

WHITE-COLLAR CRIME

## Expert Analysis

# Era of Post-‘Booker’ Sentencing: Whither the Guidelines

Just when federal judges may have thought it safe to exercise discretion in imposing sentence, signs of dissatisfaction with the post-*Booker* sentencing scheme are emerging. Recent congressional hearings, full of vitriol and partisanship, have raised the specter of a return to a mandatory and binding sentencing scheme—like the one that existed in the “good old days,” according to one congressman—and hint at the possible reformation or total elimination of the U.S. Sentencing Commission.

On Oct. 12, 2011, the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee conducted a hearing to examine the post-*Booker* sentencing regime titled “Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*.” The hearing revealed the existence of two camps with respect to the current sentencing structure—those who believe the current advisory system should remain in place (albeit with a bit of tweaking) and those who believe the advisory Sentencing Guidelines are a failure. The debate about the current federal sentencing system occurs against a greater backdrop in which some scholars believe the American criminal justice system, which one scholar referred to as “the harshest in the history of democratic government,” is rife with paradox.<sup>1</sup> Regardless of whether one agrees with this view, attention must be paid to the current state of sentencing in America.

### Brief History of the Guidelines

Before Congress passed the Sentencing Reform Act (SRA) in 1984, federal judges had virtually unfettered discretion in handing down sentences. The tremendous disparities that resulted from this system prompted Congress to establish the U.S. Sentencing Commission authorized to promulgate Sentencing Guidelines that would “provide certainty and fairness” by “avoiding unwarranted sentencing disparities among defendants with



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similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted.”

The mandatory Sentencing Guidelines that followed required federal judges to impose sentences within the applicable guideline range, unless the court found the existence of mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. This mandatory system was deemed unconstitutional

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by the Supreme Court in *United States v. Booker* in 2005. *Booker* rendered the guidelines advisory, and while a federal judge is still required to compute the appropriate guidelines range for a defendant, it is only one of several factors the judge should consider in imposing sentence. Other factors to be considered by a sentencing court are set forth in 18 U.S.C. §3553(a) and include the nature and seriousness of the offense, the defendant’s personal characteristics, restitution for the victims, and the elimination of unwarranted sentencing disparities.

### Effectiveness

The congressional hearings opened with a statement by Subcommittee Chairman James Sensenbrenner (R-Wisc.) that the Supreme Court’s decision in *Booker* had “undermined” and “destroyed” the guidelines by restoring to federal judges the discretion Congress previously found had been abused. Noting an apparent increase

in downward departures, Mr. Sensenbrenner suggested that the commission was to blame for the perceived failures of the system. Weighing in from the other side of the aisle, Representative Bobby Scott (D-Va.), the ranking minority member of the subcommittee, asserted that “*Booker* was the fix, not the problem.”

Sentencing statistics compiled by the commission were quoted by both sides in advocating their positions. The numbers reveal that the percentage of sentences imposed within the applicable guidelines has decreased since *Booker*. In 2004, the year immediately preceding *Booker*, 72.1 percent of all sentences imposed were within the guidelines range. In fiscal year 2010, that rate had decreased to 55.5 percent, the lowest in 15 years. Without question, federal judges have exercised the expanded discretion granted after *Booker* to sentence outside the guidelines.

Proponents of the current system argue that this result is not necessarily negative, however, noting that there is nothing to indicate that the below guidelines sentences of the past six years have been unwarranted. Moreover, sentence lengths have not decreased significantly since *Booker*—the average sentence before *Booker* was approximately 46 months, and today it is approximately 43.3 months. Further, the length of sentences in certain offense categories, such as white collar and serious fraud offenses, has skyrocketed in recent years.

James Felman, the American Bar Association Liaison to the Sentencing Commission and co-chair of the ABA Criminal Justice Section Committee on Sentencing, testified before the subcommittee to express the views of the ABA. He opined that the advisory guidelines system has resulted in more meaningful and just sentences because it promotes more awareness among sentencing courts as to the aggravating and mitigating aspects of the offense and the individual history and characteristics of the defendant. A binding sentencing system does not allow for such flexibility and results in “unwarranted uniformity.” As stated by Felman: “Even the wisest guidelines, if mandatory, will yield in instances of undue uniformity.”

Matthew S. Miner, a practitioner who presented testimony to the subcommittee, disagreed that the current federal sentencing system was a success, asserting that it failed in the uniform treatment of offenders and had become a system of luck rather than laws. He pointed specifically to statistics showing that a defendant is twice as likely to receive a below guidelines sentence “based solely on the

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judge's discretion" if arrested in the Southern District of New York than when arrested for the same crime in the Northern District of New York. Miner stated that in enacting the SRA, Congress did not intend that a sentence would differ based on "county lines... [or] where you're lucky enough or unlucky enough to be picked up."

Indeed, Georgetown University Law Center Professor William Otis testified that he believes Congress should repeal the SRA and start anew. "The heart of the [SRA] has already been discarded for most day-to-day purposes. That happened when *Booker* ended mandatory guidelines and stripped the appeals courts of the power of de novo sentencing review, severely degrading their ability to correct even gross outlier sentences. The appendages of the SRA still twitching in the land of the undead should be put out of their misery."

Because the Supreme Court ruled in *Booker* that the Sixth Amendment right to jury trial requires that a defendant's sentence be based only on facts admitted by the defendant or found by a jury beyond a reasonable doubt, a return to mandatory sentencing guidelines would necessitate reliance on a system that leaves to a jury the matter of determining and weighing aggravating or mitigating factors. Advocating for a reform of the SRA to make the guidelines presumptively applicable in all cases through greater reliance on jurors, Miner dismissed the notion that the system would be too complex, noting that civil juries regularly deal with special verdict forms.

### Commission's Perspectives

Perhaps the most significant testimony of the hearing was from the chair of the Sentencing Commission, Judge Patti B. Saris. Although Judge Saris, a district court judge in Massachusetts, acknowledged that there had been an increase in the number of sentencing variances and other "troubling trends" in sentencing in the wake of *Booker* and progeny despite the "gravitational pull" of the guidelines, she repeatedly declined to advocate for either an advisory or mandatory sentencing system, emphasizing instead that the commission was continuing its bipartisan, independent work of evaluating and refining federal sentencing policy as set forth in the guidelines.

Specifically, Judge Saris testified that the commission believes Congress should take action in three specific areas in order to make the guidelines system as strong and efficient as possible. First, the commission recommends that Congress enact a "more robust appellate review standard" for federal sentencing decisions because the Supreme Court's post-*Booker* opinions had served to "take[] some of the 'teeth' from appellate review." Specifically, to ensure that appellate courts address the substantive reasonableness of a sentence, as opposed to procedural issues or guideline application, the commission advocates a statute requiring appellate courts to i) presume that properly calculated sentences within the guidelines range are reasonable—an issue over which federal circuit courts currently are split; ii) expect the sentencing court's justification for any variance from the guidelines to be greater where the variance is greater; and iii) create a "heightened standard of review for sentences imposed as a result of a 'policy disagreement' with the guidelines."

Second, the commission recommends that Congress resolve the existing statutory tension

regarding the propriety of a sentencing court's consideration of certain offender characteristics in imposing sentence. On the one hand, the SRA directs sentencing courts to consider the nature and circumstances of the offense and the history and characteristics of the defendant in imposing sentence. By contrast, the commission's enabling statute specifically instructs that guidelines and policy statements promulgated by the commission should "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."

As noted by Judge Saris during her testimony, although sentencing judges routinely consider the offender characteristics set forth in §3553(a) because the Supreme Court instructed them to do so in *Booker*, such consideration is contrary to provisions contained in the guidelines which, consistent with congressional directives, do not provide for the consideration of such factors. This is significant because statistics reveal that below-guidelines sentences are imposed in almost 14 percent of all federal felony and Class A misdemeanor cases as a result of the court's consideration of the factors set forth in §3553(a). According to the commission, this "strong doctrinal tension" should be resolved by Congress.

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Finally, the commission recommends that Congress codify the three-step sentencing process articulated in *Booker* and set forth in the guidelines. This process requires the court to i) determine the guideline sentence; ii) consider whether the case warrants departure pursuant to the policies set forth in the guidelines manual; and iii) consider the applicable factors in §3553(a). Judge Saris noted that most federal circuit courts agreed on this three-step approach, and she encouraged Congress to codify the process. In addition, the commission recommended that Congress should clarify and codify the "substantial weight" to be given the guidelines in a sentencing proceeding.

### Effectiveness of Commission

In her testimony, Judge Saris also went to great lengths to detail the work of the commission in the past six years, characterizing the agency as uniquely positioned "as a clearinghouse and expert on federal sentencing practices." Judge Saris' defense of the commission's efforts was significant in the face of harsh criticism from both members of Congress and other hearing witnesses that the commission had failed to act to reinstate a mandatory guideline system that passed constitutional muster. Many perceived language in the Supreme Court's decision in *Booker* to invite just such action. Specifically, in

*Booker* the Court stated, "Ours, of course, is not the last word: The ball now 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."

One such critic is Chairman Sensenbrenner who opened the hearing by stating, "In the last six years as the judiciary has untethered itself from the checks and balances of the legislative branch, one would expect the Sentencing Commission to come up with a plan of action to make the Guidelines relevant again, yet we have not received any proposal from the Commission for six years. It's as if the Commission is satisfied as if the regulations they promulgate can routinely be ignored." Sensenbrenner also noted that the commission's budget has increased 25 percent since *Booker*, laying the groundwork for an implicit threat, repeated throughout the hearing, that perhaps Congress should do away with the commission altogether.

In his written testimony, Professor Otis articulated the commission's ineffectiveness as follows: "Fifteen years ago, the Commission was the 900-pound gorilla of sentencing law. It wrote binding rules, which courts followed more than seventy percent of the time, at an annual cost of roughly \$8.8 million. Today, the Commission is an overfed lemur. It writes sentencing suggestions, which courts follow fifty-three percent of the time, at roughly twice the annual cost (\$16.2 million)."

In defense of the commission and its adjustment in the post-*Booker* era, Felman stated that "as the guidelines make more sense, judges will follow them more frequently." For this reason, he argued that the commission's efforts to propose amendments to the guidelines, in response to empirical data on how judges are making sentencing determinations under the advisory system, were valuable and indispensable.

### Conclusion

A number of additional issues were discussed during the congressional hearing on Oct. 12, including the possible release of sentencing data on individual judges, the current guideline system's promotion of racial disparity, and the value of mandatory minimum sentences (described by Felman as "the logical equivalent of sentencing by temper tantrum"). The content and tenor of the hearing—brief and sparsely attended though it was—suggests that federal sentencing is a hot button issue in Congress. And it seems many in Congress are keen on increased, mandatory sentences "for the people." With an election looming, the concern is that some politicians will use issues regarding post-*Booker* sentencing practice to portray a "tough-on-crime" stance, leading to an even more punitive criminal justice system and further limiting the discretionary power of judges.

1. William J. Stuntz, "The Collapse of American Criminal Justice," Belknap Press of Harvard University Press (2011).