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FOR LAW AND POLICY

THE CONSTITUTION PROJECT'S SENTENCING INITIATIVE
PANEL DISCUSSION

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P R O C E E D I N G S

MS. MONROE: All right, good afternoon. Thank you for your patience, we had a panelist delayed this morning due to weather in the Northeast and so. I'm Katie Monroe, I'm with The Constitution Project. And on behalf of the Project, I'd like to welcome you to today's event. Oh, you can't hear me? Oh, sorry.

[Technical interruption.]

Thank you, welcome. On behalf of The Constitution Project, I'm Katie Monroe, I direct the Sentencing Initiative with my colleague Virginia Sloan, who is the President and founder of the Constitution Project.

For those of you who don't know about the Constitution or do know, as well, we're based at Georgetown University's Public Policy Institute and our specialty is convening bipartisan blue ribbon committees and creating bipartisan emphasis on controversial legal and constitutional issues of our day. We have initiatives on the death penalty and on right-to-counsel; liberty and security; war powers; judicial independence; constitutional amendments; and our newest initiative is our sentencing initiative, which was launched last summer, immediately in the wake of *Blakely v. Washington* and we put together, if I may say, a really extraordinary panel, I mean committee, of bipartisan judges and prosecutors and defense attorneys. The committee is chaired by former Attorney General Ed Meese and by former Deputy Attorney General Phil Heymann. And the group is presently examining the state of federal sentencing post-*Blakely* and now post-*Booker* and we're hoping that the committee will release its report and recommendation shortly, hopefully sometime this spring.

Obviously, we want to thank Wiley, Rein and Fielding for this really terrific space, thank all of you for making time today to come out and join us. And I

would like to introduce Lisa Brown who is the Executive Director of the American Constitution Society.

MS. BROWN: Thanks, Katie. Excuse me for my voice. ACS has--we love partnering with the Constitution Project, we've done this a number of times and it's terrific because we bring different strengths to bear on the most important issues facing our country today. And this panel is an example of exactly that. I want to add my thanks to Wiley, Rein and Fielding for this wonderful space. It's great for us to be able to hold this panel here.

Welcome on behalf of the American Constitution Society. And a particularly warm welcome to our panelists. We are honored to have you here and thank you for your patience as we have been juggling everything today with this weather and especially Beryl for jumping in at the last minute and helping out. We are deeply appreciative and are very much looking forward to hearing your thoughts on the future of criminal sentencing.

I know I, for one, am hoping to come out with slightly clearer views about where everything's going than I have right now.

This panel's an example of what ACS is doing all across the country, which is bringing expert minds to bear on the critical legal and policy issues of our time. And I think every time you turn around today there is a legal policy issue that affects almost every part of our lives, and which makes ACS's role in educating the public and lawyers about the legitimacy and vitality of a progressive vision of law and policy ever more important.

I hope you'll join us for our convention this summer. It is July 29 to 31, here in Washington. This year's convention is an integral part of our *Constitution in the 21st Century* project. And we will have panels on everything from, again, criminal sentencing to the Commander-in-Chief Power, detention without charge, election law, the

role of international norms in interpreting U.S. Law, morality and the constitution. Once again, as one panelist described it last year, we hope it will be a spa for the mind. And I encourage all of you to join us.

Now, let me introduce today's moderator: a woman whose familiar voice has educated all of us on innumerable legal issues. Thanks to Nina, time in the shower and time in the car can be very educational these days. Nina Totenberg is one of our nation's most well-known and well-respected reporters.

As legal affairs correspondent for National Public Radio, she's had a ringside--maybe I should say courtside--seat at many of the most important events in our nation's recent judicial history. And while her work has garnered many, many, many, national awards, I think one of the best testaments to her greatness is that her reporting has enabled our fellow Americans who are not lawyers to understand the importance of law in the courts to their own lives. So, Nina, we're honored to have you here.

MS. TOTENBERG: Thank you, Lisa. I'm delighted to be here and being the contrarian that I am, I think I'll begin with the words of the French author Alfonse Karr: "le plus ça change, plus c'est le même chose," the more things change, the more they stay the same.

And so it is that we come together today to discuss the Supreme Court cases known as *Booker* and *Fanfan*. I could have probably not made up better names for cases involving sentencing. Those cases that, this year, invalidated key provisions of the sentencing guidelines. Those guidelines, as I'm sure all of you all remember, were enacted by Congress twenty years ago to remedy what Congress considered unjustified disparities in sentencing. Although initially enacted as guidelines, the system later became mandatory by congressional design, pretty much. Federal district court judges were instructed to follow a sentencing grid from which it was increasingly difficult to depart. But, you know, a funny thing happened on the way to the straightjacket the

Congress sewed--the Supreme Court started flexing the muscle of the Sixth Amendment right to a jury trial. And, in January, in a pair of decisions with shifting majorities, the Court with one-hand--did I just lose the microphone?--I just lost the microphone--hello. I'll speak up.

The Court gave with one hand, so to speak, and took away with the other. By a five-to-four vote, the Court held that federal sentences that exceed the maximum statutory penalty must be based on criminal conduct found beyond a reasonable doubt by a jury of one's peers; not by a judge using a lesser standard.

But, in a second decision, one of those five justices, Ruth Bader Ginsberg, jumped ship, to make for a different five-to-four majority on the question of remedy. The sentencing guideline system could be used, that second majority said, as long as it was voluntary, not mandatory.

Bottom-line? well, as near as we can tell, federal judges are to consider the guidelines as advisory. But in the last analysis are free to do with they wish with one caveat: The appeals courts are instructed to review sentences for reasonableness.

Now, none of this is very certain, of course, as Judge Scalia put it in his dissent, no one knows, and perhaps no one is meant to know, how advisory guidelines and unreasonableness review by appellate courts will function in practice. Time may tell, he said, but the Court's opinion does not. Pithy as always.

So the men and women of the federal judiciary must now soldier on with Congress looking over their shoulders and threatening the *bête noire* of mandatory minimums. And this panel, today, is going to discuss how the lower courts are carrying out the admittedly--or at least I would say admittedly--somewhat contradictory instructions of the Supreme Court.

And with us, on my right are Judge Sam Alito of the U.S. Court of Appeals for the Third Circuit, who has held that august position since 1990; Judge

William Sessions, who as vice chair of the Sentencing Commission was supposed to be with us, but he got iced out in Vermont, and, in his stead, we have the wonderful Beryl Howell, also a Commissioner and former staff member of the Senate Judiciary Committee, and Federal Judge Paul Friedman on my immediate left of the D.C. District Court.

Judge Nancy Gertner, from Boston, is due momentarily and we will ask her a lot of questions, too, when she comes.

But I'm going to start with Beryl Howell, who I think has the most up-to-date data that the Sentencing Commission has compiled on how much or how little district court judges are departing from the old guidelines, for want of a better expression, as they invoke their newfound discretion, post-*Booker*. So, I'm going to turn this over to Beryl to tell us the stats and the information that she's got.

MS. HOWELL: Thanks, Nina. I should say that one of the things you didn't mention is I am also a former federal prosecutor and I was with a bunch of my colleagues about a week--two weeks ago and instead of saying oh, congratulations for being on the Sentencing Commission. How is the Senate confirmation process? Some of them said, so, you got nothing to do? You know, like okay, so, big deal, you're on a Commission that doesn't exist anymore? So, as was a bunch of hard-boiled prosecutors would be, they really were not very impressed. And I didn't think that we really did have very much to do on the Sentencing Commission.

And I think one of the things that the Sentencing Commission has done is speed up and change some of the ways that we're collecting data because we understand that one of the important roles that we had played since the beginning and continue to play for all three branches of government--the Judiciary, the Executive Branch and, certainly, Congress, is to collect data about what is actually going on in the field.

So, thank you, I think that's a very appropriate question to ask me. We do have, you know, a bigger role, but let me just answer your question about the data.

I see some people in the audience heard some of this data when I was at the Heritage Foundation for the very first time in my life, last week. It was interesting. And so there's no new data for those of you who were at that

MS. TOTENBERG: So, you can sleep now.

MS. HOWELL: Yeah, you can go to sleep now. And I should say that the data that's been collected since the *Booker* decision has not been, you know, has been analyzed to a certain extent. But we want to caution everybody that this is preliminary statistics, it's not from every district in the country; a lot more analysis and some people can say, some of the statistics raise more questions than they answer. So, you know, with all those caveats and probably more that I've forgotten to say, I'm going to tell you what these statistics say.

We have looked at and have accumulated for 2,056 cases of defendants who were sentenced after January 2005. Of those cases, 70 had incomplete data. So, I'm going to give you statistics not on 2,056, but only on 1,986, for which we have complete data.

Of that total 1,986, 1,304 defendants were sentenced within the advisory guideline range, which is 65.7 percent. That is very consistent with the 64 to 65 percent of the cases that were sentenced within the guideline range over the last three years where we have published data. So, it's not that big a change in terms of the numbers or percentage of cases sentenced within the guideline range since the advisory guideline system has been in effect.

Of course, the next question is: how many have been above the guideline range and how many have been below the guideline range? And have those percentages

changed from cases in the past? And let me talk, first, about the number of cases below the advisory guideline range.

Out of the 1,986 cases, 643 were decided below the advisory guideline range, which is 32.4 percent, which is actually a little bit below the 33.9 or 35.4 percent range from previous years. And out of that 32.4 percent, or 643 cases, 404, or 63 percent of the total of downward-departure cases were due to a government-sponsored motion.

The other cases where there were downward departures consisted of a downward departure pursuant to guideline policy statements or pursuant to provisions of the guideline manual or were, otherwise, outside the manual and what some people might deem to be the *Booker* downward departures.

The *Booker* downward-departures were 166 cases, or 8.4 percent of the total number of cases. Other downward-departures that were pursuant to the guideline manual in some way, were 73 cases or 3.7 percent of the total.

So, downward-departures that were not due to a government-sponsored motion constitute 12 percent of the total cases.

What I thought was particularly interesting and other Commissioners, as well, was the number of upward-departure cases, post-January 12, and the total number of cases where there was an upward-departure was 39, 17 of which were pursuant to guideline policy statements or pursuant to the guideline's manual, but 22 or 1.4 percent were due to the advisory nature of the guidelines or were *Booker* upward-departures.

Now, in past years, the number of departures above the guideline sentences: 7 percent. So, no matter how you cut this, whether it's because it's *Booker* upward-departures or the number of general upward-departures both concerned to the guidelines manual or otherwise is a total of 2 percent, so it's, you know, more than doubled the number of upward-departures in previous years.

So I think that's--people can raise a lot of other questions and we, on the Commission have talked about different ways that we can make more meaningful some of these statistics. And we have talked--among the things that the Sentencing Commission has done post *Booker* and *Fanfan* is Chairman Hinojosa has testified before a House Judiciary Subcommittee; we, the Commission, have held two days of hearings.

At the hearings, we actually ask witnesses how they would consider other questions that we, the Commission, would be collecting to make this data more informative for both policymakers for people who are students of the sentencing policy and academicians who are studying it, as well as judges. So, for example, we don't know when there were upward departures or downward departures outside the manual, how far those departures were, in terms of months or years and so on. And so, there is a lot more information that could help make these statistics more informative that we just don't have right now.

MS. TOTENBERG: Could I ask a question at that? Do you have a regional breakdown on the upward- and downward-departures? Are they pretty much spread out equally around the country or are they concentrated in one or two areas?

MS. HOWELL: And I don't have that breakdown.

MS. TOTENBERG: Okay, and what about the subject matter--that is, the kinds of crimes?

MS. HOWELL: We--I have a breakdown of the kinds of crimes where we have sentences, but I don't have a breakdown of the upward- or downward-departures. Those are all very important questions and we're busily taking in the data and putting together these very brief overview statistics. And that additional analysis is not something that I have in hand or that we've done yet as we're trying to keep up with the cases.

MS. TOTENBERG: In case you didn't figure it out for yourselves, the Honorable Nancy Gertner, just finally--

JUDGE GERTNER: Blew in.

MS. TOTENBERG: Blew in from Logan Airport. They don't close Logan, often but--I want to move on now to a larger question. Judge Paul Cassell, from Utah, who couldn't be with us today because of a scheduling conflict, has written an opinion saying that district court judges should give heavy weight to the sentencing guidelines under the regimen in *Booker* and *Fanfan*. And Judge Gertner, on my far right, who we have here, has said that the guidelines should be given less weight, that they should be a consideration, along with other considerations.

Now, I suppose it's true that if heavy-weight translates into just follow the guidelines, the grid might, once again, be considered mandatory. But we all know that isn't the way the system works. If Judge Cassell has someone before him who he really thinks is outside the mold of what the guidelines would have called for, he's now going to tailor that sentence because he can.

And if Judge Gertner has someone before her who absolutely fits the mold, she's absolutely going to follow the guidelines. So discretion means discretion, doesn't it? And I'm going to ask this of the two district court judges here, Judge Friedman and Judge Gertner. You know, no matter what you call it and I've read both your opinion, Judge Gertner and I read Judge Cassell's, it's just how many angels dance on the head of a pin? And, in the end it's the character of the defendant; and to some extent the character and views of the judge that make the difference that's going to determine this, not whether you call it a heavy burden or a burden or a whatever burden?

JUDGE FRIEDMAN: I'll give you a minute to rest if you want to.

JUDGE GERTNER: Yes, catching my breath would be good.

JUDGE FRIEDMAN: Although, can I quote, your--paraphrase your opinion, as I answer this question? Judge Gertner wrote an opinion the other day in which she said something like, on the one hand there are--it's a continuum. On the one hand you've got mandatory guidelines and on the other hand, post-*Booker*, you have what some judges might call, free at last, free at last, now I can do whatever the hell I want to do and--she didn't say that in the opinion, she said--

MS. TOTENBERG: Pretty close, she said free at last, she said free at last.

JUDGE FRIEDMAN: She said free at last is what she said though. And she then said, but that's not what *Booker* means. And I agree with that. That's not what *Booker* means. We are not at liberty to do whatever we want to do. This is not pre-1984, it's not pre-guidelines. What the Supreme Court was very careful to tell us, these guidelines are still important, but they are advisory.

I think that the distinction between--I won't speak for Judge Gertner--but the distinction between what Judge Cassell said on the one hand and what Judge Adelman in the *Ranum* case said on the other hand, may go something like this: Judge Cassell says you start with the guidelines and they have heavy weight--I don't know if he--I think he used the word presumption, but someone read it to say presumption that the guidelines, then apply.

Judge Adelman, on the other hand, went to 3553(a) and said if you look at 3553(a), you see that the guidelines are only one of the factors that we're supposed to consider.

The question is whether, under *Booker*, you are free to go straight to 3553(a) or whether Justice Breyer is telling us that you go to the guidelines first and then you apply whatever weight you give them, but you must consider the guidelines. He said you must consider the guidelines. The second circuit, which is not binding on any of us here, but I think Judge Newman's opinion in *Crosby* was a terrific and very helpful

opinion, said the same thing. And it seems to me that you go to the guidelines first. And you go through the same exercise that you did before. You do the guideline calculation, guideline analysis, you consider requests for upward- and downward-departures. Because after all the departure within the guideline or authorized by a guideline, it's still a guideline sentence.

A departure, as we always understood departures, is still a guideline sentence.

And then when you've done all that--you notice I'm not answering the question--you then say, okay, now I take an extra step under *Booker*, and that is I consider the factors under 3553(a) and decide whether or not any of those factors persuade me; either the government persuading me or the defendant persuading me to do something different from what my guideline analysis and guideline calculation would otherwise get me to.

And I think that's the way we should go about doing it. I think that's what the Supreme Court had in mind. I certainly think that's what Judge Newman in the Second Circuit had in mind. And the question is whether you call it a heavy weight, substantial weight, presumption, and the argument against doing so is that if the guideline sentence is presumptively the right sentence, if that's the standard--and maybe heavy weight and presumption are the same thing, I'm not sure, then, do we invite the courts of appeal to say, well, if they're presumptively the right standard, then anything outside the guidelines is unreasonable. And I don't think that's what the Supreme Court had in mind.

Now, beyond that I'm not going to say anything else, since I have not yet written on it. And both the prosecutor and the defense lawyer in the very same case that are waiting for sentencing are briefing this very question and are sitting here in the room, so I'll leave it at that.

MS. TOTENBERG: Judge Gertner.

JUDGE GERTNER: Since Paul quoted me, there's not much more I can say. But to some degree this is a very nice abstract discussion, which I'm not sure is going to make a difference in a concrete case and here's why.

Before there were guidelines, there was nothing. It sounds like this is the beginning of a biblical routine. But it's true, there was nothing. We talked about judges exercising discretion, but it was discretion based on air. There were no studies of deterrents. There were no meaningful standards of who could be rehabilitated and who couldn't. Judges were never trained how to exercise this discretion; there were no courses in law school about sentencing. In fact, it's as if everything ended with a verdict or a plea of guilty.

So, to some degree, the guidelines came in and even if one says I'd like to ignore the guidelines, the fact of the matter is they were the only framework for sentencing that we had. They came in on top of essentially a tabula rasa. And to some degree, that's the same situation now. Even though I disagree with Judge Cassell, and since I don't believe that the guidelines should be entitled to presumptive weight for the reasons I described in my decisions, that's essentially the old regime. They were always entitled to presumptive weight; you always departed in extraordinary circumstances. If that's followed, then all the innovations of *Apprendi* and *Booker* will be gone out the window. So, I disagree with him to that degree.

But, nevertheless, I had declared the guidelines unconstitutional and advisory last July. I had about 40 cases that I sentenced between then and now. So, I had to come to grips with not just the abstraction, but--what do you do in the concrete case? And what I discovered was that, in fact, you had to grapple with the guideline framework because there was nothing else.

If I were going to say I thought this person could be rehabilitated, that sentence gave me a way--I thought this person could be rehabilitated based on what?

Says who? And that gave me pause. It made me feel like one had to grapple with the guidelines, at least that's a starting point.

And let me give you some examples: Every judge from right or left has agreed that there's been a moment in their judicial career when you tallied up the guideline calculations and you came up with a result that made no sense--made no sense. And those are the kinds of cases that I've been grappling with. The situation--the case that I wrote about, actually, was a situation in which the government had a huge pseudoephedrine conspiracy nationwide, the top rolled on everyone else, including the individuals he had set up across the country. He was a cooperator, his sentence 130 months, then it went to 70 months, then it went to 51 months.

The U.S. Attorney in Boston, however, told the story only from the perspective of the individual that she found. And so she said, well, he set up this pseudoephedrine factory. By the time you finish the guidelines, his guidelines were more than the cooperator who had set up the entire operation.

Under the guideline regime, one could never address that. One could never address that. There was a rule that said you couldn't harmonize the disparity between defendants. It made absolutely no sense.

And then there was a departure of jurisprudence involved that also made no sense. The First Circuit determined that you could only depart for extraordinary family circumstances when the defendant was irreplaceable. And, frankly, I wrote decisions that were spoofing that. I was saying, jeeze, I think I'm pretty irreplaceable, my kids probably disagree. What does irreplaceable mean? I meant that we ought to have keyed these concepts to the purposes of sentencing.

What were we trying to accomplish by these categories? And neither the case law nor judges ever came to grips with that. And so dealing with the guidelines was not the issue. The issue was measuring the guidelines by the purposes of sentencing and

see to what degree they advanced those purposes and to what degree they didn't. And that will ultimately improve the regime, it seems to me, nationwide.

The question will come with the so-called discouraged factors, crack cocaine, other factors like addiction or the age of a defendant. And it's interesting to me that we've operated under a regime for 20 years in which guidelines promulgated by the Commission have never been meaningfully reviewed.

The Commission, unlike the Environmental Protection Agency and other administrative agencies is not subject to the Administrative Procedure Act. We don't review standards with respect to liberty to the same degree that we review standards with respect to snail-darters. So, frankly, if the Commission's statements that certain factors are discouraged, should now be held up to the light and we say, do they make sense? Do they make sense and not--I have to end where I began: It's not do they make sense to me N. Gertner, it's do they make sense in terms of the purposes of sentencing.

The extent to which we are off the guideline page will be determined by how well people come up with alternative standards. Alternative studies, rehabilitation studies, deterrent studies.

The extent to which lawyers come to us with meaningful data, as opposed to asking us to simply say, I disagree. Because once I hit the I-disagree point, I'm at the free-at-last moment. Once I've hit the I-am-bound point, I'm at an unconstitutional point. And in-between we have to--to counter the guidelines, we have come up with a regime of rules of standards and studies and put our money where our mouth is. Did I answer your question remotely?

MS. TOTENBERG: Judge Alito, so you've heard these two very distinguished judges discussing this. Let me ask you, what is unreasonable? Make sure that they get the microphone there, we don't want to miss this. What is unreasonable? What things should district court judges do to prevent themselves from delivering

unreasonable sentences and how interventionist do you think busy appeals court judges are going to be?

JUDGE ALITO: Well, those are the \$64,000 questions for the courts of appeals. And I don't think there's any single clear answer to those questions at this point. We have several models, really remarkable models that have been produced by extraordinary district judges within a short period after the Supreme Court handed down *Booker* and they are all reasonable, and they all make--let me not use the word reasonable--because it's a term of art. They're all very impressive and, certainly, it's conceivable that, ultimately, we could go off in any of those directions.

And they've been described; there's Judge Cassell's model in which the guidelines, which, after all, have been promulgated by an expert agency with congressional oversight taking into account factors that Congress has specified in the Sentencing Reform Act. They've produced a very complicated system, a very sophisticated system for calculating sentences. And one of his arguments is, why isn't that presumptively reasonable.

And then on the other hand there's Judge Gertner's model, which, as I understand it would have sentencing judges acting--basically a common-law type capacity informed by data brought to their attention by lawyers regarding the purposes of sentences, and they would apply that in individual cases and, presumably, there would be an appellate review of those determinations in sort of a common-law way, a body of sentencing precedents would be worked out.

I think it's conceivable that, as I said, ultimately, the whole system could go off in either of those directions.

In the short-term, I expect that the courts of appeals are probably not going to be any more unanimous on this than the district courts have been. And we probably, if

this system sticks, will have to get guidance from the Supreme Court about exactly what they mean by reasonableness.

I found at least one court of appeals opinion that addresses this and there may be more. These are coming out so fast it's hard to keep up with them. But the Fifth Circuit a couple days ago handed down a decision explaining what they think reasonableness review means. And they said that if a sentencing judge exercises discretion to propose a sentence within the guideline range, it will be rare for a reviewing court to say such a sentence is unreasonable.

And, on the other hand, if the sentencing judge gives appropriate reasons for a sentence that is outside the range, the court stated, "we will give great deference to that sentence."

So, in answer to the final question, this is very much a deferential approach which would allow the district courts a great deal of leeway, either to sentence within the guidelines or outside the guidelines. And when you're talking about a court of appeals like the Fifth Circuit where each judge is handling around 500 cases a year, it's easy to see how the system could move toward that type of review.

Whether any sort of consistency in sentencing, like defendants across districts and across circuits can be maintained under a system like that is certainly one of the questions that that kind of review would present.

JUDGE GERTNER: First, there's this wonderful feeling that somehow in the absence of guidelines, we will be in chaos. Common-law countries, Australia, Israel, Scotland, England have had sentencing--indeterminate sentencing with appellate review from the beginning. In other words, appellate courts developed standards whenever anyone went outside the page or off the, you know, totally became an outlier, the courts would say that's too far. And over time, as in the rest of our law, rules evolved. And that's what I see here. There is one framework. To the extent judges find that framework

wanting, they will articulate why, the courts of appeals will then say yea or nay.

Hopefully, the Commission will now really be an expert agency--the Commission, so far, has just given us average sentences. They've done none of the studies that they were intended to do. They've not looked at what works.

One judge in Oregon has a wonderful way of describing it. We've had a regime for 20 years in which I will do exactly what the judge next to me does and neither of us may be doing anything that makes sense. And maybe now, the Commission will begin to look at data and expertise. And, maybe now in this technological age, judges will be able to exchange opinions; judges will be on e-mail; judges will be able to know what we're doing in a way that didn't happen 20 years ago.

MS. TOTENBERG: This may be a dumb question, but does there have to be a single standard? As long as the objective is to keep sentencing within certain parameters and not have gross outliers, do you have a Cassell or Gertner standard? Supposing Gertner has one standard and Cassell has another but, in neither case are there big outliers, do you have to pick one?

JUDGE FRIEDMAN: Well, maybe Judge Alito is better equipped to answer that. Are the courts of appeals going to pick a standard or announce a standard? In other words, that's what courts of appeals do, they try to give us guidance in some ways. You know, like the famous totality of the circumstances test, which Justice Scalia says is, of course, no test at all. But that's how we decide search-and-seizure cases and Miranda questions and so forth and so on.

So, it may be that it's helpful to have Judge Cassell saying one thing and Judge Gertner saying something else and Judge Adelman saying something else; and others that are thinking about this as they sentence particular people. And whether when I get down to it in my crack powder cases that are coming up or in my health care fraud

case that's coming up--whether I announce a standard or pick one of them or not, may very well depend upon the circumstances presented to me.

But I have a feeling that the courts of appeals or at least some of them are going to grab upon some words in the hope that by doing so, all of the district court judges in that circuit will think they know what the standard is and, therefore, that will be viewed as a way to minimize disparity, which is one of the goals. That's just a hunch.

MS. HOWELL: And if I can just say, you know, that I think the congressional policy behind the Sentencing Reform Act, of course, was limiting unwarranted sentencing disparities. And I think you're right, Judge Gertner, that the sentencing guidelines have made an effort to limit sentencing disparities and not necessarily taken into account when they might be warranted, more often than not.

Certainly, from the position--and I've never been in this position of having to sentence somebody. But certainly the frustration of sentencing judges with the sentencing guidelines, shows that there hasn't been sufficient flexibility in their view within the guidelines for when disparities are warranted.

And I think the big question that Nina's probably going to get to is: how much patience is the Congress going to have with sentencing disparity? There are some people who think sentencing disparity is not such a big deal, so long as there's sufficient transparency in the process that people understand judges reasoning for a disparity outside of an otherwise advisory guideline range. And it looks warranted. And it's not necessarily going to be perceived that way by Congress. They're going to look at all sentencing disparities as unwarranted.

MS. TOTENBERG: Do we have to pick one?

JUDGE ALITO: Well, I think we will have to pick a standard, because we're going to have hundreds of these cases to review, very shortly. And whether it's a

very general standard, such as the one I just mentioned from the Fifth Circuit or whether it's something that's much more specific, I think it remains to be seen.

But I think it would be surprising--pleasantly surprising, if all the courts of appeals agreed on this. On the one very technical issue that's come up right away, is how do you determine whether a district judge committed plain error in sentencing somebody under the belief that the guidelines were mandatory during the time when the statute said they were mandatory. And, immediately, there's a split in the circuit on that rather simple issue, with some courts saying it's up to the defendant to prove that the defendant would have gotten a different sentence if the judge realized that the judge didn't have to sentence under the guidelines. And some courts saying there's no way we could know what the judge have done. So, we'll let the judge resentence or tell us whether the judge would have sentenced differently.

So, on that very simple technicality which came up there's already a split in the circuits and, as I said, I think it would be surprising if we don't see something similar on this much deeper and more difficult issue.

MS. TOTENBERG: Judge Gertner?

JUDGE GERTNER: I think that part of the reason for the immediate split is it's a question of how much chaos one wants to deal with. In other words those are dealing with cases in the past, not going forward and, really, is how interventionist the courts of appeals want to be. But on the question of the Congress, it is critical that we monitor this situation in all of its complexity. If the issue is how many judges have given guideline sentences and how many not, you know, how many have deviated; how many have gone off the page, then it will look terrible.

If the issue is why have judges deviated, in what situations, based on what fact. Let me give you an example. After the Feeney Amendment was passed, which narrowed judicial departures, I was concerned because the First Circuit was one of the

courts that had a higher departure rate. And I was determined not to let the issue be simply trampled on in the press unless we understood why we were departing; what the issue was; what was behind it. And so a good deal of those departures were substantial assistance departures. And that was one thing.

And then, the vast majority of the categories, the largest single category were departures over criminal history problems. And, of course, that made a great deal of sense. Massachusetts is not a guideline state. It often happened that one had a Massachusetts record that did not fit easily into the guideline categories. *United States versus Shepherd*, which was my case, was a classic example of that.

And, so, if the answer is not just, if you deviated? If you went outside the lines, but why and what does that deviation show about the problems in the system, which is, in fact, the way departures were envisioned.

There are huge numbers of departures, I would predict, based on the way the guidelines deal with family circumstances and women offenders. The guidelines have increased the incarceration of women, partly because the role adjustment one gets for being a minor player is relatively minor relative to the huge adjustment one gets being related to a certain quantity. The extent to which family circumstances were not taken into account--when for many women offenders, those are really terribly salient factors--also made a difference.

So, if there are departures because of real issues that have a real, you know, role in penology, real issues in rehabilitation, then, Congress should monitor that--

MS. HOWELL: The Sentencing Commission should monitor that.

JUDGE GERTNER: Or the Sentencing Commission. It shouldn't be allowed to be just departures.

MS. TOTENBERG: Is it going to?

MS. HOWELL: You know that is one of the things we've been talking about--giving more meat to these statistics and the kind of analysis that we bring to the statistics. And, you know, I think it can help--you know we get massive amounts of information, and have people doing data processing and data input and analysis and turning out numbers. And, adding to that burden, which is both a resource issue and so on, is something that we can't--that we have to be very precise in asking to do and how we expand on these numbers. And the answer is we haven't taken those steps yet.

They are things that we're talking about--particularly with these *Booker* numbers and how they're going to be interpreted. And we feel the same kinds of frustration that the numbers don't really speak to the issues about whether the departures are warranted? Whether they're up or down and what they're for and what kinds of cases?

Those are things that we are going to have to analyze more and dig down deeper into the data.

JUDGE FRIEDMAN: I think that on the trial court level, when we sentence people, we have several different audiences that we are now trying to address. First, and most important, is the defendant and trying to explain what we're doing and why we're doing it. And, second, is the court of appeals, because regardless of what the Sentencing Commission or the Justice Department or the Hill collect, the Court of Appeals is the only one and the Bureau of Prisons, the court of appeals is the only one who is going to read the transcript, either a written opinion or the transcript.

The Bureau of Prisons never gets the transcript of what we say when we sentence somebody and, yet, they make determinations on where they're sending somebody and what level of security and all sorts of other things, based on all these interesting formulas and based on what's on the pre-sentence investigation report, regardless of what we say at sentencing, unless we append that transcript to the judgment

commitment. Or we dictate separate reasons and append it. And then, of course, the Sentencing Commission gets it, as well.

Congress is going to, probably, make its decisions based on anecdotal statistical evidence and also anecdotal evidence. And I think the concern that many of us have is that the first time some judge goes off and does something that is widely reported and is viewed as being crazy, the Congress will jump into high gear. Now the House of Representatives may, anyway. But I think that the Senate Judiciary Committee is probably prepared to adopt more of a wait-and-see attitude, but even they, I think, if we do something crazy, will jump on it.

Now, how do you define crazy? It's what you read in the newspapers, which may not be accurate, which may not be complete. And I don't know that there's any way, unless the Sentencing Commission can help us figure out a way--the burdens on them would be tremendous if they had to do all of this. I don't know any way that we can give the Congress and the Bureau of Prisons and maybe even the Sentencing Commission that same transcript that we're going to give to the Court of Appeals. And because of what their responsibility is, we know that they or their law clerks will actually read it. But people on the Hill won't.

And that's where we're going. Now, whether that is creating a chilling effect on some judges or whether it's just making us cautious and careful with this new-found sort of freedom we have is the question, but it's not going to be long in coming, I don't think.

MS. HOWELL: Well, in terms of the data collection, it is a bigger issue about the forms that judges fill out at sentencing--whether we get complete forms. And how much of an input the Sentencing Commission has in helping the administrative office of the court to put together those forms. And every district is an empire unto itself. It has its own sort of forms that it used in the past. And so, collecting the data is not

necessarily an easy thing and has implications all throughout the system in terms of even the forms that the judges have to fill out. It's a bigger issue and we need to do a better job of it.

I mean, I think--and I think you're right. Everybody's concerned about the outlier case that makes headlines and provokes and prompts congressional hearing and congressional action. I mean, I have to say that we had a representative from the Justice Department, a U.S. Attorney from Oklahoma who testified at the Sentencing Commission hearing and he made the statement that there were vulnerabilities inherent in the advisory guidelines that we, meaning the Justice Department, consider super impediments to law enforcement. Serious impediments to law enforcement are flag words suggesting they are collecting data about sentences. And he outlined four different areas where the Justice Department was considering the most serious impediments to law enforcement. The Sentencing Commission has an ex officio member from the Justice Department, who is actually here, Deborah Rhodes. That doesn't mean that the Sentencing Commission, itself, just because we have an ex officio member from the Justice Department, gets any inside information from the Justice Department about what they're planning or what they're doing.

But I think it was certainly my impression from this witness that the Justice Department is putting together, you know, looking very closely at a legislative proposal that could start the ball rolling in Congress for post-*Booker* legislation.

MS. TOTENBERG: I think I'm seeing what everybody in this room knows--that there is a good deal about sentencing that people really do agree on in Congress if you could have a secret vote. But nobody wants--everybody could envision that campaign ad that pictures the Senator or Congressman as being--to be trite about it--soft on crime or sympathetic to rapists --pick your poison. And so, in the short-run, I think Judge Friedman is right, that everybody's sort of holding their breath, but I'm not--

somebody correct me if they think I'm wrong--I'm not overly hopeful that sense will prevail.

JUDGE GERTNER: Well, I'd like to sum it up. Maybe what we have to do is have more modest goals here. Let's talk turkey, right, the child pornographer will be the traditional Willie Horton, the first person who gives a child pornographer probation, whatever the circumstances, will be the problem.

On the other hand, there may well be narratives one can tell to the press and to the public about cases that we've seen from time to time in the press of ridiculous outcomes dictated by the guidelines. Like I said, sentencing women is one category, men and women who function as mules is another, the kind of disparities one would see with co-defendants, depending on the happenstance of where they were indicted is another.

There are categories that we can look at. And it's terribly important that that discussion not be the abstract discussion about discretion and what is mandatory, but it be a discussion about people. Because that's the only way people will understand that you can't have a nationwide uniform regime.

MS. TOTENBERG: But take the most clear-cut case that, really I think there is a widespread private consensus about, and that is the disparity between crack and cocaine sentencing. Judge Friedman has called for briefs in a case involving that, which leads to the question whether that is something a federal district court judge is under the new regimen allowed to straighten out? But, you know, the Sentencing Commission recommended changes repeatedly and Congress wouldn't buy it, I think, largely, out of political fear. So, why are we to think that this is going to be any different?

JUDGE FRIEDMAN: Well, on the crack/powder issue, let me see how I want to phrase this--there are judges that have already dealt with the question: Judge Adelman, again, in Wisconsin; Judge Robertson here. I understand there's briefing going on--Judge Levi tells me there's briefing going on in San Diego. I think Judge Cassell told

me there's briefing going on in Utah, as well. There are a lot of people interested in this question.

And it seems to me, I'll say only as much as I said in the transcript in which I invited briefing and which I laid out what I thought some of the factors were to consider on both sides. It seems to me to the extent that the Supreme Court in *Booker* has said that one of the reasons that we strongly consider or, in Judge Cassell's view, give heavy weight to what the Commission has said, is because the Commission is supposed to be the expert agency. Well, what the expert agency has said about crack and powder is that the disparity is wrong and it ought to be changed, but Congress won't change it. And so, therefore, we're not going to write guidelines that comport with our expert views. We're going to start with the mandatory minimums that Congress has imposed and work upward.

And so, the question that I suggested to the government and the defense in these two cases is how much deference do you give to the Sentencing Commission's guidelines in the crack case versus how much deference do you give to the Sentencing Commission's full reports on the issue?

On the other side of the coin, both of these are safety-valve cases. And so the government has a good argument that Congress and the Commission have both accounted for dealing with the mule less harshly than somebody more significant. But you still have the 100:1 disparity when, in fact, Congress--when the Commission, itself, has suggested no more than a 20:1 disparity, makes sense.

Now, Judge Robertson recently had two co-defendants who were both mules. For both of them there was a mandatory minimum of five years and the guideline sentencing range. The Commission could have done here what it did in 924(c), which is a gun charge where they said the guideline for 924(c) shall always be the mandatory

minimum, nothing more, nothing less. They could have done something like that in crack and they didn't.

Judge Robertson, instead of giving the 70 to 87 range for number one, gave the mandatory minimum of 60 months; after considering the factors in 3553(a). And then with respect to defendant number two where the guideline range was 120 to 150 months, who clearly had a much more extensive criminal history, decided that 96 months was sufficient to meet the concerns and articulated his reasons.

And among other things, he set forth the nature and circumstances of the offense, which is one of the things you're supposed to consider under 3553(a). He said they were bottom-rung street sellers, they were observed serving customers in a line of cars, exchanging zip-lock bags of drugs for currency. The officers' testimony was that they were walking back and forth, to and from a third man, getting the drugs from him.

He was never arrested. It was a case involving joint possession and the amount of drugs was just over the 5-gram mark. And if it had been just under the 5-gram mark, it would have made a huge difference. The average weight of a zip-lock bag was .38 grams and the total transaction was, like, 10 minutes. And he also considered the first sentence of 3553(A), which tells us that we are supposed to impose a sentence that's sufficient but not greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

He cited and quoted from--paraphrased the Commission's reports, but geared it to the specifics of these individuals and concluded that five years was enough for one and eight years was sufficient for the other.

Now, I don't have the transcript, I only have the short little opinion he wrote afterwards. The question is whether the court of appeals will think that that's a reasonable thing to have done in these circumstances. If he had simply said, I don't like the disparity and that's the end of my analysis, I suspect there would be many people in

this room who would think it would not survive appellate review, but given what he did do and what he did say, hopefully it will.

JUDGE ALITO: I think it's helpful to think back to the cases that prompted the enactment of the Sentencing Reform Act in the first place. Back when I was an assistant U.S. Attorney before the Sentencing Reform Act and the guidelines took effect, the two areas where we saw the greatest sentencing disparity were child pornography, as Judge Gertner mentioned and white-collar cases.

There were particular judges who thought that child pornography was not a crime that ever merited incarceration, that these people should be treated in other ways. And, likewise, there were judges who did not think that it was necessary--in most cases some of them probably in all cases--to send white-collar criminals to jail.

And it wasn't that these judges were irrational; it wasn't that they didn't have reasons for what they did, it was not that. If you told them you have to justify your sentence by reference to the goals of sentencing that are set out in 3553(a) to (d), they could have done that and they would have done that. The judges sentencing the white-collar cases, I think, would have said, you don't need a lengthy term of incarceration, like you would now get under the sentencing guidelines to deter white-collar crime; even in cases with huge losses, I think that sending a defendant of this sort to jail for even five years is a huge deterrent for anybody else contemplating such a crime.

Now, they might be right or wrong about that and maybe there are statistics that show that they're right or they're wrong. But that was their view. And similar arguments would be made with reference to child pornography. So, I am skeptical that enough sentencing disparity can be wrung out of the system simply by requiring judges to justify what they did by reference to the goals of sentencing in the Sentencing Reform Act, which, after all, includes every single goal of sentencing that anybody would think is legitimate.

MS. TOTENBERG: Well, and the other thing that you didn't mention was racial disparities, which are considerable.

JUDGE GERTNER: Let me just say, I actually think that we can ask judges to do better than what you just described. One of the first cases after I had declared the guidelines unconstitutional was an illegal re-entry after deportation. A guy who did not commit a crime, he was simply deported and he came back into this country.

The lawyer made an argument and said this is a good man, he just came back to be with his family. That was all. And I said to the lawyer, show me how everywhere it is the case that everyone in this category is exactly what you described. In other words, this was the category not of people who had committed crimes. This was the category of people who had simply been deported and returned to this country. And that was the entire category.

And I began to realize that if I sentenced as she asked me to, I would simply be saying I disagree that these people deserve this punishment. And I recognize that that was the free-at-last moment. That was the point at which I would say that I thought the penalties were crazy. But unless I could do better than simply saying, I disagree with the penalties Congress had set up--

MS. TOTENBERG: So, what did you do?

JUDGE GERTNER: I sentenced to the guideline range. I sentenced to the guideline range. I unhappily sentenced to the guideline range. I asked her if there was any way to individualize it. Can you describe who else was in--what made him different than everyone else in this category, because if he's like everyone else in this category, then the guideline range has to stand.

So, what I'm saying is that there will be reasons and there will be reasons. And the reason that says I don't believe that a white-collar offender should get time is a

clearly disavowed reason by Congress. You have to do better. And I think that we can do better. We can talk about individuals. We can talk about individual circumstances.

The other thing is that what's wonderful about this period of time is that we're talking about sentencing in a way we haven't talked about sentencing before. We're actually talking about people in a way that we haven't talked about before. And if this regime does nothing more than have decisions from Judge Friedman and Judge Cassell about the unfairness or the fairness of the crack/cocaine disparity, that's a good thing.

The problem with the guidelines is they silence this discussion.

JUDGE ALITO: The question is how long this discussion is going to be allowed to go on?

JUDGE GERTNER: That's a problem, yes.

JUDGE FRIEDMAN: It's interesting what Judge Alito just said about pre-guidelines, child pornography and white-collar cases and Nina's point about racial disparity, which, obviously, is a major factor for the Sentencing Commission and all of us.

And I did some white-collar defense work and we always made the same argument. And you heard the argument when you were a prosecutor.

JUDGE GERTNER: He's suffered enough.

JUDGE FRIEDMAN: He's suffered enough, you can't imagine how tough it is for him to walk into the country club, you know. He's just--it's so hurtful to him to have to face his friends after all--well, that's just, you know. And I do think that part of it has to do with unbridled discretion and who the judges were and, to some extent, are because we tend to identify with people of our own backgrounds and education and training and race and religion and that sort of thing, whether we like it or not.

And the bench pre-guidelines was a lot more white males and fewer women and fewer minorities and so forth, but the concern is that these arguments are going to be made again now.

I spoke five years ago to a white-collar tax defense seminar. And I was near the end of a program and was asked to talk a little bit about sentencing. And I did. And I was asked the question was what do you think we, as white-collar criminal tax defense lawyers ought to be most concerned about in the sentencing area. I said you really ought to be most concerned about the disparity between powder and crack cocaine. And they said, well why is that?

I said, because when I have to go into court day- in and day-out and sentence people who sold 5.8 grams or 10.-whatever it is of crack cocaine to 151 months and then every month or two after sentencing 20 of them, I get one of your clients in, I say to myself, this really isn't fair. This isn't fair. I'm forced to apply these guidelines because I'm going to follow the law because I've sworn to follow the law, so I'm going to apply the mandatory minimums; I'm going to apply the guidelines.

But when I have somebody who comes in--and this was before Sarbanes/Oxley it was before Enron and all of this and the organizational guidelines are not all that tough, they're tougher now than they were, but they weren't all that tough. You say to yourself, I really should depart upward in a case like this because of what I'm doing day-in and day-out.

So, I think, Sam, that maybe, those of you that have now lived with the guidelines for a while won't react the way our predecessor judges did, but if this regime lasts, we have to worry about the new judges who come in, only with the experience of advisory guidelines and never having to live through what the three of us had to live through.

MS. TOTENBERG: Before I turn this over to the floor, because we need to give folks in the audience a little time to ask questions. I was at one point in the last few days trying to recruit one more judge for this panel. And I called a friend of mine who's a very, very conservative Republican district court judge. And he said, are you crazy, I'm not going on any panel. He said, this is the time to lie low.

JUDGE FRIEDMAN: So, what does that say about us?

MS. TOTENBERG: And then he said, you know, I had thought they would get rid of the disparities between crack and powder because people's kids would start getting arrested. But they'd only get arrested with cocaine, they don't get arrested with crack. So--

JUDGE FRIEDMAN: One last thing, I got an e-mail from Judge Rob Janelle in the Western District of Texas. I don't know if you know Rob Janelle. But they're in one of these border states and he told me in one month or six-week period he had like 80 drug trials scheduled for a six-week period and they all pled because they got the benefit of the what do you call it the--

MS. TOTENBERG: The fast track.

JUDGE FRIEDMAN: Fast track--so his e-mail says, attached is the unintentional consequence of *U.S. versus Booker*. You open it up, it's a cartoon and these two cowboys sitting there under a sign that says cowhands and one guy's saying to the other guy, I got married by a judge. I should have asked for a jury.

MS. TOTENBERG. So, questions? Yes?

PARTICIPANT: I really appreciate the discussion about powder and crack cocaine and I'm glad that *Booker* does provide this type of opportunity for this type of discussion. There are those, however, who will say that putting these issues out in the public more and more will allow the majority in Congress to see these as smoking gun

issues and the very type situations where they will say, well, this is a clear situation that we're trying to avoid but we have these judges who run amok.

The question I really want to ask is, in a crack cocaine case where--and I read--but when you don't have substantial assistance what you had--where you don't have safety-valve where you don't have a mule, where is the 100:1 ratio between crack and powder cocaine, what--being that reasonable, just based on the report of the Sentencing Commission, based on even in Congress, Senator Sessions's bill that even calls for the marrying of the penalty between crack and powder cocaine? Based on all the empirical and scientific evidence, based on evidence decisions--

MS. TOTENBERG: Okay, we got the point. We've got only one appeals court judge on this panel.

JUDGE ALITO: You want me to say whether the courts of appeal would strike down the crack cocaine powder disparity? I don't know. It's--you've made the argument in favor of doing it. And, as I've tried to suggest, the framework we're working under now, provides a lot of leeway, so I don't know which direction they'll go.

MS. TOTENBERG: Yes.

PARTICIPANT: Can you talk a little bit about the relation between *Booker* and plea bargaining and how all of that's affected and how they affect each other?

JUDGE GERTNER: I don't see an enormous difference. The prosecutor has substantial power--he still has substantial power. In one sense it's the power--the uncertainty of the jury. The onerousness of the punishments are still there--the potential punishments are still there. He has the possibility now of more flexibility--the defense lawyer has the possibility of more flexibility before the judge, but it may be that the best answer to that is that the system went so overwhelmingly in the other direction, which is to say the power of the prosecutor that if it's modulated to a degree now, this is not a bad thing.

So, I don't see need of it. You see, post-*Blakely* we saw more trials, more jury trials. And it's not clear the impact of all of this on jury trials. That's just not clear. But I don't see major differences in the plea situation at all. Pleas before sentencing guidelines were already at 90 percent. The sentencing guidelines ratcheted it up to 98, 99 percent in my jurisdiction. That dipped down a little bit post *Blakeley*, but, you know, a system that has so many cases resolved by a guilty plea, suggests that the prosecutor has a substantial number of cards.

JUDGE FRIEDMAN: We were seeing for a while between *Blakely* and *Booker* a lot more 11(c)(1)(C) pleas, which means that the prosecutor and the defense would agree on a specific sentence either to avoid our discretion or because of the uncertainty of what was going to happen in *Booker*.

I'm told that that's changing, we're not seeing a lot of that anymore, which sort of surprises me because I would have thought that there's still some benefit to certainty in the system.

I'm also told that there are more instances in certain kinds of cases of the defendant coming in and wanting to plead to the entire indictment--take their chances with the judge because they can't work out what they think is a favorable deal. And you can always plead to the entire indictment. You can't reserve any issues, you can't reserve anything, but if you want to plead to everything that's charged, you can do that.

There are still 5(K)(1) substantial assistance issues. I think that there may be some arguments to judges that we ought to consider substantial assistance even if the government doesn't recommend it. If I were a defense lawyer, I'd be very nervous about that and I would definitely try to work out a deal with the prosecutor under 5(K)(1) and 3553(e) because, you know, they and their agents are the best sources of information about what the cooperation has looked like.

I think there are going to be some issues relating to the third point under acceptance of responsibility, can we only do that with a government motion or not. So, as long as that's uncertain, you know, you're going to want to negotiate that in your plea agreement.

I gather there are going to be some issues--which upsets me greatly--about--and have already been--waiver of appellate rights. I've already held that appeal waivers are unconstitutional. Judge Gertner did, as well. The First Circuit apparently took a different view. The D.C. Circuit has not opined yet on that. There's a case that the government always cites saying that they did, but it really doesn't say that. And a more recent case, a case called *West* by Judge Roberts, suggests that it's very much an open question.

I think that waiving appeals rights is even a more questionable practice post-*Booker* because sentencing is even more uncertain than it was before and, therefore, you can't know what you're waiving. And you can't knowingly, and intelligently, and voluntarily waive that. I gather some circuits have already dealt with that. I hope they will rethink it in view of *Booker*.

And I also think that Justice Breyer certainly suggested that the appellate process was a very important part of this whole new sentencing regime and I would hope that the government doesn't insist on appellate waivers at least until we get some body of law of the courts of appeals.

MS. TOTENBERG: I didn't write about the *Shepherd* case this week. Sorry, Judge Gertner, because it was just impossible to describe what generic burglary was. But, the bottom-line for people who do this for a living here, seems to me to be that there are five members of the Supreme Court who very clearly don't want judges finding facts. They still don't want judges finding facts. And if you thought that *Booker* and *Fanfan* sort of backed away from that, think again.

And if that's the case and here where we're dealing with the staple of a past criminal history. If that is already sort of knocked down in part, then what else might be?

JUDGE FRIEDMAN: But, you know, I have to say I haven't read it yet.

JUDGE GERTNER: I committed it to memory.

JUDGE FRIEDMAN: I'm sure. But if I'm right, what *Booker* wants us to and certainly what the Sentencing Commission wants us to do is to go through the same exercise we always have in calculating the guidelines, they also include things like finding abusive positions of trial, more than minimum planning and all those other things. I thought what they said in *Booker* was once we do all of that, so long as we're not required to--we may make the findings, but that doesn't necessarily lead to a specific sense because we now have some level of discretion. We still have to make the findings by preponderance, reasonable doubt, who knows? But we still have to make these findings, but those findings don't then require us to sentence in a certain way and that's the difference.

JUDGE GERTNER: There's also a difference. *Shepherd* was about the armed career criminal statute. You made findings with respect to that and the person was at 15 years. It was the classic situation with which the Court was concerned in *Blakely*. It was finding facts with specific determinant consequences. And, ultimately, it came down to do you accept the formalities of the conviction or do you dig? In other words--

MS. TOTENBERG: Do you look at police reports?

JUDGE GERTNER: Right.

MS. TOTENBERG: Do you look at witness statements or do you just accept the court record.

JUDGE GERTNER: Right.

MS. TOTENBERG: And the Court said you have to just accept the Court record, you can't just go on a fishing expedition and/or you can't look at the character of the offense by stuff that's not proved.

JUDGE GERTNER: Right, but let me just add, I have to--this goes in two directions. On the one hand, you say, look at the police report, that was real easy. Well, if you looked at the police report the predicate offense for this armed career criminal was grabbing a piggy bank at a day care center. Now, grabbing change off a counter in a gas station is a drug addict who has a series of offenses like that. So the question was, if you want to get into an archeological dig, let me dig in all directions here.

A far better way of looking at it was to look at just the formalities and the record--

MS. TOTENBERG: Well, what did that mean, for example, for pre-sentence reports?

JUDGE GERTNER: Well, convictions are a different issue. You know, it gets very complicated. When you start talking about statutes that pivot specific onerous consequences on convictions. Those were looking at convictions, the formality of the situation. What did you actually plead to--that actually makes a great deal of sense. You know Shepherd was a drug addict who, every time he went to jail pled to anything, just to get out. So, the notion that I should look below the surface of the formalities of the pleading opened up all sorts of questions.

With respect to other kinds of criminal records that don't have armed-career consequences, you know, we were always allowed to depart up or down if reliable information suggested that there was something wrong. And, as I said, that was the single largest departure category in Massachusetts. When you got into these records they made no sense. That's still there and it would also enable us to say what does this record

really amount to? In *Shepherd* it was a drug addict's record. It was not, you know it was a record of somebody who simply never got treatment.

MS. TOTENBERG: But if you take that--I don't remember whether it was *Booker* or *Fanfan* anymore, and I may be asking a stupid layperson's question here, but if you take one of those cases: let's just assume that the judge is going to want to exceed the maximum based on a pre-sentence report that says he lied on the witness stand, he really sold tons more drugs, and we absolutely know it. We've got lots to tell us that the prosecutors have been very charitable and only charged him with X and you should take this into consideration and you want to depart beyond the maximum, then where are you?

JUDGE GERTNER: There's no question, I spoke last week in Puerto Rico and the lawyers in Puerto Rico are actually mostly concerned about the upward movement of an advisory guideline system. And that is a major concern. In other words, before, upward-departures were presumptively wrong, you had to justify them. In an advisory situation, who knows what that will open up. And that is a problem. That will take--it will take the same kind of searching inquiry by the courts of appeals as existed before.

But your comment about fact-finding is an interesting problem. I think the answer is that whenever you're going to be bound by the facts, then there are all sorts of formalities that have to attach to those facts. I think that's the simple way of describing it. It may be beyond a reasonable doubt. It may be clear and convincing. But if you say you're going to be bound--the single most important thing to me is going to be his criminal record. Or the single most important thing to me is going to be the amount of the fraud, then, arguably, that will trigger some of the concerns of *Blakely*.

JUDGE ALITO: But *Shepherd*, insofar as it reaffirms *Taylor*, allows judges to make findings of fact. And it may be logically inconsistent with the whole *Apprendi* line of cases as Justice Thomas said in his concurring opinion.

It doesn't seem to me that it speaks to the issue of criminal history under guidelines because figuring out whether somebody has convictions under the guidelines is like figuring out any other fact under the guidelines. I mean, presumably if the guidelines are just advisory, then those can be found in the same way.

Where *Shepherd* seems to--if you extend it the way Justice Thomas did--what it seems to suggest is that in an armed career criminal act case in the future, you would actually have to allege the prior convictions in the indictment and prove them at trial and it would be up to the jury. Even if you introduce a judgment of conviction, it's up to the jury to determine whether that exists. And it introduces a lot of procedural complexities about whether the defendant is entitled to a bifurcated trial; whether the jury in the--if you do have a bifurcated trial, whether the jury in the first trial hears anything about the convictions. It leads to a whole set of other procedural complications.

JUDGE GERTNER: Well, I understand whether the juries need to be punishment qualified. In other words, should they know about the punishment? Should they understand the consequences of this decision that they're making and if they are, are we getting into a death penalty discussion. Should they be punishment qualified. I had that in a case this year, too? Any other questions?

PARTICIPANT: Yes, I think the discussions touched to a limited extent by Judge Friedman, especially where the original guidelines came into effect for child pornography, white-collar cases. A case can be made that society is harmed for that. But Judge Gertner says, using an example of a drug addict case, where the states of Washington and Maryland have recently declared that the cure

for--the first line of defense on addiction is treatment, not mandatory minimum jail sentencing. I represent the National Bar Association that's looking into this.

I have a short question to the appellate judge. You mentioned a circuit court of appeals case decided in early March, could you give me the parties or the date--

JUDGE ALITO: Sure, it's *U.S. versus Mares*, M-a-r-e-s, it's Circuit 03-21035, March 4, 2005.

MS. TOTENBERG: Yes?

PARTICIPANT: This question is for Beryl Howell in the first instance, and then for the district judges. One of the biggest changes made by the guidelines from the prospective of defense counsel was whether your client goes to jail or not, or whether they get probation, as Judge Friedman was describing. And not just for white-collar offenders, but if you had that defendant without a white collar who was up for a first offense, you'd still make a strong plea for probation. Do the statistics you have indicate whether the 2,000 cases show a greater or lesser percentage of probation granted than before? And to the district judges, do you feel freer to grant probation in a case where you would have felt before it was appropriate, but couldn't give it under the guidelines?

MS. HOWELL: And the short answer to your question is no.

JUDGE GERTNER: No, not more probations?

MS. HOWELL: The statistics are not broken down either in terms of cases, region, you know, types of cases, whether they were within or outside the guideline range; whether it was cases requiring term of imprisonment or not. It doesn't have that kind defined real well.

JUDGE FRIEDMAN: You know, I think we start with the guidelines as our mind set and as the framework. And it depends, Bob, on, you know, are we going to go from a 60-month sentence to probation? I don't think so. I think it would be very hard

to justify, when you do your guideline calculation and then you go to the other factors in 3553(A).

On the other hand, there's a case, I think it's called *Jones* by Judge Brock Hornby, in which he determined that the sentence was 12-to-whatever months, which puts you in Zone D under the guidelines. But for reasons which he clearly indicated, he thought a split-sentence was appropriate and, therefore, he imposed the same sentence, but went from Zone D to Zone C--and in Zone D, it's straight prison time; in Zone C, you can do a split sentence. And I've done that twice since *Booker* in two very different situations. But it seemed to me that that achieved all the purposes of sentencing and more than gave consideration to the guidelines; gave a heavy, whatever the word is to them, and imposed the same sentence I would have imposed, except that half of it was served in one case in a half-way house, rather than in a prison. And in the other case it was served in home confinement with electronic monitoring.

A case like the ones that Nancy's talking about in a way. It was a woman with two minor children whose live-in boyfriend had died within the last two years; whose last conviction--who was a drug addict her whole life and all of her convictions, the most recent one was ten years ago, were either drugs or shop-lifting. And she slipped again. So, the facts as articulated convinced me. Well, should I have sent this 42-year-old mother of two kids under 10 without any other parent at home away for 16 months or would 8 months do it with 8 months of home confinement? She had a job, a good job. Eight months of home confinement with electronic monitoring, assuming they held her job for her and they thought--the lawyer thought they would. She'd be able to go back to work, earn money, go to church, other than that, not leave the house, for eight months.

JUDGE GERTNER: But you see, one thing--

MS. TOTENBERG: Not your Martha Stewart?

JUDGE GERTNER: Right but, if the bottom line here turned into what I've said in another form as guidelines is light. Certainly I would have wished for a different system. But if it turns out guidelines light, meaning extraordinary family circumstances are already in the guidelines, but this time enforced with a view to what the purposes of sentencing are, that will open up the door for probation for a wider number of people.

There are physical needs, you can always depart for physical characteristics. The problem is with the courts of appeals characterize physical characteristics are, at least my court was, if you were not at death's door, it didn't apply. Now, that was based on air. They interpreted the guideline departure that way, based on their conclusion that that was appropriate, not on anything in the case at bar or anything that had to do with the purposes of sentencing.

So if some of these categories are opened up and we are given an opportunity to fully interpret them, then I think there would be more opportunities for probation.

But I agree with Paul that you're going to have to justify why the guideline range is 180 months and you're at probation. And you see that only suggests that guidelines will stick in our analysis whether we like it or not. Whatever camp we're in, we're going to have to account for that difference.

MS. TOTENBERG: I think I'm going to end it now, because we have-- certainly, I have another job. And I'm not king in my courtroom, so thank you all for coming. Thank you to a wonderful panel.

[Whereupon, at 2:10 p.m., the meeting concluded.]