

Citizens Crime Commission

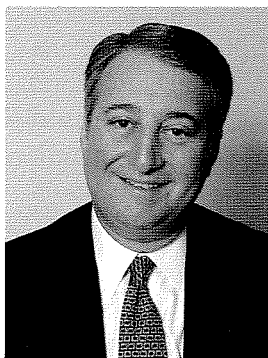
OF NEW YORK CITY, INC.

Remarks by
Chief Judge
John M. Walker, Jr.

Introduction by
Howard P. Milstein

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THE MILSTEIN CRIMINAL JUSTICE POLICY FORUM



HOWARD P. MILSTEIN

Since 2002, the Citizens Crime Commission of New York City has presented a series of Criminal Justice Policy lectures sponsored by Edward L. and Howard P. Milstein through the Milstein Brothers Foundation. Each event features a nationally prominent speaker who addresses the Commission on such issues as crime, criminal justice or terrorism. The formal remarks are followed by a question-and-answer period. Each meeting is open to the media.

Attendance is limited to 150 invited guests drawn from the top ranks of the New York City business and law enforcement communities. Each lecture is printed and distributed to top business, civic and law enforcement leaders.

The Citizens Crime Commission of New York City is an independent, non-profit organization working to reduce crime and improve the criminal justice system in New York City. The Commission is supported by the business community; its board of directors is drawn from top corporate executives and members of major law firms. The Commission was established in 1978.

Howard and Edward Milstein are prominent New York bankers and real estate owners. They have a long record of working with the New York City criminal justice system to create and support innovative programs. They are also active in national crime prevention issues.

Introduction by Howard P. Milstein

TOM REPPETTO: Good afternoon, ladies and gentlemen. I am Tom Repetto, the president of the Citizen's Crime Commission of New York City. I would like to welcome you to the Milstein Criminal Justice Policy Series and thank Verizon for hosting this event.

I want to thank so many of you for coming out today. It's a great tribute to our speaker. I would now like to call to the podium the president of Verizon New York, Paul Crotty.

PAUL CROTTY: Thank you very much, Tom. It's very nice to have the Citizens Crime Commission here. This is a great day for law enforcement. At lunchtime we can have this wonderful lecture. And tonight we can all join Commissioner Kelly at the Police Foundation annual gala down at police headquarters.

But it's now my pleasure to introduce the sponsor of this series. He and his brother Edward are principals of Milstein Brothers Capital Partners and many other successful ventures.

They carry on a long tradition of family philanthropy, and I was privileged once to serve as one of the lawyers for the Milstein family. They are terrific people, long time committed and loving and caring New Yorkers. And so it's a special privilege for me today to introduce the sponsor of the lecture series, Howard Milstein.

HOWARD P. MILSTEIN:

Thank you, Paul. New sentencing policies in the United States have usually emerged in response to periods when heightened levels of crime have led to an intensification of public fear.

The 1960s and '70s saw an increase in crime, and it quickly led to heightened public fears that remained high. This sometimes led to legislative enactments that increased sentence lengths and eroded the rehabilitation ideal. By 1983, forty-eight states and the District of Columbia had taken away much of a judge's discretion in meting out punishment.

In the past decade, we have seen much lower rates in violent crimes that frighten the public most. In the same period, white collar crimes have escalated to a point where public outrage has led courts to be much tougher on the corporate scoundrels and swindlers who damage our society in insidious ways.

On January 1, 2005, the United States Supreme Court handed down a long awaited decision in the cases of *Booker* and *Fanfan*. The Court held that judicially enhanced sentences violated the Sixth Amendment right to a jury trial. In so doing, the court invalidated the U.S. sentencing guidelines that have been binding on judges for the past eighteen years. But the ruling does allow the guidelines to remain as advisory.

The response to that ruling has been mixed. On the one hand, we have judges who cherish the flexibility to handle individual cases with a whole range of punitive options. On the other, we have legislators

who feel that the ruling "Flies in the face of the clear will of Congress." Supreme Court Justice Steven Breyer, one of the architects of the federal guidelines, says that new initiatives should come from Congress. It's up to them, he wrote, "to devise a long term sentencing system compatible with the constitution."

It's against this dynamic backdrop that I'd like to introduce today's speaker, the Honorable John M. Walker, Jr. Judge Walker has been in the forefront of those urging the Supreme Court to render a clear ruling on sentencing guidelines. He is the chief circuit judge of the U.S. Court of Appeals for the second circuit – arguably the most important judicial position short of the Supreme Court – from the court where such luminaries as Judge Learned Hand, Judge Augustus Hand, and Judge Henry Friendly served, wields enormous and well deserved influence on federal law. Judge Walker has had a remarkably distinguished career, having previously served as district judge for the southern district of New York, the assistant secretary of the Treasury for enforcement and operations, a partner at Carter, Ledyard & Milburn in New York City, and an assistant U.S. attorney in the criminal division for the southern district of New York.

A graduate of Yale College and the University of Michigan Law School, Judge Walker is an adjunct professor at NYU Law School, a visiting lecturer at Yale Law School, and on the faculty of the Institute of Judicial Administration Appellate Judges Seminar. Actually, that sounds like three or four distinguished careers. Your Honor, it's my distinct pleasure to invite you to the podium.

Remarks by Chief Judge John M. Walker, Jr.

Ladies and gentlemen, it's a great privilege and honor to be here today. And I appreciate the fact that all of you came for these remarks. I'm not going to detain you for too long.

Howard pointed out that sentencing changes usually come in response to a wave of crime, or perceptions of criminality. And some might argue that the changes that we're about to experience came in the wake of *Blakely* and *Booker*, which to some, was a crime. I don't think so. I can understand the series of decisions that have taken place. In the past year since *Blakely*, and in the past few months in particular, we really have witnessed an upheaval in the criminal justice system, as administered at the federal level. We have a revolution on our hands, and like most revolutions, we're not sure how the revolution is going to end up.

For seventeen years, we operated under mandatory sentencing guidelines. Under the guidelines, the judge was required to follow a complex, reticulated set of rules and regulations to arrive at the appropriate sentence. This process now has been determined by the Supreme Court to be, by and large, unconstitutional because it deprived the defendant of his right to have the facts that were used to increase his sentence found by a jury beyond a reasonable doubt.

So my goal in these remarks is briefly to tell you how we got to where we are, say a bit about the current state of sentencing, and to join you in speculating a little bit about where we might be going in the future.

Prior to 1987, which some of us in the room do remember, federal judges enjoyed broad discretion in sentencing. Judge Tyler, who spoke to me about coming here, was a judge in that regime. Basically, sentences were un-reviewable in the courts of appeals. As long as a judge was within the statutory limits, the statutory bounds, he could impose any sentence he wanted.

As a result, similarly situated defendants could, and often did, receive disparate sentences from different judges. In the 1970s as you know, there was a lot of literature on this issue, particularly a noted book by the late Marvin Frankel. A defendant convicted of a first drug offense in those days might be let off with probation by one judge, while another judge could send him away for the full five years, as the sentence was at that time.

So the reaction was the Sentencing Reform Act of 1984, which was designed to correct these disparities and bring some order and consistency to sentencing. The Act established the U.S. Sentencing Commission with authority to promulgate the sentencing guidelines. And for the first time, there would be appellate review of sentencing.

Also, I might add that because judges, not surprisingly, were perceived by Congress as being too lenient — a perception that persists even to this day — Congress used the guidelines, and the enactment of the guidelines, to increase the general level of punishment. We operated under this system, largely without interruption, for seventeen years, from November 1987, when they went into effect, through the end of last year.

Now I know most of the lawyers here

are familiar with the system, and I'm not going to spend much time on the system itself. But for those of you who perhaps are not quite as familiar, let me just briefly explain kind of how the guidelines worked. Under the guidelines, a judge first fixed the base offense level by referring to the crime of conviction; the guideline would then direct you to a base offense level. That judge was then permitted to conduct fact finding on a fair preponderance of the evidence — just the judge, not the jury — to decide whether or not the base offense level should be moved up or down. Then an adjusted level was arrived at, which was then converted into a sentencing range by reference to a set of tables, found at the end of the guidelines book every year.

So for example, in the case of a fraud conviction, the sentencing range would be adjusted upward based on the amount of money lost, perhaps the harm done to a financial institution, the leadership role of the defendant, and the criminal history of the defendant. But the range could be reduced, as well, for mitigating circumstances such as when a defendant accepted responsibility by pleading guilty or played a minor role in the commission of the crime. Overall, the most important point is that the judge had the authority to alter the sentences up or down based on simple fact finding by a preponderance of the evidence. No jury was required.

The first hint of change to all of this came in the year 2000, when the Supreme Court handed down *Apprendi v. New Jersey*. Yet we did not, at that time, foresee that this would directly impact the federal guidelines. There, the defendant pleaded guilty to a crime of firearms possession.

Under the New Jersey statute, he could receive a maximum of ten years. The judge gave him two more years based upon an enhancement because that judge found that the conduct was racially motivated. The Supreme Court set aside the sentence and held that, other than a prior conviction, which did not require a jury finding, any fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Now this was a landmark decision, there's no doubt about it. But we thought its impact would be limited. Indeed, all the courts around the country did because we interpreted the decision in a way that did not apply to guidelines sentencing. After all, the guidelines were within the statutory maximum. So the guidelines could be applied by the judge within the statutory maximum without offending *Apprendi*, so we all thought.

The situation changed dramatically last year in June of 2004, when the Supreme Court decided *Blakely v. Washington*. The Court decided that a Washington State judge exceeded his constitutional authority under the Sixth Amendment, the jury trial provision, by adjusting the guidelines upon his own fact finding and enhancing a defendant's sentence within the statutory maximum but above the guidelines that would normally be authorized because the kidnapping offense involved deliberate cruelty.

The Court said that such facts— such an upward adjustment in the guidelines— had to be proven to a jury beyond a reasonable doubt. *Blakely* held that the maximum sentence that a judge could impose under the Sixth Amendment, then, was that which

was legally permitted solely upon the facts found by the jury or admitted by the defendant. Any higher sentence under the Washington State guidelines required a separate jury finding.

The immediate question for everyone was what would *Blakely's* likely effect be on the federal sentencing guidelines? Justice Scalia went out of his way in writing the *Blakely* opinion to say expressly that this was not to be taken as casting any opinion on the federal sentencing guidelines. However, the dissenting justices felt otherwise. They saw the tea leaves clearly. Justice O'Connor warned, "[t]he consequences of today's decision will be as far reaching as they are disturbing... . The Court ignores the havoc it is about to wreak on trial courts across the country. It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines."

The reaction of courts around the country was anything but calm. We were thrown into what can best be described as disarray, if not havoc, despite Justice Scalia's admonition, because the reasoning of *Blakely* seemed to apply with equal force to the federal guidelines.

As you know, the wheels of justice grind slowly most of the time, but the reaction of the federal courts to *Blakely* was anything but that. Less than a week after the decision, some district court judges were already writing opinions declaring at least parts of the guidelines unconstitutional in light of *Blakely*. And soon the circuit courts had divided on the issue.

In July of last year, a few weeks after *Blakely*, and in the middle of this earth-

quake, the Second Circuit decided to take an unusual approach. In the case of *United States v. Penaranda*, all of our active judges voted to go *in banc* quickly and to certify three questions to the Supreme Court bearing on the question of whether *Blakely* applied to the federal guidelines. This certification procedure is rarely used; I think the last time was about thirty years ago. But we were using it in order to solicit what we thought and hoped would be a prompt and authoritative answer from the Supreme Court. We also wanted to take the opportunity to educate the Supreme Court about the uncertainty that *Blakely* had created and to urge them to take immediate action by reviewing this matter on an expedited basis in order to calm the waters — hopefully, before the beginning of the term in the fall.

The Supreme Court did not take our certification. They granted *certiorari*, however, in *Booker* and *Fanfan*. And they scheduled oral argument for the first day of the term, the first Monday in October. So we were then left with a period of uncertainty once *cert.* was granted in those cases, which we expected to last throughout the fall until the Supreme Court decided *Booker*. So what were we to do?

The district courts were reaching different decisions. They all had their own ideas. We, the judges of the Second Circuit, felt that we needed to give some assurance, some guidance. We basically decided to adhere to the existing guidelines until we were definitively told by the Supreme Court to the contrary. And we issued an opinion to that effect. But at the same time, we held the mandates in all of our cases because we did not want to have the cases go down and then have to be reappealed. We wanted to be able to recall

them and to work on them, if necessary, depending upon the outcome of *Booker*.

Booker came out in January. In an opinion by Justice Stevens, he held that *Blakely* did indeed apply to the federal guidelines. Insofar as they provided for enhancements based upon a judge's finding on a fair preponderance of the evidence, the federal guidelines violated the Sixth Amendment's jury trial guarantee and the guarantee of proof beyond a reasonable doubt.

So the guidelines largely would be unconstitutional, certainly the enhancements portion of it. Prior to the decision, we were speculating as to how the Supreme Court would decide this. I mean would they just hold the enhancements to be unconstitutional? Would they strike down the entire statute? How would they deal with this if they came out this way? And it looked very clearly that they might.

We were surprised, frankly, I think most of us, by Justice Breyer's remedial decision in tandem with Justice Stevens' in which he was able to get one of the justices who was in the majority for Justice Stevens — Justice Ginsburg — to come over to his side. Justice Breyer said that if, in fact, the mandatory guidelines are unconstitutional, then Congress never would have enacted them on that basis. They would have preferred an advisory set of guidelines to no guidelines at all. Therefore, by the simple exercise of excising two provisions of the guidelines— that which made the guidelines mandatory and that which provided how the court of appeals was to review sentences— the Court could render the guidelines advisory. And that's what happened.

Justice Scalia commented on the irony of the situation. In other words, a decision

that he signed on to reduce judges' discretion was turned around to actually grant judges more discretion than they'd ever had.

But that is the so-called remedial section, and that is the section that we are working with now. Essentially, it holds that the guidelines are advisory. They are to be considered by the district judge in imposing sentence, and appellate review is confined to the issue of reasonableness. Perhaps if the system had started off that way, way back in the early 80s, we never would have needed the guidelines.

The decision was front page news across the country, as you know — much more so than *Blakely*. While the opinion was expected in some form, we didn't anticipate Justice Breyer's remediation opinion.

So now the task has fallen to my court and other circuit courts around the country to interpret and apply *Booker* as we define the sentencing landscape today. Let me tell you briefly where we are right now.

One big issue that the Supreme Court left open in *Booker* was how to review all of those sentences which had been imposed since *Blakely*, or were on direct review at the time of *Booker*, where the defendant never raised an objection under *Apprendi* or *Blakely*. Normally, such sentences are reviewable for what we call plain error. The plain error standard, which is tougher on the defendant, requires a showing of prejudice by the defendant. He has to show that there was error, that it was plain, there was prejudice, and also that the error interferes with, or impinges upon the reputation, fairness, or integrity of judicial proceedings. But it was a clear issue for all of these cases — and there were hundreds

of them that had piled up, and a great number in our circuit and around the country. What were courts of appeals to do under these circumstances?

So far there have been three different approaches that have been taken. The Eleventh Circuit and a panel of the Sixth Circuit have simply found no plain error, and they've affirmed. Other circuits, including the Third, the Fourth and another panel of the Sixth— they're divided on this— have just automatically remanded the cases for re-sentencing.

The Second Circuit took a more nuanced middle ground. We thought there ought to be cognition of the plain error standard. The best way to do that, we thought, was to send the case back to the district court to ask the district court whether it would have imposed the same sentence had it known at the time that the guidelines were advisory. If the answer to that is yes, then obviously there was no prejudice, and that could be the end of the case. If the answer is no, there would be prejudice, and the district judge could then re-sentence.

The first determination was whether to re-sentence, whether the court would have given the same decision. That would be based on the earlier set of facts known to the judge, or that could have been presented to the judge at the time of the earlier sentence. And assuming that that hurdle was crossed by the defendant, there could be re-sentencing based upon new circumstances up to the present time.

These decisions are still playing out. Some circuits have taken these decisions *in banc*. Others haven't completely decided where they're going.

Our decision was handed down in a case called *United States v. Crosby*, an opinion by Judge Newman, in which the full court collaborated. We did not go *in banc*. We all simply decided that this was a good way to approach it, and the opinion was circulated to everybody on the court. I think it is a testament to our court's collegiality that we were able to do that. I'm sure some judges felt that they were giving up something, you know, they were compromising a bit. But we felt that it was important to get a decision out fairly quickly.

So now that we've established a process for handling these hundreds of appeals that challenge post-*Blakely* sentences, we now have to address some other matters raised in *Booker*.

First, we're going to have to decide what it means to "consider" all of the factors that bear upon sentencing now that the guidelines are advisory. There's a statute, which most of you are familiar with, section 3553(a), that spells out a number of factors that are to be considered by a court in imposing sentence. This provision preceded the guidelines. It goes way back in time—back to the 1970s. But back in those days, the meaning was never litigated because pre-guidelines sentences within the statutory maximum were not reviewable by the courts of appeals. As a result, nobody looked at whether the district court was really paying attention to the factors set forth in this section. It simply wasn't brought up in court. They were there. Courts could look at them or not look at them, and nothing would happen. There were no consequences. After the guidelines were promulgated, the guidelines trumped the factors set forth in section 3553. The guidelines had to be followed; they were

mandatory. Section 3553 was not relevant then either. Even though it was on the books it was not followed.

Now, after *Booker*, the section 3553 factors take on a special force because they're not trumped by the guidelines, which are only advisory, and because now there is appellate review — albeit for reasonableness. So these factors are going to be very important in forthcoming cases. They're not surprising, and they won't come as a surprise to you. I'll just run through them very quickly: the nature and circumstances of the offense, the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the crime, provide for punishment, afford adequate deterrence, and protect the public; the kinds of sentences available; the applicable guideline range—because the guidelines still have to be consulted — the need to avoid sentencing disparity among defendants; and the need to provide restitution to victims.

These are the factors that courts will now have to consider. Whether and to what degree the judge considers these section 3553 factors and how the judge should do it will be the subject of future decisions under the rubric of reasonableness review.

There is a second development that I think is foreseeable, and it's related, of course, now that the guidelines are advisory. What degree of guidelines consultation will be sufficient and what weight should be given to the guidelines now that they're advisory?

In *Crosby*, we've already explained that a judge cannot do what I call a wave by, wave at the guidelines and say you've considered them. The judge cannot satisfy his duty to consider the guidelines by

general reference to the entirety of the guidelines followed by a decision then to impose a non-guidelines sentence.

Some district judges, such as Judge Casell in Utah who's written extensively on this subject, have already held that courts should give considerable or heavy weight to the guidelines in determining what sentences to impose. And the U.S. Sentencing Commission has indicated its view that the guidelines should be given substantial weight. We will have to decide whether and to what degree a judge must explain how he has considered the guidelines, particularly when the judge chooses to give a non-guidelines sentence.

Obviously if the judge is giving a guidelines sentence, the judge will have fully considered everything in the guidelines. But what about when the guidelines call for a particular sentence and the judge just simply decides, "Well, they're advisory, I'm disregarding the advice"? How can the judge do that in a way that convinces us that the judge has considered the guidelines?

Third, we'll have to decide what it means to review a sentence for reasonableness. We're familiar with the standard of reasonableness. The Supreme Court, in Justice Breyer's opinion, was accurate in saying that we're familiar with that standard of review. But we'll still have to flesh that out.

In *Crosby*, we clarified that reasonableness is a flexible concept. It's not simply review for abuse of discretion. So we expect to have to develop a standard that reviews not just the sentence itself, not just the numbers — the number of months, the amount of restitution or the fine — but also how the

sentence was arrived at — the process — in order to decide whether the sentence was reasonable.

We'll also have to confront the question of whether sentences that are within the guidelines are presumptively reasonable. One would think so, but maybe there should not be a presumption. Maybe there should be, and maybe that presumption should be rebuttable. Or whether it's an actually safe harbor, always reasonable if it's within the guidelines, will be another question that we'll have to look at.

Just briefly, then, I'd like to take a broader view of sentencing in the federal courts now that we have these decisions. I think it's important to emphasize, as have others who have thought about this deeply, that we have, in no way, returned to the pre-1987 world of freedom of sentencing by district judges. Some might call it lawless sentencing, where judges were constrained merely by their own discretion and were essentially free to do as they pleased.

Although the guidelines are now advisory, I think that considerable and sufficient restraints are still in place. First of all, I believe the vast majority of sentences will continue to fall within the applicable guideline range. This is so, because, if you think about it, most of the active district judges on the bench today were not on the bench prior to the introduction of the guidelines themselves. They are therefore in the habit of imposing a guidelines sentence and of using the guidelines. And in general, judges have found the calculated ranges not to be too far off the mark, to be fair and accurate generally.

We also ought to remember that advisory guidelines systems are in place in ten

states, and they seem to work. They seem to operate successfully. Now before *Booker*, about two thirds of defendants were sentenced within the applicable guidelines range, while the other third were given departures outside the range. It's interesting that the early returns now post-*Booker* are about the same: two thirds within the guidelines, about a third outside.

Our Deputy Attorney General, who you all know very well, the former U.S. Attorney here, Jim Comey, has instructed federal prosecutors to continue to seek sentences under the guidelines. He has also extended the Justice Department's requirement that prosecutors report when sentences outside the guidelines are imposed.

Also, the provision that requires district courts to report to the Sentencing Commission the outcomes of sentencing is still in place. So the Sentencing Commission is still alive and well. The Sentencing Commission is still going to be modifying guidelines, considering changes, and getting reports from judges.

But the courts are not the only ones wrestling with *Booker*. There are legislative proposals floating around the Hill at this point. There is a proposal by Professor Bowman that suggests moving the top end of the guidelines range to the statutory maximum. That would obviate the *Booker* problem because there would be no upper edge, upper limit, to go over that would require a jury trial. Another one simply raises the entire guidelines to the statutory maximum and then allows for only downward departures. Other legislation would add more statutory mandatory minimums.

Now Justice Breyer indicated that the ball is now in Congress's court and that

Congress would do best to install a long-term sentencing scheme compatible with the Constitution. When he did that I guess that he anticipated there would be swift response by Congress. I personally think that their hasty response would be a mistake, and it should be avoided.

We are now in a new system, a new sentencing season, if you will. It's spring training, not October. There is plenty of time to make adjustments and corrections if legislative change proves to be necessary. Justice Breyer's solution, in my view, did not create a stop-gap solution. Rather, he has delivered to us an eminently workable system that should be given a chance to play out. It should not be rejected prematurely until we know that it's not working.

This is a view that the ABA has taken and the view that the Federal Judges Association has taken, that Congress should take a wait-and-see approach and should take legislative action only if the new system is seen to be failing.

Also I think it's important that any legislative change be informed and deliberated, and be carefully arrived at. It should not just simply be reactive to the decisions of a particular judge that the staff of the Senate or House Judiciary Committee takes issue with. The system is much more important than that, and it deserves the deliberation of careful minds and full consultation.

In that regard, I want to say that this is not just a matter for Congress. All of us should be involved in any changes and in legislation that is considered for a new sentencing regime. All three branches of the federal government, including the U.S. Sentencing Commission and the Judicial

Questions & Answers

Chief Judge John M. Walker, Jr.

Q. Under *Crosby* what standards will the circuit courts set?

A. Under the standards set forth by Justice Breyer, we will review for reasonableness. The government can indicate, based upon the severity of the crime — the nature of the conduct — that the sentence was unreasonable. But there will not be the degree of close review of sentences that are too lenient that we had under the mandatory system. That does not appear to be in the cards right now under the broader reasonableness standard.

But, the guidelines themselves are still there. They're on the books. And the government will be fighting very hard to have them adhered to.

I might say that if judges do depart downward from the guidelines too much, the statistics will be received by Congress and the likelihood of a mandatory regime being re-imposed would be increased.

Q. ...Role of Section 3553(a)

A. I couldn't agree with you more. I think it's going to be difficult. And we are going to just have to see how it plays out on a case-by-case basis, to see how we determine to interpret that provision. It's very broad right now.

Q. Given the present political climate, what are the chances that Congress will wait and see?

A. You know your ability to read the Congressional tea leaves are as good as mine. I will just give you a couple of bits of information.

Conference of the United States, as well as Congress and the executive branch, should work together and explore and develop revisions and improvements to this advisory system, should they be needed. We need to have dialogue among the many interested parties in this matter.

I think that Congress can learn as much from the courts as we can from Congress, and that groups like this one here, and other citizens groups, should be heard on the question. There should be full debate, full deliberation, before legislative change is enacted. None of us should forget that we all seek the same result: sentences in the federal courts that are just, fair, consistent, and adequate.

So in conclusion, let me just say that sentencing in this country has undergone dramatic change over the past twenty years, and particularly in the last year. Prior to the guidelines, judges were constrained simply by their own discretion. But that was not good enough. The mandatory guidelines that came in worked to reduce sentencing disparity, raise sentences to some degree, but now have been found to be unconstitutional as enacted then. *Blakely* and *Booker* have altered the sentencing landscape by rendering the guidelines advisory.

We haven't returned to pre-guideline times. As the appellate courts fulfill their duty of crafting their decisions in conformity with *Booker*, I urge Congress not to throw the baby out with the bathwater with rushed legislation. This is an historic time in the world of criminal justice, and all interests will be best served if we simply allow patience to rule the day. I'd be happy to answer any questions.

I understand that there's agitation in the House to do something, to change it, to re-impose mandatory guidelines, to some degree. The chairman of the House Judiciary Committee, Chairman Sensenbrenner, has expressed the view to one judge that I know and I've talked to, that there ought to be some 'wait and see' as to what happens before they act. And that indicates to me that there will be some period of time before Congress steps in.

I think the Senate is taking a much more deliberate wait-and-see approach to see how things play out. So it's not clear to me what will happen. One of the staff members on the House side has indicated that, should there be some really outlier decisions of leniency on the part of the judges, it's much more likely that legislation will be forthcoming more quickly. Yes, sir?

Q. Under the new rules how will prior convictions be handled under the new three-strikes rule?

A. I don't know about this decision itself. But there was a decision that was handed down yesterday by the Supreme Court. I'm not that familiar with it. I read about it in the paper today.

But as I understand from the reports, the decision basically took a very formalist approach towards prior convictions. That is, they would have to be clearly established based upon court records. And the First Circuit was chided for having gone back beyond court records to try and prove priors that were not clearly delineated in the court records.

And it may well be that the Supreme Court will re-address a case that is now an exception to *Apprendi* called *Almendarez-Torres*, which says that the fact of a prior conviction does not have to be proven to a jury beyond a reasonable

doubt at this present time. It can simply be found by the judge.

I think there may be a majority in the Court now to overrule that decision. Justice Thomas has changed his position on this. If that's the case, then the government's going to have to prove these prior convictions beyond a reasonable doubt, which would be more difficult for the government.

So you know, to that extent there is some question about the prior strikes. The Supreme Court, in recent years, has upheld the three-strikes-and-you're-out provision. I think it was in California involving a couple of cases a few years ago. So the actual system is not, I don't think, in question.

Q. I just wanted to pick up on your opening remark that we are undergoing a revolution in the criminal justice system. Because I think one of the other engines of this is Justice Scalia's opinion in *Crawford*. The subtext I get from his opinion is that some justices feel that the judiciary has strayed from some of the fundamentals protected in the Bill of Rights. And I'm wondering if you agree with that analysis and, if so, why we have strayed?

A. Well, I think that that's an accurate description. I think that there is a sense among Justice Scalia, Justice Thomas, Souter, Stevens, and Justice Ginsburg that the system has become lax, that rules have been watered down, if you will— confrontation rules, sentencing rules, rights that matter, that historically, perhaps, have gone to a jury, are now being decided by judges.

And as we all know one of the hallmarks of Justice Scalia's jurisprudence is not to give discretion, to minimize discretion for judges and to have a clear set of rules that will guide judges in their work, and will also enhance predictability and stability in the law.

And I think that is a theme of the Supreme Court's jurisprudence that goes—*Crawford* is an example of that, this case—I think it was called *Chapman* or *Shepherd* yesterday—the *Booker* decision, and the *Blakely* decision, and so forth. So I think that that is certainly a theme of the Supreme Court's criminal justice jurisprudence. Anything else?

Q. Even before *Blakely*, I believe the Congress was collecting information on judges who they thought deviated too far below the guidelines. It can be seen as a harbinger of what the Congress is likely to do. I took Justice Breyer's statement as a warning his colleagues, that having made this decision the Congress is liable to move very swiftly.

What you're saying today, though, causes me to believe that the Congress will probably not move very swiftly on this, that there will be some kind of waiting period to see what happens.

A. I think that that's accurate. I do think there will be a waiting period. And we can only speculate as to how long it will be. But I find it interesting that, very often, Congress is reactive. They will react to a decision. If there's some particularly outrageous decision in terms of leniency, I think they'll move. One staffer has said, "I'm just waiting for the first guy who gets probation for child pornography."

Q. So you are telling me that I'd better schedule the Congressional speaker sooner rather than later.

A. That's probably a good idea. Yes.

TOM REPPETTO: Your Honor, on behalf of the Crime Commission, we thank you so much for your remarks.