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Federal Sentencing Then, Federal Sentencing Now: The United States Sentencing Commission's Ill-Advised Efforts to Fix Something That is not Broken

Before Congress enacted the Sentencing Reform Act (SRA) in 1984, federal judges had almost unrestricted discretion in imposing criminal sentences as long as punishment was meted out within the statutory parameters for the offense of conviction. This scheme undoubtedly allowed for many disparities in sentencing to occur. With the enactment of the SRA, Congress created the U.S. Sentencing Commission and authorized it, among other things, to promulgate sentencing guidelines with the goal of providing certainty and fairness as well as avoiding unwarranted sentencing disparities among defendants with similar records convicted of similar offenses. With few exceptions, this system, formally adopted in 1987, required judges to impose a sentence within the applicable guideline range.

On Jan. 12, 2005, however, the Supreme Court revolutionized federal sentencing with the announcement of its decision in *United States v. Booker*, 543 U.S. 220 (2005). In order to remedy what the majority of the Court deemed a violation to the Sixth Amendment right to a trial by jury, the Court excised the SRA's mandatory provisions and rendered the guidelines merely advisory. The progeny of *Booker* has established that, although the sentencing guidelines are "the starting point and initial benchmark," *Gall v. United States*, 552 U.S. 38 (2007), they really are just one of the many sentencing factors to be considered under 18 U.S.C. § 3553(a). These factors include the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentencing disparities, and other factors. In making sentencing decisions in the wake of the Supreme Court's ruling in *Booker*, judges should be guided by the parsimony principle, which requires a sentence to be "sufficient and not greater than necessary" to accomplish the following listed goals of sentencing:

- to reflect the seriousness of the offense,
- to promote respect for the law,
- to provide just punishment,
- to afford adequate deterrence,
- to protect the public, and
- to provide the defendant with education or vocational training as well as medical care or other correctional treatment in the most effective manner.

Following these factors permits judges to impose sentences within, below, or even above the applicable range provided by the sentencing guidelines. The sentence ultimately chosen is subject to review on appeal for reasonableness and under a deferential abuse-of-discretion standard.

More than seven years have passed since the Court decided *Booker*, and the federal sentencing system is still far from perfect. The advisory sentencing regime has, however, struck a balance—imperfect as it may be—between a system of unfettered discretion that judges had prior to the SRA and that promoted unwarranted disparities and a system allowed no discretion whatsoever. In the post-*Booker* world, judges can now vary downwardly or upwardly from the applicable guidelines range in consideration of many mitigating factors—more prominently the history and characteristics of a defendant, something that was prohibited (or at least discouraged) in the previous regime—or aggravating factors. Simply put, a system that consists of advisory guidelines permits judges to be judges at sentencing, to use their discretion in selecting the punishment they understand reasonable as opposed to a one-size-fits-all type of process, in which a judge had very little wiggle room in determining the length of a person's imprisonment. The ability to consider all the relevant evidence and to even disagree with the guidelines in the case where appropriate is the benchmark of a just and fair sentencing system that provides both consistency and predictability without sacrificing flexibility.

Notwithstanding the above, in recent years, the U.S. Sentencing Commission has become increasingly concerned about the fact that judges are making use of this newly conferred discretion and sentencing defendants in a number of cases below the applicable guideline range. This "concern" was recently expressed by Judge Patti B. Saris of the District of Massachusetts and chair of the Sentencing Commission in her testimony before the U.S. House

of Representatives' Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, on Oct. 12, 2011.[1] In her testimony, Judge Saris admitted "that the federal sentencing guidelines continue to provide gravitational pull in federal sentencing," but noted that "the Commission has observed an increase in the numbers of variances from the guidelines in the wake of the Supreme Court's recent jurisprudence."[2] The Sentencing Commission believes that an increase in the number of variances from the guidelines is a "troubling trend" that creates disparities among circuits and districts as well as demographic disparities. To curb this so-called troubling trend, and with the goal of implementing a "strong and effective guidelines system," the commission has suggested to Congress that legislation be enacted as follows:

- creation of a more robust appellate review standard requiring appellate courts to apply a presumption of reasonableness to sentences within the properly calculated guidelines range;
- a requirement that greater variance from the guidelines should be given greater justification;
- adoption of a heightened standard of review for variances based on policy disagreements with the guidelines;
- clarification of statutory directives currently in tension, such as 28 U.S.C. § 994 (discouraged offender characteristics) and 18 U.S.C. § 3553(a) (history and characteristics of the offender);
- instructions to judges to give "substantial weight" to the guidelines during sentencing; and
- codification of the three-part sentencing process.[3]

The concerns underlying the Sentencing Commission's proposals are mostly misplaced. The growing consensus among scholars, judges,[4] the Department of Justice,[5] and the federal and community defenders,[6] among others, is that the current advisory guidelines system has proved to be the one that can best achieve the purposes of sentencing. The proposal to adopt a more robust appellate review standard requiring the application of a presumption of reasonableness to sentences within the guidelines and the giving substantial weight to the guidelines is the most worrisome of the proposals and suffers from several defects:

- The proposal appears to be a subterfuge for promoting the imposition of sentences that are within the guidelines at a higher rate.
- The suggested standard is contrary to Supreme Court jurisprudence and tends to bring the sentencing regime dangerously close to the pre-*Booker* mandatory guidelines system, thereby calling into question the constitutionality of the proposal.
- The current standard of review provides appellate courts with the necessary tools to assess the procedural and substantive reasonableness of a sentence, giving substantial deference to sentencing judges and disturbing a sentencing decision only upon a finding of a significant procedural error or a sentence that is simply unreasonably longer than necessary.
- The proposal comes too close to creating a presumption of unreasonableness for sentences below the guidelines range, again in contravention of recent Supreme Court precedent.

Furthermore, the proposal to require greater justification for a greater variance also contravenes recent Supreme Court decisions holding that a rule requiring proportional justifications for departures from the guidelines range is inconsistent with remedial opinion set forth in *Booker*.[7] In any event, the Supreme Court has specifically noted that "a major departure should be supported by a more significant justification than a minor one,"[8] and there is no evidence that judges are providing insufficient explanations and reasons for deciding to impose non-guideline sentences.

Requiring "heightened review" for sentences outside of the guidelines when they are based on policy disagreements is also contrary to Supreme Court jurisprudence and assumes, to a certain extent, that the sentencing guidelines are all based on empirical data and national experience, when the reality is that many guideline sections are not. Examples such as the guidelines for sentences imposed for convictions involving cocaine base and child pornography show that not every guideline section in the manual is based on empirical data or the Sentencing Commission's exercise of its institutional role. Moreover, experience has shown that the Sentencing Commission itself has benefited from the feedback provided by the judges in the process of applying variances based on their disagreements with policy considerations. Several amendments to the guidelines have been implemented following, at least in part, the feedback provided by sentencing judges.

The U.S. Sentencing Commission has also proposed that Congress clarify the statutory provisions that are in tension and codify the three-step sentencing process. Not much time will be spent on these two proposals. Suffice it to say that they appear unnecessary, impractical, and/or based on flawed premises. They also appear geared at restricting judges' discretion and promoting greater enforcement of the guidelines, as is the case with many of the other proposals.

The arguments advanced by the Sentencing Commission about increases in the number of variances vis-à-vis disparity seem to be defeated by the commission's own data as well as by data from independent studies. Despite the stated concerns, statistics show that, in the last quarter of 2010, 55 percent of the cases received sentences within the guidelines

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range. From the cases in which offenders received sentences below the range, 25.4 percent of the sentences were sponsored by the government, whereas only 17.8 percent were not sponsored by the government. Sentences not sponsored by the government that were below the range dropped slightly to 17.2 percent in the fourth quarter of 2011. Sentences within the guidelines and those sponsored by the government that were below the range remained roughly similar in the fourth quarter of 2011: 54.6 percent and 26.4 percent, respectively. Granted, in 2004, before the *Booker* ruling was handed down, 72.1 percent of the sentences were within the guidelines range, but this figure is not surprising when one considers that the guidelines were mandatory. Also, it seems inappropriate to compare rates in trying to determine whether disparities exist among districts. A number of factors may cause differences among the districts, including local conditions, types of cases, prosecutorial and judicial decisions, and community norms. In addition, the post-*Booker* era has not brought about a significant drop in the average length of incarceration. Before *Booker*, the average sentence length was 46 months; in 2011, it decreased to about 43.3 months. Accordingly, there is no indication that the *Booker* decision and the advisory guidelines regime have brought about a situation in which judges have been handing down unduly lenient sentences. To the extent that there may be disparities among districts, it is submitted that the solution is not to limit judges' discretion or go back to an almost mandatory sentencing guidelines regime.

Finally, it is worth repeating that 75 percent of the district judges consulted in a recent survey agree that the advisory guidelines system best achieves the purposes of sentencing. Of the respondents, 8 percent prefer no guidelines at all; 14 percent prefer mandatory guidelines with jury fact-finding if there were fewer mandatory minimums; and only 3 percent would go back to the pre-*Booker* mandatory guidelines system. Simply put, the advisory guidelines system, imperfect as it may be, is the best of both worlds. On the one hand, the guidelines offer the benefit of the research and experience of the U.S. Sentencing Commission; for this reason, this writer is not at all opposed to the proposition that the guidelines should always be the starting point at sentencing. On the other hand, the guidelines provide the flexibility that sentencing judges need to be able to deviate from the guidelines when there is a valid and fair justification for doing so. In the process, the unwarranted disparities that existed prior to the passage of the Sentencing Reform Act are minimized while, at the same time, the judicial system avoids the equally undesirable proposition of unwarranted uniformity—a situation in which a sentencing judge had no room to consider compelling reasons to impose a sentence above or below the one called for by the mandatory guidelines. And appellate judges are certainly well equipped to determine if a sentence is unreasonable. There is no need, in my view, to try and fix a system that is not broken. **TFL**

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Endnotes

[1]U.S. Sentencing Commission Chair Judge Patti B. Saris, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security (Oct. 12, 2011).

[2]*Id.* at 1.

[3]*Id.* at 1–2.

[4]According to a survey conducted by the U.S. Sentencing Commission from January 2010 until March 2010, 75 percent of district judges prefer the advisory guidelines system.

[5]Attorney General Eric Holder, Memorandum to All Federal Prosecutors (May 19, 2010) (explaining that, in typical cases, prosecutors should continue to advocate for sentences within the applicable guidelines range in recognition that the guidelines are important in furthering the goal of national uniformity, but that, given their advisory nature, "advocacy at sentencing—like charging decisions and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case.").

[6]Thomas W. Hiller, II, Federal Public Defender for the Western District of Washington, Letter to the Chair and Ranking Member of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Oct. 11, 2011), available at www.fd.org/pdf_lib/Defender%20Letter%20Oct%2011%202011.pdf.

[7]*Gall v. United States*, 552 U.S. 38, 46 (2007).

[8]*Id.* at 50.

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