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IMPLICATIONS OF THE BOOKER/FANFAN DECISIONS FOR THE FEDERAL SENTENCING GUIDELINES

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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HOUSE OF REPRESENTATIVES

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IMPLICATIONS OF THE BOOKER/FANFAN DECISIONS FOR THE FEDERAL SENTENCING GUIDELINES

THURSDAY, FEBRUARY 10, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. Welcome to the Judiciary hearing room.

Let me think aloud for a moment or two. This sentencing guidelines is very significantly important, as all of you know. We will have the border security bill, which came from this Committee, on the floor for debate around 11:30. I am hoping we can finish examining you witnesses by that time. I hate to inconvenience you all. If, however, we come to 11:30 and additional examination may be done, we may have to have you fellows go get a bite to eat and just keep your eye on the TV monitor. I am thinking, however, that if luck is with us, we can probably finish this on or about the time when we have to suspend.

I want to welcome everyone to this very important oversight hearing before the Subcommittee on Crime, Terrorism, and Homeland Security to examine the implication of two recent Supreme Court decisions in *United States v. Booker* and *United States v. Fanfan* to the Federal sentencing guidelines.

The Supreme Court's rulings eliminated two critical provisions of the Federal sentencing guidelines. First, the Court ruled the sentencing guidelines were no longer mandatory but are advisory. Second, the Court eliminated the de novo appellate review standard for downward departures which was passed by Congress as part of the PROTECT Act in the 108th Congress and replaced it with a vague and unspecific reasonableness standard for appellate review.

It is an understatement, in my opinion, to say that the Supreme Court's decisions have had a dramatic impact on the Federal criminal justice system. Some have characterized the impact as resulting in complete disarray, and even other characterize the decision as posing a direct and significant threat to public safety, thereby jeopardizing dramatic reductions in the crime rate in our country.

As this Committee examines this issue, we must be mindful of the fact that the Sentencing Reform Act of 1984 which created the mandatory Federal sentencing guideline system was a bipartisan measure designed to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct.

In the short time since the Supreme Court issued its rulings in the *Booker* and *Fanfan* decisions, there have been reported instances of judges deviating from the guideline sentencing ranges, relying on varying rationales for such departures.

It is the Congress's role to ensure that the original purposes of the Sentencing Reform Act of 1984 are adhered to by the Federal Judiciary. We all can agree that disparities among similarly situated defendants are unfair and undermine the Federal criminal justice system. Justice Breyer in his majority opinion in *Booker* made it clear as to our institutional responsibility when he wrote of the Court's decision, "Ours, of course, is not the last word. The ball lies in Congress's court."

In order to fulfill our constitutional responsibilities, today's hearing is the first step to ensuring that the Federal sentencing system continues to promote fairness, eliminate disparities, and protect the public safety so that law-abiding citizens can live in freedom without fear of crime and defendants receive fair and equal treatment in the Federal judicial system.

I am looking forward to hearing from our distinguished panel of witnesses, and now I am pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of this Subcommittee, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and I thank you for convening this hearing. This is our first Subcommittee meeting and I look forward to working with you during this session of Congress.

I am pleased to join you in convening this hearing on the implications of the United States Supreme Court's *Booker* and *Fanfan* decisions and the Federal sentencing guidelines. Since the *Blakely v. Washington* decision last June, the viability of the Federal and many State sentencing systems have been in jeopardy. That decision made it clear that sentences based on facts found by the court after the trial that were not admitted by the defendant or established during the trial deprived the defendant of their constitutional right to a jury trial.

We contemplated a range of options or approaches after the decision. They ranged from doing nothing to enacting an entire system of statutory minimums and maximums. However, we wisely, I believe, listened to the Council of Sentencing Experts and others suggesting that we give the courts a chance to further clarify the impact of the decision on the Federal system.

That further clarification came in the decision by a strangely divided Court in January through the *Booker/Fanfan* decision. That decision clarified that *Blakely*, indeed, was applicable to the Federal sentencing guideline system and found the system unconstitutional as applied. However, the Court delineated the aspects of the system that caused it to be unconstitutional, thereby excising the applicability of those factors, leaving the remainder of the system

intact. Yet, the Court, as it properly tends to do, only answered the questions it considered to be properly before it at the time. Therefore, we are left with the issue of how the remaining system can operate consistent with its aims and purposes and the Court's decisions. Again, sentencing experts and others are advising that we await further clarification from the courts on the impact of *Booker/Fanfan.*

The early indications of this post-*Booker/Fanfan/Blakely* context is that the sky is not falling. The criminal defendants are being prosecuted and sentenced, and the sentencing guideline system is directing those sentences to essentially the same extent as it was before. So for those who found the sentencing guideline system acceptable as applied before *Blakely, Booker,* and *Fanfan* should still find the situation reasonably acceptable now. There are quirks and imperfections before the recent upheavals that required appellate court correction or clarification, and that is the situation we have today.

For others, including myself, the Federal sentencing guidelines as applied were not satisfactory. I am concerned about the growing minority percentage of a rapidly increasing Federal prison population serving excessively long sentences for minor roles in non-violent crimes due in large part to unfair application of mandatory minimums and other reasons. These problems are detailed in two recent reports from the Sentencing Project entitled "Racial Disparity in Sentencing: A Review of the Literature," and "The Federal Prison Population: A Statistical Analysis," along with a recently completed 15-year study of the U.S. Sentencing Commission, of which I have an executive summary and I would ask unanimous consent that those be introduced into the record of this hearing.

Mr. COBLE. Without exception, it will be done.

[The material referred to is located in the Appendix.]

Mr. SCOTT. All of the credible data shows that minorities are less likely than whites to use illegal drugs of virtually all types, including crack cocaine, yet a grossly disproportionate percentage of the enforcement of the war against drugs falls on minorities, many of whom are bit players in the end stage of the drug trade whose involvement is based more on addiction than profit. Eighty percent of the crack prosecutions are against African-American defendants, while drug use data reflects that 60 percent of the crack is used by whites.

All of the research and demonstrations show that drug treatment and other alternatives to incarceration are much more effective and much cheaper than incarceration. Yet we continue to greatly increase our resources to lock people up, and more of these bit players get locked up for longer and longer periods while making no consideration to effective and less costly alternatives and only minimally increasing drug treatment as compared to the increases in enforcement and incarceration.

Report after report, including these by the Sentencing Commission and others, have pointed to these gross disparities in application of the drug enforcement and sentencing policies against minorities, and while we address the atrocities before us in *Blakely* and *Booker* and *Fanfan*, it is certainly time to look at these sentencing policies as they affect minorities.

So, Mr. Chairman, as we carefully contemplate what needs to be fixed in the Federal guideline system, I would invite consideration of this longstanding and shameful problem in our Federal law enforcement and sentencing applications and look forward to our witnesses' testimony for any guidance they may give us as we contemplate these and other challenges in our criminal justice system, particularly as it pertains to sentencing.

I yield back.

Mr. COBLE. I thank the gentleman, and I, too, Mr. Scott, look forward to working with you during this 109th Congress.

We have been joined by the Ranking Member of the full Committee, the distinguished gentleman from Michigan, Mr. Conyers. Did you have an opening statement you wanted to make?

Mr. CONYERS. Thank you, Mr. Chairman. I wanted to commend you and Ranking Member Scott for reviewing *Booker/Fanfan*, and the impact on Federal guidelines. I think it is very timely and I am looking forward to the witnesses spelling out some of the directions we now may be able to look at.

The Federal sentencing guidelines weren't originally enacted to address many of the problems that are facing us today. In fact, their original purpose was simply to make sentencing more certain and predictable. One of the things that has happened, of course, is the only thing more certain and predictable is that racial minorities are disproportionately punished under the guidelines, so we have a great challenge here in front of us.

The question might occur, how did this come about? Several reasons serve as the source of blame for the current state of affairs, but the greatest responsibility lies with those who rely stubbornly on mandatory minimums and Congressional directives to enact misguided policies all in the name of being tougher on crime. The crack-powder disparity has already been referred to. So why the disparity, even though experts firmly agree that there is no logic about it?

One look today at these sentencing guidelines provides us with a unique opportunity to consider these issues, and here is where it starts, in this Subcommittee in this room. I think it is a great opportunity for us to move forward.

We also have some probable suggestions as to really what do these new decisions really mean. They are not spelled out with any great particularity, and I think this gives us a chance with our witnesses and among ourselves to begin this dialogue, as well. So I thank you for this opportunity.

Mr. COBLE. I thank the gentleman.

We are pleased to be joined by the distinguished gentleman from Arizona, Mr. Flake, the distinguished gentleman from Massachusetts, Mr. Delahunt, and if you all have opening statements, gentlemen, they will be put into the record, as is the case of the gentlelady from Texas, Ms. Sheila Jackson Lee.

We have four distinguished witnesses with us today. Our first witness is Mr. Christopher Wray, Assistant Attorney General at the Criminal Division of the U.S. Department of Justice. Prior to this position, Mr. Wray served as the Principal Associate Deputy Attorney General and as an Assistant U.S. Attorney for the Northern District of Georgia. As a prosecutor in Atlanta, he prosecuted

cases involving racketeering, arson, bank robbery, gun trafficking, counterfeiting, and immigration issues, among other things. Mr. Wray earned both his undergraduate degree and his J.D. from Yale University.

Our second witness is Judge Ricardo Hinojosa. Judge Hinojosa was nominated by Ronald Reagan and serves as the U.S. District Court Judge for the Southern District of Texas. In addition, Judge Hinojosa is the Chairman of the United States Sentencing Commission. He joined the Commission in 2003 and has been Chairman since January 31, 2004. Previously, Judge Hinojosa served as a law clerk for the Texas Supreme Court as well as working in private practice in McAllen, Texas. Judge Hinojosa is a graduate of the University of Texas and earned his J.D. at Harvard University.

Third, we have Mr. Daniel Collins, a partner at Munger, Tolles, and Olson in Los Angeles. Mr. Collins has represented clients in various appellate cases at the Ninth Circuit, the United States Supreme Court, and the California appellate courts. He served previously at the Department of Justice as an Associate Deputy Attorney General and Chief Privacy Officer. During his tenure at DOJ, Mr. Collins worked extensively on the PROTECT Act, as well as on the establishment of the Terrorist Screening Center. Additionally, Mr. Collins was an Assistant U.S. Attorney in the Criminal Division in Los Angeles. He received his undergraduate degree from Harvard University and his J.D. from Stanford University.

Our final witness today, Mr. Frank O. Bowman III, is a professor at the Indiana University School of Law in Indianapolis. Prior to serving in his current position, he served as an academic advisor to the Criminal Law Committee of the U.S. Judicial Conference and as Special Counsel to the U.S. Sentencing Commission in Washington, D.C. He further served as a Deputy District Attorney for Denver, Colorado, and was Deputy Chief of the Southern Criminal Division in the U.S. Attorney's Office for the Southern District of Florida. Mr. Bowman received his law degree from Harvard University.

Now, for those in the audience, I apologize for my verbose introduction, but I feel that you all, in the event that you did not know it, you need to know the credentials that these witnesses bring to the table and I think that is significant and important for all of us. It is good to have you all with us.

Gentlemen, we operate here under the 5-minute rule. Now, you won't be drawn and quartered when that red light appears, but when the red light appears, that is your information that the ice has become awfully thin on which you are skating. The amber light, when the amber light appears, I think that will give you about 30 to 60 seconds to wrap it up.

We have your written testimony. It has been examined and will be reexamined. We impose the 5-minute rule against ourselves when we question you all, if you could make your responses as brief as possible so we can beat the red light, as well.

Mr. Wray, why don't we start with you.

STATEMENT OF THE HONORABLE CHRISTOPHER A. WRAY, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. WRAY. Thank you, Mr. Chairman, and thank you for holding this hearing.

Mr. Chairman and Ranking Member Scott, distinguished members of this Subcommittee, in *Booker* the Supreme Court held that the mandatory nature of the Federal sentencing guidelines violated a defendant's sixth amendment right to a jury trial. The Court then severed the two provisions that make the guidelines mandatory, rendering the guidelines only advisory.

The Supreme Court, however, did not contemplate that advisory guidelines would be a permanent solution and anticipated that the Congress would consider legislation in the wake of *Booker*. And Mr. Chairman, as you noted, Justice Breyer himself stated that the ball lies in Congress's court.

In considering *Booker*'s consequences, this Subcommittee has the benefit of a substantial body of evidence. The long and troubled history of sentencing before the Sentencing Reform Act demonstrates the problems of disparity and unfairness that resulted from fully discretionary sentencing. Almost two decades of experience then under the Sentencing Reform Act have also shown that the mandatory system of guidelines enacted by Congress led to consistency, transparency, and fairness and helped to bring about historic declines in crime.

Since *Booker*, the actions of several courts have already raised concerns about the consequences of a return to greater discretion in sentencing. Based on this record, this Committee can predict the long-term implications of *Booker* and can assess the need for legislative action.

The Justice Department is committed to working with Congress, with the Judiciary, with the Sentencing Commission and with other interested parties to ensure that the resulting sentencing regime is just and lasting and carries out the purposes of sentencing.

Before the passage of the Sentencing Reform Act in 1984, our country had experimented with different sentencing schemes: early release on parole, rehabilitation in place of incarceration, and unfettered judicial discretion. Those policies did not work. They failed to prevent crime and promote safe streets and they contributed to the high crime periods of the 1960's, 1970's, and 1980's. There was no coherent sentencing policy and judges enjoyed almost unlimited discretion in sentencing. That discretion was largely unreviewable and it resulted in unwarranted disparity.

In the late 1970's and early 1980's, a bipartisan Congress passed the Act. It guiding principle was consistency so that similar defendants who committed similar crimes and had similar records would receive similar sentences. Another guiding principle was transparency, so that the parties and the public would know the factual and legal basis for a sentence, providing accountability.

As one court has recently noted in a post-*Booker* opinion, it would be startling to discover that while Congress had created an expert agency, and—I am quoting now—"approved the agency's members, directed the agency to promulgate the guidelines, allowed those guidelines to go into effect, and adjusted those guide-

lines over a period of 15 years, that the resulting guidelines did not well serve the Congressional purposes. On the contrary, the more likely conclusion is that the guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes." That is from a recent Utah case decided since *Booker*.

We believe that the Sentencing Reform Act has been successful in achieving Congress's goal of reducing unwarranted disparity. Statistical studies bear that out.

Another significant impact of sentencing reform has been the steep decline of crime in the United States, which is currently at a 30-year low. Following Congress's lead, many States have adopted similar guideline systems and an expanding body of literature suggests that incarceration of dangerous persons in recent years has demonstrably reduced crime.

As Congress crafts the policies which will guide Federal sentencing, we urge you to keep in mind that the ultimate goals are to promote fair sentencing by minimizing unwarranted disparity and to ensure the public safety through tough sentencing.

Since *Blakely*, the Department has closely studied various sentencing proposals, and although we are not here today to endorse a particular option, we are here to say that the resulting system must retain the strengths that existed in the mandatory guideline system without suffering from its constitutional weakness. We agree with those experts who predict that a purely advisory system will undoubtedly lead to greater disparity, and that over time, this disparity will likely increase. I note that at a Sentencing Commission hearing last November that a number of us attended, there was widespread agreement from professors to defense attorneys that advisory guidelines were not appropriate for the Federal justice system.

My written testimony identifies a number of particular vulnerabilities, Mr. Chairman, and I see I am coming up on that thin ice period. If I could just beg the chair's indulgence for just a minute, briefly, the vulnerabilities that I think are of particular note and should be of particular concern to this Subcommittee. One, it is essential to have consistent sentencing procedures at the hearings themselves. We have already seen in the wake of *Booker* some courts that have actually adopted procedures that were rejected in *Booker* by the Supreme Court, and that raises, I think, a very sobering thought. If lower courts don't feel constrained by a decision of the Supreme Court of the United States, then it is certainly fair to ask whether they will ever be constrained by guidelines that are merely advisory.

Also, the guidelines had prohibited factors that were deemed by the Sentencing Commission to be inappropriate factors upon which to reduce a sentence, for example, and in the wake of *Booker*, some courts have already taken prohibited factors into account in sentencing defendants to lower sentences.

Third, one consequence of the advisory guidelines that we are very concerned about is the effect on cooperation. Mr. Chairman, Mr. Ranking Member, as you know, in order to make cases in terrorism, organized crime, drug cases, corporate fraud cases, cooperation of lower-level participants is absolutely essential to make

those cases and the ability for us to control that cooperation credit is critical to be able to assure that we get the complete truth from the people who seek cooperation. So we would not support any proposal that did not adequately address that issue in the appropriate ways.

Mr. COBLE. Your time is about up, Mr. Wray.

Mr. WRAY. Thank you, Mr. Chairman. I would be happy to answer any further questions.

Mr. COBLE. Thank you.

[The prepared statement of Mr. Wray follows:]

PREPARED STATEMENT OF THE HONORABLE CHRISTOPHER A. WRAY

INTRODUCTION

Chairman Coble, Ranking Member Scott, distinguished members of the Subcommittee—

On January 12, 2005, the Supreme Court of the United States in *United States v. Booker* [1] held that the mandatory nature of the federal sentencing guidelines, promulgated pursuant to the Sentencing Reform Act of 1984, violated defendant's Sixth Amendment right to a jury trial. The Court remedied this problem by severing and invalidating the two provisions that made the Guidelines mandatory, thereby rendering the guidelines advisory. A majority of the Supreme Court contemplated that advisory guidelines would not be a permanent solution and anticipated that Congress would consider legislation in the wake of the *Booker* decision. Indeed, Justice Breyer stated in his majority opinion that "the ball lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." [2]

In considering the consequences of *Booker* for the future of sentencing, this Subcommittee has the benefit of a substantial body of evidence. The long and troubled history of discretionary sentencing prior to the Sentencing Reform Act demonstrates the problems of disparity and unfairness that resulted from fully discretionary sentencing. Almost two decades of experience under the Sentencing Reform Act have shown that the mandatory system of guidelines enacted by Congress led to consistency, transparency and fairness, and helped to bring about historic declines in crime. In the three weeks since *Booker*, the actions of several federal courts have already raised concerns about the consequences of a return to greater discretion in sentencing. Based on that record, this Subcommittee can begin to predict the long-term implications of the Supreme Court's decisions in *Booker* and *Blakely*,3 and can begin to assess the need for legislative action to address those implications. The Department of Justice is committed to working with Congress, the judiciary, and other interested parties, to ensure that the resulting sentencing regime is just and lasting and carries out the fundamental purposes of sentencing.

PRE-SENTENCING REFORM ERA

Prior to the passage of the Sentencing Reform Act in 1984, the United States experimented with different sentencing schemes: early release on parole, rehabilitation in place of incarceration, and unfettered judicial discretion. Those policies failed to prevent crime and promote safe streets, and contributed to the high crime periods of the 1960's, 1970's, and 1980's. In spite of ample criminal laws, adequate levels of federal investigators, and vigorous prosecutions, there was no coherent sentencing policy. Judges enjoyed almost unlimited discretion at sentencing. This discretion was largely unreviewable and the exercise of it by judges throughout the nation resulted in unwarranted disparity in sentencing. Senators Edward Kennedy, Dianne Feinstein and Orrin Hatch characterized the disparity that existed before the Sentencing Reform Act as "shameful" and "astounding." [3] This past summer, during Senate hearings, Senator Patrick Leahy referred to the time before the Sentencing Reform Act as "the bad old days of fully indeterminate sentencing when improper

[1] *United States v. Booker*, 125 S.Ct. 738 (2005).

[2] *Id.* at 768.

[3] Brief of Amici Curiae Senators Kennedy, Feinstein, and Hatch, *United States v. Booker*, 125 S.Ct. 738 (2005) (Nos. 04–104, 04–105).

factors such as race, geography and the predilections of the sentencing judge could drastically affect a defendant's sentence."[4]

This disparity is well-known and has been documented in a number of studies which demonstrated that sentences varied significantly depending on the judge to whom an offender was assigned.[5] In one study, judges in the Second Circuit were sent presentence reports based upon 20 actual federal cases and asked what sentences they would impose. Judges considering the same offense and the same defendant often gave those defendants vastly different sentences. In one case the defendant's sentence differed by 9 years, in another by 13 years, and in a third case 17 years separated the most severe from the most lenient sentence. Data also showed that handfuls of judges were consistently more severe or more lenient than their colleagues. This fact may not be surprising. But the fact that a defendant's sentence could vary by 9, 13, or even 17 years depending solely on the judge assigned to the case, or that two defendants with similar characteristics who committed the same crime in the same Circuit would be sentenced to two such different sentences, underscored the need for mandatory guidelines.

Another study analyzed the role played by each judge's sentencing philosophy by providing 264 judges with hypothetical cases. The study found that judges who were oriented toward the goals of incapacitation and deterrence gave sentences at least ten months longer on average than judges who emphasized other goals.

This type of disparity, coupled with the fact that many sentences were not sufficiently punitive, undermined the public's confidence in the federal criminal justice system and had far reaching consequences. Congress, the Department, and other analysts recognized that such inconsistency and uncertainty in federal sentencing practices was incompatible with effective crime control and with a fair system of justice. And they demanded change.

SENTENCING REFORM ACT OF 1984

In the late 1970's and early 1980's, policymakers in Washington came to a consensus view that a determinate sentencing system was necessary. Leaders of both parties came together to pass the Sentencing Reform Act of 1984. Its guiding principle was consistency, so that defendants who committed similar crimes and had similar criminal records would receive similar sentences. Another guiding principle was transparency, so that the parties and the public would know the factual and legal basis for a sentence, providing accountability. Finally, Congress articulated the purposes of punishment, which are codified in 18 U.S.C. § 3553(a)(2) and in 28 U.S.C. § 991(b), and directed the Commission to promulgate policies and practices to assure that they be achieved. All sentences must reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Under this congressional mandate, the Sentencing Commission established a uniform system of guidelines, structured to provide fairness, predictability, and consistency for similarly situated defendants. At the same time, the guidelines require each sentence to be individualized to fit the offender and the offense, and require the court to state the reasons for each sentence. The guidelines also require longer sentences for especially dangerous or recidivist criminals. Under this system, sentences no longer depended on the district where the offenders committed the offense or the judge who imposed the sentence, so the likelihood of unwarranted disparity was greatly minimized.

As directed by Congress, the Commission drafted the original guidelines based upon the averages of actual sentences imposed by judges throughout the United States and it has continued to refine the guidelines based upon actual sentencing practice. In addition to these empirical data, the Commission collaborates with all of the major stakeholders in the federal criminal justice system, advisory groups, interested observers, and the general public. Thus, the Commission ensures that the guidelines achieve congressionally-mandated purposes, and Congress reviews those guidelines and all proposed amendments to them to ensure that those purposes are met before allowing them to take on the force and effect of law. On occasion, Congress has directed the Sentencing Commission to alter existing punishment levels. Congress has also approved legislation which mandates minimum punishments for

[4] *Blakely v. Washington and the Future of Federal Sentencing Guidelines:* Hearing Before the Senate Judiciary Comm, 108th Cong. 8573 (2004), available at *http://judiciary.senate.gov/testimony.cfm?id=1260&wit—id=2629.*

[5] U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 80 (2004) [hereinafter *Fifteen Year Report*] (studies cited therein).

certain offenses. Because Congress and the Sentencing Commission have made judgments about the appropriate penalties for federal crimes, part of our Executive Branch enforcement responsibility is to ensure that this policy is translated into actual sentences for defendants.

As United States District Judge Paul Cassell of the District of Utah recently noted in a post-*Booker* opinion, "It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate the Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes."[6] The Department was pleased to see that Judge Cassell adopted in that opinion an approach of adhering insofar as is possible post-*Booker* to the Sentencing Guidelines, stating that "in all future sentencings, the court will give heavy weight to the Guidelines in determining an appropriate sentence. In the exercise of its discretion, the court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons."[7] The Department will urge the federal courts to adhere to the guidelines as far as possible within the limits of *Booker*, as we await prompt enactment of legislation in response to the *Booker* decision.

THE IMPACT OF SENTENCING REFORM

The Sentencing Reform Act has been successful in achieving Congress' goal of reducing unwarranted disparity in sentencing. The Sentencing Commission's Fifteen Year Report completed in November noted that "[r]igorous statistical study both inside and outside the Commission confirm that the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences among judges."[8] In fact, according to the Fifteen Year Report, the reduction of unwarranted judicial disparity has been reduced by approximately one third to one half by implementation of the Guidelines.[9]

Another significant impact of sentencing reform has been the steep decline of crime in the United States, currently at a 30-year low. Congress, through the Sentencing Reform Act of 1984, instituted determinate sentences, the elimination of parole, truth in sentencing, limited judicial discretion, and appropriate consistency. Following Congress' lead, many states adopted similar guidelines systems. Congress also used mandatory minimum sentences such as those contained in the Anti-Drug Abuse Act of 1986, to incarcerate drug dealers and reduce the violence associated with the drug trade, and once again, many states followed suit. Further, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act which provided incentives to states to pass truth in sentencing laws requiring violent offenders to serve at least 85% of their sentences. This also is an example of a matter on which the states followed Congress' lead. The new sentencing systems adopted by Congress and many states recognized the need to place the public's safety from crime first and to further that end through adequate deterrence, incapacitation of violent offenders, and just punishment. The overall drop in the violent crime rate of 26% in the last decade is proof of the success of Congress' policies.

A few critics have said that our sentencing system has been a failure and that our prisons are filled with non-violent first-time offenders. But the facts tell us otherwise. Focusing exclusively on the federal prison population, approximately 66% of all federal prisoners are in prison for violent crimes or had a prior criminal record before being incarcerated.[10] Again looking only at federal inmates, 79% of federal inmates classified as non-violent offenders released from prison have a prior arrest. The rap sheets of federal prisoners incarcerated for non-violent offenses indicate an average of 6.4 prior arrests with an average of at least 2.0 prior convictions.[11] Given the active criminal careers and the propensity for recidivism of most prisoners, incapacitation works.

As noted by Judge Paul Cassell and others, "an expanding body of literature suggests that incarceration of dangerous persons in recent years has demonstrably reduced crime, through both incapacitation and deterrence."[12] These incapacitative

[6] *United States v. Wilson,* 2005 WL 78552, at *4 (D. Utah 2005).
[7] *Id.* at *12.
[8] *See* FIFTEEN YEAR REPORT, *supra* note 6, at 140.
[9] *See id.* at 97–98.
[10] BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES (NOV. 1997).
[11] BUREAU OF PRISONS, OFFICE OF RESEARCH AND EVALUATION (NOV. 2004).
[12] *Wilson,* 2005 WL 78552, at *7.

and deterrent effects arise from a sentencing guidelines system which is tough, fair, and predictable. As Congress crafts the sentencing policies which will guide the federal criminal justice system, we urge you to keep in mind that the ultimate goals are to promote fair sentencing, by minimizing unwarranted disparity, and to ensure the public's safety through tough sentencing, especially sentencing that incorporates a person's prior criminal history and real offense conduct.

VULNERABILITIES OF ADVISORY GUIDELINES

Since *Blakely,* the Department has closely studied various sentencing proposals. Today we reaffirm our commitment to support a sentencing regime that advances the principles of consistency, fairness, transparency, accountability, and the other statutory purposes of punishment. Though we are not here today to endorse a particular option, we are here to say that the resulting system must retain the strengths of the mandatory guideline system without suffering from its constitutional weakness.

We agree with experts who predict that a purely advisory system will undoubtedly lead to greater disparity and that, over time, this disparity is likely to increase.[13] At a hearing before the Sentencing Commission last November, there was widespread agreement among all of the panelists, from professors to public defenders, that advisory guidelines were not appropriate for the federal justice system. For example, the Practitioners Advisory Group stated that "rules that are mandatory are valuable in controlling unwarranted disparity, and in providing certainty so that defendants can make rational decisions in negotiating plea agreements and in trial strategy."[14] Testimony of a witness appearing on behalf of the Federal Public Defenders stated: "We view advisory guidelines as another means of simply evading rather than embracing the principles of *Blakely*."[15] And a law professor testified that "[g]iven the fact that Congress has repeatedly expressed its commitment to uniformity (most recently in the Feeney Amendment), these solutions [advisory guidelines] ignore the will of the ultimate decision-maker in this area."[16] Further, those who would cite to state advisory systems as models for the federal system often disregard the fact that, unlike the states, the federal system casts a wide net over far flung geographical areas, with diverse legal cultures.

As we have analyzed an advisory guideline system, we have identified vulnerabilities that are inherent in advisory guidelines, which we consider serious impediments to law enforcement. We urge you to give serious consideration to these vulnerable areas and to ensure that they are addressed by whatever legislation is enacted.

SENTENCING PROCEEDINGS

The first area is the sentencing hearing itself. In order to have consistent sentences, it is essential that sentencing hearings have consistent form and substance. Although there are currently statutes and Criminal Rules of Procedure controlling sentencing proceedings (e.g., 18 U.S.C. §§ 3552, 3553(a); Fed. R. Crim P. 32(d)), these procedures don't necessarily ensure that courts "consult the guidelines and take them into account when sentencing" as explicitly required by the Court in *Booker*. In order to comply with these requirements, the Department has issued guidance to the field instructing prosecutors to recommend guideline sentences in all but the rarest cases, and to recommend guideline departures only when justified by the facts and the law. We will also ask the sentencing court to consult the guidelines and to calculate a guideline sentence prior to any other considerations as several courts, including the Second and Fourth Circuits, have directed.[17]

We have, however, already encountered judges who have exercised their newfound discretion to fashion sentencing procedures which were considered and explicitly rejected by *Booker*. In both Oklahoma and Nebraska, courts have declared that the appropriate remedy is that suggested by Justice Stevens's *dissent* in *Booker*—to require prosecutors to charge and prove all sentencing facts to a jury beyond a

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[13] Felman, James, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?,* 17 Federal Sentencing Reporter 97 (Dec. 2004).

[14] Letter from Practitioners Advisory Group to the United States Sentencing Commission 12 (Nov. 4, 2004), available at *http://www.usscpag.com/index.asp.*

[15] Jon Sands, Submitted Testimony before Sentencing Commission 4 (Nov. 17, 2004), available at *http://www.ussc.gov/hearings/11—16—04/Porter1.pdf.*

[16] Professor Stephanos Bibas, Submitted Testimony before Sentencing Commission 5 (Nov. 17, 2004), available at: *http://www.ussc.gov/hearings/11—16—04/Bibas.pdf.*

[17] *United States v. Crosby,* 2005 WL 240916 (2nd Cir. 2005); *United States v. Hughes,* 2005 WL 147059 (4th Cir. 2005).

reasonable doubt.[18] In Nebraska, the court used a system of its own making to impose a sentence of 36 months for an aggravated illegal reentry after deportation, when the guideline range was 57–71 months.[19]

These examples reflect a sobering thought: if lower courts are not constrained by a clear and explicit holding of the Supreme Court of the United States, it is fair to ask whether they will be constrained by guidelines that are merely advisory. Similarly, if lower courts exercise their discretion to ignore the law concerning matters as large as what sentencing system applies in federal courts, surely courts will exercise their discretion even more freely when applying individual guidelines.

The fact is that although the guidelines are now advisory, they are still an integral part of federal sentencing. As the Second Circuit recently noted, "the Guidelines are not casual advice, to be consulted or overlooked at the whim of the sentencing judge."[20] Although the law still requires that courts consider the "applicable category of offense and . . . defendant as set forth in the guidelines," and "any pertinent policy statement" and "the need to avoid unwarranted sentence disparities" among similarly situated defendants,[21] these requirements may, like the *Booker* opinion itself, be ignored under a purely advisory system.

PROHIBITED FACTORS

With the current system of advisory guidelines, courts may believe they can consider sentencing factors that are prohibited by the guidelines. Under the mandatory guidelines system, courts were prohibited from considering certain grounds for departure which were considered improper by the Sentencing Commission, and in some cases are impermissible under the Constitution. Such grounds include the defendant's race, sex, national origin, creed, religion, and socio-economic status.[22] The Commission also prohibited consideration of other factors—such as the defendant"s dependence on alcohol, drugs, or gambling, lack of guidance as a youth, disadvantaged upbringing and others—and discouraged consideration of other factors.[23] Clearly, whether under the former mandatory guidelines system, or under the post-*Booker* advisory guidelines system, no court may consider grounds for departure that are impermissible under the Constitution.

Soon after the Court's decision in *Booker*, a number of courts sentenced defendants to sentences significantly below the applicable guideline range, relying on factors that the Sentencing Commission considered improper when imposing sentences. In Wisconsin, a judge sentenced a white collar bank officer in a bank fraud case to one year and one day when the guidelines provided for 36–47 months, explicitly basing the sentence on considerations such as the defendant's motivation to keep

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[18] The two remedies considered at length in *Booker* were whether to render the guidelines advisory or to require proof of sentencing facts to a jury. The Supreme Court chose the former and the federal courts must apply it until the Congress enacts a more appropriate remedy. But, in *United States v. Barkley,* Case No. 04–CR–119–H (N.D. Okla. Jan. 24, 2005), the district court did not follow the *Booker* decision on the remedy. In *Barkley,* the district court said "for purposes of determining the viability of the new, advisory system now legislated by the Supreme Court, Congress was never called upon to choose between such an advisory system and a modified mandatory system. Nevertheless, the Supreme Court amended the federal statute to reflect its belief as to what Congress would have done if presented with these alternatives. This Court believes that Congress will be motivated to reimpose a mandatory sentencing system which, under *Booker*, must reflect such modifications as are necessary to accommodate the Sixth Amendment rights described in *Blakely.*" *Id,.* slip op. at 8–9. The district court ultimately concluded in *Barkley* that "as a matter of history, policy and common sense, a mandatory sentencing system that accommodates the Sixth Amendment rights described in *Blakely* and *Booker* is preferable to an advisory application of the Guidelines. The Court believes that applying the guidelines, modified to satisfy *Blakely,* will have the additional benefit of contributing to the public debate when Congress determines whether to reimpose the mandatory components of federal sentencing." *Id.,* slip op. at 32. In *United States v. Jose Huerta-Rodriguez,* No. 8:04CR365 (D. Neb. Feb. 1, 2005), the district court concluded that "it will continue to require that facts that enhance a sentence are properly pled in an indictment or information, and either admitted, or submitted to a jury (or to the court if the right to a trial by jury is waived) for determination by proof beyond a reasonable doubt. The court finds that although *Booker*'s Sixth Amendment holding may not require such a procedure, it is not precluded." *Id.,* slip op. at 12. These district court opinions cannot be squared with the statement of the majority of the Supreme Court in *Booker* that "we must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review." *Booker,* 125 S. Ct. at 769.

[19] *Huerta-Rodriguez,* Case No. 8:04 CR365 (D. Neb. Feb. 1 2005); *United States v. Barkley,* Case No. 04–CR–119 (N.D. Okla. Jan. 24, 2005).

[20] *Crosby,* 2005 WL 240916, at *7.

[21] 18 U.S.C. §§ 3553(a)(4), (a)(5), and (a)(6).

[22] USSG §§ 5H1.10, 5H.12. *See generally* USSG § 5K2.0.

[23] USSG § 5H1.4

the client's business afloat and the fact that the conviction resulted in financial distress for the defendant.[24] In California, a judge sentenced four men, convicted of smuggling more than a ton of cocaine from Colombia, to 41 months, when the guidelines provided for a sentence of at least 235–293 months. Among the reasons the court cited for the sentence was the defendants' poverty. A newspaper reporting the case quoted the court as stating that the guideline sentence recommended by the government was "extremely harsh" and that the "the government is being absolutely and totally unfair."[25] Meanwhile, other defendants in the same district in California received sentences of 20 and 30 years for the same conduct—smuggling tons of cocaine from Colombia on the high seas.

As these decisions make clear, there is a need for courts to be consistent in their application of what factors are proper to consider at sentencing. Failing to do so will result in greater disparity. We urge Congress, in whatever sentencing system it implements, to prohibit certain factors so that judges may not consider in sentencing grounds which would be improper to consider or which would create sentencing disparity based upon inappropriate characteristics of a defendant.

COOPERATION AND ACCEPTANCE OF RESPONSIBILITY

Another consequence of the advisory guidelines is the reduced incentive for defendants to enter early plea agreements or cooperation agreements with the government, since defendants may request and obtain the same benefit from the court without such an agreement. Under the mandatory guideline system, a defendant could obtain an additional third point reduction in his guideline range as consideration for an early acceptance of responsibility only upon the Department's motion. The Department is in the best position to determine whether a defendant's early plea has save prosecutorial resources, and should retain control of who receives that consideration.

Similarly, it is essential that the Department retain control over whether consideration at sentencing will be given for cooperation. Cooperation agreements are an essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court. First, the Department is in the best position to evaluate the truthfulness and value of a cooperator's assistance, by evaluating it within the context of the entire body of investigative information and by determining whether it is consistent and corroborated by other evidence. But there is a more important reason—the Department needs the leverage in order to insist that cooperating defendants testify to the complete truth, rather than half-truths. The integrity of the judicial system depends upon the prosecutor's ability, in good faith, to present only truthful testimony. The Department's ability to insist on complete and truthful testimony is undercut if a cooperating defendant can tell half-truths and then, himself, seek a sentence reduction based upon partial cooperation.

In a number of circumstances, there will be less of an incentive for cooperating defendants to assume the risks of cooperation if they can seek sentencing benefits without risk. The implications of the status quo are particularly troubling for the Department in those cases in which defendants and targets are not charged with an offense involving a mandatory minimum sentence. This will have grave effects on the Department's ability to prosecute a wide variety of crimes which are difficult, if not impossible, to investigate without cooperators, such as drug trafficking, gangs, corporate fraud and terrorism offenses. Moreover, it may impair the Department's ability to obtain timely information. If defendants or targets of an investigation believe a district judge will impose minimal punishment or reward the defendant's representations regarding his cooperation and its value, defendants may defer attempts to cooperate with the Department. This could have a very disruptive effect on on-going investigations.

The potential problem created by these issues is serious enough that the Department will not support any proposal that does not appropriately address this issue.

APPELLATE REVIEW

The Supreme Court in *Booker* excised 3742(e), which sets forth the standard of review on appeal for departures from the applicable guideline range, and announced that henceforth appellate courts would review sentences for "unreasonableness."[26] The Department believes that guideline sentences are presumptively reasonable, and that sentences outside the guidelines become less reasonable the more they

[24] *United States v. Ranum,* 2005 WL 161223 (E.D. Wis. Jan, 19, 2005).

[25] Soto, Onell R., *Four Colombians Get Light Sentences, Judge Cites Threats,* at *http://SignOnSanDiego.com/news/metro/20050128–9999–7m28fast.html.*

[26] *Booker*, 125 S.Ct. at 745.

vary from the guideline range. It is, however, unclear how courts will define "reasonableness" and it is foreseeable that courts around the country will define it differently, opening another window through which disparity can infiltrate the system. Both the majority and dissenting opinions in *Booker* noted point. In response to Justice Scalia's dissent that the "reasonableness" standard will lead to sentencing disparities, the majority noted that "we cannot claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."[27]

The Department is disappointed that the *de novo* standard established by the PROTECT Act for sentences outside the applicable guideline range is no longer the law. This standard proved invaluable in the re-sentencing of a number of cases. For example, the Fourth Circuit reviewed *de novo* a district courts one-month sentence in a cross-burning case, based upon the victim's conduct and the defendant's aberrant behavior. The Circuit concluded that the departures were unwarranted and clearly erroneous.[28] The Seventh Circuit reviewed *de novo* a district court's decision to grant a downward departure to a defendant convicted of child molestation on the grounds of national origin and health. Again, the Circuit court found that the departures were not warranted.[29]

We are concerned that the "reasonableness" standard may not be sufficiently rigorous to reduce unwarranted disparity. A rigorous and consistent appellate standard is essential to any guideline system since appellate review will be an important means for the parties to obtain consistent sentencing.

REVIEW OF SENTENCING DATA

Finally, under any regime, it is important that Congress and the Sentencing Commission monitor the sentences being imposed throughout the country to determine whether the guidelines are being properly considered and applied. The impact of the Supreme Court's ruling can only be assessed with accurate, real-time information on sentencing, which is necessary to play an appropriate and effective role in the public debate. This information remains vital to determine whether it is necessary to make adjustments to the guidelines, or to impose mandatory minimum sentences for certain types of crimes. This review is also necessary to ensure that the sentences imposed in the federal system are proportionate to the crime and provide adequate punishment, incapacitation and deterrence.

CONCLUSION

The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that meet the goals of sentencing reform, which has so well served the United States. We look forward to working with Congress and others to create a lasting system that advances these goals. We are confident that Congress will act in the near term to ensure that federal sentencing policy continues to play its vital role in bringing justice to the communities of this country.

I would be happy to try to answer any questions that the Subcommittee may have.

Mr. COBLE. And in the sense of equity and fairness, since I gave you an extra minute, I will give you all 6 minutes if you need it. If you can do it in five, that will make the Chairman real happy.

Judge, good to have you with us. Thank you.

STATEMENT OF THE HONORABLE RICARDO H. HINOJOSA, CHAIRMAN, UNITED STATES SENTENCING COMMISSION

Judge HINOJOSA. Thank you, Chairman Coble and Ranking Member Scott and distinguished Members of the Committee. I thank you for this opportunity to be able to address you on the aftermath of *Booker* and its possible effect on the Federal sentencing guidelines.

As you know, the *Booker* decision leaves the Sentencing Reform Act intact with the exception of two excised provisions and main-

[27] *Id.* at 767.
[28] *United States v. May,* 359 F.3d 683 (4th Cir. 2004).
[29] *United States v. Mallon,* 345 F.3d 943 (7th Cir. 2004). *See also United States* v *Tucker,* 386 F.3d 273 (DC Cir. 2004); *United States v. Mandhai,* 375 F.3d 1243 (11th Cir. 2004).

tains all of the Sentencing Commission's statutory obligations. My statement today presents some initial observations regarding *Booker*, provides early data regarding the impact of the decision, and outlines actions we are taking to ensure that the guidelines continue to be an effective sentencing tool.

After *Booker*, the guidelines remain an important and essential factor in the imposition of Federal sentences. Under the approach set forth by the Court, district courts must consult the guidelines and take them into account when sentencing, subject to review by the courts of appeal for unreasonableness. The Commission believes that the *Booker* decision makes clear that the sentencing court must consider the guidelines and that such consideration necessarily requires the sentencing court to calculate the guideline sentencing range and consider the departure policy statements of the Federal sentencing guidelines.

Significantly, Title 18, U.S. Code Section 3553(a) was left wholly intact and still instructs that in determining the particular sentence to impose, the court shall consider the kinds of sentence and the sentencing range as set forth in the guidelines. Of course, sentencing courts cannot consider the sentencing guideline range if one is not determined by the court. Appellate case law is already developing on this point.

The *Booker* decision does not expressly address the question of how much weight the guidelines should be accorded by the sentencing court. There are a number of district court decisions with varying opinions regarding the precise weight that should be given to the guidelines. The Commission believes that the courts should give substantial weight to the guidelines in determining the appropriate sentence because as mandated by the Sentencing Reform Act, the Commission has considered the factors listed in section 3553(a) during the process of promulgating and refining the guidelines.

The factors the Commission has considered are a virtual mirror image of the factors sentencing courts are required to consider pursuant to section 3553(a). In addition, Congressional action through the history of the Federal sentencing guidelines indicates Congress's belief that they generally achieve the statutory purposes of sentencing as they are submitted for Congressional review before they become effective, and Congressional approval can only be interpreted as a sign that Congress believes the guidelines have done so. Accordingly, sentencing courts should give the guidelines substantial weight.

After *Booker*, sentencing courts also continue to be required by Title 28 U.S. Code Section 994(w) to submit to the Commission five specific sentencing documents. Judge Sim Lake, Chair of the Criminal Law Committee of the Judicial Conference of the United States, and I have issued a joint memorandum to all United States district judges and other court personnel reminding them of this ongoing statutory obligation. The submission of these sentencing documents is of utmost importance because without them, the Sentencing Commission cannot generate the sentencing data that Congress, the Commission, and others need to evaluate the impact of *Booker*.

The Commission is sensitive to the need for timely and thorough post-*Booker* data and has prioritized and reconfigured its data col-

lection in order to analyze and disseminate post-*Booker* data in as close to real time as possible. As of February 4, 2005, we have received and analyzed sentencing documents from 74 Federal districts for 733 cases sentenced on or after January 12, 2005. These courts have been highly compliant with their statutory requirements to submit sentencing documentation to the Commission. The data we have compiled is preliminary in nature and not necessarily representative of the nation as a whole. I would urge extreme caution in making firm conclusions based on these figures.

The percent of cases sentenced within the guideline sentencing range post-*Booker* does not appear to be noticeably different from previous practice. Of the 692 cases for which complete sentencing information was available, 63.9 percent were sentenced within the applicable guideline sentencing range, which is almost identical to the data we have for the last three fiscal years of published data, which range from 64 to 65 percent.

One-third of the cases were sentenced below the applicable guideline sentencing range, which also is almost identical to the data we have for the last three fiscal years of published data. Almost two-thirds, 63.2 percent of the sentences below the applicable guideline range since *Booker* were based on an agreement with the Government either for substantial assistance, an early disposition or fast track program, or otherwise pursuant to a plea agreement.

Also noteworthy is that 2.7 percent of the post-*Booker* cases were sentenced above the sentencing guideline range, which is a relatively small number but represents more than a three-fold increase above the average upward departure rate of 0.7 percent for the last three fiscal years.

This very preliminary post-*Booker* data indicates that courts appear to be sentencing pursuant to the guidelines in the overwhelming majority of cases. Only 7.8 percent of cases appear to be sentenced below, and only 1.3 percent appear to be sentenced above the applicable guideline sentencing range based upon sentencing authority established in *Booker*. Therefore, courts sentenced pursuant to the guideline system as a whole, including upward and downward departure policy statements contained in the guideline manual, in 90.9 percent of the cases.

Next week, we have planned a 2-day hearing to continue building a record of informed discussion of *Booker* and we are scheduled to vote to publish for comment proposed guideline amendments that would implement Congressional directives and other legislation concerning identity theft and antitrust offenses. In short, our core work continues uninterrupted.

In closing, the Commission recognizes that *Booker* presents new potentially significant challenges to Federal sentencing and we are aware proposals to respond to the decision are being discussed. If Congress decides at some point to pursue legislation, we hope that it will preserve the core principles of the Sentencing Reform Act, and to the extent possible, avoid a wholesale rewriting of the system that has operated well for nearly two decades. We believe the Sentencing Reform Act was a landmark piece of legislation and the resulting guidelines have made significant strides in furthering the goals of the Act.

As we move forward, the Commission is ready to assist Congress in any way it deems appropriate, and I thank you so much for giving me the time to be here today and for going over my alloted time, Mr. Chairman. As a judge for 22 years, I know that bothers the person at the helm, so I appreciate it very much.

Mr. COBLE. Thank you, Your Honor. I appreciate that.

[The prepared statement of Judge Hinojosa follows:]

PREPARED STATEMENT OF THE HONORABLE RICARDO H. HINOJOSA

Chairman Coble, Ranking Member Scott, and Distinguished Members of the Committee, thank you for inviting me to testify today on behalf of the United States Sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker* [1] on the Federal Sentencing Guidelines.

After the Court's decision in *Blakely v. Washington,* [2] the federal criminal justice system experienced a period of uncertainty regarding whether the Federal Sentencing Guidelines would remain valid. The Sentencing Commission, in testimony before Congress and in its own amicus brief, vigorously asserted that the holding in *Blakely* did not apply to the Federal Sentencing Guidelines. Although the Court ultimately extended *Blakely* to the Federal Sentencing Guidelines, the *Booker* decision resolved the uncertainty in a manner that leaves the Sentencing Reform Act intact with the exception of two excised provisions. The opinion maintains *all* of the Sentencing Commission's statutory obligations under the Act. In fact, the Court noted the Commission's important role in the federal criminal justice system, stating that "the Sentencing Commission remains in place, writing Guidelines, collecting information and actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." [3]

There is no doubt, however, that the *Booker* decision is the most significant case affecting the federal guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta.* [4] While it is impossible to evaluate fully the impact of *Booker* after less than one

month, the Sentencing Commission and its staff are committed to assisting Congress in any way it deems appropriate as you assess and respond to the decision.

The Sentencing Commission is uniquely positioned to assist all three branches of government in ensuring the continued security of the public while providing fair and just sentences. An independent agency housed in the judicial branch, the Sentencing Commission is an expert bipartisan body of federal judges, individuals with varied experience in the federal criminal justice system, and *ex-officio* representatives of the Executive branch whose work on sentencing guidelines must be reviewed by Congress. In short, the Sentencing Commission is at the crossroads where the three branches of government intersect to determine federal sentencing policy.

My testimony today presents some of the Sentencing Commission's initial observations regarding *Booker,* provides early data regarding the impact of the decision, and outlines actions we are taking to ensure that the guidelines continue to be an effective sentencing tool.

Guidelines Still Must Be Calculated and Considered

After *Booker* the Federal Sentencing Guidelines remain an important and essential consideration in the imposition of federal sentences. The decision severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the Federal Guidelines mandatory, and 18 U.S.C. § 3742(e), an appeals provision. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, *must consult those Guidelines and take them into account when sentencing,*" subject to review by the courts of appeal for "unreasonableness." [5]

The Sentencing Commission firmly believes that the Court's decision makes clear that the sentencing court must consider the guidelines and that such consideration necessarily requires the sentencing court to calculate the guideline sentencing range. It is significant that 18 U.S.C. § 3553(a), which was left wholly intact by the decision, still instructs that sentencing courts

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[1] *United States v. Booker,* 125 S. Ct. 738 (2005).

[2] *Blakely v. Washington,* 542 U.S. (2004) (holding that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt).

[3] *Booker*, 125 S. Ct. at 767 (opinion of BREYER, J.).

[4] *Mistretta v. United States,* 488 U.S. 361 (1989).

[5] *Booker*, 124 S. Ct. at 767 (opinion of BREYER, J.) (emphasis added).

". . . in determining the particular sentence to be imposed, *shall* consider . . . the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission . . .".[6]

Sentencing courts of course cannot consider the sentencing guideline range if one has not been determined. Therefore, probation officers should continue preparing presentence reports with

guideline calculations, pursuant to 18 U.S.C. § 3552 and Rule 32 of the Federal Rules of Criminal Procedure, both of which were unchanged by the decision.

Appellate case law is already developing on this point. The Second Circuit has held that in order to comply with the duty to "consider" the guidelines:

A judge cannot satisfy this duty by a general reference to the entirety of the Guidelines Manual, followed by a decision to impose a "non-Guidelines sentence." Subsection 3553(a)(4) contemplates consideration of the Guidelines range applicable to the defendant, and subsection 3553(a)(5) contemplates consideration of policy statements issued by the Sentencing Commission, including departure authority. *The applicable Guidelines range is normally to be determined in the manner as before Booker/Fanfan.*[7]

The Fourth Circuit similarly has held that "[c]onsistent with the remedial scheme set forth in *Booker,* a district court shall first calculate (after making the appropriate findings of fact) *the range prescribed by the guidelines.* Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence."[8] Therefore, prior to imposing a sentence sentencing courts must consider the guideline range calculations and departure policy statements, pursuant to *Booker* and 18 U.S.C. § 3553(a).

Sentencing Guidelines Should be Given Substantial Weight

Although the *Booker* decision makes clear that the guidelines must be consulted and taken into account, it does not expressly address the question of how much weight they should be accorded by the sentencing court. There are a number of district court decisions with varying opinions regarding the precise weight that should be given to the guidelines. For example, a case in the District of Utah has held that the Federal Sentencing Guidelines should be given "heavy weight" and deviated from only in "unusual cases for clearly identified and persuasive reasons," while a case in the Eastern District of Wisconsin has held that "courts must treat the guidelines as just one of a number of sentencing factors" enumerated at 18 U.S.C. § 3553(a).[9] The appellate courts ultimately can be expected to address this issue.

The Sentencing Commission firmly believes that sentencing courts should give substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose, and that *Booker* should be read as requiring such weight. The *Booker* sentencing scheme "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004)."[10]

During the process of developing the initial set of guidelines and in refining them throughout the ensuing years, the Sentencing Commission has considered the factors listed at section 3553(a) and cited with approval in *Booker*. The Sentencing Reform Act, in fact, mandates such consideration by the Sentencing Commission. Section 991(b) of title 28, United States Code, expressly states that the very purposes of the Sentencing Commission are, among other things: to assure the purposes of sentencing, as set forth in section 3353(a)(2), are met; to provide certainty and fairness in sentencing; to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct; and to maintain sufficient flexibility to permit individualized sentences when warranted. In short, the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.[11] As a result, sentencing courts should give the guidelines substantial weight.

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[6] 18 U.S.C. § 3553(a)(4) (emphasis added).

[7] *See, e.g., United States v. Crosby,* F.3d , 2005 WL 240916 (2nd Cir Feb. 2, 2005), at *5 (emphasis added).

[8] *United States v. Hughes,* F.3d , 2005 WL 147059 (4th Cir. Jan. 24, 2005), at *3. (emphasis added).

[9] *United States v. Wilson,* 2005 WL 78552 (D. Utah Jan 13, 2005); *United States v. Ranum,* 2005 WL 161223 (E.D. Wis. Jan 19, 2005).

[10] *Booker*, 125 S. Ct. at 757 (opinion of BREYER. J.).

[11] There is considerable pre-*Booker* case law supporting the proposition that the Sentencing Guidelines take into account the factors set forth at 18 U.S.C. § 3553(a)(2). *See, e.g., United States v. Davern,* 970 F.2d 1490 (6th Cir. 1992); *United States v. Mogel,* 956 F.2d 1555 (5th Cir.

In addition, congressional action throughout the history of the Federal Sentencing Guidelines indicates Congress's belief that they generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guidelines and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and 672 amendments have withstood congressional scrutiny, and many guideline amendments were promulgated in response to congressional directives. Such congressional approval can only be interpreted as a sign that Congress believes the Federal Sentencing Guidelines adequately achieve the statutory purposes of sentencing, providing further support for the Sentencing Commission's position that sentencing courts should give the guidelines substantial weight in imposing sentences.

Sentencing Documentation Must be Completed and Submitted

Sentencing courts also continue to be required by 18 U.S.C. § 3553(c) (statement of reasons for imposing a sentence) and 28 U.S.C. § 994(w) to submit to the Commission within 30 days of entry of judgment five specific sentencing documents: the judgment and commitment order, the statement of reasons (including the specific reasons for any departure), any plea agreement, the indictment or other charging document, and the presentence report. *Booker* makes no changes in the document submission requirements imposed by the PROTECT Act, and it is imperative that all districts continue to make these submissions to the Commission in a timely and complete manner.

In order to emphasize this point, on January 21, 2004, Judge Sim Lake, Chair of the Criminal Law Committee of the Judicial Conference of the United States and I issued a joint memorandum to all United States District Judges and other court personnel reminding them of the duty to continue fulfilling this ongoing statutory requirement (Attachment A). I also appeared earlier this week on a television broadcast to the courts sponsored by the Federal Judicial Center and again reiterated this point.

The statutorily required submission of sentencing documents is of utmost importance because without these documents the Sentencing Commission cannot generate the sentencing data that Congress, the Commission, and others need to evaluate the impact of *Booker* on federal sentencing. As a result, we intend to continue coordinating with the Criminal Law Committee, the Administrative Office of the United States Courts, and the Federal Judicial Center to ensure that the courts provide us with the documentation and information we need, and this effort could include either revisions or supplements to forms currently in use.

Sentencing Commission's Actions in Response to Booker

The Sentencing Commission conducted a two day hearing on November 16 and 17, 2004, at which it heard testimony from the Department of Justice, defense attorneys, and academics, and the Commission and its staff have attended various conferences and meetings since the *Blakely* decision. Based on these interactions, the Sentencing Commission is aware that a number of proposals to respond to *Booker* are being discussed. These proposals include, among others, a "wait and see" approach, statutory implementation in some form of the *Booker* sentencing scheme, providing a jury trial mechanism for sentencing guideline enhancements, "simplification" of the guidelines either by reducing the number of guideline adjustments and/or by expanding the sentencing guideline ranges, equating the maximum of the guideline sentencing ranges with the statutory maximum for the offense of conviction, and broader reliance on statutory mandatory minimum penalties.

If Congress decides at some point to pursue legislation, we hope that it will preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid a wholesale rewriting of a system that has operated well for nearly two decades. We believe the Sentencing Reform Act was a landmark piece of legislation and the resulting guidelines have made significant strides in furthering the goals of the Act.

The Sentencing Commission will continue fulfilling its many statutory duties and in furtherance of its ongoing mission already is taking several steps in response to *Booker*. The Sentencing Commission is sensitive to the need for timely and thorough post-*Booker* data on federal sentencing. As stated earlier, the Sentencing Commission already has communicated with the courts regarding their continuing statutory duties regarding completion and submission of sentencing documentation. In addition, the Sentencing Commission has prioritized and reconfigured its data collection modules in order to collect, analyze, and disseminate post-*Booker* data in as close to "real time" as possible.

1992); *United States v. Hefferman,* 43 F.3d 1144 (7th Cir. 1994); *United States v. Breeding,* 109 F.3d 308 (6th Cir. 1997).

As of February 4, 2005, the Sentencing Commission has received and analyzed sentencing documents for 733 cases sentenced on or after January 12, 2005, the date of the *Booker* decision. The data we have compiled is preliminary in nature and not necessarily representative of the nation as whole and, therefore, I would urge extreme caution in making firm conclusions based on these figures.

The Sentencing Commission has received sentencing documents from 74 of the 94 federal districts, and these courts have been highly compliant with the documentation submission requirements of 18 U.S.C. § 3553(c) and the PROTECT Act, which remain unchanged by *Booker*. The sentencing documentation for these cases included 99.6% of the Judgment and Commitment Orders, 98.8% of the Presentence Reports, 97.3% of the Indictments or other charging documents, and 95.8% of the Statements of Reasons. These figures indicate that courts are continuing to take their statutorily required documentation and submission requirements seriously.

The percent of cases sentenced within the guideline sentencing range post-*Booker* does not appear to differ noticeably from previous practice. Of the 692 cases for which complete sentencing information was available,[12] 63.9 percent (442) were sentenced within the applicable guideline sentencing range. During the last three fiscal years of published data, the proportion of cases sentenced within the applicable guideline sentencing range remained between 64 and 65 percent.[13]

Also similar to prior sentencing practice, approximately one-third of the cases—33.4 percent (231)—were sentenced below the applicable guideline sentencing range. Between 33.9 percent and 35.4 percent of the federal caseload in fiscal years 2000–2002 were sentenced below the applicable guideline sentencing range.[14]

The majority of the sentences below the applicable guideline range since *Booker* were based on an agreement with the government. Of the 231 cases sentenced below the applicable guideline sentencing range, 105 (45.5%) were pursuant to a substantial assistance motion made by the government under USSG § 5K1.1 (Substantial Assistance), 32 (13.9%) were pursuant to an early disposition or fast track motion made by the government under USSG § 5K3.1 (Early Disposition Programs), and 9 (3.9%) were otherwise pursuant to a plea agreement. Therefore, the government initiated or plea bargained for almost two thirds (63.2%) of the sentences below the applicable guideline sentencing range.

Downward departures were granted for other reasons identified in the *Guidelines Manual* in 31 cases, which represents 13.4 percent of the cases sentenced below the applicable sentencing guideline range. The remaining 54 cases sentenced below the applicable guideline sentencing range appear to be based upon sentencing authority established in *Booker,* which represents 23.4 percent of the cases sentenced below the applicable guideline sentencing range.

Also noteworthy is the fact that 19 cases were sentenced above the applicable guideline sentencing range. These sentences were divided almost evenly between sentence increases pursuant to upward departure provisions contained in the *Guidelines Manual* and increases based upon sentencing authority established in *Booker*. Combined they comprise 2.7 percent of the post-*Booker* cases, which represents more than a three-fold increase above the average upward departure rate of 0.7 percent for fiscal years 2000–2002.[15]

This very early preliminary data since *Booker* seems to indicate that courts are sentencing pursuant to the Federal Sentencing Guidelines in the overwhelming majority of cases. Only 7.8 percent of the cases appear to be sentenced below, and only 1.3 percent appeal to be sentenced above, the applicable guideline sentencing range based upon sentencing authority established in *Booker*. Therefore, courts sentenced pursuant to the Federal Sentencing Guidelines system as a whole, including upward and downward departure policy statements contained in the *Guidelines Manual,* in 90.9 percent of the cases analyzed for this period.

In addition to its timely data collection and analysis, the Commission has scheduled another two-day hearing on February 15 and 16, 2005, to gauge the impact of *Booker* and continue building a record of informed discussion. We expect several witnesses representing a broad spectrum of parties interested in the federal criminal justice system to testify.

As evidenced by our testimony today, the Commission is monitoring closely emerging case law to see how district courts rely on the Federal Sentencing Guide-

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[12] Of the 733 cases analyzed, in 41 cases the Commission was unable to determine whether the sentence was within the guideline sentencing range, including for example class A misdemeanors for which there was no applicable guideline range or immigration offenses in which the presentence report was waived and the sentence imposed was "time served."

[13] *See,* Table 26 of the 2002, 2001, and 2000 Sourcebook of Federal Sentencing Statistics.

[14] *Id.*

[15] *Id.*

lines in the post-*Booker* era, how appellate courts interpret what is an "unreasonable" sentence,[16] and whether the Sentencing Commission must resolve any new resulting conflicts among the circuit courts.[17]

The Commission also is continuing to train judges, probation officers, prosecutors, and defense attorneys on guideline application and the extensive provisions of the Sentencing Reform Act that remain in full force and effect.

As further evidence of the Sentencing Commission's continued vitality and our belief in the continued relevance and importance of the Sentencing Guidelines, next week the Sentencing Commission is scheduled to vote to publish for comment proposed guideline amendments that would implement congressional directives and other legislation concerning identity theft and antitrust offenses. In short, our core work continues uninterrupted.

Conclusion

In closing, the Sentencing Commission recognizes that the *Booker* decision presents new, potentially significant challenges to federal sentencing. The Sentencing Commission concurs with a recent admonishment to sentencing courts, however, "that *Booker/Fanfan* and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." [18] The Sentencing Commission firmly believes that *Booker* requires that sentencing courts calculate the applicable guideline sentencing range. We are noticing in some case law that different sentencing courts are giving the Federal Sentencing Guidelines varying weights. In addition, we are unsure of how appellate review for "unreasonableness" will work in practice, or how the courts of appeal will resolve the issue of how much weight sentencing courts should accord the guidelines.

The Sentencing Commission and its staff are closely monitoring these and other issues. We are dedicated to our mission to carry out the goals of sentencing reform and, as the *Booker* decision itself says, "to provide certainty and fairness in meeting the purposes of sentencing [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." [19]

As we move forward in the wake of *Booker*, we are ready to assist Congress in any way it deems appropriate. Mr. Chairman, Ranking Member Scott, and Members of the Committee, thank you again for holding this very important hearing. I will be glad to answer any questions you may have.

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[16] *See, United States v. Crosby,* F.3d. , 2005 WL 240916 (2nd Cir.) (recognizing that "reasonableness" is "inherently a concept of flexible meaning, generally lacking precise boundaries" and declining to establish per se standards of reasonableness).

[17] *See, Braxton v. United States,* 500 U.S. 344 (1991).

[18] Crosby, 2005 WL 240916, at *7.

[19] *Booker*, 125 S. Ct. at 767 (opinion of BREYER, J) (quoting 28 U.S.C. § 991(b)(1)(B)).

Attachment A

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

January 21, 2005

MEMORANDUM TO ALL: **CHIEF JUDGES, UNITED STATES COURTS OF APPEALS**
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT COURT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS OF APPEALS
CLERKS, UNITED STATES DISTRICT COURTS
CHIEF PROBATION OFFICERS

SUBJECT: Documentation Required to be Sent to the Sentencing Commission

On January 12, 2005, the Supreme Court issued its opinion in U.S. v. Booker, ___S.Ct. ___, 2005 WL 50108 (Jan. 12, 2005), in which two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3553(b)(1) and 3742(e), were severed and excised. The opinion makes clear that "with these two sections excised...the remainder of the Act satisfies the Court's constitutional requirements." Booker at 16 (opinion of BREYER, J.).

This memorandum reiterates and emphasizes the importance of continuing to submit sentencing documents to the Sentencing Commission in accordance with the requirements of 28 U.S.C. § 994(w). This subsection of the statute requires the Chief Judge in each district to ensure that a report of sentence be submitted to the Commission within 30 days of entry of judgment. It also requires that five specific sentencing documents (judgment and commitment order, statement of reasons [including the reasons for any departures], any plea agreement, indictment or other charging document, and presentence report) be included with the report, along with any other information the Commission deems appropriate.

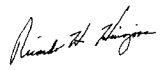
Booker makes clear that "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court decisions, undertaking research, and revising guidelines accordingly. See 28 U.S.C.A. § 994." Booker at 21 (opinion of BREYER, J.). The collection and analysis of sentencing data continue to be extremely important aspects of the Commission's work. Since Booker makes no change in the document submission requirements of 28 U.S.C. § 994(w), it is imperative that all districts continue to make these submissions to the Commission in a timely manner.

It is particularly important that judges continue to comply with the requirements of 28 U.S.C. § 3553(c) by providing a complete statement of reasons for imposing the sentence. From the standpoint of the Commission and the judiciary as a whole it will be necessary to be able to capture information about any sentence that varies from the guidelines and the reasons for such a variance. Unless sentencing judges comply with § 3553(c) by giving specific reasons for sentences that vary from the guidelines, the Commission will be unable to provide complete information. Providing specific, detailed information in the statement of reasons will also assist the courts of appeals in reviewing sentences for reasonableness.

The documentation will be useful to the Judiciary, the Commission, and the Congress as we strive to continue to carry out the goals cited by the Supreme Court, to "provide certainty and fairness in meeting the purposes of sentencing [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." Booker at 21 (opinion of BREYER, J.) (quoting 28 U.S.C. § 991(b)(1)(B)).

In the weeks that follow, the Commission will be working with the Criminal Law Committee to determine whether revisions to any of the sentencing forms would be advisable. In the meantime, we would ask courts to refrain from modifying locally the Statement of Reasons adopted by the Judicial Conference at its September 2003 session. JCUS-SEP 03, p. 18. If you have suggestions for revising any of these forms, please communicate them to Kim Whatley at the AO at e-mail address Kim_Whatley@ao.uscourts.gov who will compile them for consideration by the Committee and Commission.

Thank you for your prompt attention to this memorandum.



Ricardo H. Hinojosa
Chair, United States Sentencing Commission

Sim Lake
Chair, Criminal Law Committee of the Judicial Conference of the United States

Mr. COBLE. Mr. Collins?

STATEMENT OF DANIEL P. COLLINS, PARTNER, MUNGER, TOLLES, AND OLSON LLP

Mr. COLLINS. Good morning, Chairman Coble, Ranking Member Scott, and Members of the Subcommittee. I appreciate the opportunity to testify here today.

By declaring the U.S. sentencing guidelines to be merely advisory, the United States Supreme Court's decision in *Booker* effectively demolishes in one stroke the entire edifice of Federal sentencing reform that had been carefully built over the course of the last 20 years. The Court has invited the Congress explicitly to rebuild a, quote, "sentencing system compatible with the Constitution that Congress judges best for the Federal system of justice." I applaud you, Mr. Chairman, for moving quickly to hold hearings on this important task.

I would like to begin my remarks by emphasizing the importance of the issue before you. Federal sentencing policy is not some abstract matter about the mechanics and details of court procedure. It is a grave matter that goes to the heart of one of the Government's first and foremost responsibilities, the protection of public safety.

In my view, it is no accident that the unprecedented and historic declines in crime rates in America have coincided with the rise of determinate sentencing under the Federal sentencing guidelines and analogous systems at the State level. Common sense suggests that if you lock up criminals for longer periods of time and lock up the very worst for very long periods of time, there will be less crime.

We simply cannot be sure that if we heed recent calls for less severity, for smaller prison populations, or for greater flexibility, we will not again see a spike in crime rates. To accede to such measures would be to engage in an irresponsible experiment that would literally gamble with the lives of this nation's citizens.

Accordingly, it is my strong recommendation that Congress act, and act promptly, to rebuild the Federal sentencing system so that it can function most nearly as it did before *Booker*. If Federal sentencing policy wasn't broke before *Booker*, don't fix it into something entirely different. The invalidation of the guidelines in *Booker* does not call into question any of the ultimate values or objectives of Federal sentencing policy. It simply found fault with the mechanisms by which those values were achieved in certain cases.

What, then, is the source of the flaw that was identified in *Booker*? *Blakely* and *Booker* are quite clear on that point. In *Blakely*, the Court stated that the crucial factor that distinguished Washington's sentencing system from an admittedly constitutional system of complete judicial discretion was the fact that in the absence of additional factual findings beyond those admitted by the defendant or found by the jury, the defendant has a legal right to a lesser sentence, and the word "right" is italicized in the Court's opinion.

Accordingly, the flaw in the guidelines under *Booker* and *Blakely* is that in the absence of particular findings, the guidelines set a legally enforceable maximum sentence that is below the theoretical statutory maximum. By contrast, the Supreme Court has squarely

held that basing a minimum sentence on additional facts found solely by the judge does not violate the sixth amendment as construed in Apprendi.

If the goal is, as I think it should be, to preserve the practical substance of the guidelines system to the greatest extent possible and with as little alteration as possible, the question about what Congress should do almost answers itself. If the problem is created only by the guidelines' use of ranges with legally enforceable maxima below the statutory maximum, then the solution is to get rid of those maxima. In other words, the sentencing guidelines would be fully restored exactly as they were before with the sole exception that in every case, the top of the authorized range would be the statutory maximum. *Booker* leaves little doubt that under current Supreme Court doctrine, such a system would be perfectly constitutional.

The only objection that I can perceive to this approach is the policy argument that it eliminates the protections the guidelines previously conferred against a "hanging judge," but this objection is wide of the mark. We now have accumulated 15 years of empirical data of the experience under the sentencing guidelines and that practical experience confirms that there is very little need to worry about this sort of excessive severity. In the last fiscal year for which data are publicly available, upward departures occurred in only 457 out of nearly 59,000 cases, a grand total of 0.8 percent. In this system, the hanging judge is a myth. We should not make fundamental structural changes solely to accommodate a problem that does not occur in more than 99 percent of the cases.

On the contrary, as I have testified in my previous appearances before this Committee, the problems with disparity have all been in the other direction. With the guidelines now being purely advisory, we can only expect these problems to reappear and to worsen. We should not abandon a highly successful system of guideline sentencing.

Finally, there is one additional aspect that I think ought to be addressed in any legislation. As I have noted, the Supreme Court has held in Harris that Apprendi did not apply to minima. It has also held in *Almendarez/Torres* that the Apprendi rule does not apply to the mere fact of a prior conviction. Those decisions were 5–4 and the Congress may wish to address the issue of severability and what should go into effect were the Court to reverse itself on those decisions.

I would be pleased to answer any questions the Committee may have.

Mr. COBLE. Thank you, Mr. Collins.

[The prepared statement of Mr. Collins follows:]

PREPARED STATEMENT OF DANIEL P. COLLINS

Chairman Coble and Members of the Subcommittee, I appreciate the opportunity to testify here today. By declaring the U.S. Sentencing Guidelines to be mere advisory, the United States Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), effectively demolishes in one stroke the entire edifice of federal sentencing reform that has been carefully built over the last 20 years. As the Court made clear, "[t]he ball now lies in Congress' court." 125 S. Ct. at 768. I applaud you, Mr. Chairman, for moving quickly to holding hearings on this important issue, so that the Congress can promptly move to rebuild a "sentencing system, compatible

with the Constitution, that Congress judges best for the federal system of justice." *Id.*

My perspective on federal sentencing policy is informed by my service over a total of nearly eight years in various capacities in the Justice Department. During the 1990s, I served three and one-half years as a federal prosecutor in the U.S. Attorney' Office in Los Angeles. More recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. During my time as an ADAG, I had the privilege of testifying before this Committee several times concerning a variety of provisions that were ultimately enacted into law in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003. The PROTECT Act enacted some of the most significant reforms in federal sentencing policy since the original enactment of the Sentencing Reform Act of 1984. I also helped to develop the Administration's 2002 proposal to strengthen federal sentencing of identity theft crimes, a proposal that I was pleased to see ultimately enacted into law as the Identity Theft Penalty Enhancement Act. I also helped coordinate the Department's 2003 review and revision of its policies on charging of criminal offenses, plea bargaining, sentencing recommendations, and sentencing appeals. While my views on federal sentencing policy are influenced by my prior experiences working on such matters in the Government, I am now back in private practice in Los Angeles, and I wish to emphasize that the views I offer today are solely my own.

WHAT IS AT STAKE

I would like to begin my remarks by emphasizing the importance of the issue before you. Federal sentencing policy is not some abstract matter about the mechanics and details of court procedure; it is a grave matter that goes to the heart of one of the Government's first and foremost responsibilities: the protection of public safety.

In my view, it is no accident that the unprecedented and historic declines in crime rates in America have coincided with the rise of determinate sentencing under the federal Sentencing Guidelines and analogous systems at the state level. I recognize that correlation does not *necessarily* equal causation, but I do not think it is just a coincidence—common sense suggests that if you lock up criminals for longer periods of time, and lock up the very worst for very long periods of time, there will be less crime.

In any event, I think the burden of doubt must be cast on the *critics* of the Sentencing Guidelines. We simply cannot be sure that the decisive move towards more determinate sentencing at the federal and state levels has *not* been an important factor in lowering crime rates. Put another way, we simply cannot be sure that, if we heed recent calls for less severity, for smaller prison populations, or for greater flexibility, we will not again see a spike in crime rates. To accede to such measures would be to engage in an irresponsible experiment that would literally gamble with the lives of this Nation's citizens.

Moreover, the ultimate measure for evaluating sentencing policy is not whether individual sentences can be said to meet some pre-conceived notion of a "proportionate" sentence. Proportionality is an important value, to be sure, and it is taken into account in the many gradations made within the guidelines system. But the vast diversity of competing views as to what constitutes a proportionate sentence is precisely what led to the enactment of the Sentencing Reform Act and the creation of the Sentencing Guidelines in the first place, and congressional consideration about how to rebuild the federal sentencing system should not get side-tracked into ultimately irresolvable debates about subjective notions of proportionality. Rather, sentencing policy must ultimately be evaluated in terms of its ability to accomplish the core goal of *ensuring public safety and reducing crime.* By that measure, the Sentencing Guidelines have been a unqualified success. That they have done so while simultaneously respecting and fostering important values of proportionality, consistency, and fairness, makes them all the more worth preserving and restoring.

REBUILDING THE EDIFICE OF FEDERAL SENTENCING

Accordingly, it is my strong recommendation that the Congress act—and act promptly—to rebuild the federal sentencing system so that it can function most nearly as it did before *Booker*. If federal sentencing policy wasn't broke before *Booker*, don't fix it into something entirely different. The invalidation of the Guidelines in *Booker* does not call into question any of the ultimate values or objectives of federal sentencing policy; it simply found fault with the *mechanisms* by which those values were achieved in certain cases.

In determining how to go about rebuilding the Guidelines system, it is essential to identify precisely what it was about the prior system that led to the constitutional defect identified by the Supreme Court. In *Blakely* v. Washington, 124 S. Ct. 2531 (2004), which addressed Washington State's sentencing system, the Court was explicit in stating that it was *not "find[ing] determinate sentencing schemes unconstitutional." Id. at 2540. On the contrary, the Court stated that the issue was how determinate sentencing "can be implemented in a way that respects the Sixth Amendment" as construed under the Court's landmark decision in Apprendi v. New Jersey,* 530 U.S. 466 (2000). *See Blakely,* 124 S. Ct. at 2540.

What, then, is the source of the flaw? *Blakely* and *Booker* are quite clear on that point. In *Blakely,* the Court stated that the crucial factor that distinguished Washington's sentencing system from an admittedly constitutional system of complete judicial discretion was the fact that, in the absence of additional factual findings beyond those admitted or found by the jury, "the defendant has a legal *right* to a lesser sentence." 124 S. Ct. at 2540 (emphasis in original). Indeed, the Court gave an example in order to illustrate its point:

> "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury."

Id. (emphasis in original). Likewise, in extending *Blakely* to the Sentencing Guidelines, the *Booker* Court emphasized that the defect in the Guidelines is that "[i]t became the judge, not the jury, that determined the *upper limits* of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance." 125 S. Ct. at 751 (emphasis added).

Accordingly, the flaw in the Guidelines under *Booker* and *Blakely* is that, in the absence of particular findings, the Guidelines set a legally enforceable *maximum* sentence that is *below* the theoretical statutory maximum.

By contrast, the Supreme Court has squarely held that basing a *minimum* sentence on additional facts found solely by the judge does *not* violate the Sixth Amendment as construed in *Apprendi. See Harris v. United States,* 536 U.S. 545, 568 (2002).

If the goal is, as I think it should be, to preserve the practical substance of the Guidelines system to the greatest extent possible and with as little alteration as possible, the question about how to do that almost answers itself: if the problem is created only by the Guideline's use of ranges with legally enforceable *maxima* below the statutory maximum, then the solution is to get rid of those maxima. In other words, the Sentencing Guidelines would be fully restored exactly as they were before, with the sole exception that, in *every* case, the top of the authorized range would be the statutory maximum. Because *Booker* is unambiguously clear in stating that the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range," 125 S. Ct. at 750, there can be little doubt that this revised system would satisfy *Booker* and *Blakely.*

The only objection that I can perceive to this approach is the *policy* argument that the revised system would eliminate the ability to ensure sentencing uniformity and fairness at the *top* as well as at the *bottom* of the Guidelines. Put simply, it eliminates the protection the Guidelines had previously conferred against a "hanging" judge. For a number of reasons, this objection cannot carry the day. As an initial matter, this objection ignores the obvious fact that, *as matters currently stand,* a defendant has no protection against a hanging judge other than the Court's newly fashioned appellate review of sentences for "reasonableness." *Booker,* 125 S. Ct. at 765–67, But the objection is wide of the mark for a more fundamental reason. We now have accumulated 15 years of experience under the Sentencing Guidelines, and that practical experience confirms that there is very little need to worry about this sort of excessive severity. For example, in the last fiscal year for which data are publicly available, upward departures occurred in only 457 of 58,684 cases sentenced nationwide—a grand total of 0.8%. In this system, the hanging judge is a myth. We should not make fundamental structural changes solely to accommodate a problem that does not occur in 99.2% of the cases.

On the contrary, as I have testified before in my previous appearances before this Committee, the problems with disparity have all been in the other direction. With the Guidelines now being purely advisory, we can only expect these problems to reappear and to worsen. It is therefore urgent that the Congress act promptly to restore the Guidelines system so that, as before, judges will at least be bound by the

highly reticulated and carefully tailored system of minimum sentences that it contains. We should not abandon the highly successful system of Guidelines sentencing.

ENSURING THAT A REBUILT SYSTEM SURVIVES

There is one additional aspect that I think ought to be addressed in any legislation that seeks to rebuild the Guidelines system after *Booker* and *Blakely*.

As I have noted, the Supreme Court held in *Harris* that *Apprendi* does not apply to mandatory minima. The Court has also continued to state that it does not apply to the mere fact of a prior conviction. *Blakely,* 124 S. Ct. at 2536; *cf. Almendarez-Torres v. United States,* 523 U.S. 224 (1998). Both *Harris* and *Almendarez-Torres* were 5–4 decisions, and Justice Breyer's concurrence in *Harris* and Justice Thomas' concurrence in *Apprendi* are alone enough to raise a question whether a future Court might, despite the force of *stare decisis,* see these matters differently. Were the Court to do so, it would be a travesty to have a replay of *Booker* in which a future Court might decide, once again, to "sever" the mandatory nature of the Guidelines so as to eliminate the constitutional difficulty.

Accordingly, I urge the Congress to give serious consideration to adding a title to whatever legislation emerges that would specifically address the severability issue. In other words, the Congress should add language that would have the effect of providing what system would go into effect if either *Harris* or *Almendarez-Torres* are overruled. There are a variety of options Congress could choose. For example, you might provide for a graded system of statutorily prescribed mandatory minima for all offenses (if *Harris* were overruled) or for submission of prior convictions to the jury (in the event *Apprendi* were extended to prior convictions). There is recent precedent, in the McCain-Feingold Act, for taking a more proactive approach toward the issue of possible severability. The Congress should likewise act to ensure that the system it puts in place here will survive for the long term. Indeed, the case for being proactive on severability is uniquely compelling here, because the Ex Post Facto Clause will prevent Congress from retroactively fixing the problem for the many thousands of cases decided in the interim.

I would be pleased to answer any questions the Committee may have.

Mr. COBLE. We have been joined by the distinguished gentleman from Texas, Mr. Gohmert, and Judge Hinojosa, as you know, he is a former judge, so we have two judges in our presence today.

Mr. Bowman, good to have you with us.

I stand corrected. I didn't see the gentlelady from California, Ms. Waters, has joined us, as well.

STATEMENT OF FRANK O. BOWMAN, III, M. DALE PALMER PROFESSOR OF LAW, INDIANA UNIVERSITY SCHOOL OF LAW

Mr. BOWMAN. Thank you, Mr. Chairman, Ranking Member Scott, distinguished Members of the Committee. Thank you for giving me an opportunity to appear before you today.

The Federal criminal justice system has been in a state of some excitement since the Supreme Court decided *Blakely v. Washington* last summer. *Blakely* cast the constitutional validity of the Federal sentencing guidelines into uncertainty, an uncertainty that was resolved, at least sort of, by the Court's decision less than a month ago in *Booker*. We now know that the guidelines as they were are unconstitutional, but we find, perhaps a little bit to our surprise, that the guidelines are with a stilt, albeit in a form that few anticipated and no one yet entirely understands. So the questions before us are, one, what does *Booker* mean, and two, what should Congress do about it?

I appear today in a dual capacity. On the one hand, I appear on behalf of the Sentencing Initiative of the Constitution Project, a bipartisan nonprofit organization that seeks solutions to difficult legal and constitutional problems. Shortly after *Blakely* was decided last summer, the Constitution Project launched its Sentencing Initiative and drew together a remarkably talented, experi-

enced, and bipartisan group to study the Federal sentencing system generally and the impact of *Blakely* in particular.

The group, which is headed by former Attorney General Edwin Meese and Harvard Professor Philip Heymann, who is formerly the Deputy Attorney General of the United States, has sent a letter to the Committee urging that Congress respond to *Booker* with caution. I have the honor to serve along with Professor David Yellen as co-reporter of the Constitution Project and I fully endorse the call for caution expressed in its letter.

My personal message today is also a counsel of caution and a recommendation against at least immediate major legislation. In particular, I recommend that Congress not enact so-called "topless guidelines" as an immediate response to *Booker*. Those who have been aboard the *Blakely* to *Booker* roller coaster from the beginning will recognize that this recommendation puts me as the original author of the topless guidelines proposal, ably described by Mr. Collins, in the somewhat peculiar position of recommending that you not do now precisely what I said you should do last summer. At a minimum, as Ricky used to say to Lucy, "it looks like I've got some 'splaining to do," so let me do it.

When *Blakely* was decided last summer, several things seemed clear. First, *Blakely* was going to create a God-awful mess in the Federal courts. On the one hand, the rationale of the opinion seemed plainly applicable to the Federal guidelines, and on the other hand, the Supreme Court reserved ruling on the Federal guidelines, so the lower courts were left in the position of some confusion until a new case brought the Federal guidelines before the Court.

Second, if *Blakely* was found to apply to the Federal guidelines, only two remedies seemed available to the Court. First, keep the guideline rules intact but require that all sentencing-enhancing guidelines facts be tried to juries or admitted in a guilty plea, or two, invalidate the guidelines rules, thus rendering them either completely void or advisory in the ordinary sense of the term, that is to say, a set of useful but legally non-binding suggestions.

The first of these remedies, taking judges out of guidelines fact finding and running the guidelines through juries and pleas, would be complex to the point of unworkability. The second possible remedy, voiding the guidelines altogether or making them merely non-binding suggestions, would work, but would abandon the accomplishments of the Sentencing Reform Act in favor of transferring unprecedented, unchecked sentencing power to judges.

In short, the prospect in July 2004 seemed to be a period of turmoil while the question of *Blakely*'s applicability worked its way up to the Supreme Court, followed by a Supreme Court ruling mandating either an unworkably complex system of *Blakely*-ized guidelines or an intolerable abandonment of constraint on judicial setting. In that setting, it seemed appropriate to suggest legislation that would restore order to the Federal courts and effectively restore the guideline system almost unchanged.

Now, how has the passage of time and the decision in *Booker* changed this assessment? First, the post-*Blakely* turmoil happened. It is water over the dam and no legislation passed today can undo it.

Second, I was wrong about the remedies available to the Court. Justice Breyer has crafted a third way. The nature of his remedial opinion alters the legislative equation in at least two ways. First, advisory guidelines in the *Booker* sense are not unworkable, as running the Federal guidelines through juries would have been. Nor are they an intolerable abandonment of constraint on judicial discretion in the sense that advisory guidelines as mere suggestions would be. Instead, *Booker* has given us a system that is workable in the near term and that will meaningfully constrain judicial discretion even though we don't yet know by how much.

I don't suggest that *Booker* created an ideal system. Congress may well want to alter it or replace it. I do suggest that the *Booker* system will work pretty well while we study it and consider alternatives.

Second, though *Booker* has created a system that will work, what *Booker* means as a constitutional matter is still unclear. We still don't yet know exactly what advisory means and we don't yet know how binding or presumptive guidelines can be before they will offend the Constitution. Thus, we can't be certain how much *Booker*ized guidelines will differ in practice from the old system and we can't be sure how to draft any replacement without falling afoul of the undefined limits of the *Booker* doctrine.

My own sense is that *Booker* is not simply an application of the *Blakely* doctrine to the Federal guidelines. In this sense, Justices Scalia and Stevens are correct, I think, in their complaint that the *Booker* remedy is inconsistent with the *Blakely* principle. It appears that this Court is deeply split between Justice Scalia's formalistic emphasis on jury fact finding and Justice Breyer's effort to create constitutional space for sentencing guidelines based on judicial fact finding. *Booker* creates, but does not resolve, this doctrinal split.

And the outcome of the settle over the split will turn, in part, on unknown, unpredictable factors. Justice Ginsberg's reasons for joining the *Booker* remedial majority, the state of the Chief Justice's health, the identity of his successor, should he retire, and lots of other things, we cannot know.

Therefore, in an environment of such profound constitutional uncertainty, Congress should exercise the greatest caution before legislating. The last thing we need is a brand new sentencing regime that will itself be found unconstitutional within months of its enactment.

Thank you, Mr. Chairman.

Mr. COBLE. Mr. Bowman, you do not have a corner on the market of having some explaining to do. Each of us finds ourselves in that position from time to time.

[The prepared statement of Mr. Bowman follows:]

PREPARED STATEMENT OF FRANK O. BOWMAN, III*

A COUNSEL OF CAUTION

I. Introduction

I am grateful to the Subcommittee for the opportunity to testify today regarding the impact on the federal sentencing system of the U.S. Supreme Court's recent decision in *United States v. Booker*, ____U.S.____, 125 S.Ct. 738 (Jan. 12, 2005), and the nature of an appropriate congressional response to that decision. I appear today primarily in my individual capacity, but also as a representative of the Sentencing Initiative of the Constitution Project.

The Constitution Project is a bipartisan, nonprofit organization that seeks consensus-based solutions to difficult legal and constitutional issues through study, consultation, and policy advocacy. Last summer, in response to the Supreme Court's decision in *Blakely v. Washington*, ____U.S.____, 124 S.Ct. 2531 (June 24, 2004), the Constitution Project created the Sentencing Initiative, a group co-chaired by former Attorney General Edwin Meese, now of the Heritage Foundation, and Philip Heymann, James Barr Ames Professor of Law at Harvard and former Deputy Attorney General of the United States. The members of the group represent a broad cross-section of institutional interests and political views. Professor David Yellen of Hofstra University and I are reporters to the Sentencing Initiative. Attorney General Meese and Professor Heymann have already forwarded a letter to Chairman Sensenbrenner expressing the consensus of the Constitution Project group that Congress should respond to the *Booker* opinion with caution. The Constitution Project anticipates issuing a more detailed report addressing the state of the federal sentencing system, the impact of *Blakely* and *Booker,* and recommendations about how the system might be improved.

I agree wholeheartedly with the position expressed in the Constitution Project letter and will be happy to answer any questions about the letter and the ongoing work of the Constitution Project's Sentencing Initiative. That said, the particulars of the analysis contained in the remainder of this testimony represent my personal views and not those of the Constitution Project's Sentencing Initiative or any of its members.

II. From *Blakely* to *Booker*

This is the second time in the past seven months that I have had the honor of appearing before this Subcommittee. On July 6, 2004, I testified about H. 4547, a bill involving drug crime, and about the impact of the immediate predecessor to the *Booker* decision, *Blakely v. Washington,* ____U.S.____, 124 S.Ct. 2531 (June 24, 2004).[1] On that occasion, and again the following week in the Senate Judiciary Committee,[2] I analyzed the *Blakely* opinion, concluded that it probably rendered the Federal Sentencing Guidelines unconstitutional as then applied, and offered a proposal to cure the apparent constitutional defect.[3] That proposal, sometimes referred to colloquially as "topless guidelines," and other suggested responses to *Blakely* have been the subject of ongoing debate. Today, in the wake of *Booker,* I find myself in the curious position of recommending that Congress not do what I recommended that it should do after *Blakely.* In short, along with the other members of the Con-

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[1] *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004, Hearing on H.R. 4547 Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary,* 108th Cong. (2004) (testimony of Frank O. Bowman, III), *available at* http://www.house.gov/judiciary/bowman070604.pdf.

[2] *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary,* 108th Cong. (2004) (testimony of Frank O. Bowman, III), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit—id=647.

[3] The most completely developed version of the proposal appears in my written Senate testimony, *id. See also,* Frank O. Bowman, III, *A Proposal for Bringing the Federal Sentencing Guidelines Into Conformity with Blakely v. Washington,* 16 FED. SENT. REP. 364 (2004). For critiques of the proposal, see *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary,* 108th Cong. (July 13, 2004) (testimony of Rachel Barkow), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit—id=3684; *Id.* (testimony of Ronald Weich), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit—id=3685. *See also,* Douglas Berman, "The 'Bowman Proposal': White Knight or Force of Darkness?," *available at* http://sentencing.typepad.com/sentencing—law—and—policy/2004/07/white—knight—or.html, and other critiques posted or referenced on Professor Berman's invaluable blog, Sentencing Law & Policy, http://www.sentencing.typepad.com.

stitution Project, I urge Congress to be cautious, to monitor the effects of the *Booker* decision on the operation of federal sentencing, and not to legislate unless and until it is clear that legislation is absolutely necessary and that any proposed legislation will withstand constitutional scrutiny.

My views on what Congress should do have changed because the *Booker* decision changed the legal landscape in ways that virtually no one anticipated. The balance of this testimony is devoted to explaining *Booker*'s surprising outcome and its implications for sentencing policy.

A. *Blakely* v. *Washington*

The legal tempest that brings us here today began on June 24, 2004, with *Blakely v. Washington.* The case involved a challenge to the Washington state sentencing guidelines. In Washington, a defendant's conviction of a felony produced two immediate sentencing consequences—first, the conviction made the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of conviction, and second, the conviction placed the defendant in a presumptive sentencing range set by the state sentencing guidelines. This guideline range was within the statutory minimum and maximum sentences. Under the Washington state sentencing guidelines, a judge was entitled to adjust this range upward, but not beyond the statutory maximum, if after conviction the judge found certain additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years. The fact of conviction generated a "standard range" of 49–53 months; however, after conviction, the judge found that Blakely had committed the crime with "deliberate cruelty," a statutorily enumerated factor that permitted imposition of a sentence above the standard range, and imposed a sentence of ninety months. The U.S. Supreme Court found that imposition of the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.

In reaching its result, the Court relied on a rule it had announced four years before in *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In the years following *Apprendi,* most observers assumed that *Apprendi*'s rule applied only if a post-conviction judicial finding of fact could raise the defendant's sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction. For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant's motive in committing the offense was racial animus. The Supreme Court held that increasing Apprendi's sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.

In *Blakely,* however, the Supreme Court found that the Sixth Amendment can be violated even by a sentence below what we had always thought of as the statutory maximum. Writing for a five-member majority, Justice Scalia held that, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[4] Any fact that had the effect of increasing this newly defined "statutory maximum" must be found by a jury.

Accordingly, the Federal Sentencing Guidelines seemed to violate the *Blakely* rule. A defendant convicted of a federal offense is nominally subject to any sentence between the minimum and maximum sentences provided by statute; however, under the Guidelines, the actual sentence which a judge may impose can only be ascertained after a series of post-conviction findings of fact. The maximum guideline sentence applicable to a defendant increases as the judge finds more facts triggering upward adjustments of the defendant's offense level. In their essentials, therefore, the Federal Sentencing Guidelines are indistinguishable from the Washington guidelines struck down by the Court.

Although in *Blakely* the Supreme Court reserved ruling on the applicability of its holding to the federal guidelines, the obvious implications of the opinion for the guidelines caused immediate consternation. Within weeks after *Blakely,* dozens of federal trial and appellate courts issued opinions on whether it affected the federal sentencing system, and if so how. A legion of commentators added their voices to

[4] *Blakely v. Washington,* 124 S. Ct. 2531, 2537 (2004) (emphasis in the original).

the conversation.[5] From this cascade of analysis, three basic possibilities seemed to emerge.

First, the Department of Justice and a number of courts of appeals contended that the federal sentencing system should survive *Blakely* intact. They attempted to distinguish the federal system from the Washington state system at issue in *Blakely* because Washington's guideline sentencing ranges were set by statute while the federal guidelines were drafted by a sentencing commission.

Second, some courts and commentators suggested that the Supreme Court could "*Blakely*-ize" the federal guidelines by holding that their sentencing rules survive, but requiring substitution of a system of jury trials and jury waivers for the structure of post-conviction judicial fact-finding and appellate review created by the Sentencing Reform Act.

Third, other courts and commentators argued that the Guidelines' sentencing rules cannot be severed from the procedure of post-conviction judicial fact-finding contemplated by the Sentencing Reform Act and formalized in the Guidelines. In this view, *Blakely* rendered the Guidelines unconstitutional *in toto.* The practical effect of such a ruling was thought to be that the Guidelines would become either wholly void and legally nugatory or at most advisory.

My reaction to these three apparent options was that the first was logically unsupportable and the latter two were practically undesirable. First, it seemed unlikely that the Supreme Court would distinguish the federal system from the Washington state system based on the institution that drafted the sentencing rules.

Second, judicial "*Blakely*-ization" of the existing federal guidelines was not an attractive prospect. It would require the courts, the Sentencing Commission, and Congress to reconfigure the entire process of adjudicating and sentencing criminal cases, from the Guidelines themselves to indictment and grand jury practice, discovery, plea negotiation practice, trial procedure, evidence rules, and appellate review. The simple fact is that the current Guidelines were never meant to be administered through jury trials. Trying to engraft them onto the jury system would be both a practical and theoretical nightmare.

Finally, the possibility that the Court would void the Guidelines entirely or declare them in some sense advisory seemed equally unattractive. Having no guidelines at all would confer even more discretion on sentencing judges than was true before the Sentencing Reform Act. Prior to the SRA, judges had largely unconstrained discretion to impose sentences, while the Parole Commission retained substantial authority over actual release dates. But the SRA abolished parole, and in a world with neither sentencing guidelines nor a Parole Commission, judicial sentencing authority would be absolute. Alternatively, "advisory guidelines" produced by constitutional invalidation of mandatory guidelines seemed almost indistinguishable from no guidelines at all. I, at least, could not see how the guidelines, once declared unconstitutional, could be anything more than useful, but legally nonbinding, suggestions.

B. "Topless Guidelines"

Faced with these three unappealing possibilities and the prospect of a long period of turmoil in the federal criminal courts, I suggested an interim legislative alternative. I proposed that the Guidelines structure could be brought into compliance with *Blakely* and preserved essentially unchanged by amending the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.

This proposal depended on a peculiarity of the constitutional structure erected in *Blakely.* As written, *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range. Prior to *Blakely,* the Supreme Court had held in *McMillan v. Pennsylvania,* 477 U.S. 79, 89–90 (1986), and reaffirmed in *Harris v. United States,* 536 U.S. 545 (2002), that a post-conviction judicial finding of fact could raise the *minimum* sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. Therefore, so long as facts found by judges applying the sentencing guidelines increase only the minimum sentence to be served by a defendant, and not the maximum sentence to which he was exposed, there would be no constitutional violation. In effect, the "topless guidelines" approach would convert the Guidelines into a system of permeable mandatory minimums. That is, the Guidelines would continue to function exactly in the way they always have, except that the sentencing range produced by guidelines calculations

[5] For discussion of the *Blakely* opinion and lower federal court opinions construing it, see Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved" A Plea for Rapid Reversal of Blakely v. Washington,* 41 AMER. CRIM. L. REV. 217 (2004)

in any given case would have the same lower value now specified by the Chapter Five sentencing table, while the upper value would be set at the statutory maximum. Judges would still be able to depart downwards using the existing departure mechanism, but would not have to formally "depart" to impose a sentence higher than the top of the ranges now specified in the sentencing table.

This proposal would require legislation because the expanded sentencing ranges produced by the proposal would fall afoul of the so-called "25% rule," 28 U.S.C. § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom.[6]

The proposal for "topless guidelines" was subject to a number of criticisms. The idea suffers from the notable disadvantage to defendants of imposing enforceable limits on judges' ability to sentence below the bottom of guideline ranges, while removing restrictions on judges' power to impose sentences above the top of the guideline range. Moreover, whatever its substantive merits, the constitutionality of this approach depends on the continued viability of *Harris v. United States.* Following the *Blakely* decision, many observers questioned the continued viability of *Harris,* a 5–4 decision about which even Justice Breyer (a member of the *Harris* majority) has expressed some doubt.

Thus far, of course, Congress has responded to *Blakely* with caution and has not adopted either "topless guidelines" or any other legislative approach. The question before the Subcommittee today is whether, now that *Booker* has found the Guidelines unconstitutional as formerly applied, Congress should act

C. *Booker* v. *United States*

The principle thrust of my testimony is that the *Booker* decision has altered the landscape in at least three critical respects, all of which suggest that Congress should respond with caution.

1. The meaning of Booker *is not yet clear*

As the Subcommittee is aware, in *Booker,* a five-member majority found that the Guidelines process of post-conviction judicial fact-finding was unconstitutional under the Sixth Amendment, but an almost completely different five-member majority wrote the opinion describing the proper remedy for the constitutional violation.[7] Justice Breyer, writing for the remedial majority, did not require juries to find all sentencing-enhancing guidelines facts, nor did he invalidate the Guidelines *in toto.* Instead, he merely excised two short sections of the Sentencing Reform Act,[8] leaving the remainder of the SRA intact, and thus keeping the guidelines intact but rendering them "effectively advisory."[9] Perhaps even more importantly, the remedial opinion found that both the government and defendants retained a right to appeal sentences, and that appellate courts should review sentences for "reasonableness."

The remedial opinion lends itself to different interpretations. Some have read "advisory" to mean that the Guidelines are no longer legally binding on trial judges and that the Guidelines are now merely useful advice to sentencing courts. However, a closer reading of the opinion suggests something quite different. First, because the opinion leaves virtually the entire SRA and all of the Guidelines intact, the requirement that judges find facts and making guideline calculations based on those facts survives. Second, because the remedies opinion retains a right of appeal of sentences and imposes a reasonableness standard of review, appellate courts will have to determine what is reasonable. The remedies opinion left undisturbed 18 U.S.C. § 3553(a), which lists the factors a judge must consider in imposing a sentence and includes on that list the type and length of sentence called for by the guidelines. Thus, the determination of "reasonableness" under the statute will necessarily include consideration of whether a sentence conforms to the Guidelines. The unresolved question is the weight that will be accorded to the guidelines sentence—will it be considered at least presumptively correct or will it be reduced to the status of only one among many other factors?

We do not know how the courts will resolve this critical question. Still, there are good reasons to think that the vast majority of judges will accord great weight to the sentencing guidelines. For example, in a thoughtful decision issued the day after *Booker* was announced, Judge Paul Cassell examined *Booker* and concluded that he

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[6] The proposal in its original form would have made any sentence above the guideline minimum appealable on an abuse of discretion standard. The fact that a judge imposed a sentence higher than that suggested by the policy statement for a typical case would be a factor in the determination of whether the judge had abused his or her discretion. I also recommended that the legislation creating "topless guidelines" sunset after eighteen months.

[7] Only Justice Ginsburg joined both halves of the Court's opinion.

[8] 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e).

[9] Booker, 2005 WL 50108, at *16.

was obliged to continue to sentence within the applicable guidelines range unless there were exceptional aggravating or mitigating circumstances.[10] Other judges have concluded that they have more flexibility after *Booker,*[11] but no court has held that the guidelines could be ignored. Appellate courts have just begun addressing *Booker*, but there is every reason to think that they will move expeditiously to resolve the questions it presents and that they will give adherence to the Guidelines a prominent place in their analysis of sentence reasonableness. For example, the United States Court of Appeals for the Second Circuit recently held in that judges do not have "unfettered discretion" after *Booker* and that the congressionally-mandated factors set forth in the Sentencing Reform Act, prominently including the Guidelines, still constrain the imposition of criminal sentences.[12]

In short, we don't yet know what the post-*Booker* sentencing regime will look like. At a minimum, Congress should abstain from legislative intervention long enough for the courts to clarify what *Booker* means in practice. If Congress is to legislate, it should have a clear understanding of the situation it is setting out to correct.

*2. The post-*Booker *system may be preferable to the uncertainties of legislating a new sentencing system*

If *Booker* produces a system in which the federal sentencing guidelines are strongly presumptive, that may be a satisfactory outcome for many, at least in the short to medium term. Such a system would operate very much as the Guidelines always have, with the undoubted difference that judges would have somewhat greater freedom to sentence outside the guideline range. So long as the judges do not employ the increased flexibility to excess, and so long as both the Department of Justice and Congress are prepared to view some modest increase in judicial variance from the guidelines with a wary but tolerant eye, the system could work surprisingly well. At a minimum, it could work well enough to give all the institutional actors time to study and consider thoroughgoing reform of the Guideline system in the post-*Booker* era.

With respect to "topless guidelines" in particular, I suggested them in July 2004 because I was troubled by the prospect of prolonged turmoil in the federal courts following *Blakely,* and because neither of the seemingly likely results of applying *Blakely* to the federal system—"*Blakely*-ized" guidelines run through juries or purely advisory guidelines-as-non-binding-suggestions—was desirable. Both of these considerations have altered. First, a good deal of the disruption I hoped might be avoided through rapid legislation in July 2004 has already happened, cannot be undone, and may be compounded by over-hasty legislation. Second, in *Booker,* the Court adopted neither "*Blakely*-ized" nor purely advisory guidelines, but a system that in the vast majority of cases will probably work just like the pre-*Booker* guidelines. At worst, *Booker* seems to have created a system that is not an obvious disaster in need of immediate legislation, but a workable system whose strengths and weaknesses have yet to be determined.

3. Booker *creates tremendous uncertainty about the basic constitutional rules governing sentencing and thus raises doubts about the constitutional viability of legislative responses to that decision.*

As noted in the Constitution Project's letter, "If Congress decides to act, the most basic requirement for a new system is reasonable certainty that it will survive constitutional challenge." *Booker* throws the basic constitutional rules governing criminal sentencing into even greater confusion than did *Blakely. Blakely* laid out a simple, almost mechanical, rule: Any fact that increases a defendant's maximum sentencing exposure must be found by a jury. This rule seemed so absolute that it would render unconstitutional any structured sentencing system in which judicial fact-finding could raise the top of a defendant's guideline sentencing range, even if as was the case under the Washington guidelines, that range was only strongly presumptive.

However, *Booker* seems to take an entirely different approach. The federal guidelines survive. Judges must find facts and use those fact findings to determine guidelines ranges with both tops and bottoms. Some courts have interpreted *Booker* to mean that the guideline ranges—including their tops—are at least presumptively

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[10] *United States v. Wilson,* Case No. 2:03–CR–00882 PGC (D. Utah).

[11] *See, e.g., United States v. Nellum,* 2005 US Dist LEXIS 1568 (N.D. Ind. Feb. 3, 2005).

[12] United States v. Crosby, 2005 WL 240916 (2d Cir. Feb. 2, 2005). *See also, United States v. Hughes,* ____F.3d____, 2005 WL 147059 at *3 (4th Cir. Jan. 24, 2005) (holding that "[c]onsistent with the remedial scheme set forth in *Booker,* a district court *shall first calculate* (after making the appropriate findings of fact) *the range prescribed by the guidelines.* Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence.") (emphasis added).

reasonable. It would appear that Justice Breyer is trying to shift this line of cases away from Justice Scalia's narrow focus on the role of juries toward a world in which guidelines setting *presumptive* sentencing ranges are constitutionally valid. At a minimum, the Court is struggling mightily to define its direction and until it speaks more definitively, it will be difficult, if not impossible, for Congress to enact any remedial legislation with real confidence in its constitutionality.

Even more particularly, I think the *Booker* decision casts additional doubt on the continued viability of *Harris v. United States* and thus on the desirability of turning immediately to "topless guidelines." We know that *Booker* authorizes guideline ranges, with tops, determined by post-conviction judicial fact-finding. If the Court ultimately accords those ranges at least some measure of legally presumptive effect, then the distinction between constitutional and unconstitutional guideline systems becomes the degree of presumptiveness of the tops of the guideline ranges. Put another way, the constitutional distinction between a "statutory maximum" which must be determined by a jury under *Blakely* and the top of a presumptive guideline range that can be determined by a judge under *Booker* can only be the degree of discretion afforded the judge to sentence above the top of the range. If the Court decides that presumptive limits on maximum sentences are constitutionally acceptable, it is hard to see why the same reasoning should not apply to minimum sentences.

Those who doubted the continued viability of *Harris* have noted that Justice Breyer was the fifth vote for preserving statutes that set minimum sentences through post-conviction judicial fact-finding, and that he expressed doubt about how *Harris* could be squared with *Apprendi.* Before *Booker,* it seemed plausible that Justice Breyer and other members of the Court who favor keeping the Constitution hospitable to structured sentencing systems would hold on to *Harris* because it provided at least one tool of structured sentencing. A system that constrains judicial discretion only by setting minimums is awkward and asymmetrical, but not wholly useless. After *Booker,* it is no longer clear that the weird asymmetry of *Blakely* and *Harris* is necessary. It would make far greater sense for the Court to hold that real, hard, impermeable statutory maximum *and minimum* sentences can only result from facts found by juries or admitted by plea, while at the same time permitting structured sentencing systems that use judicial fact-finding to generate sentencing ranges, presumptive at both top and bottom, inside the statutory limits. Such an approach would appeal to many members of the Court because it treats minimum and maximum sentences consistently, gives a meaningful role to juries in setting the actual minimum sentences that matter more to defendants than theoretical maximums, preserves the accomplishments of the structured sentencing movement, and confers constitutional status on judicial sentencing discretion.[13] If this is the direction the Court is heading, then *Harris* is in danger and "topless guidelines" could be found unconstitutional in short order.

III. Beyond Booker—the Future of Federal Sentencing

The Federal Sentencing Guidelines have been immensely controversial since their advent in 1987. They have actually enjoyed many successes, but the chorus of criticism has grown over the years. As my professional biography suggests, I believe that vigorous law enforcement and the imposition of meaningful terms of incarceration on serious criminal violators are crucial tools in the fight against crime. Likewise, I am not a proponent of unchecked judicial sentencing discretion. My practice experience, my time with the Sentencing Commission, and my subsequent work in the academy have convinced me of the importance of sentencing guidelines and other mechanisms of structured sentencing in achieving just, equitable, and effective criminal sentences. More particularly, I have been a vocal advocate of the federal sentencing guidelines.[14] Nonetheless, even I have reluctantly concluded that the federal sentencing system has in recent years developed in such unhealthy and dysfunctional ways that serious rethinking of the guidelines is now called for.[15] The *Blakely* and *Booker* decisions have provided the crisis that public institutions sometimes require before they engage in careful self-examination. I enlisted as reporter to the Constitution Project because it seemed an ideal forum for considering the state of federal sentencing working with a remarkably diverse and talented group

[13] For a more complete outline of how this constitutional model of sentencing might work, see Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment,* 17 FEDERAL SENTENCING REPORTER 1 (October 2004).

[14] *See, e.g., Id.;* Frank O. Bowman, III, *Fear of Law: Thoughts on 'Fear of Judging' and the State of the Federal Sentencing Guidelines,* 44 ST. LOUIS L.J. 299 (2000) (defending the federal sentencing guidelines as a beneficial set of constraints on judicial sentencing authority).

[15] See Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Functional Analysis,—Columbia L. Rev. ____(forthcoming Spring 2005).

of people. Our work so far has confirmed what I, and I think all of us, suspected—that the difficulties with federal sentencing are serious and can be seen and agreed upon by well-informed legal professionals of widely divergent political and institutional perspectives.

My counsel to the Subcommittee is a counsel of caution. Do not act precipitously because doing so may make an uncertain situation worse. Instead, study what *Booker* has wrought. Direct others, notably the Sentencing Commission and the Department of Justice, to gather the information and perform the analysis that will assist you in your study. And take the opportunity created by *Blakely* and *Booker* to work together with all the many people of goodwill who are eager to work with Congress, with the Justice Department, with the judiciary, and with the Sentencing Commission to improve the administration of federal criminal justice.

Mr. COBLE. Gentlemen, thank you very much for your contribution. Keep in mind, the 5-minute rule applies to us, as well, so if you could keep your responses as terse as possible, we would be appreciative.

Mr. Wray, from a law enforcement perspective, would you outline for the Subcommittee in a little greater depth how an advisory system of guidelines will hamper a prosecutor's ability to gain cooperation from criminal defendants?

Mr. WRAY. Yes, Mr. Chairman. I think you have put your finger on what I would consider one of the most important vulnerabilities in the post-*Booker* environment.

First, we think that under the guidelines as they existed before *Booker*, a defendant could only obtain consideration for his cooperation at sentencing based on a motion by the Government. In the post-*Booker* world, that is no longer the case. The reason why that is a problem is because the Department is in the best position to evaluate the truthfulness and value of the cooperator's assistance, by putting it in the context of the entire body of the investigation to determine whether it is consistent, corroborated by other evidence. And that is critical because we all want to ensure that people who cooperate in criminal investigations are telling not half-truths, but complete truth.

Second, the *Booker* environment creates less of an incentive for cooperating defendants because they can seek to assume some of the benefits of cooperation without the risks. That is, they can tell part of the story, but not the whole story, and that is particularly troubling for the Government's effort to try to secure cooperation in organized criminal cases, terrorism, corporate fraud, drugs, gangs, and that sort of thing. That may be particularly critical where timeliness of information for cooperators, as all the members of this Subcommittee know, can be critical to advancing cases against CEOs in corporate fraud cases, drug leaders in big drug cartel cases, and so forth.

Mr. COBLE. Thank you, sir.

Mr. Collins, what impact did the de novo standard of review have on judges who granted downward departures after the PROTECT Act, and if any, those who imposed enhanced sentences?

Mr. COLLINS. Mr. Chairman, the Sentencing Commission's 15-year report specifically notes that the Department had indicated—and it cites a number of cases in the report where immediately after the enactment of PROTECT and the application of the de novo standard of review—there were a notable increase in the number of instances of appellate reversals of downward departures, suggesting that the change in the standard of review did have a

positive effect on curing a problem that Congress was concerned with.

Mr. COBLE. Mr. Wray, again I am going to ask you, do you have examples of courts that have sentenced defendants to unreasonable sentences or based sentences upon factors prohibited by the guidelines?

Mr. WRAY. Yes, Mr. Chairman. We have a couple of examples that are mentioned a little bit in my written statement. I would mention in particular a California case, I think it was in Southern California, where four men were convicted of smuggling more than a ton of cocaine from Colombia. They were sentenced to 41 months when the guidelines provided for a sentence of 235 to 293 months. That is a situation where you are going to have defendants—in fact, we have had defendants in the same State engaged in the same conduct receiving sentences of 20 or 30 years, whereas those defendants got 41 months for no principled reason.

In Wisconsin, we had a bank fraud involving an officer where the guidelines provided for a 36 to 47 month sentence and the judge reduced it in the wake of *Booker*, based on considerations like the defendant's motivation to keep the client's business afloat and the fact that the conviction resulted in financial distress for the defendant. So there are examples that are starting to emerge that make that point.

Mr. COBLE. Thank you.

Judge Hinojosa, in your testimony at page four, you indicate you believe that sentencing courts should give substantial weight to the Federal sentencing guidelines in determining the appropriate sentence to impose. Explain your position on whether or not there is support for such a standard under *Booker*.

Judge HINOJOSA. The Court was silent on that issue, as far as I can tell. However, I think the support exists, as I indicated in the written and the oral statement that I have made here, in the fact that the Sentencing Commission in promulgating and refining the guidelines has made determinations based on statutorily directed factors that are used under 3553(a). In fact, the Commission was directed in promulgating and refining the guidelines to take those into consideration, in addition to the fact that Congress itself has the right to review the guidelines as they are presented by the Commission and it must indicate to us that Congress' approval of the guidelines indicates that Congress itself feels strongly that the goals of the Sentencing Reform Act are met by the guidelines. Therefore, they should be given substantial weight.

Mr. COBLE. My red light illuminates in my eye. Mr. Bowman, I will get to you later.

Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Wray, I was intrigued by your statement that the Federal guidelines have reduced crime. What portion of the violent criminals that are sentenced in America today are sentenced in Federal court?

Mr. WRAY. Ranking Member Scott, I don't have that percentage. I can tell you that—and I believe what I meant to say, I am not sure if I said this or not, is that sentencing regimes like the Federal sentencing guidelines—in other words, I think I pointed out

that a number of States have followed Congress's lead in adopting similar systems and it is our view that the combination of the Federal guidelines in the Federal system, and in the State systems which track in many ways the Federal system, have resulted in that reduction in violent crime.

Mr. SCOTT. And do you have some studies that show the pattern that those States that actually increase sentences had a larger reduction in crime than the general reduction that was going on all over the country?

Mr. WRAY. I don't have that information for you today. I would be happy to try to provide that in supplemental questions. I do think there is information, if I recall correctly, that shows, for example, in California that there have been significant reductions in the wake of their adoption of a system like that.

Mr. SCOTT. I am saying I know there are reductions. We had Project Exile in Richmond, Virginia. When it went into effect, the crime rate went down. When you look at other cities similarly situated that didn't have Project Exile, the crime rate went down more. So my question is whether or not you see any pattern that there is a real effect on longer sentences and reduced crime. Just in some States did it go down. But in all States, the crime rate went down. There are plenty of studies that show there is no pattern at all and I was just wondering, in abolishing parole and all that kind of stuff, do you have any credible studies that back up what you said?

Mr. WRAY. I do believe we have information that shows that the implementation of so-called truth-in-sentencing regimes across the country, both in the Federal system and in the majority of the States, have contributed to a significant reduction in violent crime. I would be happy to respond in supplemental written questions to provide more information if that would be helpful.

Mr. SCOTT. It would be helpful, and I would hope it would be in the form that would show a pattern, not just that you did it and crime went down, but you did it but crime went down in a pattern that suggests that the longer sentences had something to do with the reduction. So I look forward to that information.

Judge Hinojosa, you tried a lot of cases and I am sure you would recognize that the seriousness of a crime isn't always conveyed by the code section that was violated. Some people can violate the same code section and common sense tells you that one crime was much more serious than the other and that ought to be reflected in the sentence.

You still have the guidelines. In the present system with them being advisory and not mandatory, is it more likely or less likely that the defendant will get an intelligent sentence in the present system or with the mandatory guidelines?

Judge HINOJOSA. I guess Congressman Coble pointed out how long I have been on the bench, more or less, by indicating who appointed me to the bench, so I have actually done sentencing both under pre-guideline system for close to 5 years and after the guidelines. I have to say that the guideline system was of great benefit to the sentencing process, which is the most difficult thing that a judge has to do.

Prior to the guidelines, you wanted to be consistent, you wanted to treat like defendants for like criminal law offenses more or less

the same, but it was very difficult without having a guideline system and you spent a lot of your time trying to determine what you had done in a similar case with someone with a similar prior history with regard to their particular sentence because you wanted to be consistent, you wanted to be fair, and you wanted to give the type of sentence you were giving on a regular basis, but that was just you individually as opposed to all the other judges.

The guideline system under the Sentencing Reform Act was created to try to prevent those kind of problems and it had its effect. It is a difficult process, but I do think that the Federal guideline system provides the considerations under the Sentencing Reform Act. As they are now, as advisory, the Commission's position as well as my position continues to be that the *Booker* decision, and I may have misspoken with regard to Congressman Coble's question, does indicate that the guidelines have to be consulted and considered with regard to every sentence, which would therefore mean substantial weight should be given to them, and I do think that it is important to do that.

As a judge, you have to make the findings on the record within the guideline system, or if not, you cannot just generally say, I have considered the guidelines but I have decided to proceed with this sentence because we will go right back to the situation we were beforehand.

Mr. SCOTT. The present situation gives you flexibility. Is that helpful in assessing an intelligent situation? I mean, some people similarly situated actually come into your court charged under different code sections, and you look at it and it is exactly the same behavior.

Judge HINOJOSA. There is flexibility, obviously, under the *Booker* decision, but I strongly believe after the number of years that I have sentenced individuals under the guidelines system that there was flexibility within the guidelines system. I did not have to proceed with relevant conduct unless I made a finding that I was convinced that that was the individual's relevant conduct. With regard to role in the offense, I can make adjustments upward or downward depending on what I saw the evidence is like with regard to every single finding under the guidelines.

I do have to say those were decisions I would make without ever telling an individual when I would sentence somebody before the guidelines system whether there was a firearm involved, what kind of drugs were involved, the amount of the drugs involved. Those were all factors with no transparency in the pre-guidelines system. But I do think there was some discretion within the guidelines system that we have failed to state within the past in the system itself because the judge still had to make those findings.

Mr. COBLE. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake, is recognized for 5 minutes.

Mr. FLAKE. Thank you, Mr. Chairman, and I thank the witnesses.

While this hearing is focusing on sentencing, that is kind of the tail end of the criminal justice system. Some argue that we need to look much broader, at the front end, the criminal laws that we have on the books. I think Attorney Generals Meese and Thorn-

burg have criticized the rapid expansion of the code. Last year, the Federalist Society published a study noting there are more than 4,000 Federal offenses that carry criminal penalties.

My question is this, and I will go to Mr. Wray first. Why does it not make sense to take a year and to see how *Booker* plays out, and during that time, have a commission to look at the code itself and then come back, if we need to, and make changes to both the code and the sentencing guidelines?

Mr. WRAY. Congressman, I think we believe that while Congress should certainly not act rashly, that we do believe that there are certain vulnerabilities that exist in the post-*Booker* world that we already know are there and that are already problematic and that already require attention. We also know, with a considerable body of experience, we have the landscape that existed in the years before the Sentencing Reform Act as well as the experience under the sentencing guidelines under the Sentencing Reform Act, as Judge Hinojosa has described, and I think that tells us certain things about how judicial discretion works in our system.

So I think that is a reason why we think there are certain things that Congress ought to tend to in a prompt fashion.

Mr. FLAKE. I understand, and I don't think anybody is looking to return to a pre-guideline period. You have mentioned there are certain problematic things already. What are those?

Mr. WRAY. The ones that I would point to in particular are the ability for courts to consider prohibited factors that they couldn't consider under the guidelines as they existed before *Booker*, factors that the Commission, based on its diversified experience and so forth over the years have already identified as things that shouldn't be considered as a basis in this, so that is one.

The second is its effect on cooperation, which is absolutely a critical tool for law enforcement in everything from terrorism to corporate fraud to any kind of organized criminal activity.

The third would be the appellate standard, this reasonableness standard that we have already talked about a little bit. We are very concerned that this will produce greater disparity because different courts are going to have different definitions of what reasonableness means and that won't provide the kind of rigorous, consistent review that the Congress, I think, intended with the Sentencing Reform Act and that we so badly need to keep in the system.

Mr. FLAKE. Judge Hinojosa, returning to the code, 4,000 Federal offenses, do you see a need to go into that?

Judge HINOJOSA. I think for a long time, people have seen a need for that, Congressman. Whether that can be done quickly with all the policy issues that that brings up, it would be something you would be better equipped to answer than a Federal judge or a Chair of the Sentencing Commission.

I will say that if there was an interest on the part of Congress to do so, the Commission, with the diversity of the members of the Commission, from our experience standpoint, and the staff, would be willing to help in any way that we could and to provide any information or service to the Congress that you would be interested in us doing.

Mr. FLAKE. Judge, I take from your testimony that you think that we could go a year and gather some evidence and see where we are after *Booker* to be better informed about what we need to do in the future. Is that the case?

Judge HINOJOSA. That is ultimately your decision, but I will say that if you are going to wait a year in order to gather this information, what would be important during this period of a year is that we make sure that the sentencing courts during this period of time, so we can compare apples and apples rather than apples and oranges, are still making the findings on the record with regard to the sentencing guidelines and departure policy within the guidelines, and then if they are sentencing varying from the guidelines, stating the reasons for varying from the guidelines, because if not, if we are just paying lip service to, "I considered the guidelines," but without going through the findings, we will not be able to compare that data to the previous years' data when the guidelines were actually mandatory.

And I think also it would be important with regard to this potential weight that is given, or the weight that is given to the guidelines, for that to be uniform across the country in order for you and for the Commission and every other interested party to have valuable information to be able to compare the system, because if not, during that 1-year period, we will be comparing apples and oranges with different situations possibly in different parts of the country, or depending on the appellate decisions or sentencing court decisions.

Mr. FLAKE. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman's time has been expired.

We have been joined by the distinguished gentleman from Ohio, Mr. Chabot.

The chair recognizes the gentlelady from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Let me thank both you and the Ranking Member for both a timely and what I believe to be a crucial hearing that I hope will lead us to answering the call of Mr. Wray, which is that the Congress acts in a reasonable, responsible manner that takes into account what I think is a very concise and, as well, very clear mandate from the United States Supreme Court.

I am not sure what arguments one would make to thwart a pronouncement that says that the sentencing guidelines violate a constitutional amendment. So, therefore, I believe it is imperative that we act and I welcome your advice and counsel.

Let me have you succinctly state the position of the Department of Justice at this time, in light of the recent Supreme Court decision. Mr. Wray, I am sorry.

Mr. WRAY. Congresswoman, I just want to be sure that in order to be succinct that I am clear on our position on which aspect of the entire——

Ms. JACKSON LEE. The sixth amendment aspect, the mandatory sentencing violating the sixth amendment.

Mr. WRAY. Well, we obviously argued to the Supreme Court that the Federal sentencing guidelines were distinct and different—distinguishable and different from the Washington State system, but

in the wake of the decision, the Supreme Court obviously disagreed with us on that point.

We do think it is possible to have, for example, a system, the so-called topless system that a couple of the other witnesses have described, we do think that would be constitutional even after *Booker*.

Ms. JACKSON LEE. The topless system?

Mr. WRAY. The proposal that Professor Bowman would no longer like to have his name attached to, but that Mr. Collins described, and that is a system where the minimum, if you will, the floor can be set by the judge, but the top is determined by the statutory maximum that the Congress has imposed and the judge has discretion in that range. So, therefore, you no longer have to acquire jury findings——

Ms. JACKSON LEE. You would be open to that?

Mr. WRAY. We would be open to the topless system, yes.

Ms. JACKSON LEE. Mr. Collins, I know you have seen the numbers, excessive numbers of minorities in State and Federal prisons. In fact, I am looking at a number in the State of Texas, and we are talking about Federal prisons, Federal law now, 70 percent of the inmate population in the State of Texas happens to be African Americans.

The system that we had before, or the concept that many of us in Congress had thought would be reasonable, is giving well-qualified judges, a well-qualified judiciary the bare opportunity of using discretion in some cases. The ones that come to mind in particular are the so-called conspiracy drug cases where you are standing on the street corner with another person and you are caught up in a conspiracy. Your mandatory is 25 years.

What is your interpretation of the latitude the Congress now has under *Booker*?

Mr. COLLINS. Well, obviously you have very wide latitude under *Booker*.

Ms. JACKSON LEE. And I hope it is wise latitude.

Mr. COLLINS. And hopefully it is wise. The Sentencing Commission—you raise a very serious question. The Sentencing Commission carefully looked at this issue in its 15-year report, had an entire chapter on the subject. Its conclusion was that very little of the racial disparity that exists in terms of outcomes and results in the Federal system is attributable to the guidelines itself. Some of it may be due to disparate impacts of particular provisions of law, particularly with respect to drug amount, et cetera. Also, the Commission cited in its report studies that indicated that introducing discretion actually had the effect of introducing racial disparity——

Ms. JACKSON LEE. That was some original thought, you are right. I think that was one of the basis of mandatory sentencing, but go ahead. It is turned around on the wrong end because of the impact on certain sentencing in certain populations being in those certain offenses.

Mr. COLLINS. Well, one of the goals of the Sentencing Reform Act, and I think the Commission's 15-year report shows that it was achieved, is to try and do as much as you could to take out improper and irrelevant facts that had no business being a part of sentencing, having even an implicit role in it, and I think the report indicates that with respect to the issue of racial disparities

that the guidelines are not a source of racial disparity and, indeed, probably——

Ms. JACKSON LEE. Mr. Bowman—thank you. Mr. Bowman, would you comment, and as I do that, Mr. Chairman, I would like to submit into the record H.R. 256, which is a bill entitled "A Good Time Relief Bill" and a letter from Mr. Burton I. Cohen[1] writing in support of that bill. It was filed last year, an individual that has sat on several disciplinary committees. But it deals with numbers of individuals incarcerated for long periods of time under the mandatory and the release of those individuals for good time behavior. I would ask unanimous consent to have these submitted into the record.

Mr. COBLE. Without objection, they will be received.

[The bill, H.R. 256, follows.]

[1] The letter from Burton I. Cohen was not available at the time this hearing was printed.

I

109TH CONGRESS
1ST SESSION

H. R. 256

To amend title 18, United States Code, to provide an alternate release date for certain nonviolent offenders, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 2005

Ms. JACKSON-LEE of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to provide an alternate release date for certain nonviolent offenders, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Prison Bureau Nonviolent Offender Relief Act of 2005".

SEC. 2. EARLY RELEASE FOR CERTAIN NONVIOLENT OFFENDERS.

(a) IN GENERAL.—Section 3624 of title 18, United States Code, is amended—

1 (1) in subsection (a), by inserting "at the early
2 release date provided in subsection (g), if applicable,
3 or otherwise" after "A prisoner shall be released by
4 the Bureau of Prisons"; and
5 (2) by adding at the end the following:
6 "(g) EARLY RELEASE FOR CERTAIN NONVIOLENT
7 OFFENDERS.—Notwithstanding any other provision of
8 law, the Bureau of Prisons, pursuant to a good time pol-
9 icy, shall release from confinement a prisoner who has
10 served one half or more of his term of imprisonment (in-
11 cluding any consecutive term or terms of imprisonment)
12 if that prisoner—
13 "(1) has attained the age of 45 years;
14 "(2) has never been convicted of a crime of vio-
15 lence; and
16 "(3) has not engaged in any violation, involving
17 violent conduct, of institutional disciplinary regula-
18 tions.".

○

Ms. JACKSON LEE. May I allow Mr. Bowman just to answer what his interpretation of *Booker* is in terms of the latitude that we now have in Congress?

Mr. COBLE. If you will do that as quickly as you can, Mr. Bowman.

Mr. BOWMAN. I confess, Congresswoman, I am not entirely sure of your question. I think that——

Ms. JACKSON LEE. Let me be clear. Just give me your assessment of the *Booker* case with respect to the latitude of Congress in mandatory sentencing.

Mr. BOWMAN. I think that that is pretty unclear. I think that, as I said in my testimony, I think that *Booker* casts the rationale of *Blakely* into some doubt and that it is somewhat unclear exactly what the Court, a majority of the Court thinks about the proper constitutional limits on structured sentencing. And it is for precisely that reason that I have suggested—inconsistently, frankly, with what I had said 7 months ago when I didn't anticipate *Booker*—that we need some time to figure out—let the courts help us find out what they need.

Mr. COBLE. The gentlelady's time has expired.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Mr. COBLE. You are welcome.

I overlooked the gentleman from California. We have been joined by Mr. Lungren. It is good to have you with us, sir.

I recognize the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

If you will pardon me, I read the *Booker* opinion in total last night for the first time and it seemed to me that was a muddled mass of murky malarkey, I am telling you.

Judge, you had indicated at one point in your opening statement that one thing that seemed clear, I am telling you, I didn't see anything that looked real clear. And when you have judges that come out with the *Blakely* decision, give indications of one thing, and then come back with a decision in which Stevens delivers the opinion for himself, Scalia, Souter, Thomas, Breyer delivers the opinion for O'Connor, Kennedy, Ginsberg, and himself, then Stevens delivers a dissenting opinion for himself and Souter and Scalia, and then Scalia gives a dissenting opinion, Thomas gives a dissenting opinion, and then Breyer gives a dissenting opinion in part for himself and Chief Justices O'Connor and Kennedy, it seems to me that if they wake up on a different side of the bed one morning, we have got a whole new decision come 6 months or a year from now and that is rather disappointing that Justices come down that way.

Obviously, you are in favor—you say you appreciate the guidelines, in effect. Is there any polling data of where the Federal judges, the district judges stand on their support for the guidelines or wish they would go away back like they were 20 years ago when you first started?

Judge HINOJOSA. Well, I guess that is a subject of discussion among judges on a pretty regular basis. Yes, I guess there have been studies in the past, and the support varies, I guess. But I will say that privately, judges probably express more support for a guidelines system than is the public aspect of the discussion, for

the same reasons that I have stated. It is the most difficult part, as you know, that a judge does with regard to their job and you do want to be consistent. You want to be transparent with regard to due process and having the defendant, as well as the public, know what factors are being considered with regard to sentencing.

And a guidelines system, whether it is a State or Federal system, provides that guidance and that public discussion with regard to the issues that are being considered by the judge in making the determination.

You have mentioned something about the *Booker* case and I will say that there has been a quote of Ricky Ricardo, and I will say that sometime when I first read the *Booker* decision, I guess one comment I would have made would have been, "Ay carramba," to quote Ricky Ricardo. But as you read it more, you do see the themes that come across with regard to at least that the guidelines need to be considered and certainly consulted with and determinations made in order for a judge to make the ultimate sentencing decision on a 3553(a).

But as you well know, any decision—as a judge, the system, when it first came into effect, probably did not have widespread judicial support. But I do feel that there is more support for it than is sometimes evident in the public.

Mr. GOHMERT. Dealing with the murkiness as we have it, or at least I see it in this opinion, I was curious, with regard to the guidelines and their apparent position that if it is a factor that takes it outside the range, then it has to be found beyond a reasonable doubt by a jury or agreed by the defendant, do you see the possibility of a system in which, like some States, like Texas has a bifurcated system. The defendant can waive a jury on sentencing so that that is when judges sentence, but not necessarily having a jury assess the sentence, but if there are factors of which the prosecutor is aware that may push it up beyond the guidelines, then as soon as a jury finding came back finding the defendant guilty, immediately move into a bifurcated portion in which the jury would determine then beyond a reasonable doubt any of those factors the prosecutor wished to pursue? Do you feel like that would be too troublesome?

Judge HINOJOSA. Actually, some judges were doing this post-*Blakely* but pre-*Booker* and there were some judges who were supportive of this. Judge Sven Holmes in Oklahoma is a prime example of that. And some judges felt that they could work with that.

It is more cumbersome, as you know, Judge, having practiced in the State courts of Texas, to have the guilty-not guilty phase and then also the sentencing phase. It is something that could be worked with. Obviously, it would require rule changes with regard to the rules of criminal procedure. It would require changes with regard to how we do business on a daily basis. It would, in some cases where you have a heavy criminal load, maybe present some issues with regard to resources, including time resources.

It does also create some other possibilities, which would mean that prosecutors and defense attorneys could probably control the sentences a lot more because they could make stipulations with regard to what they had agreed on, and then the judges and/or juries would have less to say about sentencing because there would be

more stipulations between the prosecution and the defense attorneys.

Mr. COBLE. The gentleman's time——

Mr. GOHMERT. May I do one follow-up?

Mr. COBLE. Very quickly, if you will, Mr. Gohmert.

Mr. GOHMERT. To Mr. Wray, what the Judge got to was something I was wondering about, if you did have that threat of an additional part of the trial, if that might not lead to more agreements immediately after a finding of guilty, an agreement to waive the jury on the additional issue and give prosecutors yet another tool to bring about an agreement prior to sentencing. Do you see that as a possibility?

Mr. WRAY. Congressman, I think we believe that the sort of bifurcated system that you are describing, as Judge Hinojosa mentioned, some judges were doing that and our offices were having to deal with that in some districts, is likely to, in a way, generate more disparity, because as he indicated, it puts control in the hands of the parties and you are having people making calculations about whether or not they want to run a risk with a jury pool in this State versus that State, and so I think you would probably end up with significant geographic disparities and major logistical and resource nightmares.

Mr. GOHMERT. But would you support it or not?

Mr. WRAY. Well, I am not in a position here today to be able to endorse a specific legislative proposal——

Mr. GOHMERT. Not on behalf of your office, but you personally. [Laughter.]

Mr. COBLE. The gentleman's time has expired. I will bail you out, Mr. Wray. [Laughter.]

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I wanted to extend a personal welcome to our newest colleague from Texas, Mr. Gohmert, who is reviewing the murkiness of Supreme Court decisions. But, sir, you are going to have a much bigger job in the Judiciary Committee trying to separate out what we are doing here, not only among the witnesses but among the members of this Committee, as well. So I wanted to extend my personal welcome to you and look forward to working with you in that regard.

Mr. GOHMERT. Thank you.

Mr. CONYERS. Now, in some respects, notwithstanding the very distinctive and well thought-out presentations that have been made this morning, we are further away from any agreement than we were before this hearing was called, gentlemen. We now have even larger schools of thought, wider ranges of disparity, and it is curious to me, and I didn't hear all of the opening statements, but there hasn't been one word mentioned throughout a couple of hours here about the crack cocaine-powder disparity. It is like—and we have mentioned it and none of you have even acknowledged that it exists. And then the whole question of racial disparity and the sentencing process.

Now, I don't know which legal literature you are reading, but the kind that my staff and I are looking at say that it is horrendous. And now I am treated this morning to all of the phrases and the support of the Sentencing Commission and that crime has gone down as a result of it, things are—we don't want to rock the boat too much, we don't want to override these decisions.

But can you, Mr. Bowman, give me some clue as to why there is such a wide gulf that apparently exists between many members of this Committee and many in the criminal justice arena and what we are talking about today?

Mr. BOWMAN. I am not sure I can attempt to plumb the minds of the Members of the Committee, but perhaps I can try to respond and connect the concern expressed by a number of members about crack-powder and racial disparity with the conversation that we are having here today.

One of the—as I listened to my fellow witnesses, to a certain extent, the picture that emerges here is one in which the current guideline sentences, or for that matter, the statutory sentences for things like crack, are taken to a certain extent as a given and as a desirable one and any deviations from guideline levels or perhaps statutory ones are expressly or impliedly labeled as being undesirable, somehow disruptive or even undermining the system.

I think that is probably the wrong approach to take. I think an approach that we should consider over the whatever period of time the *Booker* system of advisory or presumptive guidelines is allowed to persist, whether it is a short time or a long one, I think this Committee, and indeed Congress in general, should not look at what judges do when they deviate from the guidelines as some sort of weird aberration but consider and study whether or not there are some patterns in those deviations that suggest that some of the rules could be revised.

And thus, if it were to happen that a good many of the deviations from the guidelines that appear post-*Booker* were in crack cases, this might strongly suggest that Congress should, as the Commission has often recommended, revisit the question of the crack-powder disparity. In short, I am suggesting——

Mr. CONYERS. The light just turned red and the bells are ringing. Let me just rudely interrupt you. This hearing, in my view, is nonrelevant to the most—the two most important issues that are bedeviling the criminal justice system in America for decades. I mean, these are interesting asides about the two decisions that have just come out and what they mean to discretion, but for us in this Committee, in this room, to hold a hearing for this long a period and not talk about the racial disparity and the crack cocaine-powder disparity means to me that they do not occupy a very important level of concern for discussion before the one Committee that has jurisdiction in the House of Representatives.

I thank the Chairman for his——

Mr. COBLE. The gentleman's time has expired.

Let me think aloud for a minute. Mr. Lungren, I think you can be recognized for 5 minutes, and Ms. Waters, if you want to examine these witnesses, we will come back after the vote. Do you have a preference?

Ms. WATERS. No, I don't want you to have to come back for me.

Mr. COBLE. I don't mind doing it.

Ms. WATERS. I don't need to examine them, but I need to tell them something.

Mr. COBLE. Let us go with Mr. Lungren first and then I will recognize you.

Ms. WATERS. All right. Thank you.

Mr. COBLE. Mr. Lungren, 5 minutes.

Mr. LUNGREN. Thank you, Mr. Chairman.

It is a pleasure to be here with these distinguished panelists. As one of the fathers of the sentencing guidelines, I originally got involved in the process when I was visited by a young woman who was a constituent of mine in my previous district who had been sentenced by a Federal judge to an extraordinary sentence for certain marijuana possession which was so out of sorts with what other people were getting and so out of sorts with what violent criminals were getting that I began to investigate this and worked with others to set up the sentencing guidelines system, which until the Supreme Court gave us its very clear decision, I thought was working relatively well, certainly in comparison to what we had before. The great disparities we saw in the Federal system were largely eliminated. There was some consistency.

I just remarked to my friend from Michigan that the problem with respect to crack cocaine-powder disparity is really not one of the Sentencing Commission, it is complete direction by this Congress. I can recall when we made that decision brought to us by, with all due respect, members of the other side of the aisle, Congressman Bill Hughes of New Jersey and Congressman Rangel, who came together and said that crack cocaine was killing their communities, was a scourge on their communities, and we needed to do something about it and we needed to create far greater penalties for crack cocaine than we did for powder cocaine.

We reacted in response to that direction given to us by Representatives in this institution who were representing people from those communities and listening to the cries of the people in those communities which were being devastated by it. So it ought to be Congress that revisits it after 15 years rather than putting this on the Sentencing Commission and any suggestion that that is one reason why the Sentencing Commission decision by the Supreme Court was a good thing, I think ought to be recalculated.

Here is my question to the panel and it is a very simple one. The Sentencing Commission was specifically established for purposes, and the guidelines, for purposes of getting rid of disparity, giving a certainty to the system, giving some expectations that would be realized by those in the system, both those charged with crimes and the victims of crime.

Given what we have now, that is, the result of the Supreme Court decision, other than the bifurcated system that we have dealt with in California and other States in capital cases, how are we really going to deal with this? The way I take it from the Supreme Court, they have said that we want the Federal judges to take the guidelines seriously, but not that seriously, because if they consider it that seriously, it is unconstitutional. So long as it is an 80 percent seriousness, it is constitutional, but if it is 100 percent seriousness, it is unconstitutional.

Am I wrong on that? What do we have left? It reminds me of some people who—well, I won't go into that.

Let me just ask the four of you, and I know we have a short period of time, what can we do? I know you gave us time constraints or time imperatives, but essentially, in very short order, what can we in Congress do, or do we need to do anything now that the courts are at least trying to react to this?

Mr. BOWMAN. Mr. Lungren, if I might respond to that, I don't know if perhaps you are addressing it to someone else.

Mr. LUNGREN. All four of you.

Mr. BOWMAN. Congressman, I think that, in fact, there are a lot of smart people out there trying to figure out how to respond to this and I think that there are—including the folks on the Constitution Project, Attorney General Meese, Professor Heymann, and the judges and other folks on that group, and there are a lot of other groups out there thinking very hard about this. And I can tell you, although I can't go into the details because of time, but there are a number of proposals being worked through that would combine the concerns—addressing the concerns of Congressman Flake about simplifying the Federal sentencing system and Federal criminal laws with meeting some of the concerns expressed by Justice Scalia in *Blakely* and also addressing the alternative constitutional model put forward in *Booker*.

There are some folks out there working very hard who I think, if given some time, can actually present to you some reasonable proposals that can try to bring together and address a number of these problems.

Mr. COLLINS. Congressman, I think the case for delay is a weak one. If we think of the Sentencing Commission and the sentencing guidelines as the vehicle for Congress's accomplishing the goals of Federal sentencing policy, *Booker* is the equivalent of a flat tire. And while we stand by the side of the road, it is not time to argue about reupholstering the interior, painting the vehicle. We need to get it moving again, and it is very simple what to do. You simply remove the caps—that would make the system constitutional. If other issues want to be revisited, people can revisit those. But this system needs to get moving again in the direction of accomplishing what we all know from the pre-*Booker* period it was accomplishing what Congress wanted it to do.

Judge HINOJOSA. Congressman Lungren, I guess in some ways Professor Bowman has been more successful than he thinks he is, because to a certain extent, the *Booker* decision gives us topless guidelines.

Mr. COBLE. Judge, if you will suspend just one moment—again, I am thinking aloud. Ms. Waters, how long will it take you to make your comment?

Ms. WATERS. Just a few minutes.

Mr. COBLE. How long?

Ms. WATERS. Just a couple of minutes.

Mr. COBLE. I am just thinking, folks, in the interest of time, to give Ms. Waters due time and to let Mr. Lungren finish, the time is running down. Why don't we suspend very briefly. We will go vote and then we will come back and Mr. Lungren can finish his line of questioning, and then we will recognize Ms. Waters.

Ms. WATERS. Well, no, if you are going to come back anyway, I will just come back and take my whole 5 minutes.

Mr. COBLE. That would be fine.

Ms. WATERS. I was trying to do it out of consideration to the Committee. I think they had answered basically Mr. Lungren's question in their presentations and talking about what they thought we could do. I have heard it over and over again. But if you want to do that——

Mr. COBLE. Well, to be sure none of us miss the vote, let us suspend and we will come back after the vote and then we will wrap it up with Mr. Lungren and then Ms. Waters.

[Recess.]

Mr. COBLE. We will resume our activity here.

Mr. Lungren, I think you had the floor and you were examining the witnesses. You may continue.

Mr. LUNGREN. The Chairman is very generous in his use of the word "examining." I am being very nice. I am just asking. I think the Judge was responding.

Judge HINOJOSA. That is correct, Congressman. What I was saying was that Professor Bowman has probably been more successful than he would like to admit in that under an advisory guideline system, if you consider the Sentencing Reform Act factors, you could go to the top, the statutory maximum. We also can go to the bottom.

The Commission's position has been that in considering and consulting the guidelines as *Booker* requires and as certainly the Sentencing Reform Act itself states, you should consider the guideline ranges, applicable guideline ranges, the policy statements as the Act itself requires, then make determinations under the guidelines system, and then determine in consideration of the Sentencing Reform Act 3553(a) factors if you are going to stay within the guidelines system, including the policy statements, or going outside of the system.

But in many ways, we do have topless guidelines for those that are interested in that. The issue then becomes with regard to whether appellate review should be the same for guideline sentences versus non-guideline sentences since it is above the guidelines, below the guidelines, departures within the guidelines system, and that is certainly something that Congress will eventually decide. If not, the appellate courts are also going through that at the present time and we are already seeing some decisions at the appellate court level with regard to the review that is being used with regard to the sentence.

Mr. WRAY. Congressman, I think, if I remember correctly, the question as you had posed it was sort of what can you do in the wake of *Booker*, and I think what I would say, in addition to what the other witnesses have already said, is a couple of things.

You could address the courts' ability that they now seem to have in the wake of *Booker* to consider what would otherwise be prohibited factors in sentencing, something I mentioned earlier in my testimony. You could address the cooperation issue, which is so important to areas of criminal enforcement that are very important to every member of this Committee and every member of this country. You could address the appellate review standard, this reasonable-

ness issue which we think will result in less rigorous and less consistent appellate review. You could—and I think that is a very important issue to cover.

I think there are some other variations that have been discussed already by some of the other members of the panel. There are things that can be done like a topless guideline system, but that may not be the only way. There may be things that can be done as long as we work collaboratively together and the Department would like to work with the Congress on that in a way to come up with something that would lead to the best interest of the public.

Mr. LUNGREN. Thank you very much. Mr. Chairman, my concern is that I thought that the guidelines within the large ranges that we gave from Congress were the best way to address the situation. Now the Court has put us in the situation where a response by Congress may be to increase the minimum ranges that we have statutorily as a way of making sure that the Federal system doesn't do what we feared before, which I don't think is a good thing. And so we are sort of in a dilemma now where I thought we had a system that worked pretty well to ensure that we had consistency but yet, with maybe some exceptions that ought to be examined by the Congress on due penalties attached. I am not sure the Supreme Court thinks about those things, that the reaction of Congress might be just exactly the opposite of what they are concerned about. Thanks very much.

Mr. COBLE. I thank the gentleman.

The gentlelady from California, Ms. Waters, is recognized for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I appreciate the opportunity to have this platform today to talk about an issue that troubles me and others on this Committee and obviously Mr. Conyers so much.

Even though we are here to talk about *Booker* and to talk about the guidelines becoming advisory, that is not the major issue for me. As a matter of fact, I would submit to you without having talked to all of my colleagues, those of us who understand what racism and discrimination are all about, we would like to have clear rules that everybody would have to abide by. I think we are served better by that.

So when you talk about the sentencing guidelines being advisory and you have the opportunity for judges to go up or down, et cetera, that is a little bit troubling because we know that we will suffer under that kind of discretion, for the most part. History has proven that and I don't think it is going to change.

So for me, it is not a big issue, but here is the issue for me: Mandatory minimum sentencing. As my colleague said on the opposite side of the aisle, that is our fault. What happened in the Congress of the United States led by two of the gentlemen that he identified, and I just asked Mr. Regula about it and he didn't quite remember it, is what I am concerned about.

Now, what do you have to do with that? I mean, you didn't come here to talk about mandatory minimum sentencing as it relates to crack cocaine, et cetera. But we are watching all of these low-level drug persons with five grams of crack cocaine be sentenced to 5 years in prison or more and the judge has no discretion in the

issue. They are filling up the prisons and lives are being destroyed. Nineteen-year-olds, 20-year-olds are going to prison, some of them in college. They are not criminals, they are just stupid. They are not criminals and their lives should not be shut off in that manner.

So here is what we are saying. While we are discussing these kinds of issues, can we use this as an opportunity to talk about not only what the Congress should be considering as we take a look at *Booker*, but what we should be thinking about and how we can encourage the Congress of the United States to look at these mandatory minimum sentences.

I believe that the Sentencing Commission, and I have to—we have to accept blame for that on both sides of the aisle. I can recall when the Sentencing Commission came up with different guidelines and Bill Clinton vetoed it, as I remember, or didn't do something which caused it to go into effect.

So because you are listened to, because you are in the Justice Department, because you are people who deal with these issues, let us couple our discussion about mandatory minimum sentencing as we talk about these sentencing guidelines. Let me tell you, under these mandatory minimum sentences, not only do we have people being sentenced more harshly than we have people who commit real crimes being sentenced, we have people who are committing crimes of robbery and rape and other kinds of serious felonies who are not sentenced as harshly as a 19-year-old who is stupid enough to try to have five grams of crack cocaine in their possession. And they are disproportionately minority, even though the greater number who are involved with crack cocaine are not minority.

So when you hear us talk about this, it is not because we are blaming you. It is not because we think you can fix it. But we think that you can couple the discussion so that we can try and move the Congress of the United States to correct mandatory minimum sentencing. I disagreed with all mandatory minimum sentences. I think judges should have some discretion. I think they should have the ability to look at the individual, to look at their past history, to look at the intent, everything. However, I am focused on mandatory minimum sentences as it relates to crack cocaine sentencing.

So if you heard my colleague John Conyers today, what he is saying to you is, why aren't any of you interested in discussing mandatory minimum sentencing, particularly as it relates to these drug offenses? You know in your heart that these sentences are excessive and that they are detrimental and that they are doing nothing to deter crime. As a matter of fact, criminals, real criminals, are getting away with much lighter sentencing.

Having said that, I told my Chairman I had no questions, but I had something I wanted to tell you. I have told you. That is it. Thank you. I yield back the balance of my time.

Mr. COBLE. I thank the gentlelady.

Ladies and gentlemen, our border security bill is now on the floor and we need to adjourn, but I think the gentleman from Virginia may have a question or two. Mr. Scott, if you could, and then we will wrap it up.

Mr. SCOTT. Thanks, Mr. Chairman.

I had just a couple of technical questions if we do something. There is an old adage, slightly rephrased, that we might abide by and that is don't just do something, stand there. [Laughter.]

If we do something, what would happen to a pre-sentence report. Pre-sentence reports, under mandatory guidelines, would be useless, I would imagine. Is that right, Judge?

Judge HINOJOSA. Well, under the present system, the pre-sentence report still, according to the rules, needs to be prepared as it was being prepared beforehand.

Mr. SCOTT. And under the voluntary guidelines, you could still consider the pre-sentence report today. But if we had mandatory guidelines, it would be—the findings in the pre-sentence report, since they were not found by a judge, could not be used.

Judge HINOJOSA. Well, they would always be found by a judge, Congressman, because these are just recommendations from our probation officers. The advantage to that system, when it was created, was we have always had pre-sentence reports. After the guidelines, obviously, they were geared toward recommendations of the guidelines findings. But eventually, it is the judge's decision.

The advantage to the present system is there is a report that is given to the prosecution and the defense. There is a period of time within which they can object to it. Then there is a period within which the probation office responds to it. And then there is an actual hearing before the court. But as most probation officers find out, it is the judge who makes the decision, not the probation officer.

Mr. SCOTT. If the guidelines were made somehow mandatory, you couldn't use the pre-sentence report without a finding by a jury along with the facts in the pre-sentence report.

Judge HINOJOSA. It would depend on what the defendant had admitted at the time of the guilty plea or what the jury verdict had been with regard to the charge and the way it was worded in the instructions to the jury at the time of the conviction. And so it might very well be that the determinations would be made under *Blakely* and under *Booker* constitutionally.

Mr. SCOTT. But if we don't do anything, you can consider the information in a pre-sentence report today, if we don't do anything?

Judge HINOJOSA. Well, what it appears to me that Justice Breyer and the five members of that majority were doing was saying, yes, you the other majority have said *Blakely* applies to the Federal guidelines with regard to sixth amendment rights, but since they are now advisory, the judges can continue making the findings under the standards of proof that they have used in the past and under the same methods of determining the guidelines system without having to have a jury determine these because these are now advisory and are being considered as one of the factors within 3553(a), although a very strong factor and one obviously that the Commission feels deserves substantial weight.

Mr. SCOTT. If there is a guilty plea, obviously, you didn't find anything by a jury beyond a reasonable doubt. How do you consider the various factors today without any findings?

Judge HINOJOSA. In my case, as to what procedure I am following, I am following the same procedure and making the findings in the same fashion as I did beforehand. It is open. It is a discus-

sion of the factors that need to be considered, opportunity for both sides to come forward with whatever information they have so that the court can make the decision here.

And I do have to say that under the old system, I made those decisions without ever having to tell a soul that I was doing that, and there was no standard with regard to beyond a reasonable doubt or a preponderance and those factors were all being considered.

Mr. SCOTT. Mr. Bowman, did you want to comment on that, or on both of those questions, what do you do with the pre-sentence report and a guilty plea?

Mr. COBLE. And, Mr. Bowman, if you would as quickly as you can because we do need to adjourn, but go ahead, Mr. Bowman.

Mr. BOWMAN. Another way of putting what Judge Hinojosa is saying, which may help clarify this, is at least my understanding of what *Booker* has held, and I think this is what Judge Hinojosa is saying, as well, is that after *Booker*, everything essentially remains—in terms of procedure in the courts—everything remains exactly as it was before *Booker*. Factual determinations must be made. A sentencing hearing must be held. A guidelines determination must be made. Everything remains exactly as it was up to the point at which the guideline determination is made and the judge then has to decide whether to sentence inside that range or outside that range.

So procedurally, if you leave things exactly as they are, if you don't disturb *Booker*, the *Booker* mechanism seems to be one in which the fact-finding process is exactly the same as it was before.

Mr. SCOTT. Mr. Chairman, could I ask one other quick question, and that is to Mr. Wray on the cooperation credit. Can you say a word about the policy implications of requiring defendants to waive attorney-client and other privileges?

Mr. WRAY. Sure, Ranking Member Scott. The issue of attorney-client privilege waiver comes up most typically, at least in my experience, in the context of corporate fraud cases. I am not aware of very many instances that I have seen where anyone is asking for such a waiver in the context of an individual defendant. But has not been the Department's policy to insist on such a wavier.

It is, however—there are cases where a defendant, typically a corporate defendant, that is, a company that is under investigation, will choose to do that to demonstrate how cooperative they are being and how helpful they are being, and we want to make sure that when companies and institutions do that, they get appropriate credit for doing that, because we recognize that is a very significant step that is not to be taken lightly.

Mr. SCOTT. May I have unanimous consent to request documents be added to the record?

Mr. COBLE. Without objection.

I would also like unanimous consent with a number of documents, as well.

Ladies and gentlemen, this has been a very productive hearing.

I want to apologize for some of the Members of the Subcommittee who were not here. Their absence does not indicate lack of interest in this subject. We had other hearings and other Committee meet-

ings that were in conflict, so I assure you, we will keep our eye on the ball on this.

But I do thank you all for your testimony and your contribution. In order to ensure a full record and adequate consideration of this important issue, the record will be left open for an additional 7 days for subsequent submissions if you all want to submit something further. Any written questions that a member wants to submit should be submitted within the same 7-day period.

This concludes the oversight hearing on the "Implication of the *Booker/Fanfan* Decisions for the Federal Sentencing Guidelines." Thank you all for your cooperation. The Subcommittee stands adjourned.

[Whereupon, at 12:05 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND CHAIRMAN, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Good morning. I want to welcome everyone to this very important oversight hearing before the Subcommittee on Crime, Terrorism and Homeland Security to examine the implications of two recent Supreme Court decisions, in *United States v. Booker,* and *United States v. Fanfan,* to the federal Sentencing Guidelines.

The Supreme Court's rulings eviscerated two critical aspects of the federal Sentencing Guidelines: first, the Court ruled the Sentencing Guidelines are no longer mandatory but are "advisory;" second, the Court eliminated the *de novo* appellate review standard for downward departures, which was passed by Congress as part of the PROTECT Act in the 108th Congress, and replaced it with a vague and unspecific "reasonableness" standard for appellate review.

It is an understatement to say that the Supreme Court's decisions have had a dramatic impact on the federal criminal justice system. Some have characterized the impact as resulting in complete disarray, and even others characterize the decisions as posing a direct and significant threat to public safety, thereby jeopardizing dramatic reductions in the crime rate in our country.

As this Committee examines this issue, we must be mindful of the fact that the Sentencing Reform Act of 1984, which created the mandatory federal Sentencing Guideline system was a bi-partisan measure designed "to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct."

In the short time since the Supreme Court issued its rulings in the Booker/Fanfan decisions, there already have been reported instances of judges deviating from the guideline sentencing ranges, relying on varying rationales for such departures. It is Congress' role to ensure that the original purposes of the Sentencing Reform Act of 1984 are adhered to by the federal judiciary—we all can agree that disparities among similarly situated defendants are unfair and undermine the federal criminal justice system.

Justice Breyer in his majority opinion in Booker made it clear as to our institutional responsibility when he wrote of the Court's decision, "Ours, of course, is not the last word: The ball now lies in Congress' court."

In order to fulfill our Constitutional responsibility, today's hearing is the first step to ensuring that the federal sentencing system continues to promote fairness, eliminate disparities, and protect the public safety—so that law-abiding citizens can live in freedom without fear of crime, and defendants receive fair and equal treatment in the federal judicial system.

I am anxious to hear from our distinguished panel of witnesses and now yield to the ranking Member of this Subcommittee, the gentleman from Virginia, Mr. Bobby Scott.

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman. I am pleased to join you in convening this hearing on the implications of the U.S. Supreme Court's *Booker/Fanfan* decision on the federal sentencing guidelines. Since the *Blakely v. Washington* decision last June, the viability of the federal, and many state, sentencing systems have been in jeopardy.

That decision made it clear that sentences based on facts found by the court after the trial, that were not admitted by the defendant or established during the trial, deprived the defendant of the constitutional right to a jury trial. We contemplated a range of options or approaches after the decision. They ranged from do nothing to enacting an entire system of statutory minimums and maximums. However, we wisely, I believe, listened to the counsel of sentencing experts, and others, suggesting that we give the courts a chance to further clarify the impact of the decision on the federal system.

That further clarification came in a decision by a strangely divided Court in January through the *Booker/Fanfan* decision. That decision clarified that *Blakely,* indeed was applicable to the federal sentencing guidelines system, and found the system unconstitutional as applied. However, the court delineated the aspects of the system that caused it to be unconstitutional, thereby excising the applicability of those factors, leaving the remainder of the system intact. Yet, the Court, as it properly tends to do, only answered the questions it considered to be properly before it at the time. Therefore, we are left with the issue of how the remaining system can operate consistent with its aims and purposes and the Court's decisions. And, again, sentencing experts and others are advising that we await further clarification from the courts on the impact of *Booker/Fanfan.*

The early indications in this post *Blakely/Booker/Fanfan* context is that the sky is not falling; that criminal defendants are being prosecuted and sentenced and that the sentencing guidelines system is directing those sentences to essentially the same extent as it was before. So, for those who found the sentencing guidelines system acceptable as applied before *Blakely* and *Booker/Fanfan* should find it acceptable now. There were quirks and imperfections before the recent upheavals that required appellant court correction or clarification, and that's the situation today.

For others of us, including myself, the federal sentencing guidelines system as applied was not satisfactory. I am very concerned about the growing minority percentage of a rapidly increasing federal prison population serving excessively long sentences for minor roles in non-violent crimes, due in large part to unfair applications of mandatory minimum sentences and prosecutorial concentrations. These problems are detailed in these 2 recent reports from the Sentencing Project entitled "Racial Disparity in Sentencing: A Review of the Literature," "The Federal Prison Population: A Statistical Analysis," and the recently completed 15-year study report by the U.S. Sentencing Commission, of which I have the executive summary here.

All the credible data shows that minorities are less likely than whites to use illegal drugs of virtually all types, including crack cocaine. Yet, a grossly disproportionate percentage of the enforcement war against drugs falls upon minorities, many of whom are bit players at the end stage of the drug trade whose involvement is based more on addiction than profit. For example over 80% of the crack prosecutions are against African American offenders while drug use data reflects that 60% of the use of crack is by Whites.

And all the research and all the demonstrations show that drug treatment, and other alternatives to incarceration are much more effective and much cheaper than incarceration. Yet, we continue to greatly increase our resources to lock up more and more of these bit players for longer and longer periods while making no consideration to effective and less costly alternatives and only minimally increasing drug treatment as compared to the increases in enforcement. Report after report, including these by the Sentencing Commission and others, have pointed to these gross disparities in application of our drug enforcement and sentencing policies against minorities. It was high time that we addressed these atrocities before *Blakely* and *Booker/Fanfan,* and it is certainly time to do so now.

So, Mr. Chairman, as we carefully contemplate what needs to be fixed in the federal sentencing guidelines system, I would invite consideration to this longstanding and shameful problem in our federal law enforcement and sentencing applications. I look forward to the testimony of our witnesses for any guidance they give us as we contemplate these and other challenges in our criminal justice system, and to working with you to meet the challenges. Thank you.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Chairman Coble and Ranking Member Scott, thank you for the opportunity that this body will have today to exercise oversight in such an important area of the criminal justice system that has so many stakeholders. The holding of the high

court in *U.S. v. Booker v. Fanfan* [1] has given the Federal Sentencing Guidelines advisory weight rather than mandatory.

Mr. Chairman, I agree with many of my colleagues as well as a good number of federal trial court judges that the guidelines are an instrument created by the United States Sentencing Commission to reduce negative trends and disparities in sentencing—on their face.

However, my experience as Ranking Democrat of the Subcommittee on Immigration, Border Security, and Claims has shown me that strict application of the guidelines on a mandatory basis can preclude judges from exercising discretion as to whether or not to consider "history and characteristics of the defendant" under 18 U.S.C. 3553, the Federal Sentencing Act. The *Booker* case that was decided on January 12 has the force and effect of severing the Federal Sentencing Act to excise the provision that makes the Sentencing Guidelines mandatory.

While I am a proponent of making federal sentencing more uniform and consistent, I am not yet convinced that the Guidelines achieve this end. To date, certain serious crimes have led to minor sentences while more minor crimes have led to numerous years in prison. We must carefully balance the need to instill order, uniformity, and *judicial efficiency* into the criminal justice system while preserving judicial discretion.

Application of the Guidelines in strict form has contributed to the exponential growth of the federal prison and justice systems. Since 1980, the number of federal prisoners has increased nearly seven-fold, rising from 24,000 in 1980 to 106,000 in 1996 and to over 170,000 in 2003.

Because of this rise in incarcerations, we have seen a rise in the number of federal nonviolent offenders who may have been victims of excessive sentencing under the Guidelines.

This was the impetus for my introduction of the Federal Prison Bureau Nonviolent Offender Relief Act of 2005 which calls for the early release of nonviolent offenders under certain circumstances.

Mr. Chairman, this body must explore this matter thoroughly and follow the path that has been made by the jurisprudence of *Booker*.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Let me begin by thanking Chairman Coble and Ranking Member Scott for convening this timely hearing on the Booker/FanFan decisions and their impact on the federal sentencing guidelines.

With more than 2.1 million Americans currently in jail or prison—roughly quadruple the number of individuals incarcerated in 1985—it's hard to deny that our criminal justice is facing a real crisis.

Today, this country incarcerates its citizens at a rate 14 times that of Japan, 8 times the rate of France and 6 times the rate of Canada.

We spend an estimated $40 billion a year to imprison criminal offenders, we choose to build prisons over schools and we fail to provide inmates released from prison with the necessary tools and assistance for a successful re-entry into society.

In short, we have turned a nation of peace-loving people who have come to this country in search of nothing more than freedom and equality into a nation of convicts.

Admittedly, the federal sentencing guidelines were not originally enacted to address many of these problems. In fact, their primary purpose was to simply make sentencing more certain and predictable. Regrettably, two decades later, it's sad to say that the only thing more "certain and predictable" is that the current system targets and punishes racial minorities in a disproportionately harsher manner.

For instance, while the majority of federal offenders in the pre-guidelines era were White (60%), minorities dominate the federal criminal docket today. Moreover, while the gap in average sentences between White and Black offenders was relatively small in the preguidelines era, Blacks now receive sentences that are approximately 70% longer than Whites.

On average, Blacks now serve virtually as much time in prison for a drug offense (57.2 months) as Whites do for a violent offense (58.8 months).

The current system may be certainly predictable, but it is undeniably unfair.

Several reasons serve as the source of blame for our current state of affairs. However, the greatest responsibility lies with those who stubbornly rely on mandatory

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[1] 125 S. Ct. 738, 73 USLW 4056 (2005).

minimums and congressional directives to enact misguided and ineffective policies all in the name of appearing tough on crime.

For example, there currently exists a 1 to 100 disparity in the ratio in sentencing powder versus crack cocaine, even though all experts agree that the harms associated with the use of crack cocaine do not justify substantially harsher treatment. So, why the disparity?

Our look today at the federal sentencing guidelines provides us with a unique opportunity to consider some of these issues and debate ways to bring about meaningful reform.

Such reform has already taken place at the state level. For example, over the past couple of years, more than 25 states have passed laws eliminating some of their lengthy mandatory minimum sentences and have begun to divert non-violent drug offenders to treatment programs instead of incarceration. The day has come for us to follow their lead.

Again, I would like to thank the Chairman and Ranking Member for convening this important hearing. And, I look forward to hearing the testimony of the witnesses.

PREPARED STATEMENT OF THE HONORABLE ADAM B. SCHIFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I would like to thank the distinguished Chairman, Mr. Coble and Ranking Member Scott for holding this important hearing on the implications of the recent Supreme Court decision in *Booker/Fanfan* on the Federal Sentencing Guidelines.

The *Booker/Fanfan* decision brought about a far-reaching, if poorly reasoned result. The sentencing guidelines are no longer mandatory, but advisory, and yet they are still subject to a test of reasonableness. Justice Breyer noted that the ball now lies in Congress' court. This is an understatement.

Although the merits of the Court's opinions are subject to legitimate criticism, Congress should use the opportunity to carefully consider the strengths and weaknesses of the sentencing guidelines and determine the best method of ensuring a sentencing regime that is tough, fair, and promotes public safety.

As a former federal prosecutor, I had the opportunity to work in the criminal justice system both before and after the sentencing guidelines originally went into effect. The guidelines, although certainly imperfect, did have the laudable effect of eliminating some of the greatest disparities in sentencing. At the same time, they eliminated judicial discretion to an unprecedented degree.

The challenge for the Congress is to revise the sentencing regime consistent with the Court's opinion, establish a completely new process, or allow time to evaluate the effects of the advisory system and reasonableness standard.

I look forward to working with Chairman Sensenbrenner and Chairman Coble and our other Judiciary Committee colleagues, the Department of Justice, federal judges, defense attorneys, the Sentencing Commission, and other experts and practitioners as we face this challenge.

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RACIAL DISPARITY IN SENTENCING:

A REVIEW OF THE LITERATURE

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This report was written by Tushar Kansal, and edited by Marc Mauer.

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RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE

INTRODUCTION

The intersection of racial dynamics with the criminal justice system is one of longstanding duration. In earlier times, courtrooms in many jurisdictions were comprised of all white decisionmakers. Today, there is more diversity of leadership in the court system, but race still plays a critical role in many criminal justice outcomes. This ranges from disparate traffic stops due to racial profiling to imposition of the death penalty based on the race of victim and/or offender. A particularly important aspect of the role of race in the justice system relates to sentencing, because the prospect of a racially discriminatory process violates the ideals of equal treatment under law under which the system is premised.

The most recent generation of evidence suggests that while racial dynamics have changed over time, race still exerts an undeniable presence in the sentencing process. Racial discrimination generally does not exist in the explicit fashion that it did in the American South 50 years ago, in which blacks and whites were routinely handled differently by law enforcement and judicial authorities. Rather, racial discrimination in sentencing today is often a more surreptitious process, manifesting itself in connection with other factors and producing racially discriminatory outcomes in certain situations.

The studies that have been conducted during the past twenty years are particularly noteworthy for two, interconnected reasons. First, these studies are more methodologically sophisticated than the studies of the criminal justice system that preceded them. For example, they correct for the most serious flaws in analysis that plagued previous studies, such as not controlling statistically for the seriousness of the crime committed or for the defendant's criminal history. Second, contemporary studies reject the assumption that the sentencing process is universally plagued by racial bias and that black and Latino defendants will always be disadvantaged as compared to white defendants. Instead of this perspective, current research attempts to ask: "If racial bias does exist in the criminal sentencing process, under what circumstances does it manifest itself and when is it most apparent?"

The type of analysis in which race was presumed to play such a pervasive role in sentencing that it would almost always result in differences in sentence severity is called additive analysis. For example, additive analysis would try to ascertain if blacks, as a group, receive harsher sentences than whites, as a group. In contrast, current research is more engaged in interactive analysis, in which the effect of race, as one independent variable, is examined in conjunction with the effect of other independent variables. An example of interactive analysis is examining the confluence of age, race, and gender on sentencing practices in order to determine if young black males are sentenced more severely than young white males.

The review of recent studies that follows examines the effect of race on sentencing, differentiating between capital (subject to the death penalty) cases and non-capital cases. The sections addressing non-capital cases are heavily indebted to Cassia Spohn's 2000 survey of the relevant studies produced for the National Institute of Justice.[1] In the realm of non-capital cases, the studies deliver mixed results. While a majority of the studies report racially discriminatory sentencing outcomes, the evidence indicates that these outcomes are not uniform or extensive. The more incisive findings in non-capital cases are the result of interactive analysis. The key findings in this regard include:

- Young, black and Latino males (especially if unemployed) are subject to particularly harsh sentencing compared to other offender populations;
- Black and Latino defendants are disadvantaged compared to whites with regard to legal-process related factors such as the "trial penalty," sentence reductions for substantial assistance, criminal history, pretrial detention, and type of attorney;
- Black defendants convicted of harming white victims suffer harsher penalties than blacks who commit crimes against other blacks or white defendants who harm whites;
- Black and Latino defendants tend to be sentenced more severely than comparably situated white defendants for less serious crimes, especially drug and property crimes.

Studies that examine death-penalty cases have generally found that:

- In the vast majority of cases, if the murder victim is white, the defendant is more likely to receive a death sentence;
- In a few jurisdictions, notably the federal system, minority defendants (especially blacks) are more likely to receive a death sentence.

While this report deals primarily with sentencing processes and outcomes, it is important to keep in mind that the criminal justice system is an interdependent process and that effects are cumulative. For example, while this report does not address aspects of criminal justice such as the manner in which laws are enforced or the rates at which different populations have parole revoked and must face resentencing, both of these factors, along with many others, affect sentencing practices. For example, a study of the Maryland capital punishment system published in 2003 found that although the race of the victim did not affect the decision of the jury to sentence the defendant to death, among all death-eligible homicides, killers of white victims were still three times more likely to be sentenced to death than comparably situated killers of non-white victims.[2] The disparity between white-victim and non-white-victim cases in this instance arose from the decisions of the state's attorney to seek, and follow through with, death penalty prosecutions more often in white-victim cases than in non-white-victim cases. In other words, although there is no evidence in this case that the specific decision to sentence to death is racially discriminatory, the sentencing outcome is nevertheless racially discriminatory because of actions taken during another phase of the criminal justice process.

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[1] Spohn, Cassia. "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process." *Criminal Justice*, National Institute of Justice, Vol. 3, 2000: 427-501; p. 453.

[2] Paternoster, Raymond, and Robert Brame. "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction," 2003 (Final Report). Retrieved from http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf on July 27, 2004.

The areas in which evidence regarding racially discriminatory sentencing outcomes will be examined are:

- Direct racial discrimination;
- Interaction of race/ethnicity with other offender characteristics;
- Interaction and indirect effects of race/ethnicity and process-related factors;
- Interaction of race of the offender with race of the victim;
- Interaction of race/ethnicity and type of crime;
- Capital punishment.

DIRECT RACIAL DISCRIMINATION

This section examines the evidence for racially discriminatory sentencing outcomes for minority defendants in the aggregate. The data that is used simply looks at sentencing outcomes for racial and ethnic groups as a whole, without incorporating any of the factors discussed in following sections, such as type of crime, age and gender of the defendant, etc.

Key findings:

- There is evidence of direct racial discrimination (against minority defendants in sentencing outcomes);
- Evidence of direct discrimination at the federal level is more prominent than at the state level;
- Blacks are more likely to be disadvantaged in terms of sentence length at the federal level, whereas Latinos are more likely to be disadvantaged in terms of the decision to incarcerate;
- At the state level, both Latinos and blacks are far more likely to be disadvantaged in the decision to incarcerate or not, as opposed to the decision regarding sentence length.

Forty studies have been published that examine data collected since 1980 in order to determine whether racial and ethnic bias exists in the sentencing process.[3] Of these, 32 analyzed state-level data, while the remaining 8 analyzed data from the federal system. The 32 state-level studies contained 95 estimates—meaning 95 different ways in which these studies sought to determine whether sentencing decisions were biased—of the direct effect of race (white and black, for this purpose) on sentence severity, and 29 estimates of the direct impact of ethnicity (Latino and Anglo, for this purpose) on sentence severity. The 8 studies of the federal system contained 22 estimates of the direct relationship between race and sentence severity, and 21 estimates of the direct effect of ethnicity on sentence severity.[4]

Of the estimates of the direct effect of race on sentencing at the state level, 43.2% indicated harsher sentences for blacks, and over a quarter (27.6%) of the estimates on the direct impact of ethnicity registered harsher sentences for Latinos. The statistics also show that, at the state level, the likelihood that blacks and Latinos will be disadvantaged, as compared to whites, is far greater at the initial decision to incarcerate or not (the in/out decision) than at the subsequent decision about how long incarceration should last (sentence length decision).

At the federal level, over two-thirds (68.2%) of the estimates of the direct effect of race on sentencing indicated harsher sentences for blacks, and almost half (47.6%) of the estimates of the direct effect of ethnicity on sentencing registered harsher sentences for

[3] The studies cited here were all published up to the year 2000. They are based on sentences imposed for non-capital offenses during the 1980s and 1990s and use appropriately rigorous statistical techniques; including controls for crime seriousness and prior criminal record. See: Spohn, 2000.
[4] Ibid.

Latinos. At the federal level, the statistics pointed to blacks more likely being disadvantaged as compared to similarly situated whites regarding the length of imprisonment, as opposed to the in/out decision. Compared to whites, Latinos at the federal level face a greater disadvantage concerning the decision to incarcerate rather than the sentence length decision.[5]

Although not all of the estimates cited above find a universal incidence of direct racial discrimination in sentencing, the *majority of the studies report direct racially discriminatory sentencing outcomes*. For the most part, those estimates that do not indicate sentencing outcomes that are directly biased against minorities are not statistically significant; only 6 estimates out of a total 167 find sentencing outcomes that are favorable to minorities as compared to whites.[6]

The findings of these studies regarding incidence of direct racial discrimination in sentencing contradict those commentators who claim that discrimination no longer exists in criminal sentencing.[7] The argument most often used by these commentators is that studies that detail the existence of racially discriminatory sentencing practices do not take into account crucial variables such as seriousness of the crime and criminal history. While analytical problems of this nature did exist in earlier research, all of the studies cited here use appropriately rigorous statistical techniques and account for the seriousness of the crime committed, and 36 of the 40 studies account for criminal history. Furthermore, 35 of the 40 studies only analyze sentencing outcomes in jurisdictions and periods that have implemented some version of a determinate or guidelines-based sentencing structure, designed, in part, to eliminate racial disparities in sentencing. The results of the studies indicate that *racially discriminatory sentencing persists despite sentencing reforms and the implementation of structured sentencing*.[8]

Despite the findings of the cited studies in the area of direct racial discrimination, a number of factors indicate that the presence of direct discrimination is not uniform and extensive. Some of the state-level studies found no evidence of direct racial discrimination, and many of those that did find evidence of direct discrimination concluded that it exercised relatively modest effects, increasing the likelihood of a minority being sentenced to prison by only a few percentage points. Also, while the studies varied geographically somewhat across the United States, a number of the estimates were derived from data from a few jurisdictions, such as Pennsylvania, Chicago, Miami, and Kansas City, which makes the findings somewhat less generalizable.

Racial discrimination in sentencing in the United States today is neither invariable nor universal, nor is it as overt as it was even 30 years ago. As will be described below,

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[5] Ibid.
[6] Ibid.
[7] See: Thernstrom, Stephen, and Abigail Thernstrom. *America in Black and White: One Nation, Indivisible*. New York: Simon and Schuster, 1997, chapter 10; McWhorter, John H. *Losing the Race: Self-Sabotage in Black America*. New York: The Free Press, 2000, chapter 1; DiIulio, John. "My Black Crime Problem and Ours." *City Journal* 6 (spring 1996); Wilson, James Q. "The Facts." *Commentary* (January 1998).
[8] Spohn, 2000.

while the situation has improved in some ways, racially discriminatory sentencing today is far more insidious than in the past, and treating a racial or ethnic group as a unitary body can mask the presence of discrimination. As such, an interactive analysis that takes into account other offender characteristics (such as gender, age, and employment status), legal process-related factors, the race of the victim, or the nature of the crime, can highlight patterns of racial discrimination that a more generic examination may gloss over.[9]

[9] Ibid.

INTERACTION OF RACE/ETHNICITY WITH OTHER OFFENDER CHARACTERISTICS

This section synthesizes the findings of recent studies that examine how the defendant's race interacts with the defendant's age, gender, and employment status.

Key findings:

- Young black and Latino males tend to be sentenced more severely than comparably situated white males;
- Unemployed black males tend to be sentenced more severely than comparably situated white males.

The findings of relevant studies suggest that certain demographic groups within minority populations are treated especially harshly at sentencing in comparison to a similar population of white offenders. For example, a study of the Pennsylvania State Correctional System published in 1998 found both in terms of the decision to incarcerate and in terms of the length of sentence, blacks received harsher sentences than whites, younger offenders received harsher sentences than older offenders, and males received harsher sentences than females.[10] The confluence of these three factors results in young black males being sentenced particularly harshly. A number of other recent studies have found similar evidence indicating that young black and Latino males are sentenced more harshly than white males.[11]

The Pennsylvania study found that, controlling for other factors, including severity of the offense and prior criminal history, *white men aged 18-29 were 38 percent less likely to be sentenced to prison than black men of the same age group*. In addition, *white men of this age group were sentenced to an average prison term that was almost three months shorter than that given to black men of this age group*. Furthermore, black men aged 18-29 were more than four times as likely to be sentenced to prison as white men over the age of fifty.

There is also evidence that employment status (specifically, being unemployed) interacts with race to produce harsher sentencing patterns for certain subgroups of offenders. A study published in 1991 that examined data from two Florida counties found that while unemployment increased the likelihood of imprisonment for all defendants, young black male defendants suffered the most severe effects.[12] Indeed, the study found that unemployed blacks were 5.2 times more likely to be incarcerated than employed whites. Another study published in 1998 found that unemployment increased the likelihood of incarceration for young males and young Latino males, and increased sentence length for

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[10] Steffensmeier, Darrell, Jeffrey Ulmer, and John Kramer. "The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male." *Criminology*, Vol. 36, 1998: 763-797.

[11] Chiricos, Theodore G. and William D. Bales. "Unemployment and Punishment: An Empirical Assessment." *Criminology*, Vol. 29, 1991: 701-724; Nobiling, Tracy, Cassia Spohn, and Miriam DeLone. "A Tale of Two Counties: Unemployment and Sentence Severity." *Justice Quarterly*, Vol. 15, 1998: 401-427; Spohn Cassia, and David Holleran. "Research Note: The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders." *Criminology*, Vol. 38, 2000: 501-526.

[12] Chiricos and Bales, 1991.

males, young males, and black males in Chicago. The same study found that unemployment yielded a greater chance of incarceration for males and black males in Kansas City.[13]

A number of scholars suggest that young black and Latino males tend to be punished more severely than their white counterparts or black and Latino males of a different age because they are perceived to be particularly dangerous and problematic. As a result, judges single them out for incarceration (and, to a lesser degree, for longer prison terms for public safety reasons). Another hypothesis contends that rather than judges viscerally and indiscriminately sentencing young, black and Latino males to harsher sentences, they seek to assess the real threat that a particular offender presents to society. As judges possess imperfect information, however, they develop a "perceptual shorthand" that is informed by stereotypes about race, age, and gender. In the interest of protecting society, sentencing judges will therefore sentence the offender based, in part, on stereotypes about perceived antisocial and incorrigible natures of young black and Latino males.[14]

[13] Nobiling, Spohn, and DeLone, 1998.
[14] Spohn, 2000.

INTERACTION AND INDIRECT EFFECTS OF RACE/ETHNICITY

This section summarizes the findings of recent studies that examine the interaction of race with factors that are directly related to adjudication in the judicial system. Examples of these factors are a guilty plea, the provision of substantial assistance to the prosecution (given in exchange for a reduced sentence), prior criminal history, pretrial status (jailed pending trial or freed on bond), and type of attorney (private or court-appointed).

Key findings:

- Blacks pay a higher "trial penalty" than comparably situated whites;
- Whites receive a larger reduction in sentence time than blacks and Latinos for providing "substantial assistance" to the prosecution;
- Blacks and Latinos with a more serious criminal record tend to be sentenced more severely than comparably situated whites;
- Blacks are more likely to be jailed pending trial, and therefore tend to receive harsher sentences;
- Whites are more likely to hire a private attorney than Latinos or blacks, and therefore receive a less severe sentence.

It is widely acknowledged that defendants who go to trial and are found guilty instead of initially pleading guilty tend to receive harsher sentences; this is known as the "trial penalty." The trial penalty applies to all defendants, regardless of race or ethnicity. Nevertheless, studies in Pennsylvania released in 1996 and 1997 found that *conviction at trial increases the odds of incarceration more for blacks than it does for whites.*[15] In other words, these studies suggest that blacks pay a higher trial penalty than similarly situated whites.

In the federal sentencing system, drug offenders subject to the mandatory minimum sentencing scheme can reduce the severity of a sentence by providing "substantial assistance" to the prosecution, such as information about the trafficking of narcotics or cooperating in the prosecution of other drug offenders. A study released in 1997 found that *whites who provided substantial assistance received an average 23% reduction in the likelihood of incarceration, while comparably situated Latinos received a 14% reduction and blacks received a 13% reduction.*[16] This study suggests that for drug offenses (constituting the majority of federal criminal cases) the racial bias that structured sentencing was intended to eliminate has instead shifted to other stages of the trial process, such as the prosecutorial charging decision or the granting of sentence reductions in exchange for substantial assistance, as seen here.

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[15] Ulmer, Jeffery T. *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines*. Albany: State University of New York Press, 1997; Ulmer, Jeffery T., and John H. Kramer. "Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity." *Criminology*, Vol. 34, 1996: 383-408.

[16] Albonetti, Celesta. "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992." *Law and Society Review*, Vol. 31, 1997: 789-822.

Several studies have found that having a more serious criminal history has led to harsher sentencing for blacks and Latinos compared to similarly situated whites. For example, in Miami, black drug offenders with a prior felony conviction faced a greater likelihood of incarceration than similar white offenders, but race had no impact on drug offenders without a prior felony conviction.[17] A study in a metropolitan Pennsylvania county similarly found that race played a larger role in the decision to incarcerate for offenders with more serious criminal histories.[18] Latinos in Miami with a prior prison term were more likely to be incarcerated than similar whites,[19] and Latinos in California faced longer prison sentences than whites when both had more serious prior criminal records.[20]

Evidence suggests that the pretrial status of defendants indirectly affects sentencing patterns according to race. A study released in 1991 found that black defendants faced a much higher probability of being jailed prior to trial (as opposed to being freed on bond pending trial) than white defendants, and that pretrial detention made incarceration following conviction more likely.[21] Another study found that black defendants faced a higher probability of being jailed prior to trial, and as a result were convicted of more serious offenses (than similarly situated defendants who were freed pending trial), and that convictions on more serious charges resulted in longer sentences.[22] In other words, both studies found that black defendants were more likely to be detained pending trial, and as a result, received harsher sentences.

Regarding the effect of the defense attorney on sentencing, a study released in 1996 found that whites were much more likely to hire a private attorney than blacks or Latinos, and that retention of a private attorney tended to result in less severe sentences.[23]

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[17] Spohn, Cassia and Jeffrey Spears. "Sentencing of Drug Offenders in Three Cities: Does Race/Ethnicity Make a Difference?" In *Crime Control and Social Justice: A Delicate Balance*, Darnell F. Hawkins, Samuel L. Myers, Jr., and Randolph N. Stone, ed. Westport, Connecticut: Greenwood Publishing Group, 2000.

[18] Ulmer, 1997; Ulmer and Kramer, 1996.

[19] Spohn, Cassia, and Miriam DeLone. "When Does Race Matter?: An Analysis of the Conditions Under which Race Affects Sentence Severity." *Sociology of Crime, Law, and Deviance*, Vol. 2, 2000: 3-37.

[20] Zatz, Marjorie S. "Race, Ethnicity, and Determinate Sentencing: A New Dimension to an Old Controversy." *Criminology*, Vol. 22, 1984: 147-171.

[21] Chiricos and Bales, 1991.

[22] Crew, Keith. "Race Differences in Felony Charging and Sentencing: Toward an Integration of Decision-Making and Negotiation Models." *Journal of Crime and Justice*, Vol. 14, 1991: 99-122.

[23] Holmes, Malcolm D., Harmon M. Hosch, Howard C. Daudistel, Dolores A. Perez, and Joseph B. Graves. "Ethnicity, Legal Resources, and Felony Dispositions in Two Southwestern Jurisdictions." *Justice Quarterly*, Vol. 13, 1996: 11-30.

INTERACTION OF RACE OF THE OFFENDER WITH RACE OF THE VICTIM

This section examines evidence from recent studies regarding the effect on sentence severity of the interaction of defendant's and victim's race.

Key findings:

- Black defendants who victimize whites tend to receive more severe sentences than both blacks who victimize other blacks (especially acquaintances), and whites who victimize whites.

Two studies that provide clear data regarding the combination of the offender's race and the victim's race deal with sexual assault cases. The first study, conducted in a metropolitan Ohio county and released in 1987, found that blacks who sexually assaulted white nonstrangers were more likely to be incarcerated than blacks who assaulted black nonstrangers.[24] Furthermore, *blacks who sexually assaulted white strangers received sentences that were approximately one year longer than blacks who assaulted black strangers, and blacks who sexually assaulted white nonstrangers received sentences that were approximately seven months longer than blacks who assaulted black nonstrangers.* The author of the report hypothesizes that the less severe punishments given in cases of assault against black victims indicates a "disregard for minority victims of sexual assault."[25]

A study conducted in Detroit and published in 1996 controlled for a number of offender characteristics, case characteristics, and victim characteristics.[26] The study found that *the average sentence for blacks who were convicted of sexually assaulting whites was more than three years longer than the sentence for blacks who assaulted blacks, and more than four years longer than the sentence for whites who sexually assaulted whites*. This study also found that black men who assaulted whites (whether the victim was a stranger or an acquaintance) and black men who assaulted black strangers received the harshest punishment, while black men who assaulted black acquaintances and white men who assaulted white women (stranger or nonstranger) received lighter punishments.

The results of these studies suggest that *blacks who sexually assault whites will receive the harshest punishment, while blacks who assault other blacks, especially those with whom they are acquainted, will receive lighter sentences*. It is somewhat unclear to researchers whether this disparity in sentencing arises primarily from a perception that black men who cross racial lines and sexually assault white women are particularly threatening to societal stability and social mores, or whether the sentencing process systematically treats black victims of sexual assault as less worthy of justice than their white counterparts.[27]

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[24] Walsh, Anthony. "The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race." *Criminology*, Vol. 25, 1987: 153-173.
[25] Walsh, 1987: 167.
[26] Spohn, Cassia, and Jeffrey Spears. "The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions." *Justice Quarterly*, Vol. 13, 1996: 649-679.
[27] Spohn, 2000.

INTERACTION OF RACE/ETHNICITY AND TYPE OF CRIME

This section synthesizes the findings of recent studies that seek to analyze the differential effect that race/ethnicity may have on sentencing when interacting with crimes of varying severity and with drug offenses.

Key findings:

- Latinos and blacks tend to be sentenced more harshly than whites for lower-level crimes such as drug crimes and property crimes;
- However, Latinos and blacks convicted of high-level drug offenses also tend to be more harshly sentenced than similarly situated whites.

In general, the relevant studies have found that greater racial disparity exists in sentencing for less serious crimes (especially property crimes and drug offenses, as opposed to violent crimes). For example, a 1998 study conducted in Florida found that while racial disparity existed across the board, blacks were substantially more likely than whites to be sentenced as "habitual offenders" for property crimes and drug offenses than for higher level crimes.[28] The effect was most pronounced for drugs, such that *blacks charged with drug offenses were 3.6 times more likely than similarly situated whites to be sentenced as habitual offenders*. A study published in 2000 found that blacks in Kansas City received sentences that were 14.09 months longer for drug offense convictions and 6.57 months longer for property crime convictions than sentences given to similarly situated whites, but did not face harsher sentencing than whites for violent crimes.[29] The pattern of differential sentencing for property and drug crimes but not for violent crimes may be explained by a phenomenon in which judges faced with offenders who have committed serious crimes are constrained in their sentencing decisions but have somewhat greater latitude in sentencing less serious offenders, and may allow extra-legal factors (such as race/ethnicity) to influence the sentencing decision in these cases.[30]

Various studies show that blacks and Latinos face highly disproportionate sentencing outcomes for drug offenses. *A study of offenders convicted of drug crimes in Georgia between 1977 and 1985 found that blacks were more likely to be incarcerated for drug crimes than whites, especially for more serious offenses: there was a 25 percentage point difference in the probability that a black person would be incarcerated for drug trafficking compared to a white person, a 19 percentage point difference for drug*

[28] Crawford, Charles, Ted Chiricos, and Gary Kleck. "Race, Racial Threat, and Sentencing of Habitual Offenders." *Criminology*, Vol. 36, 1998: 481-511.
[29] Spohn and DeLone, 2000.
[30] Spohn, 2000. Judges tend to be more constrained in their sentencing decisions for more serious and violent crimes than for less serious crimes because sentencing statutes and guidelines tend to prescribe harsh punishments for serious crimes whereas the range of acceptable sentences for less serious crimes tends to be larger. Also, in cases of less serious crimes, judges may have the discretionary power of whether to sentence the defendant to probation or incarceration, and also decide how long to incarcerate for more serious crimes, sentencing policy may not allow probation, and for especially serious crimes, may mandate life sentences, in which judges have no flexibility to decide the length of sentence.

distribution, and a 12 percentage point difference for drug use.[31] Georgia toughened penalties and restricted judicial discretion in sentencing for drug offenses between 1980 and 1982. While one may presume that these legislative actions would reduce racial disparity in sentencing, the study found that racial disparity was actually most pronounced during this period, about which the author postulates that the anti-trafficking crusade of 1980-1982 was selectively directed against black traffickers.

A study published in 1997 found that black and Latino drug offenders in the federal system were sentenced more severely than white offenders.[32] As noted previously, this study also found that whites received a much larger reduction in sentence length than either blacks or Latinos in exchange for providing substantial assistance. Furthermore, a conviction for possession of drugs in lieu of a conviction for trafficking resulted in a larger sentence reduction for whites than for comparably situated blacks and Latinos.

The studies cited here indicate that racial disparity in sentencing of drug offenders persists despite structured sentencing and other reforms. One explanation for this enduring disparity may relate to assumptions about crime and drugs that link blacks and Latinos to drugs and a drug-involved lifestyle.[33] These perceptions persist despite statistical evidence that indicates that the percentage of monthly drug users within the white (7.2%), black (7.7%), and Latino (5.9%) communities is roughly equivalent. As such, whites comprise 71.8% of U.S. drug users, blacks comprise 13.3%, and Latinos comprise 10.7%. The best evidence to date has found that the vast majority of drug users purchase drugs from someone of their own racial or ethnic background, indicating that the vast majority of drug dealers are probably white, judging from the preponderance of white drug users. These perceptions may carry over to prosecutors and judges as well, resulting in more severe sentences for blacks and Latinos.[34]

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[31] Myers, Martha A. "Symbolic Policy and the Sentencing of Drug Offenders." *Law & Society Review*, Vol. 23, 1989: 295-315. It is important to note, however, that this study did not include a control for prior criminal record.

[32] Albonetti, 1997.

[33] For statistical information about drug users, see: "Results from the 2002 National Survey on Drug Use and Health: Detailed Tables." Department of Health and Human Services: Substance Abuse and Mental Health Services Administration, Office of Applied Studies, 2003. And the 2000 U.S. Census, available at: http://www.census.gov/. For studies about the race and ethnicity of drug dealers, see: Beckett, Katherine. "Race and the Enforcement of Drug Delivery Laws in Seattle." December, 2003. Retrieved from http://www.november.org/resources/RacialDisparity.pdf on July 23, 2004. Also: Riley, K. Jack. "Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities." *National Institute of Justice & Office of National Drug Control Policy Research Report*, December, 1997. Retrieved from http://www.ncjrs.org/pdffiles/167265.pdf on July 23, 2004.

[34] Spohn, 2000.

CAPITAL PUNISHMENT

This section analyzes the findings of some of the key studies that examine racial disparity in death penalty sentences.

Key findings:

- In the vast majority of cases, the race of the victim tends to have an effect on the sentence outcome, with white victim cases more often resulting in death sentences;
- However, in some jurisdictions, notably in the federal system, the race of the defendant also affects sentencing outcomes, with minority defendants more likely to receive a death sentence than white defendants.

Death penalty cases in the United States are perhaps the most notable regarding the effect of race on sentencing outcome. Indeed, the literally "vital" consequences of the outcome of a capital trial seemingly provide a greater seriousness to the possibility of racial disparity in death penalty cases than in non-capital cases. Contrary to what many may believe, however, the evidence indicates that, especially at the state level (where the vast majority of death sentences are imposed), the race of the defendant plays a negligible role on the outcome of the trial. This is not to say that racial bias does not exist in the disposition of capital cases, however. The evidence instead primarily points to discrimination based on the race of the victim of the crime.

Before the U.S. Supreme Court temporarily suspended the death penalty in 1972, studies indicated that the race of the defendant had a direct impact on the sentences handed down in capital punishment cases, especially in Southern jurisdictions.[35] Since that time, however, most reliable studies that examine the period since the death penalty was reinstated in 1976 indicate that the race of the defendant no longer plays a direct role in influencing the outcomes of death penalty cases, at least at the state level.

The federal system, on the other hand, is still plagued by race-of-defendant bias. A Congressional report published in 1994, for example, found that *although three-quarters of the people convicted under a drug kingpin law between 1988 and 1994 (during this period, this drug kingpin statute contained the only federal death penalty) were white and only 24% of the defendants were black, the state nevertheless chose to pursue death penalty prosecutions overwhelmingly against blacks: 78% of defendants were black, and only 11% of defendants were white (an additional 11% were Latino).*[36] Although the report does not specify how many of the kingpin prosecutions included a homicide charge, and thus qualified for capital prosecution, the staggering disparity between the

[35] Baldus, David C., and George Woodworth. "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception" *DePaul Law Review* Vol 53, No 4 (Summer 2004), 1411-1495.

[36] "Racial Disparities in Federal Death Penalty Prosecutions 1988-1994" Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary. One Hundred Third Congress, Second Session: March 1994. Retrieved from http://www.deathpenaltyinfo.org/article.php?scid=45&did=528 on July 28, 2004.

racial ratio of those convicted under the law and the racial ratio of death sentences sought by prosecutors suggests that blacks faced a greater likelihood of capital prosecution in the federal system than whites during this period.

A Department of Justice (DOJ) study of the federal system found that, between 1995 and 2000 (after Congress opened a wealth of crimes to capital prosecution in 1994 and 1996), *the U.S. Attorney General approved 159 cases for death penalty prosecution by federal attorneys, and 72% of these cases involved minority defendants.*[37] The DOJ study further found that, among the 159 defendants against whom the death penalty was to be sought, almost half (48%) of the white defendants received pretrial waivers for the death penalty in a plea agreement, whereas only a quarter of minority defendants (25% of blacks, 28% of Latinos, and 25% of "Other") received waivers for the death penalty. Regarding race-of-victim effects, the DOJ study found that between 1995 and 2000, *U.S. Attorneys were almost twice as likely to recommend seeking the death penalty against a black defendant if the victim was non-black* (36%) *as opposed to black* (20%). Although the Congressional and DOJ studies of the federal death penalty are not as methodologically rigorous as the studies cited above regarding non-capital cases, they do strongly suggest that the federal capital punishment system exhibits race-of-defendant and race-of-victim effects that are prejudicial to blacks and other minorities.

The vast majority (99%) of prisoners who have been sentenced to death, however, have been sentenced by the states.[38] A report published in 1990 by the General Accounting Office (GAO, and now called the Government Accountability Office) culled data from 28 studies that examined the period dating from 1976 to 1990, with the vast majority of these studies examining state capital punishment systems.[39] The GAO report found that *82% of the studies surveyed concluded that the defendant had a greater likelihood of being sentenced to death if the murder victim was white than if the victim was nonwhite.*[40] While the studies surveyed in the GAO report varied in their methodology (for example, how many variables were controlled for), the report determined that the weaknesses in the lower-quality studies was not enough to discount the overall conclusion of racial discrimination. The studies surveyed in the GOA report also found equivocal evidence for a race-of-defendant effect in the determination of a death sentence.[41]

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[37] U.S. Department of Justice, "Survey of the Federal Death Penalty Systems: 1988-2000, (2000). Retrieved from http://www.usdoj.gov/dag/pubdoc/dpsurvey.html on July 28, 2004.

[38] Department of Justice, 2000.

[39] United States General Accounting Office. "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities," Report to Senate and House Committees on the Judiciary, February 26, 1990. Retrieved from http://161.203.16.4/t2pbat11/140845.pdf on July 28, 2004.

[40] Similarly to the Paternoster study cited above, some of these studies distinguished between the different stages of a capital prosecution, while others did not. The GAO report does not distinguish between the stages of prosecution, and, in effect, the findings of the studies regarding the effect of race on the likelihood of a death sentence can include factors such as the likelihood of being charged with a crime punishable by death, which ultimately influences the likelihood of receiving a death sentence.

[41] While a majority of the studies surveyed in the GOA report found that the race of the defendant influenced the likelihood of receiving a death sentence—with three-quarters of these studies finding that black defendants were more likely to be sentenced to death—some found that white defendants were more likely to be sentenced to death, with others reporting interaction effects between the race of the defendant and the race of the victim or differences based on geography and location.

Studies that examine capital sentencing data since 1990 also report results that indicate that direct race-of-defendant discrimination is, by in large, no longer a statistically significant variable in influencing death penalty sentences in statewide studies.[42] Studies conducted in Philadelphia County, Pennsylvania, however, have found that black defendants are more likely to be sentenced to death than similarly situated non-black defendants are, and the 2003 Maryland study cited above found significant interaction effects between the race of the defendant and the race of the victim.[43] Even if these findings from Philadelphia and Maryland regarding the race of the defendant are somewhat anomalous, however, the evidence indicates that the race of the victim has an effect on capital sentencing. From 1976 to 1999, white victim cases nationwide have constituted between 51% and 56% of all murder and non-negligent homicide cases, while between 1976 and 2002, 81% of executed defendants had white victims.[44] When studies introduce controls for offender criminal culpability and geographic variability, the discrepancy between the percentage of murder cases with white victims and the percentage of defendants executed who had white victims diminishes somewhat, but the evidence still strongly indicates that defendants with white victims have a much higher probability of being sentenced to death than defendants with non-white victims.

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[42] Baldus, David C., and George Woodworth. "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception" *DePaul Law Review* Vol 53, No 4 (Summer 2004), 1411-1495.

[43] The Philadelphia study: The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Criminal Justice System. "Executive Summary of the Report on Racial and Gender Bias in the Justice System," March 3, 2003. The Philadelphia study found that one out of three black death row inmates would not be there if they were not black; The Maryland study: Paternoster and Brame, 2004. The Maryland study found that, given that a homicide is death eligible, blacks who kill whites are two and one-half times more likely to be sentenced to death than are whites who kill whites, three and one-half times more likely to be sentenced to death than are blacks who kill blacks, and almost eleven times more likely to be sentenced to death than "other" racial combinations.

[44] Baldus and Woodworth, 2004.

CONCLUSION

Contemporary, methodologically rigorous evidence indicates that racial bias continues to pervade the U.S. criminal justice sentencing system. Usually, the effects of this bias are somewhat hidden, and become most apparent for certain types of defendants, such as young minority males, or for certain types of offenses, such as drug and property crimes, or may even have less to do with the race of the defendant than with the race of the victim, as the evidence suggests in sexual assault and capital punishment cases. Although racial bias in sentencing may be somewhat surreptitious, the evidence indicates that it remains a very real part of the process.

Moreover, as previously indicated, sentencing is but one phase of the criminal justice process, and outcomes in this area are reflective of decisions made at prior points in the system. Thus, efforts to reduce racial disparity at sentencing must also pay attention to law enforcement arrest decisions, prosecutorial charging practices, indigent defense representation, presentence investigation procedures, and provision of sentencing alternatives options.

Reducing racial disparity in the criminal justice system is critical in order to produce fairness and to uphold the ideals upon which the system is premised. It is also essential from a practical point of view. Unless the justice system is perceived as fair and just, trust and confidence will erode and public cooperation with the system will diminish.

Decades of research have demonstrated that race has always played a role in sentencing outcomes, even as the dynamics of that relationship have evolved over time. Scholars, practitioners, and the public alike have a strong interest in assessing these dynamics and engaging in policy and practice changes designed to address this fundamental concern.

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THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS

In anticipation of Congressional consideration of revisions to federal sentencing policy, the following analysis provides an overview of the current federal prison population and sentencing trends of recent years. Overall, this analysis demonstrates that the federal prison population has reached record levels, that a high proportion of prisoners are non-violent drug offenders, and that racial disparities in sentencing and the proportion of lower-level drug offenders are increasing.

Recent testimony by the Department of Justice before the United States Sentencing Commission has stated that "approximately two-thirds of all federal prisoners are in prison for violent crimes or had a prior criminal record before being incarcerated."[1] As seen below, conflating those persons convicted of a violent crime – only 13% of federal prisoners – with those having a prior record, including low-level drug crimes, distorts the portrait of the current prison population and the implications for sentencing reform. Overall, nearly three-fourths (72.1%) of federal prisoners are serving time for a non-violent offense and have no history of violence.

Data for this analysis is taken from various reports of the Bureau of Justice Statistics, United States Sentencing Commission, and an analysis of the Survey of Inmates in State and Federal Correctional Facilities.

Substantial Growth of the Federal Prison Population

- As of 2003, 161,673 persons were held in federal prisons, an increase of 81% from 1995.
- The federal prison population has increased at nearly three times the rate of state prisons since 1995, 7.7% vs. 2.7%.

Composition of the Federal Prison Population – Mostly Non-Violent

- More than half (55%) of federal prisoners are serving time for a drug offense, and 13% for a violent offense.
- Nearly three-fourths (72.1%) of the population are non-violent offenders with no history of violence.
- One-third (34.4%) are first-time, non-violent offenders.
- More than half (55.7%) of persons sentenced for a drug offense in 2002 fell into the lowest criminal history category (Category 1) of the sentencing guidelines, and in 87% of cases no weapon was involved.

[1] Statement of Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, before the United States Sentencing Commission, November 17, 2004.

Time Served in Prison for Drug Offenses Increasing

- From 1992 to 2002, the average time served in prison for a drug offense increased by 31% from 32.7 months to 42.9 months.

Drug Policies Produce Disparate Sentences

- Since full implementation of the federal sentencing guidelines in 1989 disparity in sentencing between African Americans and whites has increased.
- African American drug offenders have a 20% greater chance of being sentenced to prison than white drug offenders, and Hispanics a 40% greater chance.
- African Americans receive longer prison terms for drug offenses than whites. In 2002, the average prison term of 105 months for African Americans was 69% longer than the average of 62 months for whites.

Growing Racial Disparities in Time Served in Prison

- Between 1994 and 2002, the average time served by African Americans for a drug offense increased by 73%, compared to an increase of 28% for white drug offenders.
- In 1994, African Americans served an average of 33.1 months for a drug offense; this grew to 57.2 months by 2002.
- Time served for drug offenses for whites increased from 29.1 months in 1994 to 37.2 months in 2002.
- African Americans now serve virtually as much time in prison for a drug offense (57.2 months) as whites do for a violent offense (58.8 months).

Proportion of Low-Level Crack and Cocaine Offenders Increasing

- The majority of persons sentenced for both crack and powder cocaine offenses in 2000 were convicted of low-level functions in the drug trade. More than half (59.9%) of powder cocaine offenders were either street-level dealers or couriers/mules, while two-thirds (66.5%) of crack cocaine offenders fell into these categories.
- The proportion of low-level offenders has been increasing in recent years. Low-level powder cocaine offenders rose from 38.1% in 1995 to 59.9% in 2000, while low-level crack cocaine offenders increased from 48.4% to 66.5% in this period.

Crack/Cocaine Sentencing Policy Key to Drug Disparities

- 81.4% of crack cocaine defendants in 2002 were African American, while about two-thirds of crack cocaine users in the general population are white or Hispanic.
- The average sentence for a crack cocaine offense in 2002 (119 months) was more than three years greater than for powder cocaine (78 months).
- Recent reform proposals of the crack/cocaine mandatory sentencing laws would cut in half the difference (from 34.2 months to 16.4 months) in time served in prison for drug trafficking between African Americans and whites.

Recommendations

- Congress should undertake a comprehensive assessment of the structure and goals of federal sentencing policy, with a particular emphasis on the effects of mandatory sentencing, the proportionality of drug offender sentencing, and the impact of the growth of long-term incarceration on the federal prison system.
- Congress should implement modifications to the federal sentencing guidelines that directly address the growing number of non-violent offenders in the federal prison system.
- Congress should take into consideration the abundance of research indicating the cost-effectiveness of treatment for drug abuse rather than incarceration and introduce legislation that provides ample use of alternatives to incarceration, as is the case in many states.
- Congress should adopt the recommendations of the United States Sentencing Commission and remove the 100:1 sentencing disparity between crack and powder cocaine.

Data Sources: Analysis of the *Survey of Inmates in State and Federal Correctional Facilities, 1997* by The Sentencing Project; Bureau of Justice Statistics, *Prisoners in 2003* (2004), *Compendium of Federal Justice Statistics, 2002* (2004), *Compendium of Federal Justice Statistics, 1994* (1998); United States Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* (2003), *Cocaine and Federal Sentencing Policy* (2002), *Fifteen Years of Guidelines Sentencing* (2004).

Executive Summary

The Sentencing Reform Act of 1984 [hereinafter the SRA] ushered in a new era of sentencing in federal courts. Prior to implementation of the SRA, federal crimes carried very broad ranges of penalties, and federal judges had the discretion to choose the sentence they felt would be most appropriate. They were not required to explain their reasons for the sentence imposed, and the sentences were largely immune from appeal. The time actually served by most offenders was determined by the Parole Commission, and offenders, on average, served just 58 percent of the sentences that had been imposed. The sentencing process, a critical element of the criminal justice process, was opaque, undocumented, and largely discretionary. Because of its impenetrability to outside observers, there was a sense that the process was unfair, disparate, and ineffective for controlling crime.

In order to inject transparency, consistency, and fairness into the sentencing process, Congress passed the SRA, which established the United States Sentencing Commission [hereinafter the Commission] and charged it with establishing guidelines for federal sentencing. The guidelines were promulgated in 1987, but district and circuit court rulings prevented their full implementation until the Supreme Court, in *Mistretta v. United States,* 488 U.S. 361 (1989), affirmed the constitutionality of the Commission and its work in crafting guidelines. As a result, in 1991, when the Commission issued its report, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* [hereinafter called the Four-Year Evaluation], there was relatively little data from which the Commission could evaluate the effects of the guidelines. Today the Commission is in a better position to evaluate the success of the guidelines system and identify areas for further refinement. This report focuses on three specific assessments: 1) the guidelines' impact on the transparency, certainty, and severity of punishment, 2) the impact of the guidelines on inter-judge and regional disparity, and 3) research on racial, ethnic, and gender disparities in sentencing today.

Introduction to the Sentencing Reform Act and the Guidelines

Goals and evaluation criteria. The SRA was the result of nine years of bipartisan deliberation and compromise and, as such, reflects the varied and, at times, competing sentencing philosophies of its many sponsors and supporters. It set forward the following goals for sentencing reform:

1. elimination of unwarranted disparity;
2. transparency, certainty, and fairness;
3. proportionate punishment; and
4. crime control through deterrence, incapacitation, and the rehabilitation of offenders.

The goals of the new system identified in the SRA provide the best criteria for judging whether sentencing reform has been successful. These goals can be divided into two groups. The first group, the goals of sentencing reform, include certainty and fairness in punishment and the elimination of unwarranted disparity. Research on the effectiveness of the system at achieving these goals is the subject of this report. The second group, establishment of policies that will best accomplish the purposes of sentencing—which are usually summarized as just punishment, deterrence, incapacitation, and rehabilitation—is the subject of previous Commission-sponsored research as well as ongoing research at the Commission.

Development of the guidelines. The guidelines promulgated by the Commission were based on the directives in the SRA and other statutory provisions, as well as on a study of past sentencing practices. The Commission analyzed detailed data from 10,000 presentence reports and additional data on over 100,000 federal sentences imposed in the immediate preguidelines era. The Commission determined the average prison term likely to be served for each generic type of crime. These averages helped establish "base offense levels" for each crime, which were directly linked to a recommended imprisonment range. Aggravating and mitigating factors that significantly correlated with increases or decreases in sentences were also determined statistically, along with each factor's magnitude. These formed the bases for "specific offense characteristics" for each type of crime, which adjusted the offense level upward or downward. The Commission deviated from past practice when it determined there was a compelling reason, such as past under-punishment of white collar offenses, and when Congress dictated increased severity for an offense category. The Commission also factored offenders' criminal history into the guidelines as a way to identify offenders most likely to recidivate.

Real offense guidelines. The statute-defined elements of many federal crimes fail to provide sufficient detail about the *manner* in which the crime was committed to permit individualized sentences that reflect the varying seriousness of different violations. In addition, the many, sometimes overlapping provisions in the federal criminal code create the potential that similar offenses will be charged in many different ways. To better reflect the seriousness of each offender's actual criminal conduct, and to prevent disparate charging practices from leading to sentencing disparity, the original Commission developed guidelines that are based to great extent on offenders' real offense behavior rather than the charges of conviction alone. Some of the mechanisms to help ameliorate the effects of uneven charging include: 1) the multiple count rules, 2) cross-references among guidelines, and 3) the relevant conduct rule. In a real offense system, the offender's actual conduct proved at the sentencing hearing—not only the elements of the counts of conviction—factor into the sentence imposed within the statutory penalty range established by the legislature for the offenses of conviction.

Certainty and Severity of Punishment

Truth-in-sentencing, mandatory minimums, and sentencing guidelines. In some sense, the success of the guidelines at achieving certainty of punishment has never been at issue, because

the establishment of "truth-in-sentencing" with the elimination of parole accomplished it at a stroke. Under the guidelines, punishment became not only more certain but also more severe. The proportion of probation sentences declined, use of restrictive alternatives such as home confinement increased, and the rate of imprisonment for longer lengths of time climbed dramatically compared to the preguidelines era. While mandatory minimum penalties had some direct and indirect effects on these trends, careful analysis of sentencing trends for different types of crimes demonstrates that the sentencing guidelines themselves made a substantial and independent contribution.

Overall trends in the use of imprisonment and probation. Between 1987 and 1991, as the full impact of the sentencing guidelines gradually emerged in federal courts, the use of simple probation was cut almost in half. It continued to decline throughout the guidelines era. By 2002, the percentage of offenders receiving simple probation was just a third what it had been in 1987. The use of imprisonment spiked in the early years of guidelines implementation and then resumed a long gradual climb, reaching 86 percent of all offenders by 2002, about 20 percent higher than it had been in the preguidelines era. Some of the decrease in the use of simple probation following implementation of the guidelines is explained by increased use of intermediate sanctions, especially for "white collar" crimes. These offenders historically were more likely to receive simple probation, but under the guidelines they increasingly are subject to intermediate sanctions, such as home or community confinement or weekends in prison, and imprisonment.

In addition to an increase in use of imprisonment, the guidelines era is marked by longer prison terms actually served. Longer prison terms result both from the abolition of parole, which requires offenders to serve at least 85 percent of the sentence imposed, and also by increases in the sentences that are imposed for many types of crimes. Between November 1987 and 1992, the average prison term served by federal felons more than doubled. Since fiscal year 1992, there has been a slight and gradual decline in average prison time served, but federal offenders sentenced in 2002 will still spend almost twice as long in prison as did offenders sentenced in 1984, increasing from just under 25 to almost 50 months in prison for the typical federal felon.

The abolition of parole, the enactment of mandatory minimum penalty provisions, and changes in the types of offenders sentenced in federal court, along with implementation of the guidelines, all contributed to increased sentence lengths. The influence of each of these factors varies among different offenses.

Drug Trafficking. Drug trafficking offenses have comprised the largest portion of the federal criminal docket for over three decades. With the overall growth in the federal criminal caseload, the number of offenders convicted of drug trafficking or use of a communication facility to commit a drug offense has grown every year, reaching 25,835 offenders in 2002, or 40.4 percent of the total criminal docket. Only 592 additional drug offenders, less than 1 percent, were convicted of simple drug *possession*, as opposed to trafficking. As a result of the large number of drug offenders, overall trends in the use of incarceration and in average prison terms are dominated by drug sentencing.

In developing sentences for drug trafficking offenders, the Commission was heavily influenced by passage of the Anti-Drug Abuse Act of 1986 [hereinafter ADAA] which created five- and ten-year mandatory minimum penalties based on the weight of the "mixture or substance containing a detectable amount" of various types of drugs. Finding the correct quantity ratios among different drugs and the correct thresholds for each penalty level has proven problematic. The Commission previously reported that the ratios among certain types of drugs contained in the ADAA, and incorporated into the guidelines' Drug Quantity Table, fail in some cases to reflect the relative harmfulness of different drugs. This is particularly true for the 100-to-1 drug quantity ratio between powder and crack cocaine. The quantity thresholds linked to five- and ten-year sentences for crack cocaine have been shown to result in penalties that are disproportionately long given the relative harmfulness of crack and powder cocaine, and results in lengthy incarceration for many street-level sellers and other low culpability offenders. As a result, the Commission has recommended to Congress revision of the mandatory minimum penalty statutes and the guidelines. Congress has not yet acted on this recommendation.

There has been a dramatic increase in time served by federal drug offenders following implementation of the ADAA and the guidelines. The time served by federal drug traffickers was over two and a half times longer in 1991 than it had been in 1985, hovering just below an average of 80 months. In the latter half of the 1990s, the average prison term decreased by about 20 percent but remained far above the historic average. The decrease in time served during the late 1990s is a result of a trend toward less serious offenses and a greater incidence of mitigating factors in cases sentenced. The overall pattern is repeated for each drug type, although the severity levels are highest for crack cocaine, followed by powder cocaine, heroin, and other scheduled narcotics. Marijuana offenses received the shortest prison terms.

Economic Offenses. Economic offenses—which include larceny, fraud, and non-fraud white collar offenses—constitute the second largest part of the federal criminal docket. A wide variety of economic crimes are prosecuted and sentenced in the federal courts, ranging from large-scale corporate malfeasance to small-scale embezzlement to simple theft. The Commission's study of past sentencing practices revealed that in the preguidelines era, sentences for fraud, embezzlement, and tax evasion generally received less severe sentences than did crimes such as larceny or theft, even when the crimes involved similar monetary loss. A large proportion of fraud, embezzlement, and tax evasion offenders received simple probation. In response, the guidelines were written to reduce the availability of probation and to ensure a short but definite period of confinement for a larger percentage of these "white collar" cases, both to ensure proportionate punishment and to achieve adequate deterrence.

The most striking trend in economic offenses is a shift away from simple probation and toward intermediate sentences that include some type of confinement. The use of imprisonment for economic offenders also has increased steadily throughout the guidelines era. These data demonstrate some success in achieving the Commission's goal of assuring a "short but definite period of confinement" for white collar offenders. The guidelines ensure that offenses involving the

greatest monetary loss, the use of more sophisticated methods, and other aggravating factors are given imprisonment.

Immigration Offenses. Prior to fiscal year 1994 there were relatively few immigration cases sentenced in the federal courts. In the first three years of the 1990s the number of cases ranged between 1,000 and 2,000 annually. Beginning in 1995, however, the number of cases began to climb, and after the implementation of Operation Gatekeeper—the Immigration and Naturalization Service's southwest border enforcement strategy—the number began to soar, reaching a peak of just under 10,000 cases in 2000. Along with the phenomenal growth in the size of the immigration offense docket, a series of policy decisions by Congress and by the Commission have steadily increased the severity of punishment for the two most common classes of immigration offenses: alien smuggling and illegal entry.

Use of imprisonment has increased substantially for these offenses and is affected by the fact that many immigration offenders are non-resident aliens. Lacking a legal home in the United States, many are detained prior to sentencing. Immediate deportation has also become a frequent response to those individuals arrested for illegal entry. Legislative and Commission changes to these penalties have focused on increasing the guidelines offense levels. This has pushed more offenders into the zones of the Sentencing Tables in which probation and alternative sentences are unavailable. In addition to the increased use of incarceration, the average length of time served for both alien smuggling and illegal entry have increased considerably. Illegal entry offenders experienced the first wave of sentence increases in the early 1990s as the guideline amendments enacted in those years became effective. Alien smuggling experienced a steep increase in 1998, as the amendment promulgated pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took effect.

Firearm trafficking and possession. The federal criminal code contains a variety of provisions proscribing the possession, use, and trafficking of firearms. In the last two decades, congressional attention has focused on 18 U.S.C. § 924(c), which provides for a mandatory minimum penalty for offenders who use, carry, or possess a firearm in relation to a drug trafficking or violent crime. In 1984, the statute was amended to require at least five years' imprisonment, to be served consecutive to the sentence for the underlying offense. In 1986, the statute's scope was expanded to include drug trafficking offenses, and additional penalties were added. In 1998, in response to *Bailey v. U. S.,* 516 U.S. 137 (1995)—a U. S. Supreme Court decision that narrowly construed the "use" criteria—the statute's scope was again expanded to include "possession in furtherance" of the underlying offense. Penalties were also increased for brandishing or discharging a firearm during a crime.

Federal statutes also define two other broad types of firearm offenses. Federal law regulates transactions in firearms and imposes record-keeping and other requirements designed to facilitate control of firearm commerce by the various states. In addition, possession of a firearm by certain classes of persons, such as felons, fugitives, or addicts, is prohibited, as is "knowing transfer" of

weapons to these persons. Under the guidelines, the certainty and severity of punishment for all these offenses have greatly increased.

For firearm traffickers, the use of probation has been steadily reduced to about one-quarter of its preguidelines level, replaced by imprisonment and, to a lesser extent, intermediate sanctions. After a period of volatility and decline in trafficking sentences in the first years of guidelines implementation, time served began a steady climb in fiscal year 1992, after the Commission enacted a major revision to the firearms guideline. The subsequent amendments to the guideline have continued to increase sentence severity. By 2000, prison terms were about double what they had been in the preguidelines era. For illegal possessors, probation has been replaced almost completely by imprisonment. The penalty increases for possession offenses were equally dramatic, doubling average time served between 1988 and 1995.

Some of the changes observed for firearm offenses may have been a consequence of more serious cases generated by Department of Justice [hereinafter the Department] initiatives. But the most significant factor driving the penalty increases appears to have been the guideline amendments. These revisions have dramatically increased offense levels, particularly for offenders with prior convictions and for those who used more dangerous types of weapons. These changes in sentences for illegal firearm transactions and possession represent one of the most substantial policy changes initiated largely by the Commission.

Violent Crimes. Unlike the state courts, the federal courts sentence relatively few offenders convicted of violent crimes. In 2002, murder, manslaughter, assault, kidnaping, robbery, and arson constituted less than four percent of the total federal criminal docket. Due to the unique nature of federal jurisdiction over these types of crime, a sizeable proportion of murder, assault, and especially manslaughter cases involve Native American defendants. The most common federal violent crime is bank robbery, which has long been of special concern to federal law enforcement.

For most violent offenses, rates of imprisonment have always been high and have remained so under the guidelines. Only manslaughter, the violent offense for which Native Americans are most highly represented, contained room for significant growth in incarceration rates. The use of alternatives to imprisonment for manslaughter cases has been steadily reduced under the guidelines, and now occurs in less than ten percent of cases. Kidnaping and murder have incarceration rates between 90 and 100 percent, with arson and assault somewhat lower. The imprisonment rate for bank robbers climbed from the mid to the high 90s under the guidelines.

Average prison sentences *imposed* on violent offenders decreased at the time of guidelines implementation, but due to the abolition of parole, the time served increased significantly. The greatest increases have been for murder, kidnaping, bank robbery, and arson. The more stable prison term lengths for manslaughter partly reflect the large number of these offenders who receive relatively short prison terms rather than an alternative sanction.

Sex offenses. Although sex offenses account for a very small percentage of cases in the federal docket, just 1.3 percent in 2002, Congress has legislated frequently on this issue during the guidelines era, particularly regarding offenses against minors. Much like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses. In the PROTECT Act of 2003, Congress, for the first time since the inception of the guidelines, directly amended the *Guidelines Manual* and developed unique limitations on downward departures from the guidelines in sex cases.

The guidelines treat separately three types of sexual offenses. Criminal sexual abuse involves offenses such as aggravated rape, statutory rape, or molestation. Sexual exploitation involves the production, distribution, or possession of child pornography. Promotion offenses involve inducing, enticing, or persuading commission of an illegal sex act, or traveling or transporting persons to commit such acts, or otherwise promoting illegal commercial sex acts.

The percentage of offenders receiving imprisonment increased for both sexual abuse and sexual exploitation offenders in the guidelines era, and dramatically so for sexual exploitation offenders. Fewer than ten percent of either type of offender receives probation or intermediate sanctions. The average length of time served for sexual exploitation has increased by 20 months from its preguidelines level. Sentences imposed on sexual abuse offenders show the same decreases observed for violent offenders, but time actually served has remained fairly constant throughout the period of study.

Inter-judge and Regional Disparity

Evidence of disparity in preguidelines sentencing. In the debates leading to passage of the SRA, Congress identified differences among judges and, to a lesser extent, differences among geographic regions in sentencing practices as particularly common sources of unwarranted disparity. Research demonstrated that philosophical differences among judges affected the sentences they imposed. The data showed that some judges were consistently more severe or more lenient than their colleagues, and that judges varied in their approaches to particular crime types. Several studies found geographical variations in sentencing patterns, suggesting that different political climates or court cultures can affect sentences. Regional differences arise not just from the exercise of judicial discretion, but also from differences in policies among U. S. attorneys.

Increased transparency and predictability of sentences under the guidelines. The guidelines have made sentencing more transparent and predictable. The SRA requires judges to document in open court the facts and reasons underlying the sentences they impose, which are then reviewable on appeal. Defendants and prosecutors are better able to predict sentences based on the facts of the case than in the discretionary, preguidelines era. By making sentencing policies more transparent, the guidelines make it easier to debate and evaluate the merits of particular policies. The effects of changes in sentencing policy can also be anticipated more precisely. The prison impact

model developed by the Sentencing Commission, and further elaborated by the Bureau of Prisons [BOP], has proven very accurate at projecting the need for prison beds and supervision resources, making management of correctional resources easier.

Statistics provide a method for quantifying the increased understanding of sentencing made possible by guidelines. Most of the "variance"—the deviation of sentences around the average—among sentences in the preguidelines era was unaccounted for in statistical studies. Only 30 to 40 percent of the variance could be explained by characteristics of the offense or offender, leaving open the possibility of considerable arbitrary variation. Today, approximately 80 percent of the variance in sentences can be explained by the guidelines rules themselves. This greater transparency makes it easier to dispel concerns that sentences vary arbitrarily among judges, or that irrelevant factors, such as race or ethnicity, significantly affect sentences.

Evaluation research has been made easier by another benefit of sentencing reform—the creation of a specialized expert agency with a substantial research mission. The Commission has developed and maintains huge databases on the sentences imposed in each fiscal year, as well as specialized data sets focused on particular issues. These represent the richest sources of information that have ever been assembled on federal crimes, federal offenders, and sentences imposed. As a result, we are in a better position to evaluate whether unwarranted inter-judge, regional, or racial discrimination affects sentences today.

The effect of guidelines implementation. The effect of the guidelines on unwarranted disparity is best evaluated by comparing, among judges who receive similar types of cases, the amount of variation in sentences *before* and *after* guidelines implementation. Researchers both inside and outside the Commission have made this comparison using the "natural experiment" created by the random assignment of cases to judges in many courthouses. The most recent and best of these studies found significant reductions in the unwarranted influence of judges on sentencing under the guidelines compared to the preguidelines era.

Studies of disparity divide judges' influence into "primary judge effects" (greater severity or leniency among judges in all types of cases, represented by differences in their average sentence) and "interaction effects" (greater severity or leniency in particular types of cases). Two judges with similar average sentences may greatly differ in their treatment of particular offenses. Interaction effects can reduce or even cancel the primary judge effect, with one judge sentencing drug offenses more severely than "white collar" offenses and another doing the opposite.

In the Commission's study, the influence of several different factors were compared, including the primary judge effect, interaction effects, city effects, as well as the general type of offense involved and whether an offender had any prior criminal conviction. General offense type accounted for the most variation in sentences both before and after guidelines implementation (between 15% & 20%) followed by interaction effects, city effects, and judge effects. The primary judge effect was relatively small in both the preguidelines and guidelines era, but was reduced by

between a third and half under the guidelines (*e.g.*, from 2.32 to 1.24 percent among judges who sentenced in both time periods). Interaction effects were about three to five times larger than primary judge effects. Interaction effects were reduced for most judges under the guidelines, although not among judges who sentenced in both time periods. The influence of judges was reduced by the guidelines for drug, fraud, firearm, and larceny offenses, though immigration or robbery offenses did not show a reduction. Notably, regional differences in drug trafficking cases were increased from the preguidelines to the guidelines era.

Disparity Arising at Presentencing Stages. The SRA focused primarily on sentencing, but Congress, the Commission, and other observers recognized that sentencing could not be considered in isolation. Decisions regarding what charges to bring, decline, or dismiss, or what plea agreements to reach can all affect the fairness and uniformity of sentencing. Congress directed the Commission to develop mechanisms to monitor and, if necessary, control some of the negative effects of plea bargaining, particularly through policy statements establishing standards for judicial review and rejection of plea agreements that undermine the guidelines. In addition, the Commission developed the real offense system of relevant conduct and multiple count rules to reduce the effects of charging variations on the sentencing of offenders who engage in similar conduct. The Judicial Conference of the United States developed procedures for presentencing investigations designed to inform judges of the effects of charging and plea bargaining decisions. The Department also took steps to help ensure that sentencing uniformity was not thwarted at the presentencing stages. The Department's efforts were recently renewed, demonstrating continuing recognition that presentencing decisions can undermine sentencing uniformity.

Congress has previously directed the Commission to study plea bargaining and its effects on disparity. Because fewer statistical data are available to investigate decisions made at presentencing stages, their effects are difficult for the Commission to monitor and precisely quantify. However, a variety of evidence developed throughout the guidelines era suggest that the mechanisms and procedures designed to control disparity arising at presentencing stages are not all working as intended and have not been adequate to fully achieve uniformity of sentencing.

The Commission, as well as outside observers, have reported that plea bargaining is re-introducing disparity into the system. The Commission in 1989, 1995, and again in 2000 compared descriptions of the offense conduct contained in samples of presentence reports with the conduct for which the offenders were charged and sentenced. Each time a large proportion of qualifying offenders (in some cases large majorities) were not charged with potentially applicable penalty statutes. While some offenders are charged in a manner that results in sentences above the guideline range that would otherwise apply to the case, in other cases the charges selected cap the statutory range below the guideline range that would properly apply to the offender's real offense conduct. Charging decisions that limit the normal operation of the guidelines result in sentences that are disproportionate to the seriousness of the offense and disparate among offenders who engage in similar conduct.

Surveys of judges and probation officers have suggested other forms of plea bargaining, such as fact bargaining, that can result in disparity. A majority of chief probation officers reported in a survey sponsored by the Commission's Probation Officer's Advisory Group that the facts included in plea agreements were complete and accurate in the majority of cases. However, 43 percent reported this was true just half the time or less. Probation officers in some districts reported that prosecutors tried to limit information used in applying the guidelines in some cases. The Federal Judicial Center found in a nationwide survey that more than a quarter of responding judges reported that plea stipulations understated the offense conduct somewhat or very frequently, while another 12 percent said they did so about half the time. Judges reported that they did sometimes "go behind" the plea agreements to examine underlying conduct, but they reported doing so "infrequently."

Field studies in several districts have demonstrated other ways that plea bargaining can result in sentencing disparity. An early study sponsored by the Commission estimated that plea agreements circumvented the guidelines in 20 to 35 percent of cases through charge, fact, or date bargaining. Some commentators have called circumvention of the guidelines through plea agreements a form of "hidden departure," in which prosecutors and courts create incentives for guilty pleas and defendant cooperation beyond the incentives contained in the guidelines themselves. In some cases, the sentence recommended in plea agreement appears to the parties and to the court more fair and effective at achieving the purposes of sentencing than the sentence required by strict pursuit of every potentially applicable charge or sentence enhancement.

Other Sources of Disparity Under the Guidelines. Several mechanisms within the guidelines system have been identified by commentators as continuing sources of disparity. These include variation in the rates of departure, including departures for substantial assistance to the government, or the extent of such departures. In addition, the guidelines give judges discretion over placement of the sentence within the guideline range, including, in some cases, whether to use a sentencing option such as probation.

The Commission analyzed the influence of each of these mechanisms on sentencing variations. Among these mechanisms, substantial assistance departures accounted for the greatest amount of variation in sentence lengths—4.4 percent. Other downward departures contributed 2.2 percent, while upward departures contributed just 0.29 percent. Only 0.07 percent of the variation was explained by use of the guideline range above the guideline minimum. Because data is unavailable on the types of assistance offered by defendants, or the nature of the mitigating circumstances present in cases, it is not possible to determine how much of these sentencing variations represent unwarranted disparity.

Even though the *rate* of substantial assistance and other downward departures is similar—17.1 percent and 18.3 percent, respectively—substantial assistance departures account for more variability in sentence length because the *extent* of departure for substantial assistance is on average greater. Commission research found varying policies and practices in different U. S. attorney's offices regarding when motions for departures based on substantial assistance were made, and in the extent of departure recommended for different forms of assistance.

Racial, Ethnic, and Gender Disparity

Growing caseload of minority offenders and a gap in sentencing. The proportion of the federal offender population consisting of minorities has grown over the past fifteen years. While the majority of federal offenders in the preguidelines era were White, minorities dominate the federal criminal docket today. Most of this shift is due to dramatic growth in the Hispanic proportion of the caseload, which has approximately doubled since 1984. Most notably, while the gap in average sentences between White and minority offenders was relatively small in the preguidelines era, the gap between African-Americans and other groups began to widen at the time of guidelines implementation, which was also the period during which large groups of offenders became subject to mandatory minimum drug sentences. The gap was greatest in the mid-1990s and has narrowed only slightly since then. The Commission had conducted a great deal of research to investigate possible reasons for this gap, including the possible influence of discrimination or of changes to the sentencing laws themselves.

Discrimination. The SRA sought to eliminate all forms of unwarranted disparity, including disparity based on irrelevant differences among offenders. Different treatment based on such characteristics is generally called *discrimination*. Discrimination may reflect intentional bias toward a group, or may result from unconscious stereotypes or fears about a group, or greater empathy with persons more similar to oneself. Discrimination is generally considered the most onerous type of unwarranted disparity and sentencing reform was clearly designed to eliminate it. Concern over possible discrimination in federal sentencing remains strong today. No sentencing issue has received more attention from investigative journalists or scholarly researchers.

The studies agree on a general point: racial and ethnic discrimination by judges, if it exists at all, is not a major determinant of federal sentences compared to the seriousness of offenders' crimes and their criminal records. But the studies disagree over whether discrimination continues to affect sentencing at all. Many of the earlier studies were plagued by methodological problems, including a lack of good data on legally relevant considerations that might help explain differences in sentences and a failure to take account of statutory minimum penalties. Many of these problems can be overcome by using a "presumptive sentence" model.

The Commission studied whether race, ethnicity, or gender affects federal sentences after controlling for the influence of legally relevant considerations, including the guidelines rules and mandatory statutory penalties. Across five recent years, a typical Black male or Hispanic male drug trafficker had somewhat greater odds of being imprisoned when compared to a typical White male drug trafficker. No differences were found in non-drug cases. The odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher. Differences in odds are difficult to translate into plain language, but further analysis examining the proportional reduction in error achieved by using race and ethnicity suggest that in only a handful of cases in any given year does being Black or Hispanic influence the decision whether to incarcerate. Some of these differences might be explained by legally relevant considerations for which we have no data.

For offenders whom judges choose to incarcerate, the question becomes: do similar offenders receive similar prison terms? For Black offenders, the results are once again limited to drug trafficking offenses and to male offenders. The typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer. A similar effect is found for Hispanic drug offenders, with somewhat lesser effects also found for non-drug and female Hispanic offenders. These findings indicate that all types of Hispanic offenders are placed above the minimum required sentence more frequently than similar White offenders, or receive somewhat lesser reductions when receiving a downward departure. The same is true of Black drug trafficking offenders and Black males.

While any unexplained differences in the likelihood of incarceration or in the lengths of prison terms imposed on minority and majority offenders is cause for concern, there is reason to doubt that these racial and ethnic effects reflect deep-seated prejudices or stereotypes among judges. Most noteworthy is that the effects, which are found only for some offense types and for males, are also unstable over time. Separate year-by-year analyses reveals that significant differences in the likelihood of imprisonment are found in only two of the last five years for Black offenders, and four of the last five for Hispanic offenders. The effects for sentence length disappear for both Black and Hispanic offenders in the most recent year for which data are available. Offense-to-offense and year-to-year fluctuations in racial and ethnic effects are difficult to reconcile with theories of enduring stereotypes, powerlessness, or overt discrimination affecting sentencing of minorities under the guidelines. In addition, the effects that we observe may be due in part to differences among groups on factors that judges legitimately may consider when deciding where to sentence within the guideline range or how far to depart, but on which we have no data.

Unlike race and ethnic discrimination, the evidence is more consistent that similar offenders are sometimes treated differently based on their gender. Gender effects are found in both drug and non-drug offenses and greatly exceed the race and ethnic effects discussed above. The typical male drug offender has twice the odds of going to prison as a similar female offender. Sentence lengths for men are typically 25 to 30 percent longer for all types of cases. Additional analyses show that the effects are present every year.

Rules Having Questionable Adverse Impacts. Discrimination by sentencing judges cannot explain the growing gap between African-American and other offenders observed during the guidelines era. Another possibility is sentencing rules that have a disproportionate impact on a particular demographic group. Research has shown that differences in the types of crimes committed by members of different groups and in their criminal histories explains much of the gap in average sentences among them. Rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others. But if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group.

In its cocaine reports, the Commission addressed crack cocaine defendants—over eighty percent of whom are Black—who are given identical sentences under the statutes and the guidelines

as powder cocaine offenders who traffic 100 times as much drug (the so-called 1-to-100 quantity ratio). The average length of imprisonment for crack cocaine was 115 months, compared to 77 months for the powder form of the drug. The Commission reported that the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. For these reasons, the Commission recommended that cocaine sentencing be reconsidered. If the Commission's recommendations were adopted, the gap between African-American and other offenders would narrow significantly. Other rules in the statutes and guidelines have adverse impacts on particular groups. The efficacy of these rules for advancing the purposes of sentencing should be carefully assessed.

Summary and Conclusions

Significant achievement of the goals of sentencing reform. In general, the guidelines have fostered progress in achieving the goals of the Sentencing Reform Act. Sentencing is more transparent, based on articulated reasons stated in open court and reviewable on appeal. Punishment is more certain and predictable, allowing the parties to better anticipate the sentencing consequences of case facts, and allowing the system to better predict the impact of changes in policy on prison populations and correctional resources. Sentence severity has been increased for many types of crime, in some cases substantially. Most important, the guidelines do not admit consideration of factors, such as race or ethnicity, that are irrelevant to the purposes of sentencing. There is less inter-judge disparity for similar offenders committing similar offenses.

Sentencing reform has had its greatest impact controlling disparity arising from the source at which the guidelines themselves were targeted—judicial discretion. Disparity arising from the decisions of other participants in the sentencing system, or from the process of sentencing policymaking itself, has been less successfully controlled. Statutory minimum penalties are invoked unevenly and introduce disproportionality and disparity when they prevent the guidelines from individualizing sentences. Presentencing stages, such as charging and plea negotiation, lack the transparency of the sentencing decision, making research more difficult. But significant evidence suggests that presentencing stages introduce disparity in sentencing. There is still work to be done to achieve the ambitious goals of sentencing reform in all respects.

Partial implementation of the components of sentencing reform. Part of the reason not all the goals of sentencing reform have been fully achieved is that not all of the components of guidelines implementation put in place at the dawn of the guidelines era have been fully implemented or have worked as intended. Probation officers conduct presentencing investigations to the best of their abilities given limited resources. Judges conscientiously apply the guidelines to the facts as they know them. Appellate review corrects guideline misapplications and alerts the Commission to areas of ambiguity where clarification of the guidelines is needed. But neither appellate review nor guidelines amendments have prevented, at least through the 2002 data currently available, significant variations in departure rates. Neither Department policy nor judicial review of plea agreements has prevented plea bargaining from sometimes circumventing proper application of the guidelines needed to ensure similar treatment of offenders who commit similar crimes.

The SRA also outlined three major components of sentencing policy development: 1) utilization of research and criminological expertise developed by the Commission, 2) collaboration among policymakers and front-line implementers in the courts, and 3) political accountability through legislative directives and review. The Commission has worked to be responsive to the concerns of Congress, and its priorities and policymaking agenda have been greatly influenced by congressional directives and other crime legislation. In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission.

The Commission is uniquely qualified to conduct studies using its vast database, obtain the views and comments of various segments of the federal criminal justice community, review the academic literature, and report back to Congress in a timely manner. These are the processes set out in the SRA, which established the Commission as the clearinghouse for information on federal sentencing practices and the forum for collaboration among policymakers, implementers, and other stakeholders. As an independent agency in the Judiciary, but with frequent interaction with the three branches of government, the Commission is well-positioned to develop fair and effective sentencing policy as long as it continues to receive the resources and support it needs to carry out its vital mission.

Preface

Prior to November 1, 1987, the implementation of federal sentencing guidelines, sentencing in the federal courts was very different. Crimes typically carried broad statute-defined ranges of possible penalties and sentencing judges had discretion to choose the penalty within the statutory range they felt would best achieve the purposes of sentencing. Judges were not required to explain the reasons for their sentences, and the sentences themselves were largely immune from appeal. If prison time was ordered, the time defendants actually served depended only partly on the sentence imposed by the judge. Release dates generally were determined by the United States Parole Commission and defendants typically served just 58 percent of the sentence that had been imposed (BJS, 1987).

These factors contributed to a widespread perception that sentences imposed and sentences and prison terms served under the old "indeterminate" sentencing system were unfair, disparate, and ineffective for controlling crime. Respect for law enforcement and the entire criminal justice process was undermined when offenders served only a fraction of the sentence imposed by the judge. The Sentencing Reform Act of 1984 [SRA] sought to establish sentencing practices that would eliminate unwarranted disparity, assure certainty and fairness, reflect advances in criminological knowledge, achieve proportionate punishment, and control crime through the deterrence, incapacitation, and rehabilitation of offenders.

The SRA established the U.S. Sentencing Commission, composed of federal judges and other experts in the field of sentencing, and charged it with the task of promulgating sentencing guidelines for federal courts. After eighteen months of deliberations, the Commission issued the initial set of guidelines, which took effect on November 1, 1987. Four years later, in December 1991, the Commission submitted its report to Congress, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* to Congress. The gradual implementation of the guidelines, which applied only to offenses committed after their enactment, and numerous court challenges delayed full implementation until the early 1990s. Furthermore, the guidelines were accompanied by changes of policy and practice that took time to be fully established. Thus, when the Commission released its Four-year Evaluation, it noted the report was a "preliminary assessment of some short-term effects" (USSC, 1991a) rather than a comprehensive examination of the effects of the guidelines on federal sentencing practices.

Twenty years after the SRA was passed and with fifteen years of data on sentences imposed under the guidelines, the Commission is in a better position to evaluate how well the changes brought by the SRA have achieved the ambitious goals Congress set for federal sentencing. This report will update the Four-year Evaluation and outline areas for further research in the continuing evolution of sentence reform.

Overview of the Fifteen-Year Evaluation

Fifteen Years of Guidelines Sentencing is one of a series of publications describing the results of the Commission's fifteen-year anniversary evaluation of the guidelines. In addition to this report, the Commission has published three other monographs: *Cocaine and Federal Sentencing Policy* (May 2002), the third in a series of Commission reports on cocaine sentencing; *A Survey of Article III Judges on the Federal Sentencing Guidelines, Final Report* (February 2003), which provides all the findings of the Commission's survey conducted as part of the Fifteen-Year Evaluation; and *Downward Departures from the Federal Sentencing Guidelines* (October 2003). These reports are available at the Commission website, www.ussc.gov. In addition, the Commission is releasing on its website a research series on the recidivism of federal offenders. Two reports, *Recidivism and the First Offender and Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* are currently available.

Fifteen Years of Guidelines Sentencing undertakes a survey of the federal sentencing system in light of the goals for sentencing reform established by Congress in the SRA. It draws upon a diverse pool of research, including work from both inside and outside the Commission. A bibliography of the published research bearing on the effectiveness of the guidelines is included in this report as Appendix A. The report picks up where the Four-Year Evaluation left off. The Commission targeted three primary areas for special consideration in this report: 1) the guidelines' impact on the transparency and rationality of sentencing, and the certainty and severity of punishment, 2) the impact of presentencing stages and inter-judge and regional disparity, and 3) research on racial, ethnic, and gender disparities in sentencing today. In all three areas, evidence indicates that in the fifteen years under sentencing guidelines, we have made progress toward meeting the goals of sentencing reform.

As policymakers reconsider the federal sentencing system's purposes and effectiveness, the Commission believes improvements in the system can best be achieved by careful consideration of the best available evidence concerning what works in sentencing policy, what doesn't work, and what we still do not know. The Fifteen-Year Evaluation was designed to inform this debate by summarizing the current state of "knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C § 991(b)(1)(C).

LETTER FROM THE ASSOCIATION OF CORPORATE COUNSEL (FORMERLY THE AMERICAN CORPORATE COUNSEL ASSOCIATION), THE BUSINESS CIVIL LIBERTIES, INC., THE BUSINESS ROUNDTABLE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE U.S. CHAMBER OF COMMERCE

February 9, 2005

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Subcommittee Hearing on "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines" Scheduled for February 10, 2005

Dear Mr. Chairman:

We understand that the Subcommittee has scheduled a hearing for February 10, 2005 on the subject of "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines." As you prepare for these and other related hearings, the undersigned organizations would like to express our concerns regarding a recent amendment to the Federal Sentencing Guidelines for Organizations that will weaken the attorney-client privilege. We ask that this letter be included in the official record of your Subcommittee's hearing scheduled for February 10, 2005.

On April 30, 2004, the U.S. Sentencing Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Included in these amendments—all of which became effective on November 1, 2004—was a change in the Commentary for Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Guidelines. Prior to the change, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be required, even though the Justice Department routinely sought waiver as a condition of certifying a company's cooperation.

The attorney-client privilege is the bedrock of a defendant's rights to effective counsel and confidentiality in seeking legal advice. It also serves a key practical role in the process of corporate self-investigation and reporting by allowing corporate officials to talk with lawyers without concern that their admissions, questions or requests for legal guidance will be required to be shared with government investigators. The privilege also encourages clients to place lawyers on mission-critical teams so that legal advice can be regularly integrated into the company's day-to-day and strategic business decisions. Removing the protections of the privilege from the corporate or other organizational contexts will make it far more difficult for companies, associations, unions, and other entities to detect employee wrongdoing when it occurs and correct it early.

Because we strongly support effective internal compliance programs and procedures, we want to make you aware of our concerns that this amendment undermines, rather than strengthens, legal compliance. While this letter does not address the broader issue of Guidelines reform that is currently before the Subcommittee, we share a profound concern about this discrete provision, which has serious ramifications for the attorney-client relationship.

In our view, the privilege waiver amendment contained in the Commentary for Section 8 will unfairly harm companies, associations, unions, and other entities in the following ways:

•**The new amendment will weaken the attorney-client privilege between companies and their lawyers**. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers and boards and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of the attorney-client and work product privileges, the amendment will discourage companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law.

•**The amendment will undermine internal compliance programs.** Instead of aiding in the prosecution of corporate criminals, the privilege waiver amendment will make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Because the effectiveness of these internal investigations depends on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any attempt to require routine waiver of the attorney-client and work product privileges would undermine a system that has worked well.

•**The amendment will encourage excessive litigation.** Once attorney-client or work product protections are waived, they are waived for all purposes, including subsequent civil litigation cases. Therefore, forcing companies and other entities to routinely waive these privileges during criminal investigations will provide plaintiff lawyers with a bonanza of sensitive, confidential information that will be used against the entities in subsequent litigation, including class action and shareholder derivative suits. The relative costs of these subsequent suits are necessarily weighed by companies, and as a result, many companies may decide not to cooperate with the government in order to preserve their defenses for those subsequent actions that appear to involve a far greater financial risk.

• **The amendment will unfairly harm employees.** The privilege waiver amendment will place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity or they can decline to cooperate and risk their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

Unfortunately, the Supreme Court's recent decision in *United States v. Booker/Fanfan* did not alleviate the problems caused by the amendment. Although the Supreme Court struck down as unconstitutional those provisions of the Sentencing Guidelines that made them mandatory and binding on the courts, it preserved the overall Guidelines as nonbinding standards that the courts must consider when crafting sentences. Therefore, the privilege waiver amendment will continue to cause adverse consequences as long as it remains in place.

For all these reasons, we believe that the new privilege waiver amendment is flawed and is uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship. Therefore we urge Congress to pass legislation addressing the problems caused by the privilege waiver amendment as soon as possible.

Sincerely,

ASSOCIATION OF CORPORATE COUNSEL
(formerly the American Corporate Counsel Association)

BUSINESS CIVIL LIBERTIES, INC.

BUSINESS ROUNDTABLE

NATIONAL ASSOCIATION OF MANUFACTURERS

THE U.S. CHAMBER OF COMMERCE

cc: All members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security

LETTER FROM KEITH DARCY, ACTING EXECUTIVE DIRECTOR, ETHICS OFFICER ASSOCIATION (EOA)

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EOA

February 10, 2005

Via e-mail and facsimile
The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Today's Oversight Hearing on "The Implications of the *Booker/Fanfan* Decisions for the Federal Sentencing Guidelines"

Dear Mr. Chairman:

The Ethics Officer Association ("EOA") requests that this letter be included in the official record of today's subcommittee hearing on "The Implications of the *Booker/Fanfan* Decisions for the Federal Sentencing Guidelines." The Ethics Officer Association, the largest multi-industry organization for professionals responsible for ethics, compliance, and business conduct programs, has over 1,200 members, all of whom are professional ethics and compliance officers, *i.e.*, practitioners in the field of business ethics and compliance. (A list of member organizations is attached.) They represent hundreds of organizations that have a heightened awareness of the need for effective ethics and compliance programs.

The Organizational Guidelines contain a "carrot and stick" philosophy for organizations that have an "effective program." The definition of such an effective program is included in the Guidelines. If an organization has violated the law but nevertheless is found to have an "effective program", as defined in the Guidelines, the entity may receive significant mitigation in the form of credit in the calculation of its culpability score and the resulting fine. This definition has served not only as an incentive for organizations to make significant changes in their behavior, but it also has caused organizations to focus on their responsibility to detect and prevent violations of law and to implement internal ethics and compliance programs in furtherance of this goal. The standards described in the Guidelines have become the model framework and foundation for best practices in organizational ethics and compliance programs today. Because of the incentives created by the Guidelines, thousands of corporations have developed policies and procedures to prevent and detect violations of law and to promote more ethical corporate cultures. We believe that these programs have, in turn, prevented unethical behavior and business crimes that otherwise might have been extremely costly to the nation. In our view, it is critical that strong incentives for corporations and other organizations to adopt ethics and compliance programs be maintained.

On April 30, 2004, the U.S. Sentencing Commission transmitted to Congress important amendments to Chapter 8 of the Federal Sentencing Guidelines Manual relating to "organizations" — a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. The then Executive Director of the EOA, Mr. Edward S. Petry, served as a member of the Ad Hoc Advisory Group that reviewed and evaluated the Organizational Guidelines over a period of 18 months in the first ever review of the Organizational Guidelines since they became effective in 1991. The Sentencing Commission's recent amendments to the Organizational Guidelines, which became effective on November 1, 2004, were based almost entirely on the work of the Advisory Group.

For 13 years the EOA has been providing its members with opportunities for exchanging ideas and experience, education, and sharing best practices. The new amendments to the Guidelines reflect, acknowledge, and codify the "best practices" which have been redefined as a result of the existence and activities of the EOA and through progress in the business ethics field since the original enactment of the Guidelines in 1991. Specifically, for example, the amendments address the necessity for an organization to affirmatively create a culture of ethics and compliance, as well as the important role of the board of directors, senior leadership, and the individual charged with day-to-day ethics and compliance responsibility. The EOA is especially pleased that the many years of experience that its professional ethics and compliance officers have had with the Guidelines significantly informed the conclusions and recommendations of the Advisory Group. In addition, EOA member company representatives actively participated in the Guidelines review and amendment process by providing oral and written testimony to the Advisory Group and to the U.S. Sentencing Commission.

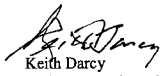
As well as reflecting the progress in the field since 1991, the amendments were designed to respond to the lessons learned from the spate of corporate scandals that have received such widespread attention since late 2001. There have been a number of legal and regulatory standards and guidelines that have been put into effect in response to these scandals, and the amendments to the Guidelines were designed to harmonize with those other changes.

We know that Congress intends to review the *Booker/Fanfan* decisions and decide what, if any, legislative action is needed. Although the full impact of the decisions is not yet clear, we believe that it would be a mistake for Congress to make a hasty legislative response, and we further believe that the *status quo* does not constitute an immediate crisis. Because the *Booker/Fanfan* decisions contemplate the continued existence of the Guidelines and the U.S. Sentencing Commission, and because sentencing courts continue to be required to consult the Guidelines, the incentive in the Guidelines for companies to implement effective compliance programs presumably endures. We therefore believe that the U.S. Sentencing Commission, the Department of Justice, and the courts should be allowed to continue to do their work in an atmosphere that will evolve and inform whether there is a better way to meet the goals of the Sentencing Reform Act. In other words, we agree with those who are advocating for caution and deliberation under the circumstances.

In addition, we would like to suggest that the business community, and particularly business ethics and compliance professionals, have an opportunity to provide information

relating to the sentencing system as it currently exists as well as the possible impact of any legislative proposals on organizations. We look forward to sharing the views of business ethics professionals as you turn your attention to this vitally important yet complex issue.

Sincerely,



Keith Darcy
Acting Executive Director
Ethics Officer Association

Attachment: List of EOA member organizations

cc: Members of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security *(via e-mail and facsimile)*
Members of the EOA Board of Directors *(via e-mail)*

Member Companies

EOA Member Company List as of February 1, 2005

- 3M
- AAA Life Insurance Company
- AAI Corporation
- ABB Inc.
- Abbott Laboratories
- ABT Associates, Inc.
- Accenture
- Acuity Brands
- Adecco
- Adelphia Communications Group
- adidas-Salomon International Sourcing Limited
- AdvancePCS
- The AES Corporation
- Aetna Inc.
- AFC Enterprises, Inc.
- AGL Resources, Inc.
- Agilent Technologies, Inc.
- Air Liquide America
- Akzo Nobel, Inc.
- Alamo Community
- Alcatel
- Alcoa, Inc.
  - *Howmet Castings*
- Alliance Data Systems
- Alliant Energy
- Alliant Techsystems Inc.
- Allstate Insurance Company
- Altria Group, In
  - *Kraft Foods*
- Alyeska Pipeline Service Company
- AMEC plc
- America Online, Inc.
- American Airlines, Inc.
- American Arbitration Association
- American Cancer Society, Inc.
- American Electric Power Company, Inc.
  - *American Electric Power* Service *Corporation*
- American Family Mutual Insurance Company
- American Honda Motor Co., Inc.
  - *Honda Engineering N.A. Inc.*
- American Institutes for Research
- American International Group, Inc.
- American Red Cross
- American Standard Companies
- American Transmission Company
- American United Life Insurance Company
- Amgen Inc.
- Amica
- Anthem Blue Cross & Blue Shield—West Region
  - *Anthem Inc.*
- AOL Time Warner
- Aon Corporation
- Applied Materials, Inc.
- Aquila, Inc.
- Archer Daniels Midland Company
- Argonaut Group, Inc.
- ARINC Incorporated
- Arkema Inc.
- Armstrong World Industries
- Ashland Inc.
- AT&T
- AT&T Broadband
- Atlanta Housing Authority
- Atlantic Marine, Inc.
- Aurora Foods Inc.
- The Auto Club Group
- Avaya Inc.
- Avery Dennison
- The Babcock & Wilcox Company
- BAE SYSTEMS North America Inc.
  - *BAE SYSTEMS Controls*
  - *BAE SYSTEMS – Information and Electronic Systems Integration Sector*
  - *BAE SYSTEMS - Information and Electronic Warfare Systems*
  - *BAE SYSTEMS Platform Solutions*
- Bahamas First Holdings Ltd.
- Baker Hughes Incorporated
- Ball Corporation
- BASF Corporation
  - *BASF Aktiengesellschaft*
- Bath Iron Works / a General Dynamics Company
- Bausch & Lomb Incorporated
- Baxter International Inc.
  - *Baxter Healthcare*
  - *Baxter Limited*
- Bayer Corporation
- BC Hydro
- Bechtel Systems & Infrastructure, Inc.
  - *Bechtel BWXT Idaho, LLC*
  - *Bechtel Hanford, Inc.*
  - *Bechtel Jacobs Company LLC*
  - *Bechtel National, Inc.*
  - *Bechtel Nevada*
- Becton Dickinson and Company
- BellSouth Corporation
  - *Bell South International*
- Bertelsmann, Inc.
  - *Bertelsmann AG*
  - *BMG*
- Best Buy Company, Inc.
- Biogen Idec France
- Black Hills Corporation
- Blue Cross and Blue Shield of Alabama
- Blue Cross and Blue Shield of California
- Blue Cross and Blue Shield of Florida
- Blue Cross and Blue Shield of Louisiana
- Blue Cross and Blue Shield of North Carolina
- Blue Cross Blue Shield Association - FEP
- BlueCross BlueShield Association
- BMC Software Inc.
- The BOC Group, plc
- The Boeing Company
  - *Boeing - Integrated Defense Systems*
  - *Boeing Commercial Airplanes*
  - *Boeing Company - Military Aircraft & Missile Systems Group*
  - *Boeing Company - Rocketdyne Propulsion & Power*
  - *Boeing Corinth - Engineering & Computing Systems*
  - *Boeing Electron Dynamic Devices, Inc.*
  - *Boeing Satellite Systems*
- Boston Scientific Corporation
- BP plc
  - *BP America Inc.*
- Brio Software, Inc.
- British Telecom
- Brodart Company
- Burger King Corporation
- Cablevision Systems Corporation
- Cabot Corporation
- California Dental Association
- California State Automobile Association
- Camp Dresser & McKee Inc.
- Canon U.S.A., Inc.
- Capital Blue Cross
- Capstone Turbine Corporation
- Cardone Industries, Inc.
- CareGroup, Inc.
- Caremark Rx, Inc.
- Cargill Incorporated
- Caterpillar Inc.
- Catholic Health East
- Cendant Corporation
  - *Cendant Timeshare Resort Group, Inc.*
- CenterPoint Energy, Inc.
- Central Hudson Gas & Electric Corporation
- CenturyTel
- Charter One Bank, N.A.
- Chemonics International
- ChevronTexaco
- Chiron Corporation
- CHRISTUS HEALTH

Member Companies

EOA Member Company List as of February 1, 2005

- CIGNA Corporation
- Cinergy Corporation
- Cingular Wireless
- Cisco Systems, Inc.
- Citigroup, Inc.
- City of Jacksonville, Florida
- City of Philadelphia
- City Public Service
- Cleco Corporation
- CNF Inc.
- Cobalt Corporation
- The Coca-Cola Company
- Colgate-Palmolive Company
- Columbia Analytical Services, Inc.
- Comdisco, Inc.
- Computer Associates International, Inc.
- Computer Sciences Corporation (CSC)
- Consolidated Edison of New York, Inc.
- Constellation Energy Group, Inc.
- Cook Inlet Region, Inc.
- Coors Brewing Company
- Copyright Clearance Center
- Corrections Corporation of America
- Countrywide Credit Industries, Inc.
  - *Countrywide*
- County of San Bernardino
- County of San Diego, Office of Internal Affairs
- Covanta Energy Corporation
- Cox Communications
- Crompton Corporation
- CSX Corporation
- CVS Corporation
- D.A. Stuart Company
- Dana Corporation
- Data Systems & Solutions, LLC
- De Lage Landen Financial Services, Inc.
- Deborah Heart and Lung Center
- Deere & Company
- DEL-JEN, INC.
- Dell Computer Corporation
- Deloitte & Touche LLP
- Deloitte & Touche Statsautoriseret Revisionsaktieselskab
- Delta Air Lines, Inc.
- DENSO International America, Inc.
- Department of National Defence, Canada
- Diageo plc
- The Dial Corporation
- DNA Sciences, Inc.
- Dominion Resources Services, Inc.
  - *Dominion Resources, Inc.*
- The Dow Chemical Company
  - *Dow Agrosciences LLC*
- Dow Corning Corporation
- Dresser, Inc.
- DRS Technologies, Inc.
- DTE Energy
- Duke Energy Corporation
  - *Duke Energy - McGuire Nuclear Station*
  - *Duke Energy North America*
- Dynamics Research Corporation
  - *Andrulis Corporation*
  - *HJ Ford*
- Dynegy, Inc.
- Eastman Chemical Company
- Eaton Corporation
- EDS
- Edison International
- EFW Inc.
- E.I. du Pont de Nemours and Company
  - *DuPont Safety & Protection*
  - *Pioneer Hi-Bred International, Inc.*
- Eisai Company, Ltd.
- El Paso Corporation
- Energy East Corporation
- Entergy - Koch L.P.
  - *Entergy-Koch Trading Limited*
  - *Gulf South Pipeline Company*
- Entergy Corporation
- Environmental Systems Products (ESP)
- Equiva Services LLC
- Ernst & Young LLP
- Ethicspoint, Inc.
- Exelon Corporation
- Fannie Mae
- Federal Express Corporation
- Federated Mutual Insurance Company
- Fidelity Investments
- Fidelity Mutual Life Insurance Co.
- Fireman's Fund Insurance Company
- First Coast Service Options, Inc.
- First Data Corporation
- FirstEnergy Corporation
- Flint Hills Resources,LP
- Fluor Government Group
- Freddie Mac
- Fonterra Cooperative Group
- Ford Motor Company
- Foster Wheeler Corporation
- Frequency Electronics
- Fresenius Medical Care of North America
- Friedkin Companies, Inc.
  - *Friedkin Business Services/Friedkin Companies Inc.*
  - *Gulf States Toyota, Inc.*
- The Gap, Inc.
- General Dynamics
  - *General Dynamics – Worldwide Telecom. Systems*
  - *General Dynamics Defense Systems*
  - *General Dynamics Information Systems*
  - *General Dynamics Ordnance and Tactical Systems*
  - *Gulf Stream*
- General Electric Co.
  - *GE Aircraft Engines*
  - *General Electric Capital Corporation*
  - *General Electric Power Systems*
- General Mills, Inc.
- General Motors Corporation
- Georgia Gulf Corporation
- Georgia-Pacific Corporation
- Gerdau AmeriSteel
- Giant Food, Inc.
- The Gillette Company
- GlaxoSmithKline
- Good Samaritan Community Healthcare
- Goodrich Corporation
  - *Goodrich Aerostructures Group*
- Government of the District of Columbia, Office of Chief Financial Officer, ISIA
- Granite Construction Incorporated
- Great American Financial Resources, Inc.
- Great Plains Energy Services
- Great-West Life
- Grey Global Group Inc.
- Growmark, Inc.
- GTECH Corporation
- Guardsmark, LLC
- H.B. Fuller Company
- H.J. Heinz Company
- Halliburton Company
- Handleman Company
- Harley-Davidson, Inc.
- Hartford Financial Services Group, Inc.
- Harvard University
- HCA
- Health Canada
- Health Care Service Corporation (Blue Cross Blue Shield of Illinois & Texas)

Member Companies

EOA Member Company List as of February 1, 2005

- Health Net, Inc.
- Heritage Property Investment Trust, Inc.
- Hershey Foods Corporation
- Hewitt Associates
- Hewlett-Packard
- Hexcel Corporation
- Highmark, Inc.
  - *Highmark, Inc. d/b/a Pennsylvania Blue Shield*
- Hitchiner Manufacturing Company, Inc.
- Holt Companies
- Holt Company of Texas
- Holland America Line Inc.
- Holland & Knight LLP
  - *Corporate Integrity Services LLP*
- The Home Depot
- Honda of America Mfg., Inc.
  - *Honda of America Manufacturing of Alabama, LLC*
  - *Honda Engineering N.A. Inc.*
- Honeywell International Inc.
- Hospira
- Houghton Mifflin Company
- Hughes Electronics Corporation
- Humana Inc.
- IDACORP
- IMC Global Inc.
- Ingram Micro Inc.
- Integra LifeSciences Corporation
- Institute of Electrical and Electronics Engineers
- Integrated Electrical Services
- Integrity Interactive Corporation
- Intel Corporation
- Internal Revenue Service
- International Monetary Fund
- International Paper
- INVISTA S.à.r.l.
- Invitrogen Corporation
- Iron Mountain
- Itochu International, Inc.
- ITT Industries, Inc.
- J C Penney Inc.
- J.M. Huber Corporation
- Jack in the Box, Inc.
- Jacobs Engineering Group Inc.
- Jet Propulsion Laboratory
- John Hancock Mutual Life Insurance Company
- Jostens Inc.
- Kaiser Permanente
  - *Kaiser Foundation Health Plan, Inc.*
- Kanazawa Institute of Technology
- Katun Corporation
- Kellogg Company
- Kerr-McGee Corporation
- Kettering Medical Center Network
- KeySpan
- Koch Industries, Inc.
  - *Koch Chemical Technology Group, LLC*
  - *Koch Materials Company*
  - *Koch Supply & Trading LP*
  - *Koch Business Solutions*
- Kollsman, Inc.
- KPMG, LLP
- Kraton Polymers
- L.A. County Metropolitan Transportation Authority
- Lamson & Sessions
- LandAmerica Financial Group, Inc.
- Lifetime Healthcare Companies
- Limited Brands, Inc.
- Linamar Corporation
- Lockheed Martin Corporation
  - *Affiliated Computer Services Inc. (ACS)*
  - *Intergrated Systems and Solutions*
  - *Lockheed Martin Aeronautical Systems*
  - *Lockheed Martin Aircraft and Logistics Centers*
  - *Lockheed Martin Astronautics*
  - *Lockheed Martin Enterprise Information Systems*
  - *Lockheed Martin Management & Data Systems*
  - *Lockheed Martin Missiles & Fire Control*
  - *Lockheed Martin Missiles & Space*
  - *Lockheed Martin Mission Systems*
  - *Lockheed Martin NE&SS – Surface Systems*
  - *Lockheed Martin NE&SS Undersea Systems*
  - *Lockheed Martin NE&SS Radar Systems*
  - *Lockheed Martin Space Systems Company*
  - *Lockheed Martin, KAPL Inc.*
  - *Lockheed Martin - Technology Services Group*
  - *Lockheed Martin Technical Operations*
  - *Sandia National Laboratories*
- L'Oreal
- Los Angeles Unified School District
- Louisiana-Pacific Corporation
- LRN, The Legal Knowledge Company
- The Lubrizol Corporation
- Lucent Technologies Inc.
- Lyondell Chemical Company
- Macromedia Inc.
- Magellan Health Services, Inc.
- Management & Training Corporation
- Manufacturers Alliance/MAPI
- Manulife Financial
- Marathon Ashland Petroleum LLC
  - *Marathon Oil Company*
- Marriott International, Inc.
- Marsh & McLennan Companies, Inc.
  - *Marsh, Inc.*
- Maryland Assoc. of Nonprofit Organizations, Inc.
- Massachusetts Bay Transportation Authority
- MassMutual Life Insurance
  - *Oppenheimer Funds Inc.*
- MBNA America
- McDermott International, Inc.
  - *BWX Technologies, Inc.*
  - *J. Ray McDermott S.A.*
- McDonald's Corporation
- MCI
- MeadWestvaco
- Medica Health Plans
- Medtronic, Inc.
- Mellon Financial Corporation
- Memorial Health University Medical Center
- Merck & Company, Inc.
  - *Medco Health Solutions, Inc.*
- MetaMorphix, Inc.
- MetLife Auto and Home Insurance Company
  - *Metropolitan Life Insurance Company*
- Metropolitan Water District of Southern California
- Microsoft Corporation
- Millenium Pharmaceuticals, Inc.
- MindShare
- Mine Safety Appliances Company
- Mirant Corporation
- MITRE Corporation
- MoneyGram International
- Monsanto Company
- The MONY Group
- Morris Capital Corporation
- Morris Machine Co., Inc.
- Motorola, Inc.
  - *Freescale Semiconductor, Inc.*
- Mueller Group, Inc.
- National Association of Securities Dealers, Inc.

Member Companies

EOA Member Company List as of February 1, 2005

- National Grid U.S.A. Service Company, Inc.
- National Institute of Arthritis & Musculoskeletal & Skin Diseases
- National Semiconductor Corporation
- Nationwide Insurance
- NCR Corporation
- Neighborcare, Inc.
- Nestle USA, Inc.
- NetJets
- The Network, Inc.
- Network Solutions LLC
- New Dimensions in Health Care
- New York City Conflicts of Interest Board
- New York Life Insurance Company
- New York Power Authority
- New York State Ethics Commission
- New York Stock Exchange, Inc.
- Nexen Inc.
- Nextel Communications
- NiSource Inc
- Nortel Networks
- North Carolina Baptist Hospital
- North Pacific Group, Inc.
- Northeast Utilities Systems
- Northrop Grumman Corporation
  - *Norden Systems*
  - *Northrop Grumman Corporation, Integrated Systems Sector*
  - *Northrop Grumman Mission Systems*
- Northrop Grumman Corporation, Electronic Sensors & Systems
- Novartis Corporation
- Novartis International AG
- Office of the Auditor General of Canada
- Oglebay Norton Company
- Oglivy & Mather
- Ohio Presbyterian Retirement Services
- The Ohio Casualty Insurance Company Group
- OhioHealth
- Olin Corporation
- Ontario Power Generation
- Oracle Corporation
- Orange & Rockland Utilities
- Organon Pharmaceuticals USA Inc.
- Owens Corning
- PacifiCare
- The Pepsi Bottling Group
- Peregrine Systems
- Perot Systems Corporation
- PETCO Animal Supplies, Inc.
- Pfizer Inc.
- PG&E Corporation
  - *Pacific Gas & Electric Company*
- Philip Morris, USA
- Philips Electronics North America Corporation
- Phillips Petroleum Co.
- Pinkerton's Inc.
  - *Global Compliance Services*
  - *Pinkerton Consulting & Investigations*
  - *Pinkerton Services Group*
- Pinnacle West Capital Corporation
- Pioneer Natural Resources Company
- Pitney Bowes, Inc.
- PMI Mortgage Insurance Company
- The PNC Financial Services Group
- Polyone Corporation
- PPG Industries, Inc.
- PPL
  - *Emel S.A.*
  - *Western Power Distribution*
- Praxair Inc.
- Premier, Inc.
- PricewaterhouseCoopers
- Principal Financial Group
- Procter & Gamble
- Professional Recruiters Inc.
- Progress Energy
- Provena Health
- Providence Health System
- Providian Financial
- Province Healthcare
- Prudential Financial
  - *Prudential Insurance Company*
- PSS World Medical, Inc.
- Public Service Company of New Mexico
- Public Service Electric & Gas Company
  - *PSEG Global LLC*
  - *PSEG Services Corporation*
- Public Works and Government Services Canada
- QUALCOMM Incorporated
- Quintiles Transnational Corp.
- Qwest - Risk Management
  - *Qwest*
  - *Qwest Services Corporation*
- RadioShack Corporation
- Raytheon Company
  - *Raytheon - Electronic Systems*
  - *ELCAN Optical Technologies - a Raytheon Company*
  - *Raytheon Aerospace Company*
  - *Raytheon Aircraft Company*
  - *Raytheon Company – Integrated Defense Systems*
  - *Raytheon Company – Space & Airborne Systems*
  - *Raytheon Intelligence and Information Systems*
  - *Raytheon Strategic Systems Division*
  - *Raytheon Systems Company*
  - *Raytheon Technical Services Company*
- Regence Blue Shield – Washington
  - *Regence BlueCross BlueShield of Oregon*
  - *Regence BlueCross BlueShield of Utah*
  - *Regence BlueShield of Idaho*
  - *The Regence Group*
- Reliant Energy
- Research Triangle Institute
- Reuters America Inc.
- Rinker Materials
- Rio Tinto plc
- Roche Diagnostics Corporation
- Rockwell Collins, Inc.
- Rolls-Royce Corporation
  - *Rolls-Royce North America Inc.*
- Royal Bank of Canada
- Royal Canadian Mounted Police
- Ruder Finn
- Ryder System, Inc.
- Safelite Group, Inc.
- Safety-Kleen
- Sankyo Pharma
- Sara Lee Corporation
- SCANA Corporation
- Schindler Elevator Corporation
- Schlumberger Limited
- Schwan Food Company
- Science Applications International Corporation (SAIC)
- Scientific - Atlantic, Inc.
- The Scotts Company
- Sears, Roebuck and Co.
- Securities Industry Association
- Sempra Energy
- Sequa Corporation
- The ServiceMaster Company
- SGS Societe Generale de Surveillance Holding SA
- Shaw Environmental & Infrastructure, Inc.
- Shaw Industries Group, Inc.
- Shell Oil Company
- Shiseido Company, Limited
  - *Shiseido International Corporation*
- Siemens Energy & Automation, Inc.

Member Companies

EOA Member Company List as of February 1, 2005

- Sierra Pacific Power Company
- Smiths Aerospace
- Solectron Corporation
- Sony Electronics, Inc.
- Sotheby's Holding, Inc.
- Southern Company
  - *Alabama Power*
  - *Georgia Power Company*
  - *Gulf Power Company*
  - *Savannah Electric*
  - *Washington Energy & Environment/ Defense*
  - *Westinghouse Savannah River Company*
- South Texas College of Law
- SPARTA, Inc.
- Sprint Corporation
- Standard Insurance Company
- Staples, Inc.
- Starbucks Coffee Company
- State Bar of California
- State Farm Insurance Companies
- State Street Corporation
- Statoil ASA
- Stephens, Inc.
- Stewart & Stevenson Services, Inc.
- St. Alexius Medical Center
- St. Paul Travelers
- Structure Tone Inc.
- Sulzer US Holding Inc.
- Sun Microsystems, Inc.
- SUPERVALU, Inc.
- SunGard Data Systems, Inc.
- Sunrise Medical Inc.
- TAP Pharmaceutical Products Inc.
- TATA Quality Management Services - Division of Tata Sons Ltd.
- Tech Data Corporation
- TECO Energy, Inc.
- Teledyne Electronic Technologies
- Teletech Holdings, Inc.
- Temple-Inland, Inc.
- Tenet Healthcare Corporation
- Texas Health Resources
- Texas Instruments, Inc.
- Textron, Inc.
  - *Textron Systems*
  - *Bell Aerospace Services*
  - *Bell Helicopter Textron, Inc.*
  - *Vought Aircraft Industries, Inc.*
- Thales, Inc.
- Time Warner Telecom
- Trataros Construction, Inc.
- Treasury Board of Canada, Secretariat
- Trinity Health
- Truman Medical Centers, Inc.
- TRW Inc.
  - *TRW Aeronautical Systems Group*
  - *TRW Space & Electronics*
  - *TRW Systems*
- TXU
- Tyco International Ltd.
- Tyson Foods, Inc.
- U.S. Agency for International Development
- UIL Holdings Corporation
- Underwriters Laboratories Inc.
- Unilever plc/Unilever NV
- Union Pacific Railroad
- Unisys Corporation
- United Airlines
- United Industrial Corporation
- United Parcel Service
- United Space Alliance
- United States Department of Housing & Urban Development
- United States Enrichment Corporation
- United Technologies Corporation
  - *UTC - Carrier Corporation*
  - *UTC - Hamilton Sundstrand*
  - *UTC - Otis Elevator Company*
  - *UTC - Pratt & Whitney*
  - *UTC- Pratt & Whitney Canada, Inc.*
  - *UTC - Pratt & Whitney Space Propulsion*
  - *UTC - Sikorsky Aircraft*
  - *UTC - UTC Fuel Cells*
- University of Illinois
- UNOVA, Inc.
- UnumProvident Corporation
- URS Corporation
- USAA
- Vericept
- Verizon Communications
  - *Verizon Wireless*
- Veterans Health Administration
- Viad Corporation
  - *Exhibitgroup/Giltspur*
  - *GES Exposition Services, Inc.*
  - *Glacier Park, Inc.*
  - *Travelers Express Company, Inc.*
- Vinnell Corporation
- Virginia Commonwealth University Audit & Management Services
- Vivendi Environnement/USFilter
  - *Vivendi Universal*
  - *Vivendi Universal Net USA Group, Inc.*
  - *Volvo Commercial Finance LLC The Americas*
- Wachovia Corporation
- Wacker Chemical Corporation
- Walker Information
- Wal-Mart Stores, Inc.
- The Walt Disney Company
- Washington Gas
- Washington Group International, Inc.
- Waste Management, Inc.
- Well Point Health Networks
- Wellmark Blue Cross Blue Shield of Iowa
- Wendy's International, Inc.
- West Pharmaceutical Services, Inc.
- Weyerhaeuser Company
- Williams
- WilTel Communications Group, Inc.
- Winn-Dixie, Inc.
- Wisconsin Energy Corporation
- Wisconsin Physicians Service
- Worker's Compensation Board Canada
- The World Bank Group
- Wyeth
- Wyse Technology
- Xcel Energy, Inc.
- Xerox Corporation
- XO Communications, Inc.
- Yamanouchi Pharma America
- Yazaki North America, Inc.
- YMCA of Frederick County
- Zachry Construction Group
- Zurich Financial Services
  - *Zurich North America*

LETTER FROM ROBERT EVANS, DIRECTOR, GOVERNMENTAL AFFAIRS OFFICE, THE AMERICAN BAR ASSOCIATION (ABA), DATED FEBRUARY 9, 2005

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February 9, 2005

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines," Scheduled for February 10, 2005

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA"), I write to express our views concerning the subject of tomorrow's Subcommittee hearing, "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines." Although this letter does not address the broader issue of Guidelines reform, we would like to express our concerns regarding a narrow provision, added to the Guidelines last November, that will require companies, associations, and other entities to routinely waive their attorney-client and work product protections as a condition for cooperation with the government. We ask that this letter be included in the official record of the Subcommittee's February 10, 2005 hearing.

The ABA has long supported the use of sentencing guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

Next week, the ABA House of Delegates will be examining the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* (the "*Booker/Fanfan* decision"), and at the conclusion of that process, the ABA may adopt new recommendations regarding the overall sentencing system. We will provide you with a copy of any new policy once it is adopted.

In the meantime, the ABA continues to have serious concerns regarding several amendments to the Federal Sentencing Guidelines that took effect on November 1, 2004. These amendments, which U.S. Sentencing Commission submitted to Congress on April 30, 2004, apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. These organizational guidelines provide the standard by which the criminal penalties for corporate wrongdoing are measured, and they are designed to create incentives for good corporate behavior while increasing penalties for corporations that lack mechanisms for discouraging and detecting employee wrongdoing. Although the ABA has serious concerns regarding several of these recent amendments, most alarming is a change in the Commentary for Section 8C2.5 that authorizes the government to require entities to waive the attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the guidelines. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

The ABA believes that the new privilege waiver amendment, though perhaps well intentioned, will have a number of negative unintended consequences, including the likelihood that companies and other organizations will be forced to waive their attorney-client and work product protections on a routine basis. While the Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]…unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization," the exception is likely to swallow the rule. Now that this amendment has become effective, the Justice Department—which has followed a general policy of requiring companies to waive privileges as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum"—is likely to pressure companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies will have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

We believe that this recent amendment will seriously weaken the attorney-client privilege between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of the attorney-client and work product privileges, the amendment will discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This will harm not only companies, but the investing public as well.

In addition, while the privilege waiver amendment was intended to aid government prosecution of corporate criminals, it is likely to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any attempt to require routine waiver of the attorney-client and work product privileges will seriously undermine a system that has worked well.

The ABA also believes that the new privilege waiver amendment will unfairly harm employees. Under the amendment, employees of a company or other organization will be placed in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that their privileged statements will be turned over to the government by the organization or they can decline to cooperate and risk their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

Over the past several months, many other organizations have expressed similar concerns regarding the new privilege waiver amendment to the Sentencing Guidelines, including the U.S. Chamber of Commerce and the Business Roundtable. In addition, a number of legal organizations have voiced concerns as well, including the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union.

In sum, the ABA believes that the new privilege waiver amendment is counterproductive and is likely to harm, rather than enhance, compliance with the law. Accordingly, as this Subcommittee and Congress examine the overall Sentencing Guidelines system in the wake of the *Booker/Fanfan* decision, we urge you to address and remedy the problems created by the privilege waiver amendment as soon as possible.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for criminal justice issues, Kevin Driscoll, at (202) 662-1766 or our legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

cc: All members of the Subcommittee on Crime, Terrorism and Homeland Security

LETTER FROM ROBERT EVANS, DIRECTOR, GOVERNMENTAL AFFAIRS OFFICE, THE AMERICAN BAR ASSOCIATION (ABA), DATED FEBRUARY 17, 2005

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February 17, 2005

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines"

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA"), I write to supplement my previous letter dated February 9, 2005, concerning the Subcommittee's hearing on "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines." My earlier letter addressed the narrow provision of the guidelines regarding the waiver of attorney-client and work product protections as a condition for cooperation with the government. The ABA House of Delegates has now met and has examined the broader issue of the overall Sentencing Guidelines system in light of the recent Supreme Court decisions in *United States v. Booker* and *United States v. Fanfan*. As a result of this process, the ABA has now adopted new recommendations regarding the overall sentencing system. A copy of these Recommendations and a Report in support of them is attached. We ask that this letter be included in the official record of the Subcommittee's February 10, 2005 hearing.

The ABA recommends that the Congress take no immediate legislative action, and that it not rush to any judgements regarding advisory guidelines until it is able to ascertain that legislation is both necessary and likely to be beneficial. We recommend that in the short term, the United States Sentencing Commission be directed to assemble and analyze all available data regarding sentences imposed under Booker and submit a report with recommendations to the Congress within 12 months. While awaiting this report, the Congress may wish to conduct hearings and solicit input from all constituents within the federal criminal justice system regarding the wisdom and efficacy of the post-*Booker* procedure and how it compares to any available legislative options.

While it is much too early to tell, we believe the advisory guidelines system may well yield excellent results. We believe in the majority of cases, courts will continue to sentence within the range suggested by the guidelines. This appears to be the case so far according to the data referenced by Sentencing Commission Chair Ricardo Hinojosa in his testimony before the Subcommittee last week. In light of the requirement under 18 U.S.C. § 3553(c) that any court desiring to sentence outside the guideline range state the reason for doing so both "with specificity" and in writing, it should not be difficult for the Sentencing Commission to determine whether and to what extent this trend continues. To the extent judges sentence outside the guidelines range, while explaining precisely why they are doing so, this will provide invaluable insight into the guidelines themselves and the extent to which they have adequately taken account all of the relevant purposes of sentencing.

The ABA specifically recommends that the Congress not move to enact additional mandatory minimum sentences or so-called "topless" guidelines. We have consistently advocated the repeal of existing mandatory minimum sentences as poor sentencing policy in light of the numerous considerations appropriate to the determination of a just sentence. The principle of eliminating unwarranted disparity requires that dissimilar offenders be treated differently, and mandatory minimums are antithetical to this goal. We also join the bi-partisan Constitution Project in urging the Congress not to adopt "topless" guidelines. As explained in greater detail in our attached Report, such legislation is both constitutionally suspect and poor sentencing policy.

Finally, in the event that careful consideration of the data assembled and analyzed by the Sentencing Commission over the coming year demonstrates that advisory guidelines yield a degree of disparity the Congress finds unacceptable, we have set forth in our Recommendations and supporting Report a very specific and concrete plan for an alternative system of simplified binding guidelines. While we are cautiously optimistic that the *Booker* remedy will work well, if we are incorrect about this, our careful consideration of the other various alternatives leads us to conclude that the best approach may well be to dramatically simplify the guidelines, present critical culpability factors to juries, and allow judges to sentence within a range greater than the present limit of 25%.

In sum, we believe the advisory guideline system may work well, and there is no compelling reason not to take the time to find out. If the Congress is unsatisfied with the results of advisory guidelines after an appropriate time of study, it can always enact corrective legislation. If legislation is enacted before that time, the opportunity to learn whether advisory guidelines can work will have been squandered.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's position on these issues, please contact our senior legislative counsel for criminal justice issues, Kevin Driscoll, at (202) 662-1766.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: All members of the Subcommittee on Crime, Terrorism and Homeland Security

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that, in light of the United States Supreme Court's decisions in United States v. Booker, 2005 WL 50108 (January 12, 2005), the American Bar Association urges the United States Congress to take the following steps to assure that federal sentencing practices are effective, fair and just and effectuate the goals of sentencing set forth in the Sentencing Reform Act:

1. Permit federal courts to use advisory guidelines while Congress carefully examines sentencing practices under such guidelines;

2. Forthwith direct the United States Sentencing Commission to assemble and analyze all available data regarding sentences imposed under Booker, including the information required by 18 U.S.C. § 3553 (c) regarding sentences outside the guidelines, and submit a Report with recommendations to the Congress within 12 months; and

3. While awaiting the Report from the Sentencing Commission on the data, conduct hearings and solicit input from all constituents within the federal criminal justice system regarding the wisdom and efficacy of the post-Booker procedure and how it compares to any available legislative options as well as state sentencing guidelines systems; and

FURTHER RESOLVED, that Should Congress determine that use of advisory guidelines results in unwarranted disparities, Congress should consider, as a substitute for advisory guidelines, the following actions:

1. Simplify the guidelines either by adding a limited number of critical culpability factors as elements of each offense to be determined by the jury, or by directing the Commission to identify sentencing factors to be determined by the jury;

2. Revise the 25% rule to allow expanded sentencing ranges derived from the jury verdicts;

3. Permit downward departures from these ranges under the same standard applicable to the existing guidelines; and

4. Leave to the Judicial Conference of the United States and the Rules Enabling Act process the task of identifying and proposing any necessary procedural revisions such as

bifurcation of proceedings, rules of discovery regarding sentencing factors, and additional jury instructions.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

Report

I. Introduction

In August 2004, the House of Delegates approved recommendations of the ABA Justice Kennedy Commission. Among the recommendations in Report 121A approved by the House were the following:

A. "[T]he American Bar Association urges that states, territories and the federal government . . . [e]mploy sentencing systems that guide judicial discretion consistent with Blakely v. Washington, 124 S.Ct. 2531 (June 24, 2004), to avoid unwarranted and inequitable disparities in sentencing among like offenses and offenders, but permit courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence."

B. "[T]he American Bar Association recommends that the Congress:

(1) Repeal the 25 percent rule in 28 U.S.C. §994(b)(2) to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing guidelines and consider state guideline systems that have proven successful.

(2) Reinstate the abuse of discretion standard of appellate review of sentencing departures, in deference to the district court's knowledge of the offender and in the interests of judicial economy. . . ."

On January 12, 2005, in *United States v. Booker*, discussed below, the United States Supreme Court held in one 5-4 opinion that the sentencing guidelines violate the Sixth Amendment right to jury trial to the extent that sentences may be increased from one guideline range to another based on facts not proved beyond a reasonable doubt to a jury. In a second 5-4 opinion, the Court held that, to carry out congressional intent, two federal statutory provisions governing sentencing are invalid, and as a result the federal sentencing guidelines are advisory.

The Supreme Court recognized that Congress may choose to modify the Sentencing Reform Act of 1984 to take account of the *Booker* decision, and both Houses of Congress have expressed concern about the effect of *Booker* on federal sentencing. The Criminal Justice Section anticipated that the decision in *Booker* might result in some or all of federal sentencing practice being held invalid. It appointed a working group, which considered various alternative decisions that might come from the Court and the position that the American Bar Association should take in response to those decisions. Although the Supreme Court's ultimate decision took a slightly different form from any anticipated by the working group, the end result was not far removed from one of the principal alternatives the group had considered. Once the decision came down, the working group – apart from its judicial members who were consulted but not asked to support a recommendation and its Department of Justice members– arrived at a consensus that received the approval of the Criminal Justice Section and is reflected in the recommendation that this Report explains.

The result of the decision in *Booker* is to leave federal sentencing practice consistent with ABA policy, as reflected in the ABA Standards for Criminal Justice: Sentencing (3d ed. 1994) , and in the recommendations of the ABA Justice Kennedy Commission. Because a number of members of Congress have expressed an interest in adopting legislation to respond to *Booker*, it is important that the ABA give additional attention to sentencing and to the specific question of what, if anything, is the optimal congressional response. This Report explains the rationale for the recommendation which we recommend to the House of Delegates.

II. The Booker Decision

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2002), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington*, 542 U.S. ___ , 124 S.Ct. 2531 (2004), the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

Blakely cast doubt upon the constitutional validity of the Federal Sentencing Guidelines. The Court's opinion in *United States v. Booker,* 2005 WL 50108 (U.S. Jan 12, 2005), settles that uncertainty.

Writing for a majority of five justices, Justice's Stevens' opinion holds that because the federal guidelines permit sentences to be increased on the basis of facts found only by the judge and by a preponderance of the evidence, the guidelines violate the sixth amendment as construed in *Blakely*. This opinion was not surprising to many observers in light of *Blakely.*

More surprising was the other 5-4 opinion. Justice Breyer's opinion for a different majority (Justice Ginsburg was the 5th vote for both majorities) addresses the appropriate remedy in light of this constitutional problem with the guidelines as written. Concluding that the guidelines did not have to be stricken as a whole, Justice Breyer's opinion saves the guidelines from constitutional infirmity by striking those parts of them that render them mandatory and the provision requiring appellate review of sentences under a *de novo* standard of review. Sentencing judges are now required to consider guidelines ranges, but are permitted to tailor sentences in light of other statutory concerns as well. This "makes the guidelines effectively advisory." Appellate review of sentences will now be under a more deferential standard of review – one of overall "reasonableness."

III. Summary of Recommendations

The recommendation consists of three parts:

1. The Congress should not rush to reject the concept of advisory guidelines until it is able to ascertain that such action is both necessary and likely to be beneficial through the means suggested below.[1]

[1] Leaving advisory guidelines in place does not signify that the current guidelines are satisfactory in all respects. Nor does it mean that amendments might not improve the current guidelines. For example, in August 2004, the House of Delegates adopted policy (Report 303) urging Congress to reverse certain recent narrow amendments to the Sentencing Guidelines, including an amendment requiring entities to waive attorney-client and work product protections as a condition for cooperation with the government. The proposed recommendation would not affect

2. The Congress should forthwith direct the United States Sentencing Commission to assemble and analyze all available data regarding sentences imposed under *Booker*, including the information regarding sentences outside the guidelines required by the Feeney Amendment, and submit a Report with recommendations to the Congress within 12 months.

3. While awaiting the Report from the Sentencing Commission on the data, the Congress should conduct hearings and solicit input from all constituents within the federal criminal justice system regarding the wisdom and efficacy of the post-*Booker* procedure and how it compares to any available legislative options as well as state sentencing guidelines systems.

In short, the recommendation urges that Congress proceed with deliberation and caution. The recommendation is supported by the following analysis.

IV. Advisory Guidelines Should Be Given a Chance To Work

The remedial majority in *Booker* reached a result that was not anticipated. Advisory guidelines, coupled with appellate review under a "reasonableness" standard, differs from the mandatory guidelines system because – to avoid constitutional infirmity – sentencing ranges resulting from judicial fact-finding are now advisory rather than mandatory. The *Booker* remedy does not, however, represent a return to pre-guidelines practice. Rather, the current system differs importantly from the pre-guidelines era because now there exist precise guidelines capturing and weighing most of the relevant sentencing factors for consideration by sentencing judges. In addition, there remains a system of appellate review to ensure that sentences are imposed in accordance with law.

In short, *Booker* yields an innovative mix of sentencing procedures that may well yield excellent results that are consistent with policies the ABA has endorsed for many years. Indeed, this new system, which relies upon the concept of presumptive sentences for ordinary cases, yet permits a court to fashion a sentence

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this and other existing ABA policies.

outside the guidelines in unusual cases, appears to strike the sort of salutary balance between rule and discretion that is contemplated in ABA policy. *See* ABA Standards for Criminal Justice: Sentencing (3d ed. 1994). *See also* the Report of the ABA Justice Kennedy Commission at 6 ("A combination of guidance and an ability to depart offers some hope of a sentencing system in which offenders are treated alike, while differences among offenders are not overlooked.")

Precisely because of the novelty of the *Booker* remedy, the Congress should take the full amount of time necessary to determine the desirability and efficacy of this new regime. It is too early to tell for certain whether this system will satisfy Congress's policy concerns as reflected in the Sentencing Reform Act of 1984, but there does not seem to be any compelling reason not to take the time to find out. The minimum amount of time necessary for this task is 12 months. If after that time the Congress is unsatisfied with the results under advisory guidelines, it can always enact corrective legislation. If such legislation is enacted before that time, the opportunity to learn whether advisory guidelines can work will have been squandered.

There are three arguments why this new system should not be permitted to operate on an interim basis for this period of time: first, the new system could produce large numbers of unduly lenient or harsh results; second, it could be difficult to evaluate the new system; and third, there might exist a readily available and obviously superior alternative. None of these concerns justifies a hasty congressional response.

A. Advisory guidelines may not greatly change the status quo

Congress has previously expressed concern about the degree of judicial compliance with the guidelines, notably in the 2003 Protect Act. A critical aspect of the Protect Act and its so-called Feeney Amendment was the addition of language to 18 U.S.C. § 3553(c) requiring courts desiring to sentence outside the guidelines range to state their reasons for doing so both "with specificity" and in writing. These specifically stated written reasons must then be submitted directly to the United States Sentencing Commission for review and analysis. *These provisions of the Feeney Amendment are unaffected by Booker and remain binding law.*

It is highly probable that judges will continue to sentence within the guideline range precisely because to do otherwise requires specific reasons, in writing, which will then be submitted to the Sentencing Commission. Sentences under advisory guidelines also may closely mirror those dictated by mandatory guidelines because the remaining section 3553(a) factors – just punishment, adequate deterrence, protection of the public, and rehabilitation – are much less specific than the guidelines and in many instances are already taken into consideration by the guidelines themselves. For that reason, one district court has already declared that it will give "heavy weight" to the guidelines and will depart from them only "in unusual cases for clearly identified and persuasive reasons." *United States v. Wilson*, Case No. 2:03-CR-00882 PGC (D. Utah 1/13.05) (Cassell, J.).

An additional reason to believe judges will not frequently impose sentences outside the guideline ranges is the process of appellate review. *Booker* struck only one section of the law relating to sentencing appeals – 18 U.S.C. § 3742(e) – governing the appellate standard of review. *Booker* did not, however, strike any part of sections 3742(a), (b), or (f). It is unclear whether these remaining sections authorize an appeal of a sentence within a properly calculated guideline range. Even if such appeals are permitted, appellate courts are likely to find sentences imposed within the guidelines range unreasonable only in rare instances. Because district courts will recognize that sentences within the applicable guideline range are more likely to be upheld on appeal, this may be a further reason to expect that they will not sentence outside the guideline range except in unusual cases. Moreover, in those cases where district courts do impose a sentence outside the guidelines range, there will then clearly be appellate review. As the "reasonableness" standard of review evolves in the appellate courts, the number of sentences outside the applicable guideline ranges is unlikely to differ significantly from the pre-*Booker* data.

Yet another reason to expect general compliance with advisory sentencing guidelines is that judges have generally followed the guidelines governing the revocation of supervised release, which have always been advisory in nature. It is our understanding that these guidelines have worked well, and have not been the subject of a large number of amendments over the years.

The experience of the various states that have employed advisory guidelines

also suggests the likelihood that federal judges will continue to sentence within guidelines ranges as a routine matter. *See* Kim Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, forthcoming in 17 *Federal Sentencing Reporter* ____ (2005)(available at Sentencing.typepad.com/sentencing_law_policy/files/ fsr_advisory_guidelines_draft.doc) (describing compliance rates among states with advisory guideline systems). While there is a great variety among these state systems, it appears that judges recognize the institutional advantages of guidelines and tend to follow them in most cases. The reasons for the effectiveness of these state advisory systems would likely be a fruitful area of further investigation for the Sentencing Commission as well as the Congress.

B. Advisory guidelines will not be difficult to evaluate

It will not be difficult to evaluate with precision the manner in which the new system operates. The Feeney Amendment to section 3553(c) will not only tend to reduce the impact of *Booker*, it will also make it quite easy to study that impact.

As noted in *Booker*, "the Sentencing Commission remains in place, writing guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the guidelines accordingly." Given the information required to be transmitted under section 3553(c) as modified by the Feeney Amendment, the Commission will be able to determine the precise number of cases involving sentences outside the guideline range, the reasons for such sentences, the types of cases involved, the districts involved, as well as the degree to which the sentences imposed differed from the guidelines ranges. And all of this data may in turn be compared to pre-*Booker* data to precisely quantify the extent, manner, and reasons for any differences in sentencing patterns between the mandatory and advisory systems.

C. There is no readily available obviously superior alternative to advisory guidelines

The final consideration for Congress in determining whether to study the new advisory system for 12 months is the extent to which there exists some readily

available obviously superior alternative to doing so. There are no good "quick fixes."

Two approaches that present significant disadvantages and few advantages are the addition of more mandatory minimum penalties, and the so-called "Bowman fix." The ABA has consistently advocated the repeal of the existing mandatory minimums (and did so again in approving ABA Justice Kennedy Recommendation 121A). Indeed, even if mandatory minimums were not poor sentencing policy, given the number and variety of federal offenses the establishment of mandatory minimums as an alternative to guidelines would seem to be an extraordinary undertaking.

The "Bowman fix" presents numerous problems. First, this "fix" will itself be unconstitutional if the Court overrules *Harris v. United States*, 536 U.S. 545 (2002)(5-4 decision upholding application of mandatory minimum based on judicial fact-finding). It is difficult in principle to draw a constitutional line between the determination of facts which raise the sentencing ceiling from the determination of facts which raise the sentencing floor. Justice Breyer, who cast the critical fifth vote in *Harris*, recognized this in his separate concurring opinion, in which he explained that he could not "easily distinguish *Apprendi* ... from this case in terms of logic." Justice Breyer joined the majority in *Harris* because he did not agree with the majority in *Apprendi*, and therefore did not "yet accept its rule." Now that a majority of the Court has applied *Apprendi* to the Washington state guidelines in *Blakely* and to the federal sentencing guidelines in *Booker*, it seems at least strongly possible that Justice Breyer will now be forced to accept the rule in *Apprendi* and change his vote on the *Harris* issue. For this reason, the "Bowman fix" rests on a foundation that is, at best, of questionable constitutional validity. Given the turmoil that has followed *Blakely* and *Booker*, it would be a mistake to reformulate federal sentencing practice on a foundation that may itself be declared unconstitutional and raise a new round of ex post facto issues when Congress is compelled to fix federal sentencing for a second time.

Second, even if the "Bowman fix" were clearly constitutional, which it is not, it is not a balanced approach to sentencing. This approach essentially converts the guidelines into a very complex system of mandatory minimums, and does nothing to control unwarranted disparity generated by unfairly harsh sentences. Indeed, it essentially sends the message that there is no concern with

sentences that are unduly harsh, so long as no one is punished too leniently. Ironically, it would not be surprising if those most likely to suffer from unwarranted severity are those who choose to exercise their jury trial rights so recently protected in *Blakely* and *Booker*. When the ABA approved the ABA Justice Kennedy Commission, it recommended repeal of mandatory minimums precisely because they tend to lead to unwarranted disparity and severity. The Bowman approach is inconsistent not only with ABA policy with basic fairness.

Finally, this approach is essentially an emergency response to an unanticipated Court ruling rather than a well reasoned analysis of ideal sentencing policy. The federal courts of this nation serve as an example for the fifty states as well as other nations around the world. The federal courts should sentence under a legislative scheme that represents the best we can achieve when starting from scratch, rather than by hastily putting a band-aid on what remains of a very complex system created under assumptions about the Sixth Amendment which have now been rejected by the Supreme Court.

V. The Ex Post Facto Clause Will Delay Implementation of Any New System

The Ex Post Facto Clause of the Constitution will preclude the application of any new sentencing system to crimes committed before its enactment if it exposes a defendant to a more severe sentence. This means that regardless of Congress' level of satisfaction with the concept of advisory guidelines, any new legislation in this area likely will not affect any crimes committed prior to its enactment. As most federal crimes take months, if not years, to investigate and prosecute, the *Booker* advisory guidelines system will be applicable for many cases in the foreseeable future irrespective of immediate Congressional action. Given this reality, there is no compelling reason not to take at least 12 months – a period in which advisory guidelines will be operating in most cases anyway – and study the manner in which this system operates and the results it achieves.

VI. Consideration of an Alternative Solution

The preceding sections make the case that there is no immediate need for the Congress to enact new legislation until the advisory system under *Booker* has been given careful study in practice. But, it is important to recognize that, if, after

12 months, the data shows advisory guidelines are generating unacceptable degrees of disparity, Congress may then wish to consider returning to mandatory guidelines based on jury fact-finding. If there is unwarranted disparity, Congress may feel a need to act quickly. It is important, therefore, for the ABA to consider what alternative Congress might consider once the data have been gathered and carefully examined.

One possibility is the remedy suggested by the *Booker* dissenters on this issue – leave the mandatory guidelines in place but present all upward adjustments to the jury. Such an approach appears fair in principle and might well be workable. It is such an obvious alternative that it should be evaluated fully and promptly. Accordingly, Congress should request the Sentencing Commission to include in its Report to Congress any data it can gather from districts which took this approach during the period between *Blakely* and *Booker*.

Another possible alternative that deserves consideration if an advisory guideline system proves to be problematic is simplifying the guidelines by reducing both the number of offense levels and the number of adjustments and presenting the remaining, more essential, culpability factors to the jury. The factors could be guideline factors established by the Commission or elements of offenses prescribed by Congress. By proposing an alternative as a backup, the recommendation does not imply that advisory guidelines will prove unsuccessful or that an alternative will be found preferable.

This Report describes in four steps how such an approach might look. Once the steps are set forth, it is easy to see why no alternative is simple and sufficient time is needed to evaluate not only advisory guidelines but also the alternatives that might be offered.

First, certain critical culpability factors would be charged in the indictment and presented to the jury. The jury's verdict would yield a sentencing range within the existing statutory range that would ordinarily be binding upon the district court. Decisions regarding which guidelines factors are to be alleged in a charging instrument and proved to a jury and which should be relegated to "within range" consideration are ideally suited to a body such as the United States Sentencing Commission. It could consider, for example, in controlled substances cases (which account for nearly half of the cases) to focus on the factors of drug

quantity and type and role in the offense. Similarly, sentencing for economic crimes might focus on loss and role in the offense. In light of the critique that the current guidelines overemphasize quantity to the detriment of role, these two factors could be merged through a table where quantity runs down the vertical axis and role runs across the horizontal axis. This would permit a wider variety of policy choices including, for example, setting the punishment for minimal role in an offload lower than that for being the kingpin in a distribution network involving less quantity.

Second, as part of the process of simplifying the guidelines as set forth in step one, strong consideration should be given to a modification of the 25% or six-month limitation on sentencing ranges. The number of culpability factors is a trade-off related to both complexity and the width of the sentencing ranges which result – as more factors are submitted to the jury, the system becomes more complex but the resulting sentencing ranges can be narrowed. The SRA limited sentencing ranges to 25% or 6 months and allowed them to overlap. This resulted in a sentencing table with 43 levels. The ABA has urged Congress to repeal the 25% rule – a reform specifically recommended after careful study by the Kennedy Commission. ABA policy, if accepted by Congress, would result in a more workable system that relied on an increased role for juries and could result in simplifying the sentencing table from 43 levels to 10 levels, which could look something like this:

1. 0- 1 year
2 1 - 2 years
3 2 - 3 years
4 3 - 4.5 years
5 4.5 - 6.75 years
6 6.75 - 10 years
7 10 - 15 years
8 15 - 22.5 years
9 22.5 - 30 years
10 30 years - Life

As with the present table, criminal history could be accounted for through horizontal expansion of the table. To allow sufficient flexibility in this process, a few additional offense levels could be added as needed.

LETTER FROM EDWIN MEESE, III, AND PHILIP HEYMANN, CO-CHAIRS, SENTENCING INITIATIVES, THE CONSTITUTION PROJECT

The Constitution Project

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The Honorable Laurie O. Robinson
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Professor L. Michael Seidman
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Professor Roger Wilkins
George Mason University

Helen Wright

Spencer P. Boyer, Esq.
Executive Director

*Affiliations listed for identification purposes only

February 9, 2005

The Honorable Howard Coble, Chairman
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
2468 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert Scott, Ranking Member
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
2464 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble and Congressman Scott:

We write as the co-chairs of a Sentencing Initiative established by the Constitution Project, a bipartisan nonprofit organization that seeks consensus-based solutions to difficult legal and constitutional issues through careful study, wide-ranging consultation, and policy advocacy. As Congress considers the appropriate response to the Supreme Court's decision in *United States v. Booker*, we respectfully urge caution. *Booker* raises important and complicated questions for the future of the federal criminal justice system. We believe that a period of careful study and deliberation, rather than any immediate legislative action, is most likely to lead to a stable, just, and effective federal sentencing system.

The Constitution Project established the Sentencing Initiative after the Supreme Court's decision last June in *Blakely v. Washington* called into question the constitutionality of the federal sentencing guidelines. The Sentencing Initiative brought together a group representing a broad cross-section of institutional interests and political views. Each member has long experience in American criminal justice and special expertise in the challenges facing federal and state criminal sentencing systems. We have enclosed a list and brief biographies of our membership.

Congress should respond to the *Booker* decision with caution for at least four reasons. First, *although Booker is a complicated decision that leaves a number of important questions unanswered, the federal courts are addressing these questions expeditiously, federal sentencings are proceeding with little obvious*

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disruption, and the federal sentencing system is not in immediate crisis. The *Booker* decision renders the federal sentencing guidelines "effectively advisory."[1] Nonetheless, under the Sentencing Reform Act and *Booker*, judges are obliged to calculate and carefully consider the appropriate sentencing guidelines range, along with other statutory directives, such as the need to avoid unwarranted sentencing disparities. Judges must explain their sentences, which are reviewable on appeal for reasonableness. It is therefore far too early to conclude that sentences imposed after *Booker* will differ very much from those that would have been imposed under the pre-*Booker* guidelines system.

Second, *precisely because Booker is complicated and leaves important questions unresolved, Congress should be cautious about legislating on such uncertain constitutional ground.* After the post-*Booker* sentencing system develops more fully, Congress might decide that it represents an effective, sensible modification of the pre-existing guidelines regime. On the other hand, Congress might decide to enact legislation changing the current structure. If Congress decides to act, the most basic requirement for a new system is reasonable certainty that it will survive constitutional challenge. The *Blakely* decision precipitated seven months of uncertainty for federal courts and criminal litigants. If a new statutory system were enacted to replace the system of advisory guidelines authorized by *Booker*, only to be overturned after considerable litigation, the uncertainty and disruption experienced between *Blakely* and *Booker* would be immeasurably compounded.

Third, *any legislative response to* Booker *that does not suffer from constitutional uncertainty would require significant modifications of the current federal sentencing system and would thus require substantial time for careful study, drafting, consultation, and refinement.* Realistically, significant revision and simplification of the existing federal guidelines and associated statutes and court rules would require broad consultation among Congress, the Justice Department, judges, defense attorneys, and others concerned with federal sentencing. Such a project could not be accomplished immediately. It would require time, resources, and careful thought.

The fourth reason for caution is that *Congress should treat the Booker decision as an opening to address some long-term problems with the federal sentencing system.* Our committee's deliberations to this point have identified significant structural problems with the federal sentencing guidelines. We will be issuing a detailed report, but we can summarize our general conclusions. Although sentencing guidelines represent one of the great advancements in criminal justice in the past several decades, the federal guidelines have not been nearly as successful as many state guidelines systems. This is principally because the federal sentencing guidelines, at least as they existed before *Booker*, have been overly complex and rigid, rely too heavily on quantifiable factors and not enough on other important measures of culpability, are based on a problematic system of "relevant conduct," and have produced distortions in the optimal division of sentencing authority among various institutional actors.

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[1]United States v. Booker, 125 S.Ct. 738, 757 (2005).

Booker presents an unparalleled opportunity for carefully examining the guidelines and working towards major improvements. We hope Congress will proceed cautiously in order to take advantage of that opportunity and will resist adopting any "quick fix," such as "topless guidelines," which is inconsistent with the concerns we have raised in this letter. The Constitution Project is working toward presenting Congress and other interested parties a set of recommendations for appropriate responses to the *Booker* decision and significant improvements of the federal sentencing system. We hope our efforts will be of assistance to Congress as it carries out its work, and we invite you to call on us at any time.

Respectfully,

Edwin Meese III

Philip B. Heymann

Enclosures

Cc: Members, Subcommittee on Crime, Terrorism, and Homeland Security

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The Constitution Project's Sentencing Initiative

Co-Chairs

Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation, and Attorney General under President Reagan

Philip Heymann, James Barr Ames Professor of Law at the Harvard Law School, and Deputy Attorney General under President Clinton

Members

Judge Samuel Alito, U.S. Court of Appeals for the Third Circuit

Zachary Carter, Partner, Dorsey & Whitney LLP, and former U.S. Attorney for the Eastern District of New York

Judge Paul Cassell, U.S. District Court for the District of Utah

James Felman, Partner, Kynes, Markman & Felman PA, and Chair of the National Seminar on the Federal Sentencing Guidelines

Judge Nancy Gertner, U.S. District Court for the District of Massachusetts

Judge Isabel Gomez, Hennepin County District Court, Minnesota

Thomas Hillier, Federal Public Defender for the Western District of Washington

Judge Renee Hughes, Court of Common Pleas, Philadelphia

Miriam Krinsky, Director, Children's Law Center of Los Angeles, and former Assistant U.S. Attorney, Central District of California

Norman Maleng, State's Attorney, King County, Washington

Judge Jon Newman, U.S. Court of Appeals for the Second Circuit

Thomas Perez, Councilmember, Montgomery County Council, and former U.S. Deputy Assistant Attorney General for Civil Rights

Barbara Tombs, Director, Minnesota Sentencing Guidelines Commission, and former Director of the Kansas Sentencing Commission

Ronald Wright, Professor of Law, Wake Forest Law School

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The Constitution Project's Sentencing Initiative

Co-Chair Biographies

Philip Heymann is the James Barr Ames Professor of Law at Harvard Law School. Heymann's global work has reached from Guatemala, to Peru, Northern Ireland, the Palestinian Authority, South Africa, and Russia. At Harvard Law School he leads efforts to encourage national and international public service by lawyers.
Heymann has served at high levels in both the State and Justice Departments during the Kennedy, Johnson, Carter, and Clinton administrations. He was appointed by Carter to lead the Criminal Division of the Department of Justice, and by Clinton to serve as Deputy Attorney General of the United States. He also served at a sub-cabinet level in the State Department.

After clerking for Supreme Court Justice John Harlan, Heymann spent four years in the Justice Department briefing and arguing Supreme Court cases. In the early 1970's he played a key role in setting up the office of the Watergate Special Prosecutor. Since then, he has been integrally involved in the national debate about the conditions necessary to keep high officials accountable to the system of criminal justice.

Heymann has authored and edited seven books and numerous articles on terrorism, management in government, criminal justice, and combating corruption. In addition to academic pieces, he has written for *The New York Times*, *The Washington Post*, *The Boston Globe*, and *Los Angeles Times*, among other written press. He has appeared frequently on national television and radio. Heymann graduated from Yale University in 1954, and obtained his J.D. at Harvard in 1960.

Edwin Meese III is a distinguished visiting fellow at the Hoover Institution and a distinguished fellow and holder of the Ronald Reagan Chair in Public Policy at the Heritage Foundation. He served as the seventy-fifth Attorney General of the United States from February 1985 to August 1988.

Meese is a member of the Board of Regents of the National College of District Attorneys; distinguished senior fellow at the Institute for United States Studies, University of London; and a member of the boards of directors of both the Capital Research Center and the Landmark Legal Foundation. He is also an expert on the U.S. legal system, law enforcement and criminal justice, intelligence and national security, and the Reagan presidency. His current research focuses on the criminal justice system, federalism, emergency response management, and terrorism. His memoirs were published in the 1992 volume *With Reagan: The Inside Story* (Regenry Gateway Publishers).

Before serving as U.S. Attorney General, Meese was counselor to the president from 1981 to 1985. In this capacity, he functioned as the president's chief policy adviser and had management responsibility for the administration of the cabinet, policy development, and planning and evaluation. During this time, he was a member of the president's cabinet and the National Security Council. Meese also headed the president-elect's transition effort following the November 1980 election. During the presidential campaign, he served as Chief of Staff and Senior Issues Adviser for the Reagan-Bush committee. Formerly, he served as Governor Reagan's executive assistant and chief of staff in California from 1969 though 1974 and as Legal Affairs Secretary from 1967 through 1968. Before joining Governor Reagan's staff in 1967, Meese served as deputy district attorney of Alameda Count, California. From 1977 to 1981, he was a professor of law at the University of San Diego, where he was also director of the Center for Criminal Justice Policy and Management. Meese graduated from Yale University in 1953, and holds a law degree from the University of California at Berkeley.

Member Biographies

Judge Samuel Alito Jr., served for three years as the U.S. Attorney for the District of New Jersey in 1987 before being nominated by George Bush for the U.S. Court of Appeals for the Third Circuit, where he has served for the past 14 years. In 1976, he became a law clerk to the Honorable Leonard A. Carth. He then went on to be the Assistant U.S. Attorney in the District of New Jersey, Assistant to the U.S. Solicitor General, and then Deputy Assistant U.S. Attorney General with the U.S. Department of Justice. Judge Alito is originally from Trenton New Jersey, and he is a graduate of Princeton University, and received his J.D. from Yale Law School.

Zachary Carter served as United States Attorney for the Eastern District of New York from 1993 to 1999. As United States Attorney for one of the largest federal districts in the United States, Carter's tenure was noted for numerous

prosecutions of national significance, including the successful prosecution of New York City police officers for the torture of Haitian immigrant Abner Louima; the civil rights prosecution of Lemrick Nelson for the bias murder of Yankel Rosenbaum; the prosecutions of broker-dealers for securities frauds arising out of their connections with organized crime, and the prosecutions of defense contractors for violations of the federal false claims act. As a member of the Attorney General's Advisory Committee of United States Attorneys, Carter played a prominent role in the development of Department of Justice policies. He is now a partner at Dorsey & Whitney LLP.

Judge Paul Cassell has been a U.S. District Court judge for the District of Utah since July 2002. Previously, he clerked for then-Judge Antonin Scalia when Scalia was on the D.C. Circuit U.S. Court of Appeals, and for the Chief Justice Warren Burger of the United States, before becoming an Associate Deputy Attorney General at the U.S. Justice Department. He was also a professor at S.J. Quinney College of Law, and an Assistant U.S. attorney for the Eastern District of Virginia. Judge Cassell's law school casebook, Victims in Criminal Procedure (co-authored with Professor Douglas Beloof and Steven Twist) will be published in early 2005. He has also recently written about criminal justice issues in the Stanford Law Review, Michigan Law Review, and UCLA Law Review. Judge Cassell received his B.A. in 1981, and his a J.D. in 1984 from Stanford University, where he graduated Order of the Coif and was president of the Stanford Law Review.

James Felman is a partner in the Tampa, Florida law firm of Kynes, Markman & Felman, P.A., where he concentrates on the defense of complex criminal cases. Felman serves as the program chair of the National Seminar on the Federal Sentencing Guidelines, which is jointly sponsored by the Federal Bar Association and the United States Sentencing Commission. He is the former co-chair of the Practitioners' Advisory Group to the Sentencing Commission and is the new co_chair of the American Bar Association Criminal Justice Section's Corrections and Sentencing Committee. Felman is also co-author of the Second Edition of Grand Jury Law and Practice, a two-volume treatise published by West Group. His publications regarding the guidelines include "The Incompatibility of Real Offense Sentencing Guidelines and the Federal Criminal Code," (7:3 Fed. Sent. Rptr. 125 (1995)), and "Defense Strategies for Litigating Substantial Assistance Downward Departures" (The Champion, July 1994). Felman is a former President of the Tampa Bay Chapter of the Federal Bar Association, and the former Chairman of the Trial Lawyers Section and the Criminal Law Section of the Hillsborough County Bar Association. He is also a former adjunct professor at the Stetson University College of Law, where he taught federal criminal law. He received his undergraduate degree in history from Wake Forest University, and his J.D. with high honors and his M.A. in philosophy from Duke University.

Judge Nancy Gertner has served on the United States District Court for the District of Massachusetts since 1994. She began her career as a clerk for Chief Judge Luther Swygert on the Seventh Circuit Court of Appeals. She was a partner at Silverglate, Gertner, Fine & Good for nearly twenty years, and then became partner at Dwyer, Collora & Gertner. Judge Gertner has taught at the law schools at Harvard, Boston College, Boston University, Northeastern University, and the University of Iowa. She was a *Charles R. Merriam Distinguished Professor* at Arizona State Law School. She has been teaching sentencing at Yale Law School for the past five years. Judge Gertner was part of a delegation to Turkey with the Lawyer's Committee on Civil Rights, where they explored human rights and judicial independence issues. She was also part of a program sponsored by Fordham University Law School, for the Ministry of Justice in Israel. Judge Gertner is on the faculty of the American Bar Association - Central & Eastern European Law Initiative Advisory Council, and is now on its Advisory Board. During trips to Prague, she taught judges and defense lawyers from across Europe. She is part of Yale Law School's China Project and traveled there to participate in a seminar, co-organized with the Institute of Law at the Chinese Academy of Social Sciences. Her book, *The Law of Juries*, co-authored with attorney Judith Mizner, was published in 1997 (Glasser Legalworks). Judge Gertner graduated from Barnard College and Yale Law School, where she served on *The Yale Law Journal*, and received her M.A. in Political Science at Yale University.

Judge Isabel Gomez has been a judge of Hennepin County District Court since 1984. She also serves as a Trial Court Representative to the Minnesota Sentencing Guidelines Commission. Gomez was also Chief Judge of Hennepin County Juvenile Court until 1992. She is active on various community boards, including the Northwest Area Foundation; the Children's Theatre Company of Minneapolis; and the Mediation Center. Judge Gomez works and

speaks in the community on issues including children's advocacy, gender in the law profession, law and family, juvenile justice, and human rights.

Thomas Hillier II has been the Federal Public Defender for the Western District of Washington since 1982. He has practiced for 30 years, exclusively as a criminal defense lawyer. He is a Fellow of the American College of Trial Lawyers. He also speaks, trains, and testifies in many legal and legislative venues, and is a prolific contributor to criminal defense treatises. In 2000, Chief Justice William H. Rehnquist appointed Hillier to the Advisory Committee on the Federal Rules of Evidence. He has argued before the United States Supreme Court, and has appeared many times before the Ninth Circuit. He has received both the Washington Association of Criminal Defense Lawyers' and the ACLU's William O. Douglas Awards; the Washington State Bar Association's Angelo Petruss Award; and the Gonzaga Law Medal.

Judge Renée Cardwell Hughes is a trial judge in the Court of Common Pleas, the First Judicial District of Pennsylvania. Judge Hughes Hughes has served in the Trial Division of the court, since her appointment to the bench in 1995. In 1996, she was appointed to the Pennsylvania Commission on Sentencing where she chairs the policy committee. Prior to becoming a member of the judiciary, Judge Hughes was in private practice and specialized in corporate, health care, worker's compensation, and insurance defense law. Before opening her own law firm, she was an associate at Mesirov Gelman Jaffe Cramer & Jamison; an associate counsel with Independence Blue Cross; and general counsel for the Law School Admissions Council and Law School Admissions Services. Judge Hughes is active in the Pennsylvania Conference of State Trial Judges and has served on the Education Committee and the Legislative Liaison Committee. She is also a member of the Board of Directors for The Sentencing Project. Active in national, state and local bar associations, Judge Hughes has served as President of the Barrister's Association and President of the National Bar Association, Women Lawyer's Division Philadelphia Chapter. She is also a member of the National Association of Women Trial Judges and has served as a judicial liaison to the Pennsylvania Supreme Court Sub-committee on Racial and Gender Bias. Her writings are published in the Temple University Law School's Journal of Civil and Political Rights and the American Correctional Association's Annual Report on the State of Corrections. She also serves on an Advisory Committee to the General Assembly of Pennsylvania to examine the issues of geriatric and seriously ill prisoners. She currently teaches at Drexel University, and has taught or lectured at the University of Pennsylvania School of Law, Duquesne University School of Law, Temple University School of Law, Villanova University School of Law, and Randolph Macon Women's College. Judge Hughes received her J.D. from Georgetown University Law Center, and her undergraduate degree from the University of Virginia.

Miriam Krinsky is the Executive Director of the Children's Law Center of Los Angeles, a 185 person nonprofit organization that serves as court appointed counsel for abused and neglected youth in Los Angeles County. Krinsky also currently sits on the California Judicial Council Family and Juvenile Law Committee, chairs the California Bench Bar Coalition, and is a member of various other state and local policy committees addressing issues impacting youth, including previously serving as chair of the L.A. County Bar's Juvenile Task Force. She has also testified before a wide array of local and state governmental and judicial bodies. Krinsky served last year as President of the Los Angeles County Bar Association and also served on the Los Angeles City Ethics Commission, acting as the Commission President for three years. After law school, Krinsky joined the Los Angeles law firm Hufstedler, Miller, Carlson & Beardsley and thereafter was an Assistant United States Attorney in the Central District of California, serving as Chief of that office's Appellate Section and prior to that as Chief of the office's General Crimes Section. During her 15 year tenure with the Department of Justice, Krinsky chaired the Solicitor General's Advisory Group on Appellate Issues, sat for a number of years on the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee and received the Attorney General's highest national award for appellate work. Krinsky has taught law school at both the University of Southern California Law Center and Loyola Law School and has lectured nationwide at judicial, bar, Sentencing Commission, community and Department of Justice conferences on criminal law, sentencing, child welfare, and other legal topics. She received her J.D. from the University of California and is a summa cum laude and Phi Betta Kappa undergraduate from the same campus.

Norm Maleng was elected King County Prosecuting Attorney Prosecutor in 1978, where he has been a leader in the effort to reform our criminal justice system and improve public safety on the local, state, and national level. Within the Prosecuting Attorney's Office, he has established a number of innovative programs, including a nationally-recognized sexual assault prosecution unit; a specialized homicide investigation and prosecution unit; a victim assistance unit; and a comprehensive domestic violence prosecution unit, including a widespread system of advocacy for victims of domestic violence. He also established Kids' Court, which helps child victims of sexual abuse understand the courtroom, and Drug Court, which offers first-time offenders an opportunity for a strict drug treatment program. Maleng began his career as a staff attorney for the United States Senate Committee on Commerce. After his return to Seattle, Maleng worked in private practice for three years before being appointed Chief Deputy of the Civil Division. Within the State of Washington, Maleng has led numerous legislative efforts, which have culminated in the passage of a number of critical bills, including restoration and expansion of the crime victim compensation system, as well as establishment of the state's presumptive sentencing system (the Sentencing Reform Act), which has brought uniformity and certainty to the state's criminal justice system. In 1989, Maleng was selected to chair the Governor's Task Force on Community Protection. The Task Force's recommendations became law in Washington, as well as national models. He also helped strengthen laws in 1994 aimed at juveniles who carry firearms without adult supervision and worked to pass the Becca Bill in 1995, which has reenforced the state's truancy laws and established expectations for dealing with runaway children. He was also a leader in passage of the 1997 Juvenile Justice Act, which provides an improved framework to intervene in the life of a troubled youth. Maleng graduated from the University of Washington in 1960, and thereafter served as a Lieutenant in the United States Army. He obtained his J.D. from the University of Washington 1966 and served as editor-in-chief of the Law Review.

Judge Jon Newman is a Senior U.S. Circuit Judge for the U.S. Court of Appeals for the Second Circuit, where he has served since 1979. Prior to this, he was a United States District Court Judge for the District of Connecticut. Following his graduation from law school, Judge Newman was a law clerk for Judge George T. Washington of the U.S. Court of Appeals for the District of Columbia Circuit. From 1957 to 1958, he was senior law clerk to Chief Justice Earl Warren of the United Sates Supreme Court. Newman returned to Connecticut in 1958 to engage in private law practice in Hartford. In 1960, he was appointed Special Counsel to Governor Abraham Ribicoff of Connecticut. He then became Executive Assistant to Mr. Ribicoff in the latter's position as U.S. Secretary of Health, Education and Welfare. In 1963, after Secretary Ribicoff was elected United States Senator from Connecticut, Judge Newman became his Administrative Assistant. From 1964 until 1969, Judge Newman was the United States Attorney for the District of Connecticut. He returned to private law practice in Hartford in 1969, at which he remained until his 1971 appointment to the district court. Judge Newman received his B.A. degree from Princeton University in 1953, and his LL.B. from Yale Law School in 1956. He served in the U.S. Army Reserve from 1954 until 1962.

Tom Perez is a member of the Montgomery County Council, where he serves on the Council's Transportation and Environment Committee and the Health and Human Services Committee. Perez began his career as an attorney in the U.S. Department of Justice's Civil Rights Division and later became Deputy Assistant Attorney General for Civil Rights. As a federal prosecutor for six years, he successfully prosecuted white supremacists in Texas and also worked on combating racial profiling and closing the achievement gap at the elementary, secondary, and higher education levels. As a senior aide to Senator Edward Kennedy, Perez co-drafted the bill to respond to the church arson epidemic of 1996 and drafted the original hate crimes bill later passed by the United States Senate. During the last two years of the Clinton administration, Perez was Director of the Office of Civil Rights at the Department of Health and Human Services under Secretary Donna Shalala. He then became an Assistant Professor of Law and Director of the Clinical Law programs at the University of Maryland School of Law. He is a member of the Kaiser Commission on Medicaid and the Uninsured, a non-partisan commission of national health care policy experts concerned with enhancing access to health care for vulnerable people. He was also President of the Board of Directors of Casa of Maryland and served as technical advisor to the Washington Business Group on Health and to the County's Latino Health Initiative. Perez is a graduate of Brown University, Harvard Law School, and the John F. Kennedy School of Government.

Barbara Tombs is the Executive Director of the Minnesota Sentencing Guidelines Commission. Prior to that, she was Executive Director of the Kansas Sentencing Commission. Tombs has also been employed jointly by the

Pennsylvania Commission on Crime and Delinquency and the Pennsylvania Commission on Sentencing as a research analyst involved in various criminal justice research projects. Since her employment with the Minnesota Sentencing Guidelines Commission, Tombs has focused on conducting an extensive study of drug sentencing policy in the state, including a historical analysis of sentencing laws, incarceration trends for drug offenders, departure rates and cost analysis of current sentencing policy. This report was presented to the 2004 Minnesota Legislature, where it served as the basis of numerous hearings on potential drug sentencing reform for the state. She also serves as a member of the statewide Drug Court Initiative, Advisory Task Force on Female Offenders, and the statewide criminal justice information system's Data Practices Committee. Tombs is also a member of the Executive Board of the National Association of Sentencing Commissions and currently serves as its President. In addition, she serves as a Program Associate with the State Sentencing Program of the VERA Institute of Justice. She has also served as adjunct faculty in the Criminal Justice Department for Washburn University, teaching both undergraduate and graduate level classes. Tombs holds both undergraduate and graduate degrees in Administration of Justice from Penn State University.

Ronald Wright teaches and writes about Criminal Justice and Administrative Law at Wake Forest Law School. His areas of expertise include prosecutorial charging decisions, plea bargaining, criminal sentencing and the use of "sentencing commissions" in state and federal government to develop sentencing rules. Wright is the co-author of two casebooks in criminal procedure and sentencing (published by Aspen Law & Business). Wright joined the Wake Forest faculty in 1988. Before then, he was a trial attorney with the U.S. Department of Justice, prosecuting antitrust and other white-collar criminal cases. He graduated from William and Mary College in 1981, and received his J.D. from Yale University in 1984.

Advisor Biographies

Frank Bowman is the M. Dale Palmer Professor of Law at Indiana University School of Law. He entered the U.S. Department of Justice as part of the Honor Graduate Program and spent three years as a Trial Attorney in the Criminal Division in Washington, D.C. From 1983 until 1986, he was a Deputy District Attorney for Denver, Colorado. He also spent three years in private practice in Colorado. In 1989, Bowman joined the U.S. Attorney's Office for the Southern District of Florida, where he was Deputy Chief of the Southern Criminal Division and specialized in complex white-collar crimes. In 1995-96, he served as Special Counsel to the United States Sentencing Commission in Washington, D.C. From 1998-2001, he served as academic advisor to the Criminal Law Committee of the United States Judicial Conference. Bowman is a co-author of the treatise, *Federal Sentencing Guidelines Handbook*. He is a frequent contributor to national law journals and a member of the editorial boards of the *Federal Sentencing Reporter*, published by the Vera Institute of Justice, and the *Criminal Justice Review*, published by Georgia State University. Bowman has also been adjunct professor of law at the University of Denver College of Law, and a visiting professor at Washington & Lee University Law School, Gonzaga University School of Law, and Wake Forest University School of Law. He graduated from Harvard Law School in 1979.

David Yellen is a former Dean and the Max Schmertz Distinguished Professor at Hofstra University School of Law. He is currently the Reuschlein Distinguished Visiting Professor at Villanova Law School. He has been involved in sentencing reform for almost two decades. He has been co-author of a leading treatise on federal sentencing law, and has written numerous articles for law reviews and other publications. He has been active in providing pro bono legal representation to indigent defendants, including before the U.S. Supreme Court, and also serves as an adviser to Families Against Mandatory Minimums. Before coming to Hofstra, Yellen was staff counsel to the Judiciary Committee of the U.S. House of Representatives. He received his B.A. from Princeton University, and his J.D. from Cornell University.

PREPARED STATEMENT OF LAWRENCE PIERSOL, PRESIDENT, THE FEDERAL JUDGES ASSOCIATION, AND CHIEF JUDGE OF THE DISTRICT OF SOUTH DAKOTA

Dear Chairman Coble, and Ranking Member Scott, and Members of the Subcommittee:

My name is Lawrence Piersol. I am the President of the Federal Judges Association and the Chief Judge of the District of South Dakota. About two-thirds of the Article III Judges (District and Circuit) belong to the Federal Judges Association.

We appreciate the opportunity to offer this testimony to you. The Board of Directors of the Federal Judges Association, subsequent to the *Booker* decision of the Supreme Court, unanimously adopted the following position:

> The Board of Directors of the Federal Judges Association has resolved that the position of the FJA should be to ask Congress to allow the present situation time to work, and only if it does not ultimately work to the satisfaction of Congress, should Congress then proceed, in consultation with the Courts, academics, the Justice Department, the United States Sentencing Commission, and other interested parties, to fashion some changes.

Now from a personal point of view, since *Booker* was published on January 12, 2005, I have kept track of my own sentencings. I have sentenced 16 people. All were sentenced within the sentencing guidelines, one was a downward departure for diminished capacity, and the 17th was continued for a few days because I gave notice that there was going to be an upward departure. These sentencings were no different than the sentencings would have been before the *Booker* decision. That is not to say that some situation will not present itself in the future where a sentence would be outside of the guidelines and the departures available under the guidelines.

Just as after *Apprendi* and *Blakely*, it takes a time to sort things out but it does get done. We ask for time to work through the issues presented as the system we have appears to be doing just that.

LETTER FROM KENT SCHEIDEGGER, LEGAL DIRECTOR AND GENERAL COUNSEL, CRIMINAL JUSTICE LEGAL FOUNDATION

Statement of Kent Scheidegger
Legal Director and General Counsel, Criminal Justice Legal Foundation

Before the United States House of Representatives Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Oversight Hearing on "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines."

February 10, 2005

I thank the subcommittee for the opportunity to submit this statement for your consideration and regret that I am unable to attend in person. The Supreme Court's decision in *United States* v. *Booker* creates a great danger that sentencing of criminals will depend as much on which judge is drawn for a case as it does on the criminal's actual culpability. Congress should act swiftly to prevent, or at least minimize, that result.

Background

On January 12, the Supreme Court decided the case of *United States* v. *Booker*, No. 04-104. The decision confirmed that the Federal Sentencing Guidelines in their preexisting form did not survive last June's decision in *Blakely* v. *Washington*, 124 S.Ct. 2531 (2004). The questions now before Congress are whether we can save guideline sentencing and whether we should.

The Sentencing Reform Act of 1984 was passed in a bipartisan consensus, a rarity for criminal law. It was sponsored by Senator Edward Kennedy and co-sponsored by a diverse group including Senators Strom Thurmond, Orrin Hatch, and Patrick Leahy. Before the reform, federal district court judges had broad and essentially unreviewable discretion to fix the sentence anywhere within a broad range. A sentence for grand larceny, for example, could be anywhere from 0 to 20 years. In such a system, sentences varied widely with the attitudes of the randomly assigned judges. In a controlled study, one judge assigned a sentence of 1 year and another judge assigned a sentence of 10 years after both reviewed the same file. There was also reason to believe that race and socioeconomic status played substantial roles.

The 1984 Act replaced this system with a set of Sentencing Guidelines. The judge computes a standard sentence range from the basic offense, the offender's criminal history, and a variety of other factors specified in the Guidelines. In theft crimes, for example, the amount stolen is the most important factor. Absent other factors, a first-offender thief at the low end could get no more than six months, while one who steals $400,000,000 would get 15 to 20 years. A variety of other factors also go into the mix, such as running a fencing operation or committing charity fraud. In most cases, the judge chooses the sentence from within the standard range. The judge is also allowed to depart upward or downward from the standard range upon finding facts that the Guidelines do not consider.

The defendant in a criminal case has the right to a jury trial and proof beyond a reasonable doubt of the elements of the offense. In *Apprendi* v. *New Jersey*, 530 U.S. 466

(2000), the Supreme Court held that a hate-crime enhancement that raised the sentence above the maximum for the underlying offense had to be treated as an element, but this holding initially appeared to have little effect in the federal system. For 20 years, the factors that go into the Guidelines computations had been uniformly understood to be sentencing factors and not elements, determined by the judge after the jury has been dismissed. The courts of appeals unanimously held that *Apprendi* did not change this. However, last June in the *Blakely* case, the Supreme Court decided that an "element" includes any factor that exposes the defendant to the possibility of a sentence greater than a maximum that can be imposed solely on the facts found by the jury. Continuing with the larceny example above, the facts established by a federal conviction of grand larceny are only an unlawful taking of $1000, and the top of the Guidelines range on those facts alone is six months. Under *Blakely*, in a mandatory system any fact used to make the defendant eligible for more than six months would have to be found by a jury beyond a reasonable doubt.

United States* v. *Booker

The Supreme Court decided 5-4 that the Guidelines in their present form cannot stand, but a different 5-4 majority decided what to do about it. Only Justice Ginsburg joined both opinions. The majority believed that the solution closest to what Congress intended, while still complying with the Sixth Amendment, was to make the Guidelines advisory. Since aggravating facts are no longer a legal necessity for a sentence anywhere in the statutory range, the Sixth Amendment requirement of jury factfinding no longer applies. The majority further decided that 18 U.S.C. § 3742(e), setting forth the standards of review on appeal, also had to be excised. The explanation for this conclusion is this: "That section contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons." (Slip op., at 17.) The logical leap from "critical cross-references" to striking the entire subsection is doubtful, but there is no need to belabor the point. The excising of the appeal standard was an exercise of statutory construction and not constitutional mandate. Congress is free to set the standard of review that it deems appropriate by enacting new legislation.

Options for Congress

Congress, unlike the Supreme Court, is not constrained to keep the system as close as possible to the intent of the Sentencing Reform Act of 1984. Congress can consider the full range of possibilities, subject only to meeting constitutional constraints. Possible responses include a short-term "fix" for immediate problems, a long-term, comprehensive revision of sentencing law, and simply doing nothing, thereby accepting the Supreme Court's remedy in *Booker*.

One answer is to keep the Guidelines system but require every fact used to increase the sentence range to be tried to the jury and proved beyond a reasonable doubt, while mitigating facts could still be found by the judge by mere preponderance of the evidence. This is sometimes called the Kansas plan, and it was favored by four Justices in *Booker*. The lopsided system this plan would create would bear no resemblance to the political consensus that Congress agreed upon in 1984. Trying the Guidelines' myriad factors to juries would require extended trials, voluminous jury instructions, more extensive pretrial investigations, and possibly even

specification of the sentencing factors in the indictment. The practical reality is that anything made more difficult and expensive will inevitably be done less often, and there would be a wholesale shift downward in sentencing.

Such a wholesale downward shift would be detrimental to the public welfare and would not produce a more just system. Overall, tough sentencing practices have served the law-abiding people of America well. See Scheidegger and Rushford, The Social Benefits of Confining Habitual Criminals, 11 Stan. L. & Policy Rev. 59 (1999). Although particular anomalies in sentencing law can and should be revised on an individual basis, the shift from the Kansas plan would be both widespread and haphazard, bearing no relation to any needed adjustment. The most heavily criticized disparity in present sentencing law, the 100-to-1 powder-to-crack ratio, see 21 U.S.C. § 841(b)(1)(B)(ii) & (iii), would not be affected at all. Drug quantity is among the most easily provable facts.

A second possibility is to simply scrap the Guidelines and revert to the prior system of unfettered discretion to sentence anywhere within the very broad range of sentences in the statute. This would bring back all the evils that the Sentencing Reform Act was enacted to redress, plus a new one. In the old system, idiosyncratic sentencing on the high side could be mitigated by parole. However, parole was abolished as part of the sentencing reform, and it is unlikely to be reinstated. The problem of aberrantly lenient sentences would be as bad as it was before the Sentencing Reform Act, and the problem of aberrantly harsh sentences would be worse.

The Supreme Court's solution in *Booker* (and, therefore, the "do nothing" option for Congress), is not quite a reversion to the *status quo ante*, but it presents much of the same danger. With the Guidelines demoted to advisory status, some judges will take that advice more strongly than others. The ink was barely dry on the *Booker* decision before some judges were stating publicly that they would routinely impose far different sentences, while others would only depart from the Guidelines in unusual circumstances. See Cohen, New Sentencing Battle Looms After Court Decision, Wall Street Journal, A1, A4 (Jan. 14, 2005). A sentence should depend on what the defendant did and what he has done before, not which judge he draws. Justice is not a lottery. The "do nothing" option should be rejected out of hand.

A third possibility has been proposed by Professor Frank Bowman. Under this proposal, the top of every range in the Guidelines would be raised to the statutory maximum for the offense. In effect, sentences that were upward departures under the pre-*Blakely* Guidelines would now be within the range. Because no facts need be found to impose such a sentence, the *Blakely* rule would not be implicated. While constitutionally valid, this plan would violate the political consensus of the Act in a way equal and opposite to the Kansas plan. The controls on unduly lenient sentences would remain in force, while all control on unduly harsh sentences would be abandoned.

A fourth possibility that Congress should seriously consider for the long term is a comprehensive revision of federal sentencing law. Offenses could be divided more finely into degrees, with a smaller statutory range for each degree. Recidivism could be handled with separate enhancements and a "three strikes" provision for incorrigibles. This is largely the way

sentencing works in California, where only relatively minor adjustments will be needed to comply with *Blakely* and *Booker*.

A Proposal for the Short Term

For a short-term fix, there is a solution that keeps the essence of the 1984 compromise intact. Eliminate the requirement that the district judge find aggravating or mitigating facts to depart from the Guidelines range. Require only a finding that the Guidelines range does not meet the criteria for determination of sentence in the general sentencing statute, 18 U.S.C. § 3553(a). With no factual findings required as a matter of law, there is nothing to be deemed an "element" under the *Blakely* rule. The legislative fix should specify that for the purpose of applying the 3553(a) criteria, the seriousness of the offense in general is determined by Congress's specification of the sentence range and not by the judge's individual opinion of seriousness. Finally, and most importantly, reinstate the requirement that all departures, up or down, be reviewable de novo on appeal, while within-range sentences continue to be reviewed deferentially. In that way, a departure sentence will be entered and affirmed only when three out of four judges agree (the district judge and a majority of the appeals panel), while within-range sentences entered by the district judge will almost always be affirmed. The vast majority of defendants would continue to be sentenced within the Guidelines ranges.

Another issue that Congress should act swiftly on, to avoid disparate results in different parts of the country, is the retroactivity of the *Booker* decision. The Supreme Court decided in *Summerlin* v. *Stewart*, 124 S. Ct. 2519 (2004) that another case in the same *Apprendi* line applied only to cases still on direct appeal, not to reopen those already final. Congress should eliminate any doubt that the same is true of *Booker*.

This proposal would shift the federal system of guided discretion in the direction of a little more discretion and a little less guidance, compared to the pre-*Booker* Guidelines system. However, it is less of a change in that direction than the system created by the Supreme Court in *Booker*. It presents less danger of idiosyncratic sentencing by individual judges, the primary evil addressed by the Sentencing Reform Act of 1984. It avoids the chaos that would result if a federal court of appeals should decide that *Booker* operates retroactively to reopen final judgments. This proposal can and should be enacted quickly, while Congress should consider deliberately more comprehensive restructuring of the sentencing system.

LETTER FROM ROBERT L. WILKINS, AND KARL A. RACINE, PARTNERS, VENEABLE LLP

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February 8, 2005

The Honorable Howard Coble, Chair
The Honorable Robert C. Scott, Ranking Member
United States House of Representatives
Committee on the Judiciary
Sub-Committee on Crime, Terrorism and Homeland Security

Re: Oversight Hearing on The Implications of The *Booker/FanFan* Decisions for the Federal Sentencing Guidelines

Dear Chairman Coble and Ranking Member Scott:

We write to commend you for holding an oversight hearing on the important policy implications of the *Booker/FanFan* decisions. As you know, the landmark Supreme Court decision in these cases have significant implications for sentencing in federal criminal cases, as well as state schemes modeled on the Federal Sentencing Guidelines. These issues certainly merit full review by your Committee.

We recently co-authored an editorial with the Honorable John Lewis in anticipation of the Supreme Court's decision in the *Booker/FanFan* cases. In that editorial, we note that since the implementation of the federal sentencing guidelines, racial disparities in federal sentencing have increased as compared to pre-Federal Guideline Sentencing. For example, in 1984 the average federal prison sentence for black offenders was about 5 months longer than for white offenders, but by 2001 the average sentence for blacks was almost 30 months longer. Thus, although Congress envisioned that the guidelines would greatly reduce – if not eliminate – racial disparities in federal sentencing, the advent of the guidelines (and mandatory minimum drug sentences) have made racial disparities in sentence length worse rather than better. We trust that you share our concern about the perceptions that such disparities cause.

We believe that racial disparities raise serious questions about the actual and perceived "equal justice under law" that all citizens are entitled to receive pursuant to the Constitution. We therefore urge the Congress to seriously consider those issues as it examines the impact of the *Booker/FanFan* decisions and any legislative proposals that are proffered in the aftermath. We have attached a copy of the editorial for your review, and we ask that this letter be placed in the

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record of this hearing. Of course, we remain available to assist the committee and the Congress on this issue in any manner possible.

Very truly yours,

Robert L. Wilkins

Robert L. Wilkins

Karl A. Racine
VENABLE LLP

Enc.

cc: The Honorable John Lewis

The Atlanta Journal-Constitution
@issue

MORE INFORMATION AND OPINIONS ON TODAY'S TOPICS: An opinion column discusses federal sentencing guidelines. To learn more:

➤ **ONLINE:**
U.S. Sentencing Commission: www.ussc.gov/
Families Against Mandatory Minimums: www.famm.org/si_race_and_mandatory.htm

➤ **BOOKS:**
"Fear of Judging: Sentencing Guidelines in the Federal Courts" by Kate Stith, Jose A. Cabranes

Fix sentencing guidelines

Move to end disparity along racial lines hasn't worked

By JOHN LEWIS and ROBERT WILKINS

File

Kemba Smith, a first offender who was connected with a crack cocaine ring only through her abusive boyfriend, received a 24-year federal sentence. She was granted clemency by President Bill Clinton.

Any day now, the U.S. Supreme Court is expected to announce its decision in the Booker and FanFan cases, which raise the issue of whether the federal sentencing guidelines violate the Sixth Amendment right to have a jury determine those facts that can increase the length of any potential sentence.

Many are hoping that the Supreme Court will strike down the guidelines, which have been lambasted by a diverse group of judges, practitioners and academics. Others are urging the court to uphold the guidelines, and they are preparing quick legislative "fixes" that would allow Congress to keep the present guidelines largely intact should the court strike them down.

Before the enactment of the guidelines, federal judges could consider a broad range of evidence and impose the sentence they believed most appropriate in each case. When Congress created the U.S. Sentencing Commission in 1984, its principal (and laudable) goal was to draft guidelines that eliminated discriminatory sentencing disparities. This approach initially appealed to minority communities because of its promise to sentence everyone fairly.

However, the guidelines, along with mandatory minimum drug sentences enacted by Congress since 1984, have been roundly criticized as unduly harsh, unduly rigid, removing too much discretion from judges and shifting too much power to prosecutors. The prestigious American College of Trial Lawyers (a group that includes several prominent former federal prosecutors) recently urged Congress to abolish the current guidelines, calling them "an experiment that has failed."

Indeed, several federal judges have resigned, in whole or in part because of their disgust with the guidelines. The latest was Judge Robert Cindrich of Pittsburgh, who said last February, "When the law provides a result that is repugnant, we must still follow the law. . . . And you can only do that so many times before you start to wonder, 'How many more times am I going to put my name on this sentence that I don't believe in?' "

U.S. Rep. John Lewis (left) is a Democrat representing Atlanta. Robert Wilkins is a Washington attorney.

One such example of unjust sentencing is Kemba Smith. Smith was a first offender who never used, sold or handled drugs and was connected with a crack cocaine ring only through actions done at the behest of her abusive boyfriend. Nonetheless Smith received a 24-year federal sentence, and she won release from prison after six years only because of intense media coverage and a grant of clemency from President Bill Clinton. Most defendants like Smith are not so lucky.

> Racial disparity in incarceration has been a moral blight on America from the beginning days of our criminal justice system.

Unfortunately, rather than reducing unfair racial disparities in federal sentencing, the evidence shows that the guidelines made the problem worse. Just before Thanksgiving, the Sentencing Commission released a report assessing whether the federal sentencing system has achieved the goals of the 1984 reforms. It confirmed what many observers have long known: In the past 20 years, the federal prison population has gotten significantly darker.

The report also shows that while the average federal prison sentence for black offenders was about five months longer than for whites in 1984, by 2001, the average sentence for blacks was almost 30 months longer. According to the report, at least some of the disparity is because of controversial mandatory minimum drug sentences and guidelines that require powder cocaine defendants (a racially varied group) to traffic 100 times more cocaine before they receive the same sentence as crack cocaine defendants (who are predominantly black).

The report should serve as a catalyst for major discussion about the racial impact of federal sentencing policy, though, to date, it has received scant attention. Of course, data showing vast racial disparities do not necessarily prove that the federal sentencing system discriminates.

But a critical goal of the federal sentencing guidelines was to eliminate unfair racial disparities in sentencing, and the Sentencing Commission has now concluded that "the sentencing guidelines and mandatory minimum statutes have a greater adverse impact on black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."

Racial disparity in incarceration has been a moral blight on America from the beginning days of our criminal justice system. That this disparity continues despite (and indeed because of) the guidelines highlights the need for serious thinking and action on the issue.

Regardless of whether the Supreme Court strikes them down in the Booker and FanFan cases, Congress should repeal the federal sentencing guidelines along with the mandatory minimum drug sentences. Then, Congress should allow the Sentencing Commission to draft new guidelines that treat the minority community fairly. The experiment with the federal sentencing guidelines has failed — it's time to go back to the drawing board.

➤ Washington attorney **Karl Racine** contributed to this column.

Perdue says one thing, does another

In politics, it's easy to talk a good game. If you're in a high-level position such as governor or senator, they practically hand you a script, which is why so many of them sound so much alike.

Consider our own Gov. Sonny Perdue, who like many governors these days is confronted by an ongoing budget crisis.

JAY BOOKMAN
jbookman@ajc.com
MY OPINION

"Less revenue plus more demand for state services equals hard choices," Perdue told legislators in his State of the State address last January. "There is a name for the kind of people who make hard choices. They are called 'leaders.' . . . Let's align our spending with our priorities and our priorities with our principles."

In addition to that fine talk on the budget, Perdue also talks the standard 21st century lingo about "positioning Georgia in the global marketplace" and making Georgia "even more competitive in the global economy." He talks about education, science and economic development, just as the script says he should.

But as we'll see, such talk is pretty much meaningless.

Today, the state Department of Education employs just two people, statewide, to help the more than 2,000 public schools in Georgia implement the state's science curriculum.

According to DOE spokesman Kirk Englehardt, the department has two positions, statewide, to assist with the math curriculum, kindergarten through high school. It employs two specialists in language arts, three in reading and two in social studies.

Meanwhile, the DOE has 30 positions devoted to help coordinate and support agriculture education, a field taught in 10 percent of Georgia public schools and fewer than half of Georgia high schools.

And yes, you read those numbers right: Two for science, two for math, three for reading.

Thirty for agriculture education.

To Kathy Cox, the state superintendent of schools, that disparity represented an opportunity. With the launch of a new, more ambitious statewide science curriculum, and with almost 30 percent of Georgia high school juniors already failing a mandated science graduation test, Cox recognized that Georgia science teachers and students need a lot of help. And with the state's budget difficulties, she knew that new resources for such an effort would have to come from within her own budget.

The solution she proposed was emi-