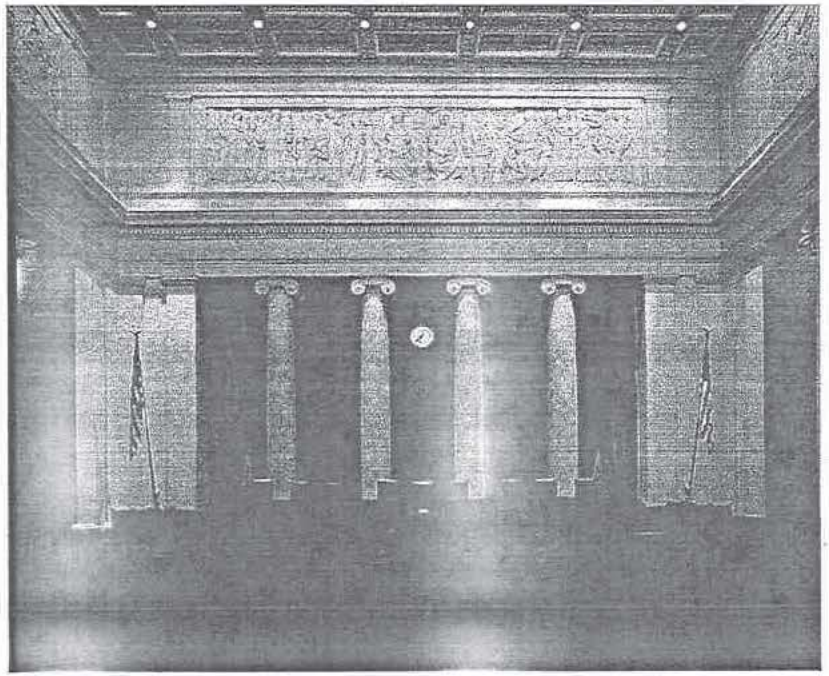
OCTOBER TERM 2008

Opening conference: September 29, 2008



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The Roberts Court Docket



- The Court will decide 78 cases in October Term 2008 (67 were decided in October Term 2007)
- By comparison, the Court decided approximately 150 cases per Term in the 1980s
- Several theories explain the decrease in the number of cases

- **The Roberts Court: Composition, Calendar, And Docket**

- **The *Certiorari* Process**

The *Certiorari* Process

- Approximately 10,000 petitions (IFP and paid) are filed with the Court each Term
- Seven Justices pool their law clerks into a "*cert.* pool" and the clerks draft a memo for each *cert.* petition
- Only a handful of cases make the "Discuss List"
- It takes four votes to grant *certiorari*

The *Certiorari* Process

Strongest Arguments For *Cert.* (S.Ct. Rule 10):

- Divergence of opinion among the U.S. Courts of Appeals
- Issue involves the Constitution, a federal statute or an important question of federal law
- Question presented has broad impact

Strongest Arguments Against *Cert.*:

- Outcome depends on facts not law
- Petition seeks only error correction

Respondent May Waive Right To File Response

- **The Roberts Court: Composition, Calendar, And Docket**
- **The *Certiorari* Process**
- **The Importance Of *Amici Curiae***

The Importance Of *Amici Curiae*

No. 07-373

In The
Supreme Court of the United States

CLARK COUNTY, NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 19, 2007

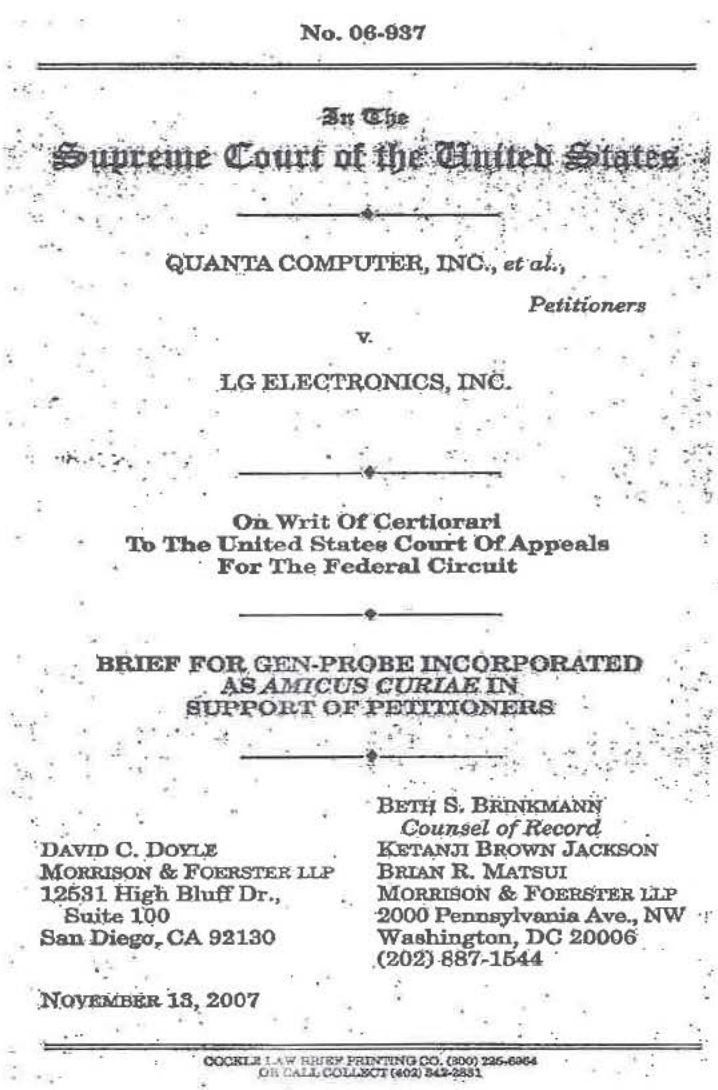
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Certiorari Stage *Amicus* Briefs

- Because few cases make the discuss list, it is critical for a *cert.* petition to attract attention
- *Amicus* briefs at *cert.* stage can demonstrate or reinforce the broader importance of the case
- No *amicus* briefs on the respondent's side at *cert.* stage

The Importance of *Amici Curiae*



No. 06-937

In The
Supreme Court of the United States

QUANTA COMPUTER, INC., *et al.*,
Petitioners
v.
LG ELECTRONICS, INC.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR GEN-PROBE INCORPORATED
AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS

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NOVEMBER 13, 2007

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Amici Briefs On The Merits Can Influence The Court's Decision

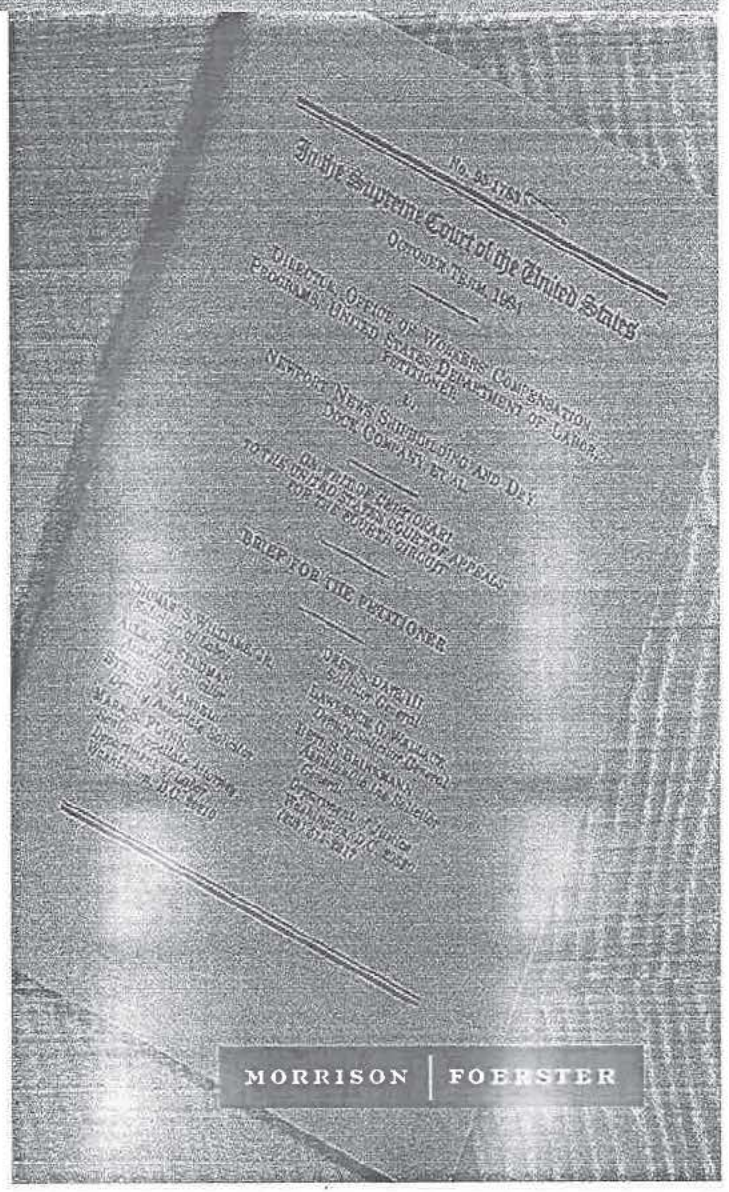
- The Justices consider the impact of a ruling beyond the facts of the case before them — *amicus* briefs
- can illustrate impact on other industries and/or similar statutes
- Supreme Court opinions sometimes inadvertently decide legal issues not presented by the parties; thus, *amici* briefs are a tool to help avoid an overbroad ruling

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The Importance of *Amici Curiae*

The Role Of The United States Government As *Amicus Curiae*

- In cases between private parties, the U.S. Solicitor General (SG) determines the position the United States will take in consultation with relevant agencies
- At *cert.* stage, the SG generally only files *amicus* briefs if invited by the Court
- Nonparties can influence the United States *amicus* process through coordination with a party and meetings with the SG and relevant agencies
- The SG is typically involved (either as *amicus* or party) in approximately two thirds of the cases the Court decides each year



- **The Roberts Court: Composition, Calendar, And Docket**
- **The *Certiorari* Process**
- **The Importance Of *Amici Curiae***
- **Pending And Recent Cases Of Particular Interest To Business (Panel Discussion)**

Pending And Recent Business Cases

- The Court is generally less divided on business cases than on social issue cases (many business cases are unanimous or near unanimous)

- Approximately 30% of the cases on the docket this Term are business cases

Pending and Recent Business Cases

- **Panel Discussion**
  - **Federal Preemption of State Law**
  - **Employment Law**
  - **Arbitration**
  - **Environmental Law**

- THANK YOU

MORRISON | FOERSTER

Outline of Talk delivered at AU on January 9, 2008
Guest speaker in course on "Women, The Law, and Litigation for Social Change"

=>It is a real pleasure for me to be here today. So much is going in my personal and professional life that I rarely get time to stop and reflect. This is a great opportunity for me to think back to when I was in your shoes: in college and facing the tough question "what do I want to do with my life???"

My career-related decisions can be categorized into three basics areas:

(1) deciding to go to law school

(2) deciding what to do with my legal education

(3) deciding day-to-day how to manage a career and my family (an ongoing process!)

GOING TO LAW SCHOOL:

→a natural fit for me. I loved the performing arts (acting, public speaking); loved to write; and hated math.

→also, had the good fortune of having a parent who was a lawyer. (dad started out as a highschool history teacher & went to law school later in life, when I was in elementary school. Remember all his law books, and his studying--we did our homework together—and I grew up think that there wasn't really anything else to do but follow in his footsteps!

→so, entered college and took courses that I thought would prepare me (gov't major).

→did take time off, though: a writing professor who wrote (a law school recommendation) encouraged me to do something else—GREAT advice. I deferred admission and had one of the best years of my life.

LIFE AFTER LAW SCHOOL:

It's been a really WILD ride! I graduated in 1996 (11 ½ years ago) and have had NINE jobs since then.

2 clerkships; Miller Cassidy; SCt clerkship; Goodwin Procter; Feinberg Group; USSC; Federal Defender; MoFo

DAY-TO-DAY BALANCE

I do appeals—intentionally—because it suits my personality & lifestyle. Not a lot of surprises; don't have to go to court all that often; little if any travel; lots of writing.

Also very intellectually stimulating because it's about questions of law (not gathering facts). Trial litigation is a moving target because the lawyer is developing the record. At the appeals level, the record is what it is; now, it's all about spinning the facts in a way that is most favorable to your client and the story you're trying to tell on his behalf.

My family=>husband is a surgeon at ; two beautiful girls (6 and 3). I've been blessed to be in a very stable marriage for a long time—11 years—and because we've been through a lot together, we are handling the balance well as a team.

Weekly Schedule=>M, W, F: takes girls to school; I take them on T and Th. He's arranged his call and work schedule so that I can work late in the office on M & W.

We have a nanny, which is really the only way we can manage with two professional careers!

RECIDIVIST ENHANCEMENTS:
ACCA, SHEPARD, AND RELATED ISSUES

Presented by:

Lisa B. Freeland
Federal Public Defender
W.D. Pennsylvania

&

Ketanji Brown Jackson
Assistant Federal Public Defender
District of Columbia

Orientation Seminar for Assistant Federal Defenders
Santa Fe, New Mexico
October 2006

Recidivism Enhancements under the United States Code and Sentencing Guidelines

1. U.S.S.G. § 4B1.1 Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a **crime of violence** or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2– ***Definitions of Terms Used in Section 4B1.1***

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

2. **U.S.S.G. § 2L1.2 Unlawfully Entering or Remaining in the U.S.**

If the defendant previously was deported, or unlawfully remained in the United States, after--

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a **crime of violence**; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an **aggravated felony**, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

NOTES:

§ 2L1.2 Commentary, note 1(B)(iii) (defines "crime of violence" for purpose of the 16-level enhancement under § 2L1.2(b)(1)(A)):

"Crime of Violence" means any of the following: murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal state or local law that has as an element the use, attempted use, or threatened use of force against the person of another.

18 U.S.C. § 16 (defines **"aggravated felony"** for purpose of 8-level enhancement under § 2L1.2):

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another

may be used in the course of committing the offense.

3. **18 U.S.C. § 924(e) Armed Career Criminal Act**

(1) In the case of a person who violates section 922 (g)of this title and has three previous convictions by any court referred to in section 922 (g)(1) of this title for a **violent felony** or a **serious drug offense**, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922 (g).

(2) As used in this subsection—

(A) the term **"serious drug offense"** means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 App. U.S.C. 1901 et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

NOTE:

18 U.S.C. § 921(a)(20)

(20) The term **"crime punishable by imprisonment for a term exceeding one year"** does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade

practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

Ketanji B. Jackson
November 2001

SUPREME COURT AS GATEKEEPER: SCREENING PETITIONS FOR 'ORIGINAL' WRITS OF HABEAS CORPUS IN THE WAKE OF THE A.E.D.P.A.

Good afternoon. Those of you who follow practice and procedure in capital cases may well remember Gary Graham. The state of Texas executed Graham on June 22, 2000, and his execution was extraordinarily controversial, in large part because Graham discovered new evidence of his innocence, and yet no court—state or federal—heard or considered all of that evidence before he was put to death. The state courts ultimately refused to consider Graham's new evidence because he had applied for state post-conviction relief in the past and under state law was procedurally-barred from doing so again. Likewise, the lower federal courts dismissed the habeas petition that was supported by the new evidence because they interpreted the Anti-Terrorism and Effective Death Penalty Act of 1996 (known by the acronym "A.E.D.P.A.") to prevent their consideration of Graham's successive habeas petition, even though it was a capital case and even though there may very well have been a credible claim of the defendant's actual innocence. So desperate was he to get this evidence considered, Graham even filed a petition for a writ of habeas corpus directly with the Supreme Court of the United States—a filing that is authorized by statute and that is called a petition for an 'original' writ of habeas corpus and that, for all intents and purposes is never granted—and, of course, in Graham's case as well the Supreme Court summarily denied habeas relief, presumably because his petition did not satisfy the Court's "exceptional circumstances" standard.

My talk today uses Graham's case to illustrate what I believe is a significant procedural problem that has arisen in the wake of AEDPA: the provisions of the statute that are designed to prevent a prisoner from filing successive and repeated habeas petitions and delaying his punishment indefinitely also make it nearly impossible for the lower federal courts to consider potentially meritorious successive claims supported by new evidence of innocence. And when such petitioners turn to the Supreme Court—which they are beginning to do with increasing frequency—the screening mechanisms that the Supreme Court applies to successive petitions brought to it in the form of original writs also appear to keep out potentially meritorious claims. My ultimate thesis is that, because Congress has severely restricted the lower federal court's ability to consider successive petitions, the Supreme Court should reevaluate and adjust the criteria it uses to screen petitions for writs of habeas that are filed directly with it. If the Supreme Court exercises its habeas authority to prevent miscarriages of justice, then I believe that the courts will have struck the appropriate procedural balance between, on the one hand, the interest in the finality of judgments, and, on the other, the interest in providing an avenue of review for those few petitioners who are actually innocent of the crimes for which they have been convicted.

I arrived at my conclusion about Supreme Court policy by looking, first, what happened procedurally in the Gary Graham case; second, what are the AEDPA restrictions that prevented Graham from receiving full and fair habeas review in the lower federal courts; and third, what are the screening mechanisms that the Supreme Court apparently employs when it reviews petitions for original writs such as the one that Graham filed on the eve of his execution. I would like to walk through these three steps now and, at the end, I will touch briefly on three proposals that I have for changing the Supreme Court policy in order to allow potentially meritorious successive habeas petitions to be heard and considered as original writs.

I. PROCEDURAL HISTORY OF THE GARY GRAHAM CASE

Our first step is to consider briefly what happened to Gary Graham. The procedural history of the Graham case actually spans 19 years—from May of 1981 until his death in June of 2000. I don't want to get mired in detail, but important to understand the crime, Graham's trial and punishment, and the myriad ways Graham attempted to get his conviction and sentence overturned during post-conviction proceedings.

A. Crime, Trial & Designated Punishment

1. May 13, 1981 at 9:30 PM: Bobby Lambert shot and killed in the parking lot of a Safeway supermarket in Houston, Texas. Murdered by lone, black assailant presumably in the course of a robbery.

2. one week later: Gary Graham, a black youth then 17, arrested for another crime and charged with Lambert's murder. Graham proclaimed his innocence.

3. October of 1981: Graham's capital trial

   (a) Guilt phase—only evidence presented by the prosecution that linked Graham to the murder was the testimony of a single eyewitness. Witness testified Graham was the killer. Court held hearing on whether the clearly illegally "suggestive" lineup and photograph array that the police officers had conducted influenced her judgment and held that it did not. [Two other prosecution witnesses testified to general events, but could not identify Graham]

   (b) Defense counsel *did not put on any evidence* at the guilt stage of the trial, and, predictably, jury convicted Graham of the murder.

   (c) Punishment phase—only evidence by defense was testimony of Graham's stepfather and grandmother who testified as to his non-violent character. The prosecution demonstrated that in a six-day crime spree during the month of May, Graham had robbed, beaten and assaulted 13 different victims.

   (d) The jury was asked whether the crime was deliberate; whether Graham posed a continuing threat; and whether the killing was unreasonable and unprovoked, and they answered in the affirmative.

   (e) Accordingly, on October 28, 1981, the state trial court sentenced Graham to death. Graham appealed.

4. June of 1984: In unpublished table decision, Texas Court of Crim Appeals (state's highest criminal court) affirms conviction and sentence.

At this point, Graham's conviction was FINAL. Every procedure that followed was a "post-conviction" proceeding, and there were many. In addition to executive clemency procedures and special state pardon hearings, Graham filed EIGHT petitions for habeas corpus (challenging the legality of his conviction and sentence)—3 in state court, 4 in federal court, and 1 in the Supreme Court.

B. Post-Conviction Habeas Proceedings

PLEASE CONSULT CHART=> summarizes his claims and their disposition. I won't take time to go through this in detail, but I will make a few observations:

1. First federal habeas petn (which was basis for "successive" designation given to subsequent filings) was not supported by the new evidence;

2. Habeas counsel apparently discovered the new evidence in 1993 and it was quite compelling (describe); and

3. No federal court actually issued a binding ruling w/r/t Graham's habeas claims in light of the new evidence. (talk through—third petition was dismissed for lack of exhaustion; fourth was barred by AEDPA; SCt summarily denied).

My view is that the SCt should have at least considered Graham's new evidence claims under the circumstances presented and that a change of policy is in order so that such consideration might take place in the future. Before we look at the Supreme Court's present criteria for evaluating original writs, need to understand why and how AEDPA blocked the lower federal courts from effective habeas review.

II. THE EFFECT OF THE "SECOND OR SUCCESSIVE" PROVISIONS OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT ON GRAHAM'S CASE

A. AEDPA—In General

- Enacted in April of 1996 (while Graham's appeal of the denial of his third federal habeas petition was pending in the 5th Circuit).
- Purpose: "to curb abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." [Conference Committee report]
- Various provisions that amend the sections of the federal code addressing habeas and that make it more difficult to get, but I'm most interested in the initial hurdle for successive petitioners—28 U.S.C. § 2244 ("finality of determination").

B. Section 2244 (As Amended By AEDPA)

- Subsection (a)—general provision clarifying that no dct or ct of appeals should be required to entertain a habeas petn if a fed ct had determined the legality of the detention as a result of a previous habeas filing (applies primarily to petns brought under 2255)
- Subsection (b) (codifies a pre-existing distinction: the difference between a successive petn that presents the same claim that was raised and determined in the prior petn and one that presents a new claim that never was raised before)—

    1. same claim as presented in prior petition "shall be dismissed"—period.

    2. new claim not previously presented shall be dismissed unless: (A) claim relies on a new rule of constitutional law that was previously unavailable and that the SCt has made retroactive; or (B) *both* the factual basis for the claim could not have been discovered previously through due diligence *and* the facts are such as are sufficient to establish by "clear and convincing evidence" that jury would not have found ptnr guilty if the constitutional error had not occurred.

- Remainder of subsection (b) establishes a new "gatekeeping" system whereby a successive ptnr must first apply to the court of appeals and get authorization to file a successive application. Ct of appeals determines, w/in 30 days, whether the criteria for preventing automatic dismissal are satisfied. Ct of Appeals' determination is not appealable and cannot be the subject of a petn for rehearing or for cert to the SCt.

C. What changed? Would Graham have been able to bring his successive petn before AEDPA? . . . (Basic History & *Schlup*)

- Habeas statute gave judges discretion; judgment was cabined by SCt in its case law related to doctrine of "abuse of the writ" :

    1. Where petitioner sought to bring a successive habeas petition that raised the *same claim* that was in a prior petition, SCt held that the successive ptn was barred only if it "raised grounds identical to those heard and decided on the merits in a previous petition" *and* if the ends of justice would not be served by considering it;

    2. Where petitioner sought to bring a successive petn raising a *new claim* that was not raised before, petn barred if the petr could not establish "cause" for not having raised the claim before and "prejudice" (the claimed error was harmful) *or*

that "a fundamental miscarriage of justice would result from not hearing the claim."

- The Ct had also developed a body of case law concerning the "ends of justice" and "fundamental miscarriage of justice" methods of having a successive petn considered. Primarily, in a case called *Schlup* v. *Delo* (1995), the Court concluded that even if a petitioner could not establish "cause" for having failed to raise his claim earlier, a ct could nonetheless consider the claim if the petitioner could demonstrate that the constitutional error complained of "probably resulted in the conviction of one who is actually innocent of the crime charged."
- Thus, "fundamental miscarriage of justice" was a safety valve that one who was actually innocent could use to avoid being barred from bringing a habeas claim on the grounds that his petition was successive and he had no cause for failing to raise the claim before.

D. So, What Did The Adoption Of AEDPA Mean In Graham's Case?

- If Graham's petition had been pre-AEDPA, Graham could have claimed entitlement to review under "the miscarriage of justice principle" articulated in *Schulp*, which is reserved for petitioners who, like Graham, contend actual innocence and constitutional error.
- But, since AEDPA applied, he was completely barred either without exception under 2244(b)(1) since his IAC claim was essentially the same one he had been making from the beginning, or, if the new evidence made it a "new claim," barred by 2244(b)(2) because he conceded that the evidence that he sought to present could have been discovered before.

III. 'ORIGINAL' WRITS OF HABEAS CORPUS IN THE SUPREME COURT

With AEDPA having closed the door to the lower federal courts, Graham turned to what was effectively the only avenue of relief remaining open to him—he filed a petition for an original writ of habeas corpus in the United States Supreme Court.

A. General Observations On 'Original' Writs

1. no substantive difference between an 'original' writ and one filed in the district court—'original writ' is just the term that is used to designate the filing of a writ of habeas directly with the Supreme Court

2. power to issue original writs is statutory and is derived from 28 U.S.C. 2241 (see handout).

3. Though AEDPA limits the SCt's ability to review a lower ct's successiveness determination via writ of certiorari (2244(b)(3)(E)), the Ct held in a case called *Felker v. Turpin* that Congress did not intend to prevent the Ct from considering habeas petns entirely and that, indeed, the

Ct retained the power to do so if the petn was brought to it in the form of an original writ under 2241.

And, because of the AEDPA bar that we just examined, for many successive petitioners, like Mr. Graham, an original writ in the Supreme Court is the last resort. Thus, we need to ask what standards the Supreme Court currently applies when it determines whether or not to consider original writs filed by successive petitioners?

B. Applicable Supreme Court "Screening" Standards—(gleaned from the few cases and rules, no developed doctrine yet)

1. First—Court Takes AEDPA's Restrictions On Successive Petitions Into Account Even Though It Is Not Clearly Constrained By Them

   (a) *By its terms, section 2244 applies only (a) to "district" judges and "circuit" judges and "courts of appeal" and (b) to successive petitions brought under section 2254 (the general provision authorizing federal courts to entertain habeas petitions on behalf of state prisoners) and 2255 (provision authorizing habeas relief for federal prisoners). Does NOT apply to a petition brought in the Supreme Court under section 2241, the provision that grounds original writs.*

   (b) *Nevertheless, Ct could determine that those restrictions apply to it as well. In* Felker *the Ct left open the question of whether it must apply AEDPA's successiveness restrictions in the original writ context, but it stated that it would take those restrictions into account: "Whether or not we are bound by the restrictions, they certainly inform our consideration of original habeas petitions." Thus, we know that the Court at least takes the AEDPA restrictions into account when it considers petitions for original writs.*

2. Second—Court Has Set The Bar For Granting A Petition For An Original Writ Extremely High

   (a) *SCt Rule 20, paragraph 4 (a) states that*

   > [t]o justify the *granting* of a writ of habeas corpus, the ptr must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. *The writ is rarely granted.*

   (b) *"Rarely" is an understatement—the Ct has not granted a petition for an original writ of habeas corpus since 1925! And commentators note that the Ct's actually setting a case involving an original writ for oral argument is also a rare occurrence.*

(c) *"Exceptional circumstance" criteria seems to apply whether or not the application for an original writ is a successive habeas filing (every petn seeking this relief must be exceptional—successive petitions are treated no differently)*

3. Third—It May Take Five Justices To Have An Original Writ Considered.

(a) *In the writ of certiorari context, Justices have adopted the "Rule of 4"—if 4 Justices vote to hear the case, the writ is granted and the case is set for oral argument.*

(b) *But it takes a vote of 5 Justices for the Ct to intervene and grant a stay in the capital context (indeed four Justices wanted to stay Graham's execution but that was not enough) . . .*

(c) *I need support for my hunch, but Ct seems to apply the "stay" 5-vote rule instead of the Rule of 4 to set original habeas case for oral argument. So few have ever reached the further consideration stage that its difficult to say for sure, but my sense is that it may take five votes to get further consideration of a petition for an original writ. (This is true regardless of its successiveness.)*

C. **In Sum . . .**

- SCt is not prohibited or restricted from considering a successive petn (as the lower fed cts are as a result of AEDPA) but the Ct has said that AEDPA's restrictions "inform" its consideration;
- the Ct has said that it will reserve original habeas review for "exceptional" cases; and
- It appears that a petitioner needs to have the support for 5 Justices just to get the case set for oral argument (not to have his case summarily denied).

Reality is that if the SCt applies these criteria to petns for original writs that come to it after AEDPA's provisions have screened them out below, even a petn that contains potentially meritorious claims supported by evidence of the petitioner's innocence likely will not receive further consideration in the Ct of last resort. As I said at the outset, I think that this circumstance needs to be addressed!

IV. MY THESIS AND PROPOSALS

A. Thesis

1. Goal=>finding a legal framework that balances the competing concerns of

(a) *preventing prisoners from delaying their punishment by filing and refiling meritless petitions, and*

(b) *allowing those few meritorious successive petitions to be heard when justice requires their consideration.*

Since AEDPA has, in my view, inappropriately tilted the balance in favor of finality and away from justice, I believe the Supreme Court should act to ensure that, where appropriate, the interest of justice can prevail. In other words . . .

2. *Given—*

(a) *AEDPA's strict limitations on the ability of lower federal courts to consider successive petitions in circumstances such as Graham's, and*

(b) *the clear potential for fundamental unfairness if our system lacks a procedure by which meritorious successive petitions can be heard,*

I would argue that the SCt needs to adjust its own policies regarding the consideration of original writs of habeas corpus.

B. Specific Proposals

Hence, I offer three proposed changes to Supreme Court policy:

1. **REJECT *FELKER*'S "AEDPA INFORMS" PRINCIPLE**—Ct should find that AEDPA neither binds nor informs. This is a matter of pure common sense: the Ct's application of the same AEDPA standards that caused a petition to be barred in the lower federal courts would mean an automatic bar at the SCt level as well. And if our goal is to ensure that at least some meritorious successive habeas claims are not screened out, applying AEDPA standards at the SCt level would certainly undermine our objective.

2. **APPLY THE "RULE OF 4"AT THE INITIAL CONSIDERATION STAGE**—There is no reason why getting to the oral argument stage should be any more difficult for a habeas petitioner than a cert petitioner! Both are discretionary, extraordinary petitions. Requiring 5 Justices—if that is the criteria—may have made sense when a petr had the option to seek habeas from the lower fed cts, but now that AEDPA has made it nearly impossible for a successive petitioner to get relief below, I am not aware of any reason to keep the bar that high. (not like a stay, which seeks immediate intervention and prevention of the legal effect of other ct's judgments; even so, some stays take only 1 justice!)

3. **INCORPORATE THE *SCHLUP V. DELO* EXCEPTION TO THE SUCCESSIVENESS BAR—**

(a) Schlup *Court held that if it can be established that constitutional error probably led to the conviction of one who is actually*

innocent, the potentially innocent petr should not be barred from bringing his constitutional claim in the form of a successive petn.

(b) *This actual innocence concept was a narrow exception to the general rule that a successive petr was procedurally barred absent a showing of cause for failing to raise the claim before.*

(c) *AEDPA eliminated this exception, but, as we have seen, its new standards are not binding on the SCt in the original writ context. I would argue that the Court should incorporate the Schlup doctrine into its own original writ jurisprudence.*

(d) *Indeed, Schlup can be restored consistent with the Court's existing standards if one allows that an "exceptional" circumstance is one in which petitioner can credibly claim actual innocence such that to carry out the sentence imposed would be a miscarriage of justice.*

(e) *To revive Schlup in this manner would mean that in certain narrow circumstances the Supreme Court could reach the merits of an original writ even when AEDPA requires the lower courts to dismiss the petition as successive. Incorporating Schlup would mean that original writs would operate as a true vehicle of last resort for the potentially innocent.*

GRAHAM HABEAS FILINGS AND DISPOSITIONS

Filing #	Place & Date	Claims	IAC Evidence	Disposition
1	State district court July 1987	• Incompetent to be executed • Texas death penalty scheme unconstitutional • Ineffective assistance of counsel ("IAC")	• Affidavits from four alibi witnesses who claimed counsel did not contact them and that Graham told them counsel prevented him from testifying	State judge holds competency and evidentiary hearings=>finds alibi witness testimony not credible and that counsel had hired an investigator. (2/9/88) Ct of Crim Apps denies relief in unpublished per curiam. (2/19/88)
2	Federal (S.D. Texas) Feb 23, 1988	• Grand jury racially biased • Incompetent to be executed • Texas death penalty scheme unconstitutional • IAC because counsel failed to investigate, introduce defense witnesses, and get independent psych eval; concealed his acquaintance with chief prosecution witness; let Graham be tried in same clothes as he wore when arrested	• (same as #1 above)	Dist ct adopts state ct's factual findings and denied relief, finding the legal claims meritless. (2/24/88) 5th Cir. denies permission to appeal (8/31/88) US SCt vacates 5th Cir judgment and remands for reconsideration of constitutionality of Texas's capital scheme (7/3/89) 5th Cir. panel on remand finds scheme unconstitutional and vacates sentence (3/7/90) 5th Cir. en banc reverses and reinstates sentence (1/3/92) US SCt grants cert and affirms on grounds that Graham's petition is Teague-barred 1/25/93)

3	State district court April 1993	• Actual innocence under *Herrera* v. *Collins* (1993) • IAC	• Affidavit of defense investigator saying that both he and counsel paid little attention to Graham's case because they believed him guilty • Affidavits of 2 eyewitnesses who described the assailant as shorter and slighter than Graham • Affidavits of 2 other witnesses who said Graham was not the shooter and whose names were in the police report but were never contacted by defense counsel	State judge adopted his own findings from 1st state habeas, also found other evidence either "not reliable" or "not credible." Concluded Graham did not satisfy high bar for claiming actual innocence. (3/26/93) Ct of Crim Apps denied relief in a per curiam order. (4/27/93) US SCt denied cert.
4	Federal (S.D. Texas) April 28, 1993	(same as #3)	(same as #3)	Voluntarily dismissed due to 30-day stay granted by Gov. Richards in connection with executive clemency proceedings
5	Federal (S.D. Texas) July 22, 1993	(same as #3)	(same as #3), *plus*: • Affidavit of Safeway employee who described shooter as no taller than 5'6" (Graham was 5'9") and said police had shown her photographs but Graham was not the killer • Affidavit of then 12 year-old witness who described someone other than Graham • Police report discussing the victim's shady past and mentioning 3 other suspects who were never investigated • Police ballistics report stating that Graham's .22 (which was mentioned to the jury) was not the .22 that killed the victim • Two psychologist reports concluding that the testimony of the prosecution's main eyewitness was not reliable.	District ct (w/o a hearing) concludes that the state ct's findings get presumption of correctness, and evidence state ct had not reviewed was insufficient (8/13/93) 5th Cir. vacates judgment for failure to exhaust state remedies (8/28/96)

6	State district court April 27, 1998	• *Herrera* actual innocence claim • IAC • Texas had violated the 8th and 14th Amends (imposed a death sentence on a minor and did not allow full consideration of youth)	(same as #5)	Ct of Crim Apps, applying state's new law, dismissed the application w/o consideration as an abuse of the writ. (11/18/98)
7	Federal (S.D. Texas) December 18, 1998	(same as #6)	(same as #5)	District ct dismissed petn w/o consideration for lack of jurisdiction under AEDPA but granted certificate of appealability. (1/7/99) 5th Cir. concluded that AEDPA applied and denied motion for authorization to file the successive petn. (2/25/99) US SCt denied cert on question of AEDPA's applicability. (3/1/00)
8	US Supreme Court June 21, 2000	• *Herrera* actual innocence • IAC	(same as #5)	US SCt summarily denied habeas relief, though order indicated that Justices Stevens, Souter, Ginsburg and Breyer would have granted a stay. (6/22/00)

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(e)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

February 26, 2021 – MoFo Community (https://together.mofo.com/category/community/), MoFo Diversity (https://together.mofo.com/category/diversity/), MoFo Women (https://together.mofo.com/category/mofo-women/)

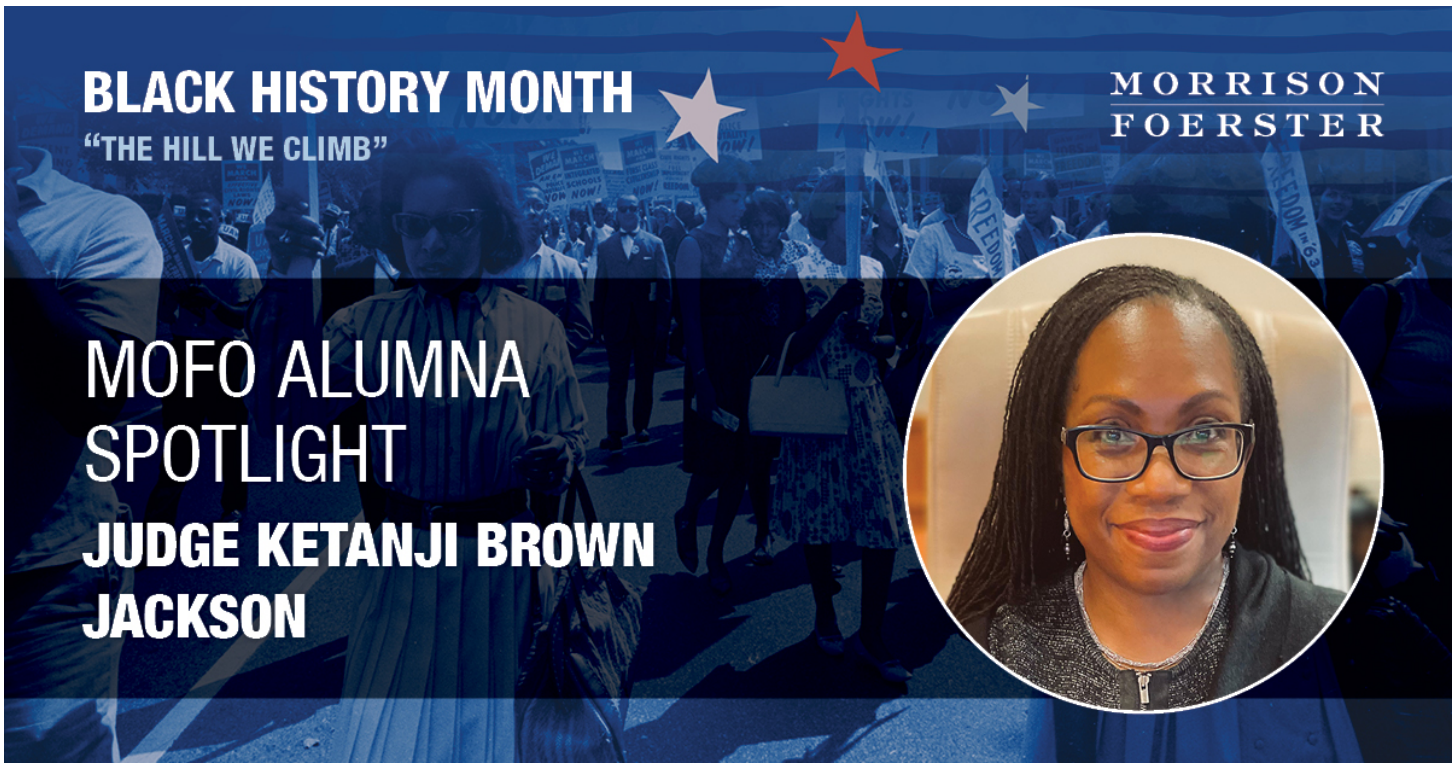
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MOFO ALUMNA SPOTLIGHT: JUDGE KETANJI BROWN JACKSON



Judge Ketanji Brown Jackson (https://www.dcd.uscourts.gov/content/district-judge-ketanji-brown-jackson) is a United States District Judge who serves on the United States District Court for the District of Columbia. Jackson's judicial service began on March 26, 2013, when President Barrack Obama signed her commission (https://obamawhitehouse.archives.gov/the-press-office/president-obama-nominates-ketanji-brown-jackson-us-sentencing-commission).

The docket of the federal district court in the District of Columbia is relatively unique because the judges handle many cases in which the federal government is the defendant. This can include cases brought under the Freedom of Information Act and the Administrative Procedure Act, and cases of that nature ordinarily do not go to trial: they are typically resolved by the judge in the context of cross-motions for summary judgment. As such, Jackson often finds herself assuming a role akin to that of an appellate judge, because she is reviewing a paper record that the parties have submitted and deciding legal questions based on that record. The other civil matters on her docket also typically involve the federal government, such as suits brought by current and former federal employees who allege employment discrimination, or cases seeking to compel the federal government to act on an immigration visa petition. Jackson has spent the bulk of her time as a judge holding hearings and writing opinions, which she enjoys because it is similar in many ways to the work she did as an appellate lawyer.

In 2007, Jackson joined MoFo as of counsel in what was then known as the Supreme Court and Appellate Group (https://www.mofo.com/capabilities/appellate-supreme-court.html), directly following her time serving as an appellate assistant federal public defender. She worked exclusively on appellate cases, drafting briefs for clients whose cases were on appeal in various state and federal courts, including the Supreme Court. The practice group represented both appellants and appellees.

Jackson recalls working on one case that the Supreme Court heard on the merits. After having served as a law clerk for Associate Justice Stephen Breyer (https://ballotpedia.org/Stephen_Breyer) early in her career, Jackson was excited to be part of a litigating team that represented an appellant in the Supreme Court. In general, however, the Supreme Court practice mostly involved analyzing legal arguments, writing briefs, and working with others to make strategic decisions about the arguments that were to be made in coordinated amicus-brief filings.

Jackson's experiences at MoFo helped to advance her career in many respects. She had the opportunity to work on sophisticated civil actions, involving complex questions of both law and policy. She also had the opportunity to develop strategic decision-making skills and to meet and work with fantastic lawyers, many of whom were well connected in the legal community and supported her eventual nomination to the district court. Beth Brinkmann (https://awards.concurrences.com/en/authors/bbrinkmann-cov-com) (former MoFo partner and chair of the Supreme Court Group) recruited Jackson to MoFo, and served as a mentor to her during Jackson's years at the firm. According to Jackson, not only did Brinkmann provide invaluable feedback on research and writing, but she also served as an influential role model with respect to balancing the practice of law and family life.

Recently, Jackson has seen a shift toward more women litigators and lead counsel in the cases that she handles as a judge—which only makes sense, given the fact that women now make up a majority of the students enrolled in juris doctorate degree programs nationwide—and she thinks that the industry as a whole is much more mindful of gender diversity and inclusion than it was when she first graduated from law school. As an example, many clients now include diversity criteria when they select preferred counsel for big cases, and firms are creating formal mentorship and sponsorship programs for women and minority

associates. Jackson hopes that the efforts that many are making to be more inclusive will bear fruit in the coming years in terms of reducing the gender disparities in the partnership ranks of law firms and in corporate general counsel positions.

The best piece of advice Jackson can offer to lawyers who are aspiring judges is simple: develop and maintain a dedicated work ethic. "The most important thing that you can do is to dedicate yourself to working hard and to doing your very best work, on every assignment, always. You will need to develop a reputation for being thoughtful and thorough and careful in order to be considered seriously for a judicial position, and you can influence how people think of you by putting in the effort and maintaining good relationships with your co-workers," says Jackson. "And remember that, no matter what new role you take on, your reputation is what will follow you, wherever you go."

Learn more about our MoFo Alumni community and their many contributions and achievements here (https://www.mofo.com/about/alumni).

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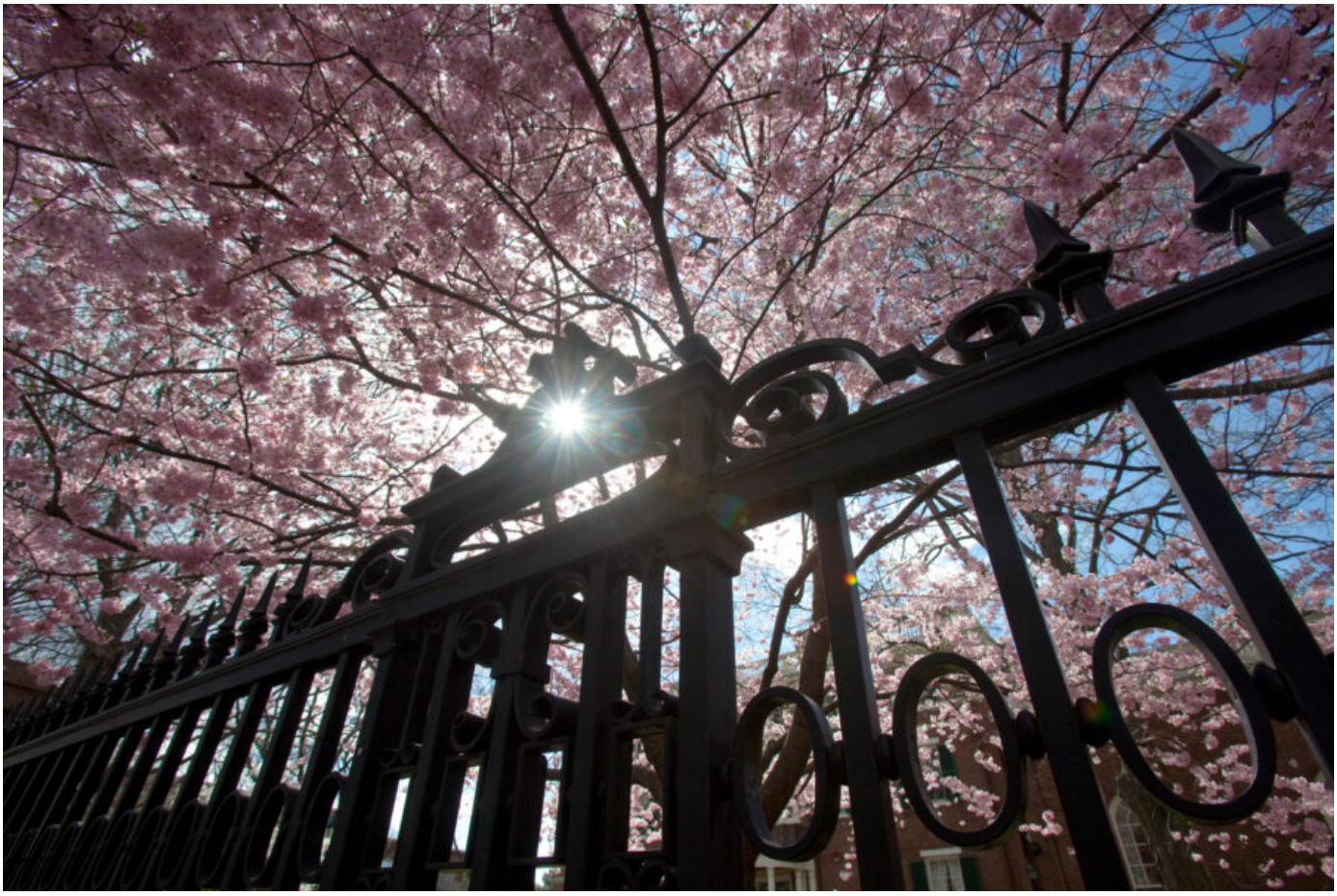
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Eight current Overseers share their unique stories



Kris Snibbe/Harvard file photo

Election for new members to the Board of Overseers to begin next month

Colleen Walsh
Harvard Staff Writer
June 16, 2020

The Harvard Board of Overseers is one of the University's two governing boards, working alongside the President and Fellows (also known as the Corporation), Harvard's principal fiduciary board. Formally

created in 1642, the Board of Overseers has for decades included 30 members elected annually by Harvard degree holders to staggered six-year terms. The Board directs the visiting committee process, Harvard's principal means for external academic review of its wide range of Schools and departments. The Overseers also counsel the University's leadership on a range of priorities and plans, and they have the power to consent to certain actions such as the appointment of new Corporation members.

Starting July 1, Harvard degree holders will have the opportunity to vote either online or by paper ballot for new members of the Board of Overseers, as well as elected directors of the Harvard Alumni Association (HAA). The roster of candidates was announced earlier this year, before the election was delayed from spring to summer in response to the COVID-19 pandemic. Completed ballots must be received by 5 p.m. (EDT) on Aug. 18.

More so than many such boards, Harvard's Board of Overseers brings together alumni with a remarkable range of backgrounds, experiences, perspectives, and professional expertise. Its recent ranks have included distinguished figures from higher education, government, nonprofits, business, finance, the arts, science, medicine, technology, law, journalism, and other fields. "What brings us together is a dedication to Harvard, a belief in the importance of education and research, and a commitment to thinking about how universities and our graduates can best serve society," said Martin Chávez, the Board's incoming president. "Given the huge challenges and profound changes now facing the country and the world, including higher education, we'll do everything in our power to help."

"Each of us brings something distinctive to the conversation, and we all learn from one another," said Beth Karlan, incoming vice chair of the board's executive committee. "My own perspective is that of a clinician-scientist and a caregiver, and I'm particularly interested in working with University leaders to support students' personal transformations and to promote wellness — especially in these challenging times. In the end, I believe the role of the Overseers is about serving the institution as a whole and strengthening its capacity to make a positive difference in the world."

Drawing on interviews over the course of several months, the following is a brief look at some members of the current board: Martin Chávez '85, S.M. '85; Paul Choi '86, J.D. '89; Philip Hart Cullom, M.B.A. '88; Meredith "Max" Hodges '03, M.B.A. '10; Marilyn Holifield, J.D. '72; Ketanji Brown Jackson '92, J.D. '96; Beth Karlan '78, M.D. '82; and John B. King Jr. '96.

Ketanji Brown Jackson ’92, J.D. ’96

Judge Ketanji Brown Jackson’s initial visit to Harvard came long before college was even on her radar. She first traveled to Cambridge for a national high school debate competition held at the University each year. But even then, the Crimson energy was palpable for the speech champion, who was born in D.C. and raised in Miami, where she attended public schools.

“The University is so majestic,” Jackson said, “and the lure of Harvard that attracts so many people came to me a little earlier.”

During her freshman year, Michael Sandel's course "Justice," which asks students to grapple with difficult ethical questions, left a lasting impression. "Professor Sandel's class was a marvel," said Jackson. "The kinds of questions that he was asking overlapped with philosophy and law. It was just really, really formative, and I think it set a path for me."

Upholding the principles of justice and fairness has been key to Jackson's career. She has served as a judge for the U.S. District Court for the District of Columbia since 2013.

"I am passionate about making sure that people who are powerless in our society and are being mistreated are heard by the system and are able to get their grievances heard and are treated fairly," said Jackson. "Fairness on a fundamental level, no matter who you are, no matter how much money you have or how little money you have or whatever your circumstances, is crucial and is at the core of who we are and who we should be as a society."

A strong writer, Jackson gravitated toward the humanities as an undergraduate and concentrated in government because she "wanted to do something practical." She planned to become a lawyer like her father and was accepted to Harvard Law School, but took a gap year to explore the world of journalism, working as a researcher and reporter for Time magazine. Harvard eventually drew her back, but writing would figure prominently in her Law School years and her career. At HLS Jackson spent most of her non class time serving on the Harvard Law Review, where the experience of crafting legal arguments helped affirm her interest in litigation work.

Clerkships after Law School with judges on both the federal district court and appeals court levels taught her "a lot about legal analysis," she said, as did her time as a clerk for Justice Stephen Breyer, LL.B. '64 of the U.S. Supreme Court. "It's stressful work because the stakes are so high," said Jackson of her work with Breyer. "But it was also just awe-inspiring every day."

For Jackson, the transition from lawyer to judge was made easier by her time working on policy issues for the U.S. Sentencing Commission. "Trying to figure out what the right result is versus the result that favors your client" was great preparation for a seat on the bench, she said. Reflecting on her career, Jackson said she considers being a judge more difficult in many ways than practicing law.

Jackson tells the students she mentors that as a lawyer, "You start with the answer, 'My client wins.' Then you work backwards from there to support that answer with case law and arguments. As a judge you are neutral to begin with and you are trying to get it right," she said. "You are trying to answer the questions in the way that makes the most sense in terms of the law, and that is most consistent with our core constitutional values."

As a judge Jackson said she is honored to have been "entrusted with the duty and the responsibility of trying to do your best to enunciate the principles of law and apply them to the facts that are before you and to reach the right results."

Jackson loved her time as an elected director of the Harvard Alumni Association and didn't hesitate when asked to stand for nomination to the Board of Overseers. She considers her job with the governing body her "service to the University that gave me so much."

“I feel like I grew up at Harvard as an undergraduate, and obviously Harvard made me a lawyer. I spent a lot of time in Cambridge, and met my husband at the College. I feel like my life would have been totally different without Harvard’s guidance and intervention, and I want to do everything I can to give back.”

Beth Karlan ’78, M.D. ’82

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KETANJI JACKSON



"GDS is well positioned to sustain the level of excellence that the school has enjoyed over the years, and I am excited about assisting in that effort," said new Board member Ketanji Jackson when discussing her reasons for joining the Board. "I am honored to join with the other GDS board members in ensuring that GDS continues to provide the high-quality education and broader social vision, that motivated its founding."

Kentanji said: "Since becoming a part of the GDS community seven years ago, Patrick and I have witnessed the transformative power of a rigorous progressive education that is dedicated to fostering critical thinking, independence, and social justice. As a result, I truly value 'the GDS way' and have benefited personally from the school's unique and significant contributions to a child's intellectual and emotional development."

Nominated by President Barack Obama in 2012 and confirmed by the U.S. Senate in March of 2013, Ketanji serves as a federal judge on the United States District Court for the District of Columbia. Until December of 2014, Ketanji also served as a Vice Chair and Commissioner on the United States Sentencing Commission.

Prior to her four years of service on the Sentencing Commission, Ketanji worked for three years as Of Counsel at Morrison & Foerster LLP, with a practice that focused on criminal and civil appellate litigation in both state and federal courts, as well as cases in the Supreme Court of the United States. Previously, she served as an Assistant Federal Public Defender in the appeals division of the Office of the Federal Public Defender in the District of Columbia. She has worked as an Assistant Special Counsel at the Sentencing Commission and also as an associate with a law firm specializing in white-collar criminal defense and another focused on the negotiated settlement of mass-tort claims. Early in her legal career, Ketanji served as a law clerk to three federal judges, including Associate Justice Stephen G. Breyer of the Supreme Court of the United States.

Ketanji is currently a member of the Board of Overseers of Harvard University, the Judicial Conference Committee on Defender Services, and the Council of the American Law Institute. She also serves on the board of the DC Circuit Historical Society and the United States Supreme Court Fellows Commission.

Ketanji received her JD, cum laude, from Harvard Law School, where she served as a supervising editor of the Harvard Law Review. She met her husband, Patrick, when they were both undergraduates at Harvard College, where she received an AB, magna cum laude, in Government.

Ketanji and Patrick have two children, one of whom attends Georgetown Day School. She serves on the External Affairs Committee and Facilities Master Planning Committee.

JIM SHELTON



Jim Shelton is the former Deputy Secretary of Education and founding Executive Director of My Brother's Keeper under President Barack Obama, as well as a partner with Amandla Enterprises and senior advisor for the Chan Zuckerberg Initiative's education work. Along with his wife, Sonia, he is also a parent to two GDS students. He brings with him a deep interest in "helping the school navigate the complex period ahead and realizing its potential to positively impact our community and—with no hyperbole—the world."

Jim said that "the GDS community has supported our family during some of the most pivotal moments and periods in our lives. I could serve in a range of capacities for many years and not begin to repay the indebtedness I feel."

> *I could serve in a range of capacities for many years and not begin to repay the indebtedness I feel.*

Currently, Jim is serving as an Entrepreneur in Residence

KENYAN MCDUFFIE

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SHE THRIVES

Ketanji Brown Jackson: A decisive force applying rules to any and all

The D.C. judge ruled in 2018 that Trump overstepped his authority in order about federal workers' right to collectively bargain.



Adriana Bellet / for NBC News

Jan. 31, 2019, 5:53 PM EST

By Janell Ross

"She Thrives: Black Women Making History Today" puts the spotlight on 10 amazing individuals whose achievements transcend generations, occupations and regions. These women – all leaders in their communities – are truly elevating the conversation around black identity, politics and culture. Meet all of our "She Thrives" honorees here.

Name

Ketanji Brown Jackson

Title

Judge, U.S. District Court for the District of Columbia

Age

48

Hometown

Miami. Lives in Washington, D.C.

Words you live by

"To whom much is given, much is required."

Your hero

Constance Baker Motley, the first black woman to serve as a federal judge

How she thrives

Newton's third law of physics – for every action, there is an equal and opposite reaction – offers an imperfect but useful metaphor in U.S. District Court Judge Ketanji Brown Jackson's life.

When Supreme Court Associate Justice Antonin Scalia died in February 2016, Jackson made the Obama administration's short list of potential history-making replacements. Jackson, nominated to the U.S. District Court for the District of Columbia by President Barack Obama in 2012, ranks among the infinitesimal group of black women who have been considered and vetted for a slot on the nation's highest court.

Although Obama decided to nominate Jackson's colleague, Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia circuit, Jackson remains in the small group of people many court watchers expect to be nominated again in the future.

"It is a very complicated process that I probably should not say too much about," Jackson told NBCBLK. "I think anybody sane has mixed feelings about anything so auspicious. It was a

tremendous honor to even be thought of, so I felt very honored and flattered. But, it is also a political process, so it's scary."

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NBCBLK presents 'She Thrives:' Meet all of the honorees

Jackson is not often rattled. She is the kind of judge who writes 148-page opinions which make her rationale clear. She was the kind of student who applied early decision to Harvard, where she earned her undergraduate and law school degrees. And she's the kind of woman who speaks about the time her husband delayed his surgical training for the sake of her career, of the period in which she embraced an out-of-state commute for the sake of his career, and even of the year when she moved to Washington, D.C., with their child's nanny six months ahead of her husband for a job opportunity.

A former appellate lawyer in the private sector, federal public defender who handled appeals, clerk to Associate Justice of the Supreme Court Stephen Breyer, staff lawyer and later Obama-appointed member of the U.S. Sentencing Commission, Jackson is accustomed to deciding big matters.

That brings us back to the laws of physics and life. Obama's decision to go with Garland, regarded as a compromise to win Republican support, devolved into a long-running political conflict in which the GOP made the unprecedented claim that Obama had no right to fill the vacancy. But federal court rules have put Jackson in a position to decide consequential matters, often involving the Obama and Trump administrations anyway because D.C. is the seat of the federal government.

On the list: a 2018 case in which Jackson ruled that President Donald Trump overstepped his authority in an order curtailing the ability of federal employees to collectively bargain. Also, a 2013 case in which meatpackers tried to block Obama administration rules requiring labels to identify the animal's country of origin. Jackson upheld the rule. The meatpackers appealed and lost.

In 2017, Jackson sentenced the so-called "pizzagate" gunman, a North Carolina man who held a Washington, D.C., pizza restaurant at gunpoint based on his belief in a right-wing conspiracy related to child pornography and the 2016 presidential campaign.

“Personally, I am happy not to have those kinds of cases,” Jackson said,” but they are randomly assigned in our district, so you cannot avoid it. And if you were too shy to proceed in these arenas, then you really can't sit [on the bench] in the district.”

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Janell Ross

Janell Ross is a reporter for NBC BLK who writes about race, politics and social issues.

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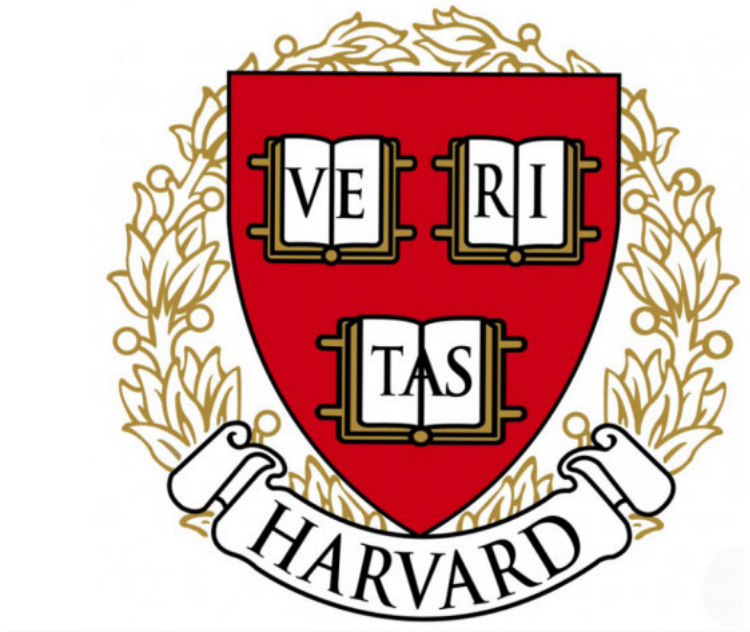
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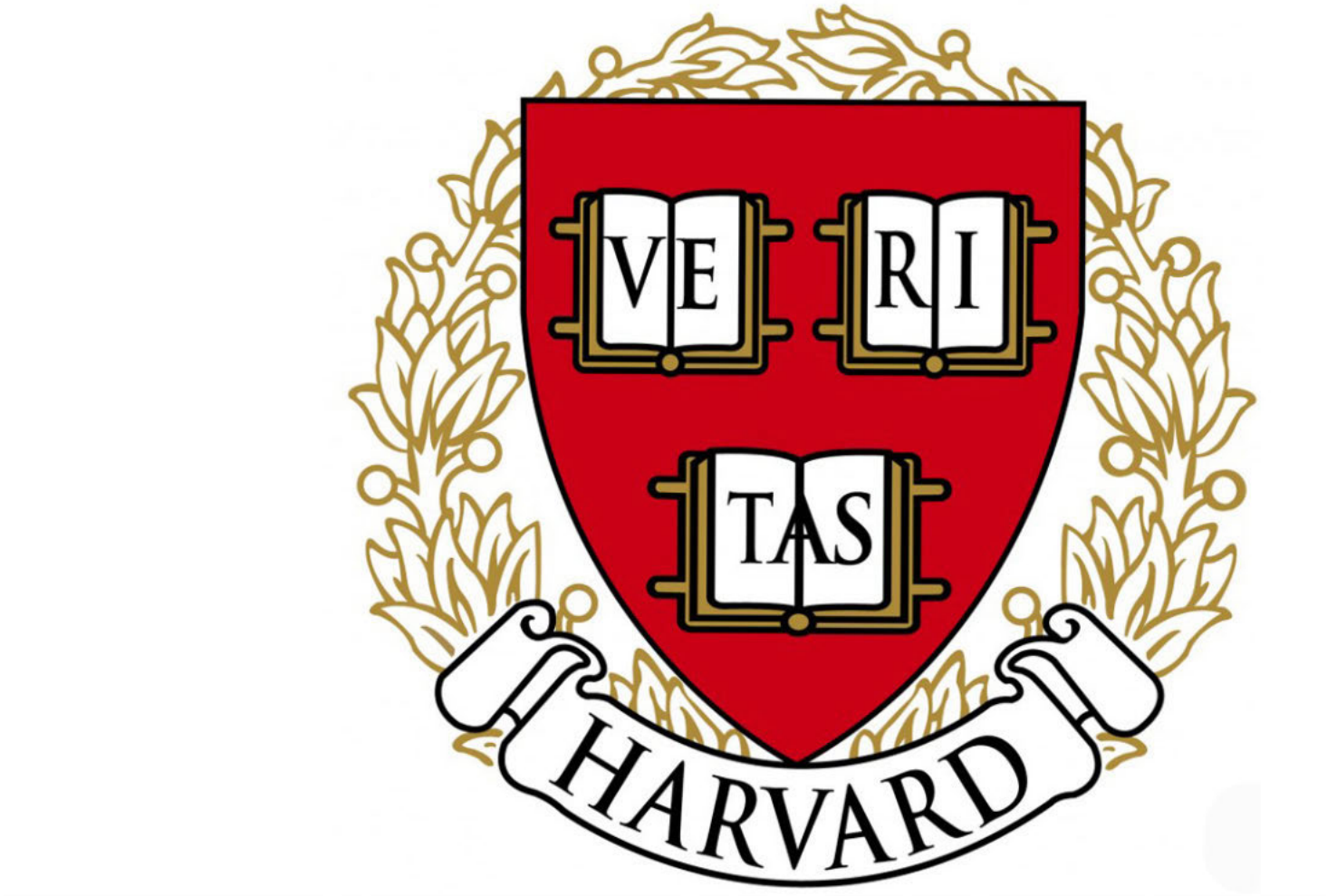
News

Contested Harvard Overseer Election Begins

by John S. Rosenberg [1]

3.28.16





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With the ferocious U.S. presidential primaries in temporary abeyance, Harvard's own 2016 campaign begins: ballots are scheduled to be in the mail April 1 for the annual election of members of the Board of Overseers and directors of the Harvard Alumni Association (HAA)—see the full slates here [4].

As previously reported [5], the election of five new Overseers is contested this year: in addition to the eight candidates put forth by the HAA nominating committee, five petition candidates qualified for the ballot [4]. Their "Free Harvard/Fair Harvard" [6] platform, challenging admissions and tuition practices, has in turn been vigorously opposed by a group of alumni [7], organized as the Coalition for a Diverse Harvard [8], who defend the University's policy of considering race and ethnicity as one factor in evaluating applicants for admission, in pursuit of a diverse student body.

As alumni voters begin considering their choices and voting (ballots must be returned to the University by May 20), they may wish to inform themselves of several recent developments, reported below: candidate statements in response to a questionnaire; endorsements and reactions; and a written statement on the issues by past presidents of the Board of Overseers.

The Coalition's Questionnaire

In keeping with its plan to solicit Overseer candidates' views [7] on what it defines as the core issues of affirmative action and diversity promoting admissions policies, the Coalition for a Diverse Harvard has published the responses in full here [9] They make interesting reading, presenting distinct worldviews on issues of importance to Harvard, and suggesting differences among candidates The responses are often nuanced, and come at the issues from different ways, so voters are well advised to read them in full and consider the arguments in depth; brief excerpts appear here

At one end of the spectrum, for example, Ketanji Brown Jackson '92, J D '96, an HAA nominated candidate, had to make an understandable recusal

> Thank you for posing these insightful and significant questions As a sitting federal judge who was nominated by President Obama and confirmed by the Senate in 2013, I feel duty bound not to express my personal views on matters of significance that have the potential to come before me in Court As you have indicated, diversity and affirmative action in higher education are among the hotly contested social issues that are currently working their way to, and through, tribunals across the country Consequently, I must respectfully decline to provide specific answers to your thoughtful inquiries

Ron Unz '83, who organized the Free Harvard/Fair Harvard slate, wrote in response to Coalition questions about affirmative action and workplace diversity

> I have always been personally opposed to racial/ethnic affirmative action However, since the candidates on our Free Harvard/Fair Harvard Overseer slate have a wide variety of different views on the contentious matter, this position is not part of our platform

and

> I've spent very little of my career as part of any large organization and anyway have serious doubts about the value of "diversity" for its own sake

HAA nominated candidate Helena Buonanno Fou kes '86, M B A '92, president of CVS Pharmacy, wrote

> I believe the intent of affirmative action, as it applies to educational institutions, is to provide equitable access to higher learning for historically under represented groups It has enabled institutions like Harvard to make tremendous progress toward that goal, but there is more progress to be made
>
> Affirmative action remains an important tool for mitigating environmental, cultural and institutional barriers to access and opportunity, and it would be a mistake for Harvard to deprive itself of that tool
>
> When considering applicants to Harvard, it is not only appropriate but necessary to take race into consideration, along with other forms of diversity that can benefit all students including ethnic diversity, religious diversity, cultural diversity, and diversity of gender, sexual orientation, talent, socioeconomic backgrounds, and place of origin, among many others

Petition candidate Lee C Cheng '93, chief legal officer of Newegg Inc , wrote

> I believe that race can be considered in college admissions it is a legitimate aspect of what makes every person different and diverse However, I oppose racial discrimination there is nothing affirmative about racial discrimination Race determinative admissions, where individuals, often from socioeconomically disadvantaged backgrounds, end up being discriminated against based on race and ethnicity, is morally repugnant to me It is never justifiable to favor someone rich over someone poor It is never justifiable to require one applicant to have to work harder, and achieve more, to have the same outcome, because of their skin color Race can be used, in my opinion, as a thumb on the scale of two equally qualified candidates, but it should not be used to justify different scales altogether

And petition candidate Ralph Nader, LL B '58, the activist/consumer advocate, wrote

> Student diversity is an indispensable element in education and should be a primary concern at Harvard University I believe that universities and all institutions should demonstrate respect for people from all walks of life and that universities should work especially hard to eliminate prejudice based on race, gender, religion, ethnicity, age, and socio economic status
>
> I strongly support affirmative action and reparations for African Americans
>
> I support race conscious college admissions with historical wisdom

Coalition Endor ement

The Coalition announced at its inception that consistent with its stand "in favor of race conscious and holistic admissions practice that support campus diversity" it would endorse Overseer candidates, based on their responses to the questionnaire On March 25, it endorsed the following five HAA nominated candidates [8]

> Lindsay Chase Lansdale '74, Evanston, Illinois Associate provost for faculty and Frances Willard professor of human development and social policy, Northwestern University
>
> Ketanji Brown Jackson '92, J D '96, Washington, D C Judge, United States District Court
>
> John J Moon '89, Ph D '94, New York City Managing director, Morgan Stanley
>
> Alejandro Ramírez Magaña '94, M B A '01, Mexico City CEO, Cinépolis
>
> Damian Woetzel, M P A '07, Roxbury, Connecticut Artistic director, Vail International Dance Festival; director, Aspen Institute Arts Program, *DEMO* (Kennedy Center), and independent projects

In making its selection, the Coalition said on its website, it had chosen the candidates "who we believe will best support campus diversity," based on evaluation of their responses to the questionnaire, their official ballot statements published by the University [10], and research conducted by Coalition

candidate-review committee members. Their evaluation, the statement noted, “did not alter the Coalition’s opposition to the ‘Free Harvard/Fair Harvard’ slate.”

Members of the review committee are identified as Jane Sujen Bock ’81, Maria Carmona ’85, Margaret M. Chin ’84, Tamara Fish ’88, Kevin Jennings ’85, Robert Lynn ’88, Jeannie Park ’83, Kristin R. Penner ’89, Tab Timothy Stewart ’88, Michael Williams ’81, and Rashid Yasin ’12. (An earlier report on the Overseers’ election [7] incorporated remarks from Jennings and Park, elaborating their views on the petitioners’ admissions and tuition planks.)

The Petitioners’ Response, and *Another* Campaign

In an e-mail, petition candidate Stuart Taylor Jr., J.D. ’77, an author and journalist, wrote, “I think we will do well among people who have time to read our platform and our individual views, as detailed on the highly informative website that Ron created for us, in our detailed answers to the Coalition’s questions, and in [news] coverage. I also hope that our answers will be circulated broadly among Harvard degree-holders because I suspect that a large majority of those who read them will find them persuasive even if the Coalition does not.”

In a telephone conversation, Ron Unz did not comment on the Coalition endorsements. “I think we have strong ballot statements,” he said. Most eligible voters, he continued, likely will become aware that there is a contested election only when they receive their ballots in the mail. He noted that news coverage of the election has perhaps been overshadowed, compared to his hopes, by the overwhelming media focus on the U.S. presidential primaries. (Unz’s media savvy is considerable. The Free Harvard/Fair Harvard slate announced its effort to secure petition slots on the Overseers’ ballot via a front-page story in *The New York Times* [5], and the effort is covered anew in an article on university endowments in the March 26-April 1 edition of *The Economist* [11].)

Similarly, he said, just a small percentage of alumni are aware of “how negligible the tuition dollars are relative to the rest” of the University’s revenues.” So he sees the Free Harvard/Fair Harvard effort prompting discussion about those matters (the subject of the article in *The Economist*)—an effort he would like to advance in a debate with HAA-endorsed candidates at or near Harvard, even if no such forum has been arranged to date. Whether or not the campaign succeeds in electing Overseers, he said, “some of the issues and ideas we’ve raised may reverberate down the road, even if it takes a bit longer than we’d l ke.”

Meanwhile, alongside his leadership of the petition slate, and publication of a collection of his writings (titled *The Myth of American Meritocracy and Other Essays* [12], after his magnum opus on admissions, discussed in some detail [5] here, with critics’ views here [7]), Unz has decided to multitask still further, making himself a candidate for the Republican nomination for a U.S. Senate seat from California. In an e-mail dated March 21, he wrote:

> As some of you may have already heard, a few days ago I made a last-minute decision to enter the U.S. Senate race for the seat of retiring Sen. Barbara Boxer in California [13]. I took out my official papers early Monday morning and returned them with the necessary 65 signatures of registered voters on Wednesday afternoon, the last possible day for filing.
>
> I am certainly under no illusions that my candidacy is anything but a tremendous long-shot.…
>
> The primary factor behind this sudden decision on my part was the current effort by the California Democrats and their (totally worthless) Republican allies to repeal my 1998 Prop. 227 “English for the Children” initiative. Although the English immersion system established in the late 1990s was judged an enormous educational triumph by nearly all observers, and the issue has long since been forgotten, a legislative ballot measure up for a vote this November aims to undo all that progress and reestablish the disastrously unsuccessful system of Spanish-almost-only “bilingual education” in California public schools.…
>
> After considering various options, I decided that becoming a statewide candidate myself was the probably the best means of effectively focusing public attention on this repeal effort and defeating it.…
>
> [I]f I were a statewide candidate myself, heavily focusing on that issue, my standing as the original author of Prop. 227 would give me an excellent chance of establishing myself as the main voice behind the anti-repeal campaign. I also discussed the possibility of this race with some of my fellow Harvard Overseer slate-members, and they strongly believed that my candidacy would be far more likely to help rather than hurt our efforts, which…was another major consideration in my decision. Furthermore, running for office provides me with an opportunity to raise all sorts of other policy issues often ignored by most political candidates or elected officials.
>
> This last point is one that I have frequently emphasized to people over the years, that under the right circumstances, the real importance of a major political campaign sometimes has relatively little connection to the actual vote on election day. Instead, if used properly, a campaign can become a powerful focal point for large amounts of media coverage on under-examined issues. And such media coverage may have long-term consequences, win or lose.

Past Overseers’ Presidents Weigh In

Finally, the magazine received a letter to the editor from five past presidents of the Board of Overseers, weighing in on the issues raised in the election to that governing board. It will appear in the printed and online versions of the May-June issue, available to readers in late April, about midway through the balloting. Given that timing, it is excerpted here, with brief identifications of the correspondents and their years of service as president of the Overseers:

> This year’s election is particularly important to the future of Harvard because a slate of five alumni has petitioned to join this year’s ballot in support of an ill-advised platform that would elevate ideology over crucial academic interests of the University.…[T]hese five alumni propose “the immediate elimination of all tuition for undergraduates,” including those whose families can afford to pay full tuition. They also suggest that Harvard’s admissions practices are “corrupt” and that Harvard discriminates against Asian-American applicants.
>
> The proposal to eliminate tuition for all undergraduates is misguided. Harvard’s financial-aid program, among the most generous in the country, already ensures that Harvard is affordable for *all* students. Roughly 20 percent of Harvard undergraduates—those whose parents earn less than $65,000—already attend free of cost. Students from families earning between $65,000 and $150,000 receive a financial-aid package designed to ensure that no family is asked to pay more than 10 percent of its income. And hundreds of students from families earning more than $150,000 receive financial aid. In total, more than 70 percent of undergraduates receive some form of aid.
>
> Harvard’s focus on affordability also ensures that tuition from those who can afford to pay continues to provide a significant source of funding for Harvard’s extraordinary educational programs. It simply does not make sense to forgo this considerable sum in order to make tuition free for students whose families can afford to pay. Although the candidates propose that free tuition could be funded by Harvard’s endowment, that simplistic premise fails to recognize that the endowment must be maintained in perpetuity and that much of it consists of restricted gifts. Rather than eliminating tuition, Harvard should continue to ensure that the cost of attendance remains affordable, and we have full confidence that the administration is committed to this important goal.

The allegations of corruption and discrimination in admissions are wholly unfounded, and mirror allegations raised in a lawsuit filed against Harvard by activists who seek to dismantle Harvard's longstanding program to ensure racial and ethnic diversity in undergraduate admissions. In reality, Harvard's admissions process—which considers each applicant as a whole person—has long been a model for undergraduate admissions at universities around the country. The current admissions policies ensure that Harvard maintains a diverse student body with a range of talents and experiences that enriches the experience of all students on campus. President Faust has recently reaffirmed Harvard's "commitment to a widely diverse student body," and has stated that Harvard will pursue a "vigorous defense of [its] procedures and…the kind of educational experience they are intended to create." We fully endorse her commitment to defending diversity.…

The Harvard Alumni Association has already proposed a slate of eight strong candidates for the Board of Overseers with a wide range of talents and expertise. We urge you to consider their candidacies carefully and to select the five candidates whom you think will best serve the interests of Harvard in the years to come. The candidates running on the "Free Harvard, Fair Harvard" slate, while accomplished individuals, are committed to a platform that would disserve the interests of the University about which we all care deeply.

Morgan Chu, J.D. '76, Partner, Irell & Manella LLP (2014-15)

Leila Fawaz, Ph.D. '79, Professor, The Fletcher School, Tufts (2011-12)

Frances Fergusson, Ph.D. '73, BI '75 President emerita, Vassar (2007-08)

Richard Meserve, J.D. '75, President emeritus, Carnegie Institution for Science (2012-13)

David Oxtoby '72, President, Pomona (2013-14)

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RACMONITOR.COM BROADCAST

Ketanji Brown Jackson
Vice Chair
United States Sentencing Commission

QUESTIONS

Q1. Many of our listeners represent organizations that have established effective compliance and ethics programs. Others are involved with organizations that are considering whether or not to make significant investments in such programs. Would you take a few moments to discuss the importance of establishing and maintaining effective compliance and ethics programs in organizations for purposes of application of the Federal Sentencing Guidelines (i.e., possible mitigation of penalties)?

Q2. You spoke a little in your initial comments about the elements of an effective compliance and ethics program under the guidelines and how an organization might approach evaluating its compliance and ethics program. One of the components was that organizations conduct a periodic review of the compliance and ethics program to ensure its effectiveness. Can you explain what this means?

Q3. Regarding the requirement that the organization's "governing authority" is knowledgeable of the program, should the governing authority just know that a program is in place or should they formally authorize the program design?

Q4. The Federal Sentencing Guidelines for Organizations were amended in 2010. Can you explain why the guidelines were amended and give a brief overview of the amendments? What impact, if any, do the amendments have upon healthcare providers?

Q5. As part of its responsibilities, the Commission continuously reviews the operation of its guidelines and it sometimes revises the guidelines and policy statements, including those dealing with organizations. We have already talked a bit about the amendments that the Commission made to the organizational guidelines in 2010. When the Commission is deciding whether and how to amend the guidelines, can working compliance professionals have input into the process?

RACMONITOR.COM BROADCAST
QUESTIONS AND ANSWERS

Q1. Many of our listeners represent organizations that have established effective compliance and ethics programs. Others are involved with organizations that are considering whether or not to make significant investments in such programs. Would you take a few moments to discuss the importance of establishing and maintaining effective compliance and ethics programs in organizations for purposes of application of the Federal Sentencing Guidelines (i.e., possible mitigation of penalties)?

A1. Having an effective compliance and ethics program is important because an organization that has been convicted of criminal misconduct faces *severe* penalties (an enormous fine) under the Federal Sentencing Guidelines, but the fine can be substantially reduced if the company has taken the types of concrete steps to prevent, detect, and remedy illegal conduct that a good compliance program contains. Having this mitigation mechanism in the guidelines—which can amount to up to a 95% reduction in applicable fines in some circumstances—is important because, as your listeners may know, a company can be held criminally liable for the bad acts of its employees as a matter of law, even if the employee acted without authorization. A compliance program permits the corporation to demonstrate its own antipathy toward lawbreaking and it also facilitates the organization's ability to discover risky behavior up front and address it before outside intervention is required. And even setting aside the sentencing context, having an effective compliance and ethics program can help an organization to meet regulatory benchmarks set by other federal agencies.

Q2. You spoke a little in your initial comments about the elements of an effective compliance and ethics program under the guidelines and how an organization might approach evaluating its compliance and ethics program. One of the components was that organizations conduct a periodic review of the compliance and ethics program to ensure its effectiveness. Can you explain what this means?

A2. A fundamental principle of the requirement that the program be ~~continually~~ Periodically reviewed is that a compliance program is not static – the program must still be evaluated for necessary changes, even if nothing goes wrong and no compliance breach occurs that you know about. The legal environment may change, the company may grow – or shrink – or expand into new business areas. The program in place at one instant in time may not be the right one later.

In conducting the periodic review, an organization's approach to evaluating its compliance and ethics program should be tailored to the size of the organization and the realities of the industry in which it is in. For example, in a business that is subject to regulation, such as the healthcare business, evaluation of the program should occur at least as often as the regulations change, so that the program is kept current with the regulations.

Q3. Regarding the requirement that the organization's "governing authority" is knowledgeable of the program, should the governing authority just know that a program is in place or should they formally authorize the program design?

A3. In section 8B2.1, the guidelines require that "the organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program *and* shall exercise reasonable oversight with respect to the implementation and effectiveness" of the program. This means

that the governing authority must be actively involved with the design and operation of the compliance program; thus, just knowing that a program is in place may not be enough.

Q4. The Federal Sentencing Guidelines for Organizations were amended in 2010. Can you explain why the guidelines were amended and give a brief overview of the amendments? What impact, if any, do the amendments have upon healthcare providers?

A4. The guidelines were amended two years ago in response to public comment received by the Commission and also to address certain concerns that the Commission had identified on its own. The 2010 guideline amendment involved several changes, two of which I will highlight here:

First, the guideline was changed to clarify the steps that a corporation must take to remedy the harm resulting from criminal conduct. The guidelines now require that, after criminal conduct has been detected, the organization must take "reasonable steps" to respond appropriately to the conduct and to prevent further similar criminal conduct. Such steps may include providing restitution to identifiable victims, self-reporting and cooperation with authorities, and the assessment and modification of the compliance and ethics program as necessary to prevent and detect criminal wrongdoing more effectively in the future.

A second part of the amendment addressed the general prohibition against a company's being given mitigating credit for having an effective compliance and ethics program in a situation in which the company's high-level or substantial authority personnel were involved in the offense. The overwhelming majority of organizations convicted and sentenced are smaller organizations, and many criminal cases involve high level individuals in the organization. Under the original guideline, an

organization could not be given credit for having an effective compliance and ethics program if a high-level officer was involved in the criminal conduct.

The 2010 Amendment created a limited exception that allows an organization to receive credit for its compliance program if the organization meets four criteria: (1) the individual (or individuals) with operational responsibility for the compliance and ethics program has *direct reporting obligations* to the organization's governing authority; (2) the compliance and ethics program detected the offense before it was discovered outside the organization or before such discovery was reasonably likely; (3) the organization promptly reported the offense to the appropriate governmental authorities; and (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense. With respect to the first prong of the new exception, an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program."

These two amendments are significant improvements that we anticipate will encourage companies to take prompt and concrete remedial action when criminal conduct is discovered, and also will make the mitigating credit for having an effective compliance program more widely available, thereby further encouraging both internal and external reporting.

In regard to your question about the impact of these changes for the healthcare industry—we believe that these amendments will

likely have the same impact for healthcare professionals as for any other organization.

However, I intentionally mentioned the "direct reporting obligations" requirement because healthcare providers may want to ensure that the individual (or individuals) with operational responsibility for their compliance and ethics program has "direct reporting obligations" to the organization's governing authority. Companies may want to consider whether it is necessary to amend position descriptions or adopt organizational changes to provide for that express authority; however, it is important to note that the Commission did not expressly mandate organizational chart changes. The guidelines leave room for organizations to ~~individually~~ assess how best to accomplish this direct reporting authority. The Commission intentionally left such decisions open because of the vast differences in the organizations and corporations potentially subject to the guidelines. Effective compliance and ethics programs must be individually tailored to the needs of the organization.

Q5. As part of its responsibilities, the Commission reviews and revises the guidelines and policy statements, including those dealing with organizations. For example, I understand that the Commission just amended the organizational guidelines in 2010. When the Commission is deciding whether and how to amend the guidelines, how do working compliance professionals have input into the process?

A5. The Commission recognizes that "the organizational guidelines [like all guidelines] may need to be modified as circumstances change" and it encourages practitioners and industry representatives "to share their thinking about the organizational guidelines and their effect." Your listeners and other industry professionals can have a significant impact on

whether changes are made to the existing guidelines. Send letters; comment on our priorities; give us feedback. It is even at industry events such as this one that we are able to touch base with the people who work with compliance issues on a daily basis and who are able to give us informed and extremely helpful reactions to guideline policy. We value this information.

Global Debate

News and information about debating activities all over the world in many different formats and context

SATURDAY, AUGUST 9, 2008

Fran Berger - Dedicated Debate Legend Called "Unforgettable Hero"

From http://www.miamiherald.com/512/story/631911.html



Posted on Thu, Aug. 07, 2008
Dedicated debate legend was an `unforgettable hero'

BY ELINOR J. BRECHER
Amy Chafetz tells this story about her mother, local-legend debate coach and National Forensic League Hall of Famer Fran Berger:
She went to a funeral recently that many of her one-time students attended.

``They were so excited to see her, and they all gave her their business cards. They were all lawyers."

Which is hardly a surprise.

Berger, who died suddenly at her Aventura home on Tuesday, taught a generation of Palmetto High School students the power of a persuasive argument. Her teams won national tournaments and produced individual champions year after year.

She was 61 and had retired about 10 years ago due to diabetes, high blood pressure and other ailments that husband Steven Berger -- a retired lawyer -- called ``annoying but nothing that was going to kill her.

``This was really a shock."

The shock so quickly reverberated around the country that by Wednesday afternoon, 14 former students -- including an Ivy League professor, a former Supreme Court clerk, doctors, executives, government officials and of course, lawyers -- collectively sent a letter to The Miami Herald calling Berger an ``unforgettable hero."

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This blog is a continuation c original Global Debate Blog established at http://debate.uvm.edu/de /.

They described her as ``colorful and controversial, mercurial and madcap, but, above all . . . dedicated to her students more than perhaps any teacher we have ever known."

When her best friend and former Palmetto teacher Iris Katz of Las Vegas heard the description, she laughed.

"In the fall, her hair was generally red. By winter it was snow-white blond. In the spring it was reddish-orange," and in summer, something like her natural brunette.

"Think bouffant," said Katz. And brassy.

``She could get an upgrade in the emergency room."

Francine Blake Berger was born in New York and spent her first four years in New Jersey before moving to Miami Beach. Fran Blake and Steve Berger, both Miami Beach High School debaters, began dating as young teenagers. Through them, their parents became close friends, so that after Fran and Steve graduated from the University of Alabama one year apart and married on Aug. 20, 1966, the two families essentially melded.

Fran Berger fielded her first debate team at Palmetto in 1981, and having combined students from the high school, Palmetto and Southwood middle schools, created the largest chapter of the National Forensic League in the country, Steve said.

The group inducted her into its Hall of Fame in 2002.

Berger lived her job nearly 24/7. Her husband said she'd leave the house at 5 a.m. and fall asleep on the phone with students at 11 p.m.

But she still found time to teach prison GED courses.

Her debate teams were constantly on the road, which meant she was always raising money -- "bagel baskets, Mother's Day presents, candy bars, roses -- anything that would sell at a good profit, Fran was selling it," Katz said. She was controversial because "she fought for her team," Katz said. ``Other teachers were upset when they traveled and some administrators questioned how long the kids should be out of school."

From her mother, Amy Chafetz learned ``that if you believed very strongly that you're right, it makes the argument a lot easier. People will believe you if you have a lot integrity and deal with the issue, not the person."

Miami lawyer Richard Rosenthal, Palmetto class of 1990 and a

Check here for 2007 Global Blogs, and here for 2006 Gl Debate Blogs. The search e previous blogs can be founc

See a list of all my website http://alfredsnider.blogspc 009/02/my-websites-index.

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all of her debaters helped raise money.

He said that she used ``to finance kids who otherwise couldn't afford to travel."

She'd buy suits for boys who couldn't afford them, and sometimes bought plane tickets.

Berger didn't just assemble teams, said Rosenthal: ``She built a family . . . Everything was for her students."

And, he said, she could talk anyone into anything.

``There was no length to which she would not go. If the hotel where we were supposed to stay was sold out, she'd schmooze her way in and hold her breath until we got our rooms."

Ketanji Brown Jackson, class of 1988, once clerked for Associate Justice Stephen Breyer. She's now in private practice with a Washington, D.C., firm.

In her senior year, Jackson won first place for original oratory in the National Catholic Forensic League grand nationals.

Berger "was over the moon," she recalled. ``She was wonderfully supportive . . . I don't know that many teachers who would have given of themselves in that way. Her dedication was the reason so many of us did so well."

In addition to her husband and daughter, Fran Berger is survived by a son, Charles, of Detroit.

Funeral services are at 10:30 a.m. Thursday, at Levitt Weinstein Memorial Chapel, 18840 W. Dixie Hwy., North Miami Beach.

Posted by Alfred Charles Snider at 9:02 AM

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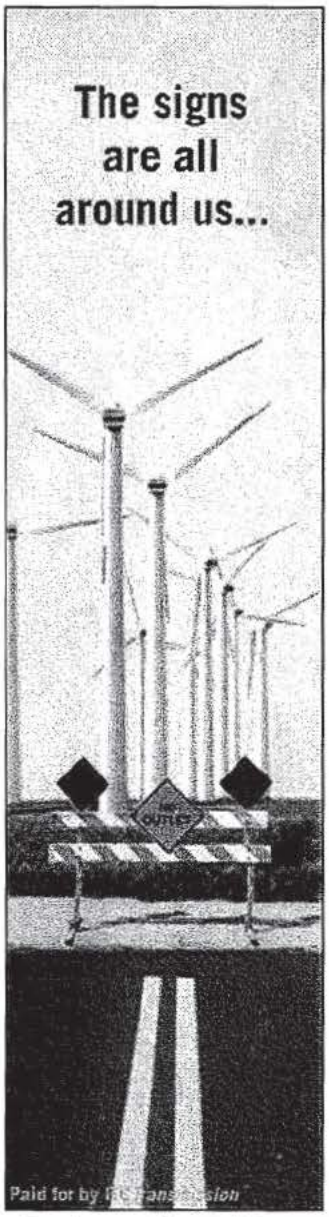
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Detroit At-Risk Studer Thrive on Debating

The Washington Post

Justice Thomas's Life A Tangle of Poverty, Privilege and Race

By Kevin Merida and Michael A. Fletcher
Washington Post Staff Writers
Sunday, April 22, 2007; A01



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Drugs have been a persistent problem in Pin Point, Ga., a tiny rural settlement best known as the birthplace of Supreme Court Justice Clarence Thomas. Neighborhood leaders tried everything to chase the scourge away -- a march, a warning sign along the main drag, even a pilgrimage by the local church congregation, which prayed for and sang hymns to the dealers one Sunday morning.

"The guys who were on the corner just walked away," said Bishop Thomas J. Sills, the pastor at Sweet Field of Eden Baptist Church. But they didn't stay gone.

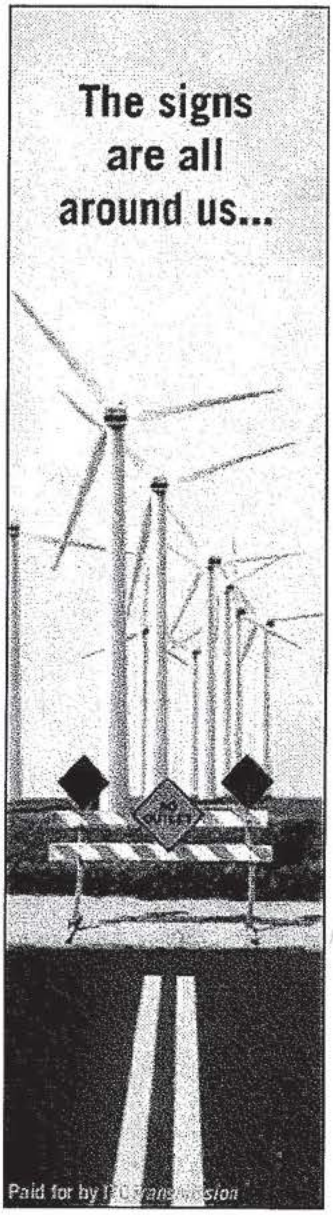
One of the local dealers was Clarence Thomas's nephew. Until his 30-year prison sentence began in 1999, Mark Elliot Martin, the son of Thomas's sister, had been part of Pin Point's drug problem. He had been in and out of trouble, and in and out of jail -- at least 12 arrests, according to court records. In 1997, the year Martin was convicted of pointing a pistol at another person, Thomas assumed custody of his nephew's son, with the nephew's permission. Mark Elliot Martin Jr. -- "Marky," they called him -- was a precocious, curly-haired 6-year-old. The justice promised to give Mark what Thomas's grandfather had given him at the same age -- opportunities to succeed beyond what the boy had in Pin Point.

Thomas's intervention in this family crisis reflects a side of him not widely known. As arguably the most powerful African American in public life, he labors under expectations that none of his fellow justices face. Even as Thomas goes about his work, perhaps the purest conservative on the high court, it is his racial identity that shadows him. For 16 years, there have been questions: Would he be on the court if he were not black? Would his silence at oral arguments cast doubt on his intellect if he were not black? Would he be the subject of such public scrutiny if he were not a black conservative?

Ever since Thomas replaced Thurgood Marshall in 1991, many have struggled to reconcile who he is today with where he began -- as the Jim Crow-era child of deprivation in Pin Point, a boy whose family insulated its shack with newspapers and shared an outhouse with neighbors.

Ketanji Brown Jackson, a former clerk for Justice Stephen G. Breyer, remembers sitting across from Thomas at lunch once with a quizzical expression on her face. Jackson, who is black, said Thomas "spoke the language," meaning he reminded her of the black men she knew. "But I just sat there the whole time thinking: 'I don't understand you. You sound like my parents. You sound like the people I grew up with.' But the lessons he tended to draw from the experiences of the segregated South seemed to

be different than those of everybody I know."



For Thomas, those experiences begin in Pin Point with a family that has faced society's most difficult social challenges: poverty, illiteracy, divorce, child abandonment, drugs, crime, imprisonment. At times, Thomas has found these problems almost too much to bear. This account is based on interviews with friends, family members and acquaintances of Thomas, as well as court records in Georgia. The justice turned down repeated requests for an interview.

When he began raising Mark -- Thomas has one adult son from a previous marriage -- he altered his Supreme Court schedule. He sent Mark to private schools, gave him extra homework to improve his math and reading, taught him to dribble with his left hand. And Mark responded. He excelled in school, became a Harry Potter fan and took up golf, and as a teenager he is comfortable around some of the most brilliant legal minds in the country.

A Blow to the Family

Mark's father was another story. Thomas had tried desperately to reach him, without success. Though Martin was good with his hands and worked for a time repairing piers at a marina near Pin Point, he injured himself and lost that job. And because he was illiterate, according to his attorney, he had little means of supporting himself. He was on probation and out of work when his luck turned worse.

On Aug. 19, 1998, 13 suspects -- all from Pin Point or nearby Sandfly -- were arrested by authorities in a 6 a.m. raid and charged with conspiracy to distribute crack cocaine. More warrants and arrests followed. And soon everyone in Pin Point had an immediate family member, distant cousin or close friend brought down by "Operation Pin Drop," as the 20-month undercover drug investigation was called.

Martin was convicted of selling 17.2 grams of cocaine to a government informant in two transactions. The informant turned out to be Martin's own cousin, Rufus Anderson, a recovering crack addict who was a key figure in the sting. Martin's defense was entrapment. The arrests divided the community and created lingering tension within Thomas's family about the impact of the justice's legal decisions on poor African Americans like his nephew.

When the drug bust went down, Thomas was so disappointed that he offered no legal advice, no pep talk, nothing. Thomas's mother said he had tried in vain to help his nephew many times. " 'Mark, please, you got them pretty little kids. Please,' " she recalled her son pleading. But Thomas couldn't get through, and now he really was through.

This time, Uncle Clarence just kept his distance. And his sister, Emma Mae Martin, didn't say a word, "just left it alone," as she put it. She didn't even ask her well-connected brother for help. "Nope, nope, no, no," she said emphatically, signaling the strain in their relationship. "He didn't want to get involved anyway," she added.

Reached at the Federal Correctional Institution in Coleman, Fla., Mark Martin was doing the kind of

long, difficult stretch that saps one's spirit. "Down here it's hard," he said in a telephone interview. "Any given day you can die." He has since been transferred to a federal prison in South Carolina.

And being Clarence Thomas's nephew has no benefits in prison. "I try to avoid letting people know who he is to me because they might want to do something to me because of him," Martin said.

Thomas is not popular among the other inmates, the nephew emphasized. Most consider the justice a sellout, believing that a black jurist should not support draconian penalties but should question why the nation's drug laws hit low-level dealers and African Americans disproportionately hard. On the court, Thomas has largely backed the government's position on drug crimes and incarceration, including on questions of inmate property forfeiture, visitation rights and maximum sentences for repeat offenders.

"They always asking, 'Why he ain't got you out of this stuff?' " said Martin. "They say he could help change the law and he doesn't." Not long ago, Martin decided to try to help himself. He figured he'd study up on the law, so he asked his uncle if he would mind sending him some law texts. "He said he would try to get some books to me as soon as he can."

Ties to His Home Town

Pin Point, population 275, is just seven-tenths of a mile from one end to the other. But getting your mind around it takes some time. It was once a plantation site, carved up and sold to blacks in the late 1890s and early 1900s. Many of the original lots are held by the heirs of the former slaves who bought the parcels more than a century ago.

This is where Clarence Thomas was born twice -- physically on June 23, 1948, as the second child of M.C. and Leola Thomas, then symbolically in the summer of 1991 as the humble young judge who rose from poverty and was tapped by President George H.W. Bush as the second African American nominated to the Supreme Court. This turned Thomas into an emblem of America's racial progress and made Pin Point a fabled corner of the South.

But the truth is that Thomas's rise was never anchored in Pin Point, as White House advisers led the public to believe. His family's house had burned down when he was 6, and for most of his young life he was raised comfortably in Savannah by his grandfather Myers Anderson, one of the black community's leading businessmen.

When Thomas does return to Pin Point now, he comes quietly and leaves quickly. He is not a frequent visitor. Some residents note he missed Pin Point's last two summer reunions, in 2000 and 2004. Thomas's sister says her brother has never even been inside her home. "No, I don't think so," Martin said.

Pin Point is beautiful, in a sleepy, antebellum way -- the tall oaks draped with Spanish moss, the gentle summer breezes. The community's valuable waterfront property looks out on Shipyard Creek, where commercial crabbers still ply their trade and high tides overtake the marsh in the middle of the day. Just beyond the creek and the marsh is Moon River, named for Johnny Mercer's 1961 ballad.

"This is paradise here," said Abe Famble, Thomas's closest childhood friend.

But Pin Point is not just quaint; it's also tragic. Eighty percent of its inhabitants live below the poverty line. The lone church, which Thomas's mother attends, is next to a cemetery where the weeds are often taller than the headstones. The one business in Pin Point -- A.S. Varn and Son's oyster and crab

company -- shut down in 1985. This was where generations of Pin Point residents, including most of Thomas's family, picked crabs and earned 5 cents a pound. Today, Pin Point claims a U.S. Supreme Court justice as its most noted son but can't muster enough political clout, or wherewithal, to get a historical marker celebrating this fact.

Some long-timers fear that wealthy developers will convert Pin Point into a mini Hilton Head and that it will soon lose its soul and character. With the community aging, some have asked, how long can people hold on to their properties? "If ever there was a time to stick together, it's now," said Charles Harris, president of the Pin Point Betterment Association. He only wishes Thomas would take more of an active interest in his birthplace. "It looks like to me a person of his status could tell us something or give us some advice on how to save it."

Sure, Sills says, the justice's advice and contacts could help the quality of life in Pin Point. But the pastor thinks that too much is expected of Thomas. "I think if our people took more time to encourage him," admonished Sills, "he'd do more."

Pin Point Comes to Thomas

Thomas maintains a distant but emotional attachment to his home town. He is always curious. Sometimes he will ask his old friends about Pin Point's youths. Why are so many of them throwing their lives away? He'll talk about the need to sit with some of the senior citizens before their perspectives on history are lost. Each summer, his curiosity is stoked further when a slice of Pin Point comes to him.

Famble and his wife, Odessa, rent a van and drive from Georgia to Fairfax Station to visit the Thomases. They bring with them Thomas's mother and stepfather, who live in Savannah, Thomas's cousin Isaac Martin, and usually the justice's sister. They spend a week relaxing and reminiscing. They barbecue on his deck, drop in at the Supreme Court's gift shop, stay up late playing cards in the kitchen ("I Declare War"). They go to the outlet malls. They take day trips: One summer it was Luray Caverns, a popular tourist attraction in Virginia's Shenandoah Valley; another year it was Gettysburg, Pa., where they toured the Civil War battle site.

"When we get there," observes Famble, "he lets the whole world go and deals with us."

And there is a lot to let go. Some who have visited Thomas in his chambers at the court have noticed how much he broods -- about the slights of his childhood, the teasing he absorbed over his dark skin, the racism he encountered in seminary, the rejections he faced coming out of law school. Struggle is a theme he returns to again and again, even in public appearances.

During a visit once to the Virginia Home for Boys & Girls, he encountered a hyperactive boy who had trouble concentrating. He had never sat still longer than 15 minutes, he told Thomas. "It's hard in school," the boy said. "I know it," Thomas replied, "but it's hard for me."

Reconnecting With Family

Thomas hails from a family in which he has no peers -- no one educated at a leading university, no one who eats out at four-star steakhouses, no one who travels to Italy to lecture or commands $1.5 million for a memoir. Given a generous boost from his grandparents, Thomas flourished. The ambivalence -- at times, perhaps shame -- he felt about some members of his family has been hard to shake.

Emma Mae Martin, who was once publicly singled out by her brother as an example of the debilitating

effects of welfare dependency, is a high school dropout who later earned her diploma in night school as an adult. She and her brother don't talk politics or law or philosophy. Their conversations tend to be about, "well, not much really," Martin said. "Find out how I'm doing, what I'm up to, that's about it."

She lives her life and lets him be. "He's supposed to be a judge," she said, "but you can't judge anybody unless you judge yourself. I've never judged anybody, but people judge me all the time."

For many years, Thomas and his mother were not close, either. Her favorite son was Myers Thomas, Clarence's younger brother, who died in 2000 of a heart attack suffered during a morning jog. "Myers was the kindest-hearted one," she said. He called often, came to visit when she was lonely, took her for rides. "I had more dealing with Myers," she explained. "Me and Myers were more really open and close together."

Though Thomas had not always thought the best of his mother as a parent, when Myers died suddenly, it tore him apart and caused him to reexamine the life he was leading. "When my brother died," Thomas said later, "it showed me the other perspective, that not only do we do things in our professional life, but there is the family side of life -- the things that really matter."

He knew what Myers had meant to his mother, and gradually Thomas stepped into the role his brother had played.

In one particularly poignant moment for Leola Williams, the name she took after her fourth marriage, to David Williams in 1983, Thomas readied his mother for something he had long intended to tell her. "And I'm just sitting up, now I want to hear what it is," she recounted. And Thomas told her: "I just want to let you know that I love you. Hadn't been for you, I wouldn't have been here today. Hadn't been for you having me, I wouldn't be where I am today. So I give it all to you."

During summer, after the court has adjourned, Thomas loves nothing more than to be behind the wheel of his 40-foot motor home, tooling down the open road with his wife, Ginni, and his great-nephew Mark -- and a slice of Pin Point in tow. Growing up, he had never ventured beyond three counties in Georgia. Now, the experience has become essential to his happiness.

As Thomas once put it: "It allows me a sense of freedom."

Adapted from the book "Supreme Discomfort: *The Divided Soul of Clarence Thomas" by Kevin Merida and Michael A. Fletcher, Doubleday, New York, © 2007.*

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1 of 1 DOCUMENT

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The Boston Globe

November 17, 1990, Saturday, City Edition

SECTION: METRO/REGION; Pg. 34 p

LENGTH: 513 words

HEADLINE: Harvard students end sit-in protest, demand more Afro-American faculty

DATELINE: CAMBRIDGE

BODY:

A group of Harvard University students that conducted an all-night demonstration in the school's main administration building ended its protest yesterday morning and presented the administration with a demand for more professors in the school's Afro-American Studies department.

The protest was the second in as many months by students who have demanded that the university hire more faculty for the department. A similar protest was held at Harvard president Derek Bok's office last month.

Anthony McLean, one of the organizers of Thursday's protest, said: "We are out here because of this university's atrocious neglect of Afro-Am studies. We have begged them, sent them letters and have requested meetings but they still haven't made any solid commitment to the program. We're sick of it."

Students submitted a list of five "expectations" to Archie Epps, the dean of students. The major request was for six new professors, three of whom would teach full time in the Afro-American Studies department, and three to be shared with affiliated departments in the university.

Students have also asked for weekly meetings with university officials to discuss hiring.

Reed Colfax, a junior and an Afro-American studies major, said he was one of eight students to spend the entire night Thursday in University Hall. He said the group slept on the floor outside Epps' office.

Colfax said the purpose of Thursday's protest was to draw increased attention to the issue. "We've had our meetings with these people," he said referring to Bok and other university administrators. "This was more of a symbolic gesture to say we will continue."

According to McLean, 25 students entered University Hall on Thursday night. Another group spent the night on the lawn in front of the building. At about 9:30 a m. the students inside the building filed out and joined the others on the building's front steps.

Colfax said Epps asked the students to leave yesterday morning and confiscated their student identification cards. Epps told the students they could be subject to unspecified disciplinary action, which could range from academic probation to expulsion, according to Colfax.

Attempts to reach university officials were unsuccessful.

The school established the Afro-American Studies department in 1969. The program has drawn criticism over the years for lack of full-time faculty members. The program will be without a full-time faculty member next semester.

There were no reported arrests or injuries during the protest. Organizers estimated that at least 200 students participated both inside and outside the building.

McLean, who is a junior majoring in Afro-American studies, said students will conduct a march today during the Harvard-Yale football game. He said marchers will assemble in front of University Hall and proceed to Harvard Stadium.

Students were asked to wear black to the game and not wear crimson and white, Harvard's colors.

"We can embarrass the university in front of the alumni," Ketanji Brown, a junior government major, said yesterday.

GRAPHIC: PHOTO, Harvard students wrap up an overnight protest with a rally yesterday morning outside University Hall. / GLOBE STAFF PHOTO / GEORGE RIZER



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Found on Miami.com
The Miami Herald

April 17, 1988 Sunday
FINAL EDITION

SECTION: NEIGHBORS KE; Pg. 36

LENGTH: 661 words

HEADLINE: PALMETTO STUDENTS EXAMINE THEIR VALUES

BYLINE: JONATHAN KARP Herald Staff Writer

BODY:

It may be as impersonal as a swastika scrawled on a bathroom stall or as blunt as a teacher telling a black student she will not be considered for a starring role in a play about a white family.

Thursday morning at Palmetto High School, students discussed prejudice in all its forms, from ethnic jokes to the crimes of Nazi Germany. During the three-hour program on values, students heard from community activists and participated in classroom discussions.

"What we're attempting to do as a community and staff is to start thinking about what our values are and how they affect our thinking," said Janet Hupp, chairman of the school's intergroup relations task force.

Hupp said she hopes an emphasis on values will reduce cheating and other unproductive forms of academic competition, as well as promote harmony among students.

Students viewed The Wave, a film about a high school teacher who convinces his students to follow a mass movement based on strength and discipline. After stirring wide support, the teacher identifies the leader of the movement -- Adolf Hitler.

The film, designed to provoke students to think for themselves, drew a lively response in creative writing teacher Stephanie Loudis' class. Some students said they avoid the calculated displays of loyalty at pep rallies and football

games. One student said the only group activities he endorsed were singing, and possibly prayer.

But when Loudis abruptly asked all the students to stand up, none of them hesitated except Luis Rotolante, 17, who with his long hair, torn T-shirt and assortment of punk jewelry, embodied the classic rebel.

Loudis complimented Rotolante for questioning authority.

"No one thinks the same way as anyone else," Rotolante said. "People just want to think the same way."

Before seeing the film, students attended three different assemblies. At one, Valerie S. Berman and Fred David Levine of the Anti-Defamation League of B'nai B'rith led a discussion on racial, ethnic and religious awareness.

Meanwhile, actress Roz Ryan of Miami, a regular on the NBC comedy Amen and mother of Palmetto sophomore Darren Reid, told students to set their goals and stick to them. "You can do anything you want to do," Ryan said. "Just make up your mind and get on down."

Ryan said she started singing in clubs at age 16. Her parents allowed her to perform as long as she maintained a B average. Now 36, she works three weeks a month in Hollywood and returns to her home in Miami to be with her family. "When I come back here, my husband and son want to know if their dinner is ready and their underwear is clean," she joked.

Ryan's husband, Lance Singleton, also spoke at the assembly and drew hearty applause from girls in the audience when, in discussing teen-age sexual relationships, he said, "Gentlemen, you have a responsibility."

Singleton, a manager for Eckerd Youth Development Foundation in Okeechobee, helps incarcerated youth adjust to life after jail. "If you care about an individual," he told the boys, alluding to birth control, "care about what's going to happen to their future."

The third discussion was led by six students, and focused on the lack of communication among ethnic and racial groups at the school. Although Palmetto is 73 percent non-Hispanic white, 11 percent Hispanic and 16 percent black, those groups do not frequently mix, said panelist Ketanji Brown, 17.

After the discussion, Brown and panelists Stephen Rosenthal, 18, and Guillermo Cano, 17, said they each had seen examples of prejudice during their years in the public schools.

Cano, who is from Nicaragua, remembered being called "alien" in elementary school. Rosenthal, who is Jewish, said he had seen swastikas in bathrooms. Brown said a drama teacher told her she would not have a chance to win a role in a play about a white family because she is black.

"We can be a beginning," Cano said. "We have to start changing these prejudices."

Echoed Brown, "If you don't talk about it, you never deal with it."



8 of 10 DOCUMENTS

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The Miami Herald

October 4, 1987 Sunday
FINAL EDITION

SECTION: NEIGHBORS SE; Pg. 7

LENGTH: 378 words

HEADLINE: SECRETARY IS GRILLED ON POLICIES

BYLINE: TERESA SMITH Herald Staff Writer

BODY:

U.S. Interior Secretary Donald Hodel, who is under intense criticism from Florida politicians, got the same treatment last week from Palmetto High School students.

After he gave a brief speech about the Interior Department and what it does, a panel of eight seniors questioned the secretary, who was in Miami on Thursday and Friday, with pointed questions about the environment.

"Oil and water don't mix," said Ketanji Brown, who asked why the department is endangering Florida's irreplaceable reefs by permitting offshore oil drilling.

Under Hodel's plan, waters off the Florida Keys would be leased to oil companies for exploration beginning in 1992. Gov. Bob Martinez, the state's two U.S. senators and environmental groups are leading a fight against the plan.

Hodel said the government's task was to find a balance between energy needs and environmental preservation. "This is a sensitive environmental mix," he said, adding that tankers are a greater threat to the coast than the "remote possibility" of an oil spill from drilling.

"He didn't really answer the question," said David Eckstein, editor of the school newspaper. "He made reference to California oil spills but didn't say anything about the effect on reefs in the Keys."

Ameeta Ganju asked Hodel what he thought about Sen. Bob Graham's proposal to end draining of the Kissimmee River into surrounding farmland, which she said has decreased the number of wading birds 90 percent.

Hodel said he was not familiar with the proposal.

"We thought as Secretary of the Interior he would know about it. But with everything he has to do I guess it's understandable," Ganju said later.

Hodel spiced his arguments with personal anecdotes. His jokes and offhand manner won him laughter and smiles, if not applause, from the audience.

Hodel's dollars-and-cents approach to environmental problems reflected President Reagan's philosophy.

The United States should not stop producing chemicals that deplete the ozone layer in the atmosphere because other countries would then produce them instead, he said, taking profits away from our businesses.

"I think he contradicted himself," said junior Aaron Greenman. "He based all his arguments on an economic standpoint, but at the end he said the main objective was the environment."

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 13(b)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5271 **September Term, 2021**

1:19-cv-02117-TJK
1:19-cv-02530-TJK

Filed On: February 24, 2022

I.A., et al.,

Appellees

v.

Merrick B. Garland, Attorney General of the United States, in his official capacity, et al.,

Appellants

Consolidated with 20-5273

BEFORE: Millett, Wilkins, and Jackson*, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss these consolidated appeals as moot and vacate the district court's judgments, the response thereto, and the reply, it is

ORDERED that the motion be granted as to the unopposed request to dismiss the appeals as moot, and denied as to the request for vacatur. With respect to the request to dismiss the appeals as moot, the appellees' issuance of a joint final rule that supersedes the joint interim rule giving rise to the complaints in these cases has rendered these appeals moot. See Planned Parenthood of Wisconsin, Inc. v. Azar, 942 F.3d 512, 516 (D.C. Cir. 2019).

With respect to the request to vacate the district court's judgments, the party requesting vacatur has the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur." U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994). Appellants have not done so here. Furthermore, vacatur is generally inappropriate when "the party seeking relief from the judgment below caused the mootness by voluntary action." Id. at 24; see also Center for Science in the Public Interest v. Regan, 727 F.2d 1161,1166 (D.C. Cir. 1984).

* A statement by Circuit Judge Jackson, concurring in this order, is attached.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5271 **September Term, 2021**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5271 **September Term, 2021**

Jackson, Circuit Judge, concurring:

The order that we issue today clearly states the background legal principle that should be the starting point for every determination of whether *Munsingwear* vacatur is appropriate: that the party requesting vacatur bears the burden of showing that the equities entitle it to that "extraordinary remedy." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). I write separately to underscore this point, which I find especially important in the recurring context of a district court opinion that invalidates a subsequently superseded agency rule.

When a district court invalidates a rule under the Administrative Procedure Act, it is not unusual for the agency to update the faulty rulemaking. And it has become increasingly common for the agency to then invoke the *Munsingwear* doctrine in the court of appeals to seek vacatur of the district court's written opinion. That happened here, and it has happened before. But rote vacatur of district court opinions, without merits review and simply because the dispute is subsequently mooted, is inconsistent with well-established principles of appellate procedure and practice. I am thinking, in particular, of the uncontroversial notion that the law presumes that issued opinions are valuable and correct. *See, e.g.*, *Bancorp*, 513 U.S. at 26. Indeed, we have long held that "there is no particular reason to assume that a decision, later mooted, is any less valid as precedent than any other opinion of a court." *Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997). Therefore, contrary to the representations of the Department of Justice in this case, the ordinary practice is *not* to vacate determinations of law that were previously rendered, and legal databases teem with opinions that were issued in cases that are subsequently settled or otherwise resolved.

This is by design. When appeals courts leave undisturbed district court opinions issued in cases that become moot over time, they simply leave the parties where they find them, which is the least disruptive (and arguably most beneficial) stance with respect to the efforts of the parties and the judicial resources that have paved the way up to the point of appellate review. *See Ctr. for Sci. in the Pub. Int. v. Regan*, 727 F.2d 1161, 1166 (D.C. Cir. 1984) (noting that, where vacatur is denied, "the prevailing party [will] be left in the same position as if no appeal had been taken"); *see also In re Mem. Hosp. of Iowa Cnty., Inc.*, 862 F.2d 1299, 1300 (7th Cir. 1988) ("The bankruptcy and district judges devoted many hours to this case and resolved it on the merits [in] decisions [with] persuasive force as precedent that may save other judges and litigants time in future cases."). Put another way, the dispute-and-decision bell cannot be unrung—there *was* a dispute and someone was declared the winner. Written opinions are the most accurate historical record of what

the supervising court thought of those events. And in a common law system of case-by-case adjudication, that history need not, and should not, be cavalierly discarded. As the Supreme Court has long recognized, indiscriminate vacatur is harmful, for it "would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *Bancorp*, 513 U.S. at 27.

Of course, "fairness to the parties," *id.*, cannot be ignored. And *that* is where motions for vacatur fit in. Appellate courts retain the power to employ this extraordinary equitable remedy—without consideration of the merits of a lower court's opinion—*precisely because* fairness may require that result. *See id.* at 25. But whether vacatur is actually justified with respect to any district court opinion "turns on the conditions and circumstances of the particular case." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (quotation marks and citation omitted). The typical scenario in which vacatur is warranted is one in which legal consequences clearly follow from the lower court's decision but mootness renders that judgment unreviewable, leaving the would-be appellant stuck. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950) (explaining that vacatur "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences"); *see also, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (basing the decision to vacate a circuit's decision due to subsequent mootness on the fact that "a constitutional ruling in a qualified immunity case is a legally consequential decision"). By contrast, where the district court's ruling pertains to an agency rule that is subsequently pulled and replaced—rendering the district court's opinion about the prior rule effectively defunct—it is hard to imagine any legal consequence or residual impact that might warrant vacatur.

Moreover, the agency's lack of *fault* for the enactment of a new rule that moots the appeal (*see* Appellants' Mot. at 19–20; Appellants' Reply at 1–5) is largely beside the point. When the burdens and purposes of vacatur are properly understood, identifying the party at fault is not an argument *for* equitable vacatur. Rather, it serves merely to divest an appellant who might otherwise be entitled to vacatur of the right to claim that remedy. Respondents have rightly discerned that an appellant who causes their own appeal to become moot ordinarily should not be rewarded with vacatur of the lower court's ruling on mootness grounds. Opp'n to Appellants' Mot. at 9–12; *see, e.g.*, *Bancorp*, 513 U.S. at 24–25; *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 351 (D.C. Cir. 1997); *Am. Fam. Life Assur. Co. of Columbus v. F.C.C.*, 129 F.3d 625, 630 (D.C. Cir. 1997). But even if the government is perfectly blameless with respect to mootness, in order to justify vacatur, it must *still* demonstrate that the district court's ruling is legally consequential or

that the government would somehow otherwise be prejudiced if the judgment were permitted to stand.

That is where the Department of Justice falters in this case. In my view, the Department of Justice here pays far too much attention to whether it is responsible for the mootness of its own appeal and far too little to the more important threshold question of whether it has a legitimate claim to this extraordinary remedy at all. And its argument that the existence of the unfavorable district court opinion is prejudicial to the government because the opinion might be cited by "other plaintiffs" in the future, Appellants' Mot. at 17, is no answer, in the absence of any demonstration that the district court's decision is legally consequential in any respect. It simply cannot be that the mere maintenance of the official record of an Article III judge's non-binding views about contested legal issues is inherently unfair to the losing party.

In sum, the Department of Justice has not provided this court with any reason to conclude that the equities favor displacing the presumption of validity afforded to the district court's opinion. And having found that vacatur is not warranted, I concur in the conclusion that the government's *Munsingwear* motion must be denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GAIL MARTINS OKORO, Plaintiff, v. MIKE POMPEO, *Secretary of the U.S. State Department*, Defendant.	)	No. 20-cv-2451 (KBJ)

MEMORANDUM OPINION

On March 22, 2021, Defendants filed a motion to dismiss Plaintiff's complaint. (ECF No. 15.) This Court's Local Civil Rules provide that "[w]ithin 14 days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to [a] motion [or] the Court may treat the motion as conceded." LCvR 7(b). To date, Plaintiff has neither filed an opposition to the motion nor requested more time to do so. Therefore, the Court will **GRANT** the motion as conceded and will **DISMISS WITHOUT PREJUDICE** Plaintiff's complaint.

A separate Order accompanies this Memorandum Opinion.

DATE: May 5, 2021

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADRIENNE OWENS LEWIS, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant.	No. 19-cv-2628 (KBJ)

MEMORANDUM OPINION

This lawsuit arises from a homeowner's insurance policy that plaintiff Adrienne Owens Lewis's late father and stepmother (who died in the 1990s and 2011, respectively) purchased from Allstate Insurance Company, for a residence located in Washington, D.C. (the "Property"). (*See* Compl., ECF No. 1, ¶¶ 6, 11.) Lewis was appointed as the personal representative of her stepmother's estate, and she claims that, in 2014, she renewed the Allstate policy on the Property in that capacity. (*See id.* ¶ 12.)

The Property was damaged in 2014 as the result of a severe storm, and Lewis initiated a homeowners claim with Allstate in June of that year. (*See id.* ¶ 12.) Lewis alleges that Allstate claims representatives promised her that Allstate would cover damage to and remediation of the house in its entirety, notwithstanding a policy limit of $5,000 for claims for mold and rot damage. (*See id.* ¶ 12–17.) Lewis also claims that Allstate has refused to honor these promises and has enforced the $5,000 policy cap for mold claims, and that it improperly delayed paying her the $5,000 that she was admittedly due, which led to increased mold damage in the house. (*See id.* ¶ 21, 31–33.) She further maintains that Allstate has breached the insurance policy by failing to

cover certain non-mold damage to the Property. (*See id.* ¶¶ 19, 23–26.) Lewis's complaint, which was filed on August 30, 2019, asserts claims for breach of contract (Counts I and II), breach of the implied covenant of good faith and fair dealing (Counts III and IV), promissory estoppel (Count V), violations of the District of Columbia Consumer Protection Procedures Act (Count VI), negligent misrepresentation (Count VII), and fraud (Count VIII).

On November 8, 2019, Allstate moved to dismiss Lewis's complaint in its entirety (*see* Mot. to Dismiss, ECF No. 5), and this Court issued an order setting a deadline of December 12, 2019, for Lewis to respond to Allstate's motion (*see* Order, ECF No. 6). Lewis requested an extension of this deadline, citing medical issues that she was experiencing that required her to limit her stress levels, and her ongoing efforts to secure counsel to represent her in this action. (*See* Mot. for Additional Time to Respond to Mot. to Dismiss ("1st Extension Mot."), ECF No. 9 at 2–3.)[1] The Court granted Lewis's motion, setting a new deadline of February 28, 2020 for her to respond to the pending motion. (*See* Min. Order of Jan. 22, 2020.) Thereafter, Lewis requested, and this Court granted, two additional extensions of time for her to respond to Allstate's motion to dismiss. (*See* Min. Orders of April 6, 2020 and July 31, 2020.) In granting the third requested extension and setting yet another a deadline for Lewis to respond to the motion to dismiss (September 30, 2020), this Court specifically warned Lewis that it would not grant her any further extensions of time absent extraordinary circumstances. (*See* Min. Order. of July 31, 2020.)

[1] Page number citations to the documents that the parties have filed refer to those automatically assigned by the Court's electronic case-filing system.

Lewis has now moved for a *forth* extension of time to respond to the motion to dismiss, citing, once again, her ongoing medical issues and search for counsel, as well as the COVID-19 pandemic, which she asserts has impacted her ability to secure representation from private counsel or law school clinics and to access law school libraries. (*See* Am. Mot. for Additional Time to Respond to Mot. to Dismiss ("4th Extension Mot."), ECF No. 24-1, at 2–7.)[2]

Having considered Lewis's motion for a fourth extension and the entire record in this case, this Court has decided that that Lewis's case must be **DISMISSED WITHOUT PREJUDICE** *sua sponte*, for lack of prosecution and for failure to follow this Court's orders regarding responding to the pending motion to dismiss, and as a result, Defendant's motion to dismiss will be **DENIED AS MOOT**. A separate Order accompanies this Memorandum Opinion

I.

A court's power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants" is well-established. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Holston v. Vance-Cooks*, No. 12-cv-1536, 2013 WL 5912475, at *1 (D.D.C. Nov. 5, 2013) (noting that "[c]ourts have inherent power to manage their dockets efficiently" (quotation marks and citation omitted)). This includes the power to "dismiss a case sua sponte for a plaintiff's failure to prosecute or otherwise comply with a court order." *Angelino v. Royal Family Al–Saud*, 688 F.3d 771, 775 (D.C.Cir.2012); *see also Peterson v. Archstone Communities*

[2] Lewis has moved to amend the initial motion for an extension of time that she filed on October 1, 2020, and this Court will **GRANT** that request and consider the arguments that she has made in her amended motion.

LLC, 637 F.3d 416, 418 (D.C.Cir.2011) (same); *Link v. Wabash R.R. Corp.*, 370 U.S. 626 (1961) (same).

Indeed, this Court's Local Civil Rules expressly provide that "[a] dismissal for failure to prosecute may be ordered by the Court upon motion by an adverse party, or upon the Court's own motion." LCvR 83.23. And while "pro se litigants are afforded more latitude than those who are represented by counsel[,] . . . a plaintiff's pro se status does not constitute a license for a plaintiff filing pro se to ignore the Federal Rules of Civil Procedure or to disregard completely court orders." *Garlington v. D.C. Water & Sewer Auth.*, 62 F. Supp. 3d 23, 27 (D.D.C. 2014) (internal quotation marks and citations omitted). Thus, "[t]he court's authority to dismiss a case for failure to prosecute or failure to follow the court's order is not discarded simply because a plaintiff is proceeding pro se." *Allen v. United States*, 277 F.R.D. 221, 223 (D.D.C.2011) (citation omitted).

II.

In the 15 months that this action has been pending, and in the nearly 12 months that Allstate's motion has been pending, the only steps that Lewis has taken to prosecute this action have been to file four requests to extend the deadlines that this Court has set for her to respond to Allstate's motion to dismiss. As noted above, when granting her third request, the Court stated that it would not entertain any requests for further extensions absent "extraordinary circumstances." Yet, in her motion requesting a fourth extension, Lewis has not established any such extraordinary circumstances. She claims that the COVID-19 pandemic has hindered her efforts to secure counsel, but she was experiencing these very same difficulties before the pandemic. (*Compare* 1st

Extension Mot. at 2 *with* 4th Extension Mot. at 2–3.) Furthermore, although local law libraries may in fact be closed (*see* 4th Extension Mot. at 2), there are numerous free web-based resources for researching case law that claimants such as Lewis can access safely from home. Lewis also points to medical issues that she is experiencing, but these issues have not prevented her from drafting and filing her various multi-page extension motions and supporting declarations.

The bottom line is that Lewis's repeated requests for extensions have delayed litigation of the motion to dismiss for nearly a year, "while engendering additional litigation requiring response from [Allstate] and the Court[.]" *Naharaja v. Nat'l Labor Relations Bd.*, No. 16-cv-24, 2016 WL 10655580, at *3 (D.D.C. Dec. 21, 2016) (dismissing pro se complaint where plaintiff had not filed an opposition after eight months, and where the court warned that it would not grant any further extensions of time). (*See also, e.g.*, Def.'s Opp'n to Pl.'s Mot. for Additional to Time Respond to Mot. to Dismiss, ECF No. 12; Def.'s Opp'n to Pl.'s Mot. to Stay, ECF No. 16; Def.'s Opp'n to Pl.'s 4th Mot. for Additional Time to Respond to Mot. to Dismiss, ECF No. 25). Because this Court will not countenance further delay with respect Lewis's response to Defendant's motion, as stated in the accompanying order, it has concluded that Lewis's complaint must be **DISMISSED WITHOUT PREJUDICE** *sua sponte*, for lack of prosecution and failure to comply with this Court's orders instructing her to respond to Allstate's motion to dismiss. Moreover, given this ruling, Defendant's motion to dismiss will be **DENIED AS MOOT**.

DATE: November 30, 2020

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASPER L. DOCKERY, Petitioner, v. C. MAIDRANA, *et al.*, Respondents.	)	No. 16-cv-0308 (KBJ)

MEMORANDUM OPINION AND ORDER DENYING PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

Jasper Dockery is an inmate who is currently incarcerated at the United States Penitentiary in Beaumont, Texas, serving a sentence of 30 years to life following his convictions in 1998 in the Superior Court for the District of Columbia on murder, assault, and weapons charges. In the instant matter, Dockery petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his current confinement violates the Constitution because he received ineffective assistance of counsel on appeal. (*See* Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Pet."), ECF No. 1 at 22–28, 41–49, 53–56.)[1]

Before the Court at present is a motion that Dockery has filed seeking emergency injunctive relief "enjoining the Respondents . . . and all other persons or federal agents acting in concert and participation with them from detain[ing] and deport[ing] Mr. Dockery from the United States, in the absence of a final resolution of his [habeas petition]." (Mot. for Prelim. Inj. & TRO ("Pl.'s Mot."), ECF No. 40, at 2–3; *see also*

[1] Page number citations to the documents that Dockery has filed refer to those automatically assigned by the Court's electronic case-filing system.

Decl. of Jasper L. Dockery ("Dockery Decl."), ECF No. 40, at 6 (alleging that government officials have "been plotting with . . . [Immigrations and Customs Enforcement ("ICE")] to prematurely detain[] Dockery and remove him from the United States to Jamaica").) Specifically, Dockery contends that he is seeking release to home confinement from the Superior Court in light of the COVID-19 pandemic, but because he is subject to an immigration detainer, ICE will immediately detain him and initiate deportation proceedings against him if his request is granted. (*See* Dockery Decl. at 9.)

For the reasons explained below, this Court finds that it does not have jurisdiction to award the relief that Dockery seeks, and, accordingly, his motion for a preliminary injunction must be **DENIED.**

I.

Dockery's motion appears to be premised on a misunderstanding of how preliminary injunctions and other such motions for emergency injunctive relief function in a civil action filed in federal court. No less an authority than the Supreme Court of the United States has explained that "[a] preliminary injunction is [] appropriate to grant intermediate relief *of the same character* as that which may be granted finally." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945) (emphasis added). Accordingly, in the *De Beers* case, the Supreme Court held that, where requested injunctive relief could not be granted as final relief, it also could not be granted as intermediate relief. And although the *De Beers* Court dealt with a federal court's authority to enter a preliminary injunction under a predecessor of the All Writs Act, the Supreme Court indicated clearly that the proper scope of a federal court's authority to issue injunctive relief as envisioned by Congress is determined based on "the usages

and principles of law[,]" and before issuing any injunctive relief, a court must ask "what is the usage, and what are the principles of equity applicable in such a case." *Id.* at 219.

Thus, a proper motion for a preliminary injunction seeks *to enjoin the action that the complaint alleges is unlawful* prior to the completion of the litigation, and without such a connection between the claim and requested injunction, there is simply no jurisdictional basis for the Court to grant preliminary relief. *See, e.g.*, *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (noting that a court lacks authority to issue a preliminary injunction absent a "sufficiently strong" connection "between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint[,]" and that such a connection exists where "the preliminary injunction would grant relief of the same character as that which may be granted finally" (internal quotation marks and citation omitted)); *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) (explaining that "[t]he purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint"); *see also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Proc. § 2948.1 (3d ed. 2015) (explaining that a preliminary injunction entitles the movant to the relief requested in the complaint prior to a ruling on the merits of his claims precisely because "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered").

II.

Here, there is an obvious disconnect between the character of relief that Dockery seeks in his Petition and that which he seeks in the pending motion for emergency relief. Specifically, in his Petition, Dockery contends that he received ineffective assistance of counsel on appeal, such that he is entitled to release from prison because his detention violates the Constitution. (*See* Pet. at 22–28, 41–49, 53–56.) By contrast, in his motion for preliminary injunctive relief, Dockery contends that he is entitled to an order barring ICE from detaining him and initiating deportation proceedings against him if the Superior Court grants his request for compassionate release from prison, because he will be prejudiced in defending himself in the context of deportation proceedings by the long delay in initiating those proceedings. (*See* Pl.'s Mot. at 9–10.) However, it is clear beyond cavil that a motion for a preliminary injunction "is not a generic means by which a plaintiff can obtain auxiliary forms of relief that may be helpful to [him] as [he] litigate[s] unrelated claims. *Bird v. Barr*, No. 19-cv-1581, 2020 WL 4219784, at *2 (D.D.C. July 23, 2020). Nor is it a means by which a court can order an entity that is not even a party to the litigation (here, ICE) to take, or not take, specific actions against a litigant. *See Hamilton v. Transportation Sec. Admin.*, 240 F. Supp. 3d 203, 205 (D.D.C. 2016) (citation omitted).

III.

This Court lacks jurisdiction to enter an order preliminarily enjoining ICE from detaining or initiating deportation proceedings against Dockery, for the reasons explained above. Accordingly, it is hereby

ORDERED that Dockery's [40] Motion for Preliminary Injunction and Temporary Restraining Order is **DENIED**.

DATE: October 23, 2020

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	No. 07-cr-131-01 (KBJ)
JAMES BECTON,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Before this Court at present is Defendant James Becton's Motion to Reduce Sentence under section 404 of the First Step Act of 2018 ("First Step Act"), Pub. L. 115-391, § 404, 132 Stat. 5194 (2018). (*See* Def.'s Mot. to Reduce Sentence ("Def.'s Mot."), ECF No. 587.) Becton is currently serving a 300-month sentence for his participation in a drug conspiracy involving "between three and one-half kilos and five kilos of cocaine powder." (*See id.* at 5.)[1] Becton contends that he is entitled to a sentence reduction under the First Step Act, because he was "sentenced for a covered offense that was subsequently modified by the Fair Sentencing Act[.]" (*See id.* at 2.) He also argues that the Court should reduce his sentence in light of the Sentencing Commission's amendments to the Guidelines range that is applicable to his offense. (*See id.* at 5–6.) The Government opposes Becton's motion, primarily on the grounds that Becton was not sentenced for a "covered offense" within the meaning of the First Step Act, and also because section 404 does not permit sentence reductions based on a

[1] Page-number citations refer to the page numbers that the Court's electronic filing system automatically assigns.

change in the Guidelines range. (*See* Gov't Opp'n to Def.'s Mot. to Reduce Sentence ("Gov't Opp'n"), ECF No. 589, at 1, 7.) In response, Becton argues that the Court should account for the Sentencing Commission's change to the applicable Guidelines range under 18 U.S.C. § 3582(c)(2), in addition to section 404 of the First Step Act. (*See* Def.'s Reply, ECF No. 590, at 9.)

This Court has carefully considered the parties' submissions and the evidence in the record, and for the reasons discussed below, the Court concludes that Becton was not "sentenced pursuant to the penalties for [a] covered offense" (*see* Def.'s Mot. at 3 n.2), such that he is ineligible for a sentence reduction under section 404 of the First Step Act. The Court further finds that Becton has failed to brief his argument with respect to 18 U.S.C. § 3582(c)(2) adequately, and as a result, the Court cannot evaluate his entitlement to relief under that provision at this time. Accordingly, Becton's motion to reduce his sentence is **DENIED without prejudice**.

I.

In 2010, Congress passed the Fair Sentencing Act ("FSA") to reduce the disparity between sentences for cocaine base offenses and powder cocaine offenses. *See* FSA, Pub. L. 111-220, 124 Stat. 2372 (2010). To achieve that end, section 2 of the FSA increased the minimum amount of cocaine base that is necessary to trigger various statutory penalties under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, while leaving in place the statutory penalties associated with powder cocaine offenses, *see* FSA § 2. The First Step Act, which was enacted in 2018, permits courts to apply the FSA's change retroactively and thereby reduce a defendant's sentence for a "covered offense," which the First Step Act defines as a "violation of a Federal criminal statute,

the statutory penalties for which were modified by section 2 . . . of the [FSA.]" *See* First Step Act § 404(a). Specifically, under section 404 of the First Step Act, a court may "impose a reduced sentence" for a covered offense "as if" section 2 of the FSA was "in effect at the time the covered offense was committed." *See id.* § 404(b).[2]

As numerous courts have held, motions for sentence reductions under section 404 of the First Step Act are governed by 18 U.S.C. § 3582(c)(1)(B), which allows courts to modify a defendant's term of imprisonment "to the extent otherwise expressly permitted by statute[,]" and a court may do so without holding a hearing that "afford[s] the defendant[] an opportunity to be present[.]" *See United States v. White*, 413 F. Supp. 3d 15, 38–42 (D.D.C. 2019) (explaining why proceedings under section 404 of the First Step Act are subject to 18 U.S.C. § 3582(c)(1)(B)); *see also United States v. Lawrence*, No. 03-cr-00092, 2020 WL 5253890, at *5–6 (D.D.C. Sept. 3, 2020) (adopting the reasoning in *White* and holding that section 404 does not authorize a "plenary resentencing proceeding"). Thus, in evaluating Becton's motion under the First Step Act, this Court must focus on section 404's plain text, and determine whether "the statutory penalties for the Federal criminal statute applied to [Becton] at sentencing were modified by" section 2 of the FSA. *See White*, 413 F. Supp. 3d at 31 (internal quotation marks and citation omitted).

II.

The Court concludes that Becton is not eligible for a sentence reduction under

[2] Section 404 of the First Step Act precludes courts from reducing a defendant's sentence under two limited circumstances, neither of which is at issue here. *See* First Step Act § 404(c) (prohibiting a sentence reduction "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act" or "if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits").

section 404 of the First Step Act, because he was not "sentence[d] for a covered offense." First Step Act § 404(b).

At the time of Becton's indictment, conviction, and sentencing, the Controlled Substances Act mandated a ten-year minimum penalty for drug trafficking offenses involving fifty grams or more of cocaine base, *see* 21 U.S.C. § 841(b)(1)(A)(iii) (2006), or five kilograms or more of powder cocaine, *see id.* § 841(b)(1)(A)(ii) (2006). The Controlled Substances Act also imposed a mandatory sentencing range of five to forty years of imprisonment for offenses involving 500 grams or more of powder cocaine, *see id.* § 841(b)(1)(B)(ii) (2006), or a mandatory minimum penalty of ten years in cases where the defendant had previously been convicted of a felony drug offense, *see id.* § 841(b)(1)(B) (2006). As relevant here, a jury found Becton guilty of one count of "Conspiracy to Distribute and Possess with Intent to Distribute 50 Grams or More of Cocaine Base, 5 Kilograms or More of Cocaine, and Cannabis," in violation of 21 U.S.C § 846. (*See* Judgment, ECF No. 329, at 1.) And on the verdict form, the jury indicated that Becton was accountable for "500 grams or more but less than 5 kilograms" of powder cocaine. (*See* Verdict Form, ECF No. 248, at 2.) The jury also found Becton responsible for a "detectable amount" of cocaine base and "50 grams or more" of cocaine base. (*See id.* at 1, 2.) However, the jury simultaneously indicated that Becton was *not* accountable for "5 grams or more but less than 50 grams" of cocaine base. (*See id.* at 2.)

At sentencing, the Court (Robertson, J.) resolved in Becton's favor the ambiguities in the jury's findings. Instead of sentencing Becton for a drug trafficking offense involving 50 grams or more of cocaine base, the Court held Becton accountable

for only a detectable amount of cocaine base—between zero and five grams—and clarified that the weight of the cocaine base would "play[] no role at all" in the Court's calculation of Becton's sentence. (*See* Sentencing Hr'g Tr., ECF No. 347, at 3, 7.) The Court also determined that Becton was responsible for "between three and a half kilos and five kilos" of powder cocaine (*see id.* at 4), thereby subjecting Becton to the Controlled Substances Act's five-year mandatory minimum penalty under 21 U.S.C. § 841(b)(1)(B)(ii). Yet, because Becton had a prior felony drug conviction (*see* Pre-Sentencing Hr'g Tr., ECF No. 346, at 20; Sentencing Hr'g Tr. at 12), the statutory minimum penalty for his powder cocaine offense increased from five to ten years, *see* 21 U.S.C § 841(b)(1)(B). Against that statutory backdrop and the applicable Guidelines range, the Court sentenced Becton to 300 months of imprisonment, taking into account the nature of Becton's offense and his criminal history. (*See* Sentencing Hr'g Tr. at 4–5, 16–18.)

The FSA did not alter the statutory provisions underlying Becton's sentence. As explained above, the FSA increased the minimum amount of *cocaine base* needed to trigger the Controlled Substances Act's mandatory minimum penalties, *see* FSA § 2, and it did not amend the statutory penalties associated with offenses involving 500 grams or more of *powder cocaine*, which was the only statutory penalty that actually applied to Becton's sentencing. *See White*, 413 F. Supp. 3d at 31. Consequently, Becton was not sentenced for a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 . . . of the [FSA,]" *see* First Step Act § 404(a), and he therefore does not qualify for a sentence reduction under section 404.

In resisting this conclusion, Becton insists that he was "sentenced for a

conspiracy where one of the objectives was to distribute [cocaine base] – a covered offense[.]" (*See* Def.'s Reply at 4; *see also id.* at 7–9 (arguing that the "conspiracy of conviction" determines a defendant's eligibility for a sentence reduction, not "the relevant conduct for which [the defendant] was found responsible").) But the mere fact that Becton was sentenced for a conspiracy that involved cocaine base and other illegal narcotics does not mean that he was sentenced for a covered offense. To be sentenced for a covered offense under the First Step Act, Becton must have (1) violated "a Federal criminal statute" whose statutory penalties were modified by the FSA, and (2) been sentenced according to the statutory penalties associated with that offense. *See* First Step Act § 404(a)–(b). Neither element is present here. The FSA did not change the statutory penalties for an offense involving zero to five grams of cocaine base, and the weight of the cocaine base did not play any role in the Court's application of the Controlled Substances Act's mandatory minimum penalties. Likewise, even though the jury convicted Becton of an offense involving a "Conspiracy to Distribute and Possess with Intent to Distribute 50 Grams or More of Cocaine Base" (*see* Judgment at 1), Becton was not *sentenced* according to the statutory penalties for that offense (*see* Sentencing Hr'g Tr. at 3). Thus, although section 404(b) of the First Step Act permits a court to "impose a reduced sentence as if" the reduced penalties in the FSA "were in effect at the time the covered offense was committed[,]" First Step Act § 404(b), where, as here, the "FSA provisions [at issue] have no effect on a defendant's sentence, no sentence reduction is available to award," *White*, 413 F. Supp. 3d at 50.

As additional bases for seeking a reduction in his sentence under section 404, Becton argues that Congress lowered the statutory sentencing enhancements for

defendants with prior convictions for felony drug offenses, and also that the applicable sentencing Guidelines range for his conspiracy conviction is now lower than it was at the time of his sentencing. (*See* Def.'s Mot. at 5–6.) Both arguments are misplaced. To start, Congress amended the statutory sentencing enhancements for defendants with prior felony drug convictions in section 401 of the First Step Act, not section 404. *See* First Step Act § 401. And unlike section 404, section 401 does not apply to defendants who were sentenced before the First Step Act's passage. *See id.* § 401(c) (limiting section 401's applicability to defendants who had not been sentenced at the time the First Step Act was passed). Moreover, based on the Court's findings at sentencing, the only relevant prior felony enhancement in Becton's case was the prior felony enhancement pertaining to crimes involving 500 grams or more of powder cocaine, *see* 21 U.S.C. § 841(b)(1)(B), and *that* prior felony enhancement was not lowered by the First Step Act, *see* First Step Act § 401(a)(2).

Becton's argument regarding the Sentencing Commission's change to the applicable Guidelines range fares no better, because by its own terms, section 404 authorizes courts to reduce sentences involving "statutory penalties" that were modified by the FSA. *See id.* § 404. The provision lacks any similar language permitting courts to reduce sentences based on amendments to the relevant Guidelines range.

III.

Perhaps in recognition of the First Step Act's limited scope, Becton appears to raise arguments under two additional statutory provisions: 18 U.S.C. § 3582(c)(1)(A) and 18 U.S.C. § 3582(c)(2). Section 3582(c)(1)(A) permits a court to reduce a defendant's sentence for "extraordinary and compelling reasons[,]" so long as the

reduction "is consistent with the applicable policy statements issued by the Sentencing Commission[.]" *See* 18 U.S.C. § 3582(c)(1)(A). "Extraordinary and compelling reasons" for a sentence reduction can include a defendant's serious medical conditions, *see* U.S.S.G. § 1B1.13, cmt. n.1(A)(ii) (2018), and a heightened risk of severe illness or death from COVID-19, *see United States v. Johnson*, No. 15-cr-125, 2020 WL 3041923, at *10 (D.D.C. May 16, 2020), both of which Becton contends that he has (*see* Def.'s Mot. at 6–7; Def.'s Reply at 13). But to the extent that Becton seeks relief under section 3582(c)(1)(A), he must exhaust his administrative remedies and then file a motion under that provision. *See* 18 U.S.C. § 3582(c)(1)(A); *see also United States v. Douglas*, No. 10-cr-171-4, 2020 WL 5816244, at *3 (D.D.C. Sept. 30, 2020) (denying a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) for failure to exhaust administrative remedies); *United States v. Goldberg*, No. 12-cr-180, 2020 WL 1853298, at *5 (D.D.C. Apr. 13, 2020) (denying a motion for compassionate release in part because the record did not demonstrate that the defendant had satisfied the statute's exhaustion requirement). Becton has failed to follow those requirements here.

If the Court were to entertain Becton's argument that it should reduce his sentence pursuant to section 3582(c)(2) of Title 18 (*see* Def.'s Reply at 9–15), that provision—which permits sentence reductions "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission[,]" 18 U.S.C. § 3582(c)(2)—requires the Court to analyze the sentencing factors outlined in 18 U.S.C. § 3553(a), including the "nature and circumstances of the offense[,]" Becton's "history and characteristics[,]" and the "need for the sentence imposed . . . to protect the public from further crimes of

the defendant[,]" *id.* § 3553(a)(1)–(2). But Becton has barely addressed the section 3553(a) factors in his brief. Therefore, the Court is not in a position to assess his eligibility for relief under section 3582(c)(2) at this time.[3]

IV.

For the reasons explained above, this Court finds that Becton is ineligible for a sentence reduction under section 404 of the First Step Act, and that he has failed to brief his entitlement to relief under section 3582(c)(2) of Title 18 sufficiently.

Accordingly, it is hereby

ORDERED that Defendant's Motion to Reduce Sentence (ECF No. 587) is **DENIED without prejudice** insofar as it requests relief under section 404 of the First Step Act. It is

FURTHER ORDERED that, on or before November 6, 2020, Defendant shall file a supplemental brief regarding his request for relief under 18 U.S.C. § 3582(c)(2) that fully addresses how section 3553(a)'s sentencing factors should be evaluated under the circumstances of his case. The Government shall file a response to Defendant's supplemental brief on or before November 20, 2020.

DATE: October 23, 2020

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

[3] Courts also evaluate section 3553(a)'s factors when addressing motions under section 404 of the First Step Act. *See United States v. Mitchell*, No. 05-cr-00110, 2019 WL 2647571, at *7 (D.D.C. June 27, 2019). In this case, the Court need not address those factors with respect to section 404 since Becton is not eligible for relief under that provision for the reasons already discussed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICARDO JOSE CALDERÓN-LÓPEZ, Plaintiff, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant.	)	No. 20-cv-0087 (KBJ)

MEMORANDUM OPINION & ORDER

Plaintiff Ricardo Jose Calderón-López alleges that, on December 19, 2019, while he was temporarily sheltering inside the Farragut North Metro Station due to frigid temperatures, WMATA personnel instructed him to leave the station and, in so doing, violated his constitutional right to freedom of movement. (*See* Compl., ECF No. 1, at 4, 15.)[1] Proceeding pro se and *in forma pauperis*, Calderón-López filed the instant lawsuit based on this incident, naming the Washington Metropolitan Area Transit Authority ("WMATA"), the District of Columbia, the United States Department of Transportation ("DOT"), and an individual named Jones Lang LaSalle as defendants, and asserting claims pursuant to 42 U.S.C. §§ 1983 and 1985, for violation and conspiracy to commit violation of his constitutional rights, and also 28 U.S.C. § 1343, for violation of the Racketeer Influenced and Corrupt Organizations Act. (*See id.* at 1–4.)

[1] Page number citations to Calderón-López's filings refer to those automatically assigned by the Court's electronic case-filing system.

Upon initial review of Calderón-López's complaint, the previously-assigned Motions Judge granted Calderón-López leave to proceed *in forma pauperis* on January 30, 2020, but dismissed the District of Columbia, DOT, and LaSalle as defendants because the complaint did not "allege[] any facts pertaining to [them or] otherwise state[] a claim against these entities[,]" as Rule 8(a) of the Federal Rules of Civil Procedure requires. (Mem. Op. & Order ("Mem. Op."), ECF No. 5, at 2 (Mehta, J.).) Calderón-López's claims against WMATA were allowed to proceed (*see id.*), and on February 6, 2020, the case was assigned to the undersigned (*see* Docket Entry of Feb. 6, 2020).

Before this Court at present are two motions that Calderón-López has filed: a motion for reconsideration of the partial dismissal of his claims (*see* Mot. for Reconsideration of Mem. Op. & Order Dismissing [P]laintiff['s] *Bivens* Action ("Reconsid. Mot."), ECF No. 6), and a motion that Calderón-López has captioned "Informative Motion" (*see* Inform. Mot., ECF No. 8). In his first motion, Calderón-López makes three arguments: (1) that he is a pro se litigant and is thus entitled to heightened deference with respect to his pleadings (*see* Reconsid. Mot. at 3, 17, 22); (2) that a court is rarely, if ever, entitled to dismiss a plaintiff's claims *sua sponte* (*see id.* at 3, 22); and (3) that he should be provided an opportunity to amend his complaint (*see id.* at 3, 5, 21–2). In his "informative motion," Calderón-López draws the Court's attention to the motion for reconsideration (Inform. Mot. at 4), and describes facts that do not appear in the complaint, such as the fact that he has initiated other litigation in California and in the Superior Court of the District of Columbia (*see id.* at 3, 4; Exs. to Inform. Mot., ECF No. 8-1). The Informative Motion further suggests that Calderón-

López is the victim of a vast and concerted conspiracy that various local, state, and federal government officials and private actors have allegedly engaged in with the intent of causing him harm. (*See* Inform. Mot. at 4.)

The Court concludes that Calderón-López has failed to identify any legitimate grounds to revisit the prior decision to dismiss his claims against the District of Columbia, DOT, and LaSalle, for the reasons explained below, but the Court will permit the filing of an amended complaint that states the legal claims with more particularity. Therefore, Calderón-López's motion for reconsideration (ECF No. 6), which specifically requests leave to amend, will be **GRANTED IN PART** and **DENIED IN PART**.[2]

I.

Motions for reconsideration submitted pursuant to Federal Rule of Civil Procedure 59(e) are discretionary and should be granted only where there "is an intervening change of controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice." *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *see also* McCoy v. F.B.I., 775 F. Supp. 2d 188, 190 (D.D.C. 2011). Thus, a motion seeking reconsideration of a prior ruling "must address new evidence or errors of law or fact." *Miss. Ass'n of Cooperatives v. Farmers Home Admin.*, 139 F.R.D. 542, 546 (D.D.C. 1991); *see also Nyambal v. Alliedbarton Sec. Servs., LLC*, 344 F. Supp. 3d 183, 189 (D.D.C. 2018) (explaining that "[i]n this Circuit, it is well-established that motions for reconsideration cannot be used as an opportunity

[2] The Court has further determined that the point of Calderón-López's "Informative Motion" (ECF No. 8) appears to be simply to provide the Court with additional information that might otherwise appear in the complaint. Thus, it is rendered moot by the Court's grant of leave to amend the complaint, and will be **DENED AS MOOT**.

to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier" (quotation marks and citation omitted)). Moreover, motions for reconsideration are "disfavored" and "granting . . . such a motion is . . . an unusual measure[.]" *Cornish v. Dudas*, 813 F. Supp. 2d 147, 148 (D.D.C. 2011) (internal quotation marks omitted) (citing *Kittner v. Gates*, 783 F. Supp. 2d 170, 172 (D.D.C. 2011)); *see also Wright v. FBI*, 598 F. Supp. 2d 76, 77 (D.D.C. 2009).

II.

Neither of Calderón-López's first two reconsideration arguments—that he is entitled to heightened deference with respect to his pleading because he is proceeding pro se, and that the ability of the Court to dismiss claims *sua sponte* is extraordinarily narrow (*see* Reconsid. Mot. at 3, 17, 22)—are meritorious. While Calderón-López is correct that the complaints that pro se plaintiffs file are held "to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), a pro se "complaint must still present a claim on which the Court can grant relief[,]" *Budik v. Dartmouth-Hitchcock Med. Ctr.*, 937 F. Supp. 2d 5, 11 (D.D.C. 2013) (internal quotation marks and citation omitted); *see also Sturdza v. United Arab Emirates*, 658 F. Supp. 2d 135, 137 (D.D.C. 2009) (explaining that the benefit afforded to a pro se plaintiff regarding construction of the complaint "is not . . . a license to ignore the Federal Rules of Civil Procedure"). The Court found that Calderón-López's complaint did not state a claim with respect to three of the named defendants, even when his complaint is viewed under the lenient standard applicable to pro se

complaints. (*See* Mem. Op. at 1.) This conclusion is not erroneous, and the Court finds no other basis for revisiting that prior ruling.

The contention that reconsideration is warranted because the scope of a court's authority to order dismissal *sua sponte* is limited fares no better. To begin with, Calderón-López largely relies on non-binding authority from other jurisdictions to support this argument. (S*ee* Mot. Recon. at 3, 22; Inform. Mot. at 4.) What is more, Calderón-López further fails to recognize that, when a litigant is proceeding *in forma pauperis*, the Court, by statute, must screen the complaint when it is filed and *must* undertake to dismiss patently deficient claims. *See* 28 U.S.C. § 1915(e). A court may also act *sua sponte* to dismiss a complaint, in whole or in part, more generally, if it determines that a pleading fails to comply with Federal Rule of Civil Procedure 8(a), which is what the Motions Judge did here. *See Brown v. WMATA*, 164 F. Supp. 3d 33, 35 (D.D.C. 2016) (collecting cases). Consequently, this Court will not revisit the prior decision to act *sua sponte* and order the dismissal of certain defendants.

That said, to the extent that Calderón-López has asked for an opportunity to amend his complaint to state his claims with greater clarity, the Court will grant that request. WMATA has not yet been served (*see* Mot. Recon. at 23–24), and the Federal Rules of Civil Procedure generally afford a plaintiff the right to amend a complaint as a matter or course at this early stage in the litigation, *see* Fed. R. Civ. P. 15(a).

III.

Accordingly, and for the reasons explained above, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration (ECF No. 6) is **GRANTED IN PART** and **DENIED IN PART**. The Court declines to reinstate the

previously-dismissed claims against the District of Columbia, DOT, and LaSalle, but it will permit Plaintiff to file an amended complaint. Given the Court's grant of leave to amend, it is

FURTHER ORDERED that the Informative Motion (ECF No. 8)—which appears to seek to add additional facts and allegations to Plaintiff's pleading—is **DENIED AS MOOT**. It is

FURTHER ORDERED that, on or before November 13, 2020, Calderón-López shall file an amended complaint that is drafted in accordance with Rules 8 and 10 of the Federal Rules of Civil Procedure and Rule 5.1 of the Local Civil Rules, and thus succinctly identifies the legal claims and alleged factual bases for those claims. This pleading "shall [not] have appended thereto any document that is not essential to determination of the action." Local Civil Rule 5.1(e). Plaintiff must also supply his full residence address on the face of the amended complaint, or file a motion setting forth reasons to use the "general delivery" address that he currently provides and attesting to his ability to successfully receive mail there without its return. *See* LCvR 5.1(c)(1).[3]

* * *

Plaintiff is hereby advised that any "document that does not conform to the requirements of [Local Civil Rule 5] and Rule 10(a) of the Federal Rules of Civil Procedure shall not be accepted for filing." Local Civil Rule 5.1(g). Moreover, if

[3] The Local Rules of this Court state that a plaintiff "filing *pro se in forma pauperis* must provide in the [complaint's] caption the name and full residence address or official address of each party." LCvR 5.1(c)(1). "[F]ailure to provide the address information within 30 days of the [the first] filing may result in the dismissal of the case against the defendant." *Id.*

Plaintiff fails to comply with this Order, the Court may dismiss this action without prejudice.

DATE: October 14, 2020

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	No. 14-cr-080 (KBJ)
ANDRE HOLLAND, JR.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Before this Court at present is Defendant Andre Holland, Jr.'s motion for compassionate release under section 3582(c)(1)(A) of Title 18 of the United States Code. (*See* Def.'s Am. Mot. for Compassionate Release, ECF No. 41; Def.'s Emergency Suppl. Mot. for Compassionate Release ("Def.'s Suppl. Mot."), ECF No. 43.) Holland is currently incarcerated at FCI Elkton—an institution in Lisbon, Ohio that has experienced "one of the largest [COVID-19] outbreaks in the nation." (Def.'s Suppl. Mot. at 33.) [1] Holland contends that he has already contracted COVID-19 at FCI Elkton, and that he faces an increased risk of severe illness or death if he contracts the disease again, given the ongoing prevalence of COVID-19 at the facility and his status as "a 43-year old African-American male with significant neurological difficulties as a result of a traumatic brain injury, as well as a history of smoking tobacco and marijuana[.]" (*Id.* at 1.) In light of these circumstances, Holland asks this Court to "reduce his sentence to time-served and let him serve the remainder of his sentence on location monitoring as a condition of supervised release." (*Id.*) The Government opposes Holland's motion. (*See* Gov't

[1] Page-number citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system automatically assigns.

Opp'n, ECF No. 55.)

This Court has carefully considered the parties' submissions and the statutory framework for compassionate release motions under section 3582(c)(1)(A). *See United States v. Johnson*, No. 15-CR-125 (KBJ), 2020 WL 3041923, at *2–5 (D.D.C. May 16, 2020) (explaining a federal court's statutory authority to grant a defendant's motion for compassionate release during the COVID-19 pandemic). For the reasons discussed below, this Court finds that Holland has not presented "extraordinary and compelling reasons" to reduce his sentence, 18 U.S.C. § 3582(c)(1)(A)(i), and that even if such reasons exist, releasing Holland at this time would be inconsistent with the sentencing factors outlined in section 3553(a) of Title 18 of the United States Code. Accordingly, Holland's motion for compassionate release is **DENIED**.

I.

As this Court recently explained in *Johnson*, the legal analysis of which is incorporated by reference here, a court must consider three main factors when evaluating a defendant's motion for compassionate release under section 3582(c)(1)(A). *See Johnson*, 2020 WL 3041923, at *3–5; *see also United States v. Sears*, No. 19-CR-21 (KBJ), 2020 WL 3250717, at *1–2 (D.D.C. June 16, 2020). First, the court must determine whether the defendant has exhausted his administrative remedies. Second, the court must decide whether extraordinary and compelling reasons justify reducing the term of imprisonment that the court previously imposed. And, third, the court must assess whether a sentence reduction would accord with the purposes of punishment set forth in section 3553(a), particularly the need to protect the public. *See Johnson*, 2020 WL 3041923, at *3–5; *see also* 18 U.S.C. § 3582(c)(1)(A). A court may grant the

defendant's motion for compassionate release only if it finds that all three factors have been met. *See Johnson*, 2020 WL 3041923, at *3–5.

In the instant case, it is undisputed that Holland has exhausted his administrative remedies. (*See* Letter from Mark K. Williams, Warden, Fed. Bureau of Prisons to Andre Holland, Jr. (May 8, 2020), Ex. D to Def.'s Suppl. Mot., ECF No. 43-5; *see also* Gov't Opp'n at 13.) The Court will therefore turn directly to the merits of Holland's motion.

II.

This Court is not persuaded that extraordinary and compelling reasons warrant a reduction in Holland's term of imprisonment. While this Court acknowledges the prevalence of COVID-19 at the facility where Holland is housed, it cannot conclude that Holland suffers from a "serious physical or medical condition" that "substantially diminishes [his] ability . . . to provide self-care within the environment of a correctional facility[.]" U.S.S.G. § 1B1.13, cmt. n.1(A)(ii) (2018); *see also Sears*, 2020 WL 3250717, at *2 (finding that the defendant's serious medical conditions, combined with the outbreak of COVID-19 at FCI Elkton, created extraordinary and compelling reasons to reduce his sentence); *Johnson*, 2020 WL 3041923, at *10–11 (finding that "the current COVID-19-related conditions in D.C. DOC facilities," coupled with the defendant's "established and serious physical and mental health issues," constituted extraordinary and compelling reasons that justified his release).

Holland contends that his "history of smoking" and "neurological difficulties"—along with his race, age, and gender—increase his risk of serious illness or death from COVID-19. (*See* Def.'s Suppl. Mot. at 1.) But he has not presented any information

about the degree to which his "history of smoking . . . has affected his respiratory system[,]" *United States v. Franklin*, No. 07-CR-178, 2020 WL 4049917, at *2 (D.D.C. July 20, 2020), and his medical records suggest that he experiences only minor neurological difficulties, if any. (*See* Ex. H to Def.'s Mot. for Leave to File Sealed Exs., ECF No. 44-8, at 3; *see also* Ex. A to Def.'s Mot. for Leave to File Sealed Exs., ECF No. 44-1.) Moreover, the Centers for Disease Control and Prevention list smoking and neurological disorders as "conditions that *might* place a person at 'increased risk of severe illness from COVID-19,' rather than as conditions that *do* pose such a risk." *Franklin*, 2020 WL 4049917, at *3; *People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention (Aug. 14, 2020).[2] And though Holland's race, age, and gender generally increase his risk of experiencing complications from COVID-19 (*see* Def.'s Suppl. Mot. at 27–29 (collecting sources)), such factors, "alone or in combination" with Holland's preexisting conditions, do not "*substantially* diminish his ability to provide self-care while in a prison environment." *See United States v. Brown*, No. 13-CR-00030, 2020 WL 4346911, at *3 (D.D.C. July 29, 2020) (internal quotation marks and alterations omitted). As a result, this Court finds no "extraordinary and compelling reasons" to release Holland at this time. *See* 18 U.S.C. § 3582(c)(1)(A)(i).

III.

Even if Holland had presented "extraordinary and compelling reasons" that justified his release, this Court would still deny his motion based on its assessment of section 3553(a)'s sentencing factors. When this Court originally sentenced Holland on November 18, 2014, it concluded that 120 months of imprisonment was an appropriate

[2] This source was archived at the time of this writing and may be accessed at https://perma.cc/8XVV-XH8B.

sentence given the "nature and circumstances of the offense[,]" 18 U.S.C. § 3553(a)(1), "the history and characteristics of the defendant[,]" *id.*, and "the need for the sentence imposed . . . to protect the public from further crimes of the defendant[,]" *id.* § 3553(a)(2)(C). After reconsidering these factors, the Court finds that reducing Holland's sentence to the 76 months he has served to date would diminish the seriousness of his offense and jeopardize public safety.

Beginning with "the nature and circumstances" of Holland's crime, *id.* § 3553(a)(1), the Court is mindful that Holland pled guilty to one count of unlawful possession of a firearm and ammunition by a convicted felon, in violation of sections 922(g) and 924(e)(1) of Title 18. (*See* Minute Entry of Sept. 4, 2014; Plea Agreement, ECF No. 16.) In the Statement of Offense that accompanied his guilty plea, Holland also admitted to possessing two semi-automatic weapons, one of which was "equipped with a silencer"; two bullet-proof vests; multiple rounds of ammunition; two speed loaders; numerous bags containing cocaine, heroin, Phencyclidine, marijuana, and Oxycodone; and "paraphernalia used to cut and process narcotics for distribution[.]" (*See* Statement of Offense, ECF No. 17, at 2–3.) Given that the unlawful possession of a firearm and ammunition is a serious crime in its own right, the sheer number of dangerous items that Holland possessed in this case is extremely concerning, especially considering the various controlled substances that Holland possessed "in connection with" the firearms and ammunition. (*See id.* at 3.)

As for Holland's history and characteristics, *see* 18 U.S.C. § 3553(a)(1), this was not the first time that Holland was convicted of a serious crime, as the title of the instant offense suggests. Between 1993 and 2014, Holland amassed an extensive

criminal record, including two drug trafficking offenses and two assaults. (*See* Presentencing Report, ECF No. 22, ¶¶ 38, 44, 45, 51.) What is more, Holland's criminal history demonstrates a consistent disregard for the law and a pronounced failure to appreciate the consequences of his actions. Holland's record is replete with violations of his probation and supervised release conditions (*see id.* at ¶¶ 37, 41, 44, 46, 51), and he has committed various infractions while incarcerated (*see* Ex. G to Gov't Opp'n, ECF No. 55-7, at 1–2). Indeed, Holland has assaulted another inmate twice in the past three years. (*See id.* at 1.) Taken together, these violations and infractions indicate that Holland still poses a danger to the community, and *that* conclusion weighs heavily against granting his motion for compassionate release. *See Sears*, 2020 WL 3250717, at *3; *see also* U.S.S.G. § 1B1.13(2).

Holland maintains that he has "already been significantly punished" for his crimes, and that "[t]he benefits of keeping [him] in prison for the remainder of his sentence" pale in comparison to "the potential consequences of doing so[.]" (*See* Def.'s Reply, ECF No. 57, at 9 (internal quotation marks omitted).) This Court disagrees. Even assuming that the prevalence of COVID-19 at FCI Elkton and Holland's preexisting health conditions warranted his release, Holland has given this Court little reason to believe that he would comply with his supervised release conditions and refrain from violent behavior if this Court granted his motion. *See Sears*, 2020 WL 3250717, at *3; *Johnson*, 2020 WL 3041923, at *11. This Court thus concludes that a 120-month term of imprisonment remains "sufficient but not greater than necessary to serve the purposes of just punishment and deterrence, to protect the public, and to reflect the inherent dangerousness" of Holland's actions. *See Johnson*, 2020 WL

3041923, at *6.

IV.

For the reasons explained above, this Court finds that Holland has not presented extraordinary and compelling reasons that justify reducing his sentence, and that even if he had, any reduction would be inconsistent with the purposes of punishment expressed in section 3553(a).

Accordingly, it is hereby

ORDERED that Defendant's Amended Motion for Compassionate Release (ECF No. 41) and Emergency Supplemental Motion for Compassionate Release (ECF No. 43) are **DENIED**.

DATE: August 24, 2020

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAPITALKEYS, LLC, Plaintiff, v. DEMOCRATIC REPUBLIC OF CONGO, *et al.*, Defendants.	Civil Action No. 15-cv-2079 (KBJ)

MEMORANDUM OPINION AND ORDER

Plaintiff CapitalKeys, LLC, ("CapitalKeys") and Defendant Central Bank of the Democratic Republic of the Congo ("Central Bank") appeared before this Court on February 3, 2020, for a hearing concerning two motions: CapitalKeys's Motion to Modify the Court's Order of October 6, 2017 (*see* ECF No. 50), and the Central Bank's Motion to Set Aside Default (*see* ECF No. 55). At the conclusion of the hearing, the Court took the motions under advisement. For the reasons explained below, the Central Bank's motion to set aside the default is **GRANTED** and CapitalKeys's motion to modify the default judgment as moot is **DENIED AS MOOT**.

I.

In April of 2013, the then-outgoing Governor of the Central Bank signed a retainer agreement with a United States public affairs firm, CapitalKeys. (*See* Compl., ECF No. 4, ¶¶ 2, 17; Retainer Agreement, Ex. A to Decl. of Adam Falkoff, ECF No. 24-30.) The primary purpose of the contract was for CapitalKeys to provide the Central Bank with "government relations and strategic communications services" (Retainer

Agreement at 3), with the objective of improving the Central Bank's relationships with various governments, financial institutions, and NGOs (*see id.* at 3–4), so as to ultimately help the Central Bank "expand its customer base and gain access to additional funding" from those entities (*id.* at 4). The agreement had a five-year term extending from November of 2013 through November of 2018, and it specifically required that the Central Bank "pay [CapitalKeys] $276,700 per month for professional services . . . for a total of $3,320,400 per year which is $16,602,000 for 5 years[.]" (*Id.*) Notably, the contract further specified that the entire amount of compensation for the five years of service was "payable in one payment of $16,602,000 due upon signing[.] (*Id.*)

Shortly before the contract was signed, CapitalKeys alleges that it received "a good faith payment of $600,000" from "the Congo[.]" (Compl. ¶ 13.) However, at the time of signing, "Congo failed to make the remaining agreed upon payment of $16,002,000," and instead, according to CapitalKeys, "promised that payment would be made shortly." (*Id.* ¶ 18.) CapitalKeys maintains that it commenced working nonetheless, and that it continued to provide the agreed-upon services in reliance on the Congo's payment promises. (*See id.* ¶¶ 24, 27). CapitalKeys asserts that its strategic communications and government relations services enabled the Democratic Republic of the Congo and the Central Bank to realize large financial gains. (*See id.* ¶¶ 22, 28.)[1]

On December 23, 2015, CapitalKeys filed a breach of contract action against the Democratic Republic of the Congo and the Central Bank. (*See* Compl.) Because

[1] To date, CapitalKeys has offered no actual evidence of any specific service that it rendered pursuant to the agreement, nor has it specified the costs or expenses that it allegedly incurred while performing under the contract.

neither defendant appeared, this Court ultimately entered default judgment in favor of CapitalKeys (*see* Order of October 6, 2017, ECF No. 35), but it "retain[ed] jurisdiction of this case during the pendency of the five-year contract period" and set a deadline for "any party" to "move for an order modifying or setting aside this default judgment for good cause pursuant to Federal Rule of Civil Procedure 55(c)" (*id.* at 2). Eventually, on December 13, 2018, counsel for the Central Bank entered an appearance in the case. (*See* Notice of Appearance, ECF No. 48.) Shortly thereafter, both parties filed timely motions under Rule 55(c)—CapitalKeys sought to recover the remainder of the contract price, while the Central Bank sought to have the Court set aside the default judgment in its entirety. The motions are now ripe for decision. (*See* ECF Nos. 56, 57, 58, 59 (the parties' oppositions and replies).)

II.

Under Rule 55(c), the Court "may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)." Fed. R. Civ. P. 55(c). Because the Court's default judgment Order was not final and appealable, "the rule 55(c) standard should apply[.]" *Jackson v. Beech*, 636 F.2d 831, 836 n.7 (D.C. Cir. 1980).

The Rule 55(c) "good cause" standard is "designed to empower courts to consider the equities that specially arise in a given case." *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 966 (D.C. Cir. 2016). The burden of showing good cause lies with the moving party. *See CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 64 (5th Cir. 1992); *see also Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 183 (D.D.C. 2016) (addressing whether Sudan has "established 'good

cause' under Rule 55(c)"). And this Court's evaluation is guided "principally" albeit "not exclusively" by three factors, *id.*, namely, "whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious," *Mohamad v. Rajoub*, 634 F.3d 604, 606 (D.C. Cir. 2011) (quoting *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980)). Relief may be obtained even if not all of these factors weigh in favor of the moving party. *See, e.g.*, *Acree v. Republic of Iran*, 658 F. Supp. 2d 124, 130 (D.D.C. 2009) (setting aside default judgment "[e]ven accepting the plaintiffs' contention that Iraq's default was willful"). Moreover, "[b]ecause of the strong preference for resolving disputes on the merits, any doubts must be resolved in favor of the party seeking relief from the default." *Gray v. Staley*, 310 F.R.D. 32, 35 (D.D.C. 2015) (citing *Jackson*, 636 F.2d at 837). This is especially so when default is entered against a foreign nation: "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and undermine the State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838–839 (D.C. Cir. 2006) (quoting *Practical Concepts Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551 n.19 (D.C. Cir. 1987)).

Balancing the equities presented here, this Court finds that there is "good cause" to set aside the default judgment it previously entered in the instant case. Fed. R. Civ. P. 55(c). To start, the Court finds that the willfulness factor weighs in favor of maintaining the default judgment Order, given that the Central Bank has not made a persuasive argument that its default was *not* willful. *See Int'l Painters & Allied Trades*

Union & Indus. Pension Fund v. H.W. Ellis Painting Co., 288 F. Supp. 2d 22, 26 (D.D.C. 2003) ("The boundary of willfulness lies somewhere between a negligent filing error, which is normally considered an excusable failure to respond, and a deliberate decision to default, which is generally not excusable."). No affidavit or declaration has been offered in support of defense counsel's representation that the default was simply due to "confusion regarding how the litigation would be handled and by whom[,]" nor has counsel provided any evidence that substantiates the assertion that the Central Bank's confusion was caused, at least in part, by internal "political turmoil[.]" (Def.'s Reply in Supp. of Mot. to Set Aside, ECF No. 59, at 15.) In this context, Central Bank bears the burden of demonstrating non-willfulness, *see CJC Holdings*, 979 F.2d at 64, and its showing is manifestly insufficient in this regard. Nevertheless, the Court concludes that the remaining *Keegel* factors and the overall balance of the equities weigh in favor of setting aside the default judgment.

As to the second *Keegel* factor, courts have been clear that "[d]elay in and of itself does not constitute prejudice" in the absence of other accompanying tangible harms, such as "loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion[.]" *Capital Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 393–94 (D.D.C. 2005) (citing *KPS & Assocs., Inc. v. Designs By FMC, Inc.*, 318 F.3d 1, 15 (1st Cir. 2003)). CapitalKeys tries to establish such prejudice by contending that "employees with whom CapitalKeys'[s] subcontractors were working on modernizing the Central Bank's infrastructure abandoned their posts in late 2018 due to the impending elections[,]" and that "[i]t is also not known which or how many documents have been lost since that time." (Pl.'s Opp'n at 15.) But this is an

insufficient representation for at least two reasons. The first is the fact that it is not at all clear that the employees' or subcontractors' testimony is relevant to the claims in this case, which concern whether the contract at issue was properly formed or whether the Central Bank breached the agreement when it did not tender the negotiated payment upon signing. Second, and similarly, any records concerning the formation of the agreement are likely in CapitalKeys's control, and CapitalKeys has not only failed to explain *why* such evidence has been lost, but it has also failed to specify the particular documents or witnesses that it now maintains are unavailable.

The third *Keegel* factor presents a very low bar: the Central Bank bears the burden of alleging meritorious defenses, and for present purposes, "allegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." *Mohamad*, 634 F.3d at 606 (quoting *Keegel*, 627 F.2d at 374). In other words, "[l]ikelihood of success is not the measure" for determining whether a defense is meritorious with respect to an evaluation made under Rule 55(c); instead, the Court considers only whether the defendant has alleged colorable defenses based on the record presently before it. *Biton v. Palestinian Interim Self Government Authority*, 233 F. Supp. 2d 31, 33 (D.D.C. 2002).

In this case, it is clear to the Court that this factor, too, is satisfied. For instance, the Central Bank raises a potentially meritorious jurisdictional defense: that the "commercial activity" exception to sovereign immunity under the Foreign Sovereign Immunities Act does not apply here because the official who signed the CapitalKeys contract lacked actual authority to bind the Central Bank contractually. (*See* Def.'s Mot. at 15–17); *see also, e.g.*, *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006)

(holding that "an agent's acts conducted with the apparent authority of the [foreign] state is insufficient to trigger the commercial exception to FSIA"); *Velasco v. Gov't Of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004) (same); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (same). In addition, the Central Bank questions the validity of the contract at issue (*see* Def.'s Mot. at 18), and further disputes that CapitalKeys actually performed any work that benefitted the Central Bank (*see id.* at 19)—which, if true, would undermine CapitalKeys's breach of contract and unjust enrichment claims, respectively. *Cf. Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015) ("To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach."); *News World Commc'ns, Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005) (noting that unjust enrichment requires that "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust."). In short—and without belaboring the point—the Central Bank has now alleged potentially meritorious defenses.

III.

Where defendants who previously defaulted demonstrate that the equities are such that a non-final default judgment should be set aside, courts have not hesitated to grant relief under Rule 55(c). *See, e.g.*, *Gilmore*, 843 F.3d at 966; *Acree*, 658 F. Supp. 2d at 130; *Biton*, 233 F. Supp. 2d at 33. Here, it is clear to this Court that the equities favor setting aside the earlier default judgment, and that adhering to the Court's prior ruling might well "undermine the State Department's continuing efforts to encourage

foreign sovereigns generally to resolve disputes within the United States' legal framework." *FG Hemisphere Assocs.*, 447 F.3d at 838–839. Therefore, this Court finds good cause to set aside its prior order.

For the foregoing reasons, it is hereby

ORDERED that the Central Bank's motion to set aside the default judgment against the defendants (*see* ECF No. 55) is **GRANTED**, and that CapitalKeys's motion to modify the judgment (*see* ECF No. 50) is **DENIED AS MOOT**.

The Court directs the Clerk of Court to docket the Central Bank's motion to dismiss (*see* ECF No. 55-3) separately and, as a result, it is

FURTHER ORDERED that CapitalKeys shall file its opposition to the Central Bank's motion to dismiss on or before February 28, 2020.

Date: February 14, 2020

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT HAMMOND, Plaintiff, v. DEPARTMENT OF DEFENSE, *et al.*, Defendants.	)	No. 16-cv-0421 (KBJ)

MEMORANDUM OPINION AND ORDER

Plaintiff Robert Hammond ("Hammond" or "Plaintiff") is an individual who has requested a number of documents, including his medical records, from the Department of Defense, U.S. Defense Health Agency, and the Walter Reed National Military Medical Center (collectively, "Defendants") under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, *et seq., as amended*. (*See* Compl. at 1–2.) On March 16, 2016, Hammond filed the instant lawsuit to challenge the adequacy of Defendants' production of documents in response to certain of his requests.[1] (*See id.*) The parties previously fully briefed cross-motions for summary judgment, which the Court denied without prejudice to allow Defendants to produce additional responsive documents. (*See* Order, ECF No. 29, at 1.) Thereafter, on July 27, 2018, Defendants filed an Amended Renewed Motion for Summary Judgment. (*See* Defs.'s Amended Renewed Mot. for Summ. J., ECF No. 50.) Before the Court at present is Hammond's Motion for

[1] Hammond's Complaint also includes a claim that arises under the Privacy Act, 5 U.S.C. §§ 552a, *et seq., as amended*.

Relief Pursuant to the Federal Rule of Civil Procedure 56(d); Hammond seeks a period of limited discovery to better enable him to respond to Defendants' summary judgment motion. (*See* Pl.'s Mot. for Relief Pursuant to the Fed. R. Civ. P. 56(d) ("Pl.'s Mot."), ECF No. 53.) For the reasons explained herein, Hammond's motion for limited discovery will be **DENIED**.

"Courts have broad discretion to manage the scope of discovery in FOIA cases." *Long v. Immigration & Customs Enf't*, 149 F. Supp. 3d 39, 58 (D.D.C. 2015) (internal quotation marks and citation omitted). As a matter of course in FOIA cases, discovery is "rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175, 183 (D.D.C. 2013) (citing *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006)). However, limited discovery may be appropriate "if the plaintiff has made a sufficient showing that the agency acted in bad faith[,]" *Voinche v. FBI*, 412 F. Supp. 2d 60, 72 (D.D.C. 2006), or "where agency affidavits 'do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized.'" *Leopold v. Nat'l Sec. Agency*, No. 14-CV-0919 (KBJ), 2015 WL 12964654, at *1 (D.D.C. Feb. 20, 2015) (quoting *Weisberg v. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)).

Although Hammond alleges several discrepancies between Defendants' four affidavits, Hammond has not alleged or shown that Defendants acted in bad faith. Moreover, Defendants' affidavits "provide sufficient detail to describe the search Defendant[s] conducted" and thereby afford Hammond an adequate basis upon which to respond to Defendants' motion. *Id.* (citing *Goland v. Cent. Intelligence Agency*, 607

F.2d 339, 353–55 (D.C. Cir. 1978) (holding discovery was properly denied where affidavits thoroughly described the search and there was no showing of bad faith)). It appears that Hammond misunderstands the purpose of FOIA litigation, which does not serve to verify a requestor's belief that certain documents exist. Instead, a proper FOIA claim challenges the adequacy of an agency's search and/or production in response to a request for documents. *See Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (explaining that in FOIA cases, "[t]he question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate" (internal quotation marks and citation omitted)). Moreover, the issues that Hammond's Rule 56(d) Motion raises are of the type that are ordinarily brought in the context of a cross-motion for summary judgment, (*see, e.g.*, Pl.'s Mot. at 6 (discussing inconsistencies in two different versions of purportedly same responsive document); *id.* (noting agency affiant's assertion that document would be provided with 15 redactions)), and therefore, it is clear to this Court that Hammond already has sufficient information to respond to Defendants' motion for summary judgment. *Cf. Beltranena v. Clinton*, 770 F. Supp. 2d 175, 187 (D.D.C. 2011) ("[W]here ... an agency's affidavits regarding its search are deficient, courts generally do not grant discovery but instead direct the agency to supplement its affidavits." (internal quotation marks and citation omitted)).

For the forgoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Relief Pursuant to the Federal Rule of Civil Procedure 56(d) (ECF No. 53) is **DENIED**. It is

FURTHER ORDERED that the summary judgment briefing schedule is reset as follows: Plaintiff's consolidated opposition and cross-motion for summary judgment is due on or before February 28, 2020; Defendants' consolidated reply and cross-motion opposition is due on or before April 10, 2020; and Plaintiff's cross-motion reply is due on or before May 22, 2020. Briefs shall be filed as a batch within three (3) business days of the service of the last reply brief authorized by this Order, but in any event no later than the Final Filing Deadline of May 29, 2020. (*See* Superseding General Order and Guidelines for FOIA Cases, ECF No. 52.) Defendants may refile their Renewed Motion for Summary Judgment (ECF No. 50) in the final batched filing.

Plaintiff's attention is directed to ¶ 7 of Appendix A of this Court's General Order and Guidelines Applicable to FOIA Cases (ECF No. 52), which states that memoranda filed in support of, or in opposition to, any motion shall not exceed 45 pages without leave of Court. The Court's Order further directs that memoranda of ten pages or more shall contain a Table of Contents and Table of Authorities. Any future submissions by either party that do not fully comply with the Court's General Order and Guidelines will not be accepted.

DATE: December 31, 2019

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. NAWAZ RAJA, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 16-cv-0511 (KBJ)
FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION REGARDING SERVICE

On February 12, 2018, this Court issued an order that required Plaintiffs to "serve all Defendants . . . and file with the Court proof that they have effectuated service of process on all Defendants by April 13, 2018." (Mem. Op. and Ord. Partially Adopting the Magistrate Judge's Report and Recommendation Regarding Service ("Mem. Op."), ECF No. 56, at 14.) Before this Court at present is Magistrate Judge Deborah Robinson's Report and Recommendation ("R & R") dated September 4, 2019, finding that Plaintiffs failed to demonstrate proper service of process on Defendants IMB Holdco LLC and Indy Mac Venture LLC by April 13, 2018, and recommending that these Defendants be dismissed from the action without prejudice. (*See* R & R, ECF No. 97, at 1.) Plaintiffs timely filed an objection contesting the R & R's findings. (*See* Pls.' Obj. to R & R ("Pls.' Obj."), ECF No. 101.)

This Court previously found that Plaintiffs' efforts to serve Defendants were improper. (*See* Mem. Op. at 6–11 (noting that Plaintiffs had not served designated agents of the Defendants under Fed. R. Civ. P. 4(h)(1)(B), (i)(2), (e)(2), and had not filed the required servers' affidavits to prove that Defendants were properly served under Fed. R. Civ. P. 4(*l*)(1))). Therefore, this Court required Plaintiffs to "serve all Defendants" and stated that if Plaintiffs "fail[ed] to file proper proof of service by April 13, 2018, this Court [would] dismiss this case without prejudice." (*Id.* at 14–15.)

Plaintiffs' objection demonstrates that Plaintiffs have not taken any new actions to serve these two Defendants properly, nor have they filed proper proof of service in the form of the servers' affidavits, as Federal Rule of Civil Procedure 4(*l*) requires. (*See* Pls.' Obj. at 2–4 (relying on June 15, 2017 services that this Court has already deemed improper and lacking in proof of service); *see also* R & R at 1 (finding that Defendants were not served and no proof of service for either Defendant "appears among the ECF entries in this civil action").) Because Plaintiffs have not taken any actions to comply with this Court's order to serve these two Defendants properly and to prove such service by April 13, 2018, this Court finds that Plaintiffs have not met their burden of service of process under Federal Rule of Civil Procedure 4.

For the reasons stated above, it is hereby

ORDERED that the findings and recommendation of the [97] Report and Recommendation are **ADOPTED** (over Plaintiffs' objections).

Accordingly, it is

FURTHER ORDERED that this action is dismissed without prejudice as to Defendant IMB Holdco LLC and Indy Mac Ventures LLC for Plaintiffs' failure to

effect service upon them in accordance with Federal Rule of Civil Procedure 4 and this Court's [56] Memorandum Opinion and Order.

DATE: October 2, 2019

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE GRIGSBY, Petitioner, v. MARY THOMAS, *Judge, Circuit Court of Cook County Illinois*, Respondent.	)	No. 18-cv-2221 (KBJ)

MEMORANDUM OPINION

Petitioner George Grigsby, who is located in Chicago, Illinois, has filed a *pro se* document titled "Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. [§§] 2241, 2254[,]" in which he challenges the decision of Judge Mary Thomas (an Illinois state court judge) "to place him in a mental health institution without a grand jury indictment[.]" (Pet. For Writ of Habeas Corpus, ECF No. 1, at 1.) Grigsby has filed eight prior habeas actions in this District that appear to arise from these same facts, each of which named Judge Thomas as the respondent. *See Grigsby v. Thomas*, No. 14cv1579, 2014 WL4661195, at *1 (D.D.C. Sept. 19, 2014) (noting Grigsby's five prior habeas actions); *see also Grigsby v. Thomas*, No. 15cv1517; *Grigsby v. Thomas*, No. 16cv1918. In each of these prior cases, the district court found that that it did not have jurisdiction over Grigsby's habeas petition. *See, e.g.*, *Grigsby*, 2014 2014 WL4661195, at *1. That same conclusion is warranted here, and thus, this Court will **DISMISS** the habeas petition without prejudice for want of jurisdiction.

The proper respondent in a habeas action is the petitioner's custodian. *See Rumsfeld v. Padilla*, 542 U.S. 426, 440–41 (2004). Grigsby "has not indicated how Judge Mary Thomas could be his custodian." *Grigsby*, 2014 WL 4661195, at *1. Furthermore, even if Judge Thomas could somehow be deemed Grigsby's custodian, the Court nevertheless lacks jurisdiction over Grigsby's habeas petition because a federal district court "may not entertain a habeas petition [under § 2241] unless the respondent custodian is within its territorial jurisdiction." *Stokes v. U.S. Parole Comm'n*, 374 F.3d 1235, 1239 (D.C. Cir. 2004). If Grigsby "is confined at all, his confinement appears to be in Chicago, Illinois, not Washington, D.C." *Grigsby*, 2014 WL 4661195, at *1. Therefore, any habeas action challenging that confinement must be brought Illinois. *See id*.

Because this Court has no jurisdiction over Grigsby's habeas petition, it will dismiss this matter without prejudice. A separate order accompanies this Memorandum Opinion.

DATE: January 31, 2019

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE GRIGSBY, Petitioner, v. MARY THOMAS, *Judge, Circuit Court of Cook County Illinois*, Respondent.	)	No. 16-cv-1918 (KBJ)

MEMORANDUM OPINION

Petitioner George Grigsby, who is located in Chicago, Illinois, has filed a *pro se* document titled "Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. [§§] 2241, 2254[,]" in which he challenges the decision of Judge Mary Thomas (an Illinois state court judge) "to place him in a mental health institution without a grand jury indictment[.]" (Pet. For Writ of Habeas Corpus, ECF No. 1, at 1.) Grigsby has filed seven prior habeas actions in this District that appear to arise from these same facts, each of which named Judge Thomas as the respondent. *See Grigsby v. Thomas*, No. 14cv1579, 2014 WL4661195, at *1 (D.D.C. Sept. 19, 2014) (noting Grigsby's five prior habeas actions); *see also Grigsby v. Thomas*, No. 15cv1517. In each of these prior cases, the district court found that that it did not have jurisdiction over Grigsby's habeas petition. *See, e.g.*, *Grigsby*, 2014 2014 WL4661195, at *1. That same conclusion is warranted here, and thus, this Court will **DISMISS** the habeas petition without prejudice for want of jurisdiction.

The proper respondent in a habeas action is the petitioner's custodian. *See Rumsfeld v. Padilla*, 542 U.S. 426, 440–41 (2004). Grigsby "has not indicated how Judge Mary Thomas could be his custodian." *Grigsby*, 2014 WL 4661195, at *1. Furthermore, even if Judge Thomas could somehow be deemed Grigsby's custodian, the Court nevertheless lacks jurisdiction over Grigsby's habeas petition because a federal district court "may not entertain a habeas petition [under § 2241] unless the respondent custodian is within its territorial jurisdiction." *Stokes v. U.S. Parole Comm'n*, 374 F.3d 1235, 1239 (D.C. Cir. 2004). If Grigsby "is confined at all, his confinement appears to be in Chicago, Illinois, not Washington, D.C." *Grigsby*, 2014 WL 4661195, at *1. Therefore, any habeas action challenging that confinement must be brought Illinois. *See id*.

Because this Court has no jurisdiction over Grigsby's habeas petition, it will dismiss this matter without prejudice. A separate order accompanies this Memorandum Opinion.

DATE: December 14, 2018

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	)	No. 18-cv-1475 (KBJ)

MEMORANDUM OPINION

On May 25, 2018, President Donald Trump issued three executive orders "relating to the administration of the federal civil service and the rights of federal employees to engage in collective bargaining." *AFGE v. Trump*, 318 F. Supp. 3d 370, 379 (D.D.C. 2018); (*see also* Compl. ¶ 23, ECF. No. 1). The American Federation of Government Employees, AFL-CIO ("AFGE") promptly filed a complaint challenging the validity of certain provisions of one of those orders (*see* No. 18-cv-1261 (hereinafter the "Initial Action"), Compl., ECF No. 1), and numerous other federal employee unions filed additional lawsuits challenging the validity of identified provisions of all three executive orders, *see AFGE*, 318 F. Supp. 3d at 379. This Court consolidated the cases (*see* Initial Action, Minute Orders of June 15 and 19, 2018), and on August 25, 2018, after "work[ing] diligently to sort out, and resolve, the myriad complicated and contentious issues" involved in the consolidated cases, *AFGE*, 318 F. Supp. 3d at 380, the Court issued an opinion granting in part and denying in part both

sides' cross-motions for summary judgment, and enjoining the Executive Branch to disregard certain provisions of all three executive orders, *see id.* at 381–82. Defendants have filed an appeal (*see* Initial Action, ECF No. 62), which remains pending to date.

Mere days after this Court consolidated AFGE's Initial Action with the other cases discussed above, AFGE filed another complaint, seeking to challenge the validity of certain provisions of the two executive orders that it chose not to address in the Initial Action. (*See* Compl. (filed June 22, 2018) (hereinafter the "Instant Action").) AFGE expressly acknowledged that the claims it seeks to litigate in the Instant Action "grow[] out of the same event or transaction" as the claims it made in the Initial Action, and also that all of the consolidated cases "involve[] common issues of fact"; indeed, it filed both a Notice of Related Case in the Instant Action (*see* Instant Action, ECF. No. 3) and a Notice of Filing in the Initial Action (*see* Initial Action, ECF No. 24) that state as much. However, AFGE further asserted that it did *not* "presently anticipate seeking consolidation of [the Instant Action], case number 18-475, with [the Initial Action]" (*see* Initial Action, Notice of Filing at 1)[1]—a puzzling position that AFGE expressly reiterated in response to the Court's subsequent Order to Show Cause as to why the Instant Action should not be consolidated with the Initial Action and the other related cases that were collectively pending before the Court at that time (*see* Instant Action, Minute Order of August 20, 2018; *see also* Instant Action, Pl.'s Resp. to Order to Show Cause ("Resp. to OSC"), ECF No. 9, at 5 (arguing that consolidation of the Instant Action with the Initial Action and other cases would be "premature" and

[1] Page-number citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system automatically assigns.

"inappropriate" given that "there is not a complete overlap of AFGE's claims here with the claims pending in the consolidated cases").

Before this Court at present is Defendants' motion to dismiss AFGE's complaint, or in the alternative, to stay this case pending a final, non-appealable judgment in related case *AFGE v. Trump*, which primarily maintains that the Instant Action should be dismissed on claim-splitting grounds. (*See* Instant Action, Defs.' Mot. to Dismiss ("Defs.' Mot."), ECF No. 6.) Specifically, Defendants contend that the well-settled prohibition against claim-splitting bars AFGE from maintaining the present lawsuit (*id.* at 1), and for the reasons explained below, this Court agrees. Accordingly, Defendants' motion to dismiss is **GRANTED**, and the Instant Action is **DISMISSED**. A separate Order consistent with this Memorandum Opinion will follow.

I.

In *AFGE v. Trump*, this Court considered—and resolved—five cross-motions for summary judgment that presented a host of arguments regarding a variety of legal issues concerning the three executive orders that President Trump issued on May 25, 2018, including the question of whether the President lacked authority to issue certain provisions of these executive orders, as AFGE and the other plaintiff Unions contended. *See AFGE*, 318 F. Supp. 3d at 380. As relevant here, by consolidating the Unions' cases and considering the summary judgment motions collectively, the Court made clear that it was effectively treating the four separate actions and related summary judgment motions "as one." *Id.*; *see also id.* (observing that, among other things, "the Unions *collectively* contend that: (1) the President has no statutory or constitutional authority to issue executive orders pertaining to the field of federal labor relations; [and] (2) the

challenged provisions conflict with particular sections of the [Federal Service Labor-Management Relations Statute ("FSLMRS")] in a manner that abrogates the Unions' statutory right to bargain collectively" (emphasis added)).

Notably, the *only* claims that AFGE made in the context of the Initial Action concerned Executive Order number 13837 (the "Official Time Order") (*see* Initial Action, Compl. ¶¶ 1, 2), which, according to AFGE, sought "to impermissibly rewrite portions of the [FSLMRS]" (*id.* ¶ 2). AFGE's complaint specifically assailed sections 4(a)(v), 2(j), 3(a), and 4(a)(ii) of the Official Time Order, alleging that section 4(a)(v) "is void and contrary to the First Amendment"; sections 2(j) and 3(a) "are *ultra vires* and contrary to 5 U.S.C. § 7131"; and section 4(a)(ii) is "*ultra vires* and contrary to 5 U.S.C. § 7131 and Chapter 71[.]" (*Id.* at 14.)

In the Instant Action, AFGE contends that Executive Orders number 13836 (the "Bargaining Order") and 13839 (the "Removal Procedures Order") also contain faulty provisions (*see* Instant Action, Compl. at 10–14), and AFGE further insists that it brings claims now that were not specifically challenged in any of the consolidated cases (*see* Resp. to OSC at 3 n.3). With respect to Defendants' claim-splitting argument, AFGE argues that it is entitled to litigate its claims concerning the Bargaining Order and the Removal Procedures Order in the context of the Instant Action because, even if these claims "overlap[]" with the claims raised in the consolidated cases, AFGE challenged only the validity of certain provisions of the Official Time Order in its earlier case (*see* Instant Action, Pl.'s Opp'n to Defs.' Mot. ("Pl.'s Opp'n"), ECF No. 8, at 8), and the Court did not actually address AFGE's current claims regarding the Bargaining Order and the Removal Procedures Order in its *AFGE v. Trump* opinion (*id.*;

see also id. at 9.)[2] Defendants counter that it is precisely because both of AFGE's cases "involv[e] the same subject matter" that AFGE cannot bring these claims now, given that it had every opportunity to make these claims in the context of the Initial Action. (Defs.' Mot. at 5 (quoting *Hudson v. AFGE*, 308 F. Supp. 3d 388, 394 (D.D.C. 2018)).) Defendants' argument is clearly correct, for the reasons explained below.

II.

It is well established that "a plaintiff has no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." *Baird v. Gotbaum*, 792 F.3d 166, 171 (D.C. Cir. 2015) (quoting *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 222 (D.C. Cir. 1980)). This disfavored practice is known as "claim-splitting," and it occurs when a plaintiff files a second lawsuit that concerns the same cause of action as the plaintiff's first lawsuit, such that it "would be precluded under *res judicata* analysis" by a final judgment in the first matter. *Hudson*, 308 F. Supp. 3d at 394 (internal quotation marks and citation omitted). Moreover, it is clear beyond cavil that "*[r]es judicata* bars further claims by parties based on the same cause of action on any ground for relief which the parties already have *had an opportunity to litigate*, even if they chose not to exploit that opportunity." *Id.* (emphasis added) (internal quotation marks, citations, and alterations omitted); *see also Drake v. F.A.A.*, 291 F.3d 59, 66 (D.C. Cir. 2002); *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981).

"Whether [or not] two cases implicate the same cause of action turns on whether

[2] Defendants disagree, arguing that the claims AFGE attempts to raise now "were *actually* litigated [in the consolidated cases] because they were raised by other Union Plaintiffs[.]" (Def.'s Mot. at 5 (emphasis in original).)

they share the same nucleus of facts[,]" *Hudson*, 308 F. Supp. 3d at 394 (internal quotation marks and citation omitted), and courts evaluate various factors to make this determination. Such factors include "whether the facts are related in time, space, origin, or motivation[;] whether they form a convenient trial unit[;] and whether their treatment as a unit conforms to the parties' expectations or business understanding and usage." *Ananiev v. Freitas*, 37 F. Supp. 3d 297, 309 (D.D.C. 2014) (internal quotation marks and citation omitted), *aff'd* 587 Fed. App'x 661 (D.C. Cir. 2014); *see also* Restatement (Second) of Judgments § 24 (referring to "a transaction, or series of connected transactions" rather than a "nucleus of facts"). Thus, although "[t]he term ['cause of action'] has been given varied treatment depending largely on the facts in each case," *U.S. Indus., Inc. v. Blake Const. Co., Inc.*, 765 F.2d 195, 205 (D.C. Cir. 1985) (internal quotation marks and citation omitted), courts have concluded that two causes of action are the same where, for example, the complaints at issue pertain to "various" breach-of-contract claims that are all related to one construction project, *id.* at 206; or the claims arise out of one "widespread mortgage scam[,]" *Poblete v. Indymac Bank*, 657 F. Supp. 2d 86, 91 (D.D.C. 2009) (internal quotation marks and citation omitted); or the second complaint arises out of "[t]he same set of events that served as the basis for" the first action's employment discrimination claims, *Polsby v. Thompson*, 201 F. Supp. 2d 45, 50 (D.D.C. 2002).

III.

The claims that AFGE makes in its two cases unquestionably "involv[e] the same subject matter" as the Initial Action and consolidated complaints, *Baird*, 792 F.3d at 171 (internal quotation marks and citation omitted), which compels the conclusion that

the prohibition against claim-splitting bars the instant case. As noted above, the three executive orders that AFGE and the other plaintiff Unions challenged in the consolidated cases form one "nucleus of facts" that the Court treated as such without objection (*see* No. 18-cv-1348, Order for Consolid., ECF No. 23, at 1 (ordering the numerous cases challenging different aspects of the three executive orders consolidated because, among other things, "the claims in each case *arise from a common nexus of fact*" (emphasis added))), and AFGE readily admits that the claims it makes in the Instant Action arise from this same corpus (*see* Instant Action, Notice of Related Case at 1). What is more, the facts involved in AFGE's two separate actions "form a convenient trial unit," *Ananiev*, 37 F. Supp. 3d at 309 (internal quotation marks and citation omitted), which is precisely why all concerned agreed that these challenges to the three executive orders should be consolidated. And AFGE's instant claims are substantively no different than the rest; they could easily have been raised and resolved alongside those other challenges.

Thus, AFGE was mistaken to suggest that it would be "prejudice[d]" if the Court considered the allegations it makes in the Instant Action at the same time as AFGE's other substantively similar challenges to the President's executive orders. (Resp. to OSC at 1.) Nor can AFGE be heard to argue that treating its two cases "as a unit" for the purpose of Defendants' claim-splitting motion—and thus dismissing the instant action as improper—fails to "conform[] to [AFGE's] expectations," *Ananiev*, 37 F. Supp. 3d at 309 (internal quotation marks and citation omitted), when it is patently clear that the parties foresaw the possibility of consolidating the Instant Action with the Initial Action and the other consolidated cases "for the purpose of simply applying any

summary judgment order in the consolidated cases to AFGE's claims in this case" (Resp. to OSC at 1), and AFGE now seeks to benefit from this Court's summary judgment ruling with respect to the very claims that it intentionally withheld at the moment this Court considered the substantively similar challenges that its prior ruling addressed. (*See* Instant Action, Joint Status Rep., ECF No. 10, at 1 ("AFGE submits that the Court's reasoning, findings, and conclusions in [*AFGE*, 318 F. Supp. 3d 370,] should be applied to this action and that a corresponding final order should therefore issue in this action.").)

It is also significant that AFGE has offered no reason *why* it opted to challenge the provisions of only one of the three executive orders in the first instance; it points to no impediment to doing so, and thus, it indisputably "had an opportunity to litigate" the claims it seeks to raise now. *Hudson*, 308 F. Supp. 3d at 394 (internal quotation marks and citation omitted). To be specific, AFGE could have amended its complaint in the Initial Action to make the claims it brings today, or at the very least, it could have consented to the consolidation of the Instant Action with all of the other challenges to the three executive orders that this Court was considering in the context of the consolidated cases, but for whatever reason, AFGE "chose not to exploit that opportunity." *Id.* (internal quotation marks and citation omitted). And under the circumstances presented here, this strategic miscalculation is especially unfortunate: this Court has now issued a final judgment in AFGE's Initial Action, which means that AFGE has forfeited the right to bring these claims at all. *See Drake*, 291 F.3d at 66 ("[U]nder *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that

action." (emphasis in original) (internal quotation marks and citation omitted)); *Hardison*, 655 F.2d at 1288 ("[T]he parties to a suit and their privies are bound by a final judgment and may not relitigate any ground for relief which they already have had an opportunity to litigate—even if they chose not to exploit that opportunity—whether the initial judgment was erroneous or not.").

IV.

The two actions that AFGE has filed in this Court arise out of the same cause of action: they both seek to challenge provisions of President Trump's May 25th executive orders concerning federal collective bargaining rights. For unknown reasons, AFGE decided to attack only one of the three executive orders in its Initial Action, and it now seeks to assail the two other executive orders in the context of a separate case, notwithstanding this Court's consideration and resolution of the other pending legal claims related to this same nucleus of facts (including the claims brought in AFGE's initial case). The well-established rule against claim-splitting plainly prevents AFGE from raising the belated, related claims that it seeks to litigate now. Accordingly, and as set forth in the accompanying Order, Defendants' motion to dismiss is **GRANTED**, and AFGE's action is **DISMISSED**.

DATE: November 16, 2018

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEVIN TURNER, Plaintiff, v. FEDERAL BUREAU OF PRISONS, *et al.*, Defendants.	)	No. 18-cv-0273 (KBJ)

MEMORANDUM OPINION

In January of 2018, pro se plaintiff Kevin Turner ("Turner") filed an action in the Superior Court of the District of Columbia alleging that that he was wrongfully held in federal custody at Federal Correctional Institution Gilmer ("FCI Gilmer") for eight months beyond the expiration date of his sentence. (*See* Compl., Ex. 1 to Not. of Removal, ECF No. 1-1, at 1.)[1] Turner's complaint names as defendants the Federal Bureau of Prisons ("BOP") and FCI Gilmer (collectively, "Defendants") and seeks damages of $300,000. (*See id.*) Defendants removed Turner's case to this Court on February 6, 2018, pursuant to 28 U.S.C. §§ 1442(a)(1) and 1446. (*See* Defs.' Notice of Removal, ECF No. 1.)

Before this Court at present is Defendants' motion to dismiss the complaint or, alternatively, for summary judgment. (*See* Defs.' Mot. to Dismiss ("Defs.' Mot."), ECF No. 4.) Defendants argue that this Court lacks jurisdiction over Turner's claim based on the derivative jurisdiction doctrine, that Turner failed to exhaust his administrative

[1] Page numbers cited herein refer to those automatically assigned by the Court's electronic case filing system.

remedies, that Turner's complaint fails to state a claim because it names the wrong parties as defendants, and that venue for Turner's action does not lie in this Court, in any event. (*See generally* Defs.' Mem. In Support of Defs.' Mot. ("Defs.' Mem."), ECF No. 4-2.) Because this Court agrees that it lacks jurisdiction over Turner's claim both under the derivative jurisdiction doctrine and because he failed to exhaust his administrative remedies, Defendants' motion to dismiss must be **GRANTED**. A separate order accompanies this Memorandum Opinion.

I. BACKGROUND

A. Factual Background

According to Turner's complaint, on November 21, 2016, he was sentenced to time-served in Superior Court Case Number 2015 CF1 007328. (*See* Compl. at 1.) Rather than being released, however, Turner claims that he was sent to FCI Gilmer and "house[d] with convicted murders with no time left on my sentence, and place[d] in their disciplinary facility." (*Id.*) Turner allegedly tried to raise the sentence computation issue with BOP officials, but he was rebuffed and "informed that my sentence was correct several times." (*Id.*) Turner was not released from federal custody until July 10, 2017, nearly eight months later, and he claims that he was released then only after the trial judge in his case intervened. (*See id.*) Turner's complaint demands $300,000 in damages for this allegedly wrongful incarceration. (*Id.*)

B. Procedural Background

Turner filed his single-page, hand-written complaint in the Superior Court of the District of Columbia on January 5, 2018. (*See generally* Compl.) On February 6, 2018,

Defendants removed Turner's complaint to this Court pursuant to 28 U.S.C. § 1442(a)(1), which permits removal of suits filed in state courts against the United States and its agents and officers. (*See* Not. of Removal at 1.) [2] Thereafter, on February 13, 2018, Defendants moved to dismiss Turner's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and Rule 12(b)(6). (*See* Defs.' Mot. at 1.)

Defendants argue for dismissal pursuant to Rule 12(b)(1) on the grounds that this Court lacks jurisdiction over Turner's complaint based on the derivative jurisdiction doctrine, under which a federal court does not have jurisdiction over a removed action if the state court lacked jurisdiction in the first instance. (*See* Defs.' Mem. at 3–4 ("If a State court lacks subject matter jurisdiction over a suit, the Federal court likewise lacks jurisdiction over the suit upon removal, even if the Federal court would have maintained jurisdiction in a like suit originally brought there." (quoting *Merkulov v. U.S. Park Police*, 75 F. Supp. 3d 126, 129 (D.D.C. 2014) (alterations omitted) (internal quotation marks omitted)).) In this regard, Defendants argue that Turner's damages claim for false imprisonment arises under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, and because that statute vests jurisdiction solely in the federal courts, the D.C. Superior Court never had jurisdiction over Turner's complaint, which prevents this Court from exercise jurisdiction on removal. (*See id.* at 4–5.) Defendants further argue that Turner failed to exhaust his administrative remedies, because he did not file the requisite notice informing BOP of his claim, which likewise deprives this Court of jurisdiction over his complaint. (*See id.* at 5–7.) With respect to the purported grounds

[2] In their notice of removal, Defendants also cite 28 U.S.C. § 1446, which lays out the procedure for removal of actions. (*See* Not. of Removal at 1.)

for dismissal under Rule 12(b)(6), Defendants argue that Turner's complaint fails to state a claim because it names BOP and FCI Gilmer as defendants, rather than the United States, as the FTCA requires. (*See id.* at 6 n.2.) In addition, Defendants argue that venue for Turner's action does not lie in this district because Turner does not reside here, and the underlying actions took place at FCI Gilmer, which is located in West Virginia, and not in this district. (*See id.* at 7–9.) In response, Turner argues solely that this Court should deem him to have exhausted his administrative remedies because he submitted administrative grievances seeking to have his sentence recalculated, to which he received belated responses or no response at all. (*See* Pl.'s Opp'n, ECF No. 7, at 1–2.)[3]

Defendants' motion to dismiss is now ripe for the Court's consideration. (*See* Defs.' Reply in Supp. of Defs.' Mot., ECF No. 8.)

II. LEGAL STANDARDS

A. Motions To Dismiss For Lack Of Subject Matter Jurisdiction Under Rule 12(b)(1)

If a court lacks subject matter jurisdiction to entertain a claim, it must dismiss that claim. *See* Fed. R. Civ. P. 12(b)(1), 12(h)(3). Where, as here, a defendant files a motion to dismiss under both Rule 12(b)(1) and Rule 12(b)(6), "the court must first examine the Rule 12(b)(1) challenges," because a dismissal for lack of subject matter jurisdiction renders "the [other] accompanying defenses and objections [] moot[.]"

[3] Turner did not respond to Defendants' derivative jurisdiction argument in his opposition brief (*see generally* Pl.'s Opp'n), which means that this Court has the discretion to treat the argument as conceded and dismiss Turner's complaint on this basis, *see* LCvR 7(b). However, because of "the clear preference of the Federal Rules to resolve disputes on their merits[,]" *Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 345 (D.C. Cir. 2018) (internal quotation marks and citation omitted), this Court will consider the merits of this argument, *see infra* Part III.A.

Schmidt v. U.S. Capitol Police Bd., 826 F. Supp. 2d 59, 64 (D.D.C. 2011) (citations and internal quotation marks omitted).

It is well-settled that the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted); *Halcomb v. Office of the Senate Sergeant-at-Arms of the U.S. Senate*, 209 F. Supp. 2d 175, 176 (D.D.C. 2002) (citation omitted). Moreover, and importantly, under Rule 12(b)(1), it is "'presumed that a cause lies outside [the federal courts'] limited jurisdiction,' unless the plaintiff establishes by a preponderance of the evidence that the Court possesses jurisdiction[.]" *Muhammad v. FDIC*, 751 F. Supp. 2d 114, 118 (D.D.C. 2010) (first alteration in original) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) and citing *Hollingsworth v. Duff*, 444 F. Supp. 2d 61, 63 (D.D.C. 2006)).

"[T]he court must scrutinize the plaintiff's allegations more closely when considering a motion to dismiss pursuant to Rule 12(b)(1) than it would under . . . Rule 12(b)(6)." *Schmidt*, 826 F. Supp. 2d at 65 (citing *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003), *Epps v. U.S. Capitol Police Bd.*, 719 F. Supp. 2d 7, 12 (D.D.C. 2010), and *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001)). In addition, when considering the issue of subject matter jurisdiction, a court is permitted to rely on matters outside of the pleadings, such as affidavits. *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). Nevertheless, the court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Brown v. District of Columbia*, 514 F.3d 1279, 1283 (D.C. Cir. 2008). However, it need not "accept

inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001). And if the court finds that it lacks subject matter jurisdiction, the matter ends there, because "the court [can] no more rule in favor of [a party] than against it." *Simpkins v. D.C. Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997).

B. Standards For Pro Se Plaintiffs

In applying the legal standards addressed above, this Court is mindful of the fact that Turner is proceeding in this matter pro se. The pleadings of pro se parties are to be "liberally construed," and it is well established that a pro se complaint "must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (internal citations and quotation marks omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam). "This benefit is not, however, a license to ignore the Federal Rules of Civil Procedure." *Sturdza v. United Arab Emirates*, 658 F. Supp. 2d 135, 137 (D.D.C. 2009) (citation omitted); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993). That means that even a pro se plaintiff must plead facts that establish subject-matter jurisdiction. *See, e.g.*, *Green v. Stuyvesant*, 505 F. Supp. 2d 176, 177 (D.D.C. 2007) (dismissing complaint where pro se plaintiff failed to demonstrate subject-matter jurisdiction).

III. ANALYSIS

A. This Court Lacks Jurisdiction Over Turner's Claims Under The Derivative Jurisdiction Doctrine

It is well established that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction." *Lambert Run Coal Co. v. Balt. & O.R. Co.*, 258 U.S. 377, 382 (1922); *see also Palmer v. City Nat'l Bank of W. Va.*, 498 F.3d 236,

244 (4th Cir. 2007) ("The derivative-jurisdiction doctrine arises from the theory that a federal court's jurisdiction over a removed case derives from the jurisdiction of the state court from which the case originated."). "To determine whether this Court lacks subject matter jurisdiction by virtue of the doctrine of derivative jurisdiction, the threshold determination is whether, prior to removal, the Superior Court for the District of Columbia had jurisdiction of the subject matter or of the parties." *McKoy-Shields v. First Wash. Realty*, No. 11-cv-1419, 2012 WL 1076195, at *2 (D.D.C. Mar. 30, 2012). If the Superior Court did not, this Court cannot "acquire" jurisdiction upon removal, even if Turner could have filed his complaint in federal court in the first instance. *Lambert Run Coal*, 258 U.S. at 382.

As discussed in Section III.B, *infra*, Turner's claim for damages arising from his alleged false imprisonment must be brought under the FTCA, which not only waives sovereign immunity under some circumstances, but also vests federal courts with "exclusive" jurisdiction to hear such claims. 28 U.S.C. §§ 1346(b), 2679(a). This means that the Superior Court did not have jurisdiction over Turner's claim against Defendants in the first place, and given that this matter was removed to federal court under sections 1442 and 1446 of Title 28 of the United States Code (*see* Notice of Removal at 1), this Court cannot assert jurisdiction over it on removal.[4]

[4] Section 1442 of Title 28 of the United States Code has long been interpreted to require that the jurisdiction of the federal court be assessed in part relative to the jurisdiction of the state court from which the case was removed. Such is not the case for removals effectuated under section 1441, which contains specific language to the effect that the derivative jurisdiction doctrine shall not apply. *See* 28 U.S.C. § 1441(f) (stating that "[t]he court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim"). "Although Congress has chosen to abrogate the derivative jurisdiction doctrine for removals effectuated under 28 U.S.C § 1441, application of the derivative jurisdiction doctrine remains valid where, like here, cases are removed under 28 U.S.C § 1442." *McKoy-Shields*, 2012 WL 1076195, at *2 (citations omitted).

B. This Court Lacks Jurisdiction Over Turner's FTCA Claim Because He Failed To Exhaust His Administrative Remedies

The defendants in this case are components of a federal agency—the United States Department of Justice—and as such, Defendants enjoy sovereign immunity. *See Jefferson v. Fed. Bureau of Prisons*, 657 F. Supp. 2d 43, 46 (D.D.C. 2009) (dismissing constitutional claims against BOP on sovereign immunity grounds). "[S]overeign immunity shields the Federal Government and its agencies from suit[,]" unless that immunity has been waived by statute. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994)) (citations omitted)). The FTCA constitutes "a limited waiver of the Government's sovereign immunity[,]" pursuant to which "plaintiffs may sue the United States in federal court for state-law torts committed by government employees within the scope of their employment." *Harbury v. Hayden*, 522 F.3d 413, 416 (D.C. Cir. 2008) (citing 28 U.S.C. §§ 1346(b), 2671–80)); *see also Epps v. U.S. Atty. Gen.*, 575 F. Supp. 2d 232, 238 (D.D.C. 2008) (noting that "[w]hen a plaintiff seeks monetary damages against a federal agency for certain torts committed by federal employees, the only possible basis for court jurisdiction would be the [FTCA]").

Turner's complaint in the instant case claims that he was falsely imprisoned, which is a tort claim that is generally cognizable under the FTCA when brought against federal defendants. (*See* Compl. at 1.) Indeed, the *only* federal statute that provides a cause of action for monetary damages against federal employees on the grounds that the defendants committed the tort of wrongful imprisonment is the FTCA. *See Khan v. Holder*, 134 F. Supp. 3d 244, 250 (D.D.C. 2015) (noting that the FTCA "provides the exclusive remedy for [a] common-law tort claim[] of . . . false imprisonment"). However, before filing suit against the United States for a tort under the FTCA, a

claimant must timely present a written claim to the relevant agency, and thereby exhaust his administrative remedies. *See* 28 U.S.C. § 2675(a) (prohibiting the institution of a tort claim against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail").[5] "For purposes of the provisions of [the FTCA], a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain[.]" 28 C.F.R. § 14.2(a).[6] Only after an agency has either denied a claim, or six months have passed following the claim's submission, will a federal court have jurisdiction over an FTCA civil suit pertaining to that claim. *See* 28 U.S.C. § 2675(a).

Here, the record is clear that Turner has not yet exhausted his administrative remedies as required by law. First of all, according to Defendants' declarant, a search of the database where BOP maintains its FTCA administrative claims did not reveal that Turner submitted to BOP Standard Form 95 or any other written claim that included a demand for monetary damages arising from his allegedly improper incarceration. (*See* Decl. of Corinne M. Nastro ¶ 6, ECF No. 4-3.) What is more, Turner essentially concedes in his opposition brief that he did not file the requisite claim; he points instead to a "Request for Administrative Remedy" that he submitted

[5] Per the FTCA, a timely claim is one that is filed with the agency in writing within two years after it accrues. *See* 28 U.S.C. §2401(b).

[6] Standard Form 95 is available to the public on the Department of Justice's website. *See* Standard Form 95, Claim for Damage, Injury, or Death (*available at* https://www.justice.gov/sites/default/files/civil/legacy/2011/11/01/SF-95.pdf).

to prison officials during his incarceration. (Request for Admin. Remedy, ECF No. 7 at 5; *see also* Pl.'s Opp'n at 1–2.) In this document, Turner asserted that his "release date is inaccurate [*sic*]" and that he "should have been released on [November 29, 2016,]" and sought an "audit of my sentence computation." (Request for Admin. Remedy at 5.) While this document does lay out the factual predicate for the instant FTCA claim, it is nonetheless insufficient under the law of this Circuit to exhaust Turner's FTCA administrative remedies because Turner did not include a demand for a specific sum of money. *See, e.g.*, *GAF Corp. v. United States*, 818 F.2d 901, 919 (D.C. Cir. 1987) (explaining that, in order to exhaust administrative remedies, an FTCA claimant must "file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum-certain damages claim").

Thus, even if this Court could exercise derivative jurisdiction over the instant action (it cannot, *see* Part III.A, *supra*), Turner's failure to exhaust his administrative remedies independently deprives this Court of any jurisdiction over the claim for monetary damages that Turner now asserts. *See McNeil*, 508 U.S. at 113 (affirming dismissal of FTCA claim for lack of subject-matter jurisdiction because "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies"); *Simpkins*, 108 F.3d at 371 (explaining that "the FTCA's requirement of filing an administrative complaint with the appropriate agency prior to instituting an action [i]s jurisdictional"); *Abdurrahman v. Engstrom*, 168 Fed. App'x 445, 445 (D.C. Cir. 2005) (per curiam) (affirming the district court's dismissal of unexhausted FTCA claim "for lack of subject matter jurisdiction"); *James v. United*

States, 48 F. Supp. 3d 58, 65 (D.D.C. 2014) (concluding that "[t]his Court can only assert jurisdiction over [an FTCA] claim after the relevant federal agency has finally denied the claim") (citing cases)).

IV. CONCLUSION

For the reasons stated above, this Court concludes that it lacks jurisdiction over Turner's claim against Defendants.[7] As a result, and as set forth in the Order that accompanies this opinion, Defendants' motion to dismiss the claim under Rule 12(b)(1) is **GRANTED**, and the matter is **DISMISSED** without prejudice to Turner's right to file suit again in the correct court, if and when he exhausts the required administrative process.

DATE: August 31, 2018

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

[7] Having concluded that this Court lacks jurisdiction over Turner's claim, it will not address the other asserted grounds for dismissal, including Defendants' contention that venue for any FTCA claim arising from Turner's detention lies in either Maryland (where Turner resides) or West Virginia (where Turner was incarcerated). (*See* Defs.' Mem. at 7 (citing *Shipley v. Bureau of Prisons*, 729 F. Supp. 2d 272, 275 (D.D.C. 2010).) *See also* 28 U.S.C. § 1402(b).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN MALACHI Appellant, v. GEMMA CALLISTE, EARL CALLISTE, Appellees.	)	No. 1:17-cv-329 (KBJ)

MEMORANDUM OPINION

Creditor John Malachi has appealed to this Court from the decision of the Bankruptcy Court for the District of Columbia regarding the validity of several loans that he made to Debtor Earl Calliste. *See In re Calliste*, 10-00685, 2017 WL 213793 (Bankr. D.D.C. Jan. 18, 2017); *see also* 28 U.S.C. § 158(a)(1) (allowing for such an appeal). In his appellate brief, which is before this Court at present, Malachi argues that the bankruptcy court erred in ruling that several of the loans he made to Calliste were illegal, and thus contractually unenforceable, under the D.C. Loan Shark Act, D.C. Code § 26-901. (*See* Appellant's Br., ECF No. 4, at 13–19.)[1] However, this Court must consider a significant threshold question: did Malachi file a timely notice of appeal regarding the bankruptcy court's substantive conclusions? (*See* Appellee's Br., ECF No. 7, at 12.) *See also Owens v. Grigsby*, 575 B.R. 1, 3–4 (D.D.C. 2017) (dismissing appeal for lack of jurisdiction due to the untimely filing of a notice of appeal). Having considered the parties' briefs and having heard the parties' oral arguments, this Court

[1] Page-number citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system automatically assigns.

has concluded that Malachi's notice of appeal was not timely, for the reasons explained below. Therefore, as set forth in the accompanying Order, Malachi's appeal must be **DISMISSED**.

I. BACKGROUND[2]

Since 1998, Malachi has executed "about 30" loans with an interest rate of around 15% per annum to Calliste and Calliste's wife. (*See* Bankr. Hr'g Tr. at 4:9–18; 5:17–18; 6:15–18.) Calliste used these loans to purchase old rundown properties that he would fix up and sell at a profit, and in theory, he would use the proceeds to pay off his debt to Malachi and pocket any leftover money. (*See id.* at 45:6–46:7.) Unfortunately, this business strategy foundered, and Calliste ended up filing for Chapter 11 bankruptcy. (*See* Bankr. Record at 60.)

In the bankruptcy proceedings, Malachi sought to recover money from Calliste's bankruptcy estate, filing nine 'proofs of claim' that corresponded to the outstanding loans between Malachi and Calliste. *See In re Calliste*, 2017 WL 213793, at *10. But Calliste objected to these proofs of claim on the ground that Malachi could not collect on these loans because they were illegal under the D.C. Loan Shark Act. *See id.* at *4, *10. The bankruptcy court proceeded to take testimony on this matter; then, in a thirty-seven page Memorandum Decision dated January 18, 2017, the bankruptcy court partially agreed with Calliste. *See id.* at *10–*12. (*See also* Bankr. Record at 15–51.) Specifically, based on "[t]he scope and breadth of Malachi's lending activities[,]" the bankruptcy court concluded that Malachi had "engaged in the business of loaning

[2] These facts are drawn from the record materials that Malachi (the appellant) has designated (*see* Notice of Bankruptcy Appeal Record ("Bankr. Record"), ECF No. 2), as well as from the transcript of the testimony from the underlying bankruptcy court proceedings (*see* Bankruptcy Hr'g Tr., ECF No. 4-2), of which this Court takes judicial notice.

money" for the purpose of the D.C. Loan Shark Act. *In re Calliste*, 2017 WL 213793, at *6. The court then explained its considerations regarding the circumstances under which the challenged loans had been made, and it ultimately announced its conclusion that four of the loans between Calliste and Malachi ran afoul of the Act's provisions. *Id.* at *10–*12; *see also id*. at *10 ("Malachi has filed a total of nine proofs of claim . . . [and] the notes supporting those claims fall into three distinct categories: (1) notes that, on their face, directly violate the D.C. Loan Shark Act"; "(2) notes that fall within an exception to the D.C. Loan Shark Act"; and (3) "notes that may not directly violate the D.C. Loan Shark Act, but are nevertheless unenforceable[.]").

The bankruptcy court formalized this ruling in an order dated January 24, 2017. (Bankr. Record at 52–54.) This order sustained Calliste's objections as to the claims Malachi had made involving the four loans that the court had held invalid under the Loan Shark Act, and it "disallowed [those claims] in their entirety[.]" (*Id.* at 52.) The bankruptcy court largely overruled Calliste's objections to Malachi's other five claims, and proceeded to determine the interest rates and late fees that would apply to the loans underlying these surviving claims. (*See id.* at 52–53.) Having thus decided the merits of Calliste's objections and the costs that Calliste would have to pay with respect to the proofs of claim that the court had accepted, the bankruptcy court's January 24th Order required the parties to "submit a proposed stipulated order" or statements that summed up these damages in dollars. (*Id.* at 53.) In light of the parties' subsequent filing, the court issued an order listing that sum on February 14, 2017. (*See id.* at 55–58.)

Malachi filed a notice of appeal on February 20, 2017. (*See id.* at 98.) At a broad level, his appeal contends that the bankruptcy court erred in holding that the Loan

Shark Act applied to him at all, and he also maintains that the bankruptcy court was wrong to conclude that four of the loans he made to Calliste were illegal under the Act. (*See* Appellant's Br. at 13–19.) Calliste contends that the bankruptcy court was correct on both points, and, as relevant here, he also argues that this Court has no jurisdiction to entertain Malachi's appeal because Malachi filed an untimely notice of appeal under Federal Rule of Bankruptcy Procedure 8002(a). (*See* Appellee's Br. at 12–22.) This Court held oral arguments on these issues on April 10, 2018.

II. LEGAL STANDARDS

Under section 158(a) of Title 28 of the United States Code, federal district courts have jurisdiction to hear appeals from the decisions of federal bankruptcy courts. *See* 28 U.S.C. § 158(a); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 252 (1992). This statute authorizes an appeal of right regarding "final judgments, orders, and decrees . . . in [the] cases and proceedings" of bankruptcy courts, *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (alteration in original) (quoting 28 U.S.C. § 158(a), and it reflects the longstanding principle that "'orders in bankruptcy cases may be immediately appealed'"—i.e., they become appealable—"'*if* they finally dispose of discrete disputes within the larger case[,]'" *id.* (emphasis added) (quoting *Howard Delivery Serv. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006)). When handling a matter on appeal from the bankruptcy court, the district court takes on the role of an appellate tribunal, in that it reviews question of law under a *de novo* standard of review and questions of fact for clear error. *See Momoh v. Osayande*, 564 B.R. 1, 3 (D.D.C. 2017); *see also* 28 U.S.C. § 158(c)(2) (noting that such an appeal "shall be taken in the same manner as

appeals in civil proceedings generally are taken to the courts of appeals from the district courts").

Notably, in seeking an appeal from an order of the bankruptcy court, the appellant must file his appeal within "the time provided by Rule 8002 of the Bankruptcy Rules." 28 U.S.C. § 158(c)(2). Under that rule, a prospective appellant has "14 days after entry of the judgment, order, or decree being appealed" to file his notice of appeal. Fed. R. Bankr. P. 8002(a)(1). Moreover, every court of appeals to have previously considered this rule has concluded that it imposes a mandatory and jurisdictional limit upon a district court's ability to hear a bankruptcy claim. *See, e.g.*, *In re Ozenne*, 841 F.3d 810, 814 (9th Cir. 2016); *In re Sobczak-Slomczewski*, 826 F.3d 429, 432 (7th Cir. 2016) (collecting cases from the Third, Fifth, and Tenth Circuits); *see also, e.g.*, *Owens*, 575 B.R. at 3 (D.D.C. 2017). Therefore, if a would-be appellant in a bankruptcy case fails to file a timely notice of appeal, the district court cannot proceed to the merits of the appellant's claim. *See Owens*, 575 B.R. at 3; *cf. Doughtery v. United States*, 156 F. Supp. 3d 222, 228 (D.D.C. 2016) (explaining that a federal court will not consider the merits of a claim made on appeal absent subject-matter jurisdiction).[3]

[3] It is unnecessary for this Court to consider whether Rule 8002's time requirement qualifies as an (unwaivable) jurisdictional rule, or a (waivable) "claims processing" rule under the Supreme Court's recent decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017) (explaining that Federal Rule of Appellate Procedure 4(a)(5)(C) is merely a claims processing rule), because even if Rule 8002(a)(2) is a claims-processing rule, Calliste has timely asserted that Malachi failed to file a timely notice of appeal. *See In re Coleman*, 429 B.R. 387, 392 (D.D.C. 2010) ("Assuming, *arguendo*, that Rule 8002 is a claim-processing rule, the Court must still dismiss the matter as [plaintiff] invoked the Rule in raising a timeliness objection to the notice of appeal."); *see also Hamer*, 138 S. Ct. at 18 ("Claim-processing rules ensure relief to a party properly raising them." (alterations omitted) (quoting *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam))).

III. ANALYSIS

As noted, Calliste contends that Malachi's appeal should be dismissed as untimely. (*See* Appellee's Br. at 12.) To be specific, Calliste maintains that Malachi had 14 days from the bankruptcy court's January 24th Order to file his notice of appeal under Rule 8002(a)(1)—which was February 7, 2017—and thus Malachi's February 20, 2017, notice of appeal comes too late. (*See id.*) In response, Malachi contends that the "order being appealed" for Rule 8002(a)(1) purposes is the bankruptcy court's Order dated February 14, 2017, and thus, his notice of appeal is timely because it came a mere six days after that order. (*See* Appellant's Reply Br., ECF No. 8, at 4.) Thus, the key question of law for this Court to decide with respect to this threshold timeliness issue is whether the January 24th Order, on the one hand, or the February 20th Order, on the other, should be deemed to have "finally dispose[d] of [the] discrete dispute[]" relating to Malachi's claims against Calliste for the purpose of Rule 8002. *Bullard*, 135 S. Ct. at 1692.

"In ordinary civil litigation, a case in federal district court culminates in a final decision . . . by which a district court disassociates itself from a case[.]" *Id.* at 1691 (internal quotation marks and citations omitted). However, "[t]he rules are different in bankruptcy." *Id.* at 1692. Because a typical "bankruptcy case involves an aggregation of individual controversies[,] . . . Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *Id.* (internal quotation marks and citations omitted). So when a party seeks to appeal an order in a bankruptcy case, the court must typically look to whether that order "alter[ed] the status quo and fixe[d] the rights and obligations of the parties" with regard to the entirety of a dispute between a particular creditor and the debtor. *Id.*;

see also In re Saco Local Dev. Corp., 711 F.2d 441, 445–46 (1st Cir. 1983) (holding that a final bankruptcy court order is one that "conclusively determines a separable dispute over a creditor's claim or priority").

Here, it is readily apparent that the bankruptcy court's January 24th Order resolved Malachi's claims and effectively determined how much money Calliste would owe Malachi. That order specifically sustained Calliste's "objection to Proofs of Claim Nos. 10-2, 12-2, 15-2, and 16-2" and "disallowed" those claims "in their entirety." (Bankr. Record at 52.) Furthermore, with respect to Malachi's other five claims, the bankruptcy court largely overruled Calliste's objections (*see id.* at 53), and determined the fees and interest rates that would apply to those loans (*see id.* at 53–54). The bankruptcy court's Order of January 24, 2017 thus determined the full extent of Calliste's liability to Malachi, and in deciding the relevant interest rates and fees that applied to the principal of each loan, the bankruptcy judge also effectively determined the amount of damages Calliste owed. Indeed, all that remained to be done was the "ministerial [and] mechanical task[]" of punching some numbers into a calculator; consequently, the January 24th Order clearly constitutes a final order for purposes of section 158(a)(1) of Title 28 of the United States Code. *See In re Saco*, 711 F.2d at 448 ("[A]s long as an order allowing a claim or priority effectively settles the amount due the creditor, the order is 'final[.]'").

The fact that the parties still needed to calculate the actual "appropriate amounts" in the wake of the January 24th Order (*see* Bankr. Record at 53)—*i.e.*, to total up the loans' principal amounts, the interest owed using the interest rates determined by the bankruptcy court, and the late fees that the bankruptcy court found allowable—is of

no moment. This kind of ministerial (nondiscretionary) act does not render the ruling of the bankruptcy court on the merits of the parties' disputed claims non-final. *See In re St. Charles Pres. Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990) (per curiam) (suggesting that an order that leaves "solely 'ministerial' proceedings to be conducted by the bankruptcy court"—such as the "computation of amounts according to established formulae"—is final). And in the subsequent order, the bankruptcy court merely documented the parties' ministerial calculations; it did nothing more than announce the foreordained monetary sums that, according to the January 24th Order, Calliste owed Malachi. (*See* Bankr. Record at 56 (calculating the balance based on the loans' principal, the interest rates determined in the January 24th Order, and the valid known late fees).) Accordingly, the bankruptcy court aptly titled the February 14th Order "Agreed Order *Calculating* Proof of Claim Balances" (*id.* at 55 (emphasis added)), and made no additional substantive determinations—acts that made eminent sense, given that the January 24th Order had already determined "the status quo and fixe[d] the rights and obligations of the parties[,]" *Bullard*, 135 S. Ct. at 1692.

In short, because the final appealable order in this case was the order that the bankruptcy court issued on January 24, 2017, Malachi had until February 7, 2017, to file his notice of appeal. *See* Fed. R. Bankr. P. 8002(a). And because Malachi waited an additional thirteen days to file such a notice (*see* Bankr. Record at 98), his notice of appeal was filed well outside of the window provided by Federal Rule of Bankruptcy Procedure 8002(a)(1). As a result, this Court lacks jurisdiction to consider the merits of Malachi's appeal. *See Owens*, 575 B.R. at 3.

IV. CONCLUSION

For the reasons explained above, and as reflected in the accompanying Order, this appeal must be **DISMISSED**.

DATE: August 31, 2018

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHEILA J. LAWSON, Plaintiff, v. JEFFERSON B. SESSIONS, *U.S. Attorney General, et al.*, Defendants.	)	No. 15-cv-1723 (KBJ)

MEMORANDUM OPINION

On March 3, 2018, Defendants in this matter filed a motion to dismiss plaintiff Sheila Lawson's amended complaint, or alternatively, for summary judgment. (ECF No. 29.) Because she is proceeding pro se, this Court advised Lawson of her obligations under the Federal Rules of Civil Procedure and the local rules of this Court to respond to the motion, and specifically warned Lawson that, if she did not respond to the motion by April 20, 2018, the Court may treat the motion as conceded and may dismiss the case or enter judgment in Defendants' favor. (*See* Order, ECF No. 30, at 1–3.) Lawson sought, and this Court granted, two extensions of this deadline (*see* Min. Order of Apr. 26, 2018 (extending deadline to May 11, 2018); Min. Order of May 21, 2018 (extending deadline to May 21, 2018)), and in its Order granting the second requested extension, the Court warned Lawson that "absent extraordinary and unforeseen circumstances, no further extensions of this deadline will be granted" (Min. Order of May 21, 2018).

Lawson has now requested a third extension to respond to Defendants' motion, asserting that she needs more time because "four fully identified FBI Special Agents and a DOJ employee utilized the verified illegally circulated unauthorized telecommunications property and access to computer programs that Plaintiffs is listening to 24/7, 365, as she is spied on by laypersons and government officials[,]" which has prevented her from working on her opposition. (Pl.'s Mot. for a 3d Extension of Time to File and/or Supplement Pl.'s Mem. in Opp'n & Decl., ECF No. 36, at 1–2; *see also id.* at 8 (alleging that Lawson "has listened to [two individuals] violently yelling into their computers (my brain) and spying into [my residence] for a couple hours"); *id.* at 11 (alleging that an individual "accesses unauthorized telecommunications property and stolen computer programs to stalk and talk to Sheila Lawson's brain 24/7, and also watch and listen to any talking in Sheila Lawson's environment anywhere.").)

Federal Rule of Civil Procedure 6(e) authorizes this court to extend a deadline if a party requests an extension before the deadline expires upon a showing of "good cause." And while Lawson did file her request before her deadline had passed, this Court finds that her assertion that she needs more time because the government has been spying on her and yelling into her brain does not constitute good cause, let alone extraordinary and unforeseen circumstances that would justify yet another extension of this deadline. *Cf. Ling Yuan Hu v. U.S. Dep't of Def.*, No. 13-5157, 2013 WL 6801189, at *1 (D.C. Cir. Dec. 11, 2013) (holding that the district court's sua sponte dismissal of a complaint as patently insubstantial was proper where "its factual allegations were 'essentially fictitious,' involving a fantastic scenario of a vast government conspiracy

to interfere in appellant's daily life"); *Custis v. CIA*, 118 F. Supp. 3d 252, 255 (D.D.C. 2015) (sua sponte dismissing a complaint as patently insubstantial where the plaintiff alleged that government officials had implanted devices into her body and were continuously stalking and surveilling her), *aff'd sub nom. Custis v. Cent. Intelligence Agency*, 650 F. App'x 46 (D.C. Cir. 2016). Accordingly, this Court will **DENY** Lawson's request for a third extension of time, will **GRANT** Defendants' motion to dismiss as conceded, and will **DISMISS** this action without prejudice.[1] *See* LCvR 7(b); *Cohen v. Bd. of Trustees of the Univ. of D.C.*, 819 F.3d 476, 480 (D.C. Cir. 2016).

A separate Order accompanies this Memorandum Opinion.

DATE: May 24, 2018

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

[1] Because the Court is dismissing Lawson's complaint, it does not reach the merits of Defendants' alternative argument that they are entitled to summary judgment. *See Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505 (D.C. Cir. 2016) ("Under the Federal Rules of Civil Procedure, a motion for summary judgment cannot be 'conceded' for want of opposition.").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEEPING GOVERNMENT BEHOLDEN, INC.,	)	
Plaintiff,	)	
v.	)	No. 17-cv-01569 (KBJ)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
DENYING PLAINTIFF'S MOTION TO EXPEDITE

Before this Court at present is Plaintiff Keeping Government Beholden's motion to expedite this case pursuant to the Federal Courts Civil Priorities Act, 28 U.S.C. § 1657. (*See* Pl.'s Mot. to Expedite Consideration of Count 5 ("Pl.'s Mot."), ECF No. 13.) Plaintiff asks this Court to expedite its review of this case and thereby compel the Federal Bureau of Investigation ("FBI") to "process and release records responsive to Count 5 [of the Complaint] biweekly and at a rate greater than 500 pages/month." (*Id.* at 1.) For the reasons that follow, Plaintiff's motion will be **DENIED**.

Under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("the FOIA"), FOIA requestors may request that an agency expedite the processing of a FOIA request. *See* 5 U.S.C. § 552(a)(6)(E). However, if the FOIA requestor fails to seek expedition at the administrative level, it cannot later make such a request before the district court. *See Am. Civil Liberties Union v. DOJ*, 321 F. Supp. 2d 24, 28 (D.D.C. 2004). This requirement allows the agency to take the first crack at any request for expedited processing and to provide its input and expertise as the parties develop an

administrative record that may eventually support judicial review. *See Judicial Watch, Inc. v. U.S. Naval Observatory*, 160 F. Supp. 2d 111, 112 (D.D.C. 2001); *see also Hidalgo v. FBI*, 344 F.3d 1256, 1259 (D.C. Cir. 2003).

Recognizing this and acknowledging its failure to seek expedited review directly from the agency, Plaintiff here insists that it is not asking for a district court order that requires expedited processing *under the FOIA*; instead, Plaintiff asks this Court to order DOJ to expedite review of the documents pertaining to Count Five of Plaintiff's complaint pursuant to 28 U.S.C. § 1657(a), a statute that allows litigants to request that a federal court expedite its review of an action when "good cause therefor is shown." 28 U.S.C. § 1657(a); *see also id*. ("'Good cause' is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit.").

After reviewing the parties' arguments and the relevant law surrounding 28 U.S.C. § 1657(a), the Court has decided that Plaintiff's motion cannot be sustained. For one thing, Plaintiff has not clearly demonstrated that section 1657(a) is a generally acceptable route for seeking expedition of the processing of documents under the FOIA. By its terms, that statute authorizes a court to "expedite the consideration of any *action*" filed pursuant to various provisions, 28 U.S.C. § 1657(a), and says nothing about a court's authority to order an agency to expedite its own processing of records under the FOIA. By contrast, the FOIA itself expressly addresses the authorized procedure for the expedition of the agency's processing obligations, as described above. The fact that Congress has provided an avenue for FOIA requestors to seek expedited

processing from an agency and also judicial review of that agency decision, *see* 5. U.S.C. § 552(a)(6)(E), renders dubious Plaintiff's contention that FOIA requesters can do an end-run around the prescribed procedures by requesting that a court order the agency to expedite its document processing under 28 U.S.C. § 1657(a) instead.

The only available cases in which courts have seen fit to apply section 1657(a) in the FOIA context are those in which there was manifest good cause for expedited review of the record and consideration of the FOIA dispute. For example, as noted in *Summers v. DOJ*, 733 F. Supp. 443, 444 n.4 (D.D.C. 1990), courts have granted such relief when a requestor needs the information to either "appeal his death penalty sentence" or "to avoid deportation." Similarly, in *Ferguson v. FBI*, the court ordered expedition under section 1657(a) because the agency had taken four years to respond to a state prisoner's FOIA request, and the relevant documents pertained to the incarcerated individual's contention that he had been wrongfully convicted of conspiracy to commit murder. *See* 722 F. Supp. 1137, 1139, 1144–45 (S.D.N.Y 1989).

The Plaintiff here has not made any similar showing of significant need, much less the kind of *urgent* need that could possibly justify this Court's application of section 1657(a) to excuse Plaintiff's failure to seek expedition directly from the agency. There is nothing about the requested records themselves—i.e. "all emails sent or received by former FBI Director James Comey between 1/1/17 – 5/9/17 which contain the word 'transitory'" (Compl. ¶ 42, ECF No. 1)—that indicates that fast processing is warranted; in fact, Plaintiff appears to acknowledge that very little is even known about the content of these records. *See* (Pl.'s Mot. at 4 ("No member of the public knew then—or knows now—how many of those emails were sent or received, what exactly

they pertained to, or more importantly for this case, whether they were considered administrative or investigatory records.").) Moreover, the fact that these particular records may be of public interest at the moment is not, standing alone, sufficient to justify expedited processing of Plaintiff's request. *See Long v. Dep't of Homeland Security*, 436 F. Supp. 2d 38, 43, (D.D.C. 2006) (emphasizing that there must be "an ongoing public controversy" that needs to be resolved within "a specific time frame"). And this is especially so where, as here, there are other potential avenues for public release of the same information that Plaintiff has requested. (*See* Decl. of David M. Hardy, ECF No. 15-1, at ¶ 16(g) (noting that this FOIA request is merely one of "numerous requests for records related to James Comey and his firing by President Donald Trump").)

Finally, this Court is satisfied that Plaintiff's purported concerns regarding the imminent destruction of records responsive to Count Five (*see* Pl.'s Mot. at 4) have been addressed. The FBI's declarant states that the agency has already located all documents potentially responsive to Count Five, and that those documents have been preserved. (*See* Hardy Decl. at ¶ 5.) Thus, rather than creating additional delay by continuing to press for expedition under a statutory provision that is not plainly applicable to the instant circumstances, this Court suggests that Plaintiff engage with the government to negotiate a processing and production schedule that is more generous than the one that the government intends to follow.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to expedite review of Count Five under 28 U.S.C. § 1657(a) is **DENIED.**

Date: December 1, 2017

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YOUNG N. CHO, Plaintiff, v. MALLON & MCCOOL, LLC, *et al*., Defendant.	)	No. 17-cv-0453 (KBJ)

MEMORANDUM OPINION

On February 18, 2017, Plaintiff Young Cho filed an eleven-count complaint in D.C. Superior Court alleging that Defendants Steven McCool, Joseph Mallon, and Mallon & McCool, LLC (collectively, "Defendants") committed a series of fraudulent and negligent acts while representing Cho in previous legal proceedings, resulting in purportedly excessive legal fees. (*See generally* Compl., Ex. 2 to Defs.' Notice of Removal, ECF No. 1-2.) Before this Court at present is Cho's motion to stay the case and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3, 4. (*See* Pl.'s Mot. to Compel Arbitration and Stay the Case ("Pl.'s Mot."), ECF No. 11-1, at 3.)[1] For the reasons that follow, this Court concludes that because Cho has forfeited any right to arbitration that he may once have possessed, Cho's Motion to Compel Arbitration and Stay the Case must be **DENIED**. A separate Order consistent with this Memorandum Opinion shall follow.

[1] Page-number citations to documents the parties have filed refer to the page numbers that the Court's electronic filing system assigns.

DISCUSSION

The Federal Arbitration Act ("FAA") authorizes courts, under certain circumstances, to stay proceedings referable to arbitration and/or compel the parties to arbitrate pursuant to a valid written agreement. *See* 9 U.S.C. §§ 3, 4. Significantly for present purposes, the D.C. Circuit has unequivocally emphasized that the *timing* of a party's request to stay a case pending arbitration matters: it has held that a defendant who seeks a stay pending arbitration under Section 3 of the FAA but "who has not invoked the right to arbitrate on the record *at the first available opportunity*, typically in filing his first responsive pleading or motion to dismiss, has presumptively forfeited that right." *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011) (emphasis added); *see also id.* at 924 ("By this opinion we alert the bar in this Circuit that failure to invoke arbitration at the first available opportunity will presumptively extinguish a client's ability later to opt for arbitration."). However, a party still can "overcome the presumption of having forfeit his right to a stay" if "his conduct in litigation after the first responsive pleading imposed no or little cost upon opposing counsel and the courts." *Id.* at 923; *see also id.*

Additionally, it appears that "[t]he right to arbitration, like any contract right, can be waived[,]" even if it is not forfeited. *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987). Such waiver can occur in several ways; for example, through "active participation in a lawsuit[,]" or by taking other actions that are otherwise "inconsistent[] with the arbitration right[,]" *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 424–25 (D.C. Cir. 2008) (internal quotation marks and citations omitted). "In this circuit, the court views the totality of the

circumstances [in deciding whether] the defaulting party has acted inconsistently with the arbitration right." *Id.* at 425 (alteration in original) (internal quotation marks and citation omitted). *Compare id.* at 428 (finding that the defendant waived its right to compel arbitration by filing a motion to dismiss, or alternatively, for summary judgment or to compel arbitration, because the defendant's actions were "inconsistent with preserving the right to compel arbitration" notwithstanding the otherwise "limited extent of [the defendant's] litigation activity[,]" and because the plaintiffs had "suffered significant prejudice"), *with Davis Corp. v. Interior Steel Equip. Co.*, 669 F. Supp. 32, 33, 34 (D.D.C. 1987) (holding that subcontractor did not waive right to arbitration by filing an action in federal court to protect against the statute of limitations, or by participating in minimal discovery, where subcontractor "*consistently* maintained that the dispute should be subject to arbitration" (emphasis in original)).

In the instant matter, Cho contends that a stay of this case in order to arbitrate the pending attorneys' fees issues is warranted because both Rule 4 of the Attorney/Client Arbitration Board ("ACAB") Rules and Rule XIII of the Rules Governing the District of Columbia Bar ("Bar Rules") provide that a lawyer is deemed to have agreed to arbitrate a fee dispute whenever a client requests arbitration on that issue. (*See* Pl.'s Mot. at 4.) However, even assuming, *arguendo*, that the ACAB and/or Bar Rules provide a valid basis for Cho to demand arbitration under the FAA—which, by its express terms, requires "an agreement *in writing*" that expresses the parties' assent to arbitration, 9 U.S.C. § 3 (emphasis added); *see also id.* § 4—Cho's motion to stay cannot be countenanced because Cho has not previously asserted his right to

arbitration in the context of this proceeding, and has repeatedly acted inconsistently with an intent to exercise any arbitration right that he may have possessed.

The timeline of Cho's protracted litigation belies any suggestion that Cho invoked arbitration at the first available opportunity. On February 22, 2016, Cho filed a substantially similar eleven-count complaint in D.C. Superior Court, which contained no reference to arbitration. (*See* Compl., Dkt. No. 1-1, in Civ. Action No. 16-cv-0562, at 11–52.) After Defendants removed Cho's case to this Court and filed two motions to dismiss, Cho once again failed to request arbitration, and instead asked for an extension of time to "prepare a response to Defendants' two motions to dismiss" and to obtain the necessary documentation in support thereof. (Pl.'s Second Consent Mot. for Enlargement of Time, Dkt. No. 13, in Civ. Action No. 16-cv-0562, at 2.) Cho then filed two separate oppositions to Defendants' motions to dismiss (*see* Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(1), Dkt. No. 14, in Civ. Action No. 16-cv-0562; Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(6), Dkt. No. 15, in Civ. Action No. 16-cv-0562)—neither of which invoked any right to arbitration—and shortly after Defendants' motions to dismiss became ripe, Cho sought leave to file two sur-replies in further opposition to Defendants' motions; his motions for leave omitted any reference to arbitration (*see* Pl.'s Mot. for Leave to File Sur-Reply in Opp'n to Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(1), Dkt. No. 18, in Civ. Action No. 16-cv-0562; Pl.'s Mot. for Leave to File Sur-Reply in Opp'n to Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(6), Dkt. No. 19, in Civ. Action No. 16-cv-0562). Then, on October 13, 2016, Cho filed a notice of voluntary dismissal of his case (*see* Pl.'s Stipulation of Dismissal Without Prejudice, Dkt. No. 21, in Civ. Action No.

16-cv-0562), yet he did not thereafter seek to arbitrate his claims (*see* Defs.' Opp'n to Pl.'s Mot., ECF No. 13, at 7).

Instead, four months later, on February 18, 2017, Cho initiated the instant action in D.C. Superior Court (*see* Compl.) and, once again, Defendants removed the case to this Court and filed two motions to dismiss (*see* Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(1), ECF No. 3; Defs.' Mot. to Dismiss Pursuant to Rule 12(b)(6), ECF No. 8). In response, Cho did not invoke a right to arbitration; rather, he sought (and received) two extensions of time to prepare oppositions to Defendants' motions. (*See* Pl.'s First Consent Mot. for Enlargement of Time, ECF No. 10; Pl.'s Second Mot. for Enlargement of Time, ECF No. 12.) It was only after more than thirteen months had passed, and after he had initiated two lawsuits, that Cho finally filed the instant motion to stay the case and compel arbitration. (*See* Pl.'s Mot.)

In this Court's view, there is no question that Cho has presumptively forfeited his right to stay the case pursuant to 9 U.S.C. § 3 by failing "to invoke arbitration at the first available opportunity." *Auffenberg*, 646 F.3d at 924. To be sure, the *Auffenberg* court articulated a forfeiture standard applicable when the party requesting arbitration is the *defendant*, and as a result, it is not entirely clear from *Auffenberg* when a *plaintiff's* "first available opportunity" to invoke arbitration occurs. *See also id.* at 922 (explaining that a defendant's first available opportunity is "typically in filing his first responsive pleading or motion to dismiss"). But even assuming, *arguendo*, that a plaintiff's first opportunity to invoke arbitration in the course of litigation can arise sometime after the filing of the complaint, it is clear on the facts of this case that Cho did not invoke his right to arbitrate at the earliest available opportunity; indeed, Cho's

prior lawsuit proceeded for nearly eight months before Cho voluntarily dismissed that action, and even at *that* point, Cho did not seek to arbitrate his claims. (*See* Defs.' Opp'n to Pl.'s Mot., ECF No. 13, at 7.) Moreover, Cho took no steps to arbitrate his claims in the four ensuing months (*see id.*), and instead ultimately opted to initiate the instant action.

Cho insists that this Court should discount this chronology because he "regularly conferred with Defendants to resolve the case by settlement[.]" (Pl.'s Reply Mem. in Supp. of Pl.'s Mot. ("Pl.'s Reply"), ECF No. 14, at 4.) But "that representation is nowhere documented in the record[,]" and it is well established that "a court considering a question of forfeiture is properly concerned only with intentions placed upon the record." *Auffenberg*, 646 F.3d at 923. What the record in this case *does* make crystal clear is that, by failing to assert his right to arbitrate timely, Cho's litigation activities have imposed substantial costs on Defendants and on this Court, which is sufficient to defeat Cho's contention that he is entitled to seek arbitration now. *See id.* (suggesting that a defendant can "overcome the presumption of having forfeit his right to a stay" if "his conduct in litigation after the first responsive pleading imposed no or little cost upon opposing counsel and the courts").

Notably, and for what it is worth, the same facts that give rise to a forfeiture finding as discussed above also demonstrate that Cho has waived any right to arbitrate.[2] Cho's active participation in litigating his claims against these defendants was vigorous

[2] The D.C. Circuit appears to have departed from the waiver approach to evaluating Section 3 motions to stay pending arbitration. *See Auffenberg*, 646 F.3d at 922 (noting that, from 1966 through 2008, the Circuit "referred to the question of default exclusively in terms of waiver[,]" but this standard "established few bright-line rules[,]" and thus, "imposed a cost upon both litigants and the district court").

and intentional, as described above. Furthermore, Cho's current representation that he initiated the February 2016 case "[i]n order to preserve his claims under the statute of limitations" (Pl.'s Reply at 4) is of no moment, because, regardless, Cho actively prosecuted his claims, and did not "*consistently* maintain[] that the dispute should be submitted to arbitration." *Davis*, 669 F. Supp. at 33 (emphasis in original).

CONCLUSION

Because Cho has failed to invoke arbitration at his first available opportunity and has repeatedly acted inconsistently with any right to arbitrate, he has forfeited any arbitration right he may once have possessed such that his request for arbitration at this juncture cannot be honored. Accordingly, as set forth in the accompanying Order, Cho's Motion to Compel Arbitration and Stay the Case (ECF No. 11) is **DENIED**.

DATE: July 11, 2017

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMEROON WHITERU, *Individually and as Personal Representative of the Estate of Okiemute C. Whiteru, ex ux.*,	)	
Plaintiffs,	)	
v.	)	No. 15-cv-0844 (KBJ)
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,	)	
Defendant.	)	

MEMORANDUM OPINION

This case concerns the death of Okiemute Whiteru ("Whiteru"), whose body was discovered in the Judiciary Square Metro Station on October 23, 2013. Whiteru suffered an accidental injury inside the Metro Station on October 19, 2013; in the instant lawsuit, Whiteru's parents, Cameroon Whiteru and Agnes Whiteru (collectively, "Plaintiffs"), contend that the Washington Metropolitan Area Transit Authority ("WMATA") negligently failed to discover Whiteru in time to provide him with life-saving emergency medical assistance. Plaintiffs' negligence claim arises under the common law of the District of Columbia (*see* Am. Compl., ECF No. 21, ¶¶ 23–30 (Count I)), and based on the alleged negligence, Plaintiffs have also brought a survival action under D.C. Code § 12-101 (*see id.* ¶¶ 31–34 (Count II)), and a claim for wrongful death pursuant to D.C. Code § 16-2701 (*see id.* ¶¶ 35–36 (Count III)).

Before this Court at present is WMATA's motion for summary judgment under Federal Rule of Civil Procedure 56. (*See* Def.'s Mot. for Summ. J. ("Def.'s Mot."),

ECF No. 27, at 8.)[1] In support of its motion, WMATA argues that the doctrine of sovereign immunity bars Plaintiffs' tort claims (*see id.*), or alternatively, that WMATA is entitled to judgment as a matter of law because Plaintiffs have failed to present evidence that is sufficient to establish all of the essential elements of their tort claims (*see id.*). Plaintiffs oppose WMATA's summary judgment motion on the grounds that WMATA has waived its sovereign immunity for the conduct alleged, and that there are genuine disputes about material facts that pertain to each of the elements of Plaintiffs' negligence accusation. (*See* Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Pls.' Opp'n"), ECF No. 28, at 10–15.)

For the reasons explained fully below, this Court finds that WMATA is not entitled to sovereign immunity for the conduct alleged, and that Plaintiffs have satisfied their burden of bringing forward admissible evidence that could support a reasonable jury finding that WMATA breached a duty of care that it owed to Whiteru and thereby caused his death. As a result, WMATA's motion for summary judgment will be **DENIED**, and this case will be scheduled for trial. A separate Order consistent with this Memorandum Opinion will follow.

I. BACKGROUND

A. Facts Pertaining To Whiteru's Death[2]

Okiemute Whiteru was a 35-year-old attorney who lived and worked in Washington, D.C. (*See* Pls.' Resp. to Def.'s Statement of Material Facts ("Pls.'

[1] Page-number citations to documents the parties have filed refer to the page numbers that the Court's electronic filing system assigns.

[2] The facts recited here are primarily drawn from the parties' statements of fact, which are based on WMATA surveillance video and depositions from WMATA station managers, among other record evidence. Unless otherwise noted, these facts are undisputed. *See* Fed. R. Civ. P. 56(a).

Material Facts"), ECF No. 30, at 3.) Shortly after midnight on Saturday, October 19, 2013, Whiteru rode a D.C. Metro train from the Farragut North Station to the Judiciary Square Station. (*See id*. at 3–4.) After Whiteru exited the train, he rode the escalator from the platform up to the mezzanine level of the station. (*See id.* at 4.)[3]

At around 1:07 a.m., Whiteru approached the information kiosk on the mezzanine level of the Judiciary Square station and spoke to Rhonda Brown, the station manager on duty. (*See id.*; Aff. of William C. Martin, Ex. 1 to Def.'s Reply to Pls.' Resp. to Def.'s Statement of Material Facts, ECF No. 31-1, at 3.) Brown helped Whiteru pass through the turnstile, and Whiteru proceeded down the escalator to the platform for Shady Grove-bound trains. (*See* Pls.' Material Facts at 4; Def.'s Mot. at 6.) At the time, the escalator down to the platform was stationary, *i.e.*, it was in "stair mode." (Pls.' Material Facts at 4.)

Whiteru stumbled down the last few steps of the escalator and fell onto the train platform. (*See* Def.'s Mot. at 6.) No one else was on the platform, and Whiteru lay at the base of the escalator for over three and a half minutes before he struggled to his feet. (*See* Pls.' Material Facts at 5.) After he stood up, Whiteru leaned against the three-foot concrete parapet—a protective wall—that runs along the outside edge of the platform, on the opposite side of where the trains arrive. (*See id.*) There is a 53-inch gap between the edge of the platform where the parapet is and the station wall (*see*

[3] Whether Whiteru left the Judiciary Square Metro Station before he ultimately returned to the train platform is disputed. (*Compare* Pls.' Material Facts at 4, *with* Def.'s Reply to Pls.' Material Facts ("Def.'s Reply re: Material Facts"), ECF No. 31, at 3.) However, there is no dispute that Whiteru exited the "paid area" of the Metro Station at 12:48 a.m., just under 20 minutes before he approached the kiosk. (Aff. Of William Martin, Ex. 1 to Def.'s Reply re: Material Facts, ECF No. 31-1, at 2.)

Investigative Report of Brian L. Mills, Ex. 7 to Pls.' Opp'n, ECF No. 28-7, at 14); the parapet separates the train platform from that gap (*see id.* 14–15).[4]

After approximately 45 seconds of leaning, Whiteru tried to sit on top of the parapet. (*See* Def.'s Mot. at 5–6.) Less than ten seconds later, at approximately 1:15 a.m., Whiteru fell backwards, over the top of the parapet and into the gap between the platform and the station wall. (*See id.* at 7; Pls.' Material Facts at 5; *see* Def.'s Reply to Pls.' Resp. to Def.'s Statement of Material Facts ("Def.'s Reply re: Material Facts"), ECF No. 31, at 5.) As a result of this fall, Whiteru suffered severe injuries, including a fracture of his "bony vertebrae at the C-5 level" (*see* Pls.' Material Facts at 5), but he did not die instantly (*see id.* at 13). The parties dispute exactly how long Whiteru was still alive after the fall, but they agree that Whiteru would have survived this accident if he had been discovered by 1:30 a.m.—*i.e.*, 15 minutes after he fell. (*See id.*; Def.'s Reply re: Material Facts at 16.) Moreover, there is no dispute that if Whiteru had been discovered soon after his accident and had received medical care, he would have survived this accident without any traumatic brain injury. (*See* Pls.' Material Facts at 13–14.) However, Whiteru was not immediately discovered; he remained behind the parapet wall for more than four and a half days (*see id.* at 5–6), and had already died from his injuries by the time he was found (*see id.* at 6).

Four days after Whiteru's fall—on October 23, 2013, at approximately 2:50 p.m.—an anonymous Metro passenger told Metro employee Reginald Herron, who was the station manager on duty at the mezzanine-level kiosk at that time, that he saw a

[4] The station's foundation is behind the parapet; the foundation is more than three feet below the passenger platform and more than seven feet below the top of the parapet. (*See id.* at 17–18.)

human body behind the parapet. (*See id.* at 6.)[5] Rhonda Brown, who happened to be on duty that day, went with Herron to the area of the platform where the passenger had seen the body. (*See id.* at 12; Herron Dep., Ex. 3 to Pls.' Opp'n, ECF No. 28-3, at 2–3.) Looking over the parapet, Brown was able to see Whiteru's body in the space between the platform and the station wall without a flashlight or any other equipment. (*See* Pls.' Material Facts at 12–13.)

Notably, as the station manager on duty when Whiteru entered the station on October 19, 2013, Rhonda Brown was supposed to inspect the station platform three times after Whiteru's fall—at 1:30 a.m., 2:30 a.m., and when the station closed that night, at 3:15 a.m. (*See id.* at 10–11.) Brown signed the station manager checklist indicating that she had completed these inspections (*see* Station Manager Hourly Checklist, Ex. to Def.'s Mot, ECF No. 27-3, at 2), but had no independent memory of them after Whiteru's body was discovered (*see* Pls.' Material Facts at 10).[6]

B. Facts Pertaining To WMATA's Standard Operating Procedures[7]

WMATA maintains a manual of standard station operating procedures ("SSOPs") that pertain to the agency's mission, which is "to move customers through the Metrorail

[5] Herron did not take any of the passenger's information at the time, and the passenger got on a train and left the station after showing Herron where he saw the body. (*See* Pls.' Material Facts at 6; Herron Dep., Ex. 3(a) to Pls.' Opp'n, ECF No. 28-3, at 2–3.)

[6] There is no available surveillance footage of the station after 1:15 a.m. on October 19, 2013, and thus, no video evidence has been submitted that shows Brown completing the inspections. (*Compare* Pls.' Material Facts at 11 (claiming as an undisputed fact that there is "no surveillance video evidence" of Brown's three inspections), *with* Def.'s Reply re: Material Facts at 13–14 (disputing the contention that no such evidence exists, but stating that "[t]here is no video imaging that was retrieved after Mr. Whiteru's fall over the concrete wall").)

[7] Like the facts related above, the facts pertaining to WMATA's standard operating procedures are also undisputed, unless otherwise noted. These facts are relevant to WMATA's sovereign immunity argument as well as its argument that Plaintiffs have failed to present evidence sufficient to establish WMATA's negligence.

system in an efficient, effective and safe manner." (SSOP, Ex. 4 to Pls.' Opp'n, ECF No. 28-4, at 1.) WMATA station managers must be familiar with and comply with the policies; they must also ensure the procedures are executed properly. (*See id.* at 7.)

SSOP 46.5.4 lays out the procedures that station managers are supposed to use when closing Metro stations. As relevant here, SSOP 46.5.4.12 mandates a "visual inspection" of the station "to ensure that no customers are in the station." (*Id.* at 10.) In its entirety, this SSOP states:

> Closing Station Managers shall make a visual inspection of the mezzanine and platform area of the station, *which includes walking the station platform from end gate to end gate*, to ensure that no customers are in the station. Pay special attention to areas of the station where confused customers or customers with diminished capacity might sleep.

Id. at 10–11 (emphasis added).[8] Notably, the directive that a closing station manager's visual inspection "includes walking the station platform from end gate to end gate" was added to the SSOP in September 2010. (*Compare* Pls.' Material Facts at 7 (current version of the SSOP), *with id.* 7–8 (version in effect prior to September 2010).) Thus, at the time of Whiteru's accident, station managers were required to inspect the platform by walking the area *in person*, even though the mezzanine-level kiosks that station managers sit in are equipped with closed-circuit monitors of the platform area. Moreover, by the date at issue, WMATA had specifically instructed its managers to "[p]ay special attention to areas of the station where intoxicated customers or customers with diminished capacity might sleep[,]" in contrast to the prior directive, which had used more passive language

[8] This procedure also applies to the hourly inspections that station managers are required to make. (*See* Pls.' Material Facts 6–7.)

concerning a closing manager's obligations in this regard. (*Compare id.* at 7 (current version of the SSOP), *with id.* at 7–8 (version in effect before September 2010, which stated that "[s]pecial attention should be given" to such areas).)

As a station manager on the night of Whiteru's accident, Rhonda Brown was familiar with the prior version of this SSOP, and was also aware of her obligations under the version of the SSOP then in effect. (*See id.* at 9–10.)

C. Procedural History

Plaintiffs filed suit against WMATA in Superior Court on May 1, 2015. (*See* Compl., Ex. 1 to Def.'s Notice of Removal, ECF No. 1-1.) The original complaint asserted (1) a claim for premises liability, (2) a claim for negligence, (3) a survival action pursuant to D.C. Code § 12-101, and (4) a claim for wrongful death pursuant to D.C. Code § 16-2701. (*See id.* at 13–19.) WMATA removed the action to federal court on June 8, 2015, pursuant to D.C. Code Ann. § 9-1107.01(81). (*See* Def.'s Notice of Removal, ECF No. 1, at 1–2.)

On June 15, 2015, WMATA filed a motion to dismiss Plaintiffs' lawsuit for failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). (*See* Def.'s Mot. to Dismiss, ECF No. 5, at 1.) WMATA argued that sovereign immunity barred Plaintiffs' premises liability claim, and that Plaintiffs' complaint failed to state a claim for negligence because it did not identify the relevant duty of care. (*See id.* at 5–8.) In their opposition brief, Plaintiffs maintained that sovereign immunity did not bar their premises liability claim because this claim was based on WMATA's "negligent implementation of policy decisions[,]" and also, that

WMATA owed a duty of reasonable care to its passengers. (Pls.' Opp'n to Def.'s Mot. to Dismiss, ECF No. 8, at 3.)

This Court held a hearing on WMATA's motion on November 4, 2015, and it ultimately granted the motion to dismiss in part, and denied it in part, for several reasons. (*See* Order of Nov. 4, 2015, ECF No. 13.)[9] WMATA answered the three remaining counts of the complaint on November 12, 2015 (*see* Answer, ECF No. 14), and with WMATA's consent, Plaintiffs filed an amended complaint on January 7, 2016 (*see* Am. Compl.). WMATA filed its answer to the amended complaint on the same day (*see* Answer, ECF No. 22), and the parties proceeded to the discovery phase of the litigation.

On July 19, 2016, WMATA filed the instant motion for summary judgment, arguing that it is entitled to summary judgment on the basis of its sovereign immunity with respect of each of Plaintiffs' remaining claims, and that, in any event, Plaintiffs have failed to adduce sufficient evidence to support all the essential elements of their negligence-based claim. (*See* Def.'s Mot. at 1.) Plaintiffs filed a brief in opposition to WMATA's motion on August 18, 2016 (*see* Pls.' Opp'n), and WMATA filed a reply on September 1, 2016 (*see* Def.'s Reply to Pls.' Opp'n ("Def.'s Reply"), ECF No. 29). WMATA's summary judgment motion became fully ripe on February 15, 2017, after a

[9] Specifically, the Court concluded Plaintiffs had failed to state a claim for premises liability, regardless of how the Court interpreted this claim, and dismissed that aspect of Plaintiffs' complaint. (*See* Nov. 4, 2015 Hr'g Tr.) The Court further explained that, to the extent Plaintiffs intended to raise a negligent design claim, sovereign immunity shielded WMATA from any challenge to the design of the metro station. (*See id.*) But the Court also concluded that Plaintiffs' complaint contained sufficient allegations of fact to state a claim for negligence, and in addition, that Plaintiffs' "survival action" and "wrongful death action" counts could survive as procedural vehicles related to the negligence claim. (*See id.*) The Court treated WMATA's motion solely as a motion to dismiss, and in denying the motion, it expressly declined WMATA's request that its motion to dismiss be converted to one for summary judgment. (*See* Order of Nov. 4, 2015, ECF No. 13, at 2.)

series of court-ordered filings related to the parties' statements of material facts. (*See* Min. Order of Feb. 1, 2017 (ordering Plaintiffs to respond to WMATA's Statement of Material Facts); Pls.' Material Facts, ECF No. 30; Def.'s Reply re: Material Facts, ECF No. 31.)

II. LEGAL STANDARDS

A. Motions To Dismiss For Lack Of Subject-Matter Jurisdiction

WMATA's claim of sovereign immunity is, in effect, an argument that this Court lacks subject-matter jurisdiction over Plaintiffs' claims in this case. *See Smith v. WMATA*, 290 F.3d 201, 205 (4th Cir. 2002) ("To the extent [WMATA's] complained-of actions fall within its cloak of immunity, we lack subject matter jurisdiction over such claims."); *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997) (noting that "sovereign immunity claims are jurisdictional"). Consequently, this Court will construe WMATA's summary judgment motion as one that partly seeks dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). (*See* Def.'s Mot. at 10–17.) *See also Smith*, 290 F.3d 201, 205 ("[A]n assertion of governmental immunity is properly addressed under the provisions of Rule 12(b)(1) of the Federal Rules of Civil Procedure.").

When a defendant has filed a Rule 12(b)(1) motion to dismiss the complaint for lack of subject-matter jurisdiction, the plaintiff bears the burden of establishing, by a preponderance of the evidence, that the court has jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To resolve jurisdictional questions, the court may look beyond the allegations of the complaint, *see Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987); however, unlike a

motion for summary judgment, a motion to dismiss for lack of subject-matter jurisdiction need not be decided solely on the basis of undisputed facts. *See* Fed. R. Civ. P. 56(a). Instead, with reference to evidence from beyond the pleadings, the court may "resolve factual disputes concerning jurisdiction." *Smith*, 290 F.3d at 205 (quoting *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995)).

B. Motion For Summary Judgment

To evaluate WMATA's claim that Whiteru has failed to "establish a . . . duty of care and failed to demonstrate a violation of a standard of care" (*see* Def.'s Mot. at 8), the Rule 56 summary judgment standard is appropriate. To support a motion for summary judgment, the moving party must demonstrate that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the non[-]moving party.'" *Steele v. Schafer*, 535 F.3d 689, 692 (D.C. Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Summary judgment should be granted against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Initially, the moving party must demonstrate that there is no genuine dispute as to any material fact. *See id.* at 323. Once the party seeking summary judgment has met that burden, the non-moving party must designate "specific facts showing that there is a

genuine issue for trial" to defeat the motion. *Id.* at 324 (internal quotation marks and citation omitted). Under Rule 56,

> [a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

Although this Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor, *see Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 23–24 (D.C. Cir. 2013), the non-moving party must show more than "[t]he mere existence of a scintilla of evidence" to raise a triable issue of fact for the jury, *Anderson*, 477 U.S. at 252. Instead, "there must be evidence on which the jury could reasonably find" for the non-moving party. *Id.* Thus, the non-moving party "may not rest upon mere allegation or denials of his pleading[s] but must present affirmative evidence showing a genuine issue for trial." *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987) (internal quotation marks and citation omitted); *see Ass'n of Flight Attendants–CWA, AFL–CIO v. U.S. Dep't of Transp.*, 564 F.3d 462, 465–66 (D.C. Cir. 2009) (conclusory assertions without support from record evidence cannot create a genuine dispute).

This Court is mindful that, in deciding a summary judgment motion, it is not a court's role to "determine the truth of the matter, but instead [to] decide only whether

there is a genuine dispute for trial." *Lawrence v. Lew*, 156 F. Supp. 3d 149, 160 (D.D.C. 2016) (alteration in original) (internal quotation marks and citation omitted). Indeed, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment." *Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013) (internal quotation marks and citation omitted).

III. ANALYSIS

WMATA first argues that sovereign immunity shields it from suit, and liability, for Whiteru's unfortunate death. In the alternative, WMATA argues that Plaintiffs have failed to satisfy their burden of producing admissible evidence that would raise any genuine issue of material fact with respect to the existence of essential elements of Plaintiffs' negligence claim. For the reasons explained below, neither of WMATA's summary-judgment arguments succeeds.

A. WMATA Is Not Immune From Suit Under The Circumstances Presented In This Case

1. WMATA Does Not Enjoy Sovereign Immunity With Respect To Torts That Occur In The Course Of Its Proprietary Functions

Maryland, Virginia, and the District of Columbia created WMATA in order to provide a regional transportation system to the Washington, D.C. metropolitan area. *See Delon Hampton & Assocs., Chartered v. WMATA*, 943 F.2d 355, 357 (4th Cir. 1991). The three governments formed the agency pursuant to a "compact[,]" *see* D.C. Code Ann. § 9-1107.01, and in so doing, the states expressly conferred upon WMATA their own Eleventh Amendment sovereign immunity, *see Watters v. WMATA*, 295 F.3d 36, 39 (D.C. Cir. 2002) (explaining that, "[a]s we have repeatedly held, the three signatories conferred each of their respective sovereign immunities, including the

Eleventh Amendment immunity of the two states, upon the Authority" (citations omitted)); *see also* U.S. Const. amend. XI. "Thus, unless WMATA's sovereign immunity has been waived, [a] district court lacks jurisdiction to enter a judgment against" it. *Watters*, 295 F.3d at 39–40 (citing *Burkhart*, 112 F.3d at 1216).

Notably, Section 80 of the WMATA Compact waives WMATA's sovereign immunity under certain circumstances; specifically, that statute states that WMATA

> shall be liable for its contracts and *for its torts* and those of its Directors, officers, employees and agents *committed in the conduct of any proprietary function*, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function.

D.C. Code Ann. § 9-1107.01(80) (emphasis added). Thus, the question of whether WMATA enjoys sovereign immunity from tort liability in any given case turns on whether the alleged tort was committed in the course of "any proprietary function," as opposed to "a governmental function." *Id.*

The path that a court must take in order to determine whether an alleged tort of WMATA's was committed in the course of a governmental function (for which the agency enjoys sovereign immunity) or a proprietary function (with respect to which sovereign immunity is waived) is well worn. Courts first ask whether the "challenged conduct 'amounts to a "quintessential" government function, like law enforcement.'" *Tapp v. WMATA*, No. 15-cv-768, 2016 WL 7441719, at *8 (D.D.C. Sept. 16, 2016) (citing *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C. Cir. 1997)). If the conduct is quintessentially governmental, the court's inquiry ends there, because WMATA is unquestionably entitled to immunity from suit. *See id.* However, in many cases, the

complained-of conduct is *not* quintessentially governmental, so the court must venture further in order to determine whether a lawsuit against WMATA can proceed. *See id.*

To further parse WMATA's immunity, courts have imported the distinction between "discretionary" and "ministerial" acts from the Federal Tort Claims Act ("FTCA"), because the line between governmental and proprietary functions can be difficult to ascertain. *See KiSKA Constr. Corp. v. WMATA*, 321 F.3d 1151, 1158 (D.C. Cir. 2003); *see also Smith*, 290 F.3d at 207 ("The Supreme Court long ago characterized the FTCA as distinguishing between 'acts of a governmental nature or function,' which remain immune, and ministerial functions resulting in 'ordinary common-law torts,' as to which the FTCA has waived governmental immunity." (quoting *Dalehite v. United States*, 346 U.S. 15, 28 (1953))). To be sure, the FTCA's "discretionary" functions and Section 80's "governmental" functions are not coterminous, nor can it necessarily be said that all "proprietary" functions for the purpose of Section 80 must be "ministerial" as FTCA jurisprudence defines that term. But it is well established that "discretionary" acts are "at least a subset of 'governmental functions.'" *Sanders v. WMATA*, 819 F.2d 1151, 1155 n.9 (D.C. Cir. 1987). Thus, a "discretionary" act within the meaning of the FTCA is properly considered to be part of an agency's "governmental function," and therefore, courts have concluded that WMATA has retained sovereign immunity with respect to torts resulting from discretionary acts. *See, e.g.*, *Beebe*, 129 F.3d at 1288; *Burkhart*, 112 F.3d at 1217. Conversely, "[u]nder [the FTCA] framework, when the agency commits a ministerial act, it is engaging in a proprietary function" for Section 80 purposes. *Tapp*, 2016 WL 7441719, at *8.

Under step one of the governmental-versus-proprietary-act inquiry, courts ask whether "any statute, regulation, or policy specifically prescribes a course of conduct for an employee to follow." *KiSKA*, 321 F.3d at 1159 (internal quotation marks and citation omitted). If such authority exists, *and* if the relevant statute, regulation or policy *leaves no room for discretion* regarding the agency's conduct, then the alleged tort resulted from the exercise of a proprietary function, and WMATA cannot claim sovereign immunity protection. *See id.* But if there is no such statute, regulation, or policy—or if the relevant guidance leaves room for discretion—courts proceed to step two of the inquiry, which requires an evaluation of the extent of the agency's "exercise of discretion and the limits (if any) on [its] decision-making[.]" *Tapp*, 2016 WL 7441719, at *8. This evaluation involves asking "whether the [agency's] exercise of discretion is grounded in social, economic, or political goals[,]" and if so, "the activity is governmental," and "fall[s] within section 80's retention of sovereign immunity[.]" *KiSKA*, 321 F.3d at 1159 (internal quotation marks and citations omitted).

Thus, the non-existence of a policy that governs a particular agency function, or the existence of some amount of discretion within the policy, does not necessarily mean that WMATA enjoys sovereign immunity. Moreover, while WMATA and its employees need not actually engage in a policy judgment when carrying out the conduct at issue, the exercise of discretion that warrants immunity still must be a "decision . . . which we would expect inherently to be grounded in considerations of policy." *Smith*, 290 F.3d at 208 (internal quotation marks and citation omitted). That is, if the agency (or its employee) exercises discretion in a manner that involves such policy considerations, WMATA is immune from suit. *See Tapp*, 2016 WL 7441719, at *8 (citing *Beebe*, 129

F.3d at 1287). If it does not, then the act fits within WMATA's waiver of sovereign immunity, and the lawsuit may proceed. *See id.* (citing *KiSKA*, 321 F.3d at 1158).

2. Because Whiteru's Injuries Allegedly Resulted From Agency Employees' Failure To Follow WMATA's Non-Discretionary Closing Procedures For Metro Stations, WMATA Cannot Claim Sovereign-Immunity Protection

Here, WMATA does not argue that the conduct at issue is part of a quintessential governmental function, but it maintains nevertheless that WMATA retains sovereign immunity with respect to the challenged conduct—i.e., the station manager's failure to conduct a reasonable inspection of the train platform—because (1) Plaintiffs have failed to identify "any statute, regulation or policy applicable to the maintenance of mass transit rail stations[,]" and (2) closing procedures for Metro Stations involve discretionary policy considerations by station managers. (Def.'s Mot. at 17.) Plaintiffs respond that WMATA's SSOPs govern a station manager's inspections of the train platform and the prescribed duties are not discretionary. (*See* Pls.' Opp'n at 14.) Therefore, in Plaintiffs view, this lawsuit fits within Section 80's express waiver of sovereign immunity. (*See id.*) This Court agrees with Plaintiffs.

WMATA's first argument—that there is no statute, regulation, or policy on point—is clearly unavailing. Plaintiffs point to the agency's Standard Operating Procedures, and SSOP 46.5.4.12 in particular, as the relevant WMATA policy, because that written policy concerns station managers' inspections of station platforms before closing and requires hourly walk-through inspections of the platforms. (*See* Pls.' Material Facts at 6–7.) It is undisputed that SSOP 46.5.4.12 exists to "reduc[e] the likelihood of customers being locked into metrorail stations after they are closed[,]" and this policy prescription specifically refers to "confused customers" and "customers with

diminished capacity." (*Id.* at 7–8.) Whiteru was a customer whose capacity was diminished, and this was especially so after he fell behind the parapet. Moreover, there is no question that he was locked in the Judiciary Square Metro Station after it closed on October 19, 2013—and for three nights thereafter. Thus, this Court easily finds that SSOP 46.5.4.12, which is a "policy [that] specifically prescribes a course of conduct for an employee to follow" regarding closing inspections, is relevant to Plaintiffs' negligence allegations. *KiSKA*, 321 F.3d at 1159 (internal quotation marks and citation omitted); *see also, e.g.*, *Walen v. United States*, No. 15-1718, 2017 WL 1207412, at *7 (D.D.C. Mar. 31, 2017) (concluding that, pursuant to an established Tree Management Action Plan, the agency was "mandated to conduct monthly inspections of trees on a primary road [and] bi-annual inspection of trees that pose a risk to the public, and [to] comply with specific industry standards for tree care[,]" and that "[t]hese clear mandates remove[d] the immunity shield provided by the discretionary function exception in the FTCA").

Having concluded that there is a WMATA policy that prescribes relevant conduct for WMATA employees concerning platform inspections, the remaining question for the purpose of analyzing WMATA's sovereign immunity in the instant case is whether SSOP 46.5.4.12 leaves room for discretion, and if so, whether the exercise of a station manager's discretion is grounded in social, economic, or policy goals. Notably, SSOP 46.5.4.12 lays out a *specific* course of conduct for station managers inspecting the station platform each hour and at closing time: under the policy, station managers must "make a visual inspection of the mezzanine and platform area of the station, which includes walking the station platform from end gate to end gate," and they must also

"[p]ay special attention to areas of the station where confused customers or customers with diminished capacity might sleep." (SSOP at 10–11.) Certainly with respect to the *manner* in which a station manager must conduct a "visual inspection"—by walking the platform from end to end, not just by checking closed-circuit monitors—the policy leaves no room for discretion, as the 2010 amendments to the relevant SSOP make clear. (*Compare* Pls.' Material Facts at 7 (current version of the SSOP), *with id.* at 7–8 (version in effect before September 2010, which did not contain an explicit requirement that station managers perform in-person inspections of the platform).)

What is more, the amended SSOP replaced the passive statement "[s]pecial attention should be paid" to areas where customers might sleep with the imperative "*[p]ay special attention*" to those areas. (*Id.* (emphasis added)). The word "should" as it previously appeared in the prior version of the inspection policy could conceivably have conferred discretion on station managers regarding whether such attention is always required. *Cf. WMATA v. Barksdale-Showell*, 965 A.2d 16, 23 (D.C. 2009) (remarking that a certain SSOP "contains an element of discretion" because it has the term "if possible" in it). But WMATA removed this conditional phraseology and inserted an imperative statement regarding what station managers must do. Thus, if SSOP 46.5.4.12 confers any discretion to station managers at all, it is merely the discretion to determine *which* areas of a station a confused customer (or one with diminished capacity) might sleep, and it is clear that any such discretionary determination is grounded in WMATA's mandatory walk-through directive, and *not* the particular manager's own "social, economic, or political" goals. *KiSKA*, 321 F.3d at 1159 (internal quotation marks and citation omitted).

WMATA v. O'Neill, 633 A.2d 834 (D.C. 1994), is instructive. In *O'Neill*, the D.C. Court of Appeals held that WMATA was not entitled to sovereign immunity for injuries that resulted from a bus driver's failure to act, even where the relevant regulations provided some discretion to the bus driver in responding to disruptive passengers. *See id.*, 633 A.2d at 839. In that case, two unruly bus passengers were harassing other passengers. *See id.* at 836. Two of the harassed individuals, including O'Neill, informed the bus driver of the issue, who refused to take any action. *See id.* The bus driver again took no action after he observed one of the unruly passengers make a death threat directed at O'Neill, and it was only after one of the unruly passengers grabbed O'Neill that the bus driver activated the silent alarm. *See id.*

The relevant WMATA policy in *O'Neill* mandated that the bus driver "instruct [a disruptive passenger] to stop any offending conduct" and "ask him to leave the bus, but [the driver] may not physically eject him unless there is immediate physical danger." *Id.* at 837. The policy also mandated that the bus driver activate the silent alarm if he or she observes "threats of bodily harm." *Id.* at 839. Consequently, although there was some discretion for bus drivers when responding to an emergency situation, the relevant policy provided a minimum response, *see id.*, and did not confer on the bus driver "unbridled discretion[,]" *id.* at 838. Indeed, the D.C. Court of Appeals specifically noted that "[t]he fact that in a particular case a [WMATA employee] might have an alternative course of action from which to choose and this choice might involve a certain degree of judgment, does not elevate the [WMATA employee's] decision to the level of basic policy." *Id.* at 839 (internal quotation marks and citation omitted).

So it is here. Although the station-closing procedures permit station managers to determine, to some degree, where a disoriented or disabled passenger might sleep, the policy does not leave managers with "unbridled discretion" with respect to platform inspections such that WMATA can claim sovereign immunity if the prescribed inspection procedures are not followed and someone is injured. *See id.* at 838. And this is as it *should* be because, in relation to conduct that is not a quintessential government function or does not involve WMATA employees engaging in essentially sovereign acts, courts have consistently interpreted Section 80 to waive WMATA's sovereign immunity for torts that occur when its employees fail to follow a specific procedure or minimum standard, thereby treating WMATA just like other non-sovereign employers. *See id* at 839. In the instant context, this means that even if SSOP 46.5.4.12 empowers station managers to decide which areas of the platform a disoriented customer or a customer with diminished capacity might sleep, WMATA's standard procedures *require* station managers to make visual inspections and pay attention to such areas, and WMATA is not immune from suit when its employees are alleged to have breached this duty. Put another way, it is clear to this Court that each manager's decision regarding which areas to inspect in furtherance of the mandatory inspection requirement is not a "judgment[] at the policy and planning level" that "should be immune from second-guessing by a jury." *O'Neill* 633 A.2d at 839 (internal quotation marks and citation omitted).

The cases that WMATA cites are readily distinguishable from the instant circumstances. In *Smith v. WMATA*, 290 F.3d 201 (4th Cir. 2002), the Fourth Circuit held that WMATA was immune from suit for its decision regarding how to respond to

an "emergency situation" when there was "no statutory or regulatory mandate specifically governing [WMATA's] actions in response to that situation." *Id.*, 290 F.3d at 209. Thus, when two of three escalators in the Bethesda Metro Station were inoperable, WMATA could not be sued for its decision to "brake" the third escalator and put it in "stair mode," even though a customer died of a heart attack climbing the escalator. *Id.* at 209. Unlike this case, the situation in *Smith* required WMATA to respond to an unforeseen circumstance in the absence of specific directives, and the circuit panel concluded that the employees "responded to the situation in a manner that implicated both their mission and public policy" such that the challenged act was best conceived of as having been performed in the course of WMATA's governmental function. *Id.* By contrast, here, Plaintiffs allege that WMATA was negligent by failing to carry out the agency's specified directives for routine platform inspections, not that its response to an emergency situation in the absence of specific directives was negligent.

WMATA v. Barksdale-Showell, 965 A.2d 16 (D.C. 2009), (*see* Def.'s Mot. at 13–14), likewise concerns WMATA's employees' responses to unpredictable circumstances in the absence of mandatory directives. In that case, inclement weather caused moisture to accumulate in a Metro station, and WMATA was held to be immune from a slip-and-fall lawsuit. *See id.*, 965 A.2d at 24. The D.C. Court of Appeals noted that "there was nothing in the [Severe Weather Plan] Alert or the relevant SSOPs that mandated certain actions to be taken[,]" and the most pertinent SSOP "contains an element of discretion" by only requiring certain actions to be taken "if possible." *Id.* at 22 (internal quotation marks omitted). Moreover, that discretion was grounded in

policy-making, because WMATA had to decide how to allocate its resources to deal with an ongoing weather-related emergency situation. *See id.* at 23. SSOP 46.5.4.12 differs substantially because it provides instructions for mandatory, routine inspections of a station, rather than prescribing flexible guidelines that permit WMATA employees to deal with novel situations. Furthermore, unlike the SSOP at issue in *Barksdale-Showell*, SSOP 46.5.4.12 does not permit station managers to deviate from the procedure if it is not feasible to follow it; instead, SSOP 46.5.4.12 makes crystal clear that the station manager *must* inspect the train platform in person, and that special attention *must* be paid to certain areas of the platform.

The other slip-and-fall case cited by WMATA, *Tinsley & Hodge v. WMATA*, 55 A.3d 663 (Md. 2012), is not to the contrary. This consolidated appeal dealt with two distinct slip-and-falls in WMATA stations: Tinsley alleged that WMATA's cleaning caused the floor to become slippery, *see id.*, 55 A.3d at 677, while Hodge alleged that WMATA had failed to clean up water that had accumulated because of snow being tracked into the station, *see id.* at 671. Whether WMATA was alleged to have created the unsafe situation or failed to allocate resources to address an unsafe condition, the Maryland Court of Appeals held that WMATA was immune from suit. *See id.* at 677. Notably, the court expressly reasoned that "challenges to the manner in which maintenance functions are carried out, but not in violation of any mandatory directive" are covered by WMATA's sovereign immunity, where "WMATA employees made determinations . . . based on economic and policy considerations." *Id.* at 676–77. By contrast, here, not only do Plaintiffs challenge conduct that does not involve WMATA's

maintenance functions, but Plaintiffs have also identified a mandatory directive that, as discussed below, a reasonable jury could find was violated.

For all these reasons, this Court concludes that the conduct of WMATA that allegedly resulted in the accident at issue does not implicate the agency's governmental function, and instead, WMATA's alleged failure to conduct a reasonable investigation of the train platform under the circumstances presented in this case fits within the agency's proprietary functions. Thus, Section 80 has waived WMATA's sovereign immunity in this regard, and WMATA is not immune from this lawsuit.

B. Disputed Material Facts Regarding WMATA's Alleged Negligence Exist And Preclude Entry Of Summary Judgment In WMATA's Favor

Pursuant to Federal Rule of Civil Procedure 56, WMATA contends that Plaintiffs have failed to adduce admissible evidence that could support a reasonable jury finding that Plaintiffs have proved all of the essential elements of their negligence claim. (*See* Def.'s Mot. at 18–23.) A plaintiff asserting negligence under the law of the District of Columbia must show (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty of care, and (3) damage to the plaintiff caused by that breach. *See Girdler v. United States*, 923 F. Supp. 2d 168, 187 (D.D.C. 2013) (citation omitted). In the instant summary judgment motion, WMATA argues that Plaintiffs have neither raised a genuine dispute of material fact regarding the applicable standard of care, nor proffered sufficient evidence to establish WMATA's breach of any duty it owed to Whiteru. (*See* Def.'s Mot. at 18–23.)

With respect to the applicable standard of care, WMATA argues, first, that Plaintiffs cannot rely solely on WMATA's internal operating procedures to establish the relevant standard of care (*see id.* at 21–23; *see also id.* at 22 (arguing that "'[c]ompany

rules are not 'conclusive' or 'wholly definitive' of the standard of care" issue, and further noting that courts have held that WMATA manuals alone are insufficient to establish the standard of care (citation omitted))), and second, that Plaintiffs lack the "necessary expert testimony" to establish the standard of care (*see id.* at 22 (arguing that expert testimony is required to establish that the manuals "embod[y] a national standard of care and not a higher, more demanding one" (alteration in original) (internal quotation marks omitted) (quoting *Clark v. D.C.*, 708 A.2d 632, 636 (D.C. 1997))); *see also id.* at 23 (contending that Plaintiffs' expert witness did not rely upon any national standards or guidelines that apply "to mass transit rail station maintenance")). The fact that Plaintiffs have proffered evidence that relates to the standard of care beyond the mere language of the SSOP belies Defendant's contention that Plaintiffs have attempted to demonstrate the standard of care through "SSOP 46 alone[,]" (Def.'s Mot. at 23), and in addition, WMATA's challenge to the sufficiency of Plaintiffs' proffered expert must fail at this juncture because WMATA has not demonstrated—as a threshold matter—that Plaintiffs are required to adduce expert testimony to establish the pertinent standard of care under these circumstances.

It is well established that "company rules are not 'conclusive' or 'wholly definitive'" of the standard of care, *WMATA v. Young*, 731 A.2d 389, 398 (D.C. 1999); however, such policies are "admissible as *bearing on the* standard of care[.]" *Briggs v. WMATA*, 481 F.3d 839, 848 (D.C. Cir. 2007) (emphasis in original) (quoting *Clark v. D.C.*, 708 A.2d 632, 636 (D.C. 1997)); *see also Garrison v. D.C. Transit System, Inc.*, 196 A.2d 924, 925 (D.C.1964) ("[R]egulations of a defendant for guidance of its employees in the performance of their duties are admissible and may be considered on

the issue of whether due care was exercised by the employee under the particular circumstances of the case."). "In a typical negligence case, the standard of care applicable to a person's conduct is simply that of a reasonable man under like circumstances[,]" and a jury can ordinarily "ascertain this standard without the aid of expert testimony." *Godfrey v. Iverson*, 559 F.3d 569, 572 (D.C. Cir. 2009) (internal quotation marks and citation omitted). However, "if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson," D.C. law requires expert testimony to establish the pertinent standard of care, "unless the subject matter is within the realm of common knowledge and everyday experience." *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000) (internal quotation marks and citations omitted). When expert testimony is required, the expert may not simply "declare that the [defendant] violated the national standard of care[,]" but must instead "clearly articulate *and reference* a standard of care" and "relate the standard of care to the practices generally followed by other comparable facilities[.]" *Briggs v. WMATA*, 481 F.3d 839, 846 (D.C. Cir. 2007) (emphasis and first alteration in original) (quoting *Clark v. D.C.*, 708 A.2d 632, 635 (D.C. 1997)).

In the instant case, Plaintiffs have designated an expert witness, Michael Hodge, to testify to the standard of care, and in so doing, have presented evidence that extends beyond WMATA's SSOPs. In his expert report and deposition, Hodge relies on his personal inspection of the Judiciary Square Metro Station, as well as Hodge's experience and training, which includes work in the security organization of the United States Marine Corps and 20 years with the Secret Service (*see* Hodge Dep., Ex. 6 to

Pls.' Opp'n, ECF No. 28-6, at 2–8), and while working with the Secret Service in particular, Hodge "provid[ed] protection for the general public as well as special dignitaries, which included areas such as what WMATA runs, . . . inspection of all kind of facilities, observing and reporting those risks of harm which are reasonable and can be identified" (*id.* at 2). (*See also* Hodge Forensic Report, Ex. 6(b) to Pls.' Opp'n, ECF No. 28-6 at 11 (describing how Hodge has "conducted over 100 surveys of premises and established security plans, including public transportation environments").) As relevant here, Hodge's testimony points to SSOP 46.5.4.12 as evidence of the standard of care WMATA requires of its station managers, but his expert opinion also includes the conclusion that a "reasonable inspection" of the Judiciary Square Metro Station would have included looking over the parapet. (Hodge Dep. at 6.) Through Hodge, Plaintiffs have proffered evidence to establish a standard of care applicable to the conduct Plaintiffs claim was negligent, and as a result, the Court rejects WMATA's suggestion that Plaintiffs impermissibly rely on "SSOP 46 alone" to establish this standard. (Def.'s Mot. at 23.)

Notably, the Court also rejects WMATA's challenge to the adequacy of Hodge's testimony in conveying a national standard of care, because, as a threshold matter, it is far from clear under District of Columbia law that Plaintiffs were *required* to present expert testimony for the specific purpose of articulating a national standard of care. *See Godfrey*, 559 F.3d at 572 ("We do not believe these cases stand for the proposition that expert testimony is always required to establish the standard of care[.]"). D.C. law requires expert testimony only "if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson[,]"

id. (internal quotation marks and citation omitted), and only where such testimony is required must the expert clearly articulate and reference a national standard of care, *see Briggs*, 481 F.3d at 846.

By focusing its challenge on the sufficiency of Hodge's testimony vis-à-vis the national-standard-of-care requirement, WMATA has assumed that an expert is necessary to establish a national standard of care in this case, and has failed to specifically address this significant threshold issue. Controlling case law makes clear that whether an expert is needed in order to establish a national standard of care is a fact-driven inquiry, which renders any such assumption unwarranted. *See Godfrey*, 559 F.3d at 573 ("As to the need for expert testimony, the factual context mattered in those cases and it matters in this one too."). *Compare Messina v. D.C.*, 663 A.2d 535, 538 (D.C. 1995) (finding that expert testimony was necessary to establish the standard of care for installation of cushioning under the monkey bars on a playground), *and Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1322 (D.C. 1994) (holding that "[w]hether a particular maintenance schedule for street lights . . . is sufficient to protect passers-by from the hazard of falling light globes is not within the knowledge of the average lay person"), *with District of Columbia v. Shannon*, 696 A.2d 1359, 1365–66 (D.C. 1997) (concluding no expert testimony was necessary to establish whether holes in the side rails of a playground slide created an unreasonably dangerous condition), *and O'Neill*, 633 A.2d at 841 ("[I]t is not beyond the ken of an average juror" to "decide whether the [bus] driver followed ordinary care in the circumstances in responding to disruptive conduct.").

This all means that the mere fact that Plaintiffs have *proffered* an expert in this case does not necessarily establish that they were *required* to offer this evidence for the particular purpose WMATA suggests. And in the absence of a developed argument from WMATA regarding the necessity of expert testimony to establish the standard of care under these circumstances, this Court is unwilling, at this juncture, to hold that WMATA is entitled to judgment as a matter of law based on any perceived insufficiency regarding Hodge's testimony.[10]

With respect to WMATA's alternative contention that there is no genuine dispute of fact regarding breach, WMATA asserts that its employees had no reason to know Whiteru was injured, since Whiteru was not injured after his initial fall down the escalator, which occurred after his communication with station manager Brown. (*See* Def.'s Mot. at 19.) But this contention distorts Plaintiffs' theory of liability in light of the record evidence developed during discovery. The critical issue of fact, as Plaintiffs have presented it, is whether Rhonda Brown performed inspections of the train platform on the date in question, and if so, whether she performed those inspections reasonably. (*See* Pls.' Opp'n at 6–9.) Plaintiffs' theory does not rely on Brown's *knowledge* of Whiteru's injury; indeed, quite to the contrary, Plaintiffs acknowledge that Brown did

[10] The parties will be given another opportunity to address this issue—which may be a significant one—prior to trial, in the context of a motion in limine. Any such a motion must address *both* the necessity of expert testimony under these circumstances, and the sufficiency of the testimony that Hodge has provided. Given the state of the law in the District of Columbia, the result of this motion may very well dispose of this case short of trial. *See, e.g.*, *Briggs*, 481 F.3d at 848 (affirming summary judgment in the defendant's favor where the plaintiff's expert's deposition testimony was insufficient to establish the national standard of care).

not know about Whiteru's condition, but maintain that she *would have* discovered him but for her failure to perform adequate inspections. (*See id.* at 6.)[11]

Notably, Brown's deposition testimony—which attempts to address, among other things, Brown's typical practices as a station manager—is contradictory at times and is far from a model of clarity, which, unfortunately for the agency, makes her statements ultimately raise more disputed factual issues than they resolve. For example, immediately after stating that she could not recall ever looking over the parapet during an inspection, Brown states that she "look[s] occasionally for things that people have lost" behind the parapet—a statement that she later undermines by remarking that she "[t]ypically" does not check behind the parapet. (Brown Dep., Ex. 5 to Pls.' Opp'n, ECF No. 28-5, at 16, 21.) Similarly, Brown initially admits that she has used the closed-circuit monitors to perform a visual inspection "in lieu of walking" the platform from end to end. (*Id.* at 8.) But in a subsequent deposition, Brown first denies that "sometimes" the closed-circuit monitors are used for inspections instead of walking the platform (*id.* at 6), then admits that she would use the monitors alone if she was in "a predicament" (*id.*). Brown also testifies that she "do[es] use the TVs." (*Id.*)

Brown's conflicting statements regarding how she ordinarily carries out her inspection duties renders WMATA's reliance on her testimony to argue there is no genuine dispute as to any material fact related to the fulfillment of her duties on the

[11] Brown's alleged breach of the duty to inspect and thereby discover Whiteru is the linchpin of Plaintiffs' negligence claim—and the key disputed fact—because there is no dispute that, had Brown performed a reasonable inspection (however defined) and discovered Whiteru in his incapacitated state, she would have had a duty to render some form of assistance. *See* Restatement (Second) of Torts § 314A(1)(b) (1965) ("A common carrier is under a duty to its passengers to take reasonable action . . . to give them first aid after it knows or has reason to know that they are ill or injured[.]"); *id.* cmt. d ("The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to . . . the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.").

date in question here entirely unpersuasive. On the basis of Brown's testimony, a reasonable jury could conclude that she failed to fulfill the requirement that she make three in-person inspections of the platform after Whiteru fell behind the parapet, and this is especially so because Brown has testified that she has no independent memory of making those particular inspections (even though she filled out an employee log indicating that she completed them [*see* Station Manager Hourly Checklist, Ex. to Def.'s Mot., ECF No. 27-3, at 2]), and because Brown has admitted that she has used the closed-circuit monitors for platform inspections in the past. The jury could also reasonably find that, even if Brown walked the platform from end to end on October 19, 2013, Brown failed to perform a reasonable inspection when she did not look over the parapet. (*See* Brown Dep. at 16 (stating that she cannot recall ever having looked over the parapet during an inspection).) The record amply demonstrates that anyone who looked over the parapet would have seen Whiteru (*see* Surveillance Photos, Ex. 1 to Pls.' Opp'n, ECF No. 28-1, at 8–9; Brown Dep. at 19), and that if help had been summoned based on that observation, Whiteru would have survived (*see* William Manion Report, Ex. 2(a) to Pls.' Opp'n, ECF No. 28-2, at 4; R.F. Davis Report, Ex. 2(b) to Pls.' Opp'n, ECF No. 28-2, at 7). Consequently, Plaintiffs have proffered sufficient record evidence regarding whether or not Brown fulfilled her inspection duties on the date in question to thwart Defendant's summary judgment argument.

IV. CONCLUSION

For the foregoing reasons, WMATA does not enjoy sovereign immunity given the conduct at issue, which means this Court does have jurisdiction over this matter, and Plaintiffs have demonstrated that a genuine dispute of material fact exists as to each

element of their negligence contention. Therefore, WMATA's motion for summary judgment will be **DENIED**. A separate Order accompanies this Memorandum Opinion.

DATE: July 7, 2017

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VICTORIA MANNINA, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	)	No. 15-cv-00931 (KBJ)

MEMORANDUM OPINION AND ORDER

On June 7, 2017, the District of Columbia ("District") filed a motion to dismiss Plaintiff's second amended complaint, and in conjunction with this motion to dismiss, the District also filed a motion to stay discovery, in which it requests that this Court halt discovery—which has been proceeding for over six months—while the Court resolves the pending motion to dismiss. (*See* Def.'s Mot. to Dismiss Second Am. Compl. ("Def.'s Mot."), ECF No. 36; Def.'s Mot. to Stay Discovery, ECF No. 37.) Because this Court has already ruled on the sufficiency of the allegations in the first amended complaint, and these allegations do not materially differ from the second amended complaint, the District's motion to dismiss the second amended complaint is **DENIED WITHOUT PREJUDICE** and the District's motion to stay discovery is **DENIED AS MOOT**.

DISCUSSION

As the parties are well aware, the District previously filed a motion to dismiss Plaintiff's complaint (*see* Def.'s Mot. to Dismiss, ECF No. 16), in which it argued, among other things, that Plaintiff's municipal liability claim under 42 U.S.C. § 1983

should be dismissed for failure to allege sufficiently a constitutional violation, and also that Plaintiff had failed to establish the existence of any unconstitutional policy or custom that resulted in Mannina's death. On August 23, 2016, this Court granted in part and denied in part Defendants' motion to dismiss, holding that the motion was granted with respect to Plaintiff's Section 1983 individual-liability claim against Thomas Faust in his personal capacity, but *denied* with respect to Plaintiff's Section 1983 municipal-liability claim against the District. (*See* Order, ECF No. 21.) In particular, the Court explained in its oral ruling that Plaintiff's complaint contained sufficient allegations that Mannina's detainment conditions were unreasonably hazardous to his health and safety in violation of his Fifth Amendment rights, and that the complaint adequately alleged that District employees were deliberately indifferent to Mannina's safety by allowing and directing the implementation of certain identified policies and procedures.

Following this Court's ruling, the parties proceeded to commence the discovery process, and based in part on facts revealed during discovery, Plaintiff sought and received leave to amend her complaint to include "additional allegations regarding the knowledge and involvement of District officials in the decedent Paul Mannina's death while detained, as well as information on the unsafe conditions that existed at D.C. Jail as a product of the District's inadequate resources and poor medical treatment, which shows a clear pattern of general indifference[.]" (Pl.'s Mot. for Leave to File Second Am. Compl., ECF No. 32, at 2–3.) Consistent with this Court's oral ruling, as well as a prior minute order (*see* Min. Order of Nov. 9, 2015), Plaintiff also removed Director Faust, and individual defendants Muriel Bowser and Karl Racine from her complaint.

Notably, and significantly for present purposes, Plaintiff's second amended complaint did not add any new claims or otherwise materially alter the underlying cause of action, but instead only augmented the factual allegations in the complaint above and beyond those that this Court already found to be sufficient, and also attached as exhibits to the complaint certain documents obtained during discovery. (*See also* Pl.'s Mem. in Opp'n to Defs.' Mot. for Stay, ECF No. 38, at 2 ("Plaintiff has reorganized the allegations in her Complaint to conform to the Court's ruling, but in substance her constitutional claims have not changed at all.").)

In response to Plaintiff's second amended complaint, the District filed the instant motion to dismiss, which argues, once again, that Plaintiff has failed to allege sufficiently that Paul Mannina's death resulted from a constitutional violation, or that the harm he suffered resulted from an unconstitutional municipal policy or custom. (*See* Def.'s Mot. at 19–31.) In particular, the District largely concentrates on the attachments to the second amended complaint, raising summary judgment-style arguments that speak to the overall sufficiency of the evidence to support a constitutional violation and/or a municipal policy or custom, rather than the plausibility of the allegations in the complaint. (*See, e.g.*, Def.'s Mot. at 23 ("Plaintiff also points to Mr. Mannina's Pretrial Service Reports as evidence that he had thoughts and attempts to harm himself. However, these Reports are ambiguous, and lack specifics." (internal quotation marks and citations omitted)); *see also id.* at 22, 24.) This Court has already considered—and rejected—the District's arguments regarding the sufficiency of the allegations in the complaint, and it will not proceed to address the District's summary judgment-like contentions at this time.

Accordingly, it is hereby

ORDERED that the District's motion to dismiss is **DENIED WITHOUT PREJUDICE**. This Court will consider the District's evidence-based arguments in the context of a motion for summary judgment should the District choose to file such a motion in the future. It is

FURTHER ORDERED that, in light of this determination, the District's motion to stay is **DENIED AS MOOT**, and the parties shall continue to comply with the discovery timeline in this Court's scheduling order. It is

FURTHER ORDERED that the District shall answer the second amended complaint on or before **July 11, 2017**.

Date: June 20, 2017

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL PASTOR DOSS, PLAINTIFF, v. U.S. PROBATION OFFICE, *et al.*, DEFENDANTS.	Civil Action No. 17-cv-0093 (KBJ)

MEMORANDUM OPINION

Pro se plaintiff Angel Pastor Doss ("Plaintiff") has filed the instant Complaint against the United States Probation Office, four federal judges, and nine Senators, and Speaker Paul Ryan (collectively, "Defendants"). (*See* Compl., ECF No. 1.) The pleading is entitled "Compl[ai]nt, Petition, or Declaration-Against Conspirators For Caused In Furtherance Of Conspiracy [,]" and in the footer of the entire document, Plaintiff includes the notation, "Civil Conspiracy Court Clerk and Federal Government[.]" (Compl., ECF No. 1, at 2.) Among other things, the complaint references an automobile accident in which Plaintiff apparently was involved in 1978 and Plaintiff's arrest in 1985 for stealing a car, as well as Plaintiff's education and work history and his language skills. (*See id.* at 2–4.) The complaint maintains that

> [a]s a result of these wrongful acts, plaintiff, in all aspects of life jobs, love and family were fragmented by deliberate actions of the Legislative, Judicial and Government employees and request special damages. The Election of 2016 is not over as this case is not closed and I could have defeated Rand Paul, and look forward to the opportunity to Drain the swamp.

(*Id.* at 3.) The relief that Plaintiff seeks includes "exemplary and punitive damages in the sum of 50 million dollars in such amount as will sufficiently punish defendants for their willful and malicious conduct and as will serve as an example to prevent a reputation of such conduct" (*id.*), as well as "an Ambassadorship for my beloved Panama Republic of Panama, which I believe I can, bring some civility to IRAN[]" (*id.* at 4).

It is entirely unclear to this Court what cause of action Plaintiff seeks to assert in this pleading, and thus, as explained below, the Court concludes that the complaint must be **DISMISSED** *sua sponte* under Federal Rules of Civil Procedure 8(a) and 12(b)(6).

DISCUSSION

"Ordinarily, the sufficiency of a complaint is tested by a motion brought under Rule 12(b)(6), which tests whether a plaintiff has properly stated a claim" upon which relief can be granted. *Bauer v. Marmara*, 942 F.Supp.2d 31, 37 (D.D.C. 2013) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). However, if the complaint's failure to state a claim for the purpose of Rule 12(b)(6) "is patent, it is practical and fully consistent with plaintiffs' rights and the efficient use of judicial resources for the court to act on its own initiative and dismiss the action." *Id.* (internal quotation marks and citation omitted). Furthermore, under Rule 8(a), a court is authorized to dismiss a complaint that does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility "is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks and citation omitted).

The plausibility standard is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

Such is the case here. Try as it might, this Court cannot begin to decipher exactly what Plaintiff means by the allegations he makes in the complaint, nor is it clear how any of the allegations are connected, much less what the cause of action might be. In contravention of Rule 8(a)'s mandate that a complaint provide a short and plain statement of the claim, Plaintiff's complaint is largely an incomprehensible mish-mash of statements that do not "give adequate notice of the alleged unlawful acts" that form the basis of his claim. *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983). Moreover, because no theory of recovery is clearly identified, the facts, such as they are, also fail to state a claim upon which relief can be granted. *See Shaw v. Ocwen Loan Servicing, LLC*, No. 14cv2203, 2015 WL 4932204, at *1–2 (D.D.C. Aug. 18, 2015).

To be sure, pro se pleadings are entitled to liberal interpretation. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). "However, this consideration does not constitute a license for a plaintiff filing pro se to ignore the Federal Rules of Civil Procedure or expect the Court to decide what claims a plaintiff may or may not want to assert." *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). And district courts have discretion to dismiss a pro se plaintiff's complaint *sua sponte* when there is simply "no factual or legal basis for alleged wrongdoing by defendants," such that it is "patently obvious that the plaintiff cannot prevail on the facts alleged in the complaint." *Perry v.*

Discover Bank, 514 F. Supp. 2d 94, 95 (D.D.C. 2007) (quoting *Baker v. Director, U.S. Parole Comm'n*, 916 F.2d 725, 726–27 (D.C. Cir. 1990)).

In sum, *sua sponte* dismissal is plainly warranted where, as here, "there are no clear allegations of fact to support, or even to illuminate, the nature of Plaintiff's claim." *Shaw*, 2015 WL 4932204, at *2. Accordingly, Plaintiff's complaint will be **DISMISSED** without prejudice pursuant to Rules 8(a) and 12(b)(6). A separate Order accompanies this Memorandum Opinion.

DATE: May 12, 2017

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEVIN BURNO, Plaintiff, v. DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, Defendant.	)	Civil Action No. 15-1369 (KBJ)

MEMORANDUM OPINION

Proceeding pro se, Plaintiff alleges that the District of Columbia Department of Corrections ("DOC") violated his "prisoner and human rights" during his incarceration at the D.C. Jail in 2014 and 2015. (Compl., ECF No. 1, at 5.)[1] He asserts specifically that DOC has infringed upon his First Amendment right to practice his religion (Plaintiff is allegedly a Sunni Muslim), and that the constitutional violations that he has suffered have taken several forms, including infringements that involve his diet and certain religious observances.[2] (*See id.* at 6–8.) Plaintiff also claims that DOC violated his right to access the courts by depriving him of an adequate law library and adequate legal assistance, (*id.* at 9), and Plaintiff alleges that DOC also deprived him of adequate medical care and mental health services, and violated his right to privacy by refusing to

[1] Page numbers cited herein refer to those that the Court's electronic case-filing system automatically assigns.

[2] For example, according to Plaintiff, DOC and its contractor, Aramark, denied his request to "be placed on a Halal Religious Diet" or an alternative kosher meal, and instead provided "a[n] ovo-vegetarian diet," which he neither requested nor approved. (Compl. at 6–7.) In addition, DOC allegedly refused to allow Plaintiff and other Sunni Muslim inmates to participate in the 2014 Eid al-Fitr celebration and one officer refused to allow Plaintiff to wear his religious scarf in the weeks leading up to the holiday. (Compl. at 8–9.)

provide "a private setting to make legal calls[.]" (*Id*. at 8.) Finally, Plaintiff suggests that he and other African-American inmate tutors were singled out and required to retake a GED tutor test. (*Id*. at 9.) Plaintiff seeks compensation from "DC-DOC, its officials and contractors" for his "personal injuries and suffering." (*Id*. at 5.)

Presently before the Court is DOC's Motion to Dismiss Plaintiff's complaint. (Def.'s Mot. to Dismiss, ECF No. 10.) DOC's primary contention is that, as a subordinate agency of the District of Columbia, it cannot be sued in its own name. (Mem. in Supp. of Def.'s Mot. to Dismiss, ECF No. 10-1, at 4–5.) DOC also argues that the District of Columbia should not be substituted as the defendant in this action, because Plaintiff (1) has failed to plead a claim of municipal liability with respect to any constitutional claims, (2) has not satisfied the pleading requirements of Federal Rules of Civil Procedure 8 and 9, and (3) has not satisfied the written notice prerequisite of D.C. Code § 12-309 for maintaining a claim against the District for unliquidated damages. (*See id.* at 5–9.)

In an order issued on April 4, 2016 (ECF No. 11), this Court informed Plaintiff of his obligation to respond to Defendant's dispositive motion by May 10, 2016, and about the possibility of dismissal if he failed to file a timely response. On May 19, 2016, the Court permitted a letter that Plaintiff mailed to the Court to be filed as an opposition to Defendant's motion. (*See* Pl.'s Opp'n to Def.'s Mot. to Dismiss, ECF No. 12.) In the letter, Plaintiff concedes that his "lawsuit must be filed against the District of Columbia" (*id.*), but he has neither addressed Defendant's argument against substituting the District nor argued for substitution. Plaintiff also states that counsel "makes a good point in her motion of me not stating any actual relief in my

complaint[.]" (*Id.*) Plaintiff then explains that he nevertheless has "a strong argument against []DOC and . . . a very effective paper trail," but he has been unable "to effectively put [his] complaint together" because of his "criminal case proceedings, conviction and transfer to another facility[.]" (*Id.* at 1-2.) Plaintiff has filed nothing more in this case, and he is no longer in the District of Columbia's custody. (*See* Case Caption (listing address of record as Hazelton Federal Correctional Institution).)

"[I]f a department or agency of a municipality is not a corporate body, it cannot be sued as such." *Kundrat v. D.C.*, 106 F. Supp. 2d 1, 5 (D.D.C. 2000) (citation omitted). This concept is commonly referred to as *non sui juris*, and it applies to DOC because it is a department of the District of Columbia. *See id.* (collecting cases). Consequently, the Court grants DOC's motion and dismisses Plaintiff's case without prejudice and solely on the ground that DOC is not a proper party defendant.[3]

_____/s/_____
KETANJI BROWN JACKSON
United States District Judge

DATE: March 31, 2017

[3] A separate order dismissing the case without prejudice will issue contemporaneously. A dismissal without prejudice is not an adjudication on the merits; therefore, Plaintiff is not precluded from filing another civil action against proper defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERVICE EMPLOYEES INTERNATIONAL UNION NATIONAL INDUSTRY PENSION FUND, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. No. 15-cv-0626 (KBJ)
PALISADES HEALTH CARE CENTER, INC., *d/b/a Alaris Health at Boulevard East*,	)	
Defendant.	)	

MEMORANDUM OPINION & ORDER GRANTING PLAINTIFFS' PETITION FOR ATTORNEYS' FEES AND COSTS

On August 5, 2016, this Court granted summary judgment in favor of plaintiffs Service Employees International Union National Industry Pension Fund and its Trustees (collectively "Plaintiffs" or "the Fund") in its action against Defendant Palisades Health Care Center, Inc. ("Palisades") for failure to pay required contributions to the Fund under the parties' collective bargaining and trust agreements, in violation of the Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq*. ("ERISA"). Before this Court at present is Plaintiffs' Petition for Attorney's Fees and Costs (Pls.' Pet. For Att'ys Fees & Costs ("Pls.' Pet."), ECF No. 26), which seeks an award of fees and costs incurred in the course of litigating this case. Defendant opposes the petition on the grounds that the billing records that Plaintiffs have presented are not specific enough to conduct "a thorough and accurate

examination of the reasonableness of the fees requested." (Def.'s Br. In Supp. of Opp'n to Pls.' Pet. ("Def.'s Opp'n"), ECF No. 27, at 9.)[1]

For the reasons explained further below, this Court concludes that an award of attorneys' fees and related expenses in the amount requested here is reasonable, and thus Plaintiffs' Petition for Attorneys' Fees and Costs will be **GRANTED**. Accordingly, Plaintiffs will be awarded $11,118.00 as compensation for attorneys' fees and costs.

I. BACKGROUND

On March 17, 2010, Defendant Palisades entered into a collective bargaining agreement ("CBA") with "Local 1199 SEIU United Healthcare Workers East" (the regional unit of Plaintiffs' union), for a term starting on April 1, 2010, and ending on March 31, 2014. (Compl., ECF No. 1, ¶¶ 8–9; *see also* CBA, Ex. 1 to Compl., ECF No. 1-1, at 2–6.) According to the CBA, Palisades agreed to participate as an employer in the Fund and to make "contributions to [Plaintiffs' fund] for all employees covered by the CBA[.]" (Compl. ¶ 10.) These contributions were to be calculated on a "base rate[]" set in the CBA, plus any "supplemental contributions" calculated at an increased rate for delinquent contributions. (*Id.* ¶¶ 10, 20.) By its terms, the CBA was automatically renewed for an additional four years after March 31, 2014. (*See id.* ¶ 9.) Palisades also became a party to two other Fund-related contracts: the Fund's Agreement and Declaration of Trust (the "Trust Agreement"), and its Statement of Policy for the Collection of Delinquent Contributions (the "Collections Policy"). (*See*

[1] Page numbers herein refer to those that the Court's electronic case filing system automatically assigns.

id. ¶ 13.) Overall, these agreements constituted a comprehensive payment scheme with strict monetary sanctions and deadlines.

Palisades failed to abide by the agreed-upon deadlines on several occasions. (*See id.* ¶¶ 22–23.) Consequently, on April 24, 2015, Plaintiffs filed the instant lawsuit to collect $21,588.03 in unpaid contributions, liquidated damages, and interest owed by Defendant under the CBA and the Trust Agreement, as well as attorneys' fees and costs, all pursuant to "Sections 502(g) and 515 of ERISA, 29 U.S.C. §§ 1132(g), 1145[.]" (*Id.* ¶ 33.) A period of discovery ensued, and on January 8, 2016, Plaintiffs moved for summary judgment on their claim. (*See* Pls.' Mot. for Summ. J., ECF No. 20.) Palisades responded to Plaintiffs' motion for summary judgment by conceding its obligations under the applicable agreements and law, but also challenging both the Fund's final calculation of the damages owed and the spreadsheets upon which that calculation was based. (*See* Def.'s Opp'n to Pls.' Mot. for Summ. J., ECF No. 21, at 5–11.) Palisades further argued that ERISA's remedy provision, which allows for interest and liquidated damages on any contribution unpaid at the time of suit, *see* 29 U.S.C. 1132(g)(2), was Plaintiffs' sole avenue for recovery and preempted the parties' contractual damages provision allowing for recovery of all delinquent contributions, whether paid or unpaid at the time of suit. (*See* Def.'s Opp'n to Pls.' Mot. for Summ. J. at 11–12.)

On August 5, 2016, this Court granted Plaintiffs' motion and entered judgment in the Fund's favor in the amount of $21,588.03, an amount that reflected the delinquent contributions, accrued interests, and liquidated damages. (*See* Order, ECF No. 25, at 3.) In the Court's analysis, which was based largely on prior decisions in this district,

the Court explicitly rejected Palisades' preemption challenge and found that Palisades had "failed to raise an issue of material fact regarding the adequacy, sufficiency, and reliability of Plaintiffs' affidavit and attached spreadsheets supporting their calculation of damages." (*Id.* at 1–2 (citing *Serv. Emps. Int'l Union Nat'l Indus. Pension Fund v. Harborview Healthcare Ctr., Inc.*, Civ. No. 15-0627, 2016 WL 3248183 (D.D.C. June 10, 2016)).)

Following their victory on the merits, Plaintiffs filed a petition for attorneys' fees and costs in the amount of $11,118.00, of which $10,600.00 corresponded to legal services provided during litigation and $518.00 reflected court filings and process server fees. (*See* Pls.' Pet. at 2–3.) In total, Plaintiffs' counsel billed 55 hours of litigation-related work, such as "(1) research regarding the collective bargaining agreement at issue; (2) preparing and filing the Complaint; (3) preparing discovery requests and responses; (4) engaging in status conferences; (5) preparing a Motion, Memorandum, and Reply in Support of Plaintiffs' Motion for Summary Judgment, and (6) communicating with the Fund's staff regarding the delinquencies and Defendant's counsel." (*Id.* at 1.) In support of their petition, Plaintiffs' included the sworn declaration of Diana M. Bardes, the lead attorney in the case and an associate at Plaintiffs' firm (*see* Decl. of Diana M. Bardes in Supp. of Pls.' Pet. ("Bardes Decl."), Ex. 1 to Pls.' Pet., ECF No. 26-1, at 2–4), as well as the firm's relevant billing records in this matter from November 10, 2011, to August 18, 2016 (*see id.* at 6–19 ("Legal Services Slip"); *id.* at 21 ("Expenses Slip")).

In opposing Plaintiffs' petition for fees and costs, Palisades takes issue with nine instances in Plaintiffs' records that purportedly reflect improper billing practices. (*See*

Def.'s Opp'n at 7–9.)[2] Specifically, Palisades argues that each of the nine challenged entries is an example of "block billing" (i.e., lumping several tasks together into a single line item), which makes it "impossible to decipher how much time was actually spent on a particular task" (*id.* at 7), and it asks the Court to "decline or significantly adjust down the amount requested" to remedy this problem (*id.* at 9).[3]

II. DISCUSSION

A. Standard of Review

Under the ERISA framework, the prevailing party in an action brought under section 1145 to recover contributions to a multiemployer plan pursuant to a collective bargaining agreement—such as the Fund here—is entitled to recover "reasonable attorney's fees and costs" incurred in litigating the action. 29 U.S.C. § 1132(g)(2)(D). "The award of [attorneys' fees and costs] under section 1132(g)(2) is mandatory and does not fall to the discretion of a court." *Serv. Emps. Int'l Union Nat'l Indus. Pension Fund v. Bristol Manor Healthcare Ctr., Inc.*, Civ. No. 12-1904, 2016 WL 3636970, at *2 (D.D.C. June 30, 2016) (internal quotation marks and citation omitted). "It remains for the district court[, however,] to determine what fee is 'reasonable.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This inquiry often begins with an estimate of an appropriate fee, calculated as "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* "[T]he product of these two

[2] Palisades challenges the task descriptions for the year 2015 entries on May 31, July 20, August 25, November 10 and 24, and December 3, and for the year 2016 entries on January 7 and 8, and February 23. (*See* Def.'s Opp'n at 7–9.)

[3] Notably, Palisades does not challenge Plaintiffs' entitlement to attorneys' fees, nor does it contest Plaintiffs' request for $518.00 in litigation-related expenses. *Cf. Boland v. Elite Terrazzo Flooring, Inc.*, 763 F. Supp. 2d 64, 69 (D.D.C. 2011) (holding that fee applicants "are entitled to recover their filing fees and service costs").

variables"—which is often referred to as the "lodestar figure"— is presumptively reasonable, *DL v. District of Columbia*, 256 F.R.D. 239, 242 (D.D.C. 2009), and serves as an objective starting point for the courts, *see Hensley*, 461 U.S. at 433. However, this figure is also subject to downward adjustments by a reasonable percentage because of (and in proportion to) inconsistencies or deficiencies in the fee request or the documentation submitted in support of it. *See id*. Here, Palisades does not contest the reasonableness of the rates the Fund's attorneys used, but instead only challenges the number of hours billed and the time-keeping records that purport to justify them. (*See supra* note 3.)

It is well established that "[a]n applicant for attorneys' fees is only entitled to an award for time reasonably expended." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). The petitioner bears the burden of setting forth sufficiently detailed, probative documentation (often in the form of billing invoices or other time records) "to enable the court to determine with a high degree of certainty" that the quantity of hours requested "were actually and reasonably expended." *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) (internal quotation marks and citation omitted). These records, however, "need not present the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Concerned Veterans*, 675 F.2d at 1327 (internal quotation marks and citation omitted).

B. Analysis

Palisades' sole contention in opposition to Plaintiffs' petition for attorneys' fees is that nine time entries evince instances of improper block billing. The term "block

billing" refers to the practice of listing multiple legal tasks within a single time entry, such that "the court is left to approximate the amount of time which should be allocated to each task." *In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989); *accord DL*, 256 F.R.D. at 245. When block billing is egregious or pervasive, "the court cannot determine with a high degree of certainty, as it must, that the billings are reasonable." *In re Olson*, 884 F.2d at 1429. Defendant argues that the "numerous block billed entries" at issue here are severe enough to demand a downward adjustment or the denial of the fee request altogether. (*See* Def.'s Opp'n at 9.) This Court disagrees.

To be clear, the nine entries that Defendant challenges do lump together several tasks. (*See, e.g.*, Legal Services Slip at 9 (billing 0.3 hours on July 20, 2015 for "Meeting with [another associate] regarding coverage of status conference; review correspondence from [Defendant]'s attorney regarding status conference, prepare correspondence to [Defendant]'s attorney regarding same"); *id.* at 17 (billing 1.8 hours on February 23, 2016 for "Edit reply in support of motion for summary judgment as to Section 301 claim for liquidated damages and interest; review comments from [another associate] regarding same; prepare correspondence to [another associate] regarding review and filing of same; prepare supplemental affidavit of K. Anderson; correspond with K. Anderson regarding same").) But these entries do not constitute even 10 percent of the entire billing record (*see id.* at 6–19 (listing 93 total entries)), and are thus merely a small fraction of the total time for which Plaintiffs seek compensation (*see id.* (listing 55 hours total, of which 12.3 (22.4 percent) are challenged by Palisades)). Because the majority of the entries include only a single task, and "even the entries that are not limited to a single task list several that all involve one filing[,]"

Bristol Manor, 2016 WL 3636970, at *5, the instant case stands in contrast to other cases where block-billing was deemed impermissibly pervasive or so intertwined with other clear defects that a reduction was justified. *See, e.g.*, *Damarcus S. K.S. v. D.C.*, No. CV 15-851, 2016 WL 4536858, at *7 (D.D.C. Aug. 30, 2016) (block-billing every entry); *see also Role Models*, 353 F.3d at 971 (listing unrelated matters within block-billed entries). This Court finds that the use of block-billing here was not unduly excessive, and that the few tasks listed were sufficiently closely related that a reduction of fees to address the block-billing concern is not warranted. *See Bristol Manor*, 2016 WL 3636970, at *5; *see also, e.g.*, *Fitts v. Unum Life Ins. Co. of Am.*, 680 F. Supp. 2d 38, 42 (D.D.C. 2010); *DL*, 256 F.R.D. at 245 & n.12.

Nor can it be said that the time claimed and/or the fees requested in this case raise the specter of unreasonable billing practices in a manner that warrants further scrutiny. When a court evaluates a petition for attorneys' fees, "the ultimate inquiry is whether the total time claimed is reasonable[,]" *Smith v. District of Columbia*, 466 F. Supp. 2d 151, 158 (D.D.C. 2006), and if a court is "outraged" by the exuberant or disproportionate amount requested, "it can scrutinize the fee petitioner's time records with a more demanding eye[,]" *DL*, 256 F.R.D. at 246. However, "where . . . the complexity of a case appears to be in line with the request, a court must recognize how lawyers work and how they notate their time rather than demanding exacting detail." *Fitts*, 680 F. Supp. 2d at 43 (internal quotation marks and citation omitted). The total amount requested Plaintiffs' here—$11,118.00—is, on its face, proportional to the complexity and length of the parties' ERISA litigation, and this Court sees no reason to deviate from this manifestly reasonable fee request. *See, e.g.*, *Bristol Manor*, 2016 WL

3636970, at *2, 5 (granting $19,023.60 in attorneys' fees and costs for 55.15 hours of legal work regarding ERISA litigation that is nearly identical to the instant case).

III. ORDER

For the foregoing reasons, this Court finds that Plaintiffs' petition for attorneys' fees and costs is reasonable and that a reduction of the amount sought is not warranted. Accordingly, it is hereby

ORDERED that Plaintiffs' [26] Petition for Attorneys' Fees and Costs is **GRANTED**, and Plaintiffs shall be awarded $11,118.00 to compensate for attorneys' fees and litigation costs.

DATE: November 18, 2016

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTWYNE REID, Plaintiff, v. JOINT SESSION OF THE UNITED STATES CONGRESS, *et al.*, Defendants.	)	No. 16-mc-2255 (KBJ)

MEMORANDUM OPINION

Pro se plaintiff Antwyne Reid has filed the instant complaint against the Joint Session of the United States Congress, the Vice President, the Speaker of the House, and the "plenary [M]embers of [C]ongress[.]" (ECF No. 1 at 1.)[1] Plaintiffs' complaint is titled "[Administrative Command] Replivin Cepit [sic] Pursuant to All Writs Per Title 28 Act 1651 in Form of Writ of Replivin Misc.," and in it he makes a series of unintelligible statements, assertions, and requests. For example, Plaintiff seeks

> [r]eplivin Cepit Relief of return of all securities under 091535-1982 commonwealth of pennsylvania department of health issued when I was an infant and without legal capacity demanding ESTOPPEL BY RECORD REUTRN OF ALL SECURITIES BONDS CHATTELS is Sought via Article 1 organic constitution for the united states 1787 articles 4 & 5 Canonum de lus positivum Article 100 cestui vie ORGANIC CONSTITUTION FOR THE UNITED STATES OF AMERICAN ARTICLE 4, & 5.

(*Id.*) In a letter that accompanies his filing, Plaintiff states that he is

> not seeking a[civil] complaint but a[] breach of contract against the United States of America[] Government[,] Joint Session of the United States

[1] Page numbers herein refer to those that the Court's electronic case-filing system automatically assigns.

> [Congress,] Mr. Vice President[,] Mr, Speaker[, and] Plenary Congress under Title 41 USC termination of war contract where fore this process this writ as a[] misc to enforce the nonperformance of termination of alien property custodian jurisdiction[.]"

(*Id.* at 2.) This Court has reviewed Plaintiff's filing and determined that Plaintiff has failed to establish that this Court has subject matter jurisdiction over this matter. Accordingly, and as explained below, the Court will **DISMISS** the instant case *sua sponte*. *See Hurt v. U.S. Court of Appeals for D.C. Circuit Banc*, 264 F. App'x 1, 1 (D.C. Cir. 2008) ("It was proper for the district court to analyze its own jurisdiction *sua sponte* and dismiss the case for lack of jurisdiction.").

DISCUSSION

Federal courts are courts of limited jurisdiction, possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the [plaintiff]." *Id.* (citation omitted). Furthermore, when a claim is "'so attenuated and unsubstantial as to be absolutely devoid of merit,'" a federal court is without power to entertain that claim. *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)); *accord Tooley v. Napolitano*, 586 F.3d 1006, 1009 (D.C. Cir. 2009) ("A complaint may be dismissed on jurisdictional grounds when it 'is "patently insubstantial," presenting no federal question suitable for decision.'" (quoting *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994))).

In the instant case, the complaint is entirely devoid of any grounds on which this Court can exercise jurisdiction over Plaintiff's case, and thus Plaintiff has failed to meet his burden of establishing the existence of subject matter jurisdiction, even under

the "less stringent standards" to which federal courts hold pro se litigants. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Although Plaintiff does refer to the All Writs Act, 28 U.S.C. § 1651, it is clear beyond cavil that the All Writs Act is not an independent source of federal court jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999). What is more, the relief that Plaintiff appears to seek—an order compelling an "alien property custodian" to return to him securities purportedly issued by an unknown entity upon his birth (ECF No. 1 at 2)—is plainly meritless, and in any event, is outside the scope of this Court's equitable powers.

CONCLUSION

Because Plaintiff's complaint presents no federal question suitable for decision and is devoid of merit, this Court lacks subject matter jurisdiction over this matter. Accordingly, and as set forth in the Order that accompanies this Memorandum Opinion, this case is **DISMISSED**.

Date: November 18, 2016

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESPIGMENIO HERNANDEZ, JR.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 15-0944 (KBJ)
U.S. DEPARTMENT OF JUSTICE, *et al.*,	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

In February of 2014, pro se plaintiff Espigmenio Hernandez, Jr. ("Hernandez"), who is currently incarcerated at a federal facility in La Tuna, Texas, submitted a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the Executive Office for United States Attorneys ("EOUSA" or "the Office"), which is a component of the United States Department of Justice ("DOJ" or "Defendant"). In that request, Hernandez sought "any records about me maintained at your agency." (Ex. A to Decl. of David Luczynski ("Luczynski Decl.") ("FOIA Request"), ECF No. 13-3, 10–11, at 10.) To provide context for this request, Hernandez also indicated that the U.S. Attorney's Office for the Western District of Texas had prosecuted him for a crime in 2011–12. (*Id.*) The EOUSA located a total of 459 pages of documents that were potentially responsive to Hernandez's request. Of these, 400 pages were public records, which the EOUSA withheld because Hernandez did not specifically request public records, and 21 pages were parts of grand jury transcripts, which the EOUSA did not produce due to the secrecy afforded to grand jury proceedings under Federal Rule of

Criminal Procedure 6(e). Of the remaining 38 pages, the EOUSA determined that 18 were not responsive, and ultimately, only seven responsive documents were released in part or in full to Hernandez. In the instant complaint, which was filed on June 19, 2015, Hernandez challenges the adequacy of the EOUSA's response to his FOIA request.

Before this Court at present are the parties' cross-motions for summary judgment. (*See* Def.'s Mot. for Summ. J. ("Def.'s Mot."), ECF No. 13; Pl.'s Cross-Mot. for Summ J. ("Pl.'s Mot."), ECF No. 15.) DOJ argues that it is entitled to summary judgment with respect to Hernandez's entire complaint, because the EOUSA conducted an adequate search for responsive documents, validly excluded the nonresponsive documents that it located in its initial search, and properly invoked various FOIA exemptions to withhold certain documents in whole or in part. (*See* Mem. in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Mem."), ECF No. 13-1, at 3–11; Def.'s Combined Reply in Supp. of Def.'s Mot. & Opp'n to Pl.'s Mot. ("Def.'s Reply"), ECF No. 20, at 3–4.)[1] In his responsive filings, Hernandez does not appear to challenge either the adequacy of the EOUSA's search or the agency's invocation of particular FOIA exemptions. (*See* Mem. in Supp. of Pl.'s Mot. & Opp'n to Def.'s Mot. ("Pl.'s Mem."), ECF No. 15, 3–6, at 4–6; *see also* Def.'s Reply at 1 ("Plaintiff's opposition . . . do[es] not address—and thereby concede[s]—virtually all of defendant's motion.").) Rather, Hernandez's argument centers on the EOUSA's failure to explain, when responding to his FOIA requests, why it withheld "39 pages of records responsive to [his] request, which are not publicly available, and have neither been produced nor has an exemption

[1] Page numbers herein refer to those that the Court's electronic case filing system automatically assigns.

[been] claimed." (Pl.'s Mem. at 5.) DOJ has subsequently explained that 21 pages of the subset of records Hernandez points to were grand jury materials that FOIA Exemption 3 permits it to withhold (*see* Supplemental Decl. of David Luczynski ("Suppl. Luczynski Decl."), ECF No. 20-1, ¶ 4; *see also* Def.'s Reply at 2–3), and the other 18 pages were considered "nonresponsive" because Hernandez's name did not appear in the documents (*see* Suppl. Luczynski Decl. ¶ 5 (explaining that when responding to a general request for records about the requester, the agency's practice is to withhold records it so finds "[i]f [the requester's] name is not mentioned anywhere on the document"); *see also* Def.'s Reply at 3–4 (explaining that EOUSA deemed 18 pages of records nonresponsive to Hernandez's request); Pl.'s Mem. at 5).

For the reasons explained below, with respect to the limited issue of whether the 39 unexplained pages have been properly withheld, this Court's decision is a split one. The Court agrees with Defendant that FOIA Exemption 3 protects the 21 pages of grand jury transcripts from disclosure (although the proper course for EOUSA to follow would have been to inform Hernandez of the existence of these records and assert Exemption 3 in its FOIA response). However, in regard to the remaining 18 pages that the agency deemed nonresponsive, the Court generally agrees with Hernandez that documents located in a government file that is associated with the requester ought not to be automatically excluded as necessarily nonresponsive to an "all records about me" FOIA request simply and solely because the requester's name is not mentioned in the documents. As a result, this Court will sustain DOJ's motion with respect to the 21 pages, but will order DOJ to produce copies of the 18 pages ex parte and in camera, along with supplemental briefing on this issue, so that the Court can assess their

responsiveness. Accordingly, DOJ's motion for summary judgment will be **GRANTED IN PART and DENIED IN PART**, and Hernandez's cross-motion for summary judgment will be **STAYED** pending the outcome of this Court's in camera review.

I. BACKGROUND

A. Factual Background

Hernandez is a federal inmate at La Tuna Federal Satellite Low, in La Tuna, Texas, who submitted the following FOIA request to the EOUSA in February of 2014:

> I am requesting access to any records about me maintained at your agency.
>
> To help you locate my records, I have had the following contact with your agency: I was prosecuted by the U.S. Attorney's Office in the Western District of Texas in the years 2011-12. Specifically, I was the defendant in USA v. Hernandez, 4:11-cr-442, tried in that court. AUSA James J. Miller, Jr., prosecuted me. AUSA Miller worked out of the Alpin, Texas office.

(FOIA Request at 10.) Because each individual U.S. Attorney's Office across the country maintains its own prosecution files, the EOUSA forwarded Hernandez's FOIA request to the prosecuting office he specifically identified: the U.S. Attorney's Office for the Western District of Texas. (*See* Luczynski Decl. ¶ 10.) Denise Swain, a paralegal in that office, searched for documents using both Hernandez's name and the identified case number, as well as an internal number associated with his prosecution. (*See id.*; Pl's Decl., ECF No. 15, 11–13, ¶ 6.)

In connection with this search, Swain utilized a standard EOUSA FOIA tracking document that "is designed to aid the FOIA Contacts who search for records in the district to keep track of what has been found" and "is organized in a checklist format[.]" (Luczynski Suppl. Decl. ¶ 1; *see also id.* ¶ 2.) The checklist has two

columns, each of which "list[s] various categories of possible records such as correspondence, law enforcement records, attorney work product, pleadings, transcripts, and grand jury records." (*Id.* ¶ 2.) Column A lists items that likely are not releasable, such as grand jury materials, and items that, like public records, "the majority of the requesters are not interested in . . . since often they already have them" (*see id.* ¶ 3), while Column B lists items that the district office forwards to the EOUSA for processing and potential release (*see id.* ¶ 5). The individual who is searching for responsive records is "instructed not to [forward to the EOUSA] anything from Column A, but to only [forward] copies of records from Column B." (*Id.* ¶ 2.)

Using the form, Swain recorded that she located 459 pages of records that were potentially responsive to Hernandez's FOIA request: 21 pages of grand jury transcripts and 400 pages of court-filed or public records, which she listed in Column A, along with 17 pages of correspondence, 13 pages of attorney work product, and 8 pages of Drug Enforcement Agency ("DEA") records, which she listed in Column B. (FOIA Cost Tracking Form, Ex. 2 to Pl.'s Decl., ECF No. 15, 18–23, at 21 (hereinafter referred by its title, "FOIA Cost Tracking Form").) In accordance with EOUSA policy, Swain forwarded copies of the documents listed in Column B to the EOUSA for further review and possible production; she did not forward the documents listed in Column A. (*See* Luczynski Suppl. Decl. ¶¶ 3–5.)

The EOUSA referred six of the eight pages of DEA records that it received from Swain to the DEA for its review, having first determined that two pages were not responsive to Hernandez's request. (*See* Decl. of Katherine L. Myrick ("Myrick Decl."), ECF No. 13-2, ¶ 5; Suppl. Luczynski Decl. ¶ 6.) Of those six pages of records,

the DEA eventually found that one page should be released in full and four pages should be withheld in full, relying on Exemptions 7(C), 7(E), and 7(F). (*See* Myrick Decl. ¶¶ 5, 7.) In addition, the DEA referred one page to the United States Marshals Service ("USMS") (*see id*. ¶ 8), and the USMS determined that this page should be partially released, with redactions claiming Exemptions 7(C) and 7(F) (*see* Decl. of William E. Bordley ("Bordley Decl."), ECF No. 13-4, ¶ 3). Of the remaining 17 pages of correspondence and 13 pages of attorney work product that Ms. Swain had located, recorded in Column B, and forwarded to the EOUSA, the EOUSA determined that 18 pages were not responsive to Hernandez's requests. (Def.'s Reply at 3.) Then, with respect to the remaining 12 pages of records, it released to Hernandez four pages in full and one page in part, and withheld seven pages in full, relying on Exemptions 5 and 7(C). (Luczynski Decl. ¶ 6.)

The EOUSA communicated to Hernandez its decision on his FOIA request in two letters, one dated May 1, 2015, which Hernandez claims he did not receive (Pl.'s Decl. ¶¶ 5–6), and one dated March 4, 2015, which Hernandez states that he did receive, (Pl.'s Decl. ¶¶ 5–6).[2] Notably, none of the documents that the agency had listed in Column A of the internal checklist were expressly mentioned in the response letters, nor were any of the documents that the agency had processed and had deemed non-responsive. However, included with the May letter was the internal checklist document that Swain had used to categorize the documents she found (*see* FOIA Cost Tracking Form at 21), which revealed to Hernandez that there were 459 pages of

[2] Although Hernandez states in his declaration that the letter he received was dated March 4, 2014 (Pl.'s Decl. ¶¶ 5–6), the Court understands this to be a typographical error, as the letter Hernandez attached to his declaration bears the date March 4, 2015 (*see* March 4, 2015 Letter, Ex. 1 to Pl.'s Decl., ECF No. 15, 14–16, at 14).

documents at the outset, but did not provide any explanation for the fact that Hernandez ultimately received only a small, partly redacted subset of those documents (Pl.'s Decl. ¶¶ 6–7, 9). In other words, neither the response letter Hernandez received nor the included tracking form document explained *why* Hernandez did not receive any Column A documents or the documents from Column B that the office had withheld. (*Id.* ¶ 9.) Hernandez filed an administrative appeal of the EOUSA's response to his FOIA request, to which the Office had not responded at the time Hernandez initiated the instant lawsuit. (*See* Compl., ECF No. 1, ¶¶ 9–10.)

B. Procedural History

On June 19, 2015, Hernandez filed a complaint in this Court, challenging the EOUSA's response to his FOIA request. (*See generally* Compl.) DOJ filed an answer on August 28, 2015 (*see generally* Answer, ECF No. 10), and shortly thereafter, on October 7, 2015, the agency filed a motion for summary judgment, supported by three declarations and a *Vaughn* Index.[3] DOJ's motion argues that EOUSA conducted an adequate search for documents and properly invoked FOIA exemptions to withhold certain documents in whole or in part. (*See* Def.'s Mem. at 3–11; Myrick Decl.; Luczynski Decl.; Bordley Decl.; *Vaughn* Index, Ex. G. to Luczynski Decl., ECF No. 13-3 at 21–27.)

Hernandez filed his combined opposition and cross-motion for summary judgment on November 23, 2015. (*See* Pl.'s Mem.) Hernandez's filing homes in on the EOUSA's use of the FOIA Tracking Form—and, in particular, its failure to provide an

[3] "A *Vaughn* index is a document that correlates all withholdings with specific FOIA exemptions and the agency's specific nondisclosure justifications." *Conservation Force v. Jewell*, 160 F. Supp. 3d 194, 198 n.1 (D.D.C. 2016) (internal quotation marks and citation omitted).

explanation for its treatment of all documents listed on that form—and recounts the various explanations that DOJ's motion provides for its withholding, noting that, of the 459 pages that were initially located "[s]hockingly, only 12 pages are addressed in the EOUSA's March 4, 2015 response" to his FOIA request. (*Id.* at 5.) Hernandez then states that, even when DOJ's stated reasons for withholding records are taken into account, "[t]hat leaves 39 pages of records responsive to Hernandez's request, which are not publicly available, and have neither been produced nor has an exemption [been] claimed." (*Id.*) Hernandez's motion concludes by declaring that he "has thus established with reasonable specificity[] that responsive records, located by the Defendant during the FOIA search, were neither produced, nor an exemption claimed, in clear violation of FOIA's mandate." (*Id.* at 6.)

DOJ filed a reply brief and attached a supplemental declaration that "provides clarification regarding the figures noted on the [FOIA Cost Tracking Form]." (Def.'s Reply at 2; *see also* Suppl. Luczynski Decl.) This declaration explains the differences between Column A and Column B, and the agency's policy that reviewers not forward to the EOUSA any records listed in Column A (here, the 21 pages of grand jury transcripts and 400 pages of public records). (*See* Suppl. Luczynski Decl. ¶¶ 3–4 (explaining that public records are not processed for production unless requested "to limit the costs associated with the request," and that grand jury transcripts are not processed because they are exempt from disclosure).) Furthermore, with respect to 18 pages of documents listed in Column B that the EOUSA deemed "nonresponsive" upon further review, Luczynski explained the agency's analysis:

> [J]ust because they were located in Plaintiff's file does not mean they were responsive or releasable. When correspondence between

> attorneys, usually in printed email format, [was] located, it [was] examined [to determine] whether it [was] related to Plaintiff or his case. If Plaintiff's name is not mentioned anywhere on the document, it [was] deemed not responsive to Plaintiff's FOIA request[,] which asked for "any records about me maintained by your agency."

(*Id* ¶ 5.)

In his own reply brief, Hernandez assails Luczynski's explanation by arguing, first, that "the issue at this point is not whether the records were releasable (in the opinion of the agency), but whether they were responsive to the request[]" because Hernandez "has a right under FOIA of notice of responsive records which the agency considers exempt from disclosure." (Pl.'s Reply at 2.) In addition, Hernandez characterizes Luczynski's explanation as an invalid "post hoc justification[,]" (*id.* at 1), arguing that "the fact [that] the records were located in Mr. Hernandez's file supports an inference that they are 'about' him[,]" even though he is not mentioned by name. (*Id.* at 3.) Hernandez's motion then proceeds to request that the Court "enter summary judgment in Mr. Hernandez's favor, and order the Defendant to produce all documents located during the search, for which they have not claimed an exemption, only a presumption of unresponsiveness due to the absence of Mr. Hernandez's proper name in the body of the documents" (*id.*), or, alternatively, Hernandez asks this Court to "conduct an in camera review of the documents to assess whether they are reasonably responsive to Mr. Hernandez's request" (*id.*).

The parties' cross-motions for summary judgment have been fully briefed, and are now ripe for this Court's review.

II. LEGAL STANDARDS

A. Summary Judgment In FOIA Cases Generally

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Judicial Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 136 (D.D.C. 2014) (quoting *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009)). A court must grant summary judgment under Rule 56 of the Federal Rules of Civil Procedure if the pleadings, disclosure materials on file, and affidavits "show[ ] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Judicial Watch v. Navy*, 25 F. Supp. 3d at 136 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). In the FOIA context, a district court reviewing a motion for summary judgment conducts a de novo review of the record, and the responding federal agency bears the burden of proving that it has complied with its obligations under the FOIA. 5 U.S.C. § 552(a)(4)(B); *see also In Def. of Animals v. Nat'l Insts. of Health*, 543 F. Supp. 2d 83, 92–93 (D.D.C. 2008).

Furthermore, in a FOIA case, a court may award summary judgment based solely upon information that the government provides in affidavits, when the affidavits describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D. C. Cir. 1981). The court must analyze all underlying facts and inferences in the light most favorable to the FOIA requester, *see Willis v. Dep't of Justice*, 581 F. Supp. 2d 57, 65 (D.D.C. 2008), so summary judgment for an agency is appropriate only after the agency

proves that it has "fully discharged its [FOIA] obligations[,]" *Moore v. Aspin*, 916 F. Supp. 32, 35 (D.D.C. 1996).

B. Application Of Summary Judgment Rules To Pro Se Parties

When applying the legal framework discussed above to evaluate the parties' cross-motions for summary judgment, this Court must be mindful of the fact that Hernandez is proceeding in this matter pro se. The Supreme Court has held that the filings of pro se parties are to be "liberally construed[,]" and that pro se filings, "however inartfully pleaded, must be held to less stringent standards than formal [documents] drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (emphasis in original) (internal quotation marks and citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). But "[t]his benefit is not . . . a license to ignore the Federal Rules of Civil Procedure." *Sturdza v. United Arab Emirates*, 658 F. Supp. 2d 135, 137 (D.D.C. 2009) (citation omitted); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993). Thus, when faced with a motion for summary judgment, even a pro se plaintiff must comply with the Federal Rules and with this Court's local rules regarding responding to statements of material fact and marshaling record evidence that establishes each element of his claim for relief. *Grimes v. District of Columbia*, 794 F.3d 83, 94 (D.C. Cir. 2015).

III. ANALYSIS

On October 8, 2015, this Court issued an Order that advised Hernandez of his obligations to respond to Defendant's motion for summary judgment, and warned him that if he did not respond to the motion by November 23, 2015, the Court would treat the motion as conceded. (Order, ECF No. 14 (referencing the Federal Rules of Civil

Procedure and the Local Rules of this Court).) Hernandez responded, but his timely response did not raise any objections to DOJ's statement of material facts (*see generally* Pl.'s Mem.), and the arguments in Hernandez's opposition and cross-motion made crystal clear that the only FOIA challenge that Hernandez wishes to preserve is his contention that DOJ has violated the FOIA because there are "39 pages of records responsive to Hernandez's request, which are not publicly available, and have neither been produced nor has an exemption [been] claimed." (Pl.'s Mem. at 5; *see also id.* at 4–5 (stating that the record evidence "establishes beyond all doubt that [DOJ] located additional records which have neither been produced nor an exemption to their production asserted"); Pl.'s Reply at 1 (maintaining that "Hernandez was silently denied access to these records without formal notice or any explanation").) Thus, this Court will deem all of DOJ's stated facts admitted for purposes of resolving the pending cross motions, *Grimes*, 794 F.3d at 94, and will also grant DOJ's motion with respect to any issues regarding the adequacy of its initial records search and its invocation of FOIA Exemptions 5, 7(C), 7(E) and 7(F), which are potential challenges that Hernandez has conceded by omission, and thereby, has effectively withdrawn, *see, e.g.*, *Saunders v. Davis*, No. 15cv2026, 2016 WL 4921418, at *12 n.17 (D.D.C. Sept. 15, 2016) ("'[W]hen a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'" (alteration in original) (quoting *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003))).

Turning its attention to the issue upon which the parties continue to disagree—namely, whether the EOUSA properly withheld 21 pages of grand jury transcripts and

18 pages of "nonresponsive" documents and/or adequately disclosed to Hernandez the existence of those documents in either of its responses—this Court concludes that DOJ is entitled to summary judgment with respect to the grand jury transcripts based on Exemption 3, but neither party has yet established that the 18 pages of allegedly "nonresponsive" materials were properly withheld, as explained below. Thus, the Court will require DOJ to provide the 18 challenged "nonresponsive" documents to the Court for an ex parte, in camera review, and will permit further briefing on the responsiveness issue and any other asserted basis for continuing to withhold these records.

A. Although DOJ's Records-Related Determinations Were Poorly Communicated, The Agency Properly Withheld The 21 Pages Of Grand Jury Transcripts Under FOIA Exemption 3

DOJ's practice of categorizing documents into Column A and Column B, and then sending only those in Column B along for further processing, is fraught with the potential for misclassification, and at the very least, appears to result in the agency's withholding of certain responsive records without adequate notice to the requester. The instant matter is a perfect example. It was only due to the fortuitous revelation of the agency's internal tracking document that Hernandez was made aware that records such as the grand jury transcripts even existed, and per agency policy, those documents were not even reviewed, much less identified in the agency's response to Hernandez as having been withheld pursuant to the FOIA exemption that the DOJ asserted once this litigation commenced. It would seem to be a far better practice—and one that the FOIA may very well mandate—to implement a system in which all of the records that the agency locates are reviewed (however briefly), and each responsive record that the agency intends to withhold is specifically identified in the agency's response to the

requester. *See Vaughn v. Rosen*, 484 F.2d 820, 826–827 (D.C. Cir. 1973) (when withholding documents under a FOIA exemption, the agency must itemize each exemption it claims and provide a detailed analysis regarding the applicability of the claimed exemption). Thus, to the extent that Hernandez has challenged DOJ's FOIA response with respect to the 21 pages of grand jury records that DOJ withheld pursuant to a FOIA exemption but did not identify as such, Hernandez is correct that the agency acted improperly. *Id.*; *cf.* 5 U.S.C. § 552(b) (when agency deletes information from a record, "[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record").

However, DOJ's technical error is not sufficient to compel this Court to require that the 21 pages of grand jury testimony be produced, because DOJ has (belatedly) invoked FOIA Exemption 3 (*see* Def.'s Reply at 2–3; *see also* Luczynski Suppl. Decl. ¶ 4), and this Court finds that Exemption 3 does, in fact, authorize the agency to withhold these records. FOIA Exemption 3 permits an agency to withhold information that is responsive to a FOIA request if the information is "specifically exempted from disclosure by statute[,]" provided that the applicable statute "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); *see also Gov't Accountability Project v. FDA*, No. 12cv1954, 2016 WL 4506967, at *4-5 (D.D.C. Aug. 26, 2016).[4] As far as

[4] There are essentially two steps to a court's Exemption 3 inquiry. First, the court must determine the threshold issue of whether the statute is one that "specifically exempt[s]" certain information. *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 814 (D.C. Cir. 2008) (internal quotation marks and citation omitted). And if the court determines that the statute the agency invokes clears this initial hurdle, it must then go on to determine whether "the withheld material satisf[ies] the criteria of the exemption statute[.]" *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990); *see also CIA v. Sims*, 471 U.S. 159, 167 (1985).

grand jury testimony is concerned, the D.C. Circuit has already concluded that the first prong of the Exemption 3 analysis is satisfied. *See Senate of the Com. of P.R. on Behalf of Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) ("The Federal Rules of Criminal Procedure . . . prohibit, with exceptions not relevant here, disclosure of 'matters occurring before [a] grand jury.'" (alteration in original) (quoting Fed. R. Crim. P. 6(e)(2))). And with respect to the second prong of the Exemption 3 analysis, it is well settled that a grand jury transcript falls within the scope of the disclosure limitations contained in Federal Rule of Criminal Procedure 6(e)(2). *See, e.g.*, *Sanders v. Obama*, 729 F. Supp. 2d 148, 156 (D.D.C. 2010) ("To disclose a transcript would be to disclose the inner workings of the grand jury, which is prohibited."), *aff'd sub nom. Sanders v. U.S. Dep't of Justice*, No. 10-5273, 2011 WL 1769099 (D.C. Cir. Apr. 21, 2011); *Dixon v. U.S. Dep't of Justice*, Civ. No. 03cv2577, 2005 WL 3273973, *3 (D.D.C. Sept. 22, 2005) ("Clearly, transcripts of grand jury testimony are protected from disclosure."); *Geronimo v. Exec. Office for United States Attys.*, 05cv1057, 2006 WL 1992625, *3 (D.D.C. July 14, 2006) (same).

Consequently, despite the fact that DOJ failed to notify Hernandez that it was withholding the 21 pages of grand jury transcripts pursuant to Exemption 3, this Court will find that the agency's decision to withhold in full the 21 pages of "transcripts of the actual Grand Jury proceeding" (Luczynski Suppl. Decl. ¶ 4) was proper.

B. On The Current Record, This Court Cannot Determine Whether DOJ Has Properly Withheld The 18 Documents In Hernandez's File That The Agency Deemed "Nonresponsive"

What remains of Hernandez's FOIA case is his challenge to the EOUSA's determination that 18 pages of records that were located in Hernandez's file in the Western District of Texas are not responsive to his FOIA request for documents "about" him

because none mentioned Hernandez by name. (*See* Luczynski Suppl. Decl. ¶ 5.) The statements in DOJ's declaration regarding the contents of these records and the basis for not producing them are entitled to a presumption of good faith. *See Friedman v. United States Secret Serv.*, 923 F. Supp. 2d 262, 275 (D.D.C. 2013) ("[S]upporting declarations are accorded a presumption of good faith[.]"). And while speculation about the potential of an improper withholding is generally insufficient to overcome this presumption of good faith, *id.*, this case has provided more than sheer speculation.

To be specific, DOJ's primary declarant *admits* that the 18 documents at issue were located in Hernandez's prosecution file (Luczynski Suppl. Decl. ¶ 5), and also that EOUSA deemed the pages nonresponsive solely because the records did not mention Hernandez *by name* (*id.*). To a certain extent, then, the "nonresponsive" classification appears to rest on the agency's conclusion that only documents that mention the requester specifically by name are documents "about" the requester. But, this Court concludes that interpreting Hernandez's FOIA request to be seeking only documents that name him was an unreasonably narrow construction of the request since there are undoubtedly many circumstances in which a document can be "about" a person without mentioning that person by name. *See Truitt v. Dep't of State*, 897 F.2d 540, 544–45 (D.C. Cir. 1990) (when responding to a FOIA request, agency must construe the request liberally); *see also Charles v. Office of Armed Forces Med. Exam'r*, 730 F. Supp. 2d 205, 215, 216 (D. D. C. 2010) (agency unreasonably interpreted FOIA request for "autopsy reports 'commenting [on], discussing or indicating' fatal bullet wounds" to include only "documents containing explicit 'statements' about these topics" (alteration in original)).

Put another way, Hernandez requested all of the documents in the government's possession that were "about" him, and DOJ's affidavits do not establish that the 18 pages of records that were located in his file are not responsive to that request. Moreover, in the absence of some explanation as to why the 18 documents are not "about" Hernandez, this Court cannot discern whether EOUSA has fully discharged is obligations in responding to Hernandez's request. Accordingly, neither party is entitled to summary judgment with respect to the 18 pages, and this Court will require DOJ to submit to the Court the 18 "nonresponsive" documents at issue ex parte, for in camera review.

IV. ORDER

The EOUSA has adopted FOIA-related policies that allow it to withhold documents that are admittedly responsive to a FOIA request without informing the requestor either of the existence of the documents or the basis on which the Office is withholding them. Such procedures are troubling, and appear to contradict the FOIA, but the 21 pages of grand jury testimony that were not produced or identified to Hernandez as a result of the application of such policies here are subject to withholding nonetheless, because Exemption 3 authorizes these pages to be withheld. No such clarity currently exists with respect to the 18 pages of records that the EOUSA has withheld as "nonresponsive," for the reasons explained above. Thus, the Court will deny without prejudice both parties' motions for summary judgment regarding that withholding, and will order DOJ to produce the documents ex parte and for in camera review, along with a supplemental brief on the responsiveness issue.

Accordingly, it is hereby

ORDERED that Defendant's [12] Motion for Summary Judgment is **GRANTED IN PART and DENIED IN PART**. The motion is granted with respect to all claims and documents except the 18 documents noted above that EOUSA has withheld as nonresponsive, and the motion is denied without prejudice with respect to those 18 documents. It is

FURTHER ORDERED that, on or before **October 31, 2016**, Defendant shall submit to this Court for ex parte, in camera review the 18 pages of documents that it has withheld as nonresponsive, along with a supplemental brief of no more than 15 pages in support of its contention that these 18 pages are not responsive to Plaintiff's FOIA request. In light of this disposition, it is

FURTHER ORDERED that Hernandez's [15] Cross-Motion for Summary Judgment is **STAYED**, as is the remainder of this case (with the exception of the production and briefing ordered above), pending further order of this Court, which will issue after the in camera review is conducted.

DATE: September 30, 2016

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALBERT E. CECCONE, *on behalf of himself and all others similarly situated*,	)	
Plaintiff,	)	
v.	)	No. 13-cv-1314 (KBJ)
EQUIFAX INFORMATION SERVICES LLC,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff Albert E. Ceccone ("Plaintiff") has sued Defendant Equifax Information Services LLC ("Defendant"), on behalf of himself and similarly situated individuals, alleging two violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681–1681x. (*See* Compl., ECF No. 1.) Before this Court at present is the parties' joint Motion for Final Approval of Class Action Settlement. (*See* Joint Mot. for Final Approval of Class Action Settlement ("Joint Mot."), ECF No. 62.) Upon consideration of the parties' submissions, the arguments and representations made at the final fairness hearing, the relevant statutes, case law, and the entire record, this Court will **GRANT** the parties' motion for final approval. A separate Order consistent with this Memorandum Opinion will issue.

I. BACKGROUND

A. Alleged Facts And Procedural History

This case stems from allegations that Equifax, a credit reporting agency, violated the FCRA by reporting inaccurate information in its consumer credit reports and providing the wrong address for the source of that information. (*See* Pl.'s Mem. in Supp. of Joint Mot. for Final Approval ("Pl.'s Final Mem."), ECF No. 62-1, at 1–2.)[1] Specifically, Ceccone alleges that Equifax had a uniform policy of including District of Columbia water and sewage liens in its consumer reports but did not have any process to update that information once the liens were paid off. (*See id.* at 1; Compl., ¶¶ 2, 11.) Ceccone also claims that Equifax uniformly provided an incorrect address for the D.C. Recorder's Office when it listed D.C. water and sewage liens on consumer credit reports, thereby failing to identify the source of the liens accurately. (*See* Pl.'s Final Mem. at 2; Compl. ¶¶ 3, 17.) Ceccone contends that these practices violated 15 U.S.C. §§ 1681e(b) and 1681g(a)(2).

Ceccone filed his complaint in this matter on May 28, 2013, in the U.S. District Court for the Eastern District of Virginia. (*See* Compl.) On August 8, 2013, Equifax filed a Motion to Transfer Venue to the U.S. District Court for the District of Columbia. (*See* Mot. to Transfer Venue, ECF No. 6.) The EDVA granted this motion, and transferred the case to this Court on September 3rd.

After more than two years of litigation, the parties notified the Court that they had reached a settlement agreement; they filed a joint Motion for Preliminary Approval

[1] Citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system assigns.

of Class Action Settlement on March 21, 2016. (*See* Mot. for Prelim. Approval of Class Action Settlement Agreement ("Prelim. Mot."), ECF No. 56.) The Court held a hearing on that motion on April 21, 2016, and granted the motion on April 29th. (*See* Prelim. Approval Order, ECF No. 58.) The Court preliminarily certified the settlement class as follows:

> All consumers in the United States who meet either of the following definitional requirements:
>
> a. The individual was the subject of a consumer report furnished by Equifax to a third party (i.) on or after May 28, 2011, (ii.) during a month in which a water and/or sewer lien filed with the District of Columbia Recorder's Office was included in the individual's credit file, and (iii.) when that lien was showing as satisfied or paid in the D.C. Recorder's Office during or prior to the month immediately preceding the month in which that consumer report was furnished; or
>
> b. Equifax sent a consumer disclosure to the individual on or after May 28, 2011 that included an incorrect address for the District of Columbia Recorder's Office.
>
> The Settlement Class does not include Defendant's officers, directors, and employees; Defendant's attorneys; Plaintiff's attorneys; any Judge overseeing or considering the approval of the Settlement together with members of their immediate family and any judicial staff; anyone who was a named plaintiff (as opposed to a putative class member) in a lawsuit pending against Defendant as of the date of the order preliminarily approving this Settlement Agreement; and all persons who timely and validly request exclusion from the Class.

(*Id.* at 2.)

B. Notice To The Class And The Terms Of The Settlement Agreement

After this Court's preliminary approval of the settlement agreement, Equifax used its own internal data to compile a list that was comprised of the names of 8,409 individuals who met the criteria for class membership, along with each person's last known verified address. (*See* Pl.'s Final Mem. at 7.) The notice of class membership and the terms of the settlement agreement were distributed by mail (using both the

addresses Defendant provided and also updated addresses that an independent search firm discovered). A total of 7,327 notices were successfully delivered, for a total delivery rate of 87%. (*See id.* at 8; Decl. of RSM US LLP ("RSM Decl."), Ex. 2 to Joint Mot., ECF No. 62-4, ¶¶ 4–8 (reporting that as of August 11, 2016, a total of 7,297 notices had been delivered).) The Settlement Administrator—RSM US, LLP ("RSM")—also created a settlement-related website and posted "the full text of the Settlement Agreement, the Class Notice, the Opt-Out Form, the Claim Form, the Preliminary Order, frequently asked questions, and the contact information for [the] Class Counsel and the Settlement Administrator." (Pl.'s Final Mem. at 8; *see also* Settlement Agreement, Ex. 1 to Prelim. Mot., ECF No. 56-2, ¶ 6.6.)

The parties' Settlement Agreement requires Equifax to remove D.C. water and sewer liens completely from *all* of the consumer credit reports that Equifax generates (or suppress the reporting of such liens), and not just take such corrective measures with respect the credit reports that belong to members of the class. (*See* Settlement Agreement ¶ 3.1; Pl.'s Final Mem. at 4.) Equifax must also provide all class members with four years of a premium credit-monitoring service, which, according to the parties, has a value of $717.60 per class member. (*See* Am. Notice of Class Action Settlement, ECF No. 61, at 3; Pl.'s Final Mem. at 5.) The Settlement Agreement also requires Equifax to create an $850,000 cash fund to compensate any class member who files a claim form verifying, under penalty of perjury, that she was the subject of a credit report that inaccurately reported an outstanding D.C. water or sewer lien. (*See* Settlement Agreement ¶¶ 3.6–3.7; Pl.'s Final Mem. at 5.) Class members who make a valid claim for payment by the deadline, which is October 7, 2016 (*see* Am. Notice of

Class Action Settlement, at 2), will receive pro rata payments from that fund, with no cap on individual payments. (*See* Settlement Agreement ¶ 3.6; Pl.'s Final Mem. at 5.)

At the fairness hearing on August 25, 2016, Class Counsel represented that a total of 253 class members had submitted claims to date, and that, if the Settlement Agreement is approved and the disbursements were made now, each member would receive $3,359.68 from the cash fund. Equifax is also paying a service award to Plaintiff (not to exceed $5,000), the costs of class notice and administration (approximately $88,000), and attorney's fees not to exceed $850,000. (*See* Pl.'s Final Mem. at 6; Settlement Agreement ¶¶ 4.2, 4.3, 6.1.) The parties estimate that the total value of the settlement is over $7.5 million. (*See* Pl.'s Final Mem. at 6.)

C. Joint Motion For Final Approval And Fairness Hearing

On August 15, 2016, the parties filed a joint motion for final approval of the settlement. (*See* Joint Mot.) As required by Rule 23(e) of the Federal Rules of Civil Procedure, this Court held a fairness hearing on August 25, 2016, at which counsel for all parties was present. At that hearing, counsel for both parties represented that the notices to potential class members had been issued and delivered successfully (as described above); that just four class members opted out of the settlement; and that no objections to the settlement had been lodged. No objectors appeared at the fairness hearing.

II. LEGAL STANDARDS

In its Preliminary Approval Order, the Court preliminarily certified Plaintiff's settlement class (*see* Prelim. Approval Order at 3), and approved the form and content of the notice to be provided to class members (*see id.* at 4). The Court also determined

that, upon preliminary examination, the terms of the settlement were fair, reasonable, and adequate (*see id.* at 1). This opinion addresses both final certification of the class for settlement purposes and approval of the settlement itself.

A. Class Certification

A class certified for settlement purposes must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, with one exception: "the court does not need to consider whether 'the case, if tried, would present intractable management problems,'" since the point of the settlement proposal is that there will be no trial. *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 159 (D.D.C. 2014) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

Rule 23(a) sets out four familiar prerequisites to class certification: numerosity, commonality, typicality, and adequacy of representation. Specifically, the rule requires that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). A class must also satisfy at least one of the requirements set out in Rule 23(b). In the instant case, the parties seek certification under Rule 23(b)(3), which requires that "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements are known as predominance and superiority. *See Alvarez*, 303 F.R.D. at 159.

B. Final Approval of Class Settlement

A class claim may only be settled with the court's approval. *See* Fed. R. Civ. P. 23(e). If the settlement will bind class members, the Court can only grant approval after holding a hearing and upon finding that the settlement is "fair, reasonable, and adequate." *Id.* The D.C. Circuit has not established a particular test for settlement approval; rather, "courts have considered a variety of factors, including: (a) whether the settlement is the result of arm's-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." *Alvarez*, 303 F.R.D. at 159 (quoting *In re LivingSocial Mktg. & Sales Practice Litig.*, 11-cv-0745, 2013 WL 1181489, at *7 (D.D.C. Mar. 22, 2013)) (internal quotation marks omitted).

A court must endeavor to evaluate these factors and cannot simply "rubber stamp" a proposed class action settlement; nevertheless, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Id.* at 160 (quoting *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 103 (D.D.C. 2004)) (internal quotation marks omitted). "[T]here is a long-standing judicial attitude favoring class action settlements, and [this] Court's discretion is constrained by the 'principle of preference' favoring and encouraging settlement in appropriate cases." *Id.* (quoting *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 114 (D.D.C. 2007)) (internal quotation marks omitted).

III. ANALYSIS

This Opinion will first address whether the proposed class satisfies the requirements of numerosity, commonality, typicality, adequacy, predominance, and superiority laid out in Rule 23 subsections (a) and (b), and whether the notice used satisfies the dictates of Rule 23(c)(2). It will then consider whether the proposed settlement is fair, reasonable, and adequate pursuant to Rule 23(e).

A. Class Certification—Rule 23(a) Requirements

1. Numerosity

Under Rule 23(a)(1), a class must be "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). Courts in this circuit "have generally found that the numerosity requirement is satisfied . . . where a proposed class has at least forty members." *Alvarez*, 303 F.R.D. at 160 (quoting *Chilcott*, 522 F. Supp. 2d at 114) (internal quotation marks omitted); *see also id.* (gathering cases). In the instant case, the parties have identified a class with over 8,400 members. (*See* Pl.'s Final Mem. at 7.) This Court has little doubt that the joinder of so many members would be impracticable, and that the interests of judicial economy would best be served by allowing these thousands of consumers to receive relief via a single action. *See, e.g.*, *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 307 (D.D.C. 2007) ("[J]udicial economy may be considered by courts in evaluating numerosity[.]"). Thus, the Court concludes that the class is sufficiently numerous to satisfy Rule 23(a)(1).

2. Commonality

Rule 23(a)(2) requires that a class action plaintiff raise claims that rest on "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2); *see Alvarez*, 303 F.R.D. at 160. This means that there must be "at least one issue, the resolution of

which will affect all or a significant number of the putative class members[.]" *Alvarez*, 303 F.R.D. at 160 (quoting *Chilcott*, 522 F. Supp. 2d at 114) (internal quotation marks omitted). "[F]actual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Id.* at 160–61 (quoting *Chilcott*, 522 F. Supp. 2d at 114) (internal quotation marks omitted).

In this case, the members of the proposed settlement class are all alleged to have been affected by the same set of Equifax's policies/procedures: they were the subject of consumer credit reports that either incorrectly listed certain liens or listed the incorrect address for the D.C. Recorder's Office when reporting those liens. (*See* Pl.'s Mem. in Supp. of Mot. for Prelim. Approval ("Pl.'s Prelim. Mem."), ECF No. 56-1, at 9.) The class members' possible avenues of recovery all arise from the basic questions of fact (Equifax's policies and their impact) and law (theories of liability under the FCRA). Therefore, the Court concludes that the class satisfies the commonality requirement of Rule 23(a)(2).

3. Typicality

Rule 23(a)(3) mandates that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). The purpose of the typicality requirement is "to assess whether the action can be efficiently maintained as a class [action] and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented." *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 177 (D.D.C. 1999) (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)) (internal quotation marks omitted). Although commonality and typicality often

overlap, "[e]ach proceeds from a different perspective: the commonality inquiry focuses on what characteristics are shared among the whole class while the typicality inquiry focuses on the desired attributes of the class representative." *Alvarez*, 303 F.R.D. at 161 (quoting William B. Rubinstein, Newberg on Class Actions § 3:31 (5th ed. 2013)) (internal quotation marks omitted). The typicality requirement "is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability." *Id.* (quoting *Pigford v. Glickman*, 182 F.R.D. 341, 349 (D.D.C. 1998)) (internal quotation marks omitted); *accord In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001).

The named plaintiff's claims in this case are fundamentally similar to those of every class member: they "arise from Defendant's practices concerning the inaccurate reporting of lien information on consumers' consumer files after the lien was satisfied and the incorrect address for the D.C. Recorder's Office listed in consumers' credit reports." (Pl.'s Prelim. Mem. at 11.) Moreover, the named plaintiff's claims concern the same factual and legal issues (issues related to Equifax's practices and the FCRA) as the others class members' claims. Accordingly, the Court finds that the typicality requirement of Rule 23(a)(3) is satisfied.

4. Adequacy

Finally, Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement obligates the Court to determine that "(1) there is no conflict of interest between the proposed class representative and other members of the class, and (2) the proposed class representative will vigorously prosecute the interests of the class

through qualified counsel." *Alvarez*, 303 F.R.D. at 161 (quoting *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010)) (internal quotation marks omitted).

Nothing in this case suggests that the named plaintiff had any conflict of interest with the other members of the class. The named plaintiff is a member of the class with materially identical claims to his fellow class members, and given the fundamental similarity of his claims and those of the other members, there is no reason to believe that there would be a conflict of interest between the named plaintiff and the other members of the class. As for Class Counsel, they attest that they have "effectively handled numerous consumer-protection and complex class actions, typically as lead or co-lead counsel." (Pl.'s Prelim. Mem. at 11; *see id.* (gathering cases in which federal courts have found that counsel in this case have satisfied the adequacy requirement).) Given these qualifications, and in light of Class Counsel's conduct in court and throughout these proceeding, this Court concludes that Class Counsel is qualified to prosecute the interests of this class vigorously. Therefore, the Court finds that Rule 23(a)(4) is satisfied.

B. Class Certification—Rule 23(b)(3) Requirements

As noted above, the parties seek to certify this class pursuant to Rule 23(b)(3), which requires the Court to determine whether "questions of law or fact common to class members predominate over any questions affecting only individual members, and [whether] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance

Rule 23(b)(3)'s predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at

623. "[I]n general, predominance is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member['s] individual position." *Alvarez*, 303 F.R.D. at 162 (quoting *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002)) (internal quotation marks omitted). "[T]he mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984).

As the Court has already noted, there are essential factual and legal issues in this case that are common among all class members: (1) whether Defendant failed to update timely the D.C. water and sewer-related lien information on the class members' consumer credit reports; (2) whether Defendant listed an incorrect address for the D.C. Recorder's Office when it reported D.C. water and sewer liens on the class members' consumer credit reports; (3) whether Defendant's conduct in this regard violated the FCRA; and (4) what damages are owed to the class members due to any FCRA violation. (*See* Pl.'s Prelim. Mem. at 14–15.) These determinative common issues far outweigh any issues specific to individual class members. Indeed, Plaintiff's "theory of liability in this case is common to every class member[,]" *Alvarez*, 303 F.R.D. at 162, and courts routinely find that common questions of law and fact predominate in the context of consumer challenges to standardized practices, *see, e.g.*, *Talbott v. GC Servs. Ltd. P'ship*, 191 F.R.D. 99, 105 (W.D. Va. 2000) ("Here, common questions predominate because of the standardized nature of [Defendant's] conduct[.]"); *accord Klewinowski v. MFP, Inc.*, No. 8:13-cv-1204-T-33TBM, 2013 WL 5177865, at *4 (M.D. Fla. Sept. 12, 2013) (same); *Halperin v. Nichols, Safina, Lerner & Co.*, No. 94 C 6960,

1996 WL 634037, at *7 (N.D. Ill. Oct. 29, 1996) (same). Thus, the Court concludes that the predominance requirement is met in this case.

2. Superiority

Finally, Rule 23(b)(3)'s superiority requirement obligates a court to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In general, "there are two situations in which a class action is the superior mechanism": first, where "many individuals have small claims, and otherwise would not be incentivized to pursue them[,]" *Alvarez*, 303 F.R.D. at 162 (citing *Amchem*, 521 U.S. at 617); second, where "the legal system . . . 'is flooded by particular types of claims' brought individually, such that coordination via class action may be efficient[,]" *id.* at 163 (quoting 2 Newberg on Class Actions § 4:64).

This case is of the former type. The actual and statutory damages that the individual plaintiffs are permitted to recover under the FCRA are small enough that most class members likely would not pursue individual actions against Defendant. (Moreover, if any class members feel the need to litigate, this settlement offers them the opportunity to opt out and pursue their own actions separately.) Given that the relatively low value of the individual claims would be likely to disincentivize the bringing of individual claims, this Court concludes that a class action is the superior method for fairly and efficiently adjudicating the controversy, as Rule 23(b)(3) requires.

C. Class Notice—Rule 23(c)(2) Requirements

For a class certified under Rule 23(b)(3), the class notice must meet the requirements of Rule 23(c)(2). That rule requires that the notice provided be "the

best . . . practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). The class notice must also explain certain key aspects of the class action "in plain, easily understood language": (1) "the nature of the action;" (2) "the definition of the class certified;" (3) "the class claims, issues, or defenses;" (4) "that a class member may enter an appearance through an attorney if the member so desires;" (5) "that the court will exclude from the class any member who requests exclusion;" (6) "the time and manner for requesting exclusion;" (7) and "the binding effect of a class judgment on members under Rule 23(c)(3)." *Id.*

The notice in this case satisfies all of Rule 23(c)(2)'s requirements. First, the notice clearly and concisely explains all of the elements required by the rule. (*See* Am. Notice of Class Action Settlement at 1–8.) Second, the method of notice was the best practicable option under the circumstances. The parties—which include a credit reporting agency—compiled a list of names and last known addresses and provided it to the Settlement Administrator. The administrator then updated the addresses using the U.S. Postal Service's National Change of Address database and sent the first wave of notices via First Class U.S. mail. (*See* Pl.'s Final Mem. at 11.) The parties then used a LexisNexis address search service to locate additional addresses and send another wave of notices. (*See id.* at 8.) Once the mailing process was complete, a total of 7,237 notices were delivered, for a delivery rate of 87%. (*See id.*) Courts have routinely found similar notice rates to be satisfactory. *See, e.g.*, *In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (direct mail notice reached 80% of class members); *In re Zurn*

Pex Plumbing Prod. Liab. Litig., No. 08-MDL-1958 ADM/AJB, 2013 WL 716088 (D. Minn. Feb. 27, 2013) (80.6% of class received notice).

In addition, as the Court noted above, the administrator also established a website (http://www.cecconeclassaction.com) that is available to the general public and contains the full text of the Settlement Agreement, the Class Notice, the Opt-Out Form, the Claim Form, the Preliminary Order, frequently asked questions, and contact information for the Class Counsel and the Settlement Administrator. Given the thoroughness of Plaintiff's efforts and the high delivery rate, the Court concludes that the notice in this case was the best practicable option under the circumstances.

D. Final Approval Of The Settlement—Rule 23(e) Requirements

Having determined that the final certification of the settlement class is appropriate under the standards of Rule 23(a) and (b), this Court now turns to the question of whether the settlement itself is "fair, reasonable, and adequate[,]" as required by Rule 23(e). *See* Fed R. Civ. P. 23(e). As noted above, "courts in this circuit generally consider five factors: (1) whether the settlement is the result of arm's-length negotiations; (2) the terms of the settlement in relation to the strengths of plaintiffs' case; (3) the status of the litigation proceedings at the time of settlement; (4) the reaction of the class; and (5) the opinion of experienced counsel." *Alvarez*, 303 F.R.D. at 163. The Court has considered each of these factors in turn.

1. Arm's-Length Negotiations

"A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Id.* (quoting *Chilcott*, 522 F. Supp. 2d at 120–21) (internal quotation marks omitted); *accord Stephens v. US Airways Grp., Inc.*, 102 F. Supp. 3d

222, 227 (D.D.C. 2015); *Meijer*, 565 F. Supp. 2d at 55. The parties in this case represent that they agreed to settlement only after "extensive discovery," and "an arms-length negotiation process supervised by . . . a private mediator with prior FCRA and class-action experience." (Pl.'s Final Mem. at 13.) In particular, the parties aver that "the issue of attorney's fees was not discussed until all of the other settlement terms had been finalized." (*Id.*)

Based on these representations, as well as the Court's experience overseeing the parties' lengthy discovery process, this Court concludes that this factor weighs in favor of approving the settlement. There is no evidence of collusion or coercion on the part of the parties, and no reason for the Court to doubt that the settlement "was the product of legitimate negotiation on behalf of both sides." *Alvarez*, 303 F.R.D. at 163.

2. Terms of the Settlement in Relation to the Strength of the Case

"Next, the Court compares the terms of the settlement with the likely recovery plaintiffs would attain if the case proceeded to trial, an exercise which necessarily involves evaluating the strengths and weaknesses of plaintiffs' case." *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 103 (D.D.C. 2013). The D.C. Circuit has suggested that this may be the most important factor in evaluating a proposed class settlement. *See Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998) ("The court's primary task [when considering a settlement under Rule 23(e)] is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case.").

The settlement *automatically* provides each class member with four years of credit-monitoring (a value of $717.60 per member), as well as the removal of any D.C. water and sewer liens from their Equifax credit reports. Each member also has the opportunity to file a claim for a pro-rata share of the $850,000 cash fund, if she can

certify that she was the subject of an inaccurate credit report. Thus, at a minimum, each class member's settlement is worth $717.60, which, as Plaintiff points out, is at the "high end of the [FCRA's] statutory damages range[.]" (Pl.'s Final Mem. at 14.) *See* 15 U.S.C. § 1681n (allowing for statutory damages "of not less than $100 and not more than $1,000" if the violation was willful).

Meanwhile, the class members would have faced various challenges in establishing liability absent a settlement. Under the FCRA, liability can be established either upon a showing of negligent or willful noncompliance. *See id.* §§ 1681n, 1681o. However, a consumer can recover statutory damages only if she can prove that a defendant's violation was willful. *See id.* § 1681n; *Berry v. Schulman*, 807 F.3d 600, 615 (4th Cir. 2015). Equifax commenced this litigation by denying that a violation occurred at all, and contending that, if there was a violation it certainly was not willful, and absent the settlement, Equifax had planned to contest the existence of any liability and the willfulness of any violation vigorously. (*See* Pl.'s Final Mem. at 14–15.) Moreover, continuing this litigation likely would have involved considerable expense on both sides; the parties represent that pretrial preparation "would likely [have] involve[d] dozens of witnesses, including experts, and thousands of pages of documents." (*Id.* at 15.) *See Pigford v. Glickman*, 185 F.R.D. 82, 104 (D.D.C. 1999) (considering that "bringing this case to trial likely would have been a very complex, long and costly proposition" in evaluating the class's likely recovery if the case had proceeded to trial), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000).

This Court agrees with the parties that these potential difficulties and uncertainties reduce the plaintiffs' expected recovery if the case had proceeded to trial.

And in light of those costs and risks, a settlement that guarantees a per-member recovery that is within the FCRA's range of statutory damages (and with the possibility of significantly greater recovery if a class member files a valid claim) is fair, reasonable, and adequate.

3. Status of the Litigation

In considering this factor, courts often look to "whether counsel had sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-a-vis the probability of success and range of recovery." *Alvarez*, 303 F.R.D. at 164 (quoting *Chilcott*, 522 F. Supp. 2d at 117) (internal quotation marks omitted). In this case, as noted above, the parties engaged in extensive discovery and even some motions practice before reaching a settlement. The parties have represented that they had sufficient information to assess the case's range of probably outcomes and that they chose to settle in order to avoid the significant expense (and risk) of summary judgment motions, class certifications, and trial, and this Court finds these representations credible. Thus, the Court concludes that this factor weighs in favor of approval as well, insofar as the settlement "does not come too early to be suspicious nor too late to be a waste of resources." *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 856290, at *3 (D.D.C. July 19, 2001).

4. Reaction of the Class

"The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court[.]" *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). In this case, the class's "reaction to the settlement in this case appears to have been overwhelmingly positive[.]" *Chilcott*, 522 F. Supp. 2d at 118. Not a single member of the 8,409-

member class has objected, and only four have requested to be excluded from the settlement. (*See* Pl.'s Final Mem. at 18; RSM Decl. ¶ 12.) Thus, this factor "unambiguously weighs in favor of approval." *Alvarez*, 303 F.R.D. at 164.

5. Opinion of Counsel

Finally, "the opinion of experienced counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *Id.* (quoting *Chilcott*, 522 F. Supp. 2d at 121) (internal quotation marks omitted); *accord In re Lorazepam & Clorazepate Antitrust Litig.*, No. 99MS276(TFH), 2003 WL 22037741, at *6 (D.D.C. June 16, 2003). As noted above, Class Counsel have extensive experience in class action litigation and FCRA litigation. (*See* Pl.'s Final Mem. at 19 (gathering cases in which courts have praised the experience or qualifications of Class Counsel); Decl. of Matthew J. Erausquin ("Erausquin Decl."), Ex. 3 to Joint Mot., ECF No. 62-5, ¶ 11 ("Mr. Bennett and I have litigated dozens of class action cases based on consumer protection claims in the past decade. In each of the class cases where we have represented plaintiffs in a consumer credit case, the Court found us to be adequate class counsel.").) Counsel for both parties have joined the motion before the Court seeking final approval of this settlement, and have averred that, in their judgment, the settlement is fair, adequate, and reasonable. Accordingly, this factor also weighs in favor of approval.

E. Final Approval Of The Settlement—Attorney's Fees & Service Award

1. Attorney's Fees

In addition to evaluating the overall fairness of a settlement as it relates to the class members, "[c]ourts [also] have a duty to ensure that claims for attorneys' fees are reasonable." *Chilcott*, 522 F. Supp. 2d at 122; *see* Fed. R. Civ. P. 23(h). The D.C.

Circuit has held that "a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases" this like one, *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *accord Chilcott*, 522 F. Supp. 2d at 122, and it is generally well established that "fee awards in common fund cases may range from fifteen to forty-five percent[.]" *Lorazepam*, 2003 WL 22037741, at *7. Furthermore, although the D.C. Circuit "has not yet developed a formal list of factors to be considered in evaluating free requests under the percentage-of-recovery method," courts in this circuit have often considered seven factors: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *Id.*; *accord In re Black Farmers Discrim. Litig.*, 953 F. Supp. 2d 82, 87 (D.D.C. 2013); *Chilcott*, 522 F. Supp. 2d at 122.

This Court has examined the attorney's fee amount as a percentage of the total value of the instant settlement, considered the seven percentage-of-the-fund factors, and double-checked the result against the lodestar method, and it concludes that the attorney's fees in this case should be approved as reasonable, as explained below.

a. *When viewed as a percentage of the total settlement value, Class Counsel's requested attorney's fees fall well within the range that courts normally approve*

The settlement agreement provides for attorney's fees and costs in the amount of $850,000. According to the parties, the total value of the settlement is $7,822,798.40, which breaks down as follows: the credit monitoring product is valued at $6,034,298.40

($717.60 per class member); the cash fund for actual damages is $850,000; the cost of notice and administration is approximately $88,500; and the attorney's fees and costs comprise an additional $850,000. (*See* Pl.'s Final Mem. at 23.) Thus, the fee request represents 10.87% of the total settlement benefits, or 12.19% of the total benefits minus the attorney's fees themselves—toward the low end of the typical range.[2]

Moreover, the parties' dollar figure value for the total settlement does not reflect the full benefits of the settlement, as it does not include the value of having Equifax remove the burdensome and inaccurate water and sewer liens from class members' credit reports. (*See* Pl.'s Final Mem. at 23.) Class Counsel represented at the Fairness Hearing that such injunctive relief would not have been available under the FCRA even if Plaintiffs had brought suit and prevailed, thereby making it a particularly significant component of the settlement. What is more, the removal of these liens can be quite valuable to individual class members; while the monetary value is difficult to quantify and will vary from consumer to consumer, the resulting improvement in credit score can be manifest "in the form of lowered interest rates, increased credit opportunities, streamlined employment application and security clearance renewals," and various other benefits. (*Id.*) It appears that the parties' dollar-value appraisal of the value of the settlement thus actually underestimates the settlement's true value, because it

[2] Class Counsel calculates the value of the four-year credit monitoring service using the price that Equifax usually charges for that product. (*See* Pl.'s Final Mem. at 23 n.1.) However, the parties represented both in their briefs (*see id.* at 27–28) and at the Fairness Hearing that in a similar class action settlement in the Eastern District of Virginia, Equifax agreed to allow class members to "cash in" the credit-monitoring subscription (of identical length) for a $180 cash payment. (*See id.* at 28 n.2 (discussing *Soutter v. Equifax Info. Servs., LLC*, 3:10-cv-107 (E.D. Va.)). Using this $180 figure, which may better represent the cost to Equifax of providing the service, the value of the credit-monitoring service would be $1,513,620, and the total settlement would be worth $2,452,120 before considering attorney's fees. Even using this appreciably lower estimate of the value of the settlement as a starting point, however, the attorney's fees in this case still would be less than 35% of the settlement value, which is well within the normal range for approval.

excludes the value of this important relief; consequently, the Court finds that the negotiated amount of attorney's fees is likely an even smaller percentage of the total value of the benefit conferred to class members.

b. *All the percentage-of-the-fund factors counsel in favor of approving the fee award*

Next, the Court will consider the typical percentage-of-the-fund factors. As to the size of the fund and the number of persons benefitted, the potential class consists of 8,409 individuals and every one of the class members will receive $717.60's worth of credit monitoring and identity theft insurance and will have D.C. water and sewage liens removed from her Equifax consumer credit report. Moreover, every member has the opportunity to seek an uncapped, pro-rata payment from the $850,000 cash fund. Importantly, none of the class members' benefits will be reduced by the cost of class notice and administration, attorney's fees and costs, or the class representative's service award. Therefore, all told, the class recovery is significant. *See Chilcott*, 552 F. Supp. 2d at 122 (noting with approval the size of an $8.3 million recovery for a class of two million consumers).

The Court has already noted that not a single class member has objected to the proposed settlement, or its proposed fee award. And, as discussed above, Class Counsel are experienced litigations who have served as lead or co-counsel in many class action consumer cases, and have particular expertise in the FCRA.

As for the complexity and duration of the litigation, the Court notes that the parties navigated a lengthy (and, at times, contested) period of discovery, and it credits Class Counsel's representation that FCRA litigation is complex even compared to other areas of consumer protection law. (*See* Pl.'s Final Mem. at 25–26.) Despite these

difficulties—including the Supreme Court's mid-stream shakeup of standing for certain FCRA violations in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)—the parties were still able to negotiate and to agree upon the terms for providing fair compensation to the class members.

With respect to the risk of nonpayment, Class Counsel have been litigating this case on a contingency fee basis, and have not yet received any payment for this action. (*See* Pl.'s Final Mem. at 26–27.) They risked receiving nothing if Defendant prevailed on a dispositive motion, or after trial. And as to the time devoted by Class Counsel, they represent that they have spent 1,106.25 hours litigating this case and advanced $4,448.99 in costs. (*See id.* at 27; Erausquin Decl. ¶¶ 28–29; Decl. of Kristi Kelly, Ex. 4 to Joint Mot., ECF No. 62-6, ¶¶ 15–16.) Thus, counsel have invested significant time in this case, all the while bearing a substantial risk that they would not recover anything.

Finally, this requested fee award is similar to fee awards in similar cases. The same Class Counsel recently settled a similar claim against Equifax in the Eastern District of Virginia, and were awarded $3.725 million in attorney's fees and costs, which represented between 5.28 and 16.28 percent of the total settlement value. *See Soutter v. Equifax Info. Servs., LLC*, 3:10-cv-107, Final Approval Order, ECF No. 247, at ¶ 12 (E.D. Va. April 5, 2016). The percentage sought in this case is comparable.

c. *A cross-check using a lodestar calculation also supports approving the fee award*

In some circuits, courts that use the percentage-of-the-fund method to calculate attorney's fees in common fund class actions will cross-check those results by calculating the attorney's fees using the more traditional "lodestar" method, which

looks to the time and expertise that the attorneys have invested in the case. *See In re Black Farmers*, 953 F. Supp. 2d at 101. No such cross-check is required in this circuit, but "district courts are free to employ such a cross-check at their direction to confirm the reasonableness of an award." *Id.* In this case, the lodestar cross-check confirms that the proposed fee award is reasonable and should be approved.

Class Counsel estimate their billable time and expenses total $452,415.25 in fees and $4,448.39 in expenses. (*See* Pl.'s Final Mem. at 28–29.) This total is a little over half of the total attorney's fees request in this case, but that is not unusual, given that courts typically apply multipliers "ranging up to four" to lodestar calculations in common fund cases. *In re Black Farmers*, 953 F. Supp. 2d at 102 (quoting *In re Lorazepam*, 2003 WL 22037741, at *9) (internal quotation marks omitted); *see also id.* (collecting cases). A multiplier is also particularly appropriate in contingency fee cases, to reflect the risk of loss that the attorneys assume. *See In re Abrams & Abrams, P.A.*, 605 F.3d 238, 245, 246 (4th Cir. 2010); *McIntosh v. McAfee, Inc.*, No. C06-07694 JW, 2009 WL 673976, at *3 (N.D. Cal. Mar. 13, 2009) ("Courts enhance Lodestar amounts in contingency cases based on the rationale that a lawyer should be paid more for bearing a contingency risk.").

In the instant case, a multiplier of 1.86 bridges the gap between the lodestar calculation and the fee award sought. Other courts in this circuit have found "that a multiplier of 2.0 or less falls well within a range that is fair and reasonable[,]" and this Court agrees. *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 19–20 (D.D.C. 2003); *see also id.* (collecting cases). Thus, the lodestar cross-check also counsels in favor of approving the requested fee award.

In sum, after consideration of the size of the fee award relative to the value of the settlement, each of the percentage-of-the-fund factors, and a lodestar cross-check, the Court concludes that Plaintiff's requested award of $850,000 in attorney's fees and costs is reasonable.

2. Service Award

The settlement agreement also provides for a service award to the named plaintiff of not more than $5,000. (*See* Settlement Agreement ¶ 4.3.) Courts in this circuit have recognized that such incentive awards to class representatives are a typical feature of class action litigation. *See In Re Lorazepam*, 2003 WL 22037741, at *10 ("This Court has previously determined that incentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class."). In fact, "courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Id.* (quoting *In Re Lorazepam*, 205 F.R.D. at 400) (internal quotation marks omitted).

In this case, Class Counsel represents that Plaintiff "has invested significant time and effort into this case," and therefore has earned "significant and meaningful benefits." (Pl.'s Final Mem. at 21.) Defendant does not object, and, importantly, the award will be paid separate from the settlement fund and will not reduce the payouts to any of the class members. Therefore, the Court concludes that a $5,000 service award is appropriate.

IV. CONCLUSION

For the reasons set forth above, the Court finds that the proposed class meets the requirements of both Rule 23(a) and Rule 23(b)(3), and the proposed settlement is fair, reasonable, and adequate. Accordingly, as stated in the accompanying Final Approval Order, the parties' Joint Motion for Final Approval is hereby **GRANTED**.

DATE: August 29, 2016

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINA MERIWETHER, Plaintiff, v. CAROLYN W. COLVIN, *Commissioner of Social Security*, Defendant.	)	Civil Action No. 12-cv-0067 (KBJ)

MEMORANDUM OPINION ADOPTING
REPORT & RECOMMENDATION OF MAGISTRATE JUDGE

Plaintiff Regina Meriwether ("Plaintiff") alleges that she suffers from multiple impairments that have prevented her from engaging relevant work or in any other substantial gainful activity. (Compl., ECF No. 1, ¶ 5.) She filed applications for Social Security Disability Insurance Benefits and/or Supplemental Security Income Benefits, which the Commissioner of the Social Security Administration ("SSA") denied. (*Id.* ¶ 4.) Plaintiff requested that the SSA reconsider this decision, which it declined to do. (*Id.*) Then, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"), and following the hearing, the ALJ issued a written opinion denying her request for benefits. (*Id.*) Plaintiff persisted, requesting that the Appeals Council review the ALJ's decision, and on November 16, 2011, the Appeals Counsel denied her request for review. Having fully exhausted her administrative remedies, Plaintiff filed the instant action on January 17, 2012.

On May 30, 2012, Plaintiff filed a motion for judgment of reversal in which she argues that the Court should reverse the ALJ's decision because it is unsupported by substantial evidence and erroneous as a matter of law. In the alternative, Plaintiff requests remand to the SSA for a new administrative hearing. (Mot. for J. of Reversal, ECF No. 6, at 1.) On July 10, 2012, Defendant Commissioner of the SSA filed a motion for judgment of affirmance, which argues that this Court should affirm the ALJ's conclusion that Plaintiff is not entitled to Social Security benefits because the ALJ properly applied that law and substantial evidence supports his decision. (Mot. for J. of Affirmance, ECF No. 7, at 1.) On April 4, 2013, the matter was transferred to this Court's docket, and on June 7, 2013, this Court referred it to a Magistrate Judge for full case management. (Minute Order of June 7, 2013.)

Before this Court at present is the Report and Recommendation (ECF No. 11) that the assigned Magistrate Judge, Alan Kay, has filed regarding Plaintiff's motion for reversal and Defendant's motion for judgment of affirmance. The Report and Recommendation reflects Magistrate Judge Kay's opinions that while a shortfall in the record of one month of medical history prior to the onset of Plaintiff's alleged disability did not prejudice Plaintiff and that the ALJ did not err in failing to obtain a consultative examination, the record before the ALJ contained other evidentiary gaps that prejudiced Plaintiff and the ALJ improperly failed to explain the weight he gave to record evidence regarding Plaintiff's concentration abilities. (*Id.* at 28-27.) As a result, Magistrate Judge Kay recommends that both motions should be granted in part, and denied in part, and that this Court should remand the matter to the SSA, pursuant to 42 U.S.C.

§ 405(g), for further proceedings consistent with the Report and Recommendation. (*Id.* at 27-28.)

The Report and Recommendation also advises the parties that either party may file written objections to the Report and Recommendation, which must include the portions of the findings and recommendations to which each objection is made and the basis for each such objection. (*Id.* at 28.) The Report and Recommendation further advises the parties that failure to file timely objections may result in waiver of further review of the matters addressed in the Report and Recommendation. (*Id.*)

Under this Court's local rules, any party who objects to a Report and Recommendation must file a written objection with the Clerk of the Court within 14 days of the party's receipt of the Report and Recommendation. LCvR 72.3(b). As of this date—several months after the Report and Recommendation was issued—no objections have been filed.

This Court has reviewed Magistrate Judge Kay's report and agrees with its conclusions. Thus, the Court will **ADOPT** the Report and Recommendation in its entirety. Accordingly, Plaintiff's Motion for Reversal will be **GRANTED IN PART AND DENIED IN PART**; Defendant's Motion for Judgment of Affirmance will be **GRANTED IN PART AND DENIED IN PART**, and this matter will be **REMANDED**, pursuant to 42 U.S.C. § 405(g), to the Commissioner of the Social Security Administration for further proceedings consistent with Magistrate Judge Kay's Report and Recommendation.

A separate Order accompanies this Memorandum Opinion.

DATE: May 19, 2015

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

REGINA MERIWETHER,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of Social Security,
Defendant.

Civil Action No. 12-cv-67 (KBJ-AK)

REPORT AND RECOMMENDATION

This case was referred to the undersigned for full case management, including a Report and Recommendation pursuant to Local Rule 72.3. (June 7, 2013 Order of Referral [10].) Pending before the undersigned are Plaintiff's Motion for Reversal of Judgment ("Pl.'s Mot. to Reverse") [6] and Memorandum in support thereof ("Pl.'s Mem.") [6-1] and Defendant's Motion for Judgment of Affirmance ("Def.'s Mot. to Affirm") [7] and Memorandum in support thereof ("Def.'s Mem.) [7-1]. Plaintiff Regina Meriwether ("Ms. Meriwether") has exhausted her administrative remedies. She now moves for a reversal of the October 28, 2010 decision of the Administrative Law Judge ("ALJ") denying her supplemental security income ("SSI") benefits on the grounds that the ALJ both failed to develop the administrative record fully and erroneously assessed her residual functional capacity. (Pl.'s Mem. at 4-8.) Alternatively, Ms. Meriwether moves to have the matter remanded to the Social Security Administration (SSA) for a new administrative hearing. *See* 42 U.S.C. § 405(g.) Defendant Michael J. Astrue, Commissioner of the SSA, moves to affirm the ALJ's decision on the grounds that it is supported by substantial evidence, that the ALJ sufficiently developed the administrative record, and that

the ALJ properly evaluated Ms. Meriwether's residual functional capacity. (Def.'s Mem. at 9-12.)

I. BACKGROUND

On the date of her supplemental security income ("SSI") application, Ms. Meriwether was a forty-one year old female who lived in Washington, DC. (AR 28.)[1] Ms. Meriwether spoke English and graduated from high school. (AR 40, 113.) Her past employment included work as a file clerk and cashier at an automobile dealership and as a cashier at a liquor store. (AR 109, 123-30, 168.) She has not worked or earned any income since 2004. (AR 41, 90, 92.) The ALJ found that she had not engaged in substantial employment since October 27, 2008, the date of her application. (AR 20, 28, 41.) Ms. Meriwether has a diagnosis of bipolar disorder, schizophrenia, and substance abuse disorder. (AR 23.) Ms. Meriwether acknowledged that her substance abuse continued for many years, although she testified at her administrative hearing that she had been sober since at least March 11, 2010. (AR 48, 59.) Finally, Ms. Meriwether has Hepatitis B. (AR 23, 45-46.) Meriwether applied for SSI benefits on October 27, 2008, alleging in her amended[2] complaint that she was disabled and stopped working on that same date. (AR 18, 83.)

The SSA issued its initial denial of SSI benefits on February 12, 2009, and again upon reconsideration on May 20, 2009. (AR 18, 63, 67.) Meriwether filed a written request for a hearing on June 22, 2009 pursuant to 20 C.F.R. 416.1429 *et seq.* (AR 18.) Meriwether appeared and testified on September 27, 2010 at a hearing before an ALJ. (AR 18.) She did not have representation at this hearing. A vocational expert did testify. (AR 18, 35-60.) On October 28,

[1] References to the Administrative Record [3] are herein noted as (AR.)
[2] Meriwether initially alleged that her disability began on January 1, 2002 but amended the alleged onset date to October 27, 2008, the date of her application for SSI. 20 C.F.R. § 416.501 states that SSI payments may not be made for any period that precedes the first month following the date on which an application is filed, or, if later, the first month following the date all conditions are met for eligibility.

2010, the ALJ issued his Decision finding that while Ms. Meriwether's bipolar disorder, schizophrenia, and substance abuse disorder were severe impairments, she nevertheless was not disabled within the meaning of 42 U.S.C. § 1382c(a)(3)(A) (AR 18-30.) The SSA Commissioner adopted the ALJ decision on November 16, 2011, when the Appeals Council denied Ms. Meriwether's request for review. (AR 1-5.) Ms. Meriwether subsequently filed this action, pursuant to 42 U.S.C. § 405(g).

II. STANDARD OF REVIEW

District courts review final decisions of the Social Security Commissioner pursuant to Section 205(g) of the Social Security Act. 42 U.S.C. §405(g) provides for a review of the administrative proceedings record to determine whether there is substantial evidence in the record to support the Commissioner's findings. *Butler v. Barnhart*, 353 F.3d 992, 999 (D.C. Cir. 2004); *Smith v. Bowen*, 826 F.2d 1120 (D.C. Cir. 1987). "The court must uphold the [Commissioner's] determination if it is supported by substantial evidence and is not tainted by an error of law." *Smith*, 826 F.2d at 1121 (citation omitted). "Substantial evidence" under the Social Security Act "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted). It is "more than a scintilla, but . . . something less than a preponderance of the evidence." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (citation omitted).

The reviewing court must carefully scrutinize the "entire record to determine whether the Commissioner, acting through the [ALJ], has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits." *Lane-Rauth v. Barnhart*,

437 F. Supp.2d 63, 65 (D.D.C. 2006) (quoting *Butler v. Barnhart*, 353 F.3d 992, 999 (D.C. Cir. 2004)) (internal quotation marks omitted). *See also Martin v Apfel*, 118 F.Supp.2d 9, 13 (D.D.C. 2000) (citations omitted) (The ALJ must "explain sufficiently the weight he has given to certain probative items of evidence" so that the reviewing court is not "left guessing as to how the ALJ evaluated probative evidence.").

In *Brown v. Bowen*, the court stated the following:

> Our review in substantial-evidence cases calls for careful scrutiny of the entire record.
> * * *
> The judiciary can scarcely perform its assigned review function, limited though it is, without some indication not only of what evidence was credited, but also whether other evidence was rejected rather than simply ignored.
> * * *
> The ALJ is certainly entitled to weigh conflicting opinions and to make his own assessment of their credibility. We merely hold that determination must be made within and according to governing regulations.

794 F.2d at 705-09 (citations omitted). *See also Martin*, 118 F.Supp.2d at 13 (citations omitted) (While the ALJ makes findings of fact and resolves conflicts in the evidence, "[the] ALJ cannot merely disregard evidence which does not support his conclusion.").

"Because the broad purposes of the Social Security Act require a liberal construction in favor of disability, the court must view the evidence in the light most favorable to the claimant." *Davis v. Shalala*, 862 F.Supp.1, 4 (D.D.C. 1994) (citation omitted.) If the court determines however that the Commissioner's findings are supported by substantial evidence and in accordance with applicable law, they must be treated as conclusive and affirmed. 42 U.S.C. §405(g); *Butler*, 353 F.3d at 999.

III. DETERMINATION OF DISABILITY

> Under the Social Security Act, a disability is defined as the:
>
> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.
>
> * * *
>
> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(1), (2)(A). A physical or mental impairment is defined as an impairment that results from "anatomical, physiological and psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3.)

Evaluation of a claim of disability involves an assessment of the following five steps: 1) whether the individual is working; 2) whether the individual has a "severe" impairment; 3) whether the impairment meets or equals a listed impairment contained in Subpart P to Appendix 1 to 20 C.F.R., part 404; 4) whether the claimant can return to his past relevant work; and if not, 5) whether the claimant can perform any other work that exists in significant numbers in the national economy. *See* 20 C.F.R. § 416.920.[3]

IV. ANALYSIS OF THE ALJ's OCTOBER 28, 2010, DECISION

The issue before the Court is not whether Ms. Meriwether is disabled but whether the ALJ's decision is supported by substantial evidence in the record and the ALJ correctly applied the law in reaching his decision. Ms. Meriwether challenged the ALJ's October 28, 2010,

[3] During the first four steps, the claimant bears the burden of proof but at the fifth step, the burden shifts to the Secretary to show that the claimant, based upon his age, education, work experience, and residual functional capacity, is capable of performing gainful work. *See Brown*, 794 F.2d at 706.

decision on the grounds that the ALJ failed to fully develop the administrative record and that the ALJ erroneously assessed Ms. Meriwether's residual functional capacity. (Pl.'s Mem. at 4, 8.) Pretermitting Ms. Meriwether's challenges, the undersigned will briefly review the ALJ's determination regarding disability.

A. Five Steps to Determine Disability

In his October 28, 2010, Decision, the ALJ considered the five steps for determining disability, as summarized below.

1. Step 1

The ALJ found that Ms. Meriwether had not engaged in substantial gainful activity since October 27, 2008, the application date. (AR 20.)

2. Step 2

The ALJ found that Ms. Meriwether had the following severe impairments: bipolar disorder, schizophrenia, and substance abuse disorder, and, further, that Meriwether's Hepatitis was not disabling, as it is stable with medication. (AR 20-23.) The ALJ did, however, take into account the secondary symptoms of Hepatitis, such as pain and fatigue, when assessing Meriwether's Residual Functional Capacity ("RFC"). (AR 23.)

3. Step 3

The ALJ found that Ms. Meriwether did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments in 20 C.F.R. Par 404, Subpart P, Appendix 1. (AR 26-27.)

4. Residual Functional Capacity

After denying Step 3 and before considering Step 4, the ALJ had to determine Ms. Meriwether's RFC, which is determined on the relevant evidence in the record and defined as

"the most [an individual] can do despite [her] limitations." 20 C.F.R. § 416.945(a.) The ALJ found that Ms. Meriwether had a residual functional capacity to perform medium work. (AR 27.) This involves the ability to lift up to 50 pounds occasionally and 25 pounds frequently, and the ability to stand or walk up to eight hours in an eight-hour day. 20 C.F.R. § 416.967(c.) Meriwether can "occasionally climb stairs and ramps, balance, stoop, and kneel." (AR 27.)

The ALJ determined that Ms. Meriwether had numerous limitations, finding that she "cannot climb ladders, ropes or scaffolds, be exposed to hazardous heights or hazardous moving machinery, or be exposed to extreme temperature changes" as a precautionary measure because of her past substance abuse and current bipolar and schizophrenia diagnoses. (AR 27.) Meriwether also cannot crawl, can only perform low stress work, requiring no more than moderate[4] attention, concentration, persistence, and pace. (AR 27.) She must avoid excessive vibration, humidity, or wetness. (AR 27.)

The ALJ found moderate limitations when it came to time, place, and manner of her work, including

> [C]ompleting a normal workday or workweek without interruptions from psychological limitations...accepting instructions and responding appropriately to criticism from supervisors…interacting and getting along with co-workers and peers…[and] she should have no regular direct immediate contact with the general public.

(AR 27.)

5. <u>Step 4</u>

At Step 4, the ALJ found that Meriwether is unable to perform any past relevant work, since she can only perform "low stress, routine work, requiring no more than moderate attention and concentration, persistence and pace." (AR 28.)

[4] The ALJ's decision defined moderate as "to preclude the attention and concentration required for high-stress work and complex work, but which is not at a level of severity for less stressful work of an unskilled nature involving using common sense while following instructions." (AR 27.)

6. Step 5

In connection with his Step 4 analysis, the ALJ determined that although Meriwether was unable to perform any past relevant work, "there are jobs that exist in significant numbers in the national economy that the claimant can perform." (AR 28.)

B. Plaintiff's Challenges to the ALJ's Decision

1. Failure to Fully Develop the Administrative Record

Ms. Meriwether argues that the ALJ failed to develop fully the administrative record in three different respects. (Pl.'s Mem. at 4-8). First, Ms. Meriwether contends that the record does not contain a "complete medical history." (Pl's Mem. at 5-6.) Second, she alleges that the record does not contain any medical evidence after February 10, 2009 and that this created a prejudicial evidentiary gap. (Pl's Mem. at 5-6.) Finally, Ms. Meriwether claims that the ALJ failed to obtain a consultative exam despite a promise to do so. (Pl.'s Mem. at 4-8.)

a. Medical Records Covering a Twelve-Month Period From Alleged Onset Date

Ms. Meriwether highlights that her amended onset date of alleged disability is October 27, 2008, the same date she filed her application for SSI. (Pl.'s Mem. at 5-6.) She claims that the most recent medical evidence in the record is from February 10, 2009, fewer than four months from her alleged onset of disability. (Pl.'s Mem. at 5.) Ms. Meriwether contends that since the record fails to contain evidence covering the twelve-month period *subsequent* to her alleged onset of disability, the ALJ "failed in his duty to develop a 'complete medical history' that contains records covering the relevant period of disability." (Pl.'s Mem. at 6.)

The Social Security Act, however, defines "complete medical history" as medical evidence covering the twelve-month period *preceding* a claimant's alleged onset date of disability, stating:

> In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security shall consider evidence available in such individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability.

42 U.S.C. § 423(d)(5)(B.) *See also* 20 C.F.R. § 416.912(d) (clarifying the term of art "complete medical history," which is defined as "at least the twelve months preceding the month in which you file your application").

Ms. Meriwether has misconstrued the statute, and mistakenly believes that the ALJ is statutorily required to gather at least twelve months of medical information subsequent to the alleged onset of disability. This is incorrect.

Moreover, Ms. Meriwether changed her alleged onset date from January 1, 2002 to October 27, 2008, the same date that she filed her application for SSI. (AR 41, 83, 108.) In this event, 20 C.F.R. § 416.912(d)(2) makes clear that "if you say that your disability began less than twelve months before you filed your application, we will develop your complete medical history beginning with the month you say your disability began unless we have reason to believe that your disability began earlier."

The medical evidence in the record begins December 3, 2007, not quite twelve-months prior to the alleged onset of disability date. (Tr. 171-445.) Nevertheless, the treatment note from Anchor Mental Health dated December 3, 2007 notes "this is consumer's first visit" and that Ms. Meriwether "has been [seen] at Hunt Clinic for psychiatric disorder in 2006, but reported no

other psychiatric [treatment]" (AR 172.) Medical evidence from the Hunt Clinic is not in the record.

Nevertheless, considering 20 C.F.R. § 416.912(d)(2) and the fact that the record contains eleven months of records prior to the alleged date of onset, Ms. Meriwether was not prejudiced by the fact that the record does not contain a full twelve months of medical history preceding her alleged onset date.

b. <u>The Lack of Medical Records from February 2009 to October 2010</u>

While the term of art "complete medical history" only requires medical evidence covering the twelve month period preceding a claimant's alleged onset date of disability, that standard is a floor, not a ceiling. *See* 42 U.S.C. § 423(d)(5)(B) ("The Commissioner…shall develop a complete medical history of *at least* the preceding twelve months for any case in which a determination is made that the individual is not under a disability.") (emphasis added). Ms. Meriwether appears to conflate the requirements of 42 U.S.C. § 423(d)(5)(B) with the requirements that the ALJ certainly has a duty to fully investigate all matters at issue and to develop a medical history that covers the relevant period of disability. *Poulin v. Bowen*, 817 F.2d 865, 870 (D.C. Cir. 1987). That is, if medical records from only the twelve months prior to the alleged date of onset of disability will not fully inform the ALJ's decision on whether or not the claimant is disabled within the meaning of the Act, he has "the affirmative duty to investigate fully all matters at issue to develop the comprehensive record requisite for a fair determination of disability." *Id.*

Ms. Meriwether opines that the records "contains no medical evidence from any health care provider subsequent to February 2009." (Pl's Mem. at 6.) It is true that there are no medical

records from Anchor Mental Health, Ms. Meriwether's treating source, after February 10, 2009. The record does, however, contain sixteen pages of medical evaluations dated after February 10, 2009. (AR 418-29.)

Specifically, these sixteen pages include three Medical Evaluation/Case Analyses, which are the reports of different doctors who read through Ms. Meriwether's medical records and provided their opinions on her diagnoses; none of these doctors visited with Ms. Meriwether in person. The first, conducted by Dr. Esther Pinder, MD, on April 30, 2009, contains four sentences and, without explanation, states that Ms. Meriwether has non-severe mental impairments. (AR 435.) The second, from Dr. Gemma Nachbahr, Ph.D., on May 7, 2009 contains one sentence reviewing the records up until January 7, 2009, and affirms the findings of Dr. Patricia Cott's Mental Residual Functional Capacity Assessment. (AR 436.) The third Medical Evaluation/Case Analysis, from Dr. John Parker on May 18, 2009, is also one page and determines that the "DDS decision is reasonable." (AR 445.)

There are also two Disability Worksheets that simply tabulate the medical records in the file and offer no analysis of Ms. Meriwether's conditions. (AR 430-34; 437-39.) There are, finally, two documents again from Dr. John Parker, dated May 7, 2009: a Medical Consultant's Review of the RFC Assessment, affirming the prior assessment and a Medical Consultant's Review of the Psychiatric Review Technique, affirming the Psychiatric Review Technique. (AR 440-44.)

Therefore, it is true that there are documents dated later than February 2009, leaving a minimum sixteen month gap between the most recent information in the record and Ms. Meriwether's hearing before the ALJ. It is clear, however, that the last in-person review of Ms. Meriwether that is in the record was conducted on February 10, 2009, leaving a nineteen month

gap between the latest medical evidence and Ms. Meriwether's appearance at her hearing in front of the ALJ on September 27, 2010, and a twenty month gap between the last medical evidence in the record and the ALJ's October 28, 2010 decision.

For the reasons discussed below, the undersigned agrees that this twenty month evidentiary gap prejudiced Ms. Meriwether and recommends that the case be remanded for better development of the record during this time period.

The ALJ Had a Heightened Duty to Develop the Record in This Case

The D.C. Circuit has held that when a claimant suffers from mental illness, lacks representation at an administrative hearing, and has difficulty understanding English, this combination of debilitating factors heightens the duty of the ALJ to develop the administrative record. *Poulin*, 817 F.2d at, 870. The duty is initially heightened, under both agency regulations and due process principles, and becomes "especially strict" when a claimant does not have representation at a hearing before an ALJ. *Id.* The duty is heightened once more when the claimant "is the victim of a mental illness that may decrease his ability to represent himself." *Id*. at 870-71.

In *Poulin*, the claimant at issue, similar to Ms. Meriwether, did not have representation at his hearing and suffered from schizophrenia. *Id.* at 867. He was not a native English speaker and could only "speak and understand some English." *Id*. This trifecta of disabilities led the D.C. Circuit to conclude that the ALJ's duty of record-development "most certainly rises to its zenith, and absent such record-development the Secretary's decision cannot stand." *Id*. at 871.

Although Ms. Meriwether is a native English speaker, Dr. Eugene Miknowski, who performed a consultative exam of Ms. Meriwether, found that she had "very poor intelligence"

and "borderline intelligence." (AR 401.) Dr. Giuseppe Scarcella, who conducted a psychiatric consultative examination of Ms. Meriwether noted that she was "vague and occasionally perplexed…she exhibited labile affect, poor insight and judgment" and manifested "inability to maintain sustained attention and concentration." (AR 361.) Moreover, Ms. Meriwether has suffered from at least three concussions. (AR 44.)

Taken together, the undersigned believes that Ms. Meriwether's very poor intelligence, concentration, and judgment could limit her ability to communicate and understand, thereby affecting her ability to represent herself at the hearing. While Ms. Meriwether's cognitive limitations are perhaps not analogous to Mr. Poulin's moderate grasp of the English language, they are serious enough that they have implications for the ALJ's duty to develop the record, which was at its peak in this case.

The ALJ's Decision

The ALJ concluded that Ms. Meriwether's admitted substance abuse was a material contributing factor to Ms. Meriwether's impairments, disqualifying her from SSI, pursuant to 42 U.S.C. § 423(d)(2)(C). (AR 25, 30.) The ALJ also found that Ms. Meriwether was at times not treatment compliant, also disqualifying her from SSI. *Id.* Pursuant to 20 C.F.R. § 416.935, the ALJ found that if she remained free from drugs and alcohol and treatment compliant, Ms. Meriwether would not be found to be disabled. In the ALJ's words, "she would be able to work" (AR 25.)

Evidence in the record illustrates the sporadic nature of Ms. Meriwether's treatment compliance. (AR 176-360.) She failed to attend appointments at Anchor Mental Health for both good cause (incarceration, hospitalization for suicidal thoughts) and at times failed to show

without explanation. (AR 419-29.) The ALJ concluded that Ms. Meriwether's "failure to comply with recommended treatment supports an inference [the] claimant's symptoms are not as severe as asserted. A claimant must follow prescribed treatment if treatment will restore ability to work." (AR 25.)

Contrary to the ALJ's determination, however, the medical evidence in the record makes clear that Ms. Meriwether's symptoms are in fact severe, and that her mental impairments contributed to her treatment non-compliance. For example, Dr. Scarcella's determined that Ms. Meriwether has "memory impairment…and manifested inability to maintain sustained attention and concentration" and should be considered unable to manage benefits or other responsibilities; this presumably includes administering her own treatment plan. (AR 363.) Anchor Mental Health notes that, even when treatment compliant and sober, Ms. Meriwether at times continued to experience visual and auditory hallucinations paranoia, persecutory feelings, and mood swings, all of which interfered with her ability to function. (AR 237.) Therefore, it appears that Ms. Meriwether's symptoms were severe even when treatment compliant and that her intelligence and memory impairments directly resulted in difficulty managing her treatment schedule.

Moreover, it is not clear that Ms. Meriwether's treatment plan was successful. The ALJ highlights that at certain intervals, her symptoms lessened or improved when taking medication. (AR 25-26.) It appears that Ms. Meriwether simultaneously experienced positive and negative gains while sober and treatment compliant. For example, she experienced side effects on Seroquel, the primary medication doctors have prescribed for her schizophrenia, complaining of extreme fatigue and an inability "to get anything done." (AR 223.) She continued to experience auditory and visual hallucinations, angry outbursts, and was listed as only "slightly improving"

on January 11, 2008, after a month of sobriety. (AR 237.) While still attending twelve step meetings and remaining treatment compliant, on April 22, 2008, Ms. Meriwether continued to experience persecutory and paranoid thoughts. (AR 208.) On January 26, 2009, Anchor Mental Health listed "patient response to medication" as minimal to none, her psychiatric condition unchanged, and her concurring disorders as worsening, although she reported that she did not have hallucinations. (AR 422.) She was nevertheless restarted on 300mg of Seroquel to treat these problems, but there is no documentation in the record as to whether medication lessened Ms. Meriwether's symptoms. (AR 422.)

Her difficulty, if not inability, to manage her own treatment schedule, as well as the questionable efficacy of her treatment program, casts doubt on the notion that Ms. Meriwether would have been able to work had she remained treatment compliant and abstained from drugs and alcohol. Perhaps more problematic, however, is the fact that the ALJ based his determination on an incomplete record. He did not solicit evidence from any part of the twenty month evidentiary gap period, and Ms. Meriwether was not afforded a thorough hearing. Therefore, because the ALJ's determination relied upon an incomplete record, and because his determination contained several factual errors, the undersigned cannot say whether or not there is substantial evidence in the record to support the ALJ's decision.

The ALJ Failed to Conduct a Thorough Hearing

As stated above, the ALJ's disability determination relied upon evidence dated between December 2007 and February 2009. The ALJ's decision did not consider the twenty month evidentiary gap in the record between February 2009 and October 2010, and Ms. Meriwether's hearing was too cursory to remedy the evidentiary gap. The transcript of the hearing suggests

that the ALJ undertook a superficial review of Ms. Meriwether's medical history. The ALJ asked only a few questions about Ms. Meriwether's mental illness, how she believed her illness would affect her ability to work, if she had applied for or obtained any work, any side effects or difficulty with her treatment plan, and the extent of her concentration issues. The ALJ did not solicit medical records or any other materials to supplement the testimony given at the hearing. If a "[m]ore probing questioning…would undoubtedly have provided more probative information" then the ALJ has not fulfilled his duty to conduct a thorough hearing. *Poulin*, 817 F.2d at 871 (quoting *Lashley v. Secretary of HHS*, 708 F.2d 1048, 1052 (6th Cir. 1983)).

During the hearing, the ALJ at times interrupted Ms. Meriwether and often changed the subject. Although Ms. Meriwether provided many clues that her condition had remained problematic, or had perhaps worsened, the ALJ often did not ask follow-up questions. Moreover, the ALJ did not alert Ms. Meriwether that she was allowed to or might wish to supplement the record with additional information from February 2009 to September 2010. *See Contra Mandziej v. Chater*, 944 F.Supp. 121, 132 (D. NH 1996) (highlighting that the ALJ solicited additional medical records and evidence from the claimant in order to remedy a potential evidentiary gap.)

Perhaps the most critical oversight in the ALJ's decision is that he incorrectly identified August 11, 2010 as the date Ms. Meriwether ceased using drugs and alcohol. (AR 25, 48.) The ALJ confused the date of Ms. Meriwether's last urinalysis test—administered on August 11, 2010 by her drug rehabilitation program—for her sobriety date. (AR 47, 48, 59.) In actuality, Ms. Meriwether entered drug rehabilitation on March 11, 2010, and she testified at the hearing that she had remained sober ever since. (AR 48.)

As a result of this oversight, the ALJ did not investigate how Ms. Meriwether's extended period of sobriety affected her. He did not inquire as to the severity of Ms. Meriwether's symptoms after becoming sober, if she remained treatment compliant while sober, or how her condition changed—if at all—since March 2010.

The Commissioner, in his brief, also repeats this false sobriety date, claiming that "Plaintiff confirmed that she was continuously using crack cocaine and other substances until August 11, 2010" ((Def.'s Mem. at 9.) This is incorrect, and Ms. Meriwether attempted to clarify her date of sobriety during the hearing, while the ALJ ended the hearing prematurely, without listening to Ms. Meriwether's protestations about the date of her sobriety.

> **ALJ:** Alright, is it raining out there right now?
> **Ms. Meriwether:** No, it was drizzling
> **ALJ:** Okay, well, I'll let you go before it starts coming down
> **Ms. Meriwether:** Yeah, I'll get a ride, I don't know
> **ALJ:** Take care of yourself, the good news is staying off the, you know, the—
> **Ms. Meriwether:** The drugs
> **ALJ:** --the polysubstance. That's going to make a world of difference for you, it really will, okay, alright. Don't go near the drugs and alcohol.
> **Ms. Meriwether:** No, I've been clean from that for months. The 11th, the clean date, I came home August 11th but I guess I stopped in March the 11th
> **ALJ:** Alright, thank you very much
> **Ms. Meriwether:** Bye
>
> [end of hearing]

(AR 59.)

The ALJ also failed to probe the extent to which Ms. Meriwether was managing her mental illness symptoms. There are clues in the transcript that Ms. Meriwether continued to experience symptoms that required increased and additional medication. During the hearing, Ms. Meriwether stated that her Seroquel dose has been increased to 400mg, indicating that she still sees a clinician and, presumably, continued to have difficulty managing her bipolar disorder and

schizophrenia. (AR 50.) There is no medical evidence in the record to explain several unresolved questions, including when the medication was increased, by whom, for what reasons, and any resulting side effects. Ms. Meriwether also indicated that her clinician wishes to add more medications to her treatment plan, after Abilify—a medication for which there are no entries in the record—apparently did not work.

> **ALJ:** Okay, are you still on the Zyprexa?
> **Ms. Meriwether:** No, she gave me, now I'm on Seroquel 400 and my next appointment to see her, I think, is next week or two weeks. She wants to give me, put me on some other medicine, try me anyway.
> **ALJ:** Well, you were on the Trazadone. Are you still on that?
> **Ms. Meriwether:** Uh-uh
> **ALJ:** No.
> **Ms. Meriwether:** I was on that, they gave me Abilify, I don't do that no more.
> **ALJ:** You came off Abilify?
> **Ms. Meriwether:** Yeah, that made me sick a little so she just narrowed it down to Seroquel 400 and she's going to start me on something else on my next appointment with her for the mood change, for the different personalities. She says she wants to try me on something else. I go see her faithfully.

(AR 50.)

At this point, Ms. Meriwether has introduced the possibility of "different personalities", or is possibly referring to her auditory or visual hallucinations. She also mentions her mood swings, well-documented throughout the record. She also tells the ALJ that she sees her clinician "faithfully," although her treatment non-compliance is one of the reasons that she is denied benefits.

Ms. Meriwether's testimony at the hearing indicates that she was both sober and treatment compliant for an extended period of time, yet she continued to have difficulty managing her bipolar disorder, schizophrenia, and Hepatitis B. Considering that the ALJ's chief reasoning for denying Ms. Meriwether SSI benefits rested on her inability to remain sober for an

extended period of time, it is problematic that he did not investigate further at the hearing this nearly seven month period of sobriety and treatment compliance. Exactly the information the ALJ claimed that he did not have—namely, documentation that Ms. Meriwether stayed free of drugs and alcohol all while abiding by her treatment plan—was available to the ALJ at the hearing, but he failed to solicit it. As a result, it is not possible to say that there is substantial evidence in the record to support the ALJ's contention that Ms. Meriwether would be able to work if she remained sober and treatment compliant. (AR 25.)

The ALJ in his decision determined that "a finding of 'not disabled' is appropriate under the framework of the above-cited rule [42 U.S.C. § 432(d)(1)(A)]" that "the undersigned finds that there has been no continuous twelve-month period during which the claimant has not been able to work due to her disability." (AR 30.) Yet this is not what 42 U.S.C. § 423(d)(1)(A) says. The standard for disability is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment…which has lasted or *can be expected to last for a continuous period of not less than twelve months*." 42 U.S.C. § 423(d)(1)(A) (emphasis added). Therefore, so long as the medical evidence in the record indicates that an individual's disability is expected to continue at least twelve consecutive months, an individual is eligible for SSI benefits. 42 U.S.C. § 423(d)(1)(A).

It is true that Ms. Meriwether reported some progress with respect to managing her symptoms, despite discussing her "mood change" and "different personalities" earlier in the hearing. The ALJ, however, linked her possible gains to her sobriety, and does not investigate her medication routine, how often she sees her clinician at Anchor Mental Health, or if she still uses the services at Anchor Mental Health.

ALJ: Are they helping you?
Ms. Meriwether: The Seroquel?

ALJ: Yes
Ms. Meriwether: Yeah it calms me and the voice, it calms me and everybody down. That's why I stay to myself and we be calmed down. Then when I don't take them that's when I have a problem.
ALJ: Well, I'm glad to hear that at least at this point in time that you're clean which helps you an awful lot and because I know you had multiple treatments for substance abuse in the past and seemed to be very heavy but as of this time it worked.

(AR 51.)

There is no evidence in the record that details how well Ms. Meriwether responded to Seroquel during her many months of continuous sobriety, beginning March 11, 2010, except for conflicting testimony from Ms. Meriwether herself. (AR 48, 59.). She initially stated that she was still having paranoid symptoms, but the ALJ did not follow up on those, and instead the conversation shifted to a discussion of Ms. Meriwether's hepatitis B.

ALJ: Stay to yourself, okay, and when has that become more difficult for you? Can you ` tell me that? These statements were made in '09?
Ms. Meriwether: Back in '05 I stayed to myself. I don't be comfortable out there. I stay to myself. I'm a little too paranoid and [inaudible] when my mind be stressed. I don't think, I think everybody out to get me, you know, stuff like that. I just stay to myself.
ALJ: Let's talk about that, okay. So let's concentrate and the way I see it, what you're doing is you're applying on the basis of some problems mentally, okay with mood changes and things like that.
Ms. Meriwether: Yeah
ALJ: You weren't applying as far as I know in terms of any physical limitations or any pain, it's more the—
Ms. Meriwether: Mental
ALJ: —more the mental?
Ms. Meriwether: Yeah, and then I found I think 2007 I had hepatitis B.
ALJ: Hepatitis B?
Ms. Meriwether: Mm-mmh and when I would start getting, seeing a doctor that it keeps me, I be tired a lot and I be in pain off and on. They just give me motrin.
ALJ: When was the hepatitis B diagnosed?

(AR 45.)

Evidentiary Gap

The Commissioner contends that the ALJ was under no duty to supplement the record, and only needed to do so "if necessary." (Def. Mem. at 11.) In this case, however, it was necessary, due to the heighted duty the ALJ owed to Ms. Meriwether and the considerable length of the evidentiary gap. The Commissioner also contends that Ms. Meriwether's counsel—whom she retained for the Appeals Council hearing—did not supplement the record with additional evidence, thereby rendering "unpersuasive" her claim that the ALJ did not develop the record properly. (Def.'s Mem. at 11.) Other district courts have held, however, that even when represented by counsel before an ALJ, it is not an impediment to remand simply because counsel did not supplement the record at that stage.

> It is unclear as to why Claimant's counsel did not supplement the record; however, regardless of whom is to blame, the end result is a conspicuous gap in the evidence…when circumstances point to the probable existence of probative and necessary evidence, which has not been furnished by the claimant, the failure of an ALJ to ask further questions, request additional records, or contact treating sources amounts to neglect of the ALJ's duty to develop the record.

Huddleston v. Astrue, 826 F.Supp 2d 942, 959 (S.D. WV 2011).

Therefore, the Commissioner's contention that Ms. Meriwether can no longer argue that the ALJ did not properly develop the record, simply because she retained counsel who did not supplement the record at a later stage, is wrong. It does not alter the duty that the ALJ owed to Ms. Meriwether, who was then-unrepresented, mentally ill, and possessed borderline intelligence.

The claimant has the burden of proving disability. *Bowen v. Yuckert*, 482 U.S. 137, 146, n.5 (1987). The ALJ, however, has a concurrent duty to ensure that the record is fairly and

adequately developed. 20 C.F.R. § 416.912. When the record has evidentiary gaps that result in unfairness, remand is necessary. *Brown v. Shalala*, 44 F.3d 931, 935 (11th. Cir. 1995). Since a social security hearing is non-adversarial, the ALJ is responsible in every case to ensure that an adequate record is developed consistent with the issues raised. 20 C.F.R. § 404.944.

This does not mean that the undersigned is imposing an unduly burdensome standard on the ALJ, which the Seventh Circuit discussed in *Turner v. Astrue*, noting that "while it is true that the ALJ has a duty to make a complete record, this requirement can reasonably require only so much…taking 'complete record' literally would be a formula for paralysis." *Kendrick v. Shalala*, 998 F.2d 455, 456 (7th Cir. 1993.) Moreover, when there are no obvious gaps in the medical record, the ALJ need not undertake additional investigation, and the record must only be supplemented where the evidentiary gap results in "unfairness or clear prejudice." *Turner v. Astrue*, 710 F.Supp 2d 95, 108 (D.D.C., 2010) (quoting *Rosa v. Callahan*, 168 F.3d 72, 79, n. 5 (2d Cir. 1999)). Even protracted evidentiary gaps are not automatically prejudicial, as seen in *Pinkey v. Astrue*, 675 F. Supp 2d 9 (D.D.C. 2009.) There, the court held that so long as "there is nothing in the record to show that plaintiff's psychiatric condition had changed" during a twenty month gap between the last medical evidence in the record and the administrative hearing, the evidentiary gap was not prejudicial. *Id*. at 21.

This case, however, is distinguishable. During the time of the evidentiary gap, Ms. Meriwether became sober and claims that she was treatment compliant, which are the two bases upon which the ALJ rejected her application for SSI. This change in her condition, along with the length of the evidentiary gap (twenty months) and the fact that the ALJ had a heightened duty to develop the record, all merit remand back to the ALJ, so that the evidentiary gap may be remedied.

c. No Consultative Exam from February 10, 2009 to October 28, 2010

Ms. Meriwether also contends that the evidence in the record was "insufficient to establish whether or not the Plaintiff was disabled" and that a consultative examination was necessary to evaluate her condition. (Pl's Mem. at 7.) To support this contention, Ms. Meriwether cites *Dozier v. Heckler*, 754 F.2d 274 (8th Cir. 1985), which states that an ALJ's refusal to order a consultative exam is reversible error, in the event that the medical sources in the record do not provide sufficient information about whether or not a claimant is disabled. *Id.* at 276. The regulations state that there is a need for a consultative exam in the event that the medical evidence regarding a claimant's impairment(s) is insufficient. *See* 20 C.F.R. § 416.917 (stating that "if your medical sources cannot or will not give us sufficient information about your impairment to determine whether you are disabled…we may ask you to have one or more physical or mental examinations or tests.").

In *Dozier*, however, the claimant at issue had debilitating migraine headaches, was prone to anxiety, and had a toe malady, yet the record contained no neurological, psychological, or orthopedic examinations, all of which were necessary to evaluate these impairments and their severity. 754 F.2d at 276. Ms. Meriwether's record contains numerous records relating to her bipolar disorder, schizophrenia, and Hepatitis B, and she previously underwent two consultative exams: Dr. Scarcella's psychiatric consultative examination and Dr. Miknowski's physical consultative examination (AR 361-64; 401-03.)

Ms. Meriwether contends that during her hearing, the ALJ promised that he would order this consultative exam during her hearing. The ALJ said that he would "admit the evidence currently in the record and take testimony at the hearing. If necessary, I will also obtain relevant

medical and non-medical records at the government's expense." (AR 38.) This is consistent with 20 C.F.R. § 416.917, which says the SSA may obtain a consultative exam at the government's expense. The regulations also state, however, that a consultative exam will not be ordered "until we have made every reasonable effort to obtain evidence from your medical sources." 20 C.F.R. § 416.912(e.)

While the ALJ is entitled to request a consultative exam, it is not required. A consultative exam may be an appropriate way to complete the record if the medical evidence about a claimant's impairment(s) is insufficient, highly technical, or specialized medical evidence is needed that cannot be obtained from a claimant's treating physician, or if there is an indication of a change in a claimant's condition that is likely to affect the claimant's ability to work, but the severity of her impairment has not been established. 20 C.F.R. § 404.919a (b)(1)-(4).

This language is consistent with the ALJ's promise, who said that he would obtain a consultative examination *if necessary*, if the needed information was not readily available from the records and examinations. While the undersigned disagrees that the ALJ had the full amount of information necessary to make a disability determination, it was not the lack of a third consultative examination that prejudiced Ms. Meriwether. Instead, Ms. Meriwether should be afforded a thorough hearing in front of the ALJ and her medical records from February 2009 to October 2010 should be reviewed, in order to remedy the evidentiary gap in the record.

2. <u>Erroneous Assessment of Plaintiff's Residual Functional Capacity</u>

Ms. Meriwether also alleges that the ALJ failed to give Dr. Scarcella's consultative exam proper weight in the RFC assessment when considering her concentration abilities. (Pl.'s Mem.

at 11.) Ms. Meriwether claims that the ALJ "provided no explanation of how he accorded significant weight to the opinion of Dr. Scarcella, yet found that the Plaintiff had no more than a moderate limitation in attention and concentration." (Pl.'s Mem. at 11.)

As noted above, Dr. Scarcella did find that Ms. Meriwether "manifested an inability to maintain sustained attention and concentration, which would affect her ability working." (AR 363.) In his decision, the ALJ did not comment on Dr. Scarcella's analysis of Ms. Meriwether's lack of concentration abilities, despite affording his report "significant weight." (AR 24.) Dr. Miknowski found that Ms. Meriwether was "somewhat disoriented and poorly coherent," but did not specifically mention concentration. (AR 401.) Finally, Dr. Patricia Cott found that Ms. Meriwether had moderate limitations in her ability to understand, remember, and carry out detailed instructions. (AR 397.) The ALJ, however, characterized Dr. Cott's analysis of Ms. Meriwether's concentration abilities as such: "[Ms. Meriwether] has no significant limitations with respect to sustained concentration and persistence except that she had moderate limitations in her ability to maintain attention and concentration for extended periods." (AR 23.) On its face, this confusingly worded sentence indicates that Ms. Meriwether has no real difficulty with concentration—except that she has difficulty with concentration. It is possible that the sentence makes reference to the fact that that Dr. Cott found Ms. Meriwether "moderately" limited in her concentration abilities, but not "markedly" limited, but the undersigned is not certain.

Moreover, on December 3, 2007, December 10, 2007, January 11, 2008, January 17, 2008, January 23, 2008, January 30, 2008, February 22, 2008, March 31, 2008, April 22, 2008, June 18, 2008, Ms. Meriwether's treating physician at Anchor Mental Health described her as having concentration problems. (AR 182, 239, 236, 234, 232, 229, 222, 216, 207, 197.)

Considering that these records come from Ms. Meriwether's treating source, Anchor Mental Health—information that is afforded special significance and can be entitled to controlling weight—their assessments regarding her concentration abilities are particularly important. *See* 20 C.F.R. § 404.1527(c) ("Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s).").

Even if those records were not afforded controlling weight, however, at the very least, the D.C. Circuit's treating physician rule would apply. *Butler*, 353 F.3d at 1003. That treating physician rule holds that a treating physician's report is binding on the fact-finder unless contradicted by substantial evidence, and an ALJ is required to explain his reasoning for rejecting the opinion of a treating physician. *Id.* Anchor Mental Health's notes on Ms. Meriwether's concentration abilities, however, were not even mentioned, let alone discussed, in the ALJ's decision.

The ALJ also did not explain why he disregarded Dr. Scarcella's view on Ms. Meriwether's concentration abilities—despite affording the opinion "significant weight." (AR 24.) The SSA concedes that "it is clear that the ALJ did not accept Dr. Scarcella's views about Plaintiff's ability to concentrate." (Def.'s Mem. at 12.) The ALJ may discredit part or all of a doctor's opinion, so long as he reasonably explains why he decided to do so. *See Butler*, 353 F.3d at 1002 (holding that an ALJ must explain what evidence he credited and what evidenced he did not, and why). Here, the ALJ did not adequately explain why he disregarded Dr. Scarcella's opinion on the issue of concentration.

The ALJ also failed to follow up when Ms. Meriwether testified that she had sustained three concussions, despite promising to do so.

> **ALJ:** Have you had any difficulty there, following written and oral instructions?
> **Ms. Meriwether:** I just have comprehend sometimes. I had three concussions, so it's hard to—
> **ALJ:** Right, and we're going to talk about those. Are you still able to follow simple instructions?
> **Ms. Meriwether:** Mm-mmh [inaudible]

(AR 44.)

After this vague testimony, where Ms. Meriwether makes an incoherent pronouncement, then raises the issue of concussions, the ALJ did not probe further or return to the issue, as he promised. The ALJ did not ask when these alleged concussions occurred, did not ask if Ms. Meriwether had sought medical treatment for these concussions, did not seek records to verify these concussions, and did not ask her about the side effects, if any, that these concussions might have had on her ability to concentrate.

It is unclear if the records from Anchor Mental Health, Ms. Meriwether's testimony about the several concussions she sustained, and the opinion of Dr. Scarcella were rejected or ignored. It is difficult for the undersigned, therefore, to perform the necessary review of the ALJ's reasoning. *See Butler*, 353 F.3d at 1002 (holding that a court cannot perform its limited reviewing function without an explanation of what evidenced the ALJ considered and why in making his determination.) Therefore, the undersigned recommends remanding this issue back to the ALJ so that he may explain the amount of weight he gave to the medical evidence in the record regarding Ms. Meriwether's concentration abilities.

V. RECOMMENDATION

For the reasons stated above, the undersigned recommends that the Plaintiff's Motion for Reversal [6] granted in part, denied in part, and the Defendant's Motion for Judgment of

Affirmance [7] be granted in part, denied in part. The undersigned further recommends that, pursuant to 42 U.S.C. §405(g), this case should be remanded to the Commissioner for further proceedings consistent with this Report and Recommendation.

REVIEW BY THE DISTRICT COURT

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985).

DATE: November 24, 2014

/s/
ALAN KAY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEENAN K. COFIELD, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE *et al.*, Defendants.	)	Civil Action No. 14-0746 (KBJ)

MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO TRANSFER

Pro se Plaintiff Keenan K. Cofield ("Plaintiff") is a Maryland state prisoner who is incarcerated at the Eastern Correctional Institution in Westover, Maryland, and is serving a ten-year sentence that the Circuit Court of Baltimore County imposed on December 7, 2011, for a theft conviction. *See Cofield v. Fed. Bureau of Prisons*, No. 12-1178, 2012 WL 6201205, at *1 (D. Md. Dec. 11, 2012). For a period of time in and around 2012, Plaintiff was incarcerated at the Federal Correctional Institution in Fairton, New Jersey ("FCI-Fairton"). (*See generally* Compl., ECF No. 1-1.) According to his complaint, while Plaintiff was at FCI-Fairton, prison officials and officers mistreated him in a variety of ways, including by denying him medical treatment and losing certain items of his property. Plaintiff lodged a five-count complaint in the Superior Court of the District of Columbia against the Director of the Federal Bureau of Prisons ("BOP"), BOP's Inmate Accident Compensation System, and various other BOP officers who work at FCI-Fairton, seeking money damages exceeding $90 million.

Defendants removed Plaintiff's complaint to this Court, pursuant to 28 U.S.C. §§ 1442(a)(1), 1446. (Not. of Removal of a Civil Action, ECF No. 1.)

Before this Court at present is Defendants' motion to transfer this matter to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1404(a). (Defs.' Mot. to Transfer, ECF No. 7.)[1] Defendants assert that transfer is warranted because all of Plaintiff's claims arise out of events that took place in New Jersey, while Plaintiff was incarcerated at FCI-Fairton. Plaintiff opposes the motion to transfer on the grounds that, "[t]hough the incident AND accident injuries occurred at FCI Fairton, NJ, all of the records, Original complaints, Tort Claims, Medical Claims-Inmate Accident Claims were all filed and sent to Washington, DC FBOP (headquarters)." (Not. of Opp'n to Defs.' Mot. to Transfer & Order ("Pl.'s Opp."), ECF No. 10, ¶ 1.) Because this Court concludes that venue for this action does not lie in the District of Columbia and, instead, the proper venue for Plaintiff's complaint is New Jersey, Defendants' motion to transfer will be **GRANTED** and the case will be **TRANSFERRED** to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1406(a).

I. BACKGROUND

In September of 2011, Plaintiff was in BOP custody and was moved from the New York Metropolitan Correction Center to FCI-Fairton in New Jersey. (Ex. A to Compl., ECF No. 1-1, at 22-23.) Plaintiff's allegations primarily relate to events that happened while he was housed in at FCI-Fairton. Plaintiff first asserts that BOP

[1] Section 1404(a) of Title 28 of the United States Code authorizes the court to transfer a case "[f]or the convenience of parties and witnesses." A separate section of Title 28, Section 1406(a), applies when venue is inappropriate in the first instance, and requires the court to dismiss or transfer a case "laying venue in the wrong division or district[.]"

personnel at FCI-Fairton " punished [him] and forced [him] to work in Food Service" even though Plaintiff's medical documentation stated that he was not cleared for Food Service work. (Compl. ¶ 6.) Plaintiff further claims that he suffered a number of on-the-job injuries that he brought to the attention of BOP personnel, and that those individuals neither properly documented nor treated these injuries. (*Id.* ¶¶ 7-8.) Plaintiff maintains that "[t]he delay and denial of medical treatment caused my injuries and damages to be permanent for life." (*Id.* ¶ 10.) Moreover, according to Plaintiff, he submitted a number of claims to the FPI-Inmate Claims Examiners Office, but never receive a response to any of his claims. (*Id.* ¶ 9.) Plaintiff also contends that, while at FCI-Fairton, he was one of three inmates housed in a cell made to hold only two inmates and often had to sleep on the floor, which exacerbated his medical condition. (*Id.* ¶¶ 12-13.)

During Plaintiff's time at FCI-Fairton, the County of Baltimore, Maryland filed a detainer against Plaintiff, which led to Plaintiff being placed in Administrative Segregation and sent to the Federal Detention Center in Baltimore for a period of time. (*Id.* ¶¶ 12, 19.) Plaintiff's complaint asserts that the Baltimore court was "without jurisdiction over [him]," and that BOP should not have honored the detainer. (*Id.* ¶ 14.) Plaintiff also alleges that the officer who handled Plaintiff's personal effects in conjunction with Plaintiff's move to Administrative Segregation and his return from Baltimore either stole or lost various items of Plaintiff's property. (*Id.* ¶¶ 18-19.) Plaintiff purportedly has submitted numerous administrative claims related to the loss of his property, all of which have gone unanswered. (*Id.* ¶ 20.)

Plaintiff initiated the instant action in the Superior Court for the District of Columbia on January 24, 2014, against the Director of the BOP, certain offices within the BOP, and several of FCI-Fairton officers.[2] Among other things, Plaintiff alleges that defendants improperly denied him medical treatment (Comp. ¶¶ 1-10), failed to provide him due process with respect to the loss of his property (*id.* ¶¶ 18-21), and failed to train or supervise BOP employees properly (*id.*, Addendum). Read liberally,[3] Plaintiff's complaint appears to assert two different categories of claims: (1) constitutional claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), against FCI-Fairton officers in their individual capacities related to denial of medical treatment, circumstances of his detention, conditions of confinement, and loss of his property, to the extent that the officers were personally involved in those events, and (2) claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2674 ("FTCA"), against the United States for denial of medical treatment, loss of his property, failure to process his tort claims, and failure to train. (*See* Compl. ¶¶ 9, 20 (alleging that Plaintiff submitted numerous administrative claims regarding his medical injuries and the loss of his property).)

Defendants removed Plaintiff's complaint to this Court on April 29, 2014, and on June 27, 2014, Defendants filed a motion to transfer the matter to the District of New

[2] Specifically, Plaintiff's complaint names the following individuals and entities as defendants: Inmate Accident Compensation System, Federal Bureau of Prisons; FPI-Inmate Claims Examiners Office, FBOP-Examiners; Warden, J.T. Shartle, FCI-Fairton Federal Bureau of Prisons; Federal Bureau of Prisons, FCI-Fairton Health Services Director & Staff; Federal Bureau of Prisons, FPC-Fairton Counselor-Job Assignment Official; Federal Bureau of Prisons, FBOP-Director; Federal Bureau of Prisons, FPC-Fairton-Property Receiving Officer-3/22/12; Federal Bureau of Prisons, FCI-Fairton David Martinez & Mr. Cruz, Inmate Systems Supervisor; and Federal Bureau of Prisons, FCI-Fairton-ICS/R&D Officers.

[3] This Court must liberally construe the pleadings of pro se litigants and hold such pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Jersey under 28 U.S.C. § 1406(a) for the convenience of the parties, witnesses, and in the interest of justice. (Defs.' Mot. to Transfer, ECF No. 7, at 1.)

II. Legal Standard For Transfer of Venue

As relevant here, two statutes govern a federal court's consideration of whether to transfer a matter to another district: 28 U.S.C. § 1406(a), which applies when venue is inappropriate in the district in which the case has been filed, and 28 U.S.C. § 1404(a), which applies when venue is appropriate in both the district in which the case was filed and another district.

Under Section 1406(a), if a case is filed "in the wrong division or district[,]" the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought." 28 U.S.C.§ 1406(a) "Although the decision to transfer or dismiss is committed to the sound discretion of the district court, the interest of justice generally requires transferring a case to the appropriate judicial district in lieu of dismissal." *Ellis-Smith v. Sec'y of the Army*, 793 F. Supp. 2d 173, 177 (D.D.C. 2011) (citing *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67); *see also Kungle v. State Farm, Fire & Cas. Co.*, No. 13-1338, 2014 WL 2700104, at *5 (D.D.C. June 16, 2014) ("Although a district court may dismiss a case if the plaintiff's claims suffer from obvious substantive defects, the interest of justice generally favors transferring a case, particularly when a plaintiff is proceeding pro se.") (internal citations omitted).

If venue lies in the district where a civil action is filed, Section 1404(a) permits a court to transfer the action nevertheless "to any other district or division where it might have been brought" "[f]or the convenience of parties and witnesses [and] in the interest

of justice[.]" 28 U.S. C. § 1404(a). The party seeking a transfer must establish that transfer is proper by showing that (1) the action could have been brought in the transferee district, and (2) "that considerations of convenience and the interest of justice weigh in favor of transfer." *Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 39 (D.D.C. 2010) (citing *Veney v. Starbucks Corp.*, 559 F. Supp. 2d 79, 82 (D.D.C. 2008)). "The decision whether or not to transfer the case to another judicial district pursuant to 28 U.S.C. § 1404(a) is discretionary." *In re DRC, Inc.*, 358 Fed. Appx. 193, 194 (D.C. Cir. 2009).

III. Analysis

It is undisputed that all of Plaintiff's claims are based on events that took place in New Jersey in conjunction with Plaintiff's imprisonment at FCI-Fairton. (See Pl.'s Opp. at 1-2.) This being so, Defendants have moved for transfer to the District of New Jersey under 28 U.S.C. § 1404(a), "[f]or the convenience of the parties and witnesses, in the interest of justice." (Defs.'s Mot. to Transfer at 6 (citing 28 U.S.C. §1404(a).) For the reasons explained below, this Court finds that venue is not appropriate in the District of Columbia, and thus, it concludes that it cannot transfer the case under section 1404(a). Instead, this Court will invoke section 1406(a), and in lieu of dismissal, will opt to transfer the case to the District of New Jersey, which is the only appropriate venue for both Plaintiff's *Bivens* claims and his FTCA claims.

A. New Jersey (And *Not* The District Of Columbia) Is A Proper Venue For Plaintiff's *Bivens* Claims

As mentioned, the gravamen of Plaintiff's complaint appears to be that the officers who supervised his incarceration during the period of time in which he was housed at FCI-Fairton mistreated him in a manner that violated his constitutional rights.

See, e.g., Compl. ¶¶ 7-8 (alleging that Plaintiff was improperly denied medical treatment for injuries that he suffered at FCI-Fairton); *id* at ¶¶ 19-20 (alleging that unnamed officers at FCI-Fairton denied Plaintiff his property without due process of law by failing to ensure the security and safety of the property). Thus, Plaintiff's complaint is fairly characterized as making a series of *Bivens* claims, *see Bivens*, 403 U.S. at 397 (recognizing an independent federal cause of action against federal officers who violate individuals' constitutional rights), and the general statute that establishes the appropriate venue for civil actions—section 1391(b) of Title 28 of the United States Code—applies. *See Gonzalez v. Holder*, 763 F. Supp. 2d 145, 152-53 (D.D.C. 2011) (section 1391(b) applies to *Bivens* actions). Under section 1391(b), a civil action may be brought in

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). With respect to Plaintiff's claims against the FCI-Fairton officers, there is no indication that any of those defendants reside in this district, and Plaintiff makes no argument to that effect. Furthermore, it is undisputed that all of the events or omissions giving rise to these claims occurred in New Jersey. (*See* Pl.'s Opp. at 1-2). Accordingly, the proper venue for Plaintiff's *Bivens* claims is the District of New Jersey under 28 U.S.C. § 1391(b), and not the District of Columbia. *See Dastmalchian v. Dep't of Justice*, No. 14-0594, 2014 WL 5315746, at *3 (D.D.C. Oct. 20, 2014)

(transferring *Bivens* claim to the Central District of California where none of the defendants resided in D.C. and events giving rise to claim took place in California); *Coltrane v. Lappin*, 885 F .Supp. 2d 228, 233-34 (D.D.C. 2012) (transferring *Bivens* claims to the Western District of Louisiana, the district where defendants resided and where the underlying incident took place).

Plaintiff's bald statements in his complaint that he is suing these BOP officers in *both* their official and individual capacities does not render venue in this district proper under 28 U.S.C. § 1391(e), which would otherwise permit Plaintiff to bring an official-capacity suit against these officers—in effect a suit against BOP—in the District of Columbia due to the fact that the BOP "resides" here. *See* 28 U.S.C. § 1391(e)(1)(A) (a suit that is brought against a federal officer in his official capacity may be brought in "any district in which a defendant in the action resides"). Section 1391(e) applies only to "official capacity" actions, *see Coltrane*, 885 F. Supp. 2d at 233, and whatever characterization Plaintiff now attempts with respect to the allegations in his complaint, his pleading clearly seeks both compensatory and punitive damages based on the conduct of the individual officers, rendering his contentions "quintessential *Bivens* claims" against the individual officers, and not official-capacity claims against the United States. *Id.* at 233-34 (rejecting pro se plaintiff's contention that her claims against BOP officers were official-capacity claims subject to Section 1391(e) because she sought monetary damages from each defendant officer); *see also Carlson v. Green*, 446 U.S. 14, 21 (1980) (noting that punitive damages are available against officers sued in their individual capacities under *Bivens*, but not in tort suits against the United States). What is more, it is well established that,"[i]f a federal prisoner in a BOP

facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity[, but t]he prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001).

Accordingly, with respect to the Plaintiff's claims that the FCI-Fairton officers violated his constitutional rights and that he is entitled to damages as a result, venue is appropriate in New Jersey under 28 U.S.C. § 1391(b)(2), and venue is not proper in the District of Columbia, notwithstanding Section 1391(e).

B. New Jersey (And Not DC) Is An Appropriate Venue For Plaintiff's FTCA Claims

To the extent that Plaintiff's complaint also can be construed as a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), a special venue provision, 28 U.S.C. § 1402(b), applies to all such claims This provision mandates that a plaintiff must bring "any civil action on a tort claim against the United States" "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b). Hence, as to any FTCA claim that can be discerned from the allegations in Plaintiff's complaint, transfer is warranted because nothing in the complaint suggests that Plaintiff is a resident of Washington, D.C., and it is undisputed that the underlying events occurred in New Jersey.

IV. CONCLUSION

This Court concludes that New Jersey is an appropriate venue for the *Bivens* and FTCA claims that Plaintiff asserts in this matter, and that the District of Columbia is not. As explained above, if a case is filed in a district in which venue is improper, the district court "shall dismiss, or if it be in the interest of justice, transfer such case to

any district or division in which it could have been brought." 28 U.S.C. § 1406(a). Transfer is the preferred option, *see Ellis-Smith*, 793 F. Supp. 2d at 177; *Kungle*, 2014 WL 2700104, at *5. Accordingly, in the interest of justice, it is hereby

ORDERED that Defendants' Motion to Transfer [7] is **GRANTED**; and it is

FURTHER ORDERED that, pursuant to 28 U.S.C. § 1406(a), this case is **TRANSFERRED** to the United States District Court for the District of New Jersey.

Date: December 31, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRACY DAVENPORT, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-cv-1014 (KBJ)
DISTRICT OF COLUMBIA,	)	
Defendant.	)	

MEMORANDUMOPINION ADOPTING
REPORT & RECOMMENDATION OF MAGISTRATE JUDGE

Plaintiff Tracy Davenport ("Davenport") is the mother of plaintiff A.M. (collectively, "Plaintiffs"), a child who has a disability and who is eligible to receive special education services from the District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450 ("IDEA"). When DCPS did not respond to Davenport's requests for an updated Individualized Education Program for A.M. for the 2012-2013 school year, Davenport filed an IDEA due process complaint with the DC Office of the State Superintendent of Special Education ("Due Process Complaint"). The assigned Hearing Officer dismissed the Due Process Complaint without holding a hearing or allowing Davenport to submit any evidence. Plaintiffs appeal that decision through the instant complaint, which they filed on July 3, 2013. (ECF No. 1.) In their complaint, Plaintiffs allege that DCPS violated the IDEA when the school system failed to provide A.M. with a free appropriate public education for the 2012-2013 school year, and that the Hearing

Officer violated Plaintiffs' due process rights when Davenport's Due Process Complaint was summarily dismissed. (*Id.* at ¶¶ 49-55.)

On August 29, 2013, this Court referred the matter to a Magistrate Judge for full case management. (Minute Order of August 29, 2013.) On June 3, 2014, Plaintiffs filed a motion for summary judgment, in which they requested that the Court remand the matter to the Hearing Officer so that the parties can present evidence and testimony on the merits of the Due Process Complaint. (Mem. in Supp. of Pls.' Mot. for Summ. J., ECF No. 17 at 13.) On July 2, 2014, DCPS responded to that motion, stating that it "does not oppose a remand for a full hearing on the merits of Plaintiffs' due process complaint." (Def.'s Resp. to Pls.' Mot. for Summ. J., ECF No. 18 at 1.)

On August 7, 2014, the assigned Magistrate Judge, Deborah A. Robinson, issued a Report and Recommendation (ECF No. 21, attached hereto as Appendix A) regarding the motion for summary judgment. The Report and Recommendation reflected Magistrate Judge Robinson's opinion that Plaintiffs' motion for summary judgment should be denied without prejudice and that, pursuant to the parties' agreement, this Court should remand the matter to the Student Hearing Office of the DC Office of the State Superintendent for Education for a hearing on the merits of the Due Process Complaint. (*Id.* at 2-3.) Magistrate Judge Robinson also recommended that, in light of the parties' agreement, this action should be dismissed without consideration of the merits of the arguments in Plaintiffs' motion.

The Report and Recommendation also advised the parties that either party may file written objections to the Report and Recommendation, which must include the portions of the findings and recommendations to which each objection is made and the

basis for each such objection. (*Id.* at 3) The Report and Recommendation further advised the parties that failure to file timely objections may result in waiver of further review of the matters addressed in the Report and Recommendation. (*Id.*)

Under this Court's local rules, any party who objects to a Report and Recommendation must file a written objection with the Clerk of the Court within 14 days of the party's receipt of the Report and Recommendation. LCvR 72.3(b). As of this date—months after the Report and Recommendation was issued—no objections have been filed.

This Court has reviewed Magistrate Judge Robinson's report and will **ADOPT** the Report and Recommendation in its entirety. Accordingly, the Court will **DENY** Plaintiffs' motion for summary judgment without prejudice, **REMAND** this matter to the Student Hearing Office of the DC Office of State Superintendent for Education for further proceedings, including a hearing on the merits of the Due Process Complaint, and **DISMISS** this action.

A separate Order accompanies this Memorandum Opinion.

DATE: December 19, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRACY DAVENPORT, et al.,

Plaintiffs,

v.

DISTRICT OF COLUMBIA,

Defendant.

Civil Action No. 13-1014
KBJ/DAR

REPORT AND RECOMMENDATION

Plaintiff Tracy Davenport commenced this action against the District of Columbia, in her own right and on behalf of her minor son, A.M., pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*, seeking review of an administrative hearing officer's order dismissing their complaint. Complaint for Declaratory and Injunctive Relief (Document No. 1). This action was referred to the undersigned United States Magistrate Judge for full case management. 08/29/2013 Minute Order.

As the undersigned observed in ruling on Plaintiffs' request to submit additional evidence to this court, the hearing officer in the underlying administrative proceedings granted a motion to dismiss filed by Defendant and dismissed Plaintiffs' due process complaint "prior to the commencement of an administrative hearing." Memorandum Opinion and Order (Document No. 15) at 3-4. Following this court's denial of Plaintiffs' request to submit additional evidence, *id.* at 9, Plaintiffs filed a Motion for Summary Judgment (Document No. 17) challenging the hearing officer's dismissal of their due process complaint. In lieu of filing an opposition, Defendant filed a Response to Plaintiffs' Motion for Summary Judgment (Document No. 18) indicating that it

"does not oppose a remand for a full hearing on the merits of Plaintiffs' due process complaint."

The undersigned thus ordered the parties to meet and confer, in an effort to agree upon the terms of the disposition by this court of the pending motion for summary judgment. 07/07/2014 Minute Order. The parties were unable to come to an agreement, and submitted separate proposed orders. With respect to resolution of Plaintiffs' motion for summary judgment, Defendant represents that it does not concede all of the facts and arguments raised in the motion. Defendant's Meet and Confer Statement (Document No. 19). However, because Defendant agrees that the hearing officer "misapplied" a legal standard in dismissing Plaintiffs' due process complaint, it thus "agrees that this matter should be remanded to the Student Hearing Office . . . ." *Id.* Plaintiffs contend that their motion "should be conceded" by Defendant because Defendant has agreed to "the exact remedy sought by plaintiffs in their motion." Plaintiffs' Meet and Confer Statement (Document No. 20) at 1. In response to Defendant's contention that it does not concede all of the facts and arguments raised in the motion, Plaintiffs note that Defendant did not file an opposition to Plaintiffs' motion. *Id.* at 2 n.1. Both Plaintiffs and Defendant, in their respective proposed orders, provide for the dismissal of this action.

Upon consideration of the parties' submissions, and the record herein, the undersigned **RECOMMENDS** that Plaintiffs' Motion for Summary Judgment (Document No. 17) be **DENIED WITHOUT PREJUDICE**. Given the parties' agreement that this matter should be remanded for a hearing officer to consider the merits of Plaintiffs' due process complaint, the undersigned finds that the court, in the interest of expediting resolution of Plaintiffs' claims and to conserve judicial resources, need not consider the merits of the arguments presented by Plaintiffs in their motion.

The undersigned **FURTHER RECOMMENDS** that the court remand this matter to the Office of State Superintendent for Education's Student Hearing Office for further proceedings, including a hearing on the merits of Plaintiffs' due process complaint, and that this action be dismissed.

It is, this 7th day of August, 2014,

SO RECOMMENDED.

/s/
DEBORAH A. ROBINSON
United States Magistrate Judge

Within fourteen days, either side may file written objections to this report and recommendation. The objections shall specifically identify the portions of the findings and recommendations to which objection is made and the basis of each such objection. In the absence of timely objections, further review of issues addressed herein may be deemed waived.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY HEMBY, Plaintiff, v. FAIRFAX VILLAGE CONDOMINIUM IV ASSOCIATION, INC., et al. Defendants.	)	Civil No. 14-cv-2038 (KBJ)

MEMORANDUM OPINION AND ORDER

On November 25, 2014, *pro se* Plaintiff Gregory Hemby ("Plaintiff") filed the instant complaint in federal court against various entities and individuals who appear to be related to negative experiences that Plaintiff allegedly has had while living in his apartment, which a condominium association apparently governs. (Compl., ECF No. 1.)[1] In general, Plaintiff alleges that Defendants have interrupted his quiet enjoyment of his home in several ways, including by (1) engaging in "unnecessary and purposeful disturbances at times when quite [sic] enjoyment is supposed to be enjoyed night/early morning hours" (*id.* ¶ 20), (2) "refusing to restore or repair know [sic] deficiencies in

[1] Although Plaintiff's complaint does not make clear exactly which persons are defendants in this case, the case caption lists as defendants the Fairfax Village Condominium IV Association, Inc.; the Fairfax Village Condominium IV Association's Board of Directors; and Arthur Harris ("the owner of the condominium unit directly above where Plaintiff resides"). (*See* Compl., ¶¶ 5-6, 8.) The complaint itself also refers to various other entities and people by the name "Defendant," including Comcast (*id.* at ¶ 7 ("Defendant Comcast ("Defendant") is the alleged cable provider in Fairfax Village Condominium IV where Plaintiffs lives"), and Urban City Management (*id.* at ¶ 9 ("Defendant Urban City Management ("Defendant") ("Urban City") is the palisade and/or the landlord/agent responsible for administering or corresponding to any requests that the Plaintiff's [sic] has or had.").

the infrastructure flooring" (*id.* ¶ 26), and (3) "engag[ing] in antitrust violations" such as "creating and maintaining a monopoly of a cable service provider" and "not allowing Plaintiff Hemby to compare the value of different cable or satellite services available" (*id.* ¶ 29). Plaintiff's complaint specifically alleges various facts—a noise-related dispute with his upstairs neighbor (*id.* ¶¶ 14-16); the termination of his Comcast cable service (*id.* ¶¶ 17-18); and an unheeded request for the installation of a bath tub support (*id.* ¶ 19)—and then proceeds to set forth three purportedly distinct causes of action: two counts of "interruption of quite [sic] enjoyment" and one count of "unlawful monopoly" (*id.* ¶¶ 24-30).

Although Plaintiff's complaint touches many of the bases as far as the Federal Rules of Civil Procedure are concerned, what Plaintiff's pleading does not—and cannot—do is establish that the instant dispute arises under federal law for the purpose of this Court's jurisdiction. *See* Fed. R. Civ. P. 8(a)(1) (requiring "a short and plain statement of the grounds for the court's jurisdiction"); *see also* 28 U.S.C. § 1331 (establishing that a complaint premised on federal-question jurisdiction must contain claims that "arise under the Constitution, laws, or treaties of the United States"); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (noting that a "well-pleaded complaint" needs to establish "either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"). To be sure, pro se pleadings are entitled to liberal interpretation, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and, here, Plaintiff does include an opening paragraph that states the action "is founded upon the following federal statutes": the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*,

the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, the Clayton Act, 15 U.S.C. §§ 12 *et seq.*, the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §§ 13 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq*. (*see id*. at ¶ 1.). But mere citation to federal law does not transform a standard landlord-tenant dispute into a federal case. *See Steele v. Salb*, 681 F. Supp. 2d 34, 36 (D.D.C. 2010) ("Under the longstanding well-pleaded complaint rule, a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based upon federal law.") (internal citations, alterations, and quotation marks omitted).

Plaintiff's action here clearly involves nothing more than a tenant's attempt to seek redress for harm allegedly caused as a result of the actions and decisions of his condominium association and nearby neighbors—"[e]ven with a liberal reading, there are no facts alleged implicating any [of the] federal laws under which this action purports to arise." *Larsah v. Koukou*, No. 08-1616 RWR, 2008 WL 4606277, at *1 (D.D.C. Oct. 15, 2008) (citing *Howerton v. Ogletree*, 466 F. Supp. 2d 182, 183 (D.D.C. 2006)). In other words, the core of Plaintiff's complaint is his dissatisfaction with the current landlord-tenant relationship, and the alleged violations of federal law, which are entirely peripheral, are neither "necessary" to, nor an "element" of, Plaintiff's claims. *Franchise Tax Bd. of Cal.*, 463 U.S. at 13 (1983). Consequently, this Court lacks subject matter jurisdiction over Plaintiff's complaint. *See Johnson v. Robinson*, 576 F.3d 522 (D.C. Cir. 2009) ("Because the complaint is an outgrowth of a D.C. landlord-tenant dispute between residents of the District, the complaint was properly dismissed

because it established neither federal question nor diversity of citizenship jurisdiction.").

Accordingly, it is hereby

ORDERED that Plaintiff's complaint is **DISMISSED**. *See Hurt v. U.S. Ct. of Appeals for the D.C. Cir.*, 264 Fed. Appx. 1, 1 (D.C. Cir. 2008) ("It was proper for the district court to analyze its own jurisdiction *sua sponte* and dismiss the case for lack of jurisdiction.") (citation omitted).

DATE: December 8, 2014

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SCIACCA, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, *et al.*, Defendants.	)	Civil Action No. 08-cv-2030 (KBJ)(JMF)

MEMORANDUM OPINION

In November of 2008, plaintiff Anthony Sciacca ("Sciacca") filed the instant pro se complaint against the Federal Bureau of Investigation, the Department of Justice, and DOJ's Office of Information and Privacy (collectively, "Defendants"), alleging that Defendants mishandled a document request that Sciacca submitted in 2006, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, ("FOIA"). (*See generally* Complaint, ECF No. 1.) Defendants previously filed a motion for summary judgment, which the Court denied without prejudice on March 6, 2014, finding that "Defendants have not provided sufficient information to permit an assessment of whether they have produced all reasonably segregable information, and have also failed to submit a sufficiently detailed affidavit, declaration, or *Vaughn* index in support of Defendants' contention that they have satisfied their FOIA obligations." (Mem. Op., ECF No. 8, at 21.) This Court also authorized Defendants to refile their motion "[o]nce they have provided supplemental declaration, or a *Vaughn* index, in a manner consistent with this opinion." (*Id.*)

On June 6, 2014, Defendants filed a renewed motion for summary judgment in which they again argue that certain records responsive to Sciacca's FOIA request have been properly withheld under various exemptions to the FOIA. (*See* Mem. in Supp. of Defs.' Second [] Mot. for Summ J., ECF No. 39-1.). As instructed, Defendants attached to this motion a supplemental declaration and a revised *Vaughn* index. (*See* Third Decl. of David M. Hardy and exhibits thereto, ECF Nos. 39-4, 39-5, 39-6, 39-7.)

The Court advised Plaintiff of his obligations under the Federal Rules of Civil Procedure and the local rules of this Court to respond to the motion, and specifically warned Plaintiff that, if he did not respond to the motion by July 21, 2014, the Court could treat the motion as conceded. (Order, ECF No. 40, at 1-2). To date, Sciacca has neither filed an opposition to the motion, nor requested more time to file his opposition. The Court, therefore, will **GRANT** the United States' motion as conceded and will enter judgment in favor of Defendants. An Order accompanies this Memorandum Opinion.

Date: October 2, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YORIE VON KAHL, Plaintiff, v. BUREAU OF NATIONAL AFFAIRS, INC., Defendant.	)	Civil Action No. 09-0635 (KBJ)

MEMORANDUM OPINION AND ORDER

Plaintiff Yorie Von Kahl ("Plaintiff") is currently incarcerated in connection with the 1983 shooting deaths of two United States Marshals in North Dakota. Plaintiff has already extensively litigated issues relating to his trial, including his contentions that he is factually innocent and that the trial court lacked jurisdiction to convict and sentence him in the manner it did. Proceeding now pro se, Plaintiff filed the instant five-count libel complaint against Bureau of National Affairs ("BNA") on April 3, 2009, alleging that false and defamatory statements of fact regarding him were contained in a "summary report" that BNA once published about a petition that Plaintiff had filed with the United States Supreme Court. Plaintiff seeks a total of $100,000,000 in compensatory and special damages, plus $90,000,000 in punitive damages. He also asks that BNA publish a satisfactory correction to mitigate the damage to his reputation that Plaintiff alleges he has suffered.

This matter is before the Court on the parties' third and fourth rounds of briefing regarding substantially the same legal issues.[1] Specifically, Plaintiff has moved for reconsideration of a prior order entering judgment in BNA's favor on his libel per se claim, arguing that the prior order contains errors of law and fact. (*See* Pl.'s Mot. to Reconsider Order Precluding Claims of Libel Per Se ("Pl.'s Mot. to Reconsider"), ECF No. 74, at 8.)[2] The parties have also filed cross-motions for summary judgment. (*See* Pl.'s Mot. for Partial Summ. J. ("Pl.'s Mot. for Summ. J."), ECF No. 58; Def.'s Mot. for Summ. J., ECF No. 62.) In his summary judgment motion, Plaintiff asks the Court to enter judgment in his favor with respect to BNA's potential collateral estoppel defense, on the grounds that a jury should be permitted to evaluate the validity of his underlying criminal convictions in order to determine whether the statement that BNA published is false. (Pl.'s Mot. for Summ. J. at 47-48.) In its motion, BNA asserts that it is entitled to summary judgment on Plaintiff's claims on the grounds of substantial truth, lack of actual malice, and the fair reporting privilege. (Def.'s Mot. for Summ. J. at 22-39.)

Because this Court finds (1) that Plaintiff has failed to establish any basis for revisiting the prior order regarding libel per se; (2) that BNA's asserts a colorable collateral estoppel defense; and (3) that material issues of fact exist regarding BNA's legal arguments, it will **DENY** all of these motions.[3]

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[1] This matter, which was previously before Chief Judge Roberts, was reassigned to this Court on April 5, 2013.

[2] Page numbers herein refer to those that the Court's Electronic Filing System automatically assigns.

[3] Plaintiff has also filed a document entitled "Motion to Invoke the Court's Inherent Powers to Strike Defendant's Combined Motion and Memorandum for Summary Judgment . . . for an Attempt to Perpetrate a Fraud on the Court and Related Misconduct and to Take Such Other Action as Justice Requires." (ECF No. 78.) This motion is meritless, and it will be summarily denied.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Underlying Facts

In 1983, Plaintiff was with a group of people that included his father, for whom an arrest warrant was pending. The United States Marshals attempted to arrest Plaintiff's father, and a shoot-out ensued that left two Deputy United States Marshals dead. As a result of this event, Plaintiff was "charged with two counts of first degree murder; four counts of assaulting United States Marshals and other law enforcement officers assisting them; one count of conspiring to assault; and one count of harboring and concealing a fugitive." *United States v. Faul*, 748 F.2d 1204, 1207 (8th Cir. 1984).[4] Ultimately, "[t]he jury found [Plaintiff] not guilty of first degree murder, but guilty of the lesser included offense of second degree murder, and guilty of the remaining charges." *Id.* at 1207-08.

Following the jury's verdict, the trial court "adjudged that Defendant, Yorie Von Kahl, . . . has been convicted of violations of 18 United States Code Sections 1111, 1114 and 2 as charged in Counts 1 and 2 of the Indictment" and ordered that he "be committed to the custody of the Attorney General of the United States for life" on these counts. (Ex. A to Mem. in Supp. of Def. Bureau of Nat'l Affairs, Inc.'s Mot. to Dismiss or for Summ. J. ("Mandamus Pet."), ECF No. 7-1, at 40.) The Eighth Circuit affirmed the convictions on appeal. *See Faul*, 748 F.2d at 1223.

Plaintiff nevertheless believes that his convictions under 18 U.S.C. §§ 1114 and 1111 are invalid and that the sentences that the trial court imposed on those convictions were illegal. With respect to § 1114, Plaintiff maintains that he was never indicted and

[4] Two other individuals, Scott Faul and David Broer, were charged and tried with Plaintiff in connection with the 1983 shoot-out.

tried for second degree murder under § 1114—only first degree murder—and therefore the jury's verdict that he was not guilty of first degree murder controls and its verdict that he was guilty of second degree murder is void. (Pl.'s Mot. to Reconsider. at 21-22.) Regarding § 1111, Plaintiff asserts that he has "never been charged or tried for any violation of any offenses" that § 1111 defines or makes punishable. (*Id.* at 2; *see also* Mandamus Pet. at 14 (asserting that jurisdiction under § 1111 extends only to murders that take place "'within the special maritime and territorial jurisdiction of the United States'" and that prerequisite was not satisfied in his case (quoting 18 U.S.C. §1111(b))).) Since 1984, Plaintiff has filed a series of unsuccessful challenges to his conviction and sentence, including a motion to correct his "illegal sentence" that he filed with the North Dakota trial court in 2003 in which he made these same invalidity arguments. *United States v. Voh Kahl*, No. A3-96-55, 2003 WL 21715352 (D.N.D. July 14, 2003). The North Dakota court rejected these arguments out of hand, *see generally id.*, and the Eighth Circuit affirmed this ruling, *see United States v. Von Kahl*, 95 F. App'x 200 (2004). Plaintiff also brought his arguments attacking the validity of his convictions to the Supreme Court, filing a petition for a writ of mandamus in 2005 that sought an order compelling the trial judge to vacate his life sentences. (*See* Mandamus Pet.)[5]

[5] No federal court has granted Plaintiff relief from his convictions and sentence. *See Kahl v. United States*, 242 F.3d 783 (8th Cir. 2001) (affirming district court's denial of motion to vacate sentence under 28 U.S.C. § 2255), *cert. denied*, 534 U.S. 941 (2001); *United States v. Faul*, 748 F.2d 1204, 1223 (8th Cir. 1984) (affirming convictions), *cert. denied*, 472 U.S. 1027 (1985); *Peltier v. U.S. Parole Comm'n*, No. 05-3484, 2006 WL 2570553 (D. Kan. Sept. 5, 2006) (dismissing petition for writ of habeas corpus under 28 U.S.C. § 2241), *aff'd sub nom. Von Kahl v. United States*, 321 F. App'x 724 (10th Cir. 2009); *Kahl*, 2003 WL 21715352, at *2 (denying plaintiff's motion to correct sentence pursuant to Fed. R. Crim. P. 35(a)).

Significantly for present purposes, BNA published the following summary of Plaintiff's Mandamus Petition in the August 17, 2015 edition of the *Criminal Law Reporter* ("CLR"):

> **04-1717 In re Kahl**
> *Homicide – Murder of U.S. marshals – Jury instructions – Sentencing.*
>
> Ruling below (D. N.D., 6/24/83):
>
> Petitioner, who showed no hint of contrition and made statements to press that he believed that murders of U.S. marshals in course of their duties were justified by religious and philosophical beliefs, is committed to custody of the U.S. Attorney General for imprisonment for life based on his convictions on two counts of violating 18 U.S.C. §§ 1111, 1114, and 2, terms to run concurrently; for 10-year term of imprisonment on each of four counts on which he was convicted of violating 18 U.S.C. §§ 111[1], 1114, and 2, which terms will run concurrently but consecutively to life term; to five-year term of imprisonment for violating 18 U.S.C. §§ 1071 and 2, term to run consecutively to 10-year term and life term; and to five-year term of imprisonment on his conviction for violating 18 U.S.C. § 371, term to run concurrently to five-year, 10-year, and life terms.

(Ex. 1 to Compl., ECF No. 1-2.) The next paragraph of the summary set forth the legal questions that Plaintiff's petition presented. (*Id.*) Through counsel, Plaintiff complained to BNA that this summary was defamatory because Plaintiff did not make the statements attributed to him, and because it damaged Plaintiff's credibility and reputation in the legal and business community, including specifically the federal courts in which Plaintiff was litigating the validity of his convictions. (Ex. 5 to Decl. of Jay Brown Ward ("Ward Decl."), ECF No. 62-7, at 2-3.). Thereafter, BNA published the following statement in the July 18, 2007, edition of the CLR:

> **Clarification**
> In a Summaries of Recently Filed Cases entry that ran at 77 CRL 2127, concerning U.S. Supreme Court petition No. 04-

> 1717, the summary of the sentencing judge's ruling should have begun:
> "Petitioner who was said to have believed that murders were justified, ..."

(Ex. 6 to Ward Decl., ECF No. 62-8.)

This summary and clarification form the basis for the instant complaint, in which Plaintiff alleges that the following statements about him that appeared in BNA's original publication are libelous:

1) "[T]hat Plaintiff showed no hint of contrition in respect to murders of officers performing duties" (Compl. ¶ 17 (internal quotation marks omitted));

2) That Plaintiff "made statements to the press that he believed that murders of U.S. marshals in course of their duties were justified" (Compl. ¶ 28 (internal quotation marks omitted));

3) That Plaintiff "positively stated beliefs justifying murders of U.S. marshals in course of their duties was premised upon religious and philosophical beliefs" (Compl. ¶ 32 (internal quotation marks omitted)); and

4) That Plaintiff "is committed to custody . . . based on his convictions on two counts of violating 18 U.S.C. §§ 1111, 1114, and 2" (Compl. ¶ 36 (alterations in original) (internal quotation marks omitted).)

Plaintiff's complaint further alleges that BNA's "clarification" is also libelous insofar as it "purport[ed] that the statement in question was a 'summary of the sentencing judge's ruling below[.]'" (*Id.* ¶ 40.)

B. Prior Proceedings[6]

In response to the instant libel complaint, BNA filed a motion for summary judgment (ECF No. 6), and Plaintiff responded with his own cross-motion for summary judgment (ECF No. 22), both of which were denied. *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 810 F. Supp. 2d 138, 146 (D.D.C. 2011) (ECF No. 26) ("*Von Kahl I*"). With respect to Plaintiff's motion, the Court found that Plaintiff was not entitled to summary judgment on his defamation claim because the question of whether or not BNA's statements regarding his lack of contrition and religious and philosophical beliefs, as well as BNA's suggestion that those remarks were attributable to the sentencing judge, were defamatory "is a question of fact that the Court cannot resolve on summary judgment." *Id.* (footnote and citation omitted). Regarding BNA's motion, the Court found that Plaintiff had adequately alleged that the "no contrition" statement was an assertion of fact rather than opinion, and that the complaint adequately alleged that BNA had falsely presented the statement as if it were the ruling of the sentencing judge, rendering it actionable. *Id.* at 143. Furthermore, the Court concluded that the "fair reporting privilege" did not immunize BNA from liability for the summary statement. *Id.* at 145.[7]

BNA sought reconsideration of this ruling, as well as judgment on the pleadings. (Def.'s Mot. for Reconsider and for J. on the Pleadings, ECF No. 38). In its written opinion on BNA's motion for reconsideration, the Court clarified its prior order,

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[6] This Court will not reproduce the findings and conclusions contained in the prior opinions related to the instant matter in full; it assumes familiarity with those opinions, and expressly incorporates them herein.

[7] The fair reporting privilege is a conditional immunity that courts afford to those who publish fair and accurate reports of official proceedings, including judicial proceedings. *Von Kahl I*, 810 F. Supp. 2d at 143-44 (citations omitted).

explaining that while "BNA going forward may still pursue a fair reporting defense[,]" BNA cannot use "that asserted defense to support summary judgment." *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 934 F. Supp. 2d 204, 212 (D.D.C. 2013) (ECF No. 53) ("*Von Kahl II*").

The Court also addressed BNA's request for judgment on the pleadings, granting in part and denying in part that motion. Specifically, the Court entered judgment in BNA's favor with respect to one aspect of Plaintiff's libel suit—his claim that the statement regarding the fact of Plaintiff's imprisonment due to his convictions was libel per se—because, in the Court's opinion, "insofar as the CLR summary indicated that [Plaintiff] had been 'committed to custody of U.S. Attorney General for imprisonment for life based on his convictions' under [18 U.S.C. § 1111, 1114 and 2], the summary is true[.]" *Id.* at 219. The Court otherwise denied all other aspects of BNA's motion for judgment on the pleadings, finding that BNA's statement regarding Plaintiff's lack of contrition is actionable (*id.* at 213-14); that Plaintiff was not rendered unable to sue for libel (*i.e.*, he was not "libel proof") based on his criminal convictions (*id.* at 214-216); that Plaintiff adequately identified the recipients of the allegedly defamatory statements (*id.* at 216-17); that, while Plaintiff is a limited purpose public figure, the complaint pled sufficient facts to support a claim of actual malice (*id.* at 217-18); and that Plaintiff may pursue claims for special damages (*id.* at 219).

Following this initial motions practice, the parties proceeded to discovery, and the matter was transferred to the undersigned. Although additional discovery remains to be done (*see* Aug. 21, 2013 Minute Order (setting schedule for additional discovery after resolution of pending motions)), Plaintiff has now moved for reconsideration of

the Court's entry of judgment in BNA's favor on his libel per se claim, arguing that "[t]he Court misapprehended that Plaintiff has been charged[,] tried and convicted of the offense of murder as defined in 18 U.S.C. § 1111, whereas, in fact and as a matter of law, he had been charged, tried and *acquitted* of offenses of killing U.S. marshals performing official duties." (Pl.'s Mot. to Reconsider at 8.)

The parties have also filed cross-motions for summary judgment, as mentioned above. (*See* Pl.'s Mot. for Summ. J. (ECF No. 58); Def.'s Mot. for Summ. J. (ECF No. 62).) In his motion for partial summary judgment, Plaintiff asks this Court to enter judgment in his favor on BNA's potential estoppel defense; that is, Plaintiff wants this Court to order that BNA cannot prevent him from re-litigating in this civil matter whether he was actually convicted of violating 18 U.S.C. §§ 1111, 1114 and 2 in the underlying criminal case. (Pl.'s Mot. for Summ. J. at 47-48.) In its motion, BNA asserts that it is entitled to summary judgment because (1) the summary and clarification are substantially true (Def.'s Mot. for Summ. J. at 22-28); (2) Plaintiff cannot establish that BNA acted with actual malice (*id.* at 29-38); and (3) the fair reporting privilege renders the summary and clarification non-actionable (*id.* at 38-39). These motions have been fully briefed and are ripe for this Court's consideration.

II. ANALYSIS

A. Plaintiff's Motion For Reconsideration Of The Order Entering Judgment For BNA On The Claim Of Libel Per Se

1. Legal Standard Governing Motions For Reconsideration

A court may revisit and revise prior interlocutory rulings under Fed. R. Civ. P. 54(b) "as justice requires[,]" including "when the Court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the

parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court." *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (alteration in original) (internal quotation marks omitted); *accord Lyles v. Dist. of Columbia*, 10cv1424, 2014 WL 4216141, at *4 (D.D.C. Aug. 27, 2014). However, it is well-established in this Circuit that "motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Loumiet v. United States*, 12cv1130, 2014 WL 4100111, at *2 (D.D.C. Aug. 21, 2014) (internal quotation marks and citations omitted).)

2. Plaintiff Has Not Established Cause For This Court To Revisit The Prior Order Regarding His Libel Per Se Claim

As explained, in its order granting in part and denying in part BNA's motion for judgment on the pleadings, the Court ruled that Plaintiff cannot claim libel per se regarding BNA's published statement that Plaintiff had been committed to the custody of the Attorney General on his "convictions under 18 U.S.C. §§ 1111, 1114 and 2" because Plaintiff had, in fact, been committed to the custody of the Attorney General based on these convictions. *Von Kahl II*, 934 F. Supp. 2d at 219. Plaintiff now seeks reconsideration of that finding, arguing that the Court mistakenly isolated from its proper context one of the four allegedly defamatory statements that the BNA publication contained. (*See* Pl.'s Mot. to Reconsider at 11-12.) Plaintiff maintains that BNA's summary, taken as a whole, stated or implied that he had been charged, tried and convicted of offenses for which he had *not* been charged, tried and convicted (*see generally id*. at 20-22 (explaining Plaintiff's belief that his charge, trial, and conviction

were invalid)), and therefore the BNA summary constitutes defamation per se insofar as it accuses him of having committed, and been convicted of, suche crimes (*id.*).[8]

Plaintiff has fallen well short of establishing his burden under Federal Rule of Civil Procedure 54(b). As explained, the federal rule that governs motions for reconsideration erects a high bar for parties who desire to have a court revisit and revise a prior ruling. Although Plaintiff here apparently fervently believes that he has not properly been convicted and sentenced under 18 U.S.C. §§ 1111, 1114 and 2, the Court previously considered this very argument, *see Von Kahl II*, 934 F. Supp. 2d at 219 (noting that "Plaintiff certainly was challenging the validity of his convictions under 18 U.S.C. §§ 1111, 1114, and 2"), and concluded that, regardless of any doubts about the validity of the underlying case, Plaintiff could not claim that BNA's statement that he had been imprisoned based on his conviction for having violated these criminal statutes was false. *Id.*; *see also Benic v. Reuters Am., Inc.*, 357 F. Supp. 2d 216, 221 (D.D.C. 2004) ("Truth is an absolute defense to defamation [per se] claims." (citing *Olinger v. Am. Sav. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969)). Nothing in Plaintiff's present motion for reconsideration suggests that the Court "patently misunderstood" Plaintiff's argument, *Cobell*, 224 F.R.D. at 272; to the contrary, it is clear that the Court fully apprehended the argument that Plaintiff was making regarding the viability of his libel per se claim in opposition to BNA's motion for judgment on the pleadings—and the one he makes again here—and the Court squarely rejected it. *Von Kahl II*, 934 F.

[8] "A statement is defamatory as a matter of law ('defamatory per se') if it is so likely to cause degrading injury to the subject's reputation that proof of that harm is not required to recover compensation." *Franklin v. Pepco Holdings, Inc.*, 875 F. Supp. 2d 66, 75 (D.D.C. 2012) (citing *Carey v. Piphus*, 435 U.S. 247, 262 (1978)).

Supp. 2d at 219 ("[T]he CLR summary does not falsely impute that plaintiff has been accused of a crime."). This Court finds no basis for revisiting that ruling now.

B. The Parties' Cross-Motions For Summary Judgment

1. Legal Standard Governing Motions For Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the record evidence "shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A moving party may successfully support its motion by identifying those parts of the record that it believes demonstrate the absence of a genuine dispute of material facts. Fed. R. Civ. P. 56(c)(1).

Material facts are those that "might affect the outcome of the suit under the governing law[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists that is sufficient to preclude summary judgment, the Court must treat the non-movant's statements as true and accept all evidence and make all reasonable inferences in the non-movant's favor. *See Anderson*, 477 U.S. at 255. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 325. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence in support of" its position. *Anderson*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted).

2. Plaintiff Is Not Entitled To Summary Judgment On BNA's Collateral Estoppel Defense

In the wake of the federal courts' consistent rejection of Plaintiff's arguments regarding the invalidity of his conviction (*see supra* Part I.A & note 5), Plaintiff apparently hopes to sway a new audience—a civil jury—with his legal theory. To that end, Plaintiff has filed this defamation action, and he seeks in his motion for partial summary judgment to bar BNA from invoking the doctrine of collateral estoppel (otherwise known as issue preclusion) to prevent him from raising the issue of the validity of his criminal conviction under 18 U.S.C. § 1111. (*See* Pl.'s Mot. for Summ. J. at 1-4.) In essence, Plaintiff wants this Court to order that a civil jury can determine whether his criminal verdict and sentence are valid—despite what courts have previously said about the matter—as a prerequisite to determining the truth or falsity of BNA's published statement that Plaintiff was imprisoned based on "convictions . . . of violating 18 U.S.C. [§] 1111[.]" (*Id.* at 1.) For its part, BNA insists that the doctrine of collateral estoppel prevents Plaintiff from re-litigating anew the issue of whether or not Plaintiff's underlying criminal convictions were valid, in the context of Plaintiff's instant defamation case. (*See* Def.'s Combined Mem. in Supp. of Def.'s Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J., ECF No. 64, at 38-39.) On this point, this Court wholeheartedly agrees with BNA.

Under the doctrine of collateral estoppel, "'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). "To preclude parties from contesting

matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Courts apply a three-factor test to determine whether collateral estoppel applies: (1) whether the same issue the party now raises was "contested . . . and submitted for judicial determination"; (2) whether that issue was "actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) whether preclusion would "work a basic unfairness to the party bound by the first determination." *Martin v. DOJ*, 488 F.3d 446, 454 (D.C. Cir. 2007) (internal quotation marks and citation omitted). Courts have also concluded that a finding in a criminal proceeding may bar a party from raising the same issue in a subsequent civil action under the doctrine of collateral estoppel. *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568-69 (1951) (holding that the party opposing re-litigation "is entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based"); *Otherson v. DOJ*, 711 F.2d 267, 271 (D.C. Cir. 1983) (stating that "issues determined in connection with a criminal conviction may be taken as preclusively established for the purposes of later civil trials") (citations omitted).

In this case, BNA is likely to be able to establish each of the requisite factors to invoke collateral estoppel with respect to the issue of the validity of Plaintiff's criminal convictions, and this Court concludes that it should be free to try. Plaintiff has previously repeatedly raised the issue of the validity of his convictions in prior courts,

and prior courts have repeatedly considered—and rejected—his arguments (*see supra* note 5), including the specific arguments that he now makes regarding the North Dakota federal court's jurisdiction and the impact of the jury's not guilty verdicts. *See United States v. Voh Kahl*, No. A3-96-55, 2003 WL 21715352 (D.N.D. July 14, 2003), *aff'd*, 95 F. App'x 200 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 1096 (2005); *see also In re Yorie Von Kahl*, 126 S. Ct. 146 (2005) (denying Mandamus Pet.). Thus, the specter of preclusion is properly raised. *See, e.g.*, *Martin*, 488 F.3d at 454. Furthermore, there is no indication that invoking the collateral estoppel doctrine to prevent Plaintiff from raising the issue of the validity of his conviction yet again would result in any "unfairness" to him; in fact, permitting re-litigation of this same question would unfairly require BNA to defend against a criminal judgment that it had nothing to do with in the first instance and that numerous judges have already consistently upheld. *See id.*

Consequently, to the extent that Plaintiff views the instant action as yet another opening to attack his underlying conviction in the guise of challenging BNA's statement that he was "convicted" of the underlying crimes, this Court will not prevent BNA from invoking the collateral estoppel doctrine to argue, and potentially establish, that Plaintiff has previously litigated that issue and that, as a result, any potential window to raise it here again is now closed.

3. BNA Is Not Entitled To Summary Judgment On Any Of The Grounds Asserted In Its Motion

BNA maintains that Plaintiff has not, and cannot, bear the burden of proving falsity or actual malice, which he is required to do by virtue of the Court's prior rulings in this matter. (Def.'s Mot. for Summ. J. at 20-36.) However, this Court concludes that

BNA is not entitled to judgment as a matter of law on the issue of falsity or malice, as explained below, and it finds no reason to revisit the Court's prior ruling regarding the applicability of the fair reporting privilege.

a. Material issues of fact exist regarding whether the statements in the CLR summary and clarification are substantially true

It is well established that a defamation action fails where the statement at issue is true. *See, e.g.*, *Benic*, 357 F. Supp. 2d at 222; s*ee also Moss v. Stockard*, 580 A.2d 1011, 1022 (D.C. 1990) ("In defamation law, it is often said that truth is an absolute defense[.]"). Here, Plaintiff claims, among other things, that BNA attributed to the sentencing judge certain potentially defamatory statements regarding Plaintiff's lack of contrition and Plaintiff's religious and philosophical beliefs that the sentencing judge did not, in fact, make. *Von Kahl I*, 810 F. Supp. 2d at 143 (citing Compl. ¶¶ 17-46). The Court has already concluded that a jury, not the court, must determine whether these statements were defamatory and whether Plaintiff is entitled to damages as a result. *Id.* at 143 ("[W]hether these statements actually are defamatory is a question of fact that the Court cannot resolve on summary judgment."); *see also White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) ("If, at the summary judgment stage, the court determines that the publication is capable of bearing a defamatory meaning, a jury must determine whether such meaning was attributed in fact.").

Undaunted, BNA now points to the doctrine of "substantial truth" under which a statement that contains some errors can nevertheless be "true" for the purpose of a defamation case so long as the inaccuracies are minor and "the substance, the gist, [and] the sting" of the challenged statement is substantially true. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991) (internal quotation marks and citations

omitted). With respect to Plaintiff's allegation that it was false to suggest in the summary that he showed "no hint of contrition" and that he "made statements to the press that he believed the murders of U.S. Marshals in the course of their duties were justified" by his "religious and philosophical beliefs" (Compl. ¶ 11), BNA maintains that an "examination of whether, when and how [plaintiff] admitted his role in the killings" is necessary in order to determine "whether it was true or false to say that [Plaintiff] had shown no contrition for his acts[,]" (Def.'s Mot. for Summ. J. at 22), and BNA submits excerpts of trial transcripts that purportedly show that plaintiff denied responsibility for the murders to facilitate that examination (*id*. at 22-24). BNA further asserts that Plaintiff's trial testimony, statements he made in an interview for a documentary film in 1993, and his writings from prison mean that, "as a matter of law, no reasonable jury could find that it was materially false for BNA to have suggested in the [s]ummary that [Plaintiff] had shown no hint of contrition and that he had made statements to the press that the killings were justified for religious and philosophical beliefs." (*Id*. at 25-26.)

As the Court previously concluded, however, what is at issue here is not any *opinion* about the extent to which Plaintiff's statements and demeanor during or after his conviction demonstrated a lack of contrition, but rather the *fact* that BNA's summary and clarification appeared to attribute the "lack of contrition" characterization to the sentencing judge in a manner that, according to Plaintiff, was untrue. *Von Kahl II*, 934 F. Supp. 2d at 213-14. Defendant's proffered evidence is not probative of any evaluation of the potentially false, defamatory, or harmful nature of BNA's suggestion that the sentencing judge believed Plaintiff lacked contrition. Thus, BNA has not

shown that its statement regarding what the sentencing judge may have believed was "substantially true," and because genuine issues of material fact remain in dispute with respect to the truth or substantial truth of the CLR summary and clarification, this Court cannot enter judgment for Defendant on this basis.

b. Material issues of fact exist regarding whether BNA acted with actual malice

Because Plaintiff has been found to be a limited purpose public figure (*see Von Kahl II*, 934 F. Supp. 2d at 217-18), "[m]ere negligence" on BNA's part does not render it liable for defamation. *Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 104 (D.D.C. 2009). Rather, Plaintiff must prove by clear and convincing evidence that the allegedly defamatory statements were made with actual malice, "that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also Masson*, 501 U.S. at 511 ("In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity."). Plaintiff may show actual malice with "evidence establishing that the story was (1) fabricated; (2) so inherently improbable that only a reckless man would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that the defendant had obvious reasons to doubt." *Tavoulareas v. Piro*, 817 F.2d 762, 790 (D.C. Cir. 1987) (alteration on original) (internal quotation marks and citation omitted).

Here, Plaintiff claims that BNA's description of his Mandamus Petition was inaccurate, and he points to the face of the Petition itself as evidence tending to show that BNA acted with actual malice in drafting and publishing the summary. In this

regard, this Court has reviewed the Mandamus Petition, and notes that the document does not mention Plaintiff's purported "lack of contrition" or "religious and philosophical beliefs" at all, which calls into question the substance of BNA's purported "summary" of that document. Language related to "contrition" and the Plaintiff's purported religious belief that the killings were "justified" appears only in the Appendix to the Petition, and when citing to these pages of the Appendix, the Mandamus Petition itself clearly identifies the speaker as the prosecutor, not the sentencing judge. (Mandamus Pet. at 9.) This Court concludes that these discrepancies between what the Mandamus Petition actually says and what BNA's "summary" reports are sufficient to create a genuine dispute of material fact regarding whether BNA acted with reckless disregard with respect to the truth or falsity of the statements in its summary. Accordingly, the Court must deny BNA's motion for summary judgment on this basis.

c. This Court will not revisit the prior fair reporting privilege rulings

Finally, for the third time in this matter, BNA asks for a ruling as a matter of law that the fair reporting privilege shields it from liability for the CLR summary and clarification. *See Von Kahl I*, 810 F. Supp. 2d at 143-46; *Von Kahl II*, 934 F. Supp. 2d at 211-12. This Court construes BNA's re-raising of the same legal issue that the Court has already resolved as a motion for reconsideration of the Court's prior ruling on the fair reporting privilege request, and so construed, denies that motion. As explained above, the Court has already concluded that, while BNA can pursue a fair reporting privilege defense, it cannot succeed on that defense at the summary judgment stage. *Von Kahl II*, 934 F. Supp. 2d at 212. BNA points to no intervening change in the law, or

any mistake of law or fact, that would justify revisiting this ruling. *See Cobell*, 224 F.R.D. at 271-72.

III. CONCLUSION

For the reasons stated above, this latest chapter in the parties' extended defamation dispute concludes in much the same way as the chapters that proceeded it: without entry of summary judgment for either party in a manner that would terminate this case. In sum, this Court concludes (1) that it will not revisit its prior rulings that Plaintiff cannot proceed on a libel per se theory and that BNA cannot base its summary judgment argument on the fair reporting privilege defense; (2) that BNA is not entitled to summary judgment on Plaintiff's other defamation claims; and (3) that Plaintiff is not entitled to an order preventing BNA from raising a collateral estoppel defense if he attempts to challenge to the validity of his conviction once again. Accordingly, it is hereby

ORDERED that Plaintiff's [74] Motion to Reconsider Order Precluding Claims of Libel Per Se; [58] Motion for Partial Summary Judgment; and [78] Motion to Invoke the Court's Inherent Powers to Strike Defendant's Combined Motion and Memorandum for Summary Judgment . . . for an Attempt to Perpetrate a Fraud on the Court and Related Misconduct and to Take Such Other Action as Justice Requires are **DENIED** and that [62] Defendant's Motion for Summary Judgment is **DENIED**. It is

FURTHER ORDERED that the parties shall serve any additional written discovery requests by **October 21, 2014**, and that BNA shall file a motion proposing

specific deadlines for the completion by both parties of all remaining discovery so that the matter can be promptly readied for trial.

DATE: September 30, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANNETTE BROWN, *et al.*,	)	
PLAINTIFFS,	)	
v.	)	Civ. No. 13-cv-1560 (KBJ)
DISTRICT OF COLUMBIA,	)	
DEFENDANT.	)	

OPINION ADOPTINGREPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Plaintiffs Annette Brown and her minor child J.B. (collectively, "Plaintiffs") reside in the District of Columbia. J.B. is disabled and eligible to receive special education services from the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education in Act ("IDEA"), 20 U.S.C. §§ 1400-1450. On May 19, 2010, Plaintiffs filed an administrative due process complaint against DCPS "challenging the appropriateness of [J.B.'s] educational programs, placement, and measures initiated by [DCPS] to ensure that [J.B.] received a free appropriate public education[.]" (Ex. 1 to Pls.' Mot. for Summ. J., ECF No. 12-5, at 1, 3.) Plaintiffs largely prevailed on their administrative complaint (*see id.* 4-17), and in February of 2011, Plaintiffs commenced an action in this court against the District of Columbia ("Defendant") seeking reimbursement of attorneys' fees and costs that Plaintiffs had incurred in connection with the administrative action. *See Brown v. Dist. of Columbia*, No. 11-cv-380. On February 10, 2012, the court awarded Plaintiffs $8,230.23 for attorneys' fees and costs. *See id.*, Order and Final Judgment, ECF No.

16. In May of 2012, Plaintiffs filed a motion in that same case seeking reimbursement of the attorneys' fees and costs that they incurred in pursuing the earlier request for fees and costs. *Id.*, Pls.' Mot. for an Award of Attorney's Fees and Costs, ECF No. 22. The court granted that motion in part, awarding Plaintiffs an additional $13,934.55. *Id.*, Order, ECF No. 26.

On February 20, 2012, ten days after the court issued its initial fee order, Plaintiffs invoiced DCPS for an additional $14,033.18, representing fees and costs that Plaintiffs claim they incurred from November 8, 2010, through February 12, 2012, "to obtain DCPS' compliance with the Hearing Officer's Determination." (Mem. in Supp. of Pls.' Mot. for Summ. J., ECF No. 12-1, at 9.) DCPS paid $5,010.20 of this invoice, and Plaintiffs commenced the instant action in October of 2013 seeking the balance ($9,020.98). (Compl., ECF No. 1.)

On November 8, 2013, this Court referred the matter to Magistrate Judge Deborah A. Robinson for full casement management, up to and excluding trial. Thereafter, the parties filed cross-motions for summary judgment. (ECF Nos. 12, 14.) Magistrate Judge Robinson issued a Report and Recommendation (ECF No. 19, attached hereto as Appendix A) regarding these motions, which reflects her belief that Plaintiffs' motion for summary judgment should be denied and that Defendant's cross-motion for summary judgment should be granted with respect to Defendant's contentions that the statute of limitations and the doctrine of res judicata bar this action, and should be denied as moot in all other respects. (Report and Recommendation at 1, 14.) The Report and Recommendation also advised the parties that either party may file written objections to the Report and Recommendation, which must include the portions of the

findings and recommendations to which each objection is made and the basis for each such objection. (*Id.* at 11.) The Report and Recommendation further advised the parties that failure to file timely objections may result in waiver of further review of the matters addressed in the Report and Recommendation. (*Id.*)

Under this Court's local rules, any party who objects to a Report and Recommendation must file a written objection with the Clerk of the Court within 14 days of the party's receipt of the Report and Recommendation. LCvR 72.3(b). This deadline has passed and no objections have been filed.

The Court has reviewed Magistrate Judge Robinson's report and will **ADOPT** the Report and Recommendation in its entirety. *See* LCvR 72.3(c) (district judge may accept in whole the findings and recommendations of the magistrate judge); *ITPE Pension Fund v. Stronghold Security, LLC*, No. 13cv0025, 2014 WL 702580 (Feb. 25, 2014). Accordingly, the Court will **DENY** Plaintiffs' [12] motion for summary judgment and **GRANT** Defendant's [14] cross-motion for summary judgment with respect to Defendant's contentions that the statute of limitations and the doctrine of res judicata bar this action. A separate order and judgment consistent with this opinion will follow.

DATE: August 26, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANNETTE BROWN, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, Defendant.	Civil Action No. 13-1560 KBJ/DAR

REPORT AND RECOMMENDATION

Plaintiffs commenced this action against the District of Columbia to recover $9,020.98 in attorneys' fees and costs that they incurred in connection with administrative proceedings conducted pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*. Complaint (Document No. 1). This action was referred to the undersigned United States Magistrate Judge for full case management. Order of Referral (Document No. 8). Pending for consideration by the undersigned are Plaintiffs' Motion for Summary Judgment ("Motion") (Document No. 12) and Defendant's Cross-Motion for Summary Judgment (Document No. 14). Upon consideration of the motions, the memoranda in support thereof and opposition thereto, the attached exhibits, and the entire record herein, the undersigned will recommend that the court deny Plaintiffs' motion and grant in part Defendant's motion.

BACKGROUND

Plaintiff Annette Brown is the parent of Plaintiff J.B., a minor student residing in the District of Columbia, Complaint ¶ 2, who is eligible to receive special education and related

services, *see* Motion, Exhibit 1 at 3. Plaintiffs filed an administrative due process complaint against the District of Columbia Public Schools ("DCPS") on May 19, 2010, in which they raised a number of issues "challenging the appropriateness of [J.B.'s] educational programs, placement, and measures initiated by [DCPS] to ensure that [J.B.] received a free appropriate public education . . . ." Motion, Exhibit 1 at 1, 3-4. After conducting hearings on Plaintiffs' complaint, the hearing officer issued a determination ("HOD") on July 17, 2010, finding largely in Plaintiffs' favor. *Id.* at 4-17.

Following the hearing officer's determination, Plaintiffs commenced an action in this court seeking $19,015.70 in attorneys' fees and costs that they incurred in the underlying administrative proceedings. Complaint, *Brown, et al. v. Dist. of Columbia*, Civil Action No. 11-380 (D.D.C. Feb. 15, 2011), ECF No. 1. The court (Wilkins, J.), adopting the Report and Recommendation of Magistrate Judge Kay, found that Plaintiffs were due $8,230.23. Order and Final Judgment, *Brown, et al. v. Dist. of Columbia*, Civil Action No. 11-380 (D.D.C. Feb. 10, 2012), ECF No. 16. Thereafter, in that same action, Plaintiffs requested $17,565.80 for attorneys' fees and costs incurred while pursuing their action for fees. Plaintiffs' Motion for an Award of Attorney's Fees and Costs, *Brown, et al. v. Dist. of Columbia*, Civil Action No. 11-380 (D.D.C. May 7, 2012), ECF No. 22. The court awarded Plaintiffs $13,934.55 for "reasonable attorneys' fees expended to obtain the underlying judgment for fees incurred in connection with the original administrative action brought under the IDEA." Order, *Brown, et al. v. Dist. of Columbia*, Civil Action No. 11-380 (D.D.C. Oct. 11, 2012), ECF No. 26.

On February 20, 2012, after the court issued its first order awarding fees in Civil Action No. 11-380, Plaintiffs submitted an invoice to Defendant requesting an additional $14,033.18, to

account for $13,985 in attorneys' fees and $48.18 in costs incurred from November 8, 2010 through February 17, 2012. Motion, Exhibit 2. In May 2012, Defendant paid $5,010.20 of the requested amount. *See* Motion, Exhibit 3; Motion, Exhibit 4. Plaintiffs commenced this action on October 9, 2013 requesting the balance. Complaint ¶ 8.[1]

CONTENTIONS OF THE PARTIES

Plaintiffs contend that they are entitled to an award of $9,020.98 for attorneys' fees and costs because the hearing officer's determination rendered them the prevailing parties in the underlying administrative proceedings. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum") (Document No. 12-1) at 2. Plaintiffs aver that the hourly rates billed by their counsel are reasonable given her "extensive legal experience" and the applicable prevailing market rates established by the *Laffey* matrix.[2] *Id.* at 6-8. Plaintiffs further aver that the number of hours billed are reasonable because the work "was necessary to obtain DCPS' compliance with the Hearing Officer's Determination." *Id.* at 9.

Defendant, in opposition to Plaintiffs' motion and in support of its cross-motion, contends that this action is barred by (1) the statute of limitations under District of Columbia law because Plaintiffs commenced this suit more than three years following the hearing officer's determination; (2) the doctrine of res judicata because this court, in Civil Action No. 11-380, already resolved Plaintiffs' claim for attorneys' fees in connection with the July 17, 2010 hearing

[1] By the undersigned's calculation, the remaining amount would be $9,022.98.

[2] The *Laffey* matrix is "a schedule of charges based on years of experience developed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 [] (1985)." *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1105 (D.C. Cir. 1995) (footnote omitted). The Civil Division of the United States Attorney's Office for the District of Columbia updates and maintains a *Laffey* matrix, available at http://www.justice.gov/usao/dc/divisions/Laffey Matrix 2014.pdf.

Case 1:13-cv-01560-KBJ Document 21-1 Filed 08/26/14 Page 4 of 14

officer determination; and (3) a provision in a January 10, 2012 settlement agreement between the parties which precluded further claims. Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment ("Defendant's Memorandum") (Document Nos. 13, 14-1) at 4-10. In the alternative, Defendant contends that Plaintiffs have not provided authority to demonstrate that the hours billed "nearly a year and a half after" the hearing officer's determination are reimbursable. *Id.* at 10-11. Defendant further contends that Plaintiffs are precluded from relitigating the reasonableness of her counsel's hourly rates because the court already made a determination in Civil Action No. 11-380. *Id.* at 7-8.

In response, Plaintiffs contend that this matter is properly before the court because they filed their complaint "within 3 years of the provision of the services on the invoice at issue," and that the running of the statute of limitations "should be keyed to the date the services were rendered . . . ." Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Plaintiffs' Reply") (Document Nos. 16, 17) at 1, 3. Plaintiffs further contend that the doctrine of res judicata does not apply because this matter involves a different invoice than the invoices that were considered by the court in Civil Action No. 11-380. *Id.* at 3. Likewise, Plaintiffs contend that the findings of the court in Civil Action No. 11-380 "are not binding" in this matter because the "services and costs" at issue "were not evaluated or reviewed" in that action. *Id.* at 4. With respect to the effect of the parties' January 2012 settlement agreement, Plaintiffs aver that the agreement "resolved a 2nd administrative due process complaint which had nothing to do with matters raised in the first administrative due process complaint," and further aver that Defendant was not a party to the agreement executed between Plaintiffs and DCPS. *Id.* at 5.

Defendant submits that decisions from this court support a finding that the statute of limitations begins to run when the hearing officer issues a final determination, and notes that Plaintiffs "never sought to amend" their complaint in Civil Action No. 11-380 to request the "additional amount sought in this action." Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply") (Document No. 18) at 2-3. In response to Plaintiffs' contention that the doctrine of res judicata is not applicable, Defendant avers that "[t]here is nothing in the IDEA or related case law that allows Plaintiffs to piecemeal an action for attorneys' fees," and that "[s]uch an approach to attorneys' fees contravenes the IDEA" because it does not allow the court to determine the reasonableness of the entire amount requested for a particular matter. *Id.* at 4-5. Defendant challenges Plaintiffs' interpretation of the parties' settlement agreement and submits that "DCPS and the District are not 'different parties' . . . ." *Id.* at 6.

APPLICABLE STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether a fact is material is determined based on whether it might affect the outcome of the suit under the governing law. *Id*.

The party seeking summary judgment must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*

Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248, 256 (internal quotation marks omitted). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id.* at 252. The court will view the evidence and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

For the reasons set forth below, the undersigned concludes that Plaintiffs' present request for fees is precluded by their earlier action in this court. The undersigned further concludes that even if Plaintiffs were not precluded from bringing this action, it is untimely. Having so determined, the undersigned does not reach the issues raised by the parties concerning the reasonableness of the request and the preclusive effect of the parties' January 2012 settlement agreement.

Res Judicata

Defendant, relying on the doctrine of res judicata, contends that the court's decision in Civil Action No. 11-380 precludes Plaintiffs' claim for fees and costs in the instant matter. "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The purpose of the

doctrine is to "protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* (citation omitted). While it appears that this court has not had occasion to address the doctrine of res judicata in the context of an action for attorneys' fees and costs under the IDEA, the court has set forth the familiar standard in the context of reviews of administrative determinations pursuant to the IDEA. "The factors that are required for res judicata to apply are: 1) the presence of the same parties or privies in the two suits; 2) claims arising from the same cause of action in both suits; and 3) a final judgment on the merits in the previous suit." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 42 (D.D.C. 2013) (citations omitted); *see also Theodore v. Dist. of Columbia*, 772 F. Supp. 2d 287, 293 (D.D.C. 2011); *Friendship Edison Pub. Charter Sch. v. Suggs*, 562 F. Supp. 2d 141, 148 (D.D.C. 2008).

Here, the parties in this action and in Civil Action No. 11-380 are identical. In both cases, Plaintiffs Annette Brown and J.B. commenced suit against the District of Columbia. The court entered a final judgment on the merits in the previous case. *See* Order and Final Judgment, *Brown, et al. v. Dist. of Columbia*, Civil Action No. 11-380 (D.D.C. Feb. 10, 2012), ECF No. 16. Thus, the issue that this court must resolve is whether the claims in this matter and in the previous matter arise from the same cause of action.

"Whether two cases implicate the same cause of action turns on whether they share the same nucleus of facts. In pursuing this inquiry, the court will consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004) (citations omitted) (quoting

another source) (internal quotation marks omitted); *see also Theodore*, 772 F. Supp. 2d at 293.

The undersigned finds that Plaintiffs' claim in this matter and Plaintiffs' claim in Civil Action No. 11-380 "share the same nucleus of facts," as the issues raised are "related in time, space, origin, or motivation." In both matters, Plaintiffs commenced suit to recover attorneys' fees and costs that they incurred while pursuing the issues set forth in their May 19, 2010 due process complaint, which culminated in a hearing officer determination on July 17, 2010. In Civil Action No. 11-380, Plaintiffs sought fees for work performed at the administrative level from February 3, 2010 through October 20, 2010.[3] *See* Plaintiffs' Reply, Exhibit 8; Plaintiffs' Reply, Exhibit 9. In this matter, Plaintiffs seek fees for work performed at the administrative level from November 8, 2010 through February 17, 2012. Motion, Exhibit 2. Plaintiffs submit that "[t]he work performed from June 16, 2011 through February 17, 2012 were efforts by [their] counsel to get DCPS to comply with the Hearing Officer's Determination and add the recommendations of the independent evaluator who conducted the developmental optometry evaluation to the student's IEP." Plaintiffs' Memorandum at 9.

Plaintiffs contend that "[t]he invoice at issue here was not litigated in the prior complaint and therefore *res judicata* could not possibly apply." Plaintiffs' Reply at 3. However, "[r]*es judicata* bars re-litigation both of 'issues that were' and of issues that 'could have been raised' in the prior action." *Jackson v. Dist. of Columbia*, 826 F. Supp. 2d 109, 121 (D.D.C. 2011), *aff'd sub nom. Jackson v. Henderson*, No. 11-7156, 2013 WL 500809 (D.C. Cir. Jan. 18, 2013); *see also Theodore*, 772 F. Supp. 2d at 294 (citation omitted) (quoting another source) (internal

[3] As previously noted, Plaintiffs also sought, and were awarded, fees for work performed while pursuing their action for fees in this court, from January 24, 2011 through May 7, 2012. *See* Invoice, *Brown, et al. v. Dist. of Columbia*, Civil Action No. 11 380 (D.D.C. May 7, 2012), ECF No. 22 4.

Case 1:13-cv-01560-KBJ Document 21-1 Filed 08/26/14 Page 9 of 14

quotation marks and alterations omitted) ("Because claim preclusion is intended to promote judicial efficiency, res judicata bars re-litigation not only of matters determined in a previous litigation but also ones a party could have raised."); *Friendship Edison Pub. Charter Sch.*, 562 F. Supp. 2d at 148 (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)) ("Under the doctrine of *res judicata*, or claim preclusion, a 'final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'").

The court appreciates Plaintiffs' concern that "waiting until the entire case has been completed is a serious financial hardship on Plaintiffs and their counsel." Plaintiffs' Reply at 4. However, the undersigned observes that a majority of the fees requested in this matter were incurred during the pendency of the prior action, prior to January 17, 2012, the date the court issued a Report and Recommendation in that matter. Indeed, some of the fees billed in the instant action were incurred prior to February 15, 2011, the date Plaintiffs filed their complaint in Civil Action No. 11-380, and prior to October 2, 2011, the date the parties commenced dispositive motions briefing in that matter. Plaintiffs have not articulated any reason that they did not request the fees at issue in this matter, or any reason that they did not seek leave to amend their request, in the previous action, to include the fees at issue here. Other than averring that it is "reasonable and permissible" for Plaintiffs to commence separate actions based on their counsel's separate invoices, *see* Plaintiffs' Reply at 4, Plaintiffs have not addressed why their instant claim for fees was not, or could not have been, raised in their previous action.[4] Nor have

[4] While the undersigned does not question Plaintiffs' contention that "there is no overlap of any type in the invoices," *see* Plaintiffs' Reply at 3, the undersigned notes that this court has expressed its concern regarding requests for fees related to the same underlying hearing officer determination that are brought under different civil actions. *See, e.g.*, *Hawkins v. Potomac Lighthouse Pub. Charter Sch.*, No. 12 0264, 2014 WL 185948, at *1 (D.D.C. Jan. 17, 2014) (noting that the court initially denied the parties' motions without prejudice, and required the plaintiff's counsel to file a declaration explaining his request, in a different case, for fees "arising from the same

Plaintiffs provided any authority for their position that res judicata does not apply under the circumstances presented.

Accordingly, the undersigned concludes that this action is precluded by the final judgment in Civil Action No. 11-380.

Statute of Limitations

Even if this action were not precluded by Plaintiffs' previous action for fees, the undersigned finds that it is untimely. The IDEA provides for an award of reasonable attorneys' fees for the prevailing party in an "action or proceeding brought under" the statute, but it does not stipulate the timeframe in which such a request for fees must be commenced. *See* 20 U.S.C. § 1415(i)(3); *see also Kaseman v. Dist. of Columbia*, 444 F.3d 637, 641 (D.C. Cir. 2006) ("Since this [cause of action for the recovery of attorneys' fees by parties prevailing in IDEA proceedings] is a creature of case law, the text of the IDEA does not specify an applicable statute of limitations."). Judges of this court have thus applied the three-year statute of limitations codified at D.C. Code § 12 301(8), in recognition of the principle that "'[w]hen Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal courts may 'borrow' one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.'" *Sykes v. Dist. of Columbia*, 870 F. Supp. 2d 86, 89 (D.D.C. 2012) (quoting *Spiegler v. Dist. of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989)); *see also* D.C. Code § 12-301(8) ("Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the

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administrative proceeding"). The concern is heightened when, as here, the party requesting fees does not disclose the related case to the court.

expiration of the period specified below from the time the right to maintain the action accrues: . . . for which a limitation is not otherwise specially prescribed 3 years[.]"); *Davidson v. Dist. of Columbia*, 736 F. Supp. 2d 115, 122-23 (D.D.C. 2010) (footnote omitted) (citations omitted) (collecting cases) ("The IDEA does not contain a statute of limitations provision for claims brought under its fee shifting provisions . . . . As a result, many courts in this district have applied the three-year statute of limitations set forth in D.C. Code § 12 301(8) to IDEA fee claims.").[5]

Plaintiffs do not dispute Defendant's contention that the court should apply a three-year statute of limitations. *See* Plaintiffs' Reply at 1-2. Rather, the parties dispute when the statute of limitations began to run in this matter. Defendant contends that "[t]he three-year timeframe starts with the issuance of the Hearing Officer's Determination." Defendant's Memorandum at 5. Plaintiffs counter that "the statute of limitations should be keyed to the date the services were rendered as would be done with the collection of any bill by a creditor." Plaintiffs' Reply at 3.

As Defendant notes, *see* Defendant's Reply at 5, some members of this court have calculated the three-year period from the date the HOD was issued. *See Sykes*, 870 F. Supp. 2d at 91 (finding an action for fees and costs under the IDEA timely after determining that it was commenced "within the three year period" from the date the HOD was "issued"); *Davidson*, 736

[5] Decisions from this court applying the three year statute of limitations have recognized that courts are split on the issue of the applicable statute of limitations for attorneys' fees actions brought pursuant to the IDEA. *See, e.g.*, *Wilson v. Dist. of Columbia*, 269 F.R.D. 8, 16 17 (D.D.C. 2010) (collecting cases) ("Courts that find an action for attorneys' fees independent from the underlying IDEA administrative proceedings assign a longer statute of limitations period, often periods spanning several years, whereas courts finding an action for attorneys' fees ancillary to the underlying IDEA administrative proceedings assign shorter statute of limitations periods comparable to a period applied to judicial review of the administrative proceeding itself."); *Armstrong v. Vance*, 328 F. Supp. 2d 50, 56 n.2 (D.D.C. 2004) (citations omitted) ("The Court recognizes that a split exists with respect to the appropriate limitations period for attorneys' fee actions under the IDEA. At least two circuits and several district courts have concluded that fee petitions are ancillary to the substantive administrative review process and that the applicable period therefore is the state law limitations period provided for judicial review of administrative decisions.").

F. Supp. 2d at 124 (concluding that the plaintiff's claim for attorneys' fees pursuant to the IDEA was "not time-barred" after noting that the HOD "underlying" the claim for fees was "issued on August 18, 2006" and "[t]he complaint was filed on July 10, 2009, less than three years later"); *Wilson v. Dist. of Columbia*, 269 F.R.D. 8, 20 (D.D.C. 2010) (noting that the HOD "was issued on November 28, 2006," and that "[t]he plaintiff's complaint in this action was filed with the Court on November 27, 2009, one day within the three-year statute of limitations period"); *Brown v. Barbara Jordan Pub. Charter Sch.*, 495 F. Supp. 2d 1, 2 (D.D.C. 2007) ("[A]s the Hearing Officer's determination was issued October 21, 2004, and plaintiffs filed suit on August 18, 2006, their claims for attorneys' fees are timely.").

Other members of this court have calculated the period from the date the plaintiff was on notice that the District was contesting the requested fees. *See Armstrong v. Vance*, 328 F. Supp. 2d 50, 53 (D.D.C. 2004); *Akinseye v. Dist. of Columbia*, 193 F. Supp. 2d 134, 145 (D.D.C. 2002), *rev'd on other grounds*, 339 F.3d 970 (D.C. Cir. 2003). The undersigned finds, however, that the circumstances presented in those cases are distinguishable from the present circumstances. In *Armstrong*, the parties were in agreement "that for each claim the limitations period for attorneys' fees began to run on the date that plaintiffs received the partial payments from DCPS . . . ." 328 F. Supp. 2d at 53. The court's consideration was thus limited to whether it should apply a thirty-day period or a three-year period, and it determined that the plaintiffs' claims for attorneys' fees were "timely because plaintiffs filed their complaint within three years of receipt of the initial partial payments by defendants." *Id.* at 53-54. In *Akinseye*, the plaintiffs' claims were for interest on "alleged late payments of their attorneys' fees that were voluntarily paid by the District of Columbia." 193 F. Supp. 2d at 135. The court thus "conclude[d] that

plaintiffs' causes of action did not accrue until they actually received the payments and at that time realized that interest had not been included." *Id.* at 145.

The undersigned concurs in the more recent decisions from this court calculating the three-year period from the date the hearing officer issued a determination, where the plaintiff's request is for an award of fees that were incurred while pursuing claims adjudicated by the hearing officer at the administrative level. While counsel may necessarily undertake work after the hearing officer issues a determination, the longer statute of limitations period three years, as opposed to a period of months permits recovery of those fees. Plaintiffs aver that "[t]here is no basis for keying the statute of limitations for specific attorney's fees and costs to the date of the HOD," *see* Plaintiffs' Reply at 2-3; however, this Circuit has observed that while "[a] fee request is . . . not a direct appeal of a decision made by the agency at the administrative hearing . . . the parent's entitlement to fees arises out of the same controversy and depends entirely on the administrative hearing for its existence." *Kaseman*, 444 F.3d at 642. Plaintiffs offer no persuasive authority in support of their argument that the court should calculate the statute of limitations period from the last date their counsel rendered services, and instead, analogize the present matter to actions against a debtor for payment owed. *See* Plaintiffs' Reply at 2. In so arguing, Plaintiffs fail to acknowledge that the court has not yet granted the award of attorneys' fees requested in this matter. *See* 20 U.S.C. § 1415(i)(3)(B)(i) ("[T]he court, in its discretion, may award reasonable attorneys' fees as part of the costs . . . .").

The hearing officer issued the determination which is the basis of Plaintiffs' present claim to fees on July 17, 2010. *See* Motion, Exhibit 1 at 1; *see also* Complaint ¶ 8 ("The outstanding amount of attorney's fees and costs still owed to Plaintiffs by Defendant for the attorney fees

incurred by Plaintiff as set forth on the invoice referenced in paragraph 5 (above) concerning the July 2010 administrative hearing is $9,020.98."). Plaintiffs filed their complaint initiating this matter more than three years later, on October 9, 2013. Therefore, the court concludes that this action is untimely.

CONCLUSION

On the basis of the foregoing findings, it is, this 7th day of August, 2014,

RECOMMENDED that Plaintiffs' Motion for Summary Judgment (Document No. 12) be **DENIED**; and it is

FURTHER RECOMMENDED that Defendant's Cross-Motion for Summary Judgment (Document No. 14) be **GRANTED** with respect to Defendant's contentions that this action is barred by the doctrine of res judicata and the applicable statute of limitations, and **DENIED AS MOOT** in all other respects.

/s/
DEBORAH A. ROBINSON
United States Magistrate Judge

Within fourteen days, either side may file written objections to this report and recommendation. The objections shall specifically identify the portions of the findings and recommendations to which objection is made and the basis of each such objection. In the absence of timely objections, further review of issues addressed herein may be deemed waived.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERVICE EMPLOYEES INTERNATIONAL UNION NATIONAL INDUSTRY PENSION FUND, *et al.*, PLAINTIFFS, v. CRYSTAL CLEANING SYSTEMS, INC., DEFENDANT.	Civ. No. 13-cv-1350 (KBJ)

OPINION ADOPTING
REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Plaintiff Service Employees International Union National Industry Pension Fund ("Fund") is an "employee pension benefit plan" and "multiemployer plan" as defined by ERISA, and "a jointly administered trust fund established pursuant to" the LMRA, which is administered in the District of Columbia. (Compl. ¶ 4.) The individual Plaintiffs in this action, who administer the Fund for its beneficiaries, are authorized Trustees of the Fund and also fiduciaries as defined by ERISA. (*Id.* ¶ 5.) Plaintiffs have brought this action against Defendant Crystal Cleaning Systems, Inc. alleging that Defendant has failed to submit remittance reports, to pay required contributions and surcharges, and to pay interest and liquidated damages that it had accrued on late-paid contributions, in violation of collective bargaining agreements that Defendant has entered into with a local Service Employees International Union affiliate.

Plaintiffs filed the complaint in this matter on September 6, 2013, and served Defendant on September 18, 2013. (See Return of Service/Affidavit, ECF No. 4.) Defendant never responded to the complaint, and the Clerk of Court filed an entry of default on November 15, 2013. Plaintiffs moved for default judgment on December 16, 2013, and on February 4, 2014, this Court referred the matter to a Magistrate Judge for full casement management, up to but not including trial. The assigned Magistrate Judge, Deborah A. Robinson, issued a Report and Recommendation (ECF No. 12, attached hereto as Appendix A) regarding Plaintiffs' motion for default judgment, which reflects her belief that Plaintiffs' motion for default judgment should be granted and that judgment should be entered against Defendant. (Report and Recommendation at 2.) Magistrate Judge Robinson further recommended that this Court order Defendant to conduct an accounting of unpaid contributions, submit outstanding remittance reports, and pay the corresponding contributions and related charges that are due and owing to the Fund. (*Id.* at 9-10.) The Report and Recommendation also advised the parties that either party may file written objections to the Report and Recommendation, which must include the portions of the findings and recommendations to which each objection is made and the basis for each such objection. (*Id.* at 11.) The Report and Recommendation further advised the parties that failure to file timely objections may result in waiver of further review of the matters addressed in the Report and Recommendation. (*Id.*)

Under this Court's local rules, any party who objects to a Report and Recommendation must file a written objection with the Clerk of the Court within 14 days of the party's receipt of the Report and Recommendation. LCvR 72.3(b). As of

this date—over a month after the Report and Recommendation was issued—no objections have been filed.

The Court has reviewed Magistrate Judge Robinson's report and will **ADOPT** the Report and Recommendation in its entirety. *See* LCvR 72.3(c) (district judge may accept in whole the findings and recommendations of the magistrate judge); *ITPE Pension Fund v. Stronghold Security, LLC*, No. 13cv0025, 2014 WL 702580 (Feb. 25, 2014). Accordingly, the Court will **GRANT** Plaintiffs' motion and enter default judgment against Defendant. A separate order and judgment consistent with this opinion will follow.

DATE: July 22, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

Case 1:13-cv-01350-KBJ-DAR Document 12 Filed 06/13/14 Page 1 of 11

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERVICE EMPLOYEES INTERNATIONAL UNION NATIONAL INDUSTRY PENSION FUND, et al., Plaintiffs, v. CRYSTAL CLEANING SYSTEMS, INC., Defendant.	Civil Action No. 13-1350 KBJ/DAR

REPORT AND RECOMMENDATION

Plaintiffs, an employee pension benefit plan administered in the District of Columbia and the individual Trustees of that plan, bring this action under the Employee Retirement Income Security Act ("ERISA") and the Labor Management Relations Act ("LMRA") "to collect contractually required remittance reports, unpaid collectively bargained contributions, and interest owed by the Defendant." Complaint (Document No. 1) ¶ 1. This action was referred to the undersigned United States Magistrate Judge for full case management, *see* 02/04/2014 Minute Order, following the Clerk's entry of default as to Defendant, *see* Default (Document No. 6); *see also* 11/25/2013 Minute Order (directing Plaintiffs either to move for default judgment or to file a stipulation of dismissal).

Pending for consideration by the undersigned is Plaintiffs' Motion for Default Judgment (Document No. 7). The undersigned conducted a hearing on Plaintiffs' motion on February 27, 2014, at which Plaintiffs introduced evidence of the damages claimed, *see* Hearing Exhibit 1.[1]

[1] The undersigned has provided the exhibit to the assigned United States District Judge.

Following the hearing, Plaintiffs, in accordance with the undersigned's order, filed a supplemental memorandum addressing their request for attorneys' fees. *See* Plaintiffs' Supplemental Brief in Support of Motion for Default Judgment ("Supplemental Memorandum") (Document No. 11). Upon consideration of Plaintiffs' motion, the memoranda in support thereof, the evidence presented, and the entire record herein, the undersigned will recommend that the court grant Plaintiffs' motion and enter default judgment against Defendant.

BACKGROUND

Plaintiff Service Employees International Union National Industry Pension Fund ("Fund") is an "employee pension benefit plan" and "multiemployer plan" as defined by ERISA, and "a jointly administered trust fund established pursuant to" the LMRA, which is administered in the District of Columbia. Complaint ¶ 4. The Fund provides pension benefits to eligible employees. *Id.* The individual Plaintiffs are authorized Trustees of the Fund, and fiduciaries as defined by ERISA, who administer the Fund for its beneficiaries. *Id.* ¶ 5. Defendant Crystal Cleaning Systems, Inc. is an employer which was a party to collective bargaining agreements with the Service Employees International Union, Local 1877 ("Union") for its employees at certain work sites at which it provided janitorial services. *Id.* ¶¶ 8-9; Declaration of Kenneth J. Anderson, Jr. ("Declaration") (Document No. 7-1) ¶ 4.

Defendant and the Union entered into a collective bargaining agreement on November 6, 2006, under which Defendant was required to make monthly contributions to the Fund for covered employees. *See* Declaration ¶¶ 4, 6; Declaration, Exhibit A at 10. Initially, Defendant was required to contribute $0.15 an hour "for each hour worked by employees to the [Fund]." Declaration, Exhibit A at 10. The rate increased to $0.25 an hour effective July 1, 2007. *Id.*

Beginning July 1, 2008, the rates were established based on the employees' "length of service"; Defendant was required to contribute $0.30 an hour for employees of one year, $0.40 an hour for employees of two years, and $0.50 an hour for employees of three years. *Id.* at 10-11. The parties renewed their collective bargaining agreement through three agreements titled "Janitor I Agreement," "Janitor II Agreement," and "Janitor III Agreement" effective November 1, 2009. Declaration ¶ 4; *see also* Complaint, Exhibit 1. Each of the three agreements established the rate at which Defendant was required to contribute to the Fund for covered employees $0.30 an hour under the Janitor I Agreement, $0.40 an hour under the Janitor II Agreement, and $0.50 an hour under the Janitor III Agreement. Complaint, Exhibit 1 at 3, 10, 17.

Each agreement included an appendix, setting forth the terms of Defendant's participation in the Fund. The appendices provided, in pertinent part, that Defendant's "[c]ontributions shall be transmitted together with a remittance report containing such information, in such manner, and on such form as may be required by the Fund or their designee." Declaration, Exhibit A at 23; Complaint, Exhibit 1 at 6, 13, 20. The terms further provided that Defendant "agrees to be bound by the provisions of the Agreement and Declaration of Trust establishing the Fund . . . and by all resolutions and rules adopted by the Trustees pursuant to the powers delegated to them by that agreement, including collection policies . . . ." Declaration, Exhibit A at 23; Complaint, Exhibit 1 at 7, 14, 21.

The Agreement and Declaration of Trust ("Fund Agreement") reiterates the requirement that employers submit reports and contributions to the Fund, and sets forth the authority of the Fund's Trustees to develop rules and regulations governing the Fund's operation. Complaint, Exhibit 2 at 2, 5. In accordance with the terms of the collective bargaining agreements and the

Fund Agreement, Trustees of the Fund promulgated policies concerning collection of delinquent contributions. Declaration ¶ 9; Complaint, Exhibit 3. The Fund's Statement of Policy for Collection of Delinquent Contributions stipulates that an employer that is delinquent in its Fund contributions shall be liable for interest, calculated from the date the contributions were due until the payment is received, at a rate of 10 percent per annum; liquidated damages, after a legal action is commenced, at 20 percent of the delinquent contributions; reasonable attorneys' fees and costs incurred.[2] Declaration ¶¶ 10-11; Complaint, Exhibit 3 at 8-9 (Section 5).

In addition to the required contributions and the charges for late-paid contributions, employers were required to pay surcharges to the Fund as a result of the Fund's "critical status" in 2009 through 2013. Declaration ¶ 12. Because of its critical status, the Fund established a Rehabilitation Plan, in accordance with the Pension Protection Act of 2006, which imposed surcharge payments equal to five percent of an employer's contributions in November 2009, and 10 percent of its contributions for each month beginning in December 2009. Declaration ¶ 13; Complaint, Exhibit 4; *see generally* 29 U.S.C. § 1085. Under the statute, failures to pay these surcharges are treated as delinquent contributions. § 1085(e)(7)(B). Defendant was notified of the Fund's critical status, as well as the Rehabilitation Plan and required surcharges, through annual letters. Declaration ¶¶ 12-13; Complaint, Exhibit 4; Complaint, Exhibit 5.

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[2] The Fund's policy stipulates that "[t]he obligations to pay interest, liquidated damages and fees chargeable under this policy are contractual in nature and independent of the provisions of ERISA Section 502(g)." Complaint, Exhibit 3 at 9. Section 502(g) provides, in pertinent part, that "in any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan (A) the unpaid contributions, (B) interest on the unpaid contributions, (C) an amount equal to the greater of (i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A), (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and (E) such other legal or equitable relief as the court deems appropriate." 29 U.S.C. § 1132(g)(2).

Plaintiffs contend that beginning in 2007, in contravention of the parties' agreements, Defendant failed to submit required remittance reports, failed to pay required contributions and surcharges, and failed to pay interest and liquidated damages that it had accrued on late-paid contributions. Declaration ¶ 14; *see also* Hearing Exhibit 1. Defendant "became inactive" in the Fund effective March 1, 2013. Declaration ¶ 4.

After unsuccessfully attempting to collect the outstanding amounts from Defendant, Complaint ¶ 27, Plaintiffs initiated this matter. In October 2013, the court observed that Defendant's responsive pleading was overdue, and ordered that it be filed by a date certain. 10/17/2013 Minute Order. Defendant failed to respond, and Plaintiffs sought entry of default. The Clerk of Court entered default (Document No. 6) on November 15, 2013. In accordance with an order of the court, *see* 11/25/2013 Minute Order, Plaintiffs then moved for default judgment pursuant to Federal Rule of Civil Procedure 55(b)(2).

APPLICABLE STANDARD

Rule 55 of the Federal Rules of Civil Procedure provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk must enter the party's default." Fed. R. Civ. P. 55(a). After the Clerk's entry of default, the party may then move for entry of default judgment by the court. Fed. R. Civ. P. 55(b)(2). "The determination of whether default judgment is appropriate is committed to the discretion of the trial court." *Fanning v. C & L Serv. Corp.*, 297 F.R.D. 162, 166 (D.D.C. 2013) (quoting *Int'l Painters & Allied Trades Indus. Pension Fund v. Auxier Drywall, LLC*, 531 F. Supp. 2d 56, 57 (D.D.C. 2008)) (internal quotation marks omitted). The defendant "must be considered a totally unresponsive party and its default plainly wilful, reflected by its failure to respond to the

summons and complaint, the entry of default, or the motion for default judgment." *ITPE Pension Fund v. Stronghold Sec., LLC*, No. 13-0025, 2014 WL 702580, at *1 (D.D.C. Feb. 25, 2014) (citations omitted) (quoting another source) (internal quotation marks omitted). "The standard for default judgment is satisfied where the defendant makes no request to set aside the default and no suggestion that it has a meritorious defense." *Id.* (citations omitted) (quoting another source); *see also C & L Serv. Corp.*, 297 F.R.D. at 166.

"Entry of default by the Clerk of Court establishes the defaulting party's liability for the well-pleaded allegations of the complaint." *C & L Serv. Corp.*, 297 F.R.D. at 166 (citation omitted). Unless the amount of damages is a sum certain, the court must make an "independent determination" and has "considerable latitude" in awarding a sum of damages. *Id.*; *see also ITPE Pension Fund*, 2014 WL 702580, at *1. The party moving for default judgment "must prove its entitlement to the amount of monetary damages requested using detailed affidavits or documentary evidence on which the court may rely." *C & L Serv. Corp.*, 297 F.R.D. at 166 (citation omitted). The court may also conduct a hearing in order to determine the appropriate amount of damages. *See id.* (citing Fed. R. Civ. P. 55(b)(2)).

DISCUSSION

Plaintiffs aver that "[j]urisdiction is conferred upon this Court" by 29 U.S.C. §§ 185(c), 1132(e), (f); 28 U.S.C. § 1331, and that "[v]enue is proper under" 29 U.S.C. § 1132(e)(2) because the Fund is administered in the District of Columbia. Complaint ¶¶ 2, 3. Plaintiffs filed Proof of Service (Document No. 4) indicating that the individual designated to accept service on behalf of the corporate Defendant was served with the summons in this matter on September 18, 2013. Defendant has not filed an answer to Plaintiffs' complaint, no appearance has been entered

on Defendant's behalf, and the Clerk of Court has entered default. Accordingly, the undersigned "adopts the well-pleaded allegations in the complaint as findings of fact regarding this matter." *See C & L Serv. Corp.*, 297 F.R.D. at 167. Plaintiffs are thus entitled to default judgment for Defendant's failure to remit certain monthly reports, required contributions, interest charges, liquidated damages, and surcharges. *See* Complaint ¶ 22.

With respect to damages, Plaintiffs seek monetary relief for damages that they are able to calculate, and equitable relief for the damages that they are unable to calculate. *See* Plaintiffs' Memorandum in Support of Motion for Default Judgment ("Memorandum") (Document No. 7) at 9. In support of their request, Plaintiffs have provided the declaration of Kenneth J. Anderson, Jr., the Fund's Contribution Compliance Manager, who "maintain[s] the Fund's records, determine[s] whether participating employers have satisfied their obligations to make timely contributions to the Fund, and assist[s] in efforts to collect delinquent contributions from participating employers . . . ." Declaration ¶ 2. Plaintiffs also submitted documentary exhibits in the form of copies of the parties' agreements and tables detailing the amounts owed, paid, and outstanding. The undersigned thus finds that Plaintiffs have established their entitlement to the requested relief, as outlined below.

Monetary damages for unpaid contributions, surcharges, interest, and liquidated damages

Under the Janitor I Agreement, Defendant owes $647.89 in contribution payments, $2,362.37 in surcharges, $1,039.03 in interest on late paid contributions, $2,528.12 in liquidated damages for late paid contributions, and additional interest that continues to accrue at a rate of 10 percent until payments have been made. Declaration ¶¶ 19-24; *see also* Hearing Exhibit 1.

Under the Janitor II Agreement, Defendant owes $1,813.78 in surcharges, $864.06 in interest on late paid contributions, $1,901.28 in liquidated damages for late paid contributions, and additional interest that continues to accrue until payments have been made. Declaration ¶¶ 27-31; *see also* Hearing Exhibit 1. Under the Janitor III Agreement, Defendant owes $7,163.52 in surcharges, $2,595.03 in interest on late paid contributions, $6,933.05 in liquidated damages for late paid contributions, and additional interest that continues to accrue until payments have been made. Declaration ¶¶ 34-38; *see also* Hearing Exhibit 1.[3]

Attorneys' fees and costs

Plaintiffs are also entitled to $3,216 in attorneys' fees and $450 in costs that they incurred in this matter. *See* Supplemental Memorandum at 2. The undersigned finds that Plaintiffs have demonstrated the reasonableness of their requested attorneys' fees through a declaration of their counsel, in which they set forth the rates of their counsel, and through invoices in which they outline the hours billed by their counsel. *See* Declaration of Diana M. Bardes in Support of Motion for Default Judgment and Attorneys' Fees and Costs (Document No. 11-1); *id.*, Exhibit A. In support of their request for costs, Plaintiffs provide an invoice documenting the court's filing fee and a process server fee that they incurred while litigating this matter. *See id.*, Exhibit A.

Equitable relief

Plaintiffs aver that they are unable to calculate the amount due and owing for the months

[3] There appears to be a typographical error with respect to Plaintiffs' request for interest on late paid contributions under the Janitor III Agreement. *Compare* Declaration ¶ 35, *with* Hearing Exhibit 1. The undersigned relies on the calculation illustrated in Hearing Exhibit 1.

in which Defendant failed to submit a remittance report, and thus seek an order requiring Defendant to conduct an accounting of past-due contributions, submit the outstanding remittance reports, and pay the due and owing amounts. Memorandum at 5. Plaintiffs request that the court retain jurisdiction over this matter pending Defendant's compliance with the court's order. *Id.* at 9. The undersigned finds that Plaintiffs are entitled to their requested relief. "ERISA authorizes the court to provide for other legal or equitable relief as the court deems appropriate." *Int'l Painters & Allied Trades Indus. Pension Fund v. R.W. Amrine Drywall Co.*, 239 F. Supp. 2d 26, 31 (D.D.C. 2002) (citing 29 U.S.C. § 1132(g)(2)(E)); *see also Serv. Emps. Int'l Nat'l Indus. Pension Fund v. Delta Window Cleaning Co.*, No. 12-00847, 2012 WL 3322368, at *2 (D.D.C. Aug. 14, 2012) (granting the plaintiffs' "request to enter a permanent injunction ordering defendant to submit its delinquent remittance reports, conduct an accounting on all past-due contributions, and pay all amounts due and owing to the Fund in accordance with its Agreement with the Fund and the Fund's governing documents").

Under the 2006 agreement, "Defendant failed to provide any reports or contributions for the entire effective period . . . from April 2007 through October 2009." Declaration ¶ 15. Defendant failed to submit reports and contributions under the Janitor I Agreement for October 2012, December 2012, January 2013, and February 2013. Declaration ¶ 18; *see also* Hearing Exhibit 1. Defendant failed to submit reports and contributions for August 2012, October 2012, December 2012, January 2013, and February 2013 under the Janitor II Agreement. Declaration ¶ 26; *see also* Hearing Exhibit 1. Finally, Defendant failed to submit reports and contributions under the Janitor III Agreement for October 2012, December 2012, January 2013, and February 2013. Declaration ¶ 33; *see also* Hearing Exhibit 1. For these months, Defendant owes

contributions, interest, liquidated damages, and surcharges, in accordance with the rates set forth in the respective agreements. *See* Declaration ¶¶ 16, 18, 26, 33.

CONCLUSION

For all of the foregoing reasons, it is, this 13th day of June, 2014,

RECOMMENDED that Plaintiffs' Motion for Default Judgment (Document No. 7) be **GRANTED**, and that judgment be entered against Defendant in the amount of $28,913.47, plus additional interest at a rate of 10 percent that continues to accrue until payment is received, to account for:[4]

(1) $647.89 in delinquent contributions;

(2) $4,498.12 in interest on late-paid contributions;

(3) $11,362.45 in liquidated damages;

(4) $11,339.67 in surcharges;

(5) $3,666 in attorneys' fees and costs; and it is

FURTHER RECOMMENDED that the court order Defendant to conduct an accounting of unpaid contributions, submit outstanding remittance reports, and pay the corresponding contributions and related charges that are due and owing to the Fund.

/s/
DEBORAH A. ROBINSON
United States Magistrate Judge

[4] The total amount also accounts for previous overpayments of contributions by Defendant in the amount of $101.80 and $2,498.86. Declaration ¶¶ 31, 38. In addition, the undersigned has not added the additional interest to date into the total amount, as it continues to accrue.

Within fourteen days, any party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the findings and recommendations to which objection is made and the basis of each such objection. In the absence of timely objections, further review of issues addressed herein may be deemed waived.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID H. PARKER, Jr.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 11-CV-0520 (KBJ)
BANK OF AMERICA, N.A.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Currently pending before the Court in this case are two motions: Plaintiff David H. Parker's Motion to Establish Rule 26 Expert Testimony Schedule & Amend Schedule Related to Class Certification ("Motion to Reschedule") [ECF No. 51], and Defendant Bank of America's Motion to Strike Plaintiff's Purported Expert Witnesses and to Preclude Class Certification Under Rule 23(b)(3) ("Motion to Strike") [ECF No. 52]. Both motions result from the same procedural morass, and accordingly, the Court will treat them together. For the reasons set forth below, the Court will set a new schedule for expert disclosures related to class certification and deny both pending motions as moot.

I. BACKGROUND

The instant motions arise as the result of a consent motion filed by the parties on May 1, 2013. [ECF No. 48.] That motion asked the Court to reset the deadlines for discovery related to class certification in order to "accommodate the deposition of a

witness who [was] scheduled to be deposed on May 23, 2013." *Id*. In the consent motion, the parties asked that certification-related fact discovery be closed on May 24, 2013. The parties also asked that Plaintiff's certification-related Rule 26 expert disclosures be due that same day, on May 24, 2013, with Defendant's certification-related expert disclosures to follow on July 26, 2013, and certification-related expert discovery to close on August 23, 2013. The Court granted the motion by minute order on May 6, 2013.

On May 24, 2013, the same day that fact discovery closed and Plaintiff's expert disclosures were due, Plaintiff served a document on Defendant entitled "Plaintiff's Expert Designations." The two-page document identified four expert witnesses whom Plaintiff expected to testify regarding class certification, along with the CV of each witness and a one-sentence description of the subject matter on which each witness was expected to testify. On June 18, 2013, Defendant filed the Motion to Strike in which Defendant maintained that Plaintiff had failed to comply with the requirements for expert disclosure set out by Fed. R. Civ. P. 26(a)(2)(B), and that, therefore, by operation of Fed. R. Civ. P. 37(c)(1), Plaintiff's experts should be precluded from providing testimony. (Motion to Strike at 4-7.) Defendant further argued that, because Plaintiff could not prevail on class certification without expert opinions and testimony, the Court should summarily deny class certification. (*Id*. at 7-9.) Finally, Defendant contended that, at a minimum, the Court should not require that Defendant's certification-related expert disclosures be submitted on July 26, 2013 (in accordance with the then-existing schedule) because Plaintiff's disclosures did not provide enough information for Defendant's experts to prepare a meaningful response. (*Id*. at 9.)

On the same day that Defendant filed its Motion to Strike (June 18, 2013), Plaintiff also filed a motion asking the Court to enter a new schedule giving it additional time to prepare expert reports. Plaintiff noted that it could not have reasonably been expected to prepare such reports by May 24, when fact discovery had closed only the day before. (Motion to Reschedule at 2.) Plaintiff also noted that, despite the May 24 deadline for fact discovery, Defendant had produced certain documents after that deadline. (*Id*.)

II. ANALYSIS

Expert disclosures are governed by Fed. R. Civ. P. 26(a)(2). Under that Rule, "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705."[1] Rule 26(a)(2)(B) further mandates that such disclosure "must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case." Moreover, "[t]he report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

[1] FRE 702, 703, and 705 govern the use of testimony provided by experts.

(vi) a statement of the compensation to be paid for the study and testimony in the case."

Fed R. Civ. P. 26(a)(2)(B)(i)-(vi). Plaintiff's May 24 "Expert Designations" plainly fail to satisfy the requirements of Rule 26(a)(2). Plaintiff has provided no experts reports of the type required by Rule 26(a)(2)(B). In fact, apart from the names, titles, and CVs of its experts, and a broad statement of the subject area in which it expects them to testify, Plaintiff has provided no information about them at all. It appears to the Court that Plaintiff has confused the requirements of Rule 26(a)(1), which requires disclosure of the names of individuals likely to have discoverable information (along with the subject matter of such information) for the purpose of *fact* discovery, with the requirements of Rule 26(a)(2), which provides the disclosure requirements for *expert* discovery, as outlined above.

Fed. R. Civ. P. 37(c)(1) details the remedy for inadequate disclosures under Rule 26(a): "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Defendant urges the Court to preclude Plaintiff from offering any expert testimony on the topic of class certification pursuant to this Rule; however, the Court retains "broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless for purposes of a Rule 37(c)(1) exclusion analysis." *DAG Enters. v. ExxonMobil Corp.*, 2007 U.S. Dist. LEXIS 102675 (D.D.C. Mar. 30, 2007) (quoting *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003)). In *DAG*, this Court (relying on *Southern States*) identified five factors to be considered in determining whether a party's failure to

comply with Rule 26 was "substantially justified or harmless": (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the case; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence. *DAG*, 2007 U.S. Dist. LEXIS 102675 at *4.

Weighing these factors in the context of the instant case, the Court finds that Plaintiff's neglect of the proper Rule 26 procedures was harmless. In regard to the first three factors, there is no surprise given that Plaintiff has already submitted a list of experts upon which he intends to rely, and any disruption can be cured simply by resetting the schedule to (1) allow Plaintiff time to submit his Rule 26 expert disclosures properly, and (2) permit defendant time to prepare an adequate response. Regarding the fourth factor, Defendant itself acknowledges that Plaintiff's class action allegations cannot survive without support from expert testimony (*see* Motion to Strike at 7-9), and there is no question that such evidence is important to the case. Finally, although Plaintiff has failed to provide a compelling explanation for its failure to follow Rule 26 in the first instance (the fifth factor), the Court finds that the overall *DAG* analysis still augurs in favor of allowing Plaintiff's experts to testify.

Accordingly, it is hereby **ORDERED** that

1. Plaintiff shall serve all expert disclosures related to class certification in accordance with Fed. R. Civ. P. 26(a)(2) by **August 23, 2013**;
2. Defendant shall serve its expert disclosures in rebuttal by **October 23, 2013**;
3. All certification-related expert discovery shall be completed by **November 22, 2013**;

4. The parties shall submit a proposed briefing schedule for class certification by **November 27, 2013**; and
5. In light of the new schedule set by the Court, both pending motions are **DENIED** as moot, and the Court's July 23, 2013 Minute Order staying discovery related to class certification is **VACATED**.

Date: July 24, 2013

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and THE DISTRICT OF COLUMBIA, *ex rel.* JANEEN CARRINGTON,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 12-CV-1775 (KBJ)
HOUSE OF RUTH,	)	**FILED UNDER SEAL**
Defendant.	)	

MEMORANDUM OPINION & ORDER

DISMISSING THE CASE PURSUANT TO 31 U.S.C. § 3730(B)(1) WITHOUT PREJUDICE TO THE UNITED STATES

On November 11, 2012, the plaintiff brought this action on behalf of the United States and the District of Columbia, seeking to recover damages arising from false claims made by the defendants in violation of the Federal False Claims Act, 31 U.S.C. § 3729, and the District of Columbia False Claims Act, D.C. Code §§ 2-381.01. On June 27, 2013, plaintiff filed a notice of voluntary dismissal. (ECF No. 4.)

Such an action may only be dismissed if the court and the Attorney General give written consent to the dismissal and their reasons for consenting. 31 U.S.C. § 3730(b)(1). On June 27, 2013, the United States gave its consent to the dismissal of the action, but it failed to articulate its reasons for consenting as required by the statute. (ECF No. 5.)[1] Accordingly, on July 1, 2013, the court ordered the United States to show cause why the case should be dismissed. (*See* Minute Order of July 1, 2013.) On July 8, 2013, the United States responded that, along with the District of Columbia, it had investigated the plaintiff's

[1] The United States' notice of consent to dismissal provided that the District of Columbia similarly consented to dismissal without prejudice to the District of Columbia. (ECF No. 5.)

allegations and deemed that it was not in the interest of the government to devote resources to pursue the litigation and informed plaintiff's counsel that it planned to decline to intervene in the matter. (U.S. Resp. to Order to Show Cause, ECF No. 7, at 1-2.)

Having now reviewed and considered plaintiff's voluntary dismissal and the government's reasons for consenting to the dismissal, the court concludes that the requirements of 31 U.S.C. § 3730(b)(1) have been satisfied. Accordingly, the case is hereby dismissed without prejudice to the United States or the District of Columbia. Accordingly, it is hereby

ORDERED that the case is dismissed.

Date: July 10, 2013

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROWLAND J. MARTIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 12-1281 (KBJ)**
	)	
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Presently before the Court are defendants G&A Outsourcing IV, LLC, ("G&A") and TALX Corporation's ("TALX") motions for reconsideration of the Court's decision to permit the *pro se* plaintiff in this employment discrimination action to file a second supplemental complaint.[1] Approximately four months after service of the original complaint in this case, plaintiff filed a second supplemental complaint along with a request for leave to file the new pleading. Second Suppl. Compl. (ECF No. 28); Pl.'s Mot. (ECF No. 25), at 5.[2] The Court summarily granted plaintiff leave to file this second supplemental complaint, *see* Minute Order dated April 24, 2013 ("Let this be filed"), and defendants G&A and TALX now object to the filing on the grounds that the new pleading "contains no factual allegations relevant to

[1] *See* Minute Order of Apr. 24, 2013 (construing defendants' responses in opposition to plaintiff's ECF No. 25 as motions for reconsideration of the Court's grant of leave to file a supplemental complaint).

[2] Neither of these pleadings has a descriptive title. Plaintiff's second supplemental complaint is formally titled "Supplement (Corrected) to the Amended Complaint." Plaintiff's request for leave to file a second supplemental complaint is formally titled "Plaintiff's Objections to Defendant Equal Employment Opportunity Commission's Affidavit Evidence and 'Statement of Undisputed Material Facts' and Rule 56(f) Motion to Deny Summary Judgment"). For the reader's convenience, these documents are hereinafter referenced and cited as "Second Suppl. Compl." and "Pl.'s Mot.," respectively.

[plaintiff's] claims that occurred after his Original Complaint was filed on July 30, 2012, or after his first Supplemental Complaint was filed on December 12, 2012." Defs.' Mots. at 3-4.[3] Moreover, the defendants argue that, to the extent the plaintiff's second supplemental complaint was intended to be filed as an "amended" complaint, the plaintiff did not file "a proper pleading with the Court nor has he explained to the Court any legal or factual basis for [amendment]." Defs.' Mots. at 3-4. The Court recognizes that the second supplemental complaint varies from the original in the some of the facts and counts alleged, and also that the second supplemental complaint is largely based upon facts that predate the original complaint. Nevertheless, the Court is not persuaded to reverse its "let this be filed" determination.

Under Federal Rule of Civil Procedure 54(b), an interlocutory judgment—such as the grant of leave to file the second supplemental complaint in this case—may be reconsidered "as justice requires." *DeGeorge v. United States*, 521 F. Supp. 2d 35, 39 (D.D.C. 2007); *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005). It is well established that "asking 'what justice requires' amounts to determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." *Cobell*, 355 F. Supp. 2d at 539.

Nothing in the defendants' submissions establishes that reconsideration is necessary in this case. For example, the defendants do not contend that, in granting leave to file, the Court misunderstood the plaintiff's request or made a decision beyond the adversarial issues presented. *See DeGeorge*, 521 F. Supp. 2d at 39. Nor do the defendants make any assertion that the law has changed or that they will be harmed in any way as a result of the filing of the supplemental pleading. *See DeGeorge*, 521 F. Supp. 2d at 39. Indeed, to the contrary, the defendants argue that most of the additional facts alleged in the second supplemental complaint are "based on

[3] The briefs filed by defendants G&A and TALX (ECF Nos. 29, 30) are identical in substance. They are hereinafter referenced and cited as "Defs.' Mots."

precisely the same transactions, occurrence, and events" as were set forth in the initial complaint. Defs.' Mots. at 3. This means, of course, that the defendants were already on notice of the events alleged in the new complaint, and that granting leave to file the second supplemental complaint has not harmed defendants due to surprise, inability to defend, or any other reason.

It is also significant that a grant of leave to supplemental or amend a pleading is purely discretionary, and that such leave is ordinarily "freely given." *Wildearth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008) (citing *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996)). Thus, any contention that the court applied the wrong legal standard, or that the grant of leave to file a second supplemental complaint was itself improper, is meritless. *See DeGeorge*, 521 F. Supp. 2d at 41 (leave to amend is proper when an amended complaint cures deficiencies or alleges new facts or arguments that would give rise to a cognizable cause of action). Moreover, when one views the grant of leave to file the second supplemental complaint in this case in light of the fact that the plaintiff is a *pro se* litigant, the propriety of the court's exercise of its discretion to permit the filing here becomes even more evident. *See Stephenson v. Langston*, 205 F.R.D. 21, 23 (D.D.C. 2001) (citing *Moore v. Agency for Int'l Dev.*, 994 F.2d 874 (D.C. Cir. 1993)); *see also Wyant v. Crittendon*, 113 F.2d 170, 175 (D.C. Cir. 1940) (leave to amend the complaint is particular appropriate when a plaintiff proceeds *pro se*).

For these reasons, the Court hereby DENIES both defendants' requests for reconsideration of the Court's grant of leave to file the second supplemental complaint (ECF Nos. 29 and 30), and the plaintiff's second supplemental complaint (ECF No. 28) shall stand. Any defendant who wishes to file a responsive pleading, or to supplement a responsive pleading

already filed in this matter, shall do so within 21 days of the issuance of this opinion (*e.g.*, by July 1, 2013).

SO ORDERED.

Date: June 10, 2013

/s/
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LING YUAN HU, Plaintiff, v. DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, OFFICE OF DIRECTOR FOR NATIONAL INTELLIGENCE, DEPARTMENT OF STATE, NATIONAL SECURITY AGENCY, and UNKNOWN NUMBER OF OFFICIALS, AGENTS, AND CONTRACTORS OF DOD, CIA and FBI, Defendants.	**Civil Action No. 1:12-CV-1640 (KBJ)**

MEMORANDUM OPINION AND ORDER

Plaintiff *pro se* Ling Yuan Hu has moved, pursuant to Federal Rules of Civil Procedure 59 and 60, for reconsideration of the Court's Memorandum Opinion and Order of May 13, 2013, which dismissed her claims as patently insubstantial. For the reasons stated below, her motion is DENIED.

A motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) is discretionary, and "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quotation marks omitted); see also Messina v. Krakower, 439 F.3d 755, 758 (D.C. Cir. 2006). "Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving

party establishes extraordinary circumstances." Niedermeier v. Office of Baucus, 153 F. Supp. 2d 23, 28 (D.D.C. 2001).

Motions for reconsideration brought under Fed. R. Civ. P. 60(b) are also committed to the district court's discretion. Summers v. Howard Univ., 374 F.3d 1188, 1192 (D.C. Cir. 2004). Rule 60(b) provides, in pertinent part, that "the court may relieve a party from a final judgment" for "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial," or "(6) any other reason that justifies relief."

For motions under Rule 59(e) or 60(b)(2) on the ground of newly-discovered evidence, the evidence must be, among other things, "admissible and . . . of such importance that it probably would have changed the outcome." Almerfedi v. Obama, -- F. Supp. 2d --, 2012 WL 5508383, at *2 (D.D.C. Oct. 26, 2012) (quotation marks omitted). Relief under Rule 60(b)(6) "is appropriate only in 'extraordinary circumstances.'" Kramer v. Gates, 481 F.3d 788, 790 (D.C. Cir. 2007).

Plaintiff's motion does not provide any basis in law or fact for granting the motion under either Rule. The "newly-discovered evidence" she presents in her motion consists largely of allegations of the existence of "28 Mind Control US patents from 1956 through 2003," as well as "evidence[ ] to this court that US military Non-lethal weapon programs have lots of these new technology so called 'directed energy weapons' using radio frequency, laser and sound waves." The presentation of such allegations does not constitute an extraordinary circumstance, nor is it of such importance that it probably would have changed the outcome. Accordingly, Plaintiff's Motion for Reconsideration (Dkt No. 24) is DENIED.

/s/
KETANJI BROWN JACKSON
United States District Judge

DATE: May 16, 2013

11/30/2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HELGA SUAREZ CLARK,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 20-3111 (UNA)
	)	
	)	
PERU REPUBLIC *et al*.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter, brought *pro se*, is before the Court on review of Plaintiff's Complaint, ECF No. 1, and application to proceed *in forma pauperis*, ECF No. 2. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer, mount an adequate defense, and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). It also assists the Court in determining whether it has jurisdiction over the subject matter.

Plaintiff is a resident of Peru, who has sued the Republic of Peru and Peruvian officials for sweeping misconduct. The 133-page pleading is neither short nor plain. A complaint, such as this, "that is excessively long, rambling, disjointed, incoherent, or full of irrelevant and confusing material will patently fail [Rule 8(a)'s] standard," as will "a complaint that contains an untidy assortment of claims that are neither plainly nor concisely stated, nor meaningfully distinguished from bold conclusions, sharp harangues and personal comments." *Jiggetts v. District of Columbia*, 319 F.R.D. 408, 413 (D.D.C. 2017), *aff'd sub nom*. *Cooper v. District of Columbia*, No. 17-7021, 2017 WL 5664737 (D.C. Cir. Nov. 1, 2017) (internal quotation marks and citations omitted). Most importantly, plaintiff's convoluted allegations do not establish jurisdiction under the Foreign Sovereign Immunities Act, which is the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 474 (D.C. Cir. 2007) (internal quotation marks and citation omitted). Consequently, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

_____/s/_____
KETANJI BROWN JACKSON
United States District Judge

Date: November 30, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VICTOR SALINAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 20-2192 (UNA)
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Victor Salinas' application to proceed *in forma pauperis* and a *pro se* civil complaint signed by Victor Salinas and Stephanie Calloway. The application will be granted, and the complaint will be dismissed for lack of subject matter jurisdiction.

Salinas and Callaway identify themselves as members of the Fabricant Victory Committee, which "promote[s] the election of Danny Fabricant to the House of Representatives for the 30th Congressional District of California." Compl. at 2. Danny Fabricant is an incarcerated inmate who is presently in the custody of the Federal Bureau of Prisons.[1] *See United States v. Fabricant*, No. CR 03-01257-RSWL-1, 2015 WL 12857301, at *1 (C.D. Cal. Nov. 18, 2015) ("Danny Joseph Fabricant . . . is currently serving a life sentence after a jury convicted him of five counts of conspiracy to distribute, distribution of, and possession with the intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841 and 846[.]"). Plaintiffs' complaint refers to the definition of "candidate" set forth in Title 52 of the United States Code:

[1] According to the Bureau of Prisons' Inmate Locator, Fabricant is designated to the United States Penitentiary in Lompoc, California.

> The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—
>
> (A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or
>
> (B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

52 U.S.C. § 30101(2). Plaintiffs alleges that Fabricant registered with the Federal Election Commission as a candidate for office and that the Commission disqualified him as a candidate because he had not received contributions or made expenditures exceeding $5,000. *See id.* at 3 ¶¶ 3-5. Plaintiffs contend that the $5,000 limit set forth in 52 U.S.C. § 30101 is unconstitutional, *see id.* at 4 ¶ 11, and they demand a declaratory judgment, *see id.* at 4.

"Article III of the United States Constitution limits the judicial power to deciding 'Cases and Controversies.'" *In re Navy Chaplaincy*, 534 F.3d 756, 759 (D.C. Cir. 2008) (quoting U.S. Const. art. III, § 2), *cert. denied*, 556 U.S. 1167 (2009). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 762 (D.C. Cir. 2020) (citations and internal quotation marks omitted). A party has standing for purposes of Article III if he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 763 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Neither plaintiff is a candidate for office, and it is unclear whether or how plaintiffs have sustained harm because the Commission disqualified Fabricant as a candidate for office. "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see Olumide v. U.S. Attorney Gen.*, No. 20-5135, 2020 WL 6600952, at *1 (D.C. Cir. Oct. 19, 2020) (per curiam) (affirming dismissal of "claim that it is unlawful for a member of Congress to change political parties, because he has identified no particularized injury to himself resulting from such a practice"); *Lance v. Cruz*, No. 16-CV-1224, 2016 WL 1383493, at *2 (E.D.N.Y. Apr. 7, 2016) (rejecting argument that particular presidential candidate's "presence on the ballot will somehow damage [plaintiff's] rights as a voter . . . constitute[s] a sufficiently particularized injury to establish standing under Article III").

Because plaintiffs fail to demonstrate standing, the Court lacks subject matter jurisdiction over their claim. Therefore, the complaint must be dismissed. An Order consistent with this Memorandum Opinion is issued separately.

DATE: November 27, 2020

/s/
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP A. BRALICH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 20-3248 (UNA)
	)	
FOX NEWS NETWORK, LLC, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's application to proceed *in forma pauperis*, his *pro se* civil complaint and motion for appointment of counsel.

Generally, the plaintiff laments the "hate speech" and derogatory language used by the current President of the United States, national political parties, and media outlets when speaking of the indigent, the disabled, and other members of this society who may not be belong to a "recognized" minority group, since the administration of former President Ronald Reagan. The plaintiff considers himself a target of such speech. He demands an award of $24 million and injunctive relief.

The Court has reviewed the plaintiff's complaint, keeping in mind that complaints filed by *pro se* litigants are held to less stringent standards than those applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even *pro se* litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand

for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claim being asserted, sufficient to prepare a responsive answer, to prepare an adequate defense and to determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

This complaint fails to meet the minimal pleading standard set forth in Rule 8(a). Its factual allegations are so broad and so vague that the pleading does not give the named defendants fair notice of the claims asserted against them. An Order consistent with this Memorandum Opinion is issued separately.

DATE: November 19, 2020

/s/
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WAYLAND DEE KIRKLAND,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 20-2945 (UNA)
	)	
	)	
WILLIAM BARR *et al*.,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

Petitioner, appearing *pro se*, has filed a Petition for Writ of Mandamus and an application to proceed *in forma pauperis*. The Court will grant the application and dismiss this action pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) (requiring dismissal of a case upon a determination that the complaint fails to state a claim upon which relief may be granted).

A writ of mandamus is available to compel an "officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." 28 U.S.C. § 1361. Mandamus actions are reserved for "extraordinary situations." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (internal quotation marks omitted). Mandamus relief is warranted where "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (citations and internal quotation marks omitted). The "word 'duty' in § 1361 must be narrowly defined, and [the] legal grounds supporting the government's duty to [petitioner] must 'be clear and compelling.' " *In re Cheney*, 406 F.3d at 729 (citations omitted). The petitioner bears the burden of showing that his right to the writ is "clear and indisputable." *Id*. Even if the

requirements for mandamus are present, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Hawsawi*, 955 F.3d 152, 156 (D.C. Cir. 2020) (internal quotation marks and citation omitted).

Petitioner resides in Fairfield Bay, Arkansas. He brings this action "to expose and end a conspiracy against rights pursuant to 18 U.S.C. § 241" of him and his "kinfolk" by "Kansas judges and other state officials and agencies[.]" Pet., ECF No. 1 at 1. Reading the prolix petition liberally, the only discernible claim seeks to involve the federal government, through named respondent U.S. Attorney General William Barr, in paternity proceedings in Kansas courts. *See id*. at 15-32 (requested relief). But the United States Attorney General has absolute discretion in deciding whether to investigate claims for possible criminal or civil prosecution, and such decisions generally are not subject to judicial review. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480-81 (D.C. Cir. 1995). It is settled, moreover, that "courts do not have authority under the mandamus statute to order any government official to perform a discretionary duty." *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). Consequently, this case will be dismissed with prejudice. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (A dismissal with prejudice is warranted upon determining "that 'the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'") (quoting *Jarrell v. United States Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985) (other citation omitted)). A separate order accompanies this Memorandum Opinion.

/s/
KETANJI BROWN JACKSON
United States District Judge

Date: November 16, 2020

11/16/2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DALE B. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 20-3072 (UNA)
	)	
MITCH A. MCCONNELL, JR.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff, appearing *pro se*, has filed a "Petition for a Redress of Grievances Against the Government," and an application to proceed *in forma pauperis*. The application will be granted, and the case will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)(iii) (requiring dismissal of a case upon a determination that the complaint fails to state a claim upon which relief may be granted, is frivolous, or seeks monetary relief from an immune defendant).

Plaintiff is a resident of Harrison, Arkansas, who has sued United States Senator Mitch McConnell for positions he has taken as Senate Majority Leader. He claims that McConnell exceeded his authority by "passing a Covid-19 relief Bill into law with blanket immunity abridging First Amendment rights to legal redress[.]" Pet. ¶ 35. Plaintiff seeks monetary damages exceeding $10 million and an order compelling "defendant to repeal any and all laws that he passed that are ultra vires to harm Adams." *Id*. at 11.

The Petition is premised on McConnell's conduct as Senate Majority Leader, for which he enjoys absolute immunity under the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) ("The Clause confers on Members of Congress immunity for all actions within the legislative sphere,

even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes") (cleaned up); *cf*. Pet. ¶ 7 (alleging that McConnell "has shown a pattern of practice to violate the U.S. Constitution, his oath of office and ethical norms to cause plaintiff Dale B. Adams irreparable harm by passing laws that abridge First Amendment rights"); *id*. ¶ 16 ("Defendant United States Senator Mitch A. McConnell Jr., has held our devastated economy, the destitute citizens and other honorable members of Congress hostage who try to abide by their oath of office serving their constituents, while Senator McConnell will not agree to pass any Covid-19 relief Bill into law without including a clause for liability reform ("immunity")); *id*. ¶ 26 ("undue delay for passing Covid-19 emergency relief by U.S. Senator Mitch A. McConnell Jr., is causing Adams and millions of other citizens a financial hardship").

An "*in forma pauperis* complaint is properly dismissed as frivolous . . . if [as here] it is clear from the face of the pleading that the named defendant is absolutely immune from suit on the claims asserted." *Crisafi v. Holland* 655 F.2d 1305, 1308 (D.C. Cir. 1981). To the extent that McConnell is not immune, the Petition is at most "a generalized grievance" warranting no "exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Consequently, this case will be dismissed with prejudice. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (A dismissal with prejudice is warranted upon determining "that 'the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'") (quoting *Jarrell v. United States Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985) (other citation omitted)). A separate order accompanies this Memorandum Opinion.

_____/s/_____
KETANJI BROWN JACKSON
United States District Judge

Date: November 16, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON WAYNE NAILLIEUX, Plaintiff, v. UNITED STATES OF AMERICA CHAIN OF COMMAND, Defendant.	))))))))))	Civil Action No. 20-3265 (UNA)

MEMORANDUM OPINION

The trial court has the discretion to decide whether a complaint is frivolous, and such finding is appropriate when the facts alleged are irrational or wholly incredible. *See Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact."). Having reviewed the complaint and its exhibits carefully, the Court concludes that what factual contentions are identifiable are baseless and wholly incredible.

The Court will grant plaintiff's application to proceed *in forma pauperis* and will dismiss the complaint as frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). An Order consistent with this Memorandum Opinion is issued separately.

DATE: November 16, 2020

/s/
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOV - 6 2020

JESSE BOYD,

Petitioner,

v.

LENNARD JOHNSON,

Respondent.

Civil Action No. 20-3167 (UNA)

MEMORANDUM OPINION

Criminal charges against petitioner Jesse Boyd are pending in the Superior Court of the District of Columbia. *See* Pet. ¶ 6. Petitioner currently is detained at the D.C. Jail pursuant to D.C. Code § 23-1322. *See id.* ¶¶ 6, 13. He explains that his last court appearance was on February 14, 2020, for a preliminary hearing, *see id.* ¶ 6, and each subsequent hearing date has been continued, *see id.* ¶ 13, due to the coronavirus pandemic. According to petitioner, not only is he detained for a "term . . . beyond the statutory protections of the expedited calendar dictated by [D.C. Code §] 23-1322(h)(1)," but also is at risk for exposure to the coronavirus at the D.C. Jail. *Id.* ¶ 8. The presiding judge denied his emergency motions for release from custody on April 20, 2020, July 17, 2020, and September 29, 2020, *see id.* ¶¶ 7-9, and now before the Court is petitioner's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241. Petitioner demands immediate release from the D.C. Jail and placement on home confinement. *See* Pet. ¶ 15.

"[A] federal court may dismiss an action when there is a direct conflict between the exercise of federal and state jurisdiction and considerations of comity and federalism dictate that

the federal court should defer to the state proceedings." *Hoai v. Sun Refining and Marketing Co., Inc.*, 866 F.2d 1515, 1517 (D.C. Cir. 1989) (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)). This is such an action. *See Miranda v. Gonzales*, 173 F. App'x 840 (D.C. Cir.) (per curiam) ("It is well-settled . . . that a court will not act to restrain a criminal prosecution if the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.") (citation omitted), *cert. denied*, 549 U.S. 889 (2006); *see Reed v. Wainwright*, No. 10-CV-0807, 2010 WL 1980170, at *1 (D.D.C. May 17, 2010) ("This Court not only lacks the authority to overturn a decision of a Superior Court judge, but also refrains from interfering with ongoing Superior Court proceedings."); *Smith v. Holder*, No. 14-131, 2014 WL 414292, at *1 (D.D.C. Jan. 30, 2014), *aff'd*, 561 F. App'x 12 (D.C. Cir. June 16, 2014) (per curiam) (noting appellant's failure to "show[] that the district court erred in dismissing his challenge to pending District of Columbia criminal proceedings under the abstention doctrine of *Younger v. Harris*").

Petitioner may raise – and presumably already has raised – any constitutional claim he believes he has regarding his ongoing detention. Because petitioner remains in custody by order of the Superior Court, this Court declines to act. *See Lewis v. Senior Judges*, 75 F. Supp. 3d 201, 203 (D.D.C. 2014). The Court will grant petitioner's application to proceed *in forma pauperis*, deny the habeas petition without prejudice, and dismiss this civil action without prejudice. An Order accompanies this Memorandum Opinion.

DATE: November 6, 2020

/s/
KETANJI BROWN JACKSON
United States District Judge

FILED
NOV - 5 2020
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN BRADIN *et al.*,

Petitioner,

v.

MICHAEL CARVAJAL *et al.*,

Respondents.

Civil Action No. 20-3104 (UNA)

MEMORANDUM OPINION

Petitioners, appearing *pro se*, are federal prisoners who are housed in at least two separate Bureau of Prison facilities, including Forrest City Federal Correctional Institution in Arkansas and Hazelton United States Penitentiary in Bruceton Mills, West Virginia. *See* Case Caption. They have filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241, styled as an "emergency class action petition due to life threatening conditions." Pet. at 1, ECF No. 1. Lead Petitioner John Bradin seeks to proceed *in forma pauperis* "on behalf of class." IFP Mot., ECF No. 2. For the following reasons, the Court will deny Bradin's motion and dismiss this case for want of jurisdiction.

"Subject to subsection (b) [governing prisoner civil actions], any court of the United States may authorize the commencement [or] prosecution" of a civil action "without prepayment of fees" based on information set forth in an IFP motion. 28 U.S.C. § 1915(a). In a *pro se* action such as this, however, each petitioner may "bring" his own case, *id.* § 1915(a)(2), but he can neither prosecute the claims of other individuals nor act as a class representative. *See* 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel[.]"); *U.S. ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003), *aff'd sub nom. Rockefeller ex rel. U.S. v. Washington TRU Solutions LLC*,

No. 03–7120, 2004 WL 180264 (D.C. Cir. Jan. 21, 2004) ("[A] class member cannot represent the class without counsel, because a class action suit affects the rights of the other members of the class.") (citation omitted)).

Even if Bradin were proceeding solely for himself, the instant petition is filed in the wrong court. A petitioner's immediate custodian is the proper respondent to a habeas petition. *Rumsfeld v. Padilla*, 542 U.S. 426, 439 (2004); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039 (D.C. Cir. 1998). And this "district court may not entertain a habeas petition involving present physical custody unless the respondent custodian is within its territorial jurisdiction." *Stokes v. U.S. Parole Comm'n*, 374 F.3d 1235, 1239 (D.C. Cir. 2004). Consequently, this case will be dismissed. *See Day v. Trump*, 860 F.3d 686, 691 (D.C. Cir. 2017) (affirming dismissal for want of jurisdiction where the District of Columbia was not "the district of residence of [petitioner's] immediate custodian for purposes of § 2241 habeas relief"). A separate order accompanies this Memorandum Opinion.

/s/
KETANJI BROWN JACKSON
United States District Judge

Date: November 5, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOV - 5 2020

JERRY E. ROBERTSON, Plaintiff, v. JEFF. CO. ATTY'S OFFICE, Defendant.	)	Civil Action No. 20-3168 (UNA)

MEMORANDUM OPINION

This matter is before the Court on consideration of plaintiff's application to proceed *in forma pauperis* and his *pro se* complaint. The plaintiff's claims pertain to defendant's efforts to collect unpaid child support.

Federal district courts have jurisdiction in civil actions arising under the Constitution, laws or treaties of the United States. *See* 28 U.S.C. § 1331. In addition, federal district courts have jurisdiction over civil actions where the matter in controversy exceeds $75,000, and the suit is between citizens of different states. *See* 28 U.S.C. § 1332(a). The complaint does not articulate a claim arising under the United States Constitution or federal law; therefore, the plaintiff does not demonstrate federal question jurisdiction. While amount in controversy allegedly exceeds $75,000, because the parties are citizens of Kentucky, the plaintiff fails to establish diversity jurisdiction. Furthermore, because none of the parties appear to reside in the District of Columbia, and because none of the events giving rise to the plaintiff's claims occurred here, it is doubtful that this district is the proper venue for resolution of the plaintiff's claims.

The Court will grant the plaintiff's application to proceed *in forma pauperis* and dismiss the complaint without prejudice for lack of subject matter jurisdiction. An Order is issued separately.

DATE: November 4, 2020

/s/
KETANJI BROWN JACKSON
United States District Judge

FILED
NOV - 4 2020
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONNA M. CONNOR,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA *et al.*,

Defendants.

Civil Action No. 20-3014 (UNA)

MEMORANDUM OPINION

Plaintiff, appearing *pro se*, has submitted a Complaint and an application to proceed *in forma pauperis*. The Court will grant the application and will dismiss this case for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring dismissal of an action "at any time" the Court determines that it lacks subject matter jurisdiction).

Plaintiff is a Virginia resident who has sued the Commonwealth of Virginia. She alleges that her trust in Virginia's justice system is broken "due to an inability to grant for the last twenty years relief, correction, and a right to feel protected when informing of crimes within my state and federal court cases and complaints." Compl. at 1. Plaintiff therefore brings this action "before the United States District Court in DC under the fourteenth, thirteenth and ninth amendments[.]" *Id.* A generous reading of the complaint suggests that Plaintiff is dissatisfied with state court proceedings in which she was a party. *See id.* at 15 ("The Commonwealth of Virginia legal and justice system has allowed assault after assault designed to hinder and block my right to succeed, to financial prosperity. The awful decisions by the Commonwealth of Virginia judges covering many issues in my court cases such as employment, stalking, serious violations of my privacy,

unlawful entry, poisons of food, medicines and persons, prevalent theft, damage to property and just an all-out bold brazen assault to destroy has left me mentally and physically damaged.").

The Eleventh Amendment to the U.S. Constitution immunizes a State from suit in federal court, unless immunity is waived.[1] Plaintiff has not come close to demonstrating Virginia's waiver of immunity. *See Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008) ("[T]he party claiming subject matter jurisdiction . . . has the burden to demonstrate that it exists.") (citation omitted)). Furthermore, this federal district court lacks authority to review the decisions of the Virginia courts. *See United States v. Choi*, 818 F. Supp. 2d 79, 85 (D.D.C. 2011) (district courts "generally lack[] appellate jurisdiction over other judicial bodies, and cannot exercise appellate mandamus over other courts.") (citing *Lewis v. Green*, 629 F. Supp. 546, 553 (D.D.C. 1986); *accord Atchison v. U.S. Dist. Courts*, 240 F. Supp. 3d 121, 126 n.6 (D.D.C. 2017) ("It is a well-established principle that a district court can neither review the decisions of its sister court nor compel it to act."). Plaintiff's recourse lies, if at all, in the Court of Appeals of Virginia and ultimately in the United States Supreme Court. *See* 28 U.S.C. § 1257; *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 75 (D.C. Cir. 1997) (Section 1257 "channels directly to the Supreme Court all federal review of judicial decisions of state (and D.C.) courts of last resort") (parenthesis in original)). Consequently, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

/s/
KETANJI BROWN JACKSON
United States District Judge

DATE: November 4, 2020

[1] The Eleventh Amendment provides in pertinent part: "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. It is long settled that this amendment applies equally to suits brought by citizens against their own states. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 08 2019
Clerk, U.S. District and Bankruptcy Courts

Fulvio Flete-Garcia,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 19-2547 (UNA)
	)	
United States of America,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This matter, brought *pro se* by a federal prisoner, is before the Court on review of his "Petition for Declaratory Judgment" under 28 U.S.C. § 2201, and application for leave to proceed *in forma pauperis* (IFP). The Court will grant the *in forma pauperis* application and dismiss the case pursuant to 28 U.S.C. § 1915A (requiring immediate dismissal of a prisoner's case upon a determination that the complaint or petition fails to state a claim upon which relief may be granted).

A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Declaratory Judgment Act creates no cause of action but rather a remedy "[i]n a case of actual controversy within [a federal court's] jurisdiction[.]" 28 U.S.C. § 2201. Because the Act is not "'an independent source of federal jurisdiction,' . . . 'the availability of [declaratory] relief presupposes the existence of a judicially remediable right'" derived from some other source. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (quoting *C & E Servs., Inc. of Washington v. D.C. Water & Sewer Auth.*, 310 F.3d

197, 201 (D.C. Cir. 2002) (other citation omitted) (alteration in original)). In other words, to obtain a declaratory judgment, petitioner must allege a "cognizable cause of action" over which this Court has jurisdiction. *Id.*

In this case, petitioner seeks "a legal declaration . . . with respect to the legality and validity of [his] court appearances on June 11, 2015 related to case No. 1:15-CR-10139PBS-1." Pet. at 2; *see id.* at 5. Because the criminal case was prosecuted in the United States District Court for the District of Massachusetts, *see* Pet. Ex. B, jurisdiction is lacking over this aspect of the petition. Petitioner contends that the criminal case "is an integrated component" of a Freedom of Information Act case that is pending in this Court, *Flete-Garcia v. United States Marshals Service*, No. 18-cv-02442 (RDM). Pet. at 2. But he does not explain, and the Court does not fathom, how that connection entitles him to declaratory relief in a wholly separate civil action. Consequently, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: September 30, 2019

United States District Judge

FILED
OCT 08 2019
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Michael E. Hunt,

Plaintiff,

v.

United States, Inc. *et al.*,

Defendants.

Civil Action No. 19-2544 (UNA)

MEMORANDUM OPINION

This matter, brought *pro se* by a North Carolina state prisoner, is before the Court on review of the complaint and plaintiff's application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case pursuant to 28 U.S.C. § 1915A (requiring immediate dismissal of a prisoner's case upon a determination that the complaint is frivolous or fails to state a claim upon which relief can be granted).

A complaint that lacks "an arguable basis either in law or in fact" may be dismissed as frivolous. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A "finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible[.]" *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Plaintiff has sued the "United States, Inc.," as well as the United States of America and North Carolina. Compl. Caption. The complaint, such as it is, includes 87 paragraphs of mostly random incoherent statements. Plaintiff's "Lawful Claims" begin at paragraph 88, stating: "Claimant/accused/sovereign, Michael Eugene Hunt has not voluntarily given his consent to enter into contracts with these corporations." *Id.* at 29. Plaintiff continues: "The fictitious named Michael E. Hunt a strawman or dummy corporation

created by the government corporation without knowledge or intent of the natural person Michael Eugene Hunt only exists under color of law . . . strictly for the benefit of the corporations and its commerce." *Id.* ¶ 89. Plaintiff alleges that he "was unlawfully arrested and tried and convicted under a statutory claim on September 19, 1980," but he then adds "because of the registration program he was made a corporate fiction and he would have no rights." *Id.* ¶ 90. Regardless, plaintiff has no recourse in this Court with regard to his conviction. Plaintiff seeks equitable relief that is equally baffling. *See* Compl.¶¶ 93-97.

The prolix complaint is simply impossible to comprehend, and the Court foresees no possibility of a cure. Consequently, this case will be dismissed with prejudice. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (A dismissal with prejudice is warranted upon determining "that 'the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'") (quoting *Jarrell v. United States Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985) (other citation omitted)). A separate order accompanies this Memorandum Opinion.

Date: September 30, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 08 2019
Clerk, U.S. District and Bankruptcy Courts

Michael Cerruti,)
)
Plaintiff,)
)
v.) Civil Action No. 19-2107 (UNA)
)
Donald Trump *et al.*,)
)
Defendants.)

MEMORANDUM OPINION

This matter, brought *pro se*, is before the Court on review of the complaint and plaintiff's application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case pursuant to 28 U.S.C. § 1915A (requiring immediate dismissal of a prisoner's action upon a determination that the complaint fails to state a claim upon which relief may be granted).

A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is a prisoner incarcerated at the Federal Correctional Institution in White Deer, Pennsylvania. He has sued President Donald Trump, Attorney General William Barr, and several other federal officials under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff claims that the defendants "are legally responsible for withholding documents necessary for any criminal defense." Compl. at 2. But the FOIA "only authorizes suits against certain executive branch 'agencies,' not individuals."

Flaherty v. IRS, 468 Fed. App'x 8, 9 (D.C. Cir. 2012) (citing 5 U.S.C. § 552(f)(1); *Martinez v. Bureau of Prisons*, 444 F.3d 620, 624 (D.C. Cir. 2006)).

Apart from naming the wrong defendants, plaintiff does not allege that an agency has improperly withheld records responsive to a properly submitted FOIA request. *See McGehee v. CIA.*, 697 F.2d 1095, 1105 (D.C. Cir. 1983) (FOIA jurisdiction "is dependent upon a showing that an agency has (1) improperly; (2) withheld; (3) agency records") (citation and internal quotation marks omitted)); *Marcusse v. U.S. Dep't of Justice Office of Info. Policy*, 959 F. Supp. 2d 130, 140 (D.D.C. 2013) (An "agency's disclosure obligations are triggered by its receipt of a request that 'reasonably describes [the requested] records' and 'is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.'") (quoting 5 U.S.C. § 552(a)(3)(A)). Rather, plaintiff alleges that he requested documents from a federal court. *See* Compl. at 2 ¶ 10. But the FOIA "adopts the definition of agency contained in 5 U.S.C. § 551 (a)(1)(b), which specifically excludes from its coverage 'the courts of the United States.' " *Maydak v. U.S. Dep't of Justice*, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (citing 5 U.S.C. § 552(f)). Consequently, the Court finds that plaintiff has stated no viable claim under the FOIA. A separate order of dismissal accompanies this Memorandum Opinion.

United States District Judge

Date: September 30, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

Franklin C. Smith,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19-2043 (UNA)
	)	
Jennifer Shirey,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on plaintiff's *pro se* complaint and application to proceed *in forma pauperis* (IFP). The Court will grant the IFP application and dismiss the complaint for lack of subject matter jurisdiction.

The subject matter jurisdiction of the federal district courts is limited and is set forth generally at 28 U.S.C. §§ 1331 and 1332. Under those statutes, federal jurisdiction is available only when a "federal question" is presented or the parties are of diverse citizenship and the amount in controversy exceeds $75,000. "For jurisdiction to exist under 28 U.S.C. § 1332, there must be complete diversity between the parties, which is to say that the plaintiff may not be a citizen of the same state as any defendant." *Bush v. Butler*, 521 F. Supp. 2d 63, 71 (D.D.C. 2007) (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978)). A party seeking relief in the district court must at least plead facts that bring the suit within the court's jurisdiction. *See* Fed. R. Civ. P. 8(a). Failure to plead such facts warrants dismissal of the action. *See* Fed. R. Civ. P. 12(h)(3).

Plaintiff has invoked the Court's diversity jurisdiction. *See* Compl. Caption. It is a "well-established rule" that in order for an action to proceed in diversity, the citizenship requirement must be "assessed at the time the suit is filed." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). To that end, "the citizenship of every party to the action must be distinctly alleged [in the complaint] and cannot be established presumptively or by mere inference," *Meng v. Schwartz*, 305 F. Supp. 2d 49, 55 (D.D.C. 2004), and an "'allegation of residence alone is insufficient to establish the citizenship necessary for diversity jurisdiction,'" *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 906 (D.C. Cir. 2006) (quoting *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 792 n.20 (D.C. Cir. 1983)).

Plaintiff has pled no facts from which the Court can ascertain his citizenship and that of the defendant. For what it is worth, the addresses of both parties are in Virginia Beach, Virginia. *See* Compl. at 6. Plaintiff has attached to the largely incomprehensible complaint a retainer agreement between him and the defendant for legal representation in a court case in Virginia Beach, Virginia, which suggests that he is suing for legal malpractice. Because the complaint neither presents a federal question nor satisfies the citizenship requirement to proceed in diversity, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

United States District Judge

Date: September 18, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

Andre Juste,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 19-2170 (UNA)
	)	
	)	
Circuit Court, Nineteenth Judicial Circuit,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner Andre Juste, appearing *pro se*, has filed a "Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241" against a Florida state court. *See* Case Caption; Pet. ¶ 6. "The writ of habeas corpus shall not extend to a [petitioner] unless" he is "in custody" under some authority. 28 U.S.C. § 2241(c). From all indications in the petition, Juste is not in custody. Besides, the named circuit court is not a proper respondent to a habeas petition. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434-39 (2004) (discussing immediate custodian rule); *accord Blair-Bey v. Quick*, 151 F.3d 1036, 1039 (D.C. Cir. 1998). Therefore, this case will be dismissed for want of jurisdiction. A separate order accompanies this Memorandum Opinion.

Date: September 18, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

Yusuf O. Bush,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19-2186 (UNA)
	)	
Clerk of the Court *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter, brought *pro se*, is before the Court on review of the complaint and plaintiff's application for leave to proceed *in forma pauperis* (IFP). The Court will grant the *in forma pauperis* application and dismiss the case pursuant to 28 U.S.C. § 1915A (requiring immediate dismissal of a prisoner's case upon a determination that the complaint fails to state a claim upon which relief may be granted).

A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Nor do "legal conclusions cast in the form of factual allegations." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

Plaintiff, a prisoner incarcerated at the United States Penitentiary in Lewisburg, Pennsylvania, has sued the Clerk and Deputy Clerks of the Superior Court of the District of

Columbia under 42 U.S.C. § 1983. Plaintiff purports to sue the defendants in their official and individual capacities, but he has not sued anyone by name and alleged what he or she did wrong. Nonetheless, plaintiff alleges that while "performing discretionary functions under color of D.C. law," the defendants rejected his "civil suit for legal malpractice." Compl. at 1. Allegedly, the clerk's staff first rejected plaintiff's pleading because the defendant's address "was not included in the complaint," although plaintiff "had supplied the address on a separate sheet of paper because the section of the complaint didn't have enough space," and "again" upon resubmission "because [plaintiff's] address was not under the caption of plaintiff." Compl. at 2. Plaintiff seeks "punitive damages in the amount of $400,000 and $20,000 in compensatory damages." *Id.*

The U.S. Supreme Court has "grounded the right of access to courts in the Article IV Privileges and Immunities Clause." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). It instructs that a right-of-access claim "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id.* at 415. To state a claim, therefore, plaintiff "must identify a nonfrivolous, arguable underlying claim" that was lost or is currently impeded as a result of defendants' alleged actions. *Id.* (internal quotation marks and citation omitted). In other words, "the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint[.]" *Harbury*, 536 U.S. at 415. And "when the access claim . . . looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." *Id.* at 416. *See generally Broudy v. Maher*, 460 F.3d 106 (D.C. Cir. 2006) (holding, after comprehensive analysis, that the plaintiffs could not show "under any set of facts consistent with the allegations in the complaint that the defendants completely foreclosed their opportunity to meaningfully pursue underlying benefits claims").

Plaintiff has alleged no facts establishing that defendants foreclosed his opportunity to file a viable lawsuit. Consequently, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: September 18, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

Nathaniel Coleman,)
)
Plaintiff,)
)
v.) Civil Action No. 19-2187 (UNA)
)
Donald Trump *et al.*,)
)
Defendants.)

MEMORANDUM OPINION

This matter, brought *pro se*, is before the Court on review of the complaint and plaintiff's application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case pursuant to 28 U.S.C. § 1915A (requiring immediate dismissal of a prisoner's action upon a determination that the complaint fails to state a claim upon which relief may be granted).

A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is a prisoner incarcerated at the Federal Correctional Institution in White Deer, Pennsylvania. He has sued President Donald Trump, Attorney General William Barr, and several other federal officials under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff claims that the defendants "are legally responsible for withholding documents necessary for any criminal defense." Compl. at 2. But the FOIA "only authorizes suits against certain executive branch 'agencies,' not individuals."

Flaherty v. IRS, 468 Fed. App'x 8, 9 (D.C. Cir. 2012) (citing 5 U.S.C. § 552(f)(1); *Martinez v. Bureau of Prisons*, 444 F.3d 620, 624 (D.C. Cir. 2006)).

Apart from naming the wrong defendants, plaintiff does not allege that an agency has improperly withheld records responsive to a properly submitted FOIA request. *See McGehee v. CIA*., 697 F.2d 1095, 1105 (D.C. Cir. 1983) (FOIA jurisdiction "is dependent upon a showing that an agency has (1) improperly; (2) withheld; (3) agency records") (citation and internal quotation marks omitted)); *Marcusse v. U.S. Dep't of Justice Office of Info. Policy*, 959 F. Supp. 2d 130, 140 (D.D.C. 2013) (An "agency's disclosure obligations are triggered by its receipt of a request that 'reasonably describes [the requested] records' and 'is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.'") (quoting 5 U.S.C. § 552(a)(3)(A)). Rather, plaintiff alleges that he requested documents from a federal court, *see* Compl. at 2, and he has attached to the complaint (1) a letter from the United States District Court for the Eastern District of Pennsylvania responding to his request for court documents, and (2) a FOIA/PA Request form confirming that he requested documents from the District Court only. But the FOIA "adopts the definition of agency contained in 5 U.S.C. § 551 (a)(1)(b), which specifically excludes from its coverage 'the courts of the United States.' " *Maydak v. U.S. Dep't of Justice*, 254 F. Supp. 2d 23, 40 (D.D.C. 2003) (citing 5 U.S.C. § 552(f)). Consequently, the Court finds that plaintiff has stated no viable claim under the FOIA. A separate order of dismissal accompanies this Memorandum Opinion.

United States District Judge

Date: September 18, 2019

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ellis D. Thomas, Jr.,

Plaintiff,

v.

U.S. Government *et al.*,

Defendants.

Civil Action No. 19-2260 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's Civil Complaint filed *pro se* and his application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). It also assists the court in determining whether it has jurisdiction over the subject matter. A complaint "that contains only vague and conclusory"

assertions simply fails to satisfy the pleading requirements of Rule 8(a). *Hilska v. Jones*, 217 F.R.D. 16, 21 (D.D.C. 2003) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

Plaintiff purports to sue the U.S. Government and "DC area LAW Enforcement." Compl. Caption. The complaint is cryptically worded and unfocused. Plaintiff alleges violations of "Civil, Human Personal and Legal Rights for going on 20 years," or since 2003. Compl. ¶ 1. He seeks "Reparations and Compensation" *id.* ¶ 2, "in the amount of $7,750,000.00," *id.* at 4. Missing from the complaint is a coherent set of facts and a clear statement showing plaintiff's entitlement to relief. Therefore, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: September 18, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

MARK DOWNEY,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civil Action No. 19-2309 (UNA)

MEMORANDUM OPINION

Plaintiff, appearing *pro se*, purports to bring this action under the False Claims Act ("FCA"), and has moved to proceed *in forma pauperis* ("IFP"). The FCA, *see* 31 U.S.C. §§ 3729-3732, "is an anti-fraud statute that prohibits the knowing submission of false or fraudulent claims to the federal government." *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 640 (6th Cir. 2003). The FCA authorizes a private individual, as a relator, "to bring [a qui tam] action in the Government's name, and to recover a portion of the proceeds of the action, subject to the requirements of the statute." *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1206 (D.C. Cir. 2011) (citations omitted).

In federal courts such as this, plaintiffs "may plead and conduct their own cases personally or by counsel[.]" 28 U.S.C. § 1654. The United States is "the real party in interest" in a *qui tam* action, *Cobb v. California*, No. 15-cv-176, 2015 WL 512896, at *1 (D.D.C. Feb. 4, 2015), and a *pro se* party may not pursue a claim on behalf of the United States, *see Jones v. Jindal*, 409 F. App'x 356 (D.C. Cir. 2011) (per curiam) (affirming dismissal of *qui tam*

complaint "because a pro se plaintiff may not file a *qui tam* action pursuant to the False Claims Act[.]"); *Walker v. Nationstar Mortg. LLC*, 142 F. Supp. 3d 63, 65-66 (D.D.C. 2015).

The plaintiff clearly intends to raise legal claims in addition to a claim under the FCA. The Court finds it difficult to determine what cognizable claims they might be, given the complaint's length and rambling nature. Federal Rule of Civil Procedure 8(a) requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). This complaint falls far short of Rule 8(a)'s minimal pleading standard, such that defendant could not be expected to prepare a responsive answer, prepare an adequate defense, and determine whether the doctrine of *res judicata* applies. *See Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

The Court will grant plaintiff's IFP motion and dismiss the complaint without prejudice. A separate Order accompanies this Memorandum Opinion.

United States District Judge

Date: September 18, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

NATALIE GREEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19-2454 (UNA)
	)	
U.S. MERIT SYSTEMS PROTECTION BOARD, *et al.*,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on plaintiff's application to proceed *in forma pauperis* and her *pro se* civil complaint. The plaintiff is "a FERS retiree from the US Postal Service." Compl. at 1. She alleges that the Merit Systems Protection Board ("MSPB") erred when it affirmed the Office of Personnel Management's decision to terminate her disability retirement benefits, *see generally id.*, Attach. A (Initial Decision dated June 6, 2019), and seeks judicial review of the MSPB's decision.

The Civil Service Reform Act ("CSRA"), under which the plaintiff has litigated, provides the exclusive remedy for adjudicating the plaintiff's claim. *See Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("recogniz[ing], in a variety of contexts, the exclusivity of the remedial and review provisions of the CSRA"). The CSRA "provides for adjudication of all claims by OPM [Office of Personnel Management] . . . , appeal of adverse decisions by OPM to the MSPB . . . , and subsequent review of MSPB decisions in the [U.S. Court of Appeals for] the Federal Circuit[.]" *Id.* at 66 (citing 5 U.S.C. §§ 8347(b),(d)(1), 7703(b)(1), 28 U.S.C. 1295(a)(9)). And "what you get under the CSRA is [all] you get." *Id.* at 67. The plaintiff has no recourse in this

Court. Consequently, the Court will dismiss this case without prejudice for lack of subject matter jurisdiction. An Order is issued separately.

DATE: September 18, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 19 2019
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

ROMAN TIFFER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19-2627 (UNA)
	)	
NOBU DC LLC, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff alleges that he sustained injuries while working in a restaurant in Washington, D.C. This civil action appears to be plaintiff's attempt at judicial review of the District of Columbia Department of Employment Services' decision on his application for workers' compensation benefits. This is a matter over which the Court lacks jurisdiction. "Plaintiff's remedy lies exclusively under the District of Columbia's Workers' Compensation Act ("WCA"), D.C. Code § 32-1501 *et seq.*, which provides for judicial review by the local courts. *See id.* § 32-1522." *Johnson v. Interstate Mgmt. Co. LLC*, No. 12-cv-0478, 2012 WL 1044489, at *1 (D.D.C. Mar. 28, 2012).

The Court will grant plaintiff's application to proceed *in forma pauperis* and dismiss his *pro se* complaint without prejudice. An Order is issued separately.

DATE: September 17, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
NOV - 5 2018
Clerk, U.S. District and Bankruptcy Courts

HELGA SUAREZ CLARK,

Plaintiff,

v.

CARLOS CASTELLON CUEVA, *et al.*,

Defendants.

Civil Action No. 18-1460 (UNA)

MEMORANDUM OPINION

The Court found that plaintiff's first amended complaint, ECF No. 10, failed to comply with the pleading standard set forth in Federal Rule of Civil Procedure 8(a). Accordingly, the Court issued an order, ECF No. 13, which allowed plaintiff to file a second amended complaint. The order instructed that the second amended complaint comply with Federal Rules of Civil Procedure 8, 9 and 10, comply with Local Civil Rule 5.1, and not exceed 25 pages including exhibits. Plaintiff availed herself of this opportunity, and now before the Court is her second amended complaint, ECF No. 16.

On review of the second amended complaint, the Court finds that it, too, fails to comply with Rule 8(a). While the pleading is shorter in length, it is just as confusing as the first. Neither the Court nor the defendants could determine what claim(s) plaintiff is bringing against which defendant(s). Furthermore, plaintiff attempts to circumvent the page limit by seeking to file excess pages. The Court is mindful that a complaint filed by a *pro se* litigant is held to a lesser standard than would be applied to a formal pleading drafted by a lawyer. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Still, a *pro se* litigant must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Because the second amended

complaint does not meet the minimal pleading standard set forth in Rule 8(a), the Court will dismiss this civil action without prejudice. An Order consistent with this Memorandum Opinion is issued separately.

DATE: October 23, 2018

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 24 2018
Clerk, U.S. District and Bankruptcy Courts

PETERA MICALE CARLTON,)
)
Petitioner,)
)
v.) Civil Action No. 18-2333 (UNA)
)
MICHAEL D. SMITH,)
)
Respondent.)

MEMORANDUM OPINION

Petitioner Petera Micale Carlton appears to challenge his conviction in and the sentence imposed by the United States District Court for the Eastern District of North Carolina. It further appears that the United States District Court for the Western District of Missouri transferred this matter to this Court in error. To the extent that there is a remedy available to the petitioner, he must present his claim to the sentencing court by motion under 28 U.S.C. § 2255. *See Taylor v. U.S. Bd. of Parole*, 194 F.2d 882, 883 (D.C. Cir. 1952). Because this Court lacks jurisdiction over this matter, the petition and this civil action will be dismissed. An Order is issued separately.

DATE: October 23, 2018

United States District Judge

FILED
OCT 24 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN KEITH HEBERT.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civil Action No. 18-2332 (UNA)

MEMORANDUM OPINION

This matter comes before the court on review of plaintiff's application to proceed *in forma pauperis* and *pro se* civil complaint. The Court will grant the application and dismiss the complaint without prejudice.

The Court is mindful that complaints filed by *pro se* litigants are held to less stringent standards than are applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, even *pro se* litigants must comply with the Federal Rules of Civil Procedure. *See Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a); *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claims being asserted, sufficient to prepare a responsive answer, to prepare an adequate defense and to determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

According to plaintiff, the United States Attorney General, the United States Department of Justice, the former Speaker of the House of Representatives, the United Nations Security Council, and Pope Francis are committing treason and violating plaintiff's constitutional rights. For the physical, mental and financial harms defendants are causing, plaintiff demands damages of $111,100,000,000, among other relief. However, based on the Court's review, the complaint fails to allege facts to demonstrate this Court's jurisdiction, and to show he is entitled to any of the relief he demands. Therefore, the Court dismisses the complaint. An Order consistent with this Memorandum Opinion is issued separately.

DATE: October 23, 2018

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 24 2018
Clerk, U.S. District and Bankruptcy Courts

JEROME L. GRIMES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 18-2306 (UNA)
	:	
NATIONAL ENQUIRER, *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

This matter comes before the court on review of plaintiff's application to proceed *in forma pauperis* and *pro se* civil complaint. The Court will grant the application, and dismiss the complaint.

Complaints filed by *pro se* litigants are held to less stringent standards than those applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even *pro se* litigants, however, must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claims being asserted, sufficient to prepare a responsive answer, to prepare an adequate defense and to determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

The Court has reviewed the complaint and finds that it utterly fails to meet the standard set forth in Rule 8(a). The pleading is incomprehensible, thus the Court identifies no viable legal claim. Absent a statement of cognizable claims showing plaintiff's entitlement to relief, the complaint must be dismissed. An Order consistent with this Memorandum Opinion is issued separately.

DATE: October 23, 2018

United States District Judge

FILED
OCT 24 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Kenneth Wayne Lewis,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-2322 (UNA)
	)	
	)	
United States Department of Justice *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). "A confused and rambling narrative of charges and conclusions . . . does not comply with the requirements of Rule 8." *Cheeks v. Fort Myer Constr. Corp.*, 71 F. Supp. 3d 163, 169 (D.D.C. 2014) (citation and internal quotation marks omitted).

Plaintiff is a prisoner at the Federal Correctional Institution in Fort Dix, New Jersey. His complaint refers to Federal Rules of Civil Procedure 12 and 55, the Privacy Act, the Thirteenth Amendment to the United States Constitution, other legal authority, and demands for millions of dollars in damages. Missing from the complaint is a short and plain statement showing that plaintiff is entitled to relief of any kind. As drafted, plaintiff's complaint fails to provide any notice of a claim and the basis of jurisdiction, and it will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: October 23, 2018

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 24 2018
Clerk, U.S. District and Bankruptcy Courts

RYAN GALLAGHER,)
)
Plaintiff,)
)
v.) Civil Action No. 18-2327 (UNA)
)
CONGRESS, *et al.*,)
)
Defendants.)

MEMORANDUM OPINION

This matter is before the Court on plaintiff's motion to proceed *in forma pauperis* and his *pro se* civil complaint.

The Court has reviewed plaintiff's complaint, keeping in mind that complaints filed by *pro se* litigants are held to less stringent standards than those applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even *pro se* litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claim being asserted, sufficient to prepare a responsive answer, to prepare an adequate defense and to determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

This complaint fails to meet the minimal pleading standard set forth in Rule 8(a). While it is replete with factual assertions, references to the United States Code, and citations to case law, websites and other sources, it fails to include a short and plain statement showing that the plaintiff is entitled to the compensatory damages and injunctive relief he seeks. Furthermore, as drafted, the complaint fails to give the defendants fair notice of the claims brought against them. Therefore, the Court will grant the plaintiff's application to proceed *in forma pauperis* and dismiss the complaint and this civil action. An Order consistent with this Memorandum Opinion is issued separately.

DATE: October 23, 2018

United States District Judge

FILED
OCT 22 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEBORAH DIANE FLETCHER,)
)
Plaintiff,)
)
v.) Civil Action No.: 1:18-cv-02163 (UNA)
)
UPS MANAGER,)
)
Defendant.)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint ("Compl.") and application for leave to proceed *in forma pauperis* ("IFP"). The Court will grant the IFP application and dismiss the case for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss an action "at any time" if it determines that the subject matter jurisdiction is wanting).

While plaintiff lists a "general delivery" address in Washington D.C.,[1] she avers that she is a "resident of Miami, Florida." Compl. at 2. She "bring[s] a claim against UPS locate[d] in Orlando, Florida." *Id.* Plaintiff alleges that she attempted to ship six boxes from Florida to Landover, Maryland, by way of UPS. *Id.* She further alleges that the boxes were lost and never received. *Id.* She seeks $6 million dollars in damages. *Id.* at 3.

The subject matter jurisdiction of the federal district courts is limited and is set forth generally at 28 U.S.C. §§ 1331 and 1332. Under those statutes, federal jurisdiction is available only when a "federal question" is presented or the parties are of diverse citizenship and the amount in controversy exceeds $75,000. A party seeking relief in the district court must at least plead facts

[1] A general delivery address is improper. "The first filing by or on behalf of a party shall have in the caption the name and *full residence address* of the party." District of Columbia LCvR 5.1(c) (emphasis added).

that bring the suit within the court's jurisdiction. *See* Fed. R. Civ. P. 8(a). Failure to plead such facts warrants dismissal of the action. *See* Fed. R. Civ. P. 12(h)(3).

Plaintiff fails to raise any federal question. She also fails to satisfy the burden to establish diversity jurisdiction. Therefore, this case will be dismissed for want of subject matter jurisdiction. A separate Order accompanies this Memorandum Opinion.

Date: October 16, 2018

United States District Judge

FILED
OCT 22 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BOBBY PORTER,

Petitioner,

v.

EXECUTIVE OFFICE OF UNITED STATES ATTORNEYS,

Respondent.

Civil Action No.: 18-cv-02122 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of petitioner's *pro se* complaint ("Compl.") and application for leave to proceed *in forma pauperis*. Petitioner's complaint will be dismissed.

Petitioner, a federal inmate at Jessup Federal Correctional Institution, located in Jessup, GA, filed suit against the Executive Office of United States Attorneys ("EOUSA"). Compl. at caption. Petitioner accepted a guilty plea on or about September 21, 2009, in a matter before Eastern District of Tennessee. *See USA v. Montgomery et al.*, No. 2:09-cr-00031-RLJ-MCLC-15 (E.D. TN Sept. 21, 2009) at ECF No. 238. He was originally sentenced on August 31, 2010. *Id.* at ECF No. 728. Here, petitioner fashions his claims under the Administrative Procedures Act ("APA"), however, he is actually presenting a challenge to his underlying conviction. Compl. at 1 ¶ 1, 2 ¶ 3, 4 ¶¶ 1–3.

Petitioner alleges that the prosecutor of the criminal matter, Mr. Donald Wayne Taylor, took his oath of office beyond the date mandated by EOUSA policy. *Id.* at 2 ¶¶ 1–3. He posits that Mr. Taylor was presented for his appointment on March 29, 2009, and did not formalize his oath of office until April 24, 2009, beyond the "14-days of [ ] requirement." *Id.* at 2 ¶ 2. As a

result, petitioner believes that he was improperly indicted and prosecuted by Mr. Taylor and his office, as that matter was initiated in mid-March 2009. *Id.* at 2 ¶ 3, 4 ¶¶ 1–3; *see USA v. Montgomery et al.*, No. 2:09-cr-00031-RLJ-MCLC-15 (E.D. TN Sept. 21, 2009) at ECF No. 1. He alleges that because Mr. Taylor "did not have proper appointment and oath[,]" the Eastern District of Tennessee "proceeded without jurisdiction." Compl. at 4 ¶ 2. He requests that his conviction(s) be deemed "invalid" and that he be immediately released from incarceration. *Id.* at 4 ¶ 3. Therefore, this Court must construe the complaint as petition to vacate, set aside or correct sentence under 28 U.S.C. § 2255.

To the extent that a remedy is available to petitioner, his claim must be addressed to the sentencing court in a motion under 28 U.S.C. § 2255. *See Taylor v. U.S. Bd. of Parole*, 194 F.2d 882, 883 (D.C. Cir. 1952); *Ojo v. Immigration & Naturalization Serv.*, 106 F.3d 680, 683 (5th Cir. 1997). Section 2255 provides that:

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

Therefore, petitioner has no recourse in this Court, and the complaint will be dismissed. *Id.* An Order accompanies this Memorandum Opinion.

United States District Judge

Date: October 16, 2018

FILED
OCT 22 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCISCO MONTES, JR.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.: 1:18-cv-02081 (UNA)
	)	
ROC-A-FELLA, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint ("Compl.") [ECF No. 1] and application for leave to proceed *in forma pauperis* ("IFP") [ECF No. 2]. The Court will grant the IFP application and dismiss the case for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss an action "at any time" if it determines that the subject matter jurisdiction is wanting). Plaintiff has also filed a motion to appoint counsel [ECF No. 3], which will be denied as moot.

Plaintiff, a resident of Washington, D.C., filed his complaint on September 5, 2018. Compl. at caption. Since that time, plaintiff has filed four "amendments" to the original complaint, which seek to join additional defendants to this action. *See* First Amnd. [ECF No. 4]; Sec. Amnd. [ECF No. 5]; Third Amnd. (also including list of attorneys who have denied plaintiff services) [ECF No. 6]; and Fourth Amnd. [ECF No. 7]. Plaintiff has named approximately 113 defendants. *See id.*; *see also* Compl. at caption. These defendants constitute a range of individuals and entities, including, but not limited to: music recording companies, professional sports organizations, health care providers, movie studios, schools, vehicle repair shops, Walmart, Facebook, and federal agencies. *See id.*

Plaintiff alleges that defendants violated his privacy. Compl. at 1. He posits that defendants "orchestrat[ed] a film" without his consent. As a result, he has suffered damage to his "mind, body, and emotional state." *Id.* Plaintiff also alleges that defendants committed "other infractions" that he admits "are undetermined due to not completely seeing, knowing, and properly having documented what really happen[ed] through this whole time frame." *Id.* He believes that defendants have been perpetuating these unknown "infractions" against him possibly "from the beginning of time to present." *Id.* Plaintiff requests a trial with the "possibility of formal charges," though the actual civil relief plaintiff seeks is completely unclear. *Id.*

The subject matter jurisdiction of the federal district courts is limited and is set forth generally at 28 U.S.C. §§ 1331 and 1332. Under those statutes, federal jurisdiction is available only when a "federal question" is presented or the parties are of diverse citizenship and the amount in controversy exceeds $75,000. A party seeking relief in the district court must at least plead facts that bring the suit within the court's jurisdiction. *See* Fed. R. Civ. P. 8(a). Failure to plead such facts warrants dismissal of the action. *See* Fed. R. Civ. P. 12(h)(3).

Plaintiff fails to raise any federal question. He also fails to satisfy the burden to establish diversity jurisdiction. Therefore, this case will be dismissed for want of subject matter jurisdiction, and plaintiff's motion to appoint counsel is denied as moot. A separate Order accompanies this Memorandum Opinion.

Date: October 16, 2018

United States District Judge

FILED
OCT 22 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AFSHIN BAHRAMPOUR,

Plaintiff,

MICROSOFT CORPORATION, *et al.*,

Defendants.

Civil Action No.: 1:18-cv-02059 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint ("Compl.") and application for leave to proceed *in forma pauperis* ("IFP"). The Court will grant plaintiff's application to proceed IFP and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

Plaintiff, a Nevada resident, sues eight defendants, including, Microsoft Corporation, several government agencies and committees, government officials, and John/Jane Does. Compl.

at caption. Plaintiff alleges that he has been subject to civil rights violations as a result of defendants' use of "space-based weapons" on him from 2006 to present. *Id.* at 2–4. He posits that defendants have exposed him to "electronic surveillance" as part of the government's perpetuation of an "information war[.]" *Id.* at 4. Plaintiff alleges that he, and various other members of the population, have been victims of "mood management and mind control[.]" *Id.* Plaintiff alleges that defendants have conspired to use these systems against "Clark County residents[,]" and to spread propaganda. *Id.* at 6. He alleges that he has been hospitalized as a result of defendants' actions, seeks monetary damages, and requests "mandamus to President of USA to remove the security clearance of 911." *Id.* at 3, 9.

The ambiguous and rambling allegations comprising the complaint fail to provide adequate notice of a claim. While plaintiff lists a litany of disparate legal authority, he fails to describe any specific wrongdoing committed by these defendants, apart from his overarching conspiracy theory. *See, e.g., id.* at 2–5. The causes of action, if any, are completely undefined. The complaint also fails to set forth allegations with respect to this Court's jurisdiction over plaintiff's entitlement to relief or a valid basis for an award of damages as pled. Therefore, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

Date: October 16, 2018

United States District Judge

FILED
OCT 22 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARCUS ALLEN,)
)
Plaintiff,)
) Civil Action No. 1:18-cv-002054 (UNA)
)
RYAN BECKER, *et al.*,)
)
Defendants.)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint ("Compl.") and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the complaint.

Plaintiff sues an ATF agent and two Assistant United States Attorneys. Compl. at caption. Plaintiff alleges that defendants committed various constitutional violations during the course of his arrest and criminal trial, resulting in his conviction. *Id.* at 1–3. More specifically, plaintiff states that defendants had no probable cause to arrest him, misled the trial judge, and failed to provide discovery as mandated by *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 1–2. Plaintiff seeks monetary relief as a result of these alleged constitutional violations, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *Id.* at 1, 12.

A federal prisoner who makes a collateral challenge to his conviction or sentence must file a motion pursuant to § 2255. *McLean v. United States*, No. 90–318, 2006 WL 543999 at *1–2 (D.D.C. 2006); *Castro v. United States*, 540 U.S. 375, 381–82 (2003). Such a motion must be made in the sentencing court. *Moore v. Smith*, 186 Fed. Appx. 8 (D.C. Cir. 2006) (per curiam); *Simmons v. Beshouri*, No. 06–380, 2006 WL 751335 at *1 (D.D.C. 2006). Plaintiff was convicted

and sentenced in the United States District Court for the Eastern District of Arkansas. *See USA v. Allen*, No. 4:14-cr-00057-KGB-1 (E.D. AK Nov. 19, 2014) at [ECF No. 95]. Therefore, as far as this is a collateral attack on plaintiff's conviction or sentencing, such relief must be sought with the Eastern District of Arkansas.

To the extent that plaintiff is seeking damages arising out of alleged constitutional violation(s), *Heck v. Humphrey*, 512 U.S. 477 (1994), bars relief. In *Heck*, the Supreme Court held that one who has been convicted of a crime may not ordinarily recover damages pursuant to 42 U.S.C. § 1983 for "harm caused by actions whose unlawfulness would render [his] conviction or sentence invalid." *Id.* at 486. The only qualification to this otherwise broad prohibition is if a plaintiff can "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." *Id.* at 486–87. The parameters of *Heck* have been expanded to reach § 1983's federal equivalent, the "*Bivens* claim." *See generally Bivens*, 403 U.S. at 388; *see also Williams v. Hill,* 74 F.3d 1339, 1340–41 (D.C. Cir. 1996) (per curiam).

If judgment were to be granted in plaintiff's favor in this case, it "would necessarily imply the invalidity of his conviction." *Heck*, 512 U.S. at 487. Therefore, because plaintiff was found guilty and because the verdicts have not been set aside, plaintiff cannot recover damages for the actions of those who allegedly brought about his conviction. *See Williams*, 74 F.3d at 1341. Therefore, dismissal is appropriate pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

Accordingly, this case is dismissed. A separate Order accompanies this Memorandum Opinion.

Date: October 16, 2018

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARCUS ALLEN,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 1:18-cv-002054 (UNA)
	)	
RYAN BECKER, *et al.*,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that plaintiff's application to proceed *in forma pauperis* [2] is **GRANTED**, and it is further

ORDERED that the complaint [1] and this case are **DISMISSED** without prejudice. This is a final appealable Order.

United States District Judge

Date: October 16, 2018

FILED
OCT 22 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANES PIERRE,

Plaintiff,

v.

CLINTON FOUNDATION, *et al.*,

Defendants.

Civil Action No. 1:18-cv-01649 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint ("Compl.") and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668–71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). "A confused and rambling narrative of charges and conclusions . . . does not comply with the requirements of Rule 8." *Cheeks v. Fort Myer Constr. Corp.*, 71 F. Supp. 3d 163, 169 (D.D.C. 2014) (citation and internal quotation marks omitted).

Plaintiff[1] brings wide-ranging allegations against defendants, Clinton Foundation, Theresa Bisenius, Roseanne Ellen Caracciolo, Bevan Brunelle, the State of Massachusetts, and three towns located in Massachusetts. Compl. at caption. Plaintiff's complaint is 36 pages, single-spaced, and presents sweeping and disjointed allegations. He brings numerous causes of action, some recognized and some not, and cites a litany of statutes, restatements, declarations, treaties, and conventions. *See, e.g., id.* at 1–4, 6–11, 17–22.

Plaintiff's allegations include, but are not limited to: theft and destruction of tribal lands in "Haiti, North America, and [the] Town of Delmas," child kidnapping in Massachusetts, neglect, murder, human rights violations, defamation, fraud, employment discrimination, racial discrimination, systematic "environmental racism," "family separation," constitutional violations, violations of the Massachusetts Constitution, violations of the International Convention on the Elimination of All Forms of Racial Discrimination, and violations of the Apartheid Convention. *Id.* These allegations range from the 1700's to present. *Id.* Any connection between these claims and the named defendants are nebulous to completely unclear. Plaintiff seeks a variety of injunctive and declaratory relief, and asks the Court to compel a variety of individuals, entities, and governments to engage in certain actions. *Id.* at 16–17, 22–3.

The complaint is compound, rambling, and fails to provide adequate notice of a claim. The complaint also fails to set forth allegations with respect to this Court's jurisdiction over plaintiff's entitlement to relief or a valid basis for any award of damages. While it is evident that plaintiff is

[1] At times throughout the complaint it appears that plaintiff requests relief on behalf of his tribe ("Plaintiff Tribe") and/or other groups of people. *See, e.g.*, Compl. at 1–4, 11–13, 16–17, 22. The Supreme Court has interpreted 28 U.S.C. § 1915(a)(1) to apply only to individuals or natural persons. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201–2 (1993). Further, plaintiff, proceeding *pro se*, may not obtain IFP status on behalf others or pursue the case on behalf of others. *Id.*; 28 U.S.C. § 1654; *Georgiades v. Martin-Trigona*, 729 F.2d 831, 834 (D.C. Cir. 1984).

generally aggrieved with defendants for a variety of reasons, as drafted, the complaint fails to meet the minimum pleading standard set forth in Rule 8(a). Therefore, the Court will grant plaintiff's application to proceed *in forma pauperis* and will dismiss the complaint. An Order consistent with this Memorandum Opinion is issued separately.

Date: October 16, 2018

United States District Judge

FILED
OCT 15 2018
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dean Himbler Aviles-Rothchild,

Plaintiff,

v.

Donald Trump *et al.*,

Defendants.

Civil Action No. 18-2196 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case pursuant to 28 U.S.C. §§ 1915(e)(2)(B), 1915A (requiring dismissal of a case upon a determination that the complaint fails to state a claim upon which relief may be granted).

A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is being detained at the Metropolitan Detention Center in Los Angeles, California. He sues President Donald Trump and United States Citizenship and Immigration Services for allegedly "aiding and abetting federal protective service officials in violation" of the "attempted first degree murder" provisions of the United States criminal code and the California penal code. Compl. at 1 (citing 18 U.S.C. § 1111 and Cal. Penal Code §§ 188, 190.03).

"The Supreme Court has 'rarely implied a private right of action under a criminal statute.'" *Lee v. United States Agency for Int'l Dev.*, 859 F.3d 74, 77 (D.C. Cir. 2017) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)). Nothing in the text of the criminal statutes plaintiff cites suggests otherwise. Therefore, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: October 12, 2018

United States District Judge

FILED
OCT 10 2018
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

John Keith Hebert,

Plaintiff,

v.

United States of America *et al.*,

Defendants.

Civil Action No. 18-2190 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's motion for leave to proceed *in forma pauperis* and *pro se* complaint. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Although allowed some flexibility, *pro se* litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief[,]" and "(3) a demand for the relief sought[.]" Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). Generally, "[e]ach allegation [in the complaint] must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).

The foregoing standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C.

1977). A complaint "that is excessively long, rambling, disjointed, incoherent, or full of irrelevant and confusing material will patently fail [Rule 8(a)'s] standard, and so will a complaint that contains an untidy assortment of claims that are neither plainly nor concisely stated, nor meaningfully distinguished from bold conclusions, sharp harangues and personal comments." *Jiggetts v. District of Columbia*, 319 F.R.D. 408, 413 (D.D.C. 2017), *aff'd sub nom. Cooper v. District of Columbia*, No. 17-7021, 2017 WL 5664737 (D.C. Cir. Nov. 1, 2017) (citations and internal quotation marks omitted)).

Plaintiff is a resident of Erath, Louisiana. He has filed an "International War Complaint" against the United States, various federal agencies, and an assortment of other defendants ranging from the United Nations to "His Holiness, Pope Francis." Compl. Caption. The complaint is simply incomprehensible and thus will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: October 9, 2018

United States District Judge

FILED
JUN 16 2017
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Victor B. Perkins,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17-963 (UNA)
	)	
John Ashcroft *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The application will be granted and the complaint will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) (requiring dismissal of a case upon a determination that the complaint fails to state a claim upon which relief may be granted).

"A complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is civilly committed at the Federal Medical Center in Rochester, Minnesota, "and not considered a prisoner." *Perkins v. Beeler*, 207 Fed. Appx, 262, 2006 WL 347394 (4th Cir. Dec. 1, 2006) (citing 28 U.S.C. § 1915(h)). Plaintiff has sued five former attorneys general—Janet Reno, John Ashcroft, Alberto Gonzales, Eric Holder, Jr., and Loretta Lynch— under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He alleges that his civil commitment under 18 U.S.C. § 4246(d) for more than 24 years violates the Constitution and his civil rights. Plaintiff seeks an order vacating the commitment and "a financial award of ten million . . . dollars." Compl. at 7.

As this court has previously determined, plaintiff's claim to be released must be pursued by way of a petition for a writ of habeas corpus in the judicial district in the State where he is incarcerated, which is currently the U.S. District Court for the District of Minnesota. *See Perkins v. Holder*, No. 10-2229, 2010 WL 5373930, at *1 (D.D.C. Dec. 22, 2010) (citing *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 809 (D.C. Cir. 1988), citing *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973)). Moreover, the court also determined that because plaintiff's claims go to the fact of his incarceration, he cannot recover monetary damages without showing that his confinement has been invalidated by "revers[al] on direct appeal, expunge[ment] by executive order, declar[ation of invalidity] by a state tribunal authorized to make such determination, or . . . a federal court's issuance of a writ of habeas corpus." *Id.* (citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Perkins v. Ashcroft*, No. 07-2023, 2007 WL 3376687, at *1 (D.D.C. Nov.8, 2007), *aff'd*, 275 Fed. App'x. 17 (D.C. Cir. 2008); *Perkins v. Anderson*, No. 06–4021, 2006 WL 3392787, at *1 (D.Minn. Nov.21, 2006); *Perkins v. United States*, No. 5:01–HC–509, 2001 WL 34704518, at *1 (E.D.N.C. July 26, 2001) (other citation omitted)); *see also Henderson v. Bryant*, 606 Fed. Appx. 301, 304 (7th Cir. 2015), citing *Huftile v. Miccio–Fonseca*, 410 F.3d 1136, 1139-40 (9th Cir. 2005) (applying *Heck's* habeas channeling rule to civil detainees). Nothing in the instant complaint suggests that plaintiff's civil commitment has been invalidated. Consequently, the complaint and this case will be dismissed as well. A separate order accompanies this Memorandum Opinion.

United States District Judge

Date: June 9, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Gregory Ackers, Plaintiff, v. DNC Services Corporation *et al.*, Defendants.	)	Case: 1:17-cv-00990 (F-Deck) Assigned To : Unassigned Assign. Date : 5/24/2017 Description: Pro Se Gen. Civil Jury Demand

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the application and dismiss the complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss an action "at any time" it determines that subject matter jurisdiction is wanting).

The subject matter jurisdiction of the federal district courts is limited and is set forth generally at 28 U.S.C. §§ 1331 and 1332. Under those statutes, federal jurisdiction is available only when a "federal question" is presented or the parties are of diverse citizenship and the amount in controversy exceeds $75,000. "For jurisdiction to exist under 28 U.S.C. § 1332, there must be complete diversity between the parties, which is to say that the plaintiff may not be a citizen of the same state as any defendant." *Bush v. Butler*, 521 F. Supp. 2d 63, 71 (D.D.C. 2007) (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978)). A party seeking relief in the district court must at least plead facts that bring the suit within the court's

jurisdiction. *See* Fed. R. Civ. P. 8(a). Failure to plead such facts warrants dismissal of the action. *See* Fed. R. Civ. P. 12(h)(3).

Plaintiff, a resident of Santa Monica, California, has submitted a complaint that seems to be based on the well-publicized computer hacking of the Democratic National Committee during the most recent presidential campaign. Plaintiff claims that he "is an American citizen who's voted in 6 Presidential elections. In learning, through the U.S. media of the breach of American democracy & U.S. Natl security, he's been spurred to act in defense of American ideals & the rule of law by holding to account those indubitably responsible for its breach." Compl. at 2. Plaintiff purports to sue the "DNC Services Corporation d/b/a Democratic National Committee," 2016 Presidential Candidate Hillary Rodham Clinton, the Hillary for America campaign, and campaign chairman, John Podesta. *Id.* The five counts of the complaint are captioned Espionage, Computer Fraud & Abuse, Negligence, Intimidation of Voters, Breach of Fiduciary Duty, respectively. Plaintiff seeks "a forensic audit of each & every Dfts accounting records beginning in Jan 2015 continuing on through to day of judgment" and an unspecified amount of "punitive, compensatory & exculpatory damages[.]" *Id.* at 4.

In his jurisdictional statement, plaintiff asserts that his claims are "predicated on 18 USC 1332," which the Court assumes is meant to be 28 U.S.C. § 1332 since no such section appears in Title 18 of the U.S. Code and plaintiff further asserts that "[t]here's complete diversity of citizenship between [him] & all Dfts." Compl. at 2. Regardless, plaintiff has not identified Podesta's citizenship, and he has not pled an amount in controversy. Consequently, plaintiff has not satisfied his burden to establish diversity jurisdiction.

In addition, plaintiff has not pleaded facts to establish his standing to sue, and "the defect of standing is a defect in subject matter jurisdiction" as well. *Haase v. Sessions*, 835 F.2d 902,

906 (D.C. Cir. 1987); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (noting that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). Federal courts only have subject matter jurisdiction if there is a "Case" or "Controvers[y]" to be decided, U.S. Const. Art. III, § 2, and in the absence of any actual or threatened injury, no such case or controversy exists. The alleged "injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.' " *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, ---, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, ---, 130 S.Ct. 2743, 2752 (2010)). The injury must be "fairly traceable" to the defendants' conduct and "not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (citation, internal quotation marks and internal alterations omitted).

Plaintiff has not alleged a specific injury. Rather, he contends that the "attack on American cyber-space . . . was the apocalyptic factor in the breach of the 2016 Pre[s]idential election, and he concludes:

> Because of Dfts NEGLIGENCE & lack of both fore & aftersight, the American public[']s consciousness, as well as an American Presidential election were indelibly hacked & intruded upon. The result was a humiliating national security disaster which will affect American global influence & a resulting lack of domestic & international confidence in our economic, intelligence & technological capabilit[ies] throughout the 21st century.

Compl. at 3. But when, as here, "the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Consequently, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

Date: May 19, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Trevin Nunnally,

Plaintiff,

v.

Administrative Office of U.S. Courts, Director,

Defendant.

Case: 1:17-cv-00972 F Deck
Assigned To : Unassigned
Assign. Date : 5/23/2017
Description: Pro Se Gen. Civil Jury Demand

Civil Action No.

MEMORANDUM OPINION

This matter is before the Court on its review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. For the reasons explained below, the *in forma pauperis* application will be granted and this case will be dismissed pursuant to 28 U.S.C. § 1915A, which requires immediate dismissal of a prisoner's complaint that fails to state a claim upon which relief can be granted.

"A complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is a federal prisoner incarcerated in Yazoo, Mississippi. He sues the Director of the Administrative Office of the United States Courts ("AO Director") in "his individual, official & federal judicial capacity as a judicial officer or federal employee." Compl. Caption. Plaintiff alleges that an "illegal arrest warrant . . . was used to illegally incarcerate [him] without probable cause." Compl. at 6. He seeks his release and "proper compensation." *Id.*

Plaintiff contends that the AO Director supervises the United States magistrate judge who allegedly issued the arrest warrant. *See* Compl. Attach., Supp'g Mem. at 1-2. He is mistaken. Magistrate judges are supervised by the U.S. district judges who appoint them, *see* 28 U.S.C. § 631, whereas the AO Director is "the administrative officer of the courts, and [is] under the supervision and direction of the Judicial Conference of the United States." 28 U.S.C. § 604(a). The AO Director "do[es] not exercise judicial power in the constitutional sense of deciding cases and controversies, but [shares] the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly within the province of the Judiciary." *Doggett v. Gonzales*, No. 06-0575, 2007 WL 2893405, at *4 (D.D.C. Sept. 29, 2007) (quoting *Mistretta v. United States*, 488 U.S. 361, 389 (1989) (brackets in original)). Consequently, the court concludes that plaintiff has failed to state claim against the AO Director. A separate order of dismissal accompanies this Memorandum Opinion.

Date: May 19, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE A. BRANCH, III,

Plaintiff,

v.

ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Defendants.

Case: 1:17-cv-00971
Assigned To : Unassigned
Assign. Date : 5/23/2017
Description: Pro Se Gen. Civil

F Deck

Jury Demand

Civil Action No.

MEMORANDUM OPINION

This matter is before the Court on plaintiff's application to proceed *in forma pauperis* and his *pro se* civil complaint. The application will be granted, and the complaint will be dismissed.

The Court has reviewed plaintiff's complaint, keeping in mind that complaints filed by *pro se* litigants are held to less stringent standards than those applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even *pro se* litigants, however, must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claims being asserted such that they can prepare a responsive answer, prepare an adequate defense, and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

Plaintiff has prepared his pleading using a preprinted form titled Third-Party Complaint. While plaintiff lists several defendants, he sets forth no factual allegations. The Court cannot determine what claim plaintiff intends to bring, and no defendant is given fair notice of the claim or claims plaintiff purportedly brings against them. As drafted, the complaint fails to comply with Rule 8(a) and therefore it will be dismissed. An Order consistent with this Memorandum Opinion is issued separately.

DATE: 5/5/17

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christopher John Villanueva,

Plaintiff,

v.

United States of America,

Defendant.

Case: 1:17-cv-00938
Assigned To : Unassigned
Assign. Date : 5/19/2017
Description: Pro Se Gen. Civ. **(F-DECK)**

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). "[A] complaint that is excessively long, rambling, disjointed,

3

incoherent, or full of irrelevant and confusing material does not meet [Rule 8's] liberal pleading requirement." *T.M. v. D.C.*, 961 F. Supp. 2d 169, 174 (D.D.C. 2013).

Plaintiff, a resident of Las Vegas, Nevada, has submitted a complaint against the United States of America that consists mostly of assorted attachments. Plaintiff begins: "No informed consent to services provided Donald Trump is not my president because of TREASON." Compl. at 1. That cryptic statement fails to provide any notice of a claim and a basis of federal court jurisdiction. Consequently, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

Date: May 10, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dukhan Mumin,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17-0726 (UNA)
	)	
Eric Holder *et al*.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on its review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. For the reasons explained below, the *in forma pauperis* application will be granted and this case will be dismissed pursuant to 28 U.S.C. § 1915A, which requires immediate dismissal of a prisoner's complaint that fails to state a claim upon which relief can be granted.

"A complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff is a Nebraska state prisoner. He alleges that in 2015, pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*., he submitted a *qui tam* complaint to the Department of Justice ("DOJ") against the Nebraska Department of Health and Human Services ("NDHHS"). According to plaintiff, that state agency "solicit[ed] funds from the federal government to assist those recipients on ADC . . . in rising above the poverty line, but diverted the funds for . . . uses other than what they were designed to address." Compl. ¶ 11. Allegedly, in response to plaintiff's recent inquiry to DOJ,

the U.S. Department of Health and Human Services ("HHS") informed him "that an investigation would not be conducted and dismissed the case."[1] *Id.* ¶ 15. Plaintiff claims that he "is entitled to pursue a *qui tam* action pursuant to law," and that defendants' conduct "represents a collaboration and conspiracy to violate [his] constitutional rights, by depriving him of an opportunity to recover at least 15% of all fines and penalties collected from the NDHHS for their fraudulent activity." *Id.* ¶¶ 17-18. Therefore, plaintiff demands "compensation of at least 15% of all fines and penalties collected from the NDHHS . . . between 1987 to the present" and punitive damages. *Id.* at 5.

The FCA authorizes "[a] person [to] bring a civil action . . . for the person and for the United States Government[,]" but "[t]he action shall be brought in the name of the Government." 31 U.S.C. § 3730. Therefore, it is established in this circuit that "*pro se* parties may not pursue [*qui tam*] actions on behalf of the United States." *Walker v. Nationstar Mortg. LLC*, 142 F. Supp. 3d 63, 65 (D.D.C. 2015) (quoting *U.S. ex rel. Fisher v. Network Software Assocs.*, 377 F. Supp. 2d 195, 196-97 (D.D.C. 2005); *see Canen v. Wells Fargo Bank, N.A.*, 118 F. Supp. 3d 164, 170 (D.D.C. 2015) (noting that "courts in this jurisdiction consistently have held that *pro se* plaintiffs . . . are not adequately able to represent the interests of the United States") (citing cases). As the court explained in *Fisher*, "a *qui tam* relator has an interest in the action," but the United States is the real party in interest "regardless of whether the government chooses to intervene." 377 F. Supp. 2d at 198 (following *Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 12 (D.D.C. 2003)). And "[b]ecause the outcome of such an action could have claim-or issue-preclusive effect on the United States, '[t]he need for adequate legal

[1] Plaintiff refers to an attachment "marked exhibit # 1," but the complaint contains no such attachment.

representation on behalf of the United States is obviously essential.'" *Id*. at 198 (quoting *Rockefeller*, 274 F. Supp. 2d at 16). Consequently, while plaintiff has every right to "plead and conduct [his] own case[ ] personally," 28 U.S.C. § 1654, he has neither a constitutional nor a statutory right to pursue the claims of the United States without counsel.

In addition, the United States Attorney General has absolute discretion in deciding whether to investigate claims for possible criminal or civil prosecution, and such decisions are generally not subject to judicial review. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480-81 (D.C. Cir. 1995); *see Wightman-Cervantes v. Mueller*, 750 F. Supp. 2d 76, 80 (D.D.C. 2010) ("[A]n agency's decision whether to prosecute, investigate, or enforce has been recognized as purely discretionary and not subject to judicial review.") (citing *Block v. SEC*, 50 F.3d 1078, 1081-82 (D.C. Cir. 1995) (other citation omitted)). Consequently, to the extent that plaintiff is challenging HHS' alleged decision not to pursue his *qui tam* claim, he has not identified any authority that provides for judicial review. A separate order of dismissal accompanies this Memorandum Opinion.

Ketanji Brown Jackson

Ketanji Brown Jackson
United States District Judge

DATE: May 19, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRINCE JONES, Plaintiff,	)	
v.	)	Civil Action No. 16-2261
MURIEL BOWSER, *et al.*, Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's application to proceed *in forma pauperis* and his *pro se* complaint. The plaintiff purports to bring this civil rights action under 42 U.S.C. § 1983 against the Mayor of the District of Columbia, the Metropolitan Police Officers who arrested him, the Assistant United States Attorney who prosecuted him, the Public Defender who represented him, and the judges of the Superior Court of the District of Columbia who presided over his criminal case. Generally, the plaintiff alleges that these defendants are responsible for his current incarceration and for assorted constitutional violations committed along the way. He demands compensatory damages of $100 million and punitive damages of $20 million.

Insofar as the plaintiff is mounting a challenge to his Superior Court conviction or sentence, this Court is without jurisdiction to adjudicate the claim. "Under D.C. Code § 23-110, a prisoner may seek to vacate, set aside, or correct sentence on any of four grounds: (1) the sentence is unconstitutional or illegal; (2) the Superior Court did not have jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized by law; or (4) the sentence is

subject to collateral attack." *Alston v. United States*, 590 A.2d 511, 513 (D.C. 1991). Such a motion must be filed in the Superior Court, *see* D.C. Code § 23-110(a), and "shall not be entertained . . . by any Federal . . . court if it appears that the [prisoner] has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention," *id.* § 23-110(g); *see Williams v. Martinez*, 586 F.3d 995, 998 (D.C. Cir. 2009) ("Section 23-110(g)'s plain language makes clear that it only divests federal courts of jurisdiction to hear habeas petitions by prisoners who could have raised viable claims pursuant to [§] 23-110(a).").

With respect to the plaintiff's demands for damages, the Supreme Court instructs:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid . . . plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Heck v. Humphrey, 512 U.S. 477, 486-487 (1994). The plaintiff does not demonstrate that his conviction or sentence has been reversed or otherwise invalidated, and, therefore, his claim for damages fails. *See, e.g., Johnson v. Williams*, 699 F. Supp. 2d 159, 171 (D.D.C. 2010), *aff'd sub nom. Johnson v. Fenty*, No. 10-5105, 2010 WL 4340344 (D.C. Cir. Oct. 1, 2010).

The Court will dismiss the complaint for failure to state a claim upon which relief can be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1). An Order is issued separately.

DATE: May 19, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
MAY 12 2017
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

IN RE PETITION OF [redacted]

Adoption No. 3251
KBJ/RMM

MEMORANDUM OPINION AND ORDER

Before the Court is a Report and Recommendation filed on May 1, 2017, by the Magistrate Judge to whom this matter was referred. (*See* R &R.) The Report and Recommendation recommends that Petitioner's adoption records be resealed because Catholic Charities has informed this Court that it "has completed the search for petitioner's biological family members without success." (*See id.* at 2.) Having reviewed the Magistrate Judge's Report and Recommendation and the record in this matter, the Court agrees with the steps taken in this proceeding by the Magistrate Judge, and concurs with the Magistrate Judge's recommendation. Accordingly, it is hereby

ORDERED that the May 1, 2017, Report and Recommendation is **ADOPTED** in this context. It is

FURTHER ORDERED that, for the reasons stated in the Report and Recommendation, the Petitioner's adoption records are to be **RESEALED**.

Date: May 10, 2017

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Surf Moore,

Plaintiff,

v.

U.S. Justice Dep't *et al.*,

Defendants.

Case: 1:17-cv-00899 (F-Deck)
Assigned To : Unassigned
Assign. Date : 5/12/2017
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

"Once again, plaintiff, a resident of Jackson, Mississippi, purports to sue the United States Department of Justice and a construction company in Chicago, Illinois." *Moore v. Justice Dep't.*, No. 14-1386, 2014 WL 4057158, at *1 (D.D.C. Aug. 12, 2014). He seeks $100 million in monetary damages. *See* Compl. at 2 (renumbered); *Moore, supra* (noting that plaintiff "seeks money damages exceeding $50 million"). Although plaintiff adds to his typical "incoherent statements," *Moore*, 2014 WL 4057158, at * 1, that "this matter is current and request foia of records and have no response," Compl. at 2, he has not provided any particulars about a request for records under the Freedom of Information Act (FOIA) to provide adequate notice of a claim. Hence this case will be dismissed as well under Rule 8 for insufficient pleading. *See Moore*, 2014 WL 4057158, at * 1 (listing cases finding same).[1] A separate Order accompanies this Memorandum Opinion.

Date: May 11, 2017

United States District Judge

[1] A review of this court's dockets reveals that since the decision in 2014, all of plaintiff's complaints (nine excluding the instant complaint), brought against the same defendants as here, have been dismissed for insufficient pleading under Rule 8. *See* Civ. Action Nos. 16-20, 16-21, 16-182, 16-981, 16-1272, 16-1701, 16-2102, 16-2392, 17-324.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Marlon L. Watford,

Plaintiff,

v.

Erik Fossum *et al.*,

Defendants.

Case: 1:17-cv-00897 (F-Deck)
Assigned To : Unassigned
Assign. Date : 5/12/2017
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This action is before the court on its initial review of plaintiff's *pro se* complaint and application to proceed *in forma pauperis*. The court will grant the application and dismiss the complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring dismissal of an action "at any time" the court determines that it lacks subject matter jurisdiction).

Plaintiff has sued the Clerk of the United States Supreme Court and one of his employees for monetary damages and injunctive relief. Plaintiff alleges that in June of 2015, defendants refused to file certain documents that he had submitted in further support of his petition for a writ of certiorari. Compl. at 3. He contends that defendants' actions deprived him "of his U.S. Supreme Court Rule 44 paper documented right to file a petition for rehearing and his entitlement and right to 25 material world days to prepare and file said petition[.]" *Id.* at 8.

The Supreme Court "has inherent [and exclusive] supervisory authority over its Clerk." *In re Marin*, 956 F.2d 339, 340 (D.C. Cir. 1992) (per curiam). Therefore, "a lower court may [not] compel the Clerk of the Supreme Court to take any action." *Id.*; *see Panko v. Rodak*, 606 F.2d 168, 171 n.6 (7th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) ("It seems axiomatic that a lower court may not order the judges or officers of a higher court to take an action."). In

4

addition, the Supreme Court Clerk and his staff enjoy absolute immunity from a lawsuit based on actions, such as alleged here, that fall within the scope of their official duties. *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993). Hence, this case will be dismissed. A separate order accompanies this Memorandum Opinion.

Date: May 10, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Seidy Maria Tiburcio,

Plaintiff,

v.

United States of America *et al.*,

Defendants.

Case: 1:17-cv-00893
Assigned To : Unassigned
Assign. Date : 5/12/2017
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977). "[A] complaint that is excessively long, rambling, disjointed,

incoherent, or full of irrelevant and confusing material does not meet [Rule 8's] liberal pleading requirement." *T.M. v. D.C.*, 961 F. Supp. 2d 169, 174 (D.D.C. 2013).

Plaintiff has submitted a complaint against the United States, the White House Office, the U.S. Congress, and a list of other various defendants. Having reviewed the complaint, which is comprised mostly of unexplained attachments, the court finds no discernible claim and a basis for exercising jurisdiction. Consequently, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

Date: May 11, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sydney E. Smith,

Plaintiff,

v.

United States Department of Justice,

Defendant.

Case: 1:17-cv-00889 (F-Deck)
Assigned To : Unassigned
Assign. Date : 5/12/2017
Description: Pro Se Gen. Civil Jury Demand

MEMORANDUM OPINION

Plaintiff, proceeding *pro se*, has submitted a Complaint and an application to proceed *in forma pauperis*. The Court will grant the application and will dismiss this case for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring dismissal of an action "at any time" the Court determines that it lacks subject matter jurisdiction).

Plaintiff is a District of Columbia prisoner who is currently incarcerated at the Federal Correctional Institution Schuylkill in Minersville, Pennsylvania. In the instant complaint brought under 42 U.S.C. § 1983, plaintiff alleges that the U.S. Department of Justice violated his constitutional rights during post-conviction proceedings in the Superior Court of the District of Columbia. According to plaintiff, the alleged violations "cast significant doubt on the fairness of [his] initial D.C. Code [§] 23-110 proceeding and more importantly, call into question the reliability of the Court's decision." Compl. ¶ 4. Among other relief, plaintiff wants this Court to issue an order stating that it "will grant the 42 U.S.C. [§] 1983 unless the State grant a New D.C. Code [§] 23-110 proceeding within a specific time." *Id.* ¶ 12(d).

Federal district courts, such as this, lack jurisdiction to review the decisions of other courts, including those of the D.C. Superior Court. *See United States v. Choi*, 818 F. Supp. 2d

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79, 85 (D.D.C. 2011) (district courts "generally lack[] appellate jurisdiction over other judicial bodies, and cannot exercise appellate mandamus over other courts.") (citing *Lewis v. Green*, 629 F. Supp. 546, 553 (D.D.C.1986)); *Fleming v. United States*, 847 F. Supp. 170, 172 (D.D.C. 1994), *cert. denied* 513 U.S. 1150 (1995) (noting that "[b]y filing a complaint in this Court against . . . judges who have done nothing more than their duty . . . Fleming has instituted a meritless action") (applying *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923)).

This Court cannot exercise appellate jurisdiction over the challenged proceedings. Plaintiff's recourse lies, if at all, in an appeal to the District of Columbia Court of Appeals. Consequently, this case will be dismissed without prejudice. A separate order accompanies this Memorandum Opinion.

Date: May 10, 2017

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VICENTE QUIROZ,

Plaintiff,

v.

JOHN THOMAS MORAN, JR., *et al.*,

Defendants.

Case: 1:17-cv-00886 (F-Deck)
Assigned To : Unassigned
Assign. Date : 5/12/2017
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's application to proceed *in forma pauperis* and his *pro se* complaint. The Court will GRANT the application and DISMISS the complaint.

Defendant John Thomas Moran, Jr. was "hire[d] by the public defenders[']office [and] assigned by the United States District Court for the Northern District of Illinois" to represent Plaintiff in a criminal matter. Compl. at 1. According to Plaintiff, Defendant committed legal malpractice, *see id.* at 2-3, and thereby violated rights protected under the Fifth and Sixth Amendments to the United States Constitution, *see id.* at 1, and caused Plaintiff to suffer "depression, anxi[e]ty, [and] hopelessness," *id.* at 3. Plaintiff has demanded compensatory and punitive damages. *Id.*

As plaintiff notes, *id.* at 2, he already has brought a civil action against Defendant on claims arising from Defendant's representation of Plaintiff in the same criminal matter. The action was dismissed because the complaint failed to state a claim upon which relief could be granted. *See Quiroz v. Moran*, No. 15 C 8129 (N.D. Ill. Sept. 28, 2015).

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Generally, a plaintiff is expected to "present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence." *U.S. Indus., Inc. v. Blake Constr. Co., Inc.*, 765 F.2d 195, 205 (D.C. Cir. 1985) (citation omitted). The doctrine of res judicata, or claim preclusion, provides "that 'a judgment on the merits in a prior suit bars a second suit involving the same parties . . . based on the same cause of action.'" *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). Here, res judicata bars Plaintiff's claims because "there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) (citations omitted).

The Court concludes that Plaintiff's claims are barred under the doctrine of *res judicata*, and, accordingly, the complaint will be dismissed. An Order accompanies this Memorandum Opinion.

DATE: 5/5/17

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT NAVON,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

Case: 1:17-cv-00879 (F-Deck)
Assigned To : Unassigned
Assign. Date : 5/12/2017
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

The trial court has the discretion to decide whether a complaint is frivolous, and such finding is appropriate when the facts alleged are irrational or wholly incredible. *See Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact."). Having reviewed the plaintiff's complaint carefully, the Court concludes that what factual contentions are identifiable are baseless and wholly incredible.

The Court will grant plaintiff's application to proceed *in forma pauperis* and will dismiss the complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). An Order consistent with this Memorandum Opinion is issued separately.

DATE: 5/5/17

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGEL PASTOR DOSS, PLAINTIFF, v. U.S. PROBATION OFFICE, *et al.*, DEFENDANTS.	Civil Action No. 17-cv-0093 (KBJ)

MEMORANDUM OPINION

Pro se plaintiff Angel Pastor Doss ("Plaintiff") has filed the instant Complaint against the United States Probation Office, four federal judges, and nine Senators, and Speaker Paul Ryan (collectively, "Defendants"). (*See* Compl., ECF No. 1.) The pleading is entitled "Compl[ai]nt, Petition, or Declaration-Against Conspirators For Caused In Furtherance Of Conspiracy [,]" and in the footer of the entire document, Plaintiff includes the notation, "Civil Conspiracy Court Clerk and Federal Government[.]" (Compl., ECF No. 1, at 2.) Among other things, the complaint references an automobile accident in which Plaintiff apparently was involved in 1978 and Plaintiff's arrest in 1985 for stealing a car, as well as Plaintiff's education and work history and his language skills. (*See id.* at 2–4.) The complaint maintains that

> [a]s a result of these wrongful acts, plaintiff, in all aspects of life jobs, love and family were fragmented by deliberate actions of the Legislative, Judicial and Government employees and request special damages. The Election of 2016 is not over as this case is not closed and I could have defeated Rand Paul, and look forward to the opportunity to Drain the swamp.

(*Id.* at 3.) The relief that Plaintiff seeks includes "exemplary and punitive damages in the sum of 50 million dollars in such amount as will sufficiently punish defendants for their willful and malicious conduct and as will serve as an example to prevent a reputation of such conduct" (*id.*), as well as "an Ambassadorship for my beloved Panama Republic of Panama, which I believe I can, bring some civility to IRAN[]" (*id.* at 4).

It is entirely unclear to this Court what cause of action Plaintiff seeks to assert in this pleading, and thus, as explained below, the Court concludes that the complaint must be **DISMISSED** *sua sponte* under Federal Rules of Civil Procedure 8(a) and 12(b)(6).

DISCUSSION

"Ordinarily, the sufficiency of a complaint is tested by a motion brought under Rule 12(b)(6), which tests whether a plaintiff has properly stated a claim" upon which relief can be granted. *Bauer v. Marmara*, 942 F.Supp.2d 31, 37 (D.D.C. 2013) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). However, if the complaint's failure to state a claim for the purpose of Rule 12(b)(6) "is patent, it is practical and fully consistent with plaintiffs' rights and the efficient use of judicial resources for the court to act on its own initiative and dismiss the action." *Id.* (internal quotation marks and citation omitted). Furthermore, under Rule 8(a), a court is authorized to dismiss a complaint that does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility "is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks and citation omitted).

The plausibility standard is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

Such is the case here. Try as it might, this Court cannot begin to decipher exactly what Plaintiff means by the allegations he makes in the complaint, nor is it clear how any of the allegations are connected, much less what the cause of action might be. In contravention of Rule 8(a)'s mandate that a complaint provide a short and plain statement of the claim, Plaintiff's complaint is largely an incomprehensible mish-mash of statements that do not "give adequate notice of the alleged unlawful acts" that form the basis of his claim. *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983). Moreover, because no theory of recovery is clearly identified, the facts, such as they are, also fail to state a claim upon which relief can be granted. *See Shaw v. Ocwen Loan Servicing, LLC*, No. 14cv2203, 2015 WL 4932204, at *1–2 (D.D.C. Aug. 18, 2015).

To be sure, pro se pleadings are entitled to liberal interpretation. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). "However, this consideration does not constitute a license for a plaintiff filing pro se to ignore the Federal Rules of Civil Procedure or expect the Court to decide what claims a plaintiff may or may not want to assert." *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). And district courts have discretion to dismiss a pro se plaintiff's complaint *sua sponte* when there is simply "no factual or legal basis for alleged wrongdoing by defendants," such that it is "patently obvious that the plaintiff cannot prevail on the facts alleged in the complaint." *Perry v.*

Discover Bank, 514 F. Supp. 2d 94, 95 (D.D.C. 2007) (quoting *Baker v. Director, U.S. Parole Comm'n*, 916 F.2d 725, 726–27 (D.C. Cir. 1990)).

In sum, *sua sponte* dismissal is plainly warranted where, as here, "there are no clear allegations of fact to support, or even to illuminate, the nature of Plaintiff's claim." *Shaw*, 2015 WL 4932204, at *2. Accordingly, Plaintiff's complaint will be **DISMISSED** without prejudice pursuant to Rules 8(a) and 12(b)(6). A separate Order accompanies this Memorandum Opinion.

DATE: May 12, 2017

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN HAAS, Plaintiff, v. DONALD TRUMP, *et al.*, Defendants.	Case: 1:17-cv-00861 (F-Deck) Assigned To : Unassigned Assign. Date : 5/9/2017 Description: Pro Se Gen. Civil

MEMORANDUM OPINION

Plaintiff, who identifies himself as "Laser" or "Laster the Liquidator," Compl. ¶ 1, generally objects to the nomination of Jay Clayton to head the Securities and Exchange Commission ("SEC"). In plaintiff's view, Mr. Clayton's partnership in the law firm of Sullivan & Cromwell LLP affords Goldman Sachs, the firm's client, undue power and influence. Based on the Court's understanding of plaintiff's claims, the case must be dismissed because it raises a nonjusticiable political question.

"The political question doctrine incorporates three inquiries:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

Nat'l Treasury Employees Union v. Bush, 715 F. Supp. 405, 407 (D.D.C. 1989) (quoting *Antolok v. United States*, 873 F.2d 369, 381 (D.C. Cir. 1989)) (additional citation omitted).

The Constitution of the United States generally "divides the delegated powers of the . . . federal government into three defined categories, legislative, executive and judicial, to assure, as

nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983). The Appointments Clause authorizes the President of the United States to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint [certain] Officers of the United States[.]" U.S. Const. art. II, § 2, cl. 2. An SEC Commissioner is one such appointment. 15 U.S.C. § 78d(a) ("There is hereby established a Securities and Exchange Commission . . . to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate."); *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010) ("Because the [Securities and Exchange] Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause."). Nothing in the complaint suggests that the President lacks authority to nominate an SEC commissioner, and there is no role for the Court in the appointment process. *See Nat'l Treasury Employees Union*, 715 F. Supp. at 407. Nor does the complaint suggest that the selection of an SEC Commissioner is a matter within the area of judicial expertise, or that there exists any other basis for a federal court's intervention in Mr. Clayton's appointment.

The Court further concludes that dismissal is warranted on a separate ground. "Article III of the United States Constitution limits the judicial power to deciding 'Cases and Controversies.'" *In re Navy Chaplaincy*, 534 F.3d 756, 759 (D.C. Cir. 2008) (quoting U.S. Const. art. III, § 2), *cert. denied*, 556 U.S. 1167 (2009). A party has standing for purposes of Article III if his claims "spring from an 'injury in fact' -- an invasion of a legally protected interest that is 'concrete and particularized,' 'actual or imminent' and 'fairly traceable' to the challenged act of the defendant, and likely to be redressed by a favorable decision in the federal

court." *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Here, the plaintiff does not show that he has suffered or stands to suffer any injury arising from Mr. Clayton's appointment, and therefore he fails to satisfy the "injury-in-fact" requirement of standing. Moreover, since the United States Senate already has confirmed Mr. Clayton's appointment, plaintiff's claims are rendered moot. *See Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974) (noting "that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed").

The Court will grant plaintiff's application to proceed *in forma pauperis* and dismiss his *pro se* civil complaint. An Order consistent with this Memorandum Opinion is issued separately.

DATE: 5/5/17

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARLENE R. ESPOSITO,

Petitioner,

v.

UNITED STATES COURT, *et al.*,

Respondents.

Case: 1:16-cv-01699
Assigned To : Unassigned
Assign. Date : 8/22/2016
Description: Pro Se Gen. Civil (F Deck)

MEMORANDUM OPINION

This matter is before the Court on the petitioner's application to proceed *in forma pauperis* and her *pro se* petition for a writ of mandamus. The Court will grant the application and dismiss the petition.

It appears that the petitioner is litigating a case in the United States Tax Court. Dissatisfied with those proceedings, she alleges that her opponents have not responded properly to pretrial motions, such that it is impossible for the upcoming trial on September 26, 2016 to be fair or adequate. *See* Pet. at 4. She requests a writ of mandamus to compel Tax Court to grant her pretrial motions and to reschedule her trial date. *Id.* at 5; *see id.* at 9-10. Further, she asks that the case be transferred to another court, such as this federal district court. *See id.* at 8

Mandamus relief is proper only if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Council of and for the Blind of Delaware County Valley v. Regan*, 709 F.2d 1521,

1533 (D.C. Cir. 1983) (en banc). The party seeking mandamus has the "burden of showing that [her] right to issuance of the writ is 'clear and indisputable.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). This petitioner mentions these elements, but does not demonstrate that mandamus relief is warranted. Furthermore, as the petitioner has been advised before, a federal district court is without authority to review the decisions of the Tax Court. *See Esposito v. Comm'r of the I.R.S.*, No. CIV.A. 04-2196 (HAA), 2005 WL 567314, at *2 (D.N.J. Feb. 15, 2005) ("[T]o the extent that Ms. Esposito seeks review of the actions by the Tax Court . . . , such matters cannot be brought before the District Court . . . and do not present a cognizable cause of action."); 26 U.S.C. § 7482(a)(1) ("The United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . .").

The petition for a writ of mandamus will be denied and this civil action will be dismissed. An Order accompanies this Memorandum Opinion.

DATE: 8/19/16

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joan F.M. Malone, Plaintiff, v. District Hospital Partners, L.P., d/b/a George Washington University Hospital *et al.* Defendants.	)	Case: 1:16-cv-01685 Assigned To : Unassigned Assign. Date : 8/18/2016 Description: Pro Se Gen. Civil (F Deck))

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

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Plaintiff, a District of Columbia resident, introduces this lawsuit as "an action of gross medical [negligence]." Compl. at 1. The complaint does not include any cogent allegations against the named defendants to provide notice of a claim, nor is the basis of federal court jurisdiction clear. Accordingly, this case will be dismissed without prejudice. A separate order accompanies this Memorandum Opinion.

Date: August 17, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Margaret Elizabeth Schweigert,)
)
Plaintiff,)
)
v.)
)
United States Elections,)
)
Defendant.)

Case: 1:16-cv-01706
Assigned To : Unassigned
Assign. Date : 8/22/2016
Description: Pro Se Gen. Civil (F Deck)

MEMORANDUM OPINION

This matter is before the Court on plaintiff's application to proceed *in forma pauperis* and her *pro se* civil complaint. The application will be granted, and the complaint will be dismissed.

The Court has reviewed plaintiff's complaint, keeping in mind that complaints filed by *pro se* litigants are held to less stringent standards than those applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even *pro se* litigants, however, must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claim being asserted, sufficient to prepare a responsive answer, to prepare an adequate defense and to determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

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In a conclusory fashion, the plaintiff alleges that the media has misreported and tampered with the primary elections for the President of the United States. Compl. at 1. She further alleges that the Federal Election Commission was "ineffective[] in reporting election[] results in primaries and caucuses," and thus fed the public "false information." *Id.* She concludes with a "[r]equest of the court [to] rectify" the situation. *Id.* at 2. The plaintiff does not explain what she means by "rectify," and the Court therefore is unable to determine what relief she seeks. Nor does the plaintiff include a statement showing that she is entitled to any relief. As drafted the complaint fails to comply with Rule 8(a) and it will be dismissed.

An Order consistent with this Memorandum Opinion is issued separately.

DATE: 8/A/16

United States District Judge

FILED

MAY 3 1 2016

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Victor Ivy Brown,

Plaintiff,

v.

The Honorable Ash Carter,

Defendant.

Case: 1:16-cv-01025
Assigned To : Unassigned
Assign. Date : 5/31/2016
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

Plaintiff is back yet again seeking this time to recover $11,849.24 from the U.S. Department of Navy. Plaintiff states that this Court "has venue by virtue" of his long closed Title VII case, *Brown v. Dep't of the Navy*, No. 86-1582 (closed Oct. 1, 1987). Compl. at 2. In that case, plaintiff prevailed and was awarded injunctive relief and "gross damages of $121,706.64." *Brown v. United States*, No. 14-1185T, 2015 WL 4450109, at *1 (Fed. Cl. July 17, 2015). Since 2002, plaintiff has filed a number of unsuccessful actions in this Court and in the Court of Federal Claims to recover $2,727 that he claimed was "erroneously deducted from his back pay award." *Id.*; *see id.* at 2 (noting that "[t]his suit is the latest iteration of plaintiff's quest for the return of the $2,727.00"); *Brown v. Dalton*, 312 F.R.D. 239, 244 (D.D.C. 2015) ("Plaintiff has been litigating his claims regarding the 1987 tax withholding since at least 2002.") (citing *Brown v. Dep't of the Navy*, No. 86-1582 (D.D.C. Aug. 11, 2003)). In 2012, this Court, after thorough examination, dismissed plaintiff's complaint as barred by *res judicata*. *Brown v. Mabus*, 892 F. Supp. 2d 115 (D.D.C. 2012), *aff'd*, 548 Fed. Appx. 623 (D.C. Cir. 2013).

In the instant complaint, plaintiff claims that "in conjunction with" deducting $2,727, the Navy "further assessed [him] the sum of $9,122.24 for his having purportedly been indebted to

4

the Government prior to April, 1988. [But] in a document dated [December 10, 2015,] the [Department of Treasury] notified the Plaintiff that the government has no record of the Plaintiff ever having been indebted to the Government." Compl. at 4. Plaintiff has not provided the document to support this overly broad and vague representation. And it is reasonably safe to conclude from plaintiff's litigation history that this latest purported discovery is simply an attempt to circumvent the statute of limitations. *See Brown*, 2015 WL 4450109, at *2-3 (dismissing complaint for refund of Social Security taxes withheld from back pay award as untimely, finding equitable tolling inapplicable, and concluding that even if the Court of Federal Claims had subject matter jurisdiction over "fraud and takings claims, they would . . . . be far too late . . . well outside this court's six year limitations period) (citing 28 U.S.C. § 2501)); *see also id.* at *3 n. 2 (rejecting plaintiff's continuing claims theory, asserted here as well, "that his claim for reprisal is ongoing and thus not time barred. . . . It is sufficient to note that the wrongdoing alleged here happened once, in 1988, and cannot serve as the basis for a continuing claim").

For the reasons stated in *Brown v. Mabus*, 892 F. Supp. 2d 115 (D.D.C. 2012) and *Brown v. United States*, 2015 WL 4450109 (Fed. Cl. July 17, 2015), the Court finds that this case is barred by *res judicata* and by time. Accordingly, it will be dismissed with prejudice. A separate order accompanies this Memorandum Opinion.

United States District Judge

Date: May 26, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANLEY BAKER,	)	
	)	
Plaintiff,	)	
	)	Case: 1:16-cv-01017
v.	)	Assigned To : Unassigned
	)	Assign. Date : 5/31/2016
U.S. HOUSING AUTHORITY,	)	Description: Pro Se Gen. Civ.
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the court on review of plaintiff's application to proceed *in forma pauperis* and *pro se* civil complaint. The Court will grant the application, and dismiss the complaint.

The Court has reviewed the plaintiff's complaint, keeping in mind that complaints filed by *pro se* litigants are held to less stringent standards than those applied to formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even *pro se* litigants, however, must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the Court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). The purpose of the minimum standard of Rule 8 is to give fair notice to the defendants of the claim being asserted, sufficient to prepare a responsive answer, to prepare an adequate defense and to

(3)

determine whether the doctrine of *res judicata* applies. *Brown v. Califano,* 75 F.R.D. 497, 498 (D.D.C. 1977).

The Court has reviewed the complaint, and finds that it does not state a basis for this Court's jurisdiction, articulate a viable claim, or demands any particular relief. As drafted, the complaint utterly fails to comply with Rule 8(a) and, therefore, the Court will dismiss this case. An Order consistent with this Memorandum Opinion is issued separately.

United States District Judge

DATE: May 24, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAD ALLEN BEERS,

Petitioner,

v.

LORETTA E. LYNCH, *et al.*,

Respondents.

Case: 1:16-cv-01016
Assigned To : Unassigned
Assign. Date : 5/31/2016
Description: Pro Se Gen. Civ.

MEMORANDUM OPINION

The petitioner is a federal prisoner who "seeks an Order from this Court to compel the [Respondents] to perform their official duties[.]" Pet. at 1-2. Specifically, the petitioner wants the respondents to recalculate his sentence to account for a period of time during which the United States relinquished its primary custody of him to the state of Nebraska. *See id.* at 4-5. In other words, the petitioner demands that the respondents award credit all the time he was on escape status and all the time he spent in Nebraska's custody toward service of his federal sentence. Had the respondents awarded the proper credit, the petitioner claims, he "should have been released from federal custody sometime in 2014. *Id.* at 7.

Through this petition for a writ of mandamus, the petitioner attempts to obtain the relief denied him in a prior habeas action. The United States District Court for the District of Kansas denied the petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241, and on appeal the United States Court of Appeals for the Tenth Circuit rejected the petitioner's argument that the Federal "Bureau of Prisons should credit against his federal sentence all the time he spent in Nebraska state prisons . . . and in this way transform his time served [in Nebraska] from a

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consecutive to [a] concurrent term of imprisonment." *Beers v. Maye*, 611 F. App'x 933, 935 (10th Cir. 2015).[1]

Mandamus relief is proper only if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Council of and for the Blind of Delaware County Valley v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (en banc). The party seeking mandamus has the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). This petitioner fails to meet his burden. Furthermore, under the doctrine of *res judicata*, the prior judgment on the merits of the petitioner's sentence computation claim bars him from relitigating the same claim. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). And "where *res judicata* applies, it bars relitigation not only as to all matters which were determined in the previous litigation, but also as to all matters that might have been determined." *Natural Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1252 (D.C. Cir. 1988) (citation omitted); *see Allen v. McCurry*, 449 U.S. 90, 94 (1980). Thus, the petitioner cannot now obtain a writ of mandamus after having been denied a writ of habeas corpus based on the same underlying facts.

The petition for a writ of mandamus will be denied. An Order accompanies this Memorandum Opinion.

DATE: May 24, 2016

United States District Judge

[1] The petitioner has provided a copy of the Tenth Circuit's Order and Judgment as an exhibit to his petition for a writ of mandamus. *See* Pet., Ex. 1.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Calvin Wedington,

Petitioner,

v.

USA *et al.*,

Respondents.

Case: 1:16-cv-01014
Assigned To : Unassigned
Assign. Date : 5/31/2016
Description: Habeas Corpus/2255 (G Deck)

MEMORANDUM OPINION

Petitioner, proceeding *pro se*, is incarcerated at the Federal Medical Center in Rochester, Minnesota. He has submitted a Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 and an application to proceed *in forma pauperis*. A district court lacking jurisdiction over a habeas petitioner's immediate custodian lacks jurisdiction over the petition. *Stokes v. U.S. Parole Comm'n*, 374 F.3d 1235, 1239 (D.C. Cir. 2004). *See Rooney v. Sec'y of Army*, 405 F.3d 1029, 1032 (D.C. Cir. 2005) (habeas "jurisdiction is proper only in the district in which the immediate . . . custodian is located") (internal citations and quotation marks omitted).

This Court cannot exercise jurisdiction over petitioner's warden in Minnesota, but the interest of justice would not be served by transferring the case because petitioner has stated no cogent grounds for relief. *See Mayle v. Felix*, 545 U.S. 644, 649 (2005) ("Rule 2(c) of the Rules Governing Habeas Corpus Cases requires a more detailed statement [than Rule 8(a) of the Federal Rules of Civil Procedure]. The habeas rule instructs the petitioner to 'specify all the

5

grounds for relief available to [him]' and to 'state the facts supporting each ground.'"). Hence, this case will be dismissed without prejudice. A separate Order accompanies this Memorandum Opinion.

Date: May 26, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert Reed,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 16-0682 (UNA)
	)	
Loretta Lynch,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner, a federal prisoner proceeding *pro se*, has submitted an application to proceed *in forma pauperis* and a "Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 to Turn Over Documents and Evidence in the Custody of the U.S. Attorney for the District of Wyoming." The extraordinary writ of mandamus is available when "there is no other adequate remedy available to plaintiff." *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 62 (D.C. Cir. 2010) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)). Requests for agency records are the province of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and "the exclusive nature of the FOIA precludes mandamus relief," *Pickering-George v. Registration Unit, DEA/DOJ*, 553 F. Supp. 2d 3, 4 n.1 (D.D.C. 2008). Consequently, the claim for mandamus relief is denied with prejudice.

"In order to obtain information through FOIA, a requester must file a request for production with the appropriate agency," *Bigwood v. United States Dep't of Def.*, 132 F. Supp. 3d 124, 134 (D.D.C. 2015), in accordance with the agency's published rules for making such a request, 5 U.S.C. § 552(a)(3)(A). *See* 28 C.F.R. § 16.3 ("Requirements for making requests" to Department of Justice components). If dissatisfied with the agency's response, the requester

(5)

must first exhaust his administrative remedies. "Only then can the [requester properly] file a civil action challenging the agency's response to [the] request." *Bigwood*, 132 F. Supp. 3d at 134 (citing 5 U.S.C. § 552(a)(4)(B); *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004)). From all indications, petitioner has not utilized the FOIA to obtain the documents he seeks. Hence, the case will be dismissed without prejudice. A separate order accompanies this Memorandum Opinion.

United States District Judge

Date: May 26, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES NERO,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Case: 1:16-cv-00984
Assigned To : Unassigned
Assign. Date : 5/24/2016
Description: Pro Se Gen. Civil (F Deck)

MEMORANDUM OPINION

This matter is before the Court on petitioner's application to proceed *in forma pauperis* and his *pro se* "Motion for Release from F.R.P. Payment Court Assessment to Late to be Activated More Than Five Years Expired from Date and Indigent Bankrupt Pro Se Petitioner." The Court construes petitioner's motion as a civil complaint and will dismiss it for the reasons stated below.

It appears that, in addition to a lengthy term of imprisonment, the Superior Court of the District of Columbia assessed petitioner costs of $7,500 under the Victims of Violent Crime Compensation Act payable from prison wages. *See* Compl., Ex. (Order Assessing Costs, *United States v. Nero*, No. F4366-99 (D.C. Super. Ct. Sept. 15, 2000)). Petitioner asks the Court to relieve him of this financial obligation because he has no prison job or other resources to pay the assessed costs. *See generally* Compl. at 2.

Petitioner's obligation arises by order of the Superior Court, and this Court has no authority to review, overturn, or otherwise alter a ruling of the Superior Court. *See Richardson*

v. District of Columbia Court of Appeals, 83 F.3d 1513, 1514 (D.C. Cir. 1996) (citing *District of Columbia v. Feldman,* 460 U.S. 462, 476 (1983) and *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923)). Furthermore, any challenge to a criminal sentence imposed by the Superior Court ordinarily must be filed in that court by motion under D.C. Code § 23-110. *See Alston v. United States*, 590 A.2d 511, 513 (D.C. 1991); *see also Williams v. Martinez*, 586 F.3d 995, 998 (D.C. Cir. 2009).

The Court will dismiss the complaint for lack of subject matter jurisdiction. An Order accompanies this Memorandum Opinion.

DATE: May 20, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANDRA GRANT,	)	
	)	
Plaintiff,	)	
	)	Case: 1:16-cv-00983
v.	)	Assigned To : Unassigned
	)	Assign. Date : 5/24/2016
DANVILLE MEMORIAL HOSPITAL, *et al.*,	)	Description: Pro Se Gen. Civil (F Deck)
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter comes before the court on review of the plaintiff's application to proceed *in forma pauperis* and her *pro se* civil complaint. The Court will grant the application, and dismiss the complaint with prejudice.

According to the plaintiff, she and her children have been the victims of stalking, harassment and thefts, *see* Compl. ¶¶ 2-4, gas leaks, *id.* ¶ 5, and water contamination, *id.* ¶ 7. Public officials did not respond to her complaints, *see id.* ¶¶ 6-8, and her family members "did not believe the details" about these events, *id.* ¶ 17. Rather, her sister and brother arranged to have her undergo a psychiatric evaluation. *See id.* ¶¶ 14, 17. Plaintiff believed that her "illegal and unlawful hospitalization was being leaked to law enforcement" to be used as "psychological terrorism" against her. *Id.* ¶ 52. She has brought this "claim [for] reputational damages against the psychiatric doctors and 'mental health' professionals at Danville Memorial Hospital and her assigned physician at the Southern Virginia Mental Health Institute for negligence and unethical practices." *Id.* at 7 (page number designated by the Court).

Federal district courts have jurisdiction in civil actions arising under the Constitution, laws or treaties of the United States. *See* 28 U.S.C. § 1331. In addition, federal district courts have jurisdiction over civil actions where the matter in controversy exceeds $75,000, and the suit is between citizens of different states. *See* 28 U.S.C. § 1332(a). The complaint raises tort claims of negligence and perhaps defamation. Plaintiff does not articulate a claim arising under the United States Constitution or federal law and therefore she does not establish federal question jurisdiction. And even though the parties appear to reside and conduct business in different states, because plaintiff does not demand damages in excess of $75,000, she does not establish diversity jurisdiction.

Accordingly, the complaint will be dismissed for lack of subject matter jurisdiction. An Order consistent with this Memorandum Opinion is issued separately.

DATE: May 20, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DUANE LETROY BERRY,)
)
Plaintiff,)
)
v.)
)
LORETTA LYNCH,)
)
Defendant.)

Case: 1:16-cv-00982
Assigned To : Unassigned
Assign. Date : 5/24/2016
Description: Pro Se Gen. Civil (F Deck)

MEMORANDUM OPINION

This matter is before the Court on review of the plaintiff's application to proceed *in forma pauperis* and his *pro se* civil complaint. The plaintiff, who identifies himself as "the primary Trustee for BRIDGEWATER CAPITAL TR % BANK OF AMERICA TTE," Compl. at 9-29 (page numbers designated by the plaintiff), asserts a right to assets of Bank of America branch offices in Chicago, Illinois, Livonia, Michigan and Redford, Michigan, *see generally id.* at 6-29 – 10-29, 15-29 – 16-19. He demands a "[p]reliminary [i]njunction of the Trust's accompanying assets (Bank of America branches)," *id.* at 15-29 – 16-29, and, it appears, a "[m]andatory [i]njunction for [his] release" from custody, *id.* at 16-29.

"The standard for issuance of the extraordinary and drastic remedy of a temporary restraining order or a preliminary injunction is very high and by now very well established." *RCM Techs., Inc. v. Beacon Hill Staffing Grp., LLC*, 502 F. Supp. 2d 70, 72-73 (D.D.C. 2007) (internal quotation marks and citation omitted). "To warrant a preliminary injunction, a movant must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an

injunction is in the public interest." *Pinson v. U.S. Dep't of Justice*, __ F. Supp. 3d __, __, 2016 WL 1408079, at *2 (D.D.C. Apr. 8, 2016) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)); *see Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). This Court's "power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (internal quotation marks and citation omitted). Here, the Court has read the complaint carefully, yet is unable to identify either a cognizable legal claim or a persuasive argument of the plaintiff's entitlement to the injunctive relief he seeks.

The Court will dismiss the complaint because it fails to state a claim upon which relief can be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b)(1). An order is issued separately.

United States District Judge

DATE: May 20, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HEATHER ANN EDMUNDS,	)	
	)	
Plaintiff,	)	Case: 1:16-cv-00979
	)	Assigned To : Unassigned
v.	)	Assign. Date : 5/24/2016
	)	Description: Pro Se Gen. Civil (F Deck)
GEORGE W. BUSH, SR., *et al.*,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on review of the plaintiff's application to proceed *in forma pauperis* and her *pro se* civil complaint. For the reasons stated below, the Court will dismiss the complaint with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

Among other things, the plaintiff alleges that the defendants have "[s]tolen [her] votes and adopted [her] children off because [she] wanted to vote for a black president," Compl. at 11, that they have "fil[ed] suit with intentions to harvest [her] fingerprints to the [C]alifornia FBI data base," *id.*, and that they "gave [her] stomach cancer . . . by poisoning [her] with radio active dye," *id.* at 12.

The trial court has the discretion to decide whether a complaint is frivolous, and such finding is appropriate when the facts alleged are irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *see Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact."). Having reviewed the complaint, the Court concludes that what factual contentions are identifiable are baseless and wholly incredible. Furthermore, the allegations of the complaint "constitute the sort of patently insubstantial

(N)

claims" that deprive the Court of subject matter jurisdiction. *Tooley v. Napolitano*, 586 F.3d 1006, 1010 (D.C. Cir. 2009).

An Order consistent with this Memorandum Opinion is issued separately.

DATE: May 20, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEXANDER BALLARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case: 1:16-cv-00973 (G Deck)
Assigned To : Unassigned
Assign. Date : 5/24/2016
Description: Habeas Corpus/2241

MEMORANDUM OPINION

This matter is before the Court on petitioner's application to proceed *in forma pauperis* and his *pro se* complaint. The criminal case against petitioner in the Superior Court of the District of Columbia has not concluded, and in this action he claims that he is "being attacked illegally using laws that don't pertain to [him]." Pet. ¶ 13. He asserts that "the courts [are] using what laws [are] necessary to hold [him] illegally changing from law to law." *Id.* Among other things, petitioner raises an ineffective assistance of counsel claim, *id.* ¶ 12, and challenges his current detention, *see id.* ¶ 12 A (Ground One).

"[A] federal court may dismiss an action when there is a direct conflict between the exercise of federal and state jurisdiction and considerations of comity and federalism dictate that the federal court should defer to the state proceedings." *Hoai v. Sun Refining and Marketing Co., Inc.*, 866 F.2d 1515, 1517 (D.C. Cir. 1989) (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)). This is such an action. *See Miranda v. Gonzales*, 173 F. App'x 840 (D.C. Cir.) (per curiam) ("It is well-settled . . . that a court will not act to restrain a criminal prosecution if the

moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.") (citation omitted), *cert. denied*, 549 U.S. 889 (2006); *see Smith v. Holder*, No. 14-131, 2014 WL 414292, at *1 (D.D.C. Jan. 30, 2014), *aff'd*, 561 F. App'x 12 (D.C. Cir. June 16, 2014) (per curiam) (noting appellant's failure to "show[] that the district court erred in dismissing his challenge to pending District of Columbia criminal proceedings under the abstention doctrine of *Younger v. Harris*"). At this time it does not appear that petitioner has been tried or convicted. Presumably he may raise any constitutional claim he believes he has in the Superior Court; if he is dissatisfied, he may pursue an appeal to the District of Columbia Court of Appeals, and from there an appeal to the Supreme Court of the United States. *See JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1121 (D.C. Cir. 2004) (footnotes omitted).[1]

Given "the fundamental policy against federal interference with state criminal prosecutions" *Younger*, 401 U.S. at 46, the Court will dismiss this action. An Order accompanies this Memorandum Opinion.

DATE: May 20, 2016

United States District Judge

[1] Furthermore, even if the criminal case had concluded, a challenge to petitioner's conviction or sentence is not properly brought in this federal district court. "Under D.C. Code § 23-110, a prisoner may seek to vacate, set aside, or correct sentence on any of four grounds: (1) the sentence is unconstitutional or illegal; (2) the Superior Court did not have jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized by law; or (4) the sentence is subject to collateral attack." *Alston v. United States*, 590 A.2d 511, 513 (D.C. 1991). Such a motion must be filed in the Superior Court, *see* D.C. Code § 23-110(a), and "shall not be entertained . . . by any Federal . . . court if it appears that the [prisoner] has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." D.C. Code § 23-110(g); *see Williams v. Martinez*, 586 F.3d 995, 998 (D.C. Cir. 2009) ("Section 23-110(g)'s plain language makes clear that it only divests federal courts of jurisdiction to hear habeas petitions by prisoners who could have raised viable claims pursuant to section 23-110(a).").

FILED
MAY 19 2016
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sushila Gaur,

Plaintiff,

v.

World Bank Group,

Defendant.

Case: 1:16-cv-00948
Assigned To : Unassigned
Assign. Date : 5/19/2016
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application to proceed *in forma pauperis*. The Court will grant plaintiff's application and dismiss the complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss an action "at any time" it determines that subject matter jurisdiction is wanting).

In a one-page complaint, plaintiff states: "I want to get my job at the World Bank and punishment for those who want to turn me into MISTRES[S]/SEX SLAVE of Karl F. Inderfurth." Plaintiff then refers the Court to an assortment of documents attached to the complaint for "details." In one attachment addressed to "Honorable Judge," plaintiff indicates that the named defendant, World Bank Group, failed to hire her for a job for which she applied in June 2015. Plaintiff surmises that former U.S. Ambassador Inderfurth and "his other associates" sabotaged her job search for unsavory reasons.

Plaintiff does not state the basis of federal court jurisdiction. Regardless, "[a] district court lacks subject matter jurisdiction [over a] complaint [that] 'is patently insubstantial, presenting no federal question suitable for decision.'" *Caldwell v. Kagan*, 777 F. Supp. 2d 177,

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178 (D.D.C. 2011) (quoting *Tooley v. Napolitano*, 586 F.3d 1006, 1009 (D.C. Cir. 2009)). And "federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine*, 415 U.S. 528, 536-7 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)). The instant complaint satisfies the foregoing standards. Consequently, this case will be dismissed with prejudice. A separate Order accompanies this Memorandum Opinion.

Date: May 18, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert Heard,

Petitioner,

v.

United States Attorney General,

Respondent.

Case: 1:16-cv-00944
Assigned To : Unassigned
Assign. Date : 5/19/2016
Description: Pro Se Gen. Civ.

MEMORANDUM OPINION

Petitioner, proceeding *pro se*, has submitted a Mandamus action and an application to proceed *in forma pauperis*. The Court will grant petitioner's application to proceed *in forma pauperis* and will dismiss the case. *See* 28 U.S.C. § 1915(e)(2)(B) (requiring dismissal of a case upon a determination that the complaint fails to state a claim upon which relief may be granted or is frivolous).

The extraordinary remedy of a writ of mandamus is available to compel an "officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." 28 U.S.C. § 1361. Petitioner bears a heavy burden of showing that his right to a writ of mandamus is "clear and indisputable." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (citation omitted). "It is well settled that a writ of mandamus is not available to compel discretionary acts." *Cox v. Sec'y of Labor*, 739 F. Supp. 28, 30 (D.D.C. 1990) (citing cases).

Petitioner sets out an assortment of disjointed statements and then asks "this court . . . to cause the United States Attorney General to ensue and perfect arrest warrants for [all] {everybody} (non lacking) whom are involved from the beginning to the end." Pet. at 2 (alterations in original). He has provided no basis for any relief, let alone the extraordinary

3

remedy of mandamus. Hence, this case will be dismissed with prejudice. A separate order of dismissal accompanies this Memorandum Opinion.

United States District Judge

Date: May 18, 2016

FILED

MAY 11 2016

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Melvin Alexander Rowe,

Plaintiff,

v.

Deutsche Bank,

Defendant.

Case: 1:16-cv-00897
Assigned To : Unassigned
Assign. Date : 5/11/2016
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

3

Plaintiff is a resident of Orlando, Florida. He purports to sue Deutsche Bank, but the complaint consists of cryptic statements that fail to provide notice of a claim and the basis of federal court jurisdiction. Therefore, dismissal will be without prejudice. A separate order accompanies this Memorandum Opinion.

Date: ~~April~~ May 9, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nathanael L. Reynolds,	)	
	)	
Plaintiff,	)	
	)	Case: 1:16-cv-00895
v.	)	Assigned To : Unassigned
	)	Assign. Date : 5/11/2016
Magistrate Judge Shiva V. Hodges *et al.*,	)	Description: Pro Se Gen. Civ.
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff, proceeding *pro se*, has submitted a complaint and an application to proceed *in forma pauperis*. The application will be granted and the complaint will be dismissed pursuant to 28 U.S.C. § 1915A, which requires the Court to screen and dismiss a prisoner's complaint upon a determination that it fails to state a claim upon which relief may be granted or seeks monetary relief from an immune defendant. *See id.* § 1915A(b).

Plaintiff is an inmate at the Charleston County Detention Center in Charleston, South Carolina. He has brought suit against a district judge and a magistrate judge, both sitting in the U.S. District Court for the District of South Carolina. Plaintiff complains about their rulings, *see* Compl. ¶ IV, and he seeks $10 million from each defendant. In addition, plaintiff seeks this Court's intervention.

Judges are absolutely immune from a lawsuit based, as here, on acts taken during the performance of their official duties. *See Mirales v. Waco*, 502 U.S. 9, 11-12 (1991); *Thanh Vong Hoai v. Superior Court for District of Columbia*, 344 Fed. Appx. 620 (D.C. Cir. 2009) (per curiam); *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993); *Smith v. Scalia*, 44 F. Supp. 3d

(3)

28, 40-42 (D.D.C. 2014) (examining cases). In addition, this Court lacks jurisdiction to review the decisions of its sister courts. *See United States v. Choi*, 818 F. Supp. 2d 79, 85 (D.D.C. 2011) (district courts "generally lack[] appellate jurisdiction over other judicial bodies, and cannot exercise appellate mandamus over other courts.") (citing *Lewis v. Green*, 629 F. Supp. 546, 553 (D.D.C.1986)); *Fleming v. United States*, 847 F. Supp. 170, 172 (D.D.C. 1994), *cert. denied* 513 U.S. 1150 (1995) (noting that "[b]y filing a complaint in this Court against federal judges who have done nothing more than their duty . . . Fleming has instituted a meritless action") (applying *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923)). Accordingly, this case will be dismissed with prejudice. A separate Order accompanies this Memorandum Opinion.

Date: May 9, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nathanael L. Reynolds,	)	
	)	
Plaintiff,	)	
	)	Case: 1:16-cv-00894
v.	)	Assigned To : Unassigned
	)	Assign. Date : 5/11/2016
Judge Martelle Morrison *et al.*,	)	Description: Pro Se Gen. Civ.
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff, proceeding *pro se*, has submitted a complaint and an application to proceed *in forma pauperis*. The application will be granted and the complaint will be dismissed pursuant to 28 U.S.C. § 1915A, which requires the Court to screen and dismiss a prisoner's complaint upon a determination that it fails to state a claim upon which relief may be granted or seeks monetary relief from an immune defendant. *See id.* § 1915A(b).

Plaintiff is an inmate at the Charleston County Detention Center in Charleston, South Carolina. He has brought suit against two state judges in South Carolina. Plaintiff complains about their rulings, *see* Compl. ¶ IV, and he seeks $90,000 from each defendant. In addition, plaintiff seeks this Court's intervention.

Judges are absolutely immune from a lawsuit based, as here, on acts taken during the performance of their official duties. *See Mirales v. Waco*, 502 U.S. 9, 11-12 (1991); *Thanh Vong Hoai v. Superior Court for District of Columbia*, 344 Fed. Appx. 620 (D.C. Cir. 2009) (per curiam); *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993); *Smith v. Scalia*, 44 F. Supp. 3d 28, 40-42 (D.D.C. 2014) (examining cases). In addition, this Court generally lacks jurisdiction to review the decisions of other courts. *See United States v. Choi*, 818 F. Supp. 2d 79, 85

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(D.D.C. 2011) (district courts "generally lack[] appellate jurisdiction over other judicial bodies, and cannot exercise appellate mandamus over other courts.") (citing *Lewis v. Green*, 629 F. Supp. 546, 553 (D.D.C.1986)). Accordingly, this case will be dismissed with prejudice. A separate Order accompanies this Memorandum Opinion.

Date: May 9, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM D. CARROLL,)
)
Plaintiff,)
)
v.)
)
STATE OF FLORIDA, *et al.*,)
)
Defendants.)

Case: 1:16-cv-00837
Assigned To : Unassigned
Assign. Date : 5/11/2016
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's application to proceed *in forma pauperis* and his *pro se* complaint. According to the plaintiff, he has been convicted twice of the same offense in the Circuit Court of the Tenth Judicial Circuit in Polk County, Florida, in violation of rights protected under the Fifth Amendment to the United States Constitution. Among other relief, the plaintiff demands monetary damages.

The Supreme Court instructs:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid . . . plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Heck v. Humphrey, 512 U.S. 477, 486-487 (1994). The plaintiff does not demonstrate that his conviction or sentence has been reversed or otherwise invalidated, and, therefore, his claim for damages fails. *See, e.g., Johnson v. Williams*, 699 F. Supp. 2d 159, 171 (D.D.C. 2010), *aff'd sub nom. Johnson v. Fenty*, No. 10-5105, 2010 WL 4340344 (D.C. Cir. Oct. 1, 2010).

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The Court will dismiss the complaint for failure to state a claim upon which relief can be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1). An Order is issued separately.

DATE: May 9, 2016

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 18 2015
Clerk, U.S. District and Bankruptcy Courts

Gregory Hemby,

Plaintiff,

v.

Fairfax Village Condominium IV Association, Inc. *et al.*,

Defendants.

Case: 1:15-cv-01337
Assigned To : Unassigned
Assign. Date : 8/18/2015
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

Plaintiff, a District of Columbia resident proceeding *pro se*, seeks to bring a class action against his condominium association for violations of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the Clayton Act, 15 U.S.C. §§ 12 *et seq*. He has submitted with the complaint an application to proceed *in forma pauperis*, which will be granted for the purpose of dismissing the case.

Plaintiff alleges that defendants have violated the foregoing Acts "by their exclusivity with a[n] expressed or implied agreement with a cable provider [Comcast] in the provision of cable services to Village IV residents[.]" Compl. at 5 (first bracket in original). He sues "On Behalf of [those] Residents[.]". *Id.* at 1. As a general rule applicable here, a *pro se* litigant can represent only himself in federal court. *See* 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."); *Georgiades v. Martin–Trigona*, 729 F.2d 831, 834 (D.C. Cir. 1984) (individual "not a member of the bar of any court . . . may appear *pro se* but is not qualified to appear in [federal] court as counsel for others") (citation and footnote omitted); *see also U.S. ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003), *aff'd sub nom. Rockefeller ex rel. U.S. v. Washington TRU Solutions LLC*,

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No. 03-7120, 2004 WL 180264 (D.C. Cir. Jan. 21, 2004) ("[A] class member cannot represent the class without counsel, because a class action suit affects the rights of the other members of the class.") (citing *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975)).

This Court previously dismissed plaintiff's complaint raising a similar antitrust claim against the same defendants for want of subject matter jurisdiction upon determining that "the core of Plaintiff's complaint is his dissatisfaction with the current landlord-tenant relationship, and the alleged violations of federal law, which are entirely peripheral, are neither 'necessary' to, nor an 'element' of, Plaintiff's claims." *Hemby v. Fairfax Village Condominium IV Assoc.'n, Inc.*, No. 14-2038, slip op. at 2 (D.D.C. Dec. 8, 2014) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)). Although the instant complaint is limited to the exclusive agreement defendant has with Comcast to provide cable services to residents, *see* Compl. at 2-6, it cannot proceed as the intended class action without licensed counsel. Hence, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

United States District Judge

DATE: August 14, 2015

FILED
AUG 17 2015
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Selina Miller,

Plaintiff,

v.

New Salem Baptist Church *et al.*,

Defendants.

Case: 1:15-cv-01332
Assigned To : Unassigned
Assign. Date : 8/17/2015
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on plaintiff's *pro se* complaint and application to proceed *in forma pauperis*. The Court will grant the plaintiff's application and dismiss the complaint for lack of subject matter jurisdiction.

The subject matter jurisdiction of the federal district courts is limited and is set forth generally at 28 U.S.C. §§ 1331 and 1332. Under those statutes, federal jurisdiction is available only when a "federal question" is presented or the parties are of diverse citizenship and the amount in controversy exceeds $75,000. A party seeking relief in the district court must at least plead facts that bring the suit within the court's jurisdiction. *See* Fed. R. Civ. P. 8(a). Failure to plead such facts warrants dismissal of the action. *See* Fed. R. Civ. P. 12(h)(3).

Plaintiff is a resident of Columbus, Ohio. She has brought a defamation suit against a church, a newspaper, and three individuals all based in Columbus, Ohio, and the Washington Post based in the District of Columbia. Jurisdiction is lacking because the complaint does not present a federal question, and plaintiff and at least one of the defendants reside in the same state so as to defeat diversity jurisdiction. *See Morton v. Claytor*, 946 F.2d 1565 (D.C. Cir. 1991)

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(Table) ("Complete diversity of citizenship is required in order for jurisdiction to lie under 28 U.S.C. § 1332."); *Bush v. Butler*, 521 F. Supp. 2d 63, 71 (D.D.C .2007) ("For jurisdiction to exist under 28 U.S.C. § 1332, there must be complete diversity between the parties, which is to say that the plaintiff may not be a citizen of the same state as any defendant.") (citations omitted). Plaintiff's recourse lies, if at all, in the appropriate state court in Ohio. Hence, this case will be dismissed without prejudice.

United States District Judge

DATE: August 13, 2015

FILED
DEC 30 2014
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUD ROSSMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case: 1:14-cv-02205
Assigned To : Unassigned
Assign. Date : 12/30/2014
Description: Pro Se Gen. Civil

MEMORANDUM OPINION

It appears that plaintiff has been charged with a misdemeanor offense, and the matter is pending in the Superior Court of the District of Columbia. He now seeks to remove the criminal matter to this federal district court.

"[A] federal court may dismiss an action when there is a direct conflict between the exercise of federal and state jurisdiction and considerations of comity and federalism dictate that the federal court should defer to the state proceedings." *Hoai v. Sun Refining and Marketing Co., Inc.*, 866 F.2d 1515, 1517 (D.C. Cir. 1989) (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)). This is such an action. *See Miranda v. Gonzales*, 173 F. App'x 840 (D.C. Cir.) (per curiam) ("It is well-settled . . . that a court will not act to restrain a criminal prosecution if the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.") (citation omitted), *cert. denied*, 549 U.S. 889 (2006); *see Smith v. Holder*, No. 14-131, 2014 WL 414292, at *1 (D.D.C. Jan. 30, 2014), *aff'd*, 561 F. App'x 12 (D.C. Cir. June 16, 2014) (per curiam) (noting appellant's failure to "show[] that the district court erred in

dismissing his challenge to pending District of Columbia criminal proceedings under the abstention doctrine of *Younger v. Harris*"). Plaintiff may raise any constitutional claim he believes he has in the Superior Court; if he is dissatisfied, he may pursue an appeal to the District of Columbia Court of Appeals, and from there an appeal to the Supreme Court of the United States. *See JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1121 (D.C. Cir. 2004) (footnotes omitted).

Given "the fundamental policy against federal interference with state criminal prosecutions" *Younger,* 401 U.S. at 46, the Court will dismiss this action. An Order accompanies this Memorandum Opinion.

DATE: 12/19/14

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Pauletta Higgins, Plaintiff, v. D.C. Civil Actions Small Claims, Defendant.	Case: 1:14-cv-02091 Assigned To : Unassigned Assign. Date : 12/12/2014 Description: Pro Se Gen. Civil

MEMORANDUM OPINION

This matter is before the Court on review of the plaintiff's *pro se* complaint and application to proceed *in forma pauperis*. The application will be granted and the case will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) (requiring dismissal of a case upon a determination that the complaint fails to state a claim upon which relief may be granted).

Plaintiff is a District of Columbia resident. She sues the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia for allegedly refusing to file her "legal paper base[d] on facts of abuse of discreation [sic]." Not. of Compl.; *see* Compl. Attachments (Superior Court forms). The D.C. Superior Court is an entity within the District of Columbia that cannot be sued in its own name. *See Kundrat v. District of Columbia*, 106 F. Supp. 2d 1, 4-8 (D.D.C. 2000). In addition, plaintiff has not alleged sufficient facts or requested any relief to warrant substituting the District of Columbia as the proper defendant. *See* Fed. R. Civ. P. 8(a) (requiring complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction[,] (2) a short and plain statement of the claim showing that the pleader is entitled to

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relief[,] and (3) a demand for the relief sought"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 16 n.4 (D.C. Cir. 2008) ("We have never accepted 'legal conclusions cast in the form of factual allegations' because a complaint needs some information about the circumstances giving rise to the claims.") (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). Hence, this case will be dismissed. A separate Order accompanies this Memorandum Opinion.

Date: December 5, 2014

United States District Judge

FILED
DEC - 4 2013
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DaVonta M. Rowland,

Plaintiff,

v.

Army National Guard,

Defendant.

Civil Action No. 13- 1927

MEMORANDUM OPINION

This matter is before the Court on its initial review of plaintiff's *pro se* complaint and application for leave to proceed *in forma pauperis*. The Court will grant the *in forma pauperis* application and dismiss the case because the complaint fails to meet the minimal pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Pro se litigants must comply with the Federal Rules of Civil Procedure. *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987). Rule 8(a) of the Federal Rules of Civil Procedure requires complaints to contain "(1) a short and plain statement of the grounds for the court's jurisdiction [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009); *Ciralsky v. CIA*, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The Rule 8 standard ensures that defendants receive fair notice of the claim being asserted so that they can prepare a responsive answer and an adequate defense and determine whether the doctrine of *res judicata* applies. *Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

Plaintiff, a District of Columbia resident, sues the Army National Guard in the District of Columbia for $3 trillion in damages. In his one-page complaint, plaintiff states that he "returned

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for an enlistment appointment" on October 18, 2013, and was "targeted by way of Human Rights Act of 'America' violations!" He then mentions "constitutional law" and "discrimination." The complaint is devoid of facts and, thus, provides no notice of a claim and the basis of federal court jurisdiction. A separate Order accompanies this Memorandum Opinion.

United States District Judge

DATE: October 29, 2013

FILED
OCT 25 2013
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Guillermo Somarriba Gonzalez,

Petitioner,

v.

Stacey Stone,

Respondent.

Civil Action No. 13-1647

MEMORANDUM OPINION

Petitioner, proceeding *pro se*, has submitted an application for a writ of *habeas corpus* under 28 U.S.C. § 2254 and an application to proceed *in forma pauperis*. For the following reasons, the Court will grant the *in forma pauperis* application and will dismiss the case without prejudice and with leave to reopen.

Petitioner claims that he received ineffective assistance of counsel on direct appeal from his conviction in the Superior Court of the District of Columbia. At the conclusion of his procedural statement, petitioner states that on April 15, 2013, he filed a motion in the District of Columbia Court of Appeals ("DCCA") to recall the mandate, Pet. at 2, but he does not state that the DCCA has ruled on his motion. The exhaustion of available state remedies is a prerequisite to obtaining the requested habeas relief. *See* 28 U.S.C. § 2254(b)(1); *Williams v. Martinez*, 586 F.3d 995, 999 (D.C. Cir. 2009) (noting that "we clarified that after 'a cogent ruling from the D.C. Court of Appeals concerning local relief, if any . . . the District Court will be in a position to rule intelligently on [petitioner's] federal petition for habeas corpus.' ") (quoting *Streater v. Jackson*, 691 F.2d 1026, 1028 (D.C. Cir. 1982)). Since this action appears to be lodged prematurely, it will be dismissed without prejudice to petitioner's moving to reopen the case after the DCCA has

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ruled on his motion to recall the mandate. A separate Order accompanies this Memorandum Opinion.

United States District Judge

Date: October 8, 2013

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 13(g)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YORIE VON KAHL, Plaintiff, v. BUREAU OF NATIONAL AFFAIRS, INC., Defendant.	)	Civil Action No. 09-0635 (KBJ)

MEMORANDUM OPINION AND ORDER

Plaintiff Yorie Von Kahl ("Plaintiff") is currently incarcerated in connection with the 1983 shooting deaths of two United States Marshals in North Dakota. Plaintiff has already extensively litigated issues relating to his trial, including his contentions that he is factually innocent and that the trial court lacked jurisdiction to convict and sentence him in the manner it did. Proceeding now pro se, Plaintiff filed the instant five-count libel complaint against Bureau of National Affairs ("BNA") on April 3, 2009, alleging that false and defamatory statements of fact regarding him were contained in a "summary report" that BNA once published about a petition that Plaintiff had filed with the United States Supreme Court. Plaintiff seeks a total of $100,000,000 in compensatory and special damages, plus $90,000,000 in punitive damages. He also asks that BNA publish a satisfactory correction to mitigate the damage to his reputation that Plaintiff alleges he has suffered.

This matter is before the Court on the parties' third and fourth rounds of briefing regarding substantially the same legal issues.[1] Specifically, Plaintiff has moved for reconsideration of a prior order entering judgment in BNA's favor on his libel per se claim, arguing that the prior order contains errors of law and fact. (*See* Pl.'s Mot. to Reconsider Order Precluding Claims of Libel Per Se ("Pl.'s Mot. to Reconsider"), ECF No. 74, at 8.)[2] The parties have also filed cross-motions for summary judgment. (*See* Pl.'s Mot. for Partial Summ. J. ("Pl.'s Mot. for Summ. J."), ECF No. 58; Def.'s Mot. for Summ. J., ECF No. 62.) In his summary judgment motion, Plaintiff asks the Court to enter judgment in his favor with respect to BNA's potential collateral estoppel defense, on the grounds that a jury should be permitted to evaluate the validity of his underlying criminal convictions in order to determine whether the statement that BNA published is false. (Pl.'s Mot. for Summ. J. at 47-48.) In its motion, BNA asserts that it is entitled to summary judgment on Plaintiff's claims on the grounds of substantial truth, lack of actual malice, and the fair reporting privilege. (Def.'s Mot. for Summ. J. at 22-39.)

Because this Court finds (1) that Plaintiff has failed to establish any basis for revisiting the prior order regarding libel per se; (2) that BNA's asserts a colorable collateral estoppel defense; and (3) that material issues of fact exist regarding BNA's legal arguments, it will **DENY** all of these motions.[3]

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[1] This matter, which was previously before Chief Judge Roberts, was reassigned to this Court on April 5, 2013.

[2] Page numbers herein refer to those that the Court's Electronic Filing System automatically assigns.

[3] Plaintiff has also filed a document entitled "Motion to Invoke the Court's Inherent Powers to Strike Defendant's Combined Motion and Memorandum for Summary Judgment . . . for an Attempt to Perpetrate a Fraud on the Court and Related Misconduct and to Take Such Other Action as Justice Requires." (ECF No. 78.) This motion is meritless, and it will be summarily denied.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Underlying Facts

In 1983, Plaintiff was with a group of people that included his father, for whom an arrest warrant was pending. The United States Marshals attempted to arrest Plaintiff's father, and a shoot-out ensued that left two Deputy United States Marshals dead. As a result of this event, Plaintiff was "charged with two counts of first degree murder; four counts of assaulting United States Marshals and other law enforcement officers assisting them; one count of conspiring to assault; and one count of harboring and concealing a fugitive." *United States v. Faul*, 748 F.2d 1204, 1207 (8th Cir. 1984).[4] Ultimately, "[t]he jury found [Plaintiff] not guilty of first degree murder, but guilty of the lesser included offense of second degree murder, and guilty of the remaining charges." *Id.* at 1207-08.

Following the jury's verdict, the trial court "adjudged that Defendant, Yorie Von Kahl, . . . has been convicted of violations of 18 United States Code Sections 1111, 1114 and 2 as charged in Counts 1 and 2 of the Indictment" and ordered that he "be committed to the custody of the Attorney General of the United States for life" on these counts. (Ex. A to Mem. in Supp. of Def. Bureau of Nat'l Affairs, Inc.'s Mot. to Dismiss or for Summ. J. ("Mandamus Pet."), ECF No. 7-1, at 40.) The Eighth Circuit affirmed the convictions on appeal. *See Faul*, 748 F.2d at 1223.

Plaintiff nevertheless believes that his convictions under 18 U.S.C. §§ 1114 and 1111 are invalid and that the sentences that the trial court imposed on those convictions were illegal. With respect to § 1114, Plaintiff maintains that he was never indicted and

[4] Two other individuals, Scott Faul and David Broer, were charged and tried with Plaintiff in connection with the 1983 shoot-out.

tried for second degree murder under § 1114—only first degree murder—and therefore the jury's verdict that he was not guilty of first degree murder controls and its verdict that he was guilty of second degree murder is void. (Pl.'s Mot. to Reconsider. at 21-22.) Regarding § 1111, Plaintiff asserts that he has "never been charged or tried for any violation of any offenses" that § 1111 defines or makes punishable. (*Id.* at 2; *see also* Mandamus Pet. at 14 (asserting that jurisdiction under § 1111 extends only to murders that take place "'within the special maritime and territorial jurisdiction of the United States'" and that prerequisite was not satisfied in his case (quoting 18 U.S.C. §1111(b))).) Since 1984, Plaintiff has filed a series of unsuccessful challenges to his conviction and sentence, including a motion to correct his "illegal sentence" that he filed with the North Dakota trial court in 2003 in which he made these same invalidity arguments. *United States v. Voh Kahl*, No. A3-96-55, 2003 WL 21715352 (D.N.D. July 14, 2003). The North Dakota court rejected these arguments out of hand, *see generally id.*, and the Eighth Circuit affirmed this ruling, *see United States v. Von Kahl*, 95 F. App'x 200 (2004). Plaintiff also brought his arguments attacking the validity of his convictions to the Supreme Court, filing a petition for a writ of mandamus in 2005 that sought an order compelling the trial judge to vacate his life sentences. (*See* Mandamus Pet.)[5]

[5] No federal court has granted Plaintiff relief from his convictions and sentence. *See Kahl v. United States*, 242 F.3d 783 (8th Cir. 2001) (affirming district court's denial of motion to vacate sentence under 28 U.S.C. § 2255), *cert. denied*, 534 U.S. 941 (2001); *United States v. Faul*, 748 F.2d 1204, 1223 (8th Cir. 1984) (affirming convictions), *cert. denied*, 472 U.S. 1027 (1985); *Peltier v. U.S. Parole Comm'n*, No. 05-3484, 2006 WL 2570553 (D. Kan. Sept. 5, 2006) (dismissing petition for writ of habeas corpus under 28 U.S.C. § 2241), *aff'd sub nom. Von Kahl v. United States*, 321 F. App'x 724 (10th Cir. 2009); *Kahl*, 2003 WL 21715352, at *2 (denying plaintiff's motion to correct sentence pursuant to Fed. R. Crim. P. 35(a)).

Significantly for present purposes, BNA published the following summary of Plaintiff's Mandamus Petition in the August 17, 2015 edition of the *Criminal Law Reporter* ("CLR"):

> **04-1717 In re Kahl**
> *Homicide – Murder of U.S. marshals – Jury instructions – Sentencing.*
>
> Ruling below (D. N.D., 6/24/83):
>
> Petitioner, who showed no hint of contrition and made statements to press that he believed that murders of U.S. marshals in course of their duties were justified by religious and philosophical beliefs, is committed to custody of the U.S. Attorney General for imprisonment for life based on his convictions on two counts of violating 18 U.S.C. §§ 1111, 1114, and 2, terms to run concurrently; for 10-year term of imprisonment on each of four counts on which he was convicted of violating 18 U.S.C. §§ 111[1], 1114, and 2, which terms will run concurrently but consecutively to life term; to five-year term of imprisonment for violating 18 U.S.C. §§ 1071 and 2, term to run consecutively to 10-year term and life term; and to five-year term of imprisonment on his conviction for violating 18 U.S.C. § 371, term to run concurrently to five-year, 10-year, and life terms.

(Ex. 1 to Compl., ECF No. 1-2.) The next paragraph of the summary set forth the legal questions that Plaintiff's petition presented. (*Id.*) Through counsel, Plaintiff complained to BNA that this summary was defamatory because Plaintiff did not make the statements attributed to him, and because it damaged Plaintiff's credibility and reputation in the legal and business community, including specifically the federal courts in which Plaintiff was litigating the validity of his convictions. (Ex. 5 to Decl. of Jay Brown Ward ("Ward Decl."), ECF No. 62-7, at 2-3.). Thereafter, BNA published the following statement in the July 18, 2007, edition of the CLR:

> **Clarification**
> In a Summaries of Recently Filed Cases entry that ran at 77 CRL 2127, concerning U.S. Supreme Court petition No. 04-

> 1717, the summary of the sentencing judge's ruling should have begun:
> "Petitioner who was said to have believed that murders were justified, ..."

(Ex. 6 to Ward Decl., ECF No. 62-8.)

This summary and clarification form the basis for the instant complaint, in which Plaintiff alleges that the following statements about him that appeared in BNA's original publication are libelous:

1) "[T]hat Plaintiff showed no hint of contrition in respect to murders of officers performing duties" (Compl. ¶ 17 (internal quotation marks omitted));

2) That Plaintiff "made statements to the press that he believed that murders of U.S. marshals in course of their duties were justified" (Compl. ¶ 28 (internal quotation marks omitted));

3) That Plaintiff "positively stated beliefs justifying murders of U.S. marshals in course of their duties was premised upon religious and philosophical beliefs" (Compl. ¶ 32 (internal quotation marks omitted)); and

4) That Plaintiff "is committed to custody . . . based on his convictions on two counts of violating 18 U.S.C. §§ 1111, 1114, and 2" (Compl. ¶ 36 (alterations in original) (internal quotation marks omitted).)

Plaintiff's complaint further alleges that BNA's "clarification" is also libelous insofar as it "purport[ed] that the statement in question was a 'summary of the sentencing judge's ruling below[.]'" (*Id.* ¶ 40.)

B. Prior Proceedings[6]

In response to the instant libel complaint, BNA filed a motion for summary judgment (ECF No. 6), and Plaintiff responded with his own cross-motion for summary judgment (ECF No. 22), both of which were denied. *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 810 F. Supp. 2d 138, 146 (D.D.C. 2011) (ECF No. 26) ("*Von Kahl I*"). With respect to Plaintiff's motion, the Court found that Plaintiff was not entitled to summary judgment on his defamation claim because the question of whether or not BNA's statements regarding his lack of contrition and religious and philosophical beliefs, as well as BNA's suggestion that those remarks were attributable to the sentencing judge, were defamatory "is a question of fact that the Court cannot resolve on summary judgment." *Id.* (footnote and citation omitted). Regarding BNA's motion, the Court found that Plaintiff had adequately alleged that the "no contrition" statement was an assertion of fact rather than opinion, and that the complaint adequately alleged that BNA had falsely presented the statement as if it were the ruling of the sentencing judge, rendering it actionable. *Id.* at 143. Furthermore, the Court concluded that the "fair reporting privilege" did not immunize BNA from liability for the summary statement. *Id.* at 145.[7]

BNA sought reconsideration of this ruling, as well as judgment on the pleadings. (Def.'s Mot. for Reconsider and for J. on the Pleadings, ECF No. 38). In its written opinion on BNA's motion for reconsideration, the Court clarified its prior order,

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[6] This Court will not reproduce the findings and conclusions contained in the prior opinions related to the instant matter in full; it assumes familiarity with those opinions, and expressly incorporates them herein.

[7] The fair reporting privilege is a conditional immunity that courts afford to those who publish fair and accurate reports of official proceedings, including judicial proceedings. *Von Kahl I*, 810 F. Supp. 2d at 143-44 (citations omitted).

explaining that while "BNA going forward may still pursue a fair reporting defense[,]" BNA cannot use "that asserted defense to support summary judgment." *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 934 F. Supp. 2d 204, 212 (D.D.C. 2013) (ECF No. 53) ("*Von Kahl II*").

The Court also addressed BNA's request for judgment on the pleadings, granting in part and denying in part that motion. Specifically, the Court entered judgment in BNA's favor with respect to one aspect of Plaintiff's libel suit—his claim that the statement regarding the fact of Plaintiff's imprisonment due to his convictions was libel per se—because, in the Court's opinion, "insofar as the CLR summary indicated that [Plaintiff] had been 'committed to custody of U.S. Attorney General for imprisonment for life based on his convictions' under [18 U.S.C. § 1111, 1114 and 2], the summary is true[.]" *Id.* at 219. The Court otherwise denied all other aspects of BNA's motion for judgment on the pleadings, finding that BNA's statement regarding Plaintiff's lack of contrition is actionable (*id.* at 213-14); that Plaintiff was not rendered unable to sue for libel (*i.e.*, he was not "libel proof") based on his criminal convictions (*id.* at 214-216); that Plaintiff adequately identified the recipients of the allegedly defamatory statements (*id.* at 216-17); that, while Plaintiff is a limited purpose public figure, the complaint pled sufficient facts to support a claim of actual malice (*id.* at 217-18); and that Plaintiff may pursue claims for special damages (*id.* at 219).

Following this initial motions practice, the parties proceeded to discovery, and the matter was transferred to the undersigned. Although additional discovery remains to be done (*see* Aug. 21, 2013 Minute Order (setting schedule for additional discovery after resolution of pending motions)), Plaintiff has now moved for reconsideration of

the Court's entry of judgment in BNA's favor on his libel per se claim, arguing that "[t]he Court misapprehended that Plaintiff has been charged[,] tried and convicted of the offense of murder as defined in 18 U.S.C. § 1111, whereas, in fact and as a matter of law, he had been charged, tried and *acquitted* of offenses of killing U.S. marshals performing official duties." (Pl.'s Mot. to Reconsider at 8.)

The parties have also filed cross-motions for summary judgment, as mentioned above. (*See* Pl.'s Mot. for Summ. J. (ECF No. 58); Def.'s Mot. for Summ. J. (ECF No. 62).) In his motion for partial summary judgment, Plaintiff asks this Court to enter judgment in his favor on BNA's potential estoppel defense; that is, Plaintiff wants this Court to order that BNA cannot prevent him from re-litigating in this civil matter whether he was actually convicted of violating 18 U.S.C. §§ 1111, 1114 and 2 in the underlying criminal case. (Pl.'s Mot. for Summ. J. at 47-48.) In its motion, BNA asserts that it is entitled to summary judgment because (1) the summary and clarification are substantially true (Def.'s Mot. for Summ. J. at 22-28); (2) Plaintiff cannot establish that BNA acted with actual malice (*id.* at 29-38); and (3) the fair reporting privilege renders the summary and clarification non-actionable (*id.* at 38-39). These motions have been fully briefed and are ripe for this Court's consideration.

II. ANALYSIS

A. Plaintiff's Motion For Reconsideration Of The Order Entering Judgment For BNA On The Claim Of Libel Per Se

1. Legal Standard Governing Motions For Reconsideration

A court may revisit and revise prior interlocutory rulings under Fed. R. Civ. P. 54(b) "as justice requires[,]" including "when the Court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the

parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court." *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (alteration in original) (internal quotation marks omitted); *accord Lyles v. Dist. of Columbia*, 10cv1424, 2014 WL 4216141, at *4 (D.D.C. Aug. 27, 2014). However, it is well-established in this Circuit that "motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Loumiet v. United States*, 12cv1130, 2014 WL 4100111, at *2 (D.D.C. Aug. 21, 2014) (internal quotation marks and citations omitted).)

2. Plaintiff Has Not Established Cause For This Court To Revisit The Prior Order Regarding His Libel Per Se Claim

As explained, in its order granting in part and denying in part BNA's motion for judgment on the pleadings, the Court ruled that Plaintiff cannot claim libel per se regarding BNA's published statement that Plaintiff had been committed to the custody of the Attorney General on his "convictions under 18 U.S.C. §§ 1111, 1114 and 2" because Plaintiff had, in fact, been committed to the custody of the Attorney General based on these convictions. *Von Kahl II*, 934 F. Supp. 2d at 219. Plaintiff now seeks reconsideration of that finding, arguing that the Court mistakenly isolated from its proper context one of the four allegedly defamatory statements that the BNA publication contained. (*See* Pl.'s Mot. to Reconsider at 11-12.) Plaintiff maintains that BNA's summary, taken as a whole, stated or implied that he had been charged, tried and convicted of offenses for which he had *not* been charged, tried and convicted (*see generally id*. at 20-22 (explaining Plaintiff's belief that his charge, trial, and conviction

were invalid)), and therefore the BNA summary constitutes defamation per se insofar as it accuses him of having committed, and been convicted of, suche crimes (*id.*).[8]

Plaintiff has fallen well short of establishing his burden under Federal Rule of Civil Procedure 54(b). As explained, the federal rule that governs motions for reconsideration erects a high bar for parties who desire to have a court revisit and revise a prior ruling. Although Plaintiff here apparently fervently believes that he has not properly been convicted and sentenced under 18 U.S.C. §§ 1111, 1114 and 2, the Court previously considered this very argument, *see Von Kahl II*, 934 F. Supp. 2d at 219 (noting that "Plaintiff certainly was challenging the validity of his convictions under 18 U.S.C. §§ 1111, 1114, and 2"), and concluded that, regardless of any doubts about the validity of the underlying case, Plaintiff could not claim that BNA's statement that he had been imprisoned based on his conviction for having violated these criminal statutes was false. *Id.*; *see also Benic v. Reuters Am., Inc.*, 357 F. Supp. 2d 216, 221 (D.D.C. 2004) ("Truth is an absolute defense to defamation [per se] claims." (citing *Olinger v. Am. Sav. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969)). Nothing in Plaintiff's present motion for reconsideration suggests that the Court "patently misunderstood" Plaintiff's argument, *Cobell*, 224 F.R.D. at 272; to the contrary, it is clear that the Court fully apprehended the argument that Plaintiff was making regarding the viability of his libel per se claim in opposition to BNA's motion for judgment on the pleadings—and the one he makes again here—and the Court squarely rejected it. *Von Kahl II*, 934 F.

[8] "A statement is defamatory as a matter of law ('defamatory per se') if it is so likely to cause degrading injury to the subject's reputation that proof of that harm is not required to recover compensation." *Franklin v. Pepco Holdings, Inc.*, 875 F. Supp. 2d 66, 75 (D.D.C. 2012) (citing *Carey v. Piphus*, 435 U.S. 247, 262 (1978)).

Supp. 2d at 219 ("[T]he CLR summary does not falsely impute that plaintiff has been accused of a crime."). This Court finds no basis for revisiting that ruling now.

B. The Parties' Cross-Motions For Summary Judgment

1. Legal Standard Governing Motions For Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the record evidence "shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A moving party may successfully support its motion by identifying those parts of the record that it believes demonstrate the absence of a genuine dispute of material facts. Fed. R. Civ. P. 56(c)(1).

Material facts are those that "might affect the outcome of the suit under the governing law[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists that is sufficient to preclude summary judgment, the Court must treat the non-movant's statements as true and accept all evidence and make all reasonable inferences in the non-movant's favor. *See Anderson*, 477 U.S. at 255. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 325. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence in support of" its position. *Anderson*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted).

2. Plaintiff Is Not Entitled To Summary Judgment On BNA's Collateral Estoppel Defense

In the wake of the federal courts' consistent rejection of Plaintiff's arguments regarding the invalidity of his conviction (*see supra* Part I.A & note 5), Plaintiff apparently hopes to sway a new audience—a civil jury—with his legal theory. To that end, Plaintiff has filed this defamation action, and he seeks in his motion for partial summary judgment to bar BNA from invoking the doctrine of collateral estoppel (otherwise known as issue preclusion) to prevent him from raising the issue of the validity of his criminal conviction under 18 U.S.C. § 1111. (*See* Pl.'s Mot. for Summ. J. at 1-4.) In essence, Plaintiff wants this Court to order that a civil jury can determine whether his criminal verdict and sentence are valid—despite what courts have previously said about the matter—as a prerequisite to determining the truth or falsity of BNA's published statement that Plaintiff was imprisoned based on "convictions . . . of violating 18 U.S.C. [§] 1111[.]" (*Id.* at 1.) For its part, BNA insists that the doctrine of collateral estoppel prevents Plaintiff from re-litigating anew the issue of whether or not Plaintiff's underlying criminal convictions were valid, in the context of Plaintiff's instant defamation case. (*See* Def.'s Combined Mem. in Supp. of Def.'s Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J., ECF No. 64, at 38-39.) On this point, this Court wholeheartedly agrees with BNA.

Under the doctrine of collateral estoppel, "'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). "To preclude parties from contesting

matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Courts apply a three-factor test to determine whether collateral estoppel applies: (1) whether the same issue the party now raises was "contested . . . and submitted for judicial determination"; (2) whether that issue was "actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) whether preclusion would "work a basic unfairness to the party bound by the first determination." *Martin v. DOJ*, 488 F.3d 446, 454 (D.C. Cir. 2007) (internal quotation marks and citation omitted). Courts have also concluded that a finding in a criminal proceeding may bar a party from raising the same issue in a subsequent civil action under the doctrine of collateral estoppel. *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568-69 (1951) (holding that the party opposing re-litigation "is entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based"); *Otherson v. DOJ*, 711 F.2d 267, 271 (D.C. Cir. 1983) (stating that "issues determined in connection with a criminal conviction may be taken as preclusively established for the purposes of later civil trials") (citations omitted).

In this case, BNA is likely to be able to establish each of the requisite factors to invoke collateral estoppel with respect to the issue of the validity of Plaintiff's criminal convictions, and this Court concludes that it should be free to try. Plaintiff has previously repeatedly raised the issue of the validity of his convictions in prior courts,

and prior courts have repeatedly considered—and rejected—his arguments (*see supra* note 5), including the specific arguments that he now makes regarding the North Dakota federal court's jurisdiction and the impact of the jury's not guilty verdicts. *See United States v. Voh Kahl*, No. A3-96-55, 2003 WL 21715352 (D.N.D. July 14, 2003), *aff'd*, 95 F. App'x 200 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 1096 (2005); *see also In re Yorie Von Kahl*, 126 S. Ct. 146 (2005) (denying Mandamus Pet.). Thus, the specter of preclusion is properly raised. *See, e.g.*, *Martin*, 488 F.3d at 454. Furthermore, there is no indication that invoking the collateral estoppel doctrine to prevent Plaintiff from raising the issue of the validity of his conviction yet again would result in any "unfairness" to him; in fact, permitting re-litigation of this same question would unfairly require BNA to defend against a criminal judgment that it had nothing to do with in the first instance and that numerous judges have already consistently upheld. *See id.*

Consequently, to the extent that Plaintiff views the instant action as yet another opening to attack his underlying conviction in the guise of challenging BNA's statement that he was "convicted" of the underlying crimes, this Court will not prevent BNA from invoking the collateral estoppel doctrine to argue, and potentially establish, that Plaintiff has previously litigated that issue and that, as a result, any potential window to raise it here again is now closed.

3. BNA Is Not Entitled To Summary Judgment On Any Of The Grounds Asserted In Its Motion

BNA maintains that Plaintiff has not, and cannot, bear the burden of proving falsity or actual malice, which he is required to do by virtue of the Court's prior rulings in this matter. (Def.'s Mot. for Summ. J. at 20-36.) However, this Court concludes that

BNA is not entitled to judgment as a matter of law on the issue of falsity or malice, as explained below, and it finds no reason to revisit the Court's prior ruling regarding the applicability of the fair reporting privilege.

a. Material issues of fact exist regarding whether the statements in the CLR summary and clarification are substantially true

It is well established that a defamation action fails where the statement at issue is true. *See, e.g.*, *Benic*, 357 F. Supp. 2d at 222; s*ee also Moss v. Stockard*, 580 A.2d 1011, 1022 (D.C. 1990) ("In defamation law, it is often said that truth is an absolute defense[.]"). Here, Plaintiff claims, among other things, that BNA attributed to the sentencing judge certain potentially defamatory statements regarding Plaintiff's lack of contrition and Plaintiff's religious and philosophical beliefs that the sentencing judge did not, in fact, make. *Von Kahl I*, 810 F. Supp. 2d at 143 (citing Compl. ¶¶ 17-46). The Court has already concluded that a jury, not the court, must determine whether these statements were defamatory and whether Plaintiff is entitled to damages as a result. *Id.* at 143 ("[W]hether these statements actually are defamatory is a question of fact that the Court cannot resolve on summary judgment."); *see also White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) ("If, at the summary judgment stage, the court determines that the publication is capable of bearing a defamatory meaning, a jury must determine whether such meaning was attributed in fact.").

Undaunted, BNA now points to the doctrine of "substantial truth" under which a statement that contains some errors can nevertheless be "true" for the purpose of a defamation case so long as the inaccuracies are minor and "the substance, the gist, [and] the sting" of the challenged statement is substantially true. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991) (internal quotation marks and citations

omitted). With respect to Plaintiff's allegation that it was false to suggest in the summary that he showed "no hint of contrition" and that he "made statements to the press that he believed the murders of U.S. Marshals in the course of their duties were justified" by his "religious and philosophical beliefs" (Compl. ¶ 11), BNA maintains that an "examination of whether, when and how [plaintiff] admitted his role in the killings" is necessary in order to determine "whether it was true or false to say that [Plaintiff] had shown no contrition for his acts[,]" (Def.'s Mot. for Summ. J. at 22), and BNA submits excerpts of trial transcripts that purportedly show that plaintiff denied responsibility for the murders to facilitate that examination (*id*. at 22-24). BNA further asserts that Plaintiff's trial testimony, statements he made in an interview for a documentary film in 1993, and his writings from prison mean that, "as a matter of law, no reasonable jury could find that it was materially false for BNA to have suggested in the [s]ummary that [Plaintiff] had shown no hint of contrition and that he had made statements to the press that the killings were justified for religious and philosophical beliefs." (*Id*. at 25-26.)

As the Court previously concluded, however, what is at issue here is not any *opinion* about the extent to which Plaintiff's statements and demeanor during or after his conviction demonstrated a lack of contrition, but rather the *fact* that BNA's summary and clarification appeared to attribute the "lack of contrition" characterization to the sentencing judge in a manner that, according to Plaintiff, was untrue. *Von Kahl II*, 934 F. Supp. 2d at 213-14. Defendant's proffered evidence is not probative of any evaluation of the potentially false, defamatory, or harmful nature of BNA's suggestion that the sentencing judge believed Plaintiff lacked contrition. Thus, BNA has not

shown that its statement regarding what the sentencing judge may have believed was "substantially true," and because genuine issues of material fact remain in dispute with respect to the truth or substantial truth of the CLR summary and clarification, this Court cannot enter judgment for Defendant on this basis.

b. Material issues of fact exist regarding whether BNA acted with actual malice

Because Plaintiff has been found to be a limited purpose public figure (*see Von Kahl II*, 934 F. Supp. 2d at 217-18), "[m]ere negligence" on BNA's part does not render it liable for defamation. *Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 104 (D.D.C. 2009). Rather, Plaintiff must prove by clear and convincing evidence that the allegedly defamatory statements were made with actual malice, "that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also Masson*, 501 U.S. at 511 ("In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity."). Plaintiff may show actual malice with "evidence establishing that the story was (1) fabricated; (2) so inherently improbable that only a reckless man would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that the defendant had obvious reasons to doubt." *Tavoulareas v. Piro*, 817 F.2d 762, 790 (D.C. Cir. 1987) (alteration on original) (internal quotation marks and citation omitted).

Here, Plaintiff claims that BNA's description of his Mandamus Petition was inaccurate, and he points to the face of the Petition itself as evidence tending to show that BNA acted with actual malice in drafting and publishing the summary. In this

regard, this Court has reviewed the Mandamus Petition, and notes that the document does not mention Plaintiff's purported "lack of contrition" or "religious and philosophical beliefs" at all, which calls into question the substance of BNA's purported "summary" of that document. Language related to "contrition" and the Plaintiff's purported religious belief that the killings were "justified" appears only in the Appendix to the Petition, and when citing to these pages of the Appendix, the Mandamus Petition itself clearly identifies the speaker as the prosecutor, not the sentencing judge. (Mandamus Pet. at 9.) This Court concludes that these discrepancies between what the Mandamus Petition actually says and what BNA's "summary" reports are sufficient to create a genuine dispute of material fact regarding whether BNA acted with reckless disregard with respect to the truth or falsity of the statements in its summary. Accordingly, the Court must deny BNA's motion for summary judgment on this basis.

c. This Court will not revisit the prior fair reporting privilege rulings

Finally, for the third time in this matter, BNA asks for a ruling as a matter of law that the fair reporting privilege shields it from liability for the CLR summary and clarification. *See Von Kahl I*, 810 F. Supp. 2d at 143-46; *Von Kahl II*, 934 F. Supp. 2d at 211-12. This Court construes BNA's re-raising of the same legal issue that the Court has already resolved as a motion for reconsideration of the Court's prior ruling on the fair reporting privilege request, and so construed, denies that motion. As explained above, the Court has already concluded that, while BNA can pursue a fair reporting privilege defense, it cannot succeed on that defense at the summary judgment stage. *Von Kahl II*, 934 F. Supp. 2d at 212. BNA points to no intervening change in the law, or

any mistake of law or fact, that would justify revisiting this ruling. *See Cobell*, 224 F.R.D. at 271-72.

III. CONCLUSION

For the reasons stated above, this latest chapter in the parties' extended defamation dispute concludes in much the same way as the chapters that proceeded it: without entry of summary judgment for either party in a manner that would terminate this case. In sum, this Court concludes (1) that it will not revisit its prior rulings that Plaintiff cannot proceed on a libel per se theory and that BNA cannot base its summary judgment argument on the fair reporting privilege defense; (2) that BNA is not entitled to summary judgment on Plaintiff's other defamation claims; and (3) that Plaintiff is not entitled to an order preventing BNA from raising a collateral estoppel defense if he attempts to challenge to the validity of his conviction once again. Accordingly, it is hereby

ORDERED that Plaintiff's [74] Motion to Reconsider Order Precluding Claims of Libel Per Se; [58] Motion for Partial Summary Judgment; and [78] Motion to Invoke the Court's Inherent Powers to Strike Defendant's Combined Motion and Memorandum for Summary Judgment . . . for an Attempt to Perpetrate a Fraud on the Court and Related Misconduct and to Take Such Other Action as Justice Requires are **DENIED** and that [62] Defendant's Motion for Summary Judgment is **DENIED**. It is

FURTHER ORDERED that the parties shall serve any additional written discovery requests by **October 21, 2014**, and that BNA shall file a motion proposing

specific deadlines for the completion by both parties of all remaining discovery so that the matter can be promptly readied for trial.

DATE: September 30, 2014

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 16(e)

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

No. 06- _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

VAUGHN A. KOSH,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. § 3582(a) prevents a sentencing court from considering the defendant's need for rehabilitation or medical treatment when it selects the term of imprisonment to be imposed after mandatory revocation of the defendant's supervised release pursuant to 18 U.S.C. § 3583(g)?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

FEDERAL STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

I. Introduction 2

STATEMENT OF FACTS 5

A. Background 5

B. The Violations Hearing & the District Court's Sentencing Determination 6

C. The D.C. Circuit's Judgment 11

REASONS FOR GRANTING THE PETITION 12

I. THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO RESOLVE THE CIRCUIT SPLIT REGARDING THE SCOPE OF 18 U.S.C. § 3582(a) AND THE EXTENT TO WHICH THAT PROVISION APPLIES TO TERMS OF IMPRISONMENT IMPOSED AFTER REVOCATION OF SUPERVISED RELEASE . . 12

A. The Second, Tenth, And Eleventh Circuits' Approach: Section 3582(a) Prohibits the Consideration Of Rehabilitation To Determine The Length Of A Term Of Imprisonment But Does Not Apply To Imprisonment Imposed After Revocation Of Supervised Release . . . 14

B. The Fifth, Sixth, And Eighth Circuits' View: Section 3582(a) Does Not Prohibit Consideration Of Rehabilitation In Regard To The Determination Of The Length Of A Term Of Imprisonment Regardless Of The Stage At Which Imprisonment Is Imposed . . . 17

C. The Position of the District of Columbia Circuit 21

II. THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO CLARIFY THE APPROPRIATE AIMS OF THE DISTRICT COURT IN IMPOSING A SENTENCE AFTER REVOKING A TERM OF SUPERVISED RELEASE 22

A. The Sentencing Statutes Are Plain, And They Plainly Prohibit Consideration Of A Defendant's Rehabilitative Needs When A Term Of Imprisonment Is Imposed After Revocation Of Supervised Release 24

B. The Legislative History Clearly Establishes That Congress Intended To Prohibit The Consideration Of Rehabilitation As A Factor When A Term Of Imprisonment Is Imposed . . . 29

C. Because Imprisonment By Any Other Name Is Still Imprisonment, The Lower Courts' Collective Conclusion That § 3582(a) Poses No Bar To A District Court's Consideration Of Rehabilitation After Revocation Of Supervised Release Is Conceptually Flawed 32

III. THIS COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE THE FACTS HERE PROVIDE A SUPERB RECORD FOR ISOLATING AND ADDRESSING THE REHABILITATION ISSUE 34

CONCLUSION 37

TABLE OF AUTHORITIES

CASES **PAGE**

Johnson v. United States, 529 U.S. 694 (2000) 16, 23

United States v. Anderson,
15 F. 3d 278 (2d Cir. 1994) 3, 15, 20, 25

United States v. Blake,
89 F. Supp. 2d 328 (E.D.N.Y. 2000) 31

United States v. Brown,
224 F. 3d 1237 (11th Cir. 2000) 3, 15, 20

United States v. Duran, 37 F. 3d 557 (9th Cir. 1994) 18

United States v. Giddings,
37 F. 3d 1091 (5th Cir. 1994) 4, 17, 18, 19

United States v. Harris,
990 F. 2d 594 (11th Cir. 1993) 13, 21

United States v. Hawk Wing,
433 F. 3d 622 (8th Cir. 2006) 4, 17

United States v. Jackson,
70 F. 3d 874 (6th Cir. 1995) 4, 13, 16, 35

United States v. Maier,
975 F. 2d 944 (2d Cir. 1992) 13, 20, 31

United States v. Thornell, 128 F. 3d 687 (8th Cir. 1997) . . 17

United States v. Tsosie,
376 F. 3d 1210 (10th Cir. 2004) . 3, 12, 15, 16, 17, 19, 20, 33

STATUTES

18 U.S.C. § 3551 . . . . . 26, 26

18 U.S.C. § 3553(a) . . . . . passim

18 U.S.C. § 3582(a) . . . . . passim

18 U.S.C. § 3583(c) 27, 29

18 U.S.C. § 3583(e) 28, 29, 36

18 U.S.C. § 3583(g) . . . . . passim

18 U.S.C. § 922(g)(1) 5

28 U.S.C. § 994 (k) 12

OTHER AUTHORITIES

S. Rep. No. 225, 95th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3182 . . . . . 30, 31

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

VAUGHN A. KOSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Vaughn A. Kosh seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit, which is available at United States v. Kosh, No. 05-3077, 2006 WL 1582662 (D.C. Cir. May 25, 2006), is not published. The unreported decision is reproduced in the appendix to this Petition (App. 1 - 3). The district court did not issue a written opinion in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25,

2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

This case involves several federal statutes, the most important of which is 18 U.S.C. § 3582(a). That statutory section provides:

> **(a) Factors to be considered in imposing a term of imprisonment.**-- The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

The case also involves 18 U.S.C. §§ 3551(a) and (b); 3553(a)(2); 3583(a), (b), (c), (e), and (g); and 28 U.S.C. § 994(k). Pursuant to Rule 14(f), the text of these statutes is set forth in the appendix to this Petition (App. 4- 10).

STATEMENT OF THE CASE

I. INTRODUCTION.

This case arises from the decision of a district court judge to sentence Petitioner, after mandatory revocation of his supervised release pursuant to 18 U.S.C. § 3583(g), to a term of imprisonment that was twice the maximum of the recommended guideline range simply and solely to promote his rehabilitation. Section 3582(a) of Title 18 of the United States Code plainly admonishes district courts to "recogniz[e] that imprisonment is

not an appropriate means of promoting correction and rehabilitation." Nevertheless, sentencing judges like the one in this case routinely employ terms of imprisonment after revocation of supervised release as a means of addressing defendants' perceived rehabilitative needs.

The numerous circuit courts of appeal that have addressed the matter have relied upon two conflicting lines of reasoning to affirm district courts' consideration of rehabilitation at post-revocation sentencing. The Second, Tenth, and Eleventh Circuits read § 3582(a) to prohibit a district court from selecting and imposing a term of imprisonment for rehabilitative purposes during original sentencing, but reason that "[t]he preclusion against considering rehabilitation . . . does not apply when a court sentences a defendant to prison upon revocation of supervised release." United States v. Brown, 224 F.3d 1237, 1242 (11th Cir. 2000)(citing United States v. Anderson, 15 F.3d 278, 283 (2d Cir. 1994)); accord United States v. Tsosie, 376 F.3d 1210, 1216 (10th Cir. 2004), cert. denied, 543 U.S. 1155 (2005). The Fifth, Sixth, and Eighth Circuits construe § 3582(a) as limiting only the factors the court can consider in deciding whether to impose a term of imprisonment at all, not the court's selection of the length of the prison term; thus, these circuits conclude that there is no statutory impediment to a sentencing court's consideration of rehabilitation in determining how long a

defendant will spend in prison without regard to whether the term of incarceration is being imposed after initial conviction or after revocation of supervised release. See United States v. Jackson, 70 F.3d 874, 880 (6th Cir. 1995)(concluding, based on a narrow reading of § 3582(a), that there is "no reason that a court sentencing a defendant upon mandatory revocation of supervised release should not be able to consider rehabilitative goals *in arriving at the length of a sentence while a court* imposing either an initial sentence or a sentence upon permissive revocation of supervised release may properly consider that need"); accord United States v. Giddings, 37 F.3d 1091, 1097 (5th Cir. 1994), cert. denied 514 U.S. 1008 (1995); see also United States v. Hawk Wing, 433 F.3d at 622, 630 (8th Cir. 2006) (interpreting § 3582(a) to allow a sentencing court to consider rehabilitation "in determining the length of the sentence of incarceration" as an initial matter, reasoning that necessarily enables such consideration after revocation of supervised release).

This Court should grant review in this case in order to clarify the meaning and scope of § 3582(a) and to determine whether, and to what extent, that statutory provision is applicable in the supervised release context. The various rationales offered for allowing consideration of rehabilitation after revocation of supervised release despite the restriction at

18 U.S.C. § 3582(a) reflect widespread confusion among the lower federal courts regarding the appropriate aims of a sentencing court when it revokes a defendant's supervised release and sends the defendant back to prison. This case is an extraordinary vehicle for resolving the issue of whether rehabilitation is a permissible factor at revocation sentencing because it involves mandatory revocation under § 3583(g) and the district court made clear that providing Petitioner with rehabilitative services was the sole basis for its decision to impose an 18-month term of imprisonment rather than the three-to-nine months called for in the Sentencing Guidelines.

II. STATEMENT OF FACTS.

A. Background.

On November 30, 2000, a federal grand jury returned a one-count indictment charging Petitioner Vaughn A. Kosh with unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Mr. Kosh pled guilty to the charged offense, and the district court (Honorable Gladys Kessler) sentenced him to 24 months in prison to be followed by three years of supervised release. As part of the judgment, the court ordered standard conditions of supervised release, including reporting and periodic drug testing, and also required Mr. Kosh to participate in mental health and substance abuse treatment programs at the direction of the probation office.

Mr. Kosh was released from incarceration and began serving the prescribed period of supervised release on February 14, 2003. He initially reported to his probation officer as directed and submitted to several urinalysis tests. But, according to the probation officer's violation report, Mr. Kosh also candidly admitted that he had used marijuana "due to his depression over remaining unemployed," and that "substance abuse counseling was not a priority" because he was searching for a job and his family was facing eviction.

On June 13, 2003, Mr. Kosh's probation officer sought a bench warrant for his arrest. In support of the warrant request, the officer provided three grounds: first, that Mr. Kosh's urine samples had tested positive for marijuana on numerous occasions; second, that Mr. Kosh had repeatedly failed to report for substance abuse counseling and had missed one urinalysis test; and third, that Mr. Kosh had failed to contact the probation office three days prior to the date the violation report was filed and seemed to have "absconded." Judge Kessler granted the request for a warrant on the same day that it was filed. A. at 27. Mr. Kosh was arrested pursuant to the warrant nearly two years later. A. at 29.

B. The Violations Hearing & The District Court's Sentencing Determination.

A hearing regarding the reported supervised-release violations commenced before the district court on April 15, 2005.

Mr. Kosh conceded the violations at the outset andattempted to explain, through counsel, the various life circumstances that purportedly precipitated them (Tr. 4/15/05 at 3-4). Defense counsel argued that the district court should revoke Mr. Kosh's term of supervised release and sentence him to two months in prison followed by three months in a residential substance abuse and mental health treatment program (id. at 5-6). For his part, rather than proposing a specific term of imprisonment, the probation officer generally recommended "that Mr. Kosh serve a period of incarceration which would allow him to be observed and his mental health status to be reviewed" (id. at 7), followed by an additional period of supervised release "for monitoring purposes and to help him transition back into the community" (id). The government followed, indicating its agreement with the probation officer's recommendation and citing Mr. Kosh's "mental health conditions" as "[a] major factor in his inability to comply, or his unwillingness to comply with the conditions of supervised release" (id. at 9).[1] The prosecutor requested, specifically, that the court sentence Mr. Kosh to "a period of incarceration at Butner, or Springfield[--]the Bureau of Prisons

[1]Although the government did not specify the "mental health conditions" to which it referred, the probation officer's violation report discussed a psychiatric evaluation from May 29, 2003, which had purportedly resulted in a diagnosis of "Axis I: Bipolar II disorder; Intermittent Explosive Disorder; Dissociative Disorder NOS; Partner Relational Problems; and AXIS II: Antisocial Personality Disorder."

hospital facilities which have both mental health and obviously regular hospital facilities," so that "he will get the treatment that he needs." Id. The following exchange ensued:

> THE COURT: The recommended revocation period under the guidelines is three to nine months.
>
> MR. O'MALLEY [the prosecutor]: That is correct, Your Honor. That is my understanding.
>
> THE COURT: What are you suggesting?
>
> MR. O'MALLEY: Your Honor, frankly I think that he needs at least the three months incarceration, and I think that Your Honor would probably be wiser to--I would suggest that you would be wise to do something more than that. At least six months.

(Id. at 10). In response to the prosecutor's recommendation that the court "send [Mr. Kosh] to Butner . . . for at least six months" (id. at 11), the district court remarked:

> My final question is this. What assurance do I have that he will go to Butner? . . .
>
> I have to tell you that my experience with the Bureau of Prisons is, despite all of their propaganda to the contrary, my experience is that they ignore my recommendations.
>
> And yes, if I sound frustrated, I am. I write them letters. I give them reasons for why I think someone should be sent to a certain facility, and I don't want to exaggerate, but I can't think of a one where they have actually followed my recommendations.

(Id. at 12-13). The court's concern about Mr. Kosh's prison placement prompted the prosecutor to suggest that the revocation hearing be continued so that he might "chase it down" and "get some sort of commitment[] from the Bureau of Prisons before the court takes that step" (id. at 14). Responding that "there is no

question in my mind . . . that Butner is the most appropriate placement," the district court granted the requested continuance (id. at 14, 15).

Five days later, on April 20, 2005, the parties returned to court for resolution of the revocation matter. The government reported that the probation office had contacted the Bureau of Prisons, and that, although B.O.P. "never commits itself entirely to anything" (Tr. 4/20/05 at 3), the probation officer was told that there was space available at Butner to receive persons with Mr. Kosh's category of mental health problems (id.). The probation officer's discussion with B.O.P. authorities also purportedly left him with the impression that whether or not Mr. Kosh would be placed at Butner depended to some extent on whether he received a sentence of six months or more (id.). Indeed, the prosecutor repeatedly insisted that "the longer that sentence is, the greater the likelihood he will be sent to Butner" (id.), and he asserted--"because I don't want the court to be disappointed"--that "in order to have the kinds of guaranties that the court is looking for, the sentence has to be six months or longer, and the longer it gets the better the guaranty" (id. at 5).

After hearing from Mr. Kosh directly, the district court formally revoked his supervised release based on the admitted violations (id. at 8). In pronouncing the revocation sentence,

the court explained that, although it had consulted the three-to-nine-month range set forth in the guidelines, it was "going to go outside the guidelines" because of Mr. Kosh's need for mental health and substance abuse treatment and "[b]ecause of the representations made to me by counsel and our probation officer." Tr. 4/20/05 at 10. It stated that

> it is, in my view, to Mr. Kosh's benefit to get a sentence of more than nine months for this reason[:]
>
> As the record will demonstrate, inquiries have been made about Butner. There is a very, very good chance that Mr. Kosh can get placed at the mental health unit at Butner. That unit is certainly the most appropriate to deal directly with his mental health and drug abuse problems, and the longer the sentence, the greater the chance that he will get placed at the most appropriate place to provide him some real treatment. Not just incarceration, but real treatment.
>
> There isn't any dispute that Butner is the place to provide that kind of treatment. And for that reason I am going to [im]pose a sentence of eighteen months.

(Id. at 10-11). Noting that "the maximum is 24 months," the district court observed that "a period of eighteen months is a substantial period of time for an individual to take advantage of mental health treatment programs and drug abuse treatment programs," and emphasized that participation in such programs "is very important for Mr. Kosh's future" (id. at 11).[2]

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[2]The district court also imposed a one-year period of supervised release to follow the 18-month term of incarceration (Tr. 4/20/05 at 11). The court stated that it was doing so "for a rehabilitative, not a punitive purpose," inasmuch as the period of supervised release would allow Mr. Kosh to "ha[ve] the resources of our Probation Office to work with him during the year that he comes back into the community and will need some help getting adjusted, getting a job, etcetera" (id.).

C. The D.C. Circuit's Judgment.

On appeal, Mr. Kosh argued that the district court plainly erred in imposing an 18-month term of imprisonment for rehabilitative purposes in light of the plain language of 18 U.S.C. § 3582(a), and that, regardless, the selected term was unreasonable because it was greater than necessary to achieve the court's stated rehabilitative purposes in light of the evidence presented. In an unpublished judgment issued on May 25, 2006, the Court of Appeals for the District of Columbia Circuit affirmed Mr. Kosh's sentence (App. 1). The court concluded that the district court's sentencing determination was not plainly erroneous because "[o]n its face, the language of § 3582(a) does not plainly apply to § 3583(g)," and "all six circuits that have addressed the issue have concluded that a sentencing court may *consider rehabilitation when imposing a term of imprisonment upon* revocation of supervised release" (App. 2). Furthermore, the court of appeals determined that the district court's decision to send Mr. Kosh to prison for 18 months so that he might "'take advantage of mental health treatment programs and drug abuse treatment programs'" was not unreasonable "[i]n light of the record evidence of the defendant's bipolar disorder and long history of drug usage" (id. (citation omitted)).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO RESOLVE THE CIRCUIT SPLIT REGARDING THE SCOPE OF 18 U.S.C. § 3582(a) AND THE EXTENT TO WHICH THAT PROVISION APPLIES TO TERMS OF IMPRISONMENT IMPOSED AFTER REVOCATION OF SUPERVISED RELEASE.

Section 3582(a) of Title 18 of the United States Code establishes the factors that a district court is to consider when it sentences a defendant to a prison term. That section states:

> **(a) Factors to be considered in imposing a term of imprisonment.**-- The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. § 3582(a).[3] Consistent with the "clear mandate" of § 3582(a), every circuit court that has interpreted that statute has concluded that it restricts a sentencing court's ability to consider the rehabilitative needs of the defendant when imposing a sentence of imprisonment, at least to some extent. Tsosie, 376 F.3d at 1214 ("[I]t is inappropriate for the district court to consider rehabilitation of the defendant as the sole purpose for

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[3]As if to underscore the final point, Congress also enacted 28 U.S.C. § 994(k), which requires the Sentencing Commission to

> insure that the [sentencing] guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

imprisonment"); see also Jackson, 70 F.3d at 879 ("For purposes of initial sentencing, a court may not consider rehabilitative goals in considering whether to impose a sentence of imprisonment."); Giddings, 37 F.3d at 1094 ("Typically, a person's need for rehabilitation cannot be used to determine whether a sentence of imprisonment is imposed."); United States v. Harris, 990 F.2d 594, 596 (11th Cir. 1993) ("Rehabilitative considerations have been declared irrelevant for purpose of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose." (internal quotation marks and citation omitted)); United States v. Maier, 975 F.2d 944, 946 (2d. Cir. 1992) ("Rehabilitation is not an appropriate ground for imprisonment." (emphasis in original)).

Despite the limiting language of § 3582(a), the district court in the instant case revoked Mr. Kosh's supervised release, as mandated by 18 U.S.C. § 3583(g), then imposed a sentence of 18 months of incarceration--as opposed to the three-to-nine months prescribed in the guidelines--based solely on the court's conclusion that that period of imprisonment would enable Mr. Kosh to access the rehabilitative programs and services that the court believed he needed. Determining whether § 3582(a) prohibits such sentencing judgments necessarily requires interpreting § 3582(a) and determining whether it is applicable to terms of imprisonment imposed after revocation of a term of supervised release. As the

following discussion demonstrates, although each circuit that has published a decision concerning the matter ultimately has concluded that a district court may take the rehabilitative needs of the defendant into account at post-revocation sentencing, the various circuits' reasoning diverges substantially such that there is a stark conflict of opinion regarding the scope and applicability of § 3582(a) in the supervised release context. This conflict of statutory interpretation is a significant and long-standing matter, and Petitioner respectfully submits that it is a dispute that this Court should seek to resolve.

A. The Second, Tenth, and Eleventh Circuits' Approach: Section 3582(a) Prohibits The Consideration Of Rehabilitation To Determine The Length Of A Term Of Imprisonment But Does Not Apply To Imprisonment Imposed After Revocation Of Supervised Release.

As discussed further below, the mandatory revocation statute, § 3583(g), and the statute establishing the factors to be considered when imprisonment is imposed, § 3582(a), use exactly the same operating phrase--"term of imprisonment"--so by every ordinary measure of statutory analysis the restriction at § 3582(a) applies when a term of imprisonment is imposed after revocation of supervised release. However, the Second, Tenth, and Eleventh Circuits discern a difference between the factors that a district court is permitted to take into account at <u>initial</u> sentencing (not rehabilitation, per § 3582(a)) and the factors that the court can consider after it revokes a

defendant's term of supervised release.

To reach this result, these circuits rely on the distinct purposes of imprisonment and supervised release, noting that, unlike original imprisonment, promotion of rehabilitation is at the heart of a court's decision to prescribe a term of supervised release. See, e.g., Brown, 224 F.3d at 1242. In United States v. Anderson, 15 F.3d 278 (1994), for example, the Second Circuit acknowledges § 3582(a)'s rehabilitation restriction but reasons (at least with respect to permissive revocation) that Congress could not have intended the limitation to apply to revocation after supervised release because the supervised-release statutes "contemplate[] that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation of supervised release." Id. at 282. Under the statutes, the argument goes, a district court is required to consider the rehabilitative needs of the defendant when it orders a term of supervised release, and at post-revocation sentencing the court simply "require[s] a person to serve in prison the period of supervised release." Id.; accord Brown, 224 F.3d at 1242; Tsosie, 376 F.3d at 1216 (supervised release addresses rehabilitative concerns and revocation is "merely converting all or a portion of the supervised release period into a term of imprisonment.").

If the Court were to grant certiorari in this case, it would have occasion to assess the viability of this line of reasoning. The Second, Tenth, and Eleventh Circuit's analysis is problematic for numerous reasons, not the least of which is the fact that there is absolutely no hint in the statutes that Congress intended district courts simply to "convert" the supervised release period into a prison term or otherwise treat mandatory revocation as "merely altering the location of the defendant's supervised release from outside prison to inside prison." Tsosie, 376 F.3d at 1216. And a straight reading of the statutes belies that argument.[4] As Tenth Circuit Judge O'Brien concluded in his dissent in Tsosie, "nothing in the structure or the text of 18 U.S.C. § 3583, or in logic, . . . suggest[s] revocations of supervised release are somehow exempt" from the "global"

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[4]Indeed, section 3583(g) plainly links the period of imprisonment to be imposed after mandatory revocation to the class of the original offense, not to the amount of supervised release that the district court originally imposed. See § 3583(g)(the maximum mandatory revocation term is the term authorized at subsection (e), which varies depending on the class of the initial offense); cf. Johnson v. United States, 529 U.S. 694, 700-701 (2000) (imprisonment after revocation relates to the original offense). Moreover, rather than ensuring that district courts upon mandatory revocation make the defendant serve a prison term that correlates to (and essentially converts) the period of supervised release, Congress changed the revocation statutes to accomplish the opposite: it made amendments that eliminate any necessary connection between the term of imprisonment imposed upon revocation and the length of the period of supervised release. See Jackson, 70 F.3d at 880 (noting that, after the amendment, the revocation sentence "may be unrelated to the length of the original term of supervised release").

rehabilitation restriction, and the majority's assertion that a revocation sentence is not a "term of imprisonment" because the defendant is just being required to serve out his supervised release term in prison "does not square the box." Tsosie, 376 F.3d at 1221 (O'Brien, J., dissenting).

B. The Fifth, Sixth, and Eighth Circuits' View: Section 3582(a) Does Not Prohibit Consideration Of Rehabilitation In Regard To The Determination Of The Length Of A Term Of Imprisonment Regardless Of The Stage At Which Imprisonment Is Imposed.

Rather than adopt the position of the Second, Tenth, and Eleventh Circuits, the Fifth, Sixth, and Eighth Circuits take a significantly different tack. As mentioned above, these circuits have concluded that the rehabilitation limitation at § 3582(a) pertains only to the district court's decision to imprison a defendant in the first place and not to the subsequent determination of how long the term of imprisonment will be. See Giddings, 37 F.3d at 1096 (relying on prior precedent to concluded that "rehabilitative factors may be considered by a district court when determining where to sentence within a particular guideline range"); Jackson, 70 F.3d at 879-80 & n.6 (same); see also United States v. Thornell, 128 F.3d 687, 688 (8th Cir. 1997) (affirming consideration of rehabilitation at post-revocation sentencing without being explicit about the statutory analysis that the circuit subsequently spells out in Hawk Wing, 433 F.3d at 629-30). Where imprisonment is mandated,

as is the case after mandatory revocation of supervised release under § 3583(g), these courts reason that a district court is fully free to consider rehabilitation in setting the length of the prison term, and this appears to be so without regard to whether the term of imprisonment is being imposed as an initial matter or after revocation of supervised release.

The legal analysis of the Fifth, Sixth, and Eighth circuits appears to originate from the Ninth Circuit's interpretation of § 3582(a) in United States v. Duran, 37 F.3d 557 (9th Cir. 1994), an original sentencing case. In Duran, the Ninth Circuit read § 3582(a) narrowly in light of the fact that district courts routinely "consider the length of imprisonment necessary to complete a particular prison program." Id. at 561 n.3. The Duran court refused to read § 3582's restriction as prohibiting consideration of rehabilitation in regard to the determination of how long to imprison a defendant, concluding that "if Congress had intended" as much "it could have enacted a statute that admonished judges to recognize that "imprisonment or the length of imprisonment is not an appropriate means of promoting correction and rehabilitation." 37 F.3d at 561 (emphasis in the original). In applying this analysis in the post-revocation context, the Fifth Circuit in Giddings added that not only does the statute fail to include specific language prohibiting the use of rehabilitation as a factor in deciding the length of a prison

term, the legislative history of the Crime Control Act of 1984 also indicates that Congress did not intend that result. See Giddings, 37 F.3d at 1096 & n.17.

The trouble with the Fifth, Sixth, Eighth (and Ninth) circuits' interpretation of § 3582(a) is obvious on the face of the statute. Far from remaining silent about the extent to which the proscription applies to the determination of the length of a term of imprisonment, § 3582 explicitly pronounces that rehabilitation is not to be considered when a court is "determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term" (emphasis supplied). As Judge O'Brien noted in his dissent in Tsosie, "[e]ven a tin ear can discern the *leitmotif*--defendant rehabilitation, treatment or care cannot drive the *incarceration decision either at the threshold or as to length.*" Tsosie, 376 F.3d at 1220 (O'Brien, J., dissenting). By the very terms of the statute, then, if "imprisonment is not an appropriate means of promoting correction and rehabilitation," then extending a term of imprisonment for rehabilitative purposes is also plainly improper.[5]

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[5]It should be noted, too, that allowing a district court to take into account the rehabilitative needs of the defendant when determining the length of a period of incarceration is obviously contrary to the structure of the relevant statutes. Section 3553(a)--the provision that requires the court to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other

Significantly for present purposes, it is clear that, although the Fifth, Sixth, and Eighth circuits ultimately agree with the Second, Tenth, and Eleventh circuits' conclusion that rehabilitation is an appropriate factor at post-revocation sentencing, the reasoning of the two groups of circuits clearly and substantially conflicts. Indeed, the Sixth Circuit in Jackson expressly rejected view espoused by the Second, Tenth, and Eleventh Circuits and affirmed the revocation sentence in that case precisely because it concluded that the factors a district court may appropriately consider at initial sentencing are no different from those appropriate for consideration after revocation of supervised release. See Jackson, 70 F.3d at 880. Highlighting the conflict further, the Eleventh Circuit in Brown reasserted the reasoning of its camp, and noted that the Sixth

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correctional treatment"--establishes the "[f]actors to be considered in imposing a sentence." 18 U.S.C. § 3553(a). With respect to the sub-category of sentences that involve "Imprisonment," section 3582(a) expressly prohibits consideration of "correction and rehabilitation." Thus, contrary to the Fifth, Sixth, and Eighth circuits' reasoning, the district court may neither impose nor extend a prison term in order to achieve rehabilitative goals, even if it is permitted take into account the rehabilitative needs of the defendant when it is considering a non-prison portion of the defendant's sentence. See Anderson, 15 F.3d at 281 (explaining that, where a court is considering a sentence "other than imprisonment," such as a period of supervised release, it has discretion to consider rehabilitative concerns like "medical care" and "correctional treatment"); accord Maier, 975 F.2d at 947 (noting that, under the statutory scheme, "rehabilitation may not be a basis for incarceration," but it "must be considered as a basis for a[nother type of] sentence," such as probation).

Circuit's holding in Jackson "is arguably contrary to our [prior] holding . . . preclud[ing] a court from considering a defendant's rehabilitative needs when imposing a prison term or extending that prison term." Brown, 224 F.3d at 1240 n.1 (citing Harris, 990 F.2d at 597) (emphasis supplied).

Petitioner submits that, given the number of courts that have considered the question of statutory interpretation at issue here, and the conflicting views that have been espoused, this Court's guidance is needed to resolve the dispute over the proper interpretation of § 3582(a) and its applicability, if any, to revocation sentences.

C. The Position Of The District Of Columbia Circuit.

The District of Columbia circuit in this case considered the legal question at issue only on plain error review and did not issue a published opinion. However, the court concluded that "[o]n its face, the language of § 3582(a) does not plainly apply to § 3583(g)," and it offered the additional observation that "all six circuits that have addressed the issue have concluded that a sentencing court may consider rehabilitation when imposing a term of imprisonment upon revocation of supervised release" (App. 2). The D.C. Circuit's judgment in the instant case unquestionably implicates the long-standing dispute among the circuits over the scope and applicability of § 3582(a)--a dispute that underlies their apparent uniformity. (Indeed, it may be

precisely because all of the other circuits that have reached the issue ultimately endorse consideration of rehabilitation at post-revocation sentencing despite the restriction at § 3582(a) that the D.C. circuit did not feel the need to analyze the issue further in the context of this case.)

Because the prospect of a future, published case extensively addressing this seemingly 'settled' issue does not loom large, this Court should seize this opportunity to interpret § 3582(a) and to determine whether the circuits' divergent analyses--and their ultimate conclusions--are consistent with that statutory provision.

II. THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO CLARIFY THE APPROPRIATE AIMS OF THE DISTRICT COURT IN IMPOSING A SENTENCE AFTER REVOKING A TERM OF SUPERVISED RELEASE.

As discussed above, several courts of appeal have considered the legal question at issue here and have relied upon remarkably different lines of reasoning. In the instant case, the D.C. Circuit found it sufficient to conclude that § 3582(a) does not plainly apply to mandatory revocation of supervised release under § 3583(g), and it did not seek to examine or clarify what a district court's appropriate objectives are, or should be, when it imposes a term of imprisonment after revoking a defendant's term of supervised release. Other circuits, too, have yet to offer a consistent, logical, and coherent vision in this regard. Petitioner respectfully submits that there is widespread

confusion regarding, among other things, whether post-revocation sentencing is essentially the same as, or different from, initial sentencing and, thus, whether Congress intended the aims of a district court when it imposes a term of imprisonment upon revocation of supervised release to include consideration of a defendant's rehabilitative needs. This confusion is only compounded when one considers this Court's most recent pronouncement regarding supervised release, Johnson v. United States, 529 U.S. 694 (2000), which holds that postrevocation penalties are attributable to the original conviction, id. at 701, and thereby suggests both that a post-revocation prison term is no different in character than the initial prison sentence from which it emanates and that revocation is properly viewed as a cancellation of the privileges of the supervised release portion of the initial sentence (rather than a 'conversion' of it), followed by imposition of the postrevocation sanction that is part of the original sentence of imprisonment.

This Court's consideration of the matter is needed to clarify congressional intent regarding the goals and purposes of sentencing after a defendant's term of supervised release is revoked. If this Court were to undertake such an examination, Petitioner submits that it would conclude, in accordance with the following analysis, that the statutes governing sentencing plainly establish that the supervised release scheme is part of

the original sentence of imprisonment and, consequently, that post-revocation terms of imprisonment are to be governed by the same factors and purposes that apply at original sentencing. Such a ruling would put to rest the D.C. Circuit's erroneous reading of the plain language of the statutes and its mistaken conclusion that 18 U.S.C. § 3582(a) does not apply when a district court imposes a mandatory term of imprisonment after revocation of supervised release under § 3583(g).

A. The Sentencing Statutes Are Plain, And They Plainly Prohibit Consideration Of A Defendant's Rehabilitative Needs When A Term Of Imprisonment Is Imposed After Revocation Of Supervised Release.

Petitioner's reading of the relevant statutes is derived directly from the plain language of the statutory texts. Section 3582(a) makes clear that a court is to consider the purposes set forth at § 3553(a)--with the exception of correction and rehabilitation--when it determines whether to impose a term of imprisonment and how long that term will be, and § 3583(g) requires the court to revoke supervised release under the stated circumstances and impose a term of imprisonment. Nothing in the relevant statutes distinguishes the scope of the district court's authority to impose a prison term as an initial matter from its authority to impose a prison term after mandatory revocation of supervised release; moreover, even as the mandatory revocation statute invokes the same "term-of-imprisonment" terminology used in § 3582(a), it does not expressly exclude the limitations on

judicial authority that § 3582 establishes. Cf. Anderson, 15 F.3d at 285 (Kearse, J., dissenting) (noting, in regard to the permissive revocation statute, that "if Congress had meant to override its two explicit statutory constraints and allow a court to impose a term of imprisonment for purposes of rehabilitation or medical care as part of a sentence for violation of supervised release it could have thought of more revealing language.").

As explained above, to overcome the obstacles that the plain language presents, various circuits have adopted complicated statutory interpretations that either rely on a differentiating between a "term of imprisonment" imposed at original sentencing and a "term of imprisonment" imposed after revocation of supervised release, or seek to avoid the entire issue by construing § 3582(a) so narrowly that the operation of the statute flatly contradicts its express provisions. A careful review of the overall statutory structure clearly reveals that Petitioner has, by far, the better statutory argument.

To be specific, proper statutory analysis begins with the observation that Chapter 227 of Title 18 of the United States Code governs "Sentences." Within this chapter, there are four subchapters: "Subchapter A--General Provisions"; "Subchapter B--Probation"; "Subchapter C--Fines"; and "Subchapter D--Imprisonment." In Subchapter A, at § 3551, one finds the general provision that establishes the "[a]uthorized [s]entences" for the

purpose of the Code. Subsection (b) of § 3551 is quite clear that there are only three kinds of "sentences" that are authorized for individuals who have been convicted of federal crimes: probation, fine, or imprisonment; and, notably, "supervised release" is not among them. Indeed, Congress placed the statute governing supervised release (18 U.S.C. § 3583) within "Subchapter D--Imprisonment," and § 3583(a) establishes unequivocally what a term of supervised release is: "a requirement" that is "part of the sentence" of imprisonment. See 18 U.S.C. § 3583(a)(providing that "[t]he court, in imposing a sentence to a term of imprisonment for a felony or misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release")(emphasis supplied).

Once it is understood that a term of supervised release is "part of the sentence" of imprisonment, as the statute clearly establishes, then any textual basis for concluding, as the D.C. Circuit does, that § 3582(a) is not plainly applicable to imprisonment imposed after revocation of supervised release surely falls away. That is to say, because of the relationship between supervised release and a sentence of imprisonment (the former is part of the latter), the pertinent question is not whether § 3582(a) should be deemed to apply to prison terms imposed after mandatory revocation of supervised release in the

absence of any reference to § 3582(a) in § 3583(g), as the government argued below, but whether the restriction that is plainly applicable to sentences of imprisonment--of which terms of supervised release are a part--should be deemed not to apply to terms of imprisonment imposed after revocation of supervised release in the absence of language expressly exempting revocation terms from that limitation. And from that perspective, the answer is clear: Congress did not expressly exempt imprisonment imposed upon revocation of supervised release from the restriction in § 3582(a); therefore, that limitation applies to a post-revocation prison sentence just as it applies to the initial prison sentence and any other part of a sentence of imprisonment that is not expressly excluded.

Of course, this analysis does not mean that § 3582(a) applies to the entirety of the supervised release scheme such that the district court cannot consider rehabilitation when it imposes a term of supervised release. One can see from the text of § 3583 that, even as Congress made clear that supervised release was part of a sentence of imprisonment, it was careful to mandate expressly that a district court must consider rehabilitation in regard to certain aspects of the supervised release portion of the prison sentence, and, thereby, excluded the § 3582(a) limitation in regard to those aspects. For example, § 3583(c) requires the court to consider § 3553(a)(2)(D)

(i.e., rehabilitation) when "determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release." (Indeed, because the very point of supervised release is to promote rehabilitation and reintegration after imprisonment, Congress necessarily had to include an express provision that effectively exempts a district court from the rehabilitation restriction when it imposes a term of supervised release.) And Congress went even further, for it also provided that, once a supervised release term is in effect, if the district court is called upon to decide whether to terminate, modify, or revoke that term, or to place the defendant on house arrest, the court must make that determination, too, "after considering that factors set forth in section 3553 . . . (a)(2)(D)." 18 U.S.C. § 3583(e). In short, careful review of the entire statutory framework reveals that Congress's references to § 3553(a)(2)(D) in various sections of the supervised release statute operate as exemptions to the general rehabilitation limitation that otherwise would apply pursuant to § 3582(a) because supervised release is part of the initial sentence of imprisonment.[6] It necessarily follows that, because Congress did

[6] This view of the statutory structure explains why Congress felt it necessary to mandate consideration of the defendant's rehabilitative needs in portions of § 3583 when it had apparently already done so in § 3553(a). Recall that § 3553(a)(2)(D) states unequivocally that "in determining the particular sentence to be

not mandate consideration of rehabilitation with respect to the determination of the period of imprisonment to be imposed after mandatory revocation of supervised release, a court ordering imprisonment pursuant to § 3583(g) must sentence the defendant in accordance with the generally applicable 'do not consider rehabilitation' rule.

B. The Legislative History Clearly Establishes That Congress Intended To Prohibit The Consideration Of Rehabilitation When A Term Of Imprisonment Is Imposed.

That the district court must conform to the dictates of §3582(a) when it imposes a term of imprisonment after mandatory revocation of a defendant's supervised release is not only clearly required by the statutory text and structure, it is also completely consistent with the legislative history of the relevant statutory provisions. In brief, prior to the Sentencing Reform Act of 1984, the amount of time that a defendant spent in prison depended largely on an assessment of whether he had been

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imposed" the court "shall consider," among other things, "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." That general mandate certainly would have been sufficient to require consideration of rehabilitation in regard to supervised release, were it not for the fact that terms of supervised release are "part of" sentences of imprisonment, and sentences of imprisonment are not to be imposed for the purpose of accomplishing rehabilitation per § 3582(a). The express requirement in §§ 3583(c) and (e) that a district court consider the rehabilitative needs of the defendant in accordance with § 3553(a)(2)(D) serves an important function, then, for it revives the authorization to consider rehabilitation in regard to those supervised-release determinations.

rehabilitated while incarcerated. See S. Rep. No. 225, 98th Cong., 2d Sess., 38, 76-77, 119 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3221, 3259-60, 3302. Ordinarily, a judge would set a maximum term of imprisonment and the Parole Commission would determine the defendant's actual release date based on its determination of when his rehabilitative needs had been met. Id. at 3221. The indeterminate sentencing scheme was based "exclusively upon [a] model of 'coercive rehabilitation' --the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons." Id. at 3223.

The sentencing statutes enacted as part of the Sentencing Reform Act were crafted after sober recognition that the rehabilitation model was "outmoded." Id. at 3221. Soaring recidivism rates in regard to presumably rehabilitated former defendants called the model into question, and, eventually, "almost everyone involved in the criminal justice system . . . doubt[ed] that rehabilitation can be induced reliably in a prison setting." Id. at 3223. The 'coercive rehabilitation' scheme that was the basis of indeterminate sentencing became widely discredited, for, as Congress observed, "[w]e know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated." Id. at 3223.

It is precisely because the model of sentencing that tied the length of a prison term to the defendant's rehabilitative needs "failed" and "most sentencing judges as well as the Parole Commission agree[d] that rehabilitation is not an appropriate basis for sentencing decisions," id., that Congress abolished parole; established supervised release to address defendants' rehabilitative needs; and expressly cautioned district courts, at § 3582(a), to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." See United States v. Blake, 89 F. Supp. 2d 328, 343-45 (E.D.N.Y. 2000)(discussing the "pendulum swing" against the rehabilitation model and describing how it lead to the Sentencing Reform Act). There can be little doubt, then, that by enacting § 3582(a) "Congress wanted to be sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur," Maier, 975 F.2d at 946, and nothing in the legislative history indicates that locking a defendant up for rehabilitative reasons was any more acceptable to Congress because the purportedly beneficial term of incarceration is being imposed after revocation of supervised release rather than during original sentencing. In any event, that § 3582(a) and the supervised release scheme were enacted as part of Congress's effort to prohibit the "outmoded rehabilitation model" of sentencing clearly supports construing §3582(a)'s rehabilitation

restriction to apply to imprisonment imposed after revocation of supervised release under § 3583(g), in clear contrast to the conclusion of the D.C. Circuit and the other circuits that have considered the issue.

C. Because Imprisonment By Any Other Name Is Still Imprisonment, The Lower Courts' Collective Conclusion That § 3582(a) Poses No Bar To A District Court's Consideration Of Rehabilitation After Revocation Of Supervised Release Is Conceptually Flawed.

In the final analysis, the practical realities of imprisonment appear to undermine any conclusion that consideration of rehabilitation at post-revocation sentencing is justifiable in light of § 3582(a), either because an initial sentence of imprisonment differs from imprisonment after revocation of supervised release or because the rehabilitation restriction is inapplicable to determinations of the length of a prison term.

The first justification is manifestly faulty for the simple reason that it fails to explain why Congress would have wanted rehabilitation excluded from the original term-of-imprisonment determination but not when a post-revocation prison sentence is imposed; indeed, the same rehabilitative programs and services are made available to both categories of inmates, and counsel is not aware of any special program or facility for supervised-release offenders that separates them from the general prison population and justifies their differential treatment with

respect to the considerations appropriate for determining the length of their sentences. Moreover, as a practical matter, it makes no more sense to say (as the Second, Tenth, and Eleventh circuits have) that a revocation sentence merely 'converts' a rehabilitative term of supervised release such that a defendant is serving his term of supervised release "in prison," Tsosie, 376 F.3d at 1217, than it does to say that a judge can opt to impose probation and also require the defendant to serve the prescribed probationary period in jail. As Judge O'Brien observed in his dissent in Tsosie:

> Relating and explaining th[e] [conversion] rationale to a client could be a challenge for defense counsel. The conversation might go something like this: "There is good news; your supervised release has been continued. But there is bad news; you will be serving your supervised release in prison." In puzzling over the logic, a defendant might well ask what kind of device one must look through to conclude that a supervised release must be served behind prison walls.

Tsosie, 376 F.3d at 1221 (citing Lewis Carroll's Through the Looking Glass)(emphasis in original).

The alternative justification--that a sentencing court may consider rehabilitation in determining the length of a prison term whether at initial sentencing or at post-revocation sentencing--is also conceptually puzzling; again, because there appears to be no cogent explanation as to why Congress would intend to prohibit consideration of the defendant's rehabilitative needs when a district court decides whether to

send a defendant to prison or send him home but allow that same factor to drive the court's decision to keep the defendant in prison, and away from his home, longer than he otherwise would have been. As a matter of logic, there is no difference between the two situations. And, as a matter of real life, prison time is prison time--and even a defendant who is already going to be incarcerated for a period of time selected based on legitimate considerations should not be subject to one additional day if the extension is based on the court's desire to employ the extra period of incarceration as a means of achieving inappropriate goals.

III. THIS COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE THE FACTS HERE PROVIDE A SUPERB RECORD FOR ISOLATING AND ADDRESSING THE REHABILITATION ISSUE.

Mr. Kosh's trial counsel did not object to the 18-month sentence on the ground that § 3582(a) prohibits a district court from considering the defendant's rehabilitative needs when it imposes a term of imprisonment. Moreover, as explained above, the D.C. Circuit was so convinced that "the language of § 3582(a) does not plainly apply to § 3583(g)" that it did not publish its judgment affirming the sentence below (App. at 2). Nevertheless, this case presents an excellent vehicle for addressing the statutory question at issue for two reasons.

First, the sentencing judge in this case made absolutely clear that she was selecting the 18-month sentence <u>solely</u> for

rehabilitative reasons. See App. at 2 (recognizing that the district court imposed the above-guideline term of incarceration because "eighteen months is a substantial period of time for an individual to take advantage of mental health treatment programs and drug treatment programs," which the district court deemed "very important for Mr. Kosh's future"). While it is relatively common for courts to consider a defendant's rehabilitative needs along with other relevant factors discussed at sentencing, Petitioner submits that it is unusual to find a case in which the defendant's rehabilitation is the only reason the court gives for the selected prison sentence. Compare, e.g., Jackson, 70 F.3d at 877 (court based sentencing determination on the defendant's rehabilitative needs and also on "a number of other factors" including defendant's "past violations of supervised release" and "his admissions to engaging in property crimes in order to support his addiction"). Granting certiorari in this case would allow this Court to focus on whether it is appropriate for a district court to consider the defendant's rehabilitative needs when selecting the term of imprisonment after revoking supervised release--a routinely reoccuring event--without having to parse the district court's various sentencing rationales to determine the extent to which the term of incarceration was based on rehabilitative goals as opposed to other sentencing purposes.

Second, the district court revoked Mr. Kosh's supervised

release under the mandatory revocation provision of 18 U.S.C. § 3583(g), which makes no specific reference to any particular factors or considerations and thus begs for this Court's clarification regarding the appropriate aims of the district court at post-revocation sentencing. While it is Petitioner's position that § 3582(a) limits the extent to which a district court can consider rehabilitation when it selects and imposes a term of imprisonment pursuant to the permissive revocation statute (18 U.S.C. § 3583(e)) as well, § 3583(e)'s direct reference to 18 U.S.C. § 3553(a)(2)(D) and the fact that it requires the district court to make a two-staged sentencing determination (first, whether to revoke; then, what term of incarceration to impose) complicates the statutory analysis. By considering the rehabilitation matter in the context of a mandatory revocation case, this Court can begin with the assumption that revocation is required and save for a later day the more complex question of how, if at all, § 3582(a)'s proscription affects permissive revocation under § 3583(e).

In sum, because the record facts and the district court's sentencing determination clearly and cleanly isolate the significant statutory question at issue, this Court should grant certiorari to review the court of appeals' judgment in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

A.J. KRAMER,
FEDERAL PUBLIC DEFENDER



KETANJI BROWN JACKSON*
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel for Appellant
625 Indiana Avenue, NW, Suite 500
Washington, D.C. 20004
(202) 208-7500

*Counsel of Record for Petitioner Kosh.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

VAUGHN A. KOSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

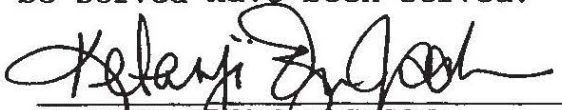
Respondent.

PROOF OF SERVICE

Ketanji Brown Jackson, a member of the bar of this Court, certifies pursuant to Rule 29 of this Court, that on August 23, 2006, she served three copies of the attached Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on counsel for respondent by depositing the documents in the United States mail, first-class postage prepaid, addressed to:

Honorable Paul D. Clement
Solicitor General of the United States
Department of Justice, Room 5614
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001.

All parties required to be served have been served.



KETANJI BROWN JACKSON*
Assistant Federal Public Defender
625 Indiana Avenue, N.W., Suite 550
Washington, D.C. 20004
(202) 208-7500

*Counsel for Petitioner

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 19

Ketanji Brown Jackson

Nominee to be Associate Justice
of the Supreme Court of the United States

Harvard Law School

WINTER TRIAL ADVOCACY WORKSHOP

Schedule of Evening Demonstrations

Ames Courtroom, Austin Hall - 7:00 p.m.

FIRST WEEK
January 7-11, 2019

Monday, January 7
Direct and Cross Examination
Hollis Deaver
Boyd v. Deaver

Direct: David Deakin
Cross: Michael Satin
Judge: Judge Ketanji Brown Jackson

Tuesday, January 8
Direct and Cross Examination
Robert Maxfield
State v. Maxfield

Direct: Linda Kenney Baden
Cross: Sylvia Smith
Judge: Timothy O'Toole

Wednesday, January 9
Evidentiary Foundations by the Honorable William G. Young
Illustrated presentation by Judge Young on offering and use to exhibits at trial

Thursday, January 10
Direct and Cross Examination
Charles Mercer
State v. Maxfield

Direct: Amanda Rogers
Cross: Stephen Singer
Judge: George Leontire

Friday, January 11
Openings
Boyd v. Deaver

Plaintiff's Attorney: Dana Cole
Defendant's Attorney: Olu Orange
Judge: Jeffrey Senger

Harvard Law School

WINTER TRIAL ADVOCACY WORKSHOP

FIRST WEEK SCHEDULE
January 7-11, 2019

MONDAY, January 7

12:00 - 2:00 p.m.	Faculty Luncheon – WCC 2036 Milstein East A
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner – WCC 2036 Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

TUESDAY, January 8

12:00 - 2:00 p.m.	Faculty Luncheon – WCC 2036 Milstein East C
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - WCC 2036 Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

WEDNESDAY, January 9

12:00 - 2:00 p.m.	Faculty Luncheon - WCC 2036 Milstein East C
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - WCC 2036 Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

THURSDAY, January 10

12:00 - 2:00 p.m.	Faculty Luncheon - WCC 2036 Milstein East C
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - WCC 2036 Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

FRIDAY, January 11

4:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - WCC 2036 Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations – Austin Hall (Ames Courtroom)

Harvard Law School

WINTER TRIAL ADVOCACY WORKSHOP

Schedule of Evening Demonstrations

Ames Courtroom, Austin Hall - 7:00 p.m.

FIRST WEEK
January 2-5, 2018

Tuesday, January 2

Direct and Cross Examination	Direct: Mina Malik
Hollis Deaver	Cross: Ronald S. Sullivan
Boyd v. Deaver	Judge: Penny White

Wednesday, January 3

Direct and Cross Examination	Direct: Michael Satin
Ashley Faulkner	Cross: Anna- Sigga Nicolazzi
Commonwealth v. Faulkner	Judge: Judge Claudia Crichlow

Thursday, January 4

Direct and Cross Examination	Direct: Renee Spence
Casey Lauper	Cross: William Hake
Commonwealth v. Faulkner	Judge: Judge Ketanji Brown-Jackson

Friday, January 5

Openings	Plaintiff's Attorney: Dana Cole
Boyd v. Deaver	Defendant's Attorney: Samantha Buckingham
	Judge: Judge Todd Edelman

Harvard Law School

WINTER TRIAL ADVOCACY WORKSHOP

FIRST WEEK SCHEDULE
January 2-5, 2018

(Monday, January 1 is the New Year's Day Holiday)

TUESDAY, January 2

12:00 - 2:00 p.m.	Faculty Luncheon - Milstein West B
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

WEDNESDAY, January 3

12:00 - 2:00 p.m.	Faculty Luncheon - Milstein West B
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

THURSDAY, January 4

12:00 - 2:00 p.m.	Faculty Luncheon - Milstein West B
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

FRIDAY, January 5

12:00 - 2:00 p.m.	Faculty Luncheon - Milstein West B
2:00 - 6:00 p.m.	Student Presentations and Critiques
6:00 - 7:00 p.m.	Student/Faculty Dinner - Milstein East BC
7:00 - 8:45 p.m.	Evening Demonstrations - Austin Hall (Ames Courtroom)

FEDERAL SENTENCING SEMINAR (# 6374)
George Washington University Law School – Spring 2014
Mondays 3:50 to 5:50 PM

Hon. Ketanji Brown Jackson, U.S. District Judge & Vice Chair, U.S. Sentencing Commission, and
Dabney L. Friedrich, Esq., Former AUSA & Member, U.S. Sentencing Commission

I. Course Description

This seminar explores one of the most vexing questions in adjudicatory criminal procedure: what should we (as a society) *do* with people who have been convicted of committing crimes? Students in this course will examine and evaluate the laws and policies that govern criminal sentencing processes in federal court. This is a fluid and continually developing area of law, and the class will address both established principles and new precedents that bear upon federal sentencing practices.

As outlined below, the class will begin with a review of various historical and theoretical perspectives on just punishment. Students will then examine the Sentencing Reform Act of 1984 and its progeny (including the Federal Sentencing Guidelines and 18 U.S.C. § 3553(a)), and study the impact of recent Supreme Court decisions on current federal sentencing practices. Students will be exposed to statutes, guidelines, case law, and commentary regarding the appropriateness of various types of criminal sentences (*e.g.*, mandatory minimums, drug treatment) and the sentencing of certain types of offenders (*e.g.*, white collar defendants, juveniles, the mentally impaired, sex offenders). In addition, the class will examine fines, supervised release, probation and other alternatives to incarceration, as well as the serious collateral consequences of federal criminal convictions.

Ultimately, students in this course will be able to analyze complex legal and policy questions about the proper role and structure of punishment in the federal criminal justice system.

II. Requirements

This seminar meets from 3:50 to 5:50 on Mondays. *Regular and punctual attendance is a course requirement*. The course grade will be based on (1) participation in class, including group and role play assignments and written class work (20%), and (2) the preparation and submission of an original research paper on an approved sentencing-related topic (80%). **A detailed outline of the research paper will be due on or before Friday, February 28, 2014 at 5:00 PM. The final paper will be due no later than 5:00 P.M. on Friday, April 18, 2014.**

Strict adherence to all aspects of GW Law School's ACADEMIC INTEGRITY CODE (*see* GW Law School Bulletin), including compliance with the anti-plagerism policies set forth in *Citing Responsibly*, is mandatory.

Any student who may need an accommodation based on the potential impact of a disability should contact the Disability Support Services (DSS) Office at: 202-994-8250 in the Marvin Center, Suite 242, to establish eligibility, and the Office of Student Affairs at 202-994-8320 to coordinate reasonable accommodations. For additional information please refer to: http://gwired.gwu.edu/dss/.

This course will follow the Law School's "Class Recording Policy," available at the Student Affairs Office Website. Requests for the recording of classes should be directed to the Student Affairs Office.

III. Materials

Selected cases, statutes, and articles (available online, distributed via the portal, or handed out in class)

UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (2013) (available in the library on reserve and online)

IV. Contact Information

We will have office hours at GW Law in **Burns Hall Room 424** on Mondays after class and on Friday mornings. Meetings during office hours will be by appointment only. The best way to reach us outside of class and office hours is by email:

Judge Jackson's GW email address is kjackson2@law.gwu.edu .

Professor Friedrich's GW email address is dfriedrich@law.gwu.edu .

(Emails sent to these addressed will be forwarded to our personal email accounts.)

During business hours, students may also seek to contact Judge Jackson by phone in her chambers at the U.S. Courthouse in D.C.: (202) 354-3350.

V. Course of the Course (a.k.a. *tentative*(!) topics to be covered):

As noted above, federal sentencing policies and practices are constantly developing; consequently, a fair amount of flexibility is required in covering the subject. Listed below is an outline of the topics that we plan to address, roughly in the order that we will approach them. Notice of upcoming topics and specific reading assignments will be posted on the portal on a rolling basis.

A. *The Foundations of Sentencing Policy*—the purposes and functions of sentencing

B. *Fair Sentencing in a Federal System*—the roles of the pertinent decision makers and the challenge of determining a just sentence amidst competing criminal justice concerns (*e.g.*, uniformity v. individualization)

C. *Discretion, Regulation, and Reform*—historical overview of the pre-Guidelines era and the complex political, legal, and social dynamic that gave birth to the last major movement in comprehensive sentencing reform (the Sentencing Reform Act of 1984)

D. *Guideline Sentencing*—introduction to the U.S. Sentencing Commission and the Federal Sentencing Guidelines Manual

E. *The Road to* Booker—the state of federal sentencing under a mandatory guidelines regime; the *Apprendi* watershed; the *Blakely* revolution

F. Booker *and Beyond*—the Supreme Court's evolving Sixth Amendment analysis and the new era of federal sentencing and appellate review under advisory guidelines (*Rita*, *Kimbrough* and *Gall*)

G. *Sentencing Advocacy Post*-Booker—the role of the probation officer and PSR; mechanics of sentencing in the advisory-guidelines era (including a potential field trip to observe a sentencing hearing)

H. *Crime Victims and Sentencing*—current scope of victims' rights and responsibilities; the Crime Victim's Rights Act; the Mandatory Victims' Restitution Act; the calculation and imposition of monetary and restorative penalties

I. *Alternatives to Incarceration and Post-Release Restrictions*—the "before" and "after" of a federal sentence: the sufficiency of probation, home detention, community confinement, and other non-incarceration options; supervised release; drug-court model of monitoring and intervention; the collateral consequences of conviction (*e.g.*, deportation, disenfranchisement).

J. *Race, Ethnicity and Gender in Criminal Justice Policy*—disparity and disparate impact (and the controversial tools of measurement); political and

social dynamics of mass incarceration of drug-related offenders; crack v. powder cocaine; The Fair Sentencing Act of 2010; mandatory minimums; immigration issues; family responsibility as a sentencing factor

K. *Special Sentences for Special Offenders?*—the role of offender characteristics at sentencing; special conditions of supervised release; treatment of white collar defendants, juveniles, the mentally ill, and sex convicts

L. *Organizations as Convicts*—corporate criminal liability and sentencing (fines and probation); Chapter 8 of the Guidelines Manual; requirements of effective compliance and ethics programs

M. *The Future of Federal Sentencing*—where we are and where do we go from here?

FEDERAL SENTENCING SEMINAR (# 6374)
George Washington University Law School – Spring 2012
Mondays 3:50 to 5:50 PM

Ketanji Brown Jackson, Esq.
Vice Chair, U. S. Sentencing Commission

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Vice Chair, U.S. Sentencing Commission

I. Course Description

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Requests for the recording of classes should be directed to the Student Affairs Office.

III. Materials

Selected cases, statutes, and articles (available online, distributed via the portal, or handed out in class)

UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (2010) (available online)

IV. Contact Information

I will have office hours at GW Law (Stockton 405) on Friday mornings from 10 AM until noon.

The best way to reach me outside of class and office hours is by email. My GW email address is kjackson2@law.gwu.edu (emails sent to this address will be forwarded to my personal email account).

During business hours, students may also seek to contact me by phone in my office at the U.S. Sentencing Commission: (202) 502-4500.

V. Course of the Course (a.k.a. *tentative*(!) topics to be covered):

As noted above, federal sentencing policies and practices are constantly developing, and a fair amount of flexibility is required in covering the subject. Listed below is an outline of the topics that we will address, in the order that I plan to approach them. Notice of upcoming topics and specific reading assignments will be posted on the portal (and/or sent by email) on a weekly basis.

A. *The Foundations of Sentencing Policy*—the purposes and functions of sentencing

B. *Fair Sentencing in a Federal System*—roles of the pertinent decisionmakers and the challenge of sentence determination amidst competing criminal justice concerns (*e.g.,* uniformity v. individualization)

C. *Discretion, Regulation, and Reform*—historical overview of the pre-Guidelines era and the complex political, legal, and social dynamic that gave birth to the last major movement in comprehensive sentencing reform (the Sentencing Reform Act of 1984)

D. *Guideline Sentencing*—introduction to the U.S. Sentencing Commission and the Federal Sentencing Guidelines Manual

E. *The Road to* Booker—the state of federal sentencing under a mandatory guidelines regime; the *Apprendi* watershed; the *Blakely* revolution

F. Booker *and Beyond*—the Supreme Court's evolving Sixth Amendment analysis and the new era of federal sentencing and appellate review under advisory guidelines (*Rita, Kimbrough* and *Gall*)

G. *Sentencing Advocacy Post*-Booker—role of the probation officer and PSR; mechanics of sentencing in the advisory-guidelines era (potential field trip to observe a sentencing hearing); retroactivity issues/concerns

H. *Crime Victims and Sentencing*—current scope of victims' rights and responsibilities; the Crime Victim's Rights Act; the Mandatory Victims' Restitution Act; the calculation and imposition of monetary and restorative penalties

I. *Alternatives to Incarceration and Post-Release Restrictions*—the "before" and "after" of a federal sentence: the sufficiency of probation, home detention, community confinement, and other non-incarceration options; supervised release; drug court model of monitoring and intervention; the collateral consequences of conviction (deportation, disenfranchisement, etc).

J. *Race, Ethnicity and Gender in Criminal Justice Policy*—disparity and disparate impact (and the controversial tools of measurement); political and social dynamics of mass incarceration of drug-related offenders; crack v. powder cocaine; The Fair Sentencing Act of 2010; mandatory minimums; immigration issues; family responsibility as a sentencing factor

K. *Special Sentences for Special Offenders?*—the role of offender characteristics at sentencing; special conditions of supervised release; treatment of white collar defendants, juveniles, the mentally ill, and sex convicts

L. *Organizations as Convicts*—corporate criminal liability and sentencing (fines and probation); Chapter 8 of the Guidelines Manual; requirements of effective compliance and ethics programs

M. *The Future of Federal Sentencing*—where we are and where do we go from here?