

# **The importance of principles, data, and leaving well enough alone**

**U.S. Sentencing Commission Hearing**

**February 15, 2005**

Written Statement of Douglas A. Berman

Professor of Law, The Ohio State University Moritz College of Law

Judge Hinojosa and members of the Commission, thank you for the kind invitation to present my views about the state of federal sentencing in the wake of the Supreme Court's rulings in *United States v. Booker* and *United States v. Fanfan*. It is both a pleasure and an honor to again have an opportunity to share my thoughts at such an important moment in the evolution of federal sentencing law. As you may recall, in my testimony last November, I stressed the importance of perspective, data and leaving well enough alone as this Commission considered *Blakely*'s impact and prepared for the decisions in *Booker* and *Fanfan*. Today, with *Booker* now having yet again redefined the federal sentencing landscape, I wish to echo similar themes while stressing the importance of principles, data and leaving well enough alone.

## **I. THE IMPORTANCE OF PRINCIPLES**

The remarkable remedy that the Supreme Court devised in *Booker* presents a remarkable opportunity for everyone involved in the federal sentencing system to focus upon “first principles,” and yet to do so while still drawing upon the collected wisdom of the last two decades of federal sentencing reform. Though dozens of principles might reasonably vie for your attention, here I will spotlight three categories of principles — institutional principles, substantive principles, and procedural principles — which I believe should guide the work of this Commission in the weeks and months ahead.

## A. Institutional Principles

**Commission Leadership**: This Commission has a critical role and unique responsibilities in the analysis and development of the federal sentencing system. Justice Breyer properly stressed this point twice in his opinion for the Court in *Booker*, and *Booker* thus reinforces that this Commission is the only institution which, by virtue of its information and insights, can take a truly comprehensive and balanced view of the entire federal sentencing landscape. As sentencing law and practice unfolds in the wake of *Booker*, I encourage this Commission to continue to take an active and leading role in Congress's examination of, and the broader public dialogue over, the current state and the future direction of federal sentencing. Over the last few months, the Commission has done a terrific job disseminating sentencing data through the release of the Fifteen-Year Report and through public posting of other data and research. And the post-*Booker* statements and testimony of Chair Hinojosa also merit great praise for highlighting the role of the Commission and for advocating a cautious and data-driven approach to federal sentencing. The Commission should continue to be a vocal and highly visible advocate for sound federal sentencing reforms; in service to that goal, I suggest, as detailed more fully below, that the Commission produce, for at least the next year, quarterly reports to Congress about post-*Booker* sentencing developments which include specific recommendations concerning potential short-term and long-term legislative responses to *Booker*.

**Broad and Transparent Collaboration**: The diverse set of witnesses invited to these hearings demonstrates that the Commission fully appreciates the diverse set of stakeholders that have a deep concern for federal sentencing laws and practices. The Commission should continue to encourage input from a broad group of individuals and institutions — perhaps by holding

hearings across the nation in the coming months — as it takes stock of *Booker*'s impact and charts a course for possible responses. Moreover, the Commission can and should facilitate the active involvement of other sentencing actors and institutions in the development of sound sentencing reforms. Indeed, the Commission should aspire to be a true hub of sentencing information and knowledge by encouraging various entities — including public policy groups, federal agencies such as the Department of Justice, and state institutions such as state sentencing commissions — to share, and allow for public dissemination on the Commission's website, data they collect and analyze concerning the operation of federal and state sentencing systems.

**Judicial Involvement:** Judges necessarily play the most critical role in the application of general sentencing laws to specific cases, and thus it is essential that judges can respect and consider sound the sentencing laws they are called upon to apply. I believe all federal judges fully recognize that Congress and this Commission have the ultimate responsibility to define and develop federal sentencing policies, but judges also recognize that they have a unique perspective on how these policies operate in individual cases. Because federal judges are understandably chary about playing an active role in public policy debates concerning laws they are going to have to administer, this Commission should take proactive steps to ensure judges can effectively participate in the post-*Booker* policy process. It is clear from these hearings that the Commission is eager to solicit the views of the judiciary as it examines the state of federal sentencing after *Booker*. But it is still less than two years since the PROTECT Act was hastily enacted without meaningful judicial input, and thus this Commission should remember to highlight the importance of judicial perspectives and experience for those contemplating future federal sentencing reforms.

## B. Substantive Principles

**Emphasis on Violent and Repeat Offenders:** In the wake of *Blakely* and now again following *Booker*, various statements from U.S. Department of Justice officials have sensibly suggested that the toughest federal sentences should be directed toward violent and repeat offenders.<sup>1</sup> Similarly, Attorney General Alberto Gonzales during his confirmation hearings last month asserted that prison is best suited “for people who commit violent crimes and are career criminals,” and he also stressed that a focus on rehabilitation for “first-time, maybe sometimes second-time offenders ... is not only smart, ... it’s the right thing to do.”<sup>2</sup> In Attorney General Gonzales’ words, “it is part of a compassionate society to give someone another chance.”<sup>3</sup> Yet, some recent analyses suggest the federal system could do a better job focusing prison resources on violent and repeat offenders. According to a recent report from the Sentencing Project,<sup>4</sup> over one-third of the federal prison population is comprised of first-time, non-violent offenders, and nearly three-fourths of this population are non-violent offenders with no history of violence. I do not wish to debate the particulars of these statistics; rather, my goals are (1) to spotlight that there is broad agreement that the federal sentencing system should be particularly concerned with violent

---

<sup>1</sup> See Testimony of Assistant Attorney General Christopher Wray to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives at 8-9 (Feb. 10, 2005) [hereinafter Wray Testimony] (stressing that most federal prisoners “are in prison for violent crimes or had a prior criminal record before being incarcerated” in response to the criticism that “our prisons are filled with non-violent first-time offenders”); see also Letter to the Editor from Dan Bryant, assistant attorney general for legal policy at the Justice Department, *Washington Post*, Dec. 24, 2005, at A25 (asserting that “[t]ough sentencing makes Americans safer by locking up repeat and violent offenders”).

<sup>2</sup> See Transcript of the Senate Judiciary Committee’s hearings on the nomination of Alberto R. Gonzales to be attorney general, as transcribed by Federal News Service, accessed at <http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?ex=1108443600&en=015b93569fa7d7d0&ei=5070&pagewanted=print&position>.

<sup>3</sup> *Id.*

<sup>4</sup> See The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (Dec. 2004), available at <http://www.sentencingproject.org/pdfs/federalprison.pdf>.

and repeat offenders, and (2) to suggest that post-*Booker* analyses and reforms should be especially attentive to the distinctions between first-time, non-violent offenders and repeat, violent offenders.

**Problems with Crude Mandatory Sentencing Laws:** To coin a *Booker* pun, the jury is still out on whether an advisory guidelines sentencing will prove effective and just for the federal system. But, as this Commission has itself powerfully highlighted, we have long known that crude mandatory sentencing statutes do not serve the sentencing reform goals embraced by Congress in the Sentencing Reform Act of 1984.<sup>5</sup> As various post-*Booker* federal sentencing reforms get proposed and debated, this Commission should vocally advocate against the crude mandatory sentencing laws that this Commission, as well as a wealth of researchers and scholars and commentators, have concluded are often ineffectual and unjust in their application.<sup>6</sup>

**A Role for Offender Circumstances:** Crude mandatory sentencing laws can often prove ineffectual and unjust because, by ascribing a sentence based on only one aspect of an offense, they often mandate identical sentences for defendants who are substantially different. Yet the existing guidelines, because of the very limited role given to a range of mitigating offender characteristics, have been justifiably criticized for sometimes placing undue emphasis on precise quantities of harm while giving insufficient attention to offender circumstances. It is thus not surprising that, in the survey of Article III judges recently conducted by the Commission, a

---

<sup>5</sup> See, e.g., U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

<sup>6</sup> See *id.*; DALE PARENT ET AL., NATIONAL INSTITUTE OF JUSTICE, MANDATORY SENTENCING (Jan. 1997); JONATHAN P. CAULKINS ET AL., RAND CORPORATION, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY (1997); BARBARA S. VINCENT & PAUL J. HOFER, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (1994); see also Letter from the Federal Sentencing Guidelines Task Force of the Federal Bar Association, District of Columbia Chapter, to Senator Orrin Hatch and Representative F. James Sensenbrenner at 2-5 (Nov. 29, 2004) (detailing widespread opposition to mandatory minimum sentencing from an array of informed participants in the federal sentencing system).

significant percentage of judges suggested that more emphasis be given to a broad array of mitigating offender circumstances, and a majority of respondents stated that age, mental condition and family ties and responsibilities should play a greater role in federal sentencing.<sup>7</sup> The *Booker* remedy obviously enables individual judges to give greater consideration to these sorts of offender circumstances; in turn, this Commission should, through its data collection and analysis, seize this opportunity to reexamine how offender circumstances can and should be incorporated into federal guideline sentencing.

**Balanced Pursuit of Uniformity.** Achieving greater sentencing uniformity was an important goal of the Sentencing Reform Act of 1984, but it was not the only goal. Indeed, the *Booker* Court’s emphasis on all the provisions of 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed “the need to avoid unwarranted sentence disparities” as only one of seven distinct sentencing considerations. Moreover, I view the *Blakely* decision in part as a statement by the Supreme Court that some other values — such as our society’s commitment to fair procedures and adversarial justice — need to be balanced with and integrated into our modern quest for sentencing uniformity. Furthermore, this Commission knows from its Fifteen-Year Report that the federal sentencing system has always reflected some geographic variations, that there are significant limits on the ability to control disparity arising at presentencing stages, and that sentences which are uniformly too harsh may do great violence to the goals of the Sentencing Reform Act and its mandate in 3553(a) that courts impose sentences “sufficient, but not greater than necessary, to comply with the purposes” set forth in the Act. In short, absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without

---

<sup>7</sup> See U.S. SENTENCING COMMISSION, SUMMARY REPORT OF U.S. SENTENCING COMMISSION’S SURVEY OF ARTICLE III JUDGES 3-4 (Dec. 2002).

recognizing a just sentencing system should also strive to be humane and respectful to all persons it impacts.

## C. Procedural Principles

**The Key Link Between Procedure and Substance.** The nature of post-*Booker* discussions of federal sentencing law and policy make it surprisingly easy to forget that *Blakely* and *Booker* are fundamentally cases about sentencing procedures. Ultimately, these cases and the reactions they have engendered serve as a critical lesson in the inextricable link between the substance and the procedures of modern sentencing reforms. However, Congress and this Commission have historically given relatively little attention to fundamental procedural issues that arise in sentencing — issues such as notice to parties, burdens of proof, appropriate fact-finders, evidentiary rules and hearing processes — even though these procedural matters play a central role in the actual application of general sentencing rules to specific cases. But as Assistant Attorney General Christopher Wray stressed in his testimony to the House Subcommittee hearing last week, “to have consistent sentences, it is essential that sentencing hearings have consistent form and substance.”<sup>8</sup> In my prior writings, I have urged sentencing commissions to take an active role in developing the procedural reforms that seem necessary to achieve the substantive goals of modern sentencing reforms,<sup>9</sup> and I continue to believe this Commission is uniquely well-suited to the task of establishing sound and uniform sentencing procedures.

---

<sup>8</sup> See Wray Testimony, *supra* note 1, at 11.

<sup>9</sup> See Douglas A. Berman, *Appreciating Apprendi: Developing Sentencing Procedures in the Shadow of the Constitution*, 67 CRIMINAL LAW BULLETIN 627 (2001).

**The Importance of Fair Notice and Transparency.** In taking up the task of reexamining federal sentencing procedures, the Commission should closely examine persistent complaints that the guidelines sentencing process fails to provide defendants fair notice and lacks transparency concerning the facts and factors which can impact a defendant's sentence. Defendants often must make critical plea decisions with incomplete information as to likely guideline sentencing outcomes, and not infrequently, after the entry of a plea, probation officers will discover facts not contemplated or even known to the parties which can significantly impact a defendant's sentencing exposure. The Commission should explore the development of procedural mechanisms which can improve the notice defendants receive concerning guideline sentencing determinations and which would more generally enhance the transparency of presentencing charging and plea bargaining decisions.

**The Importance of Burdens of Proof.** As this Commission likely realizes, in the wake of *Booker* many defense lawyers have started arguing that beyond a reasonable doubt — and not preponderance of the evidence — should be the applicable standard of proof for disputed facts at federal sentencing. And in a ruling a few weeks ago, U.S. District Judge Joseph Battalio in *United States v. Huerta-Rodriguez*, No. 8:04CR365 (D. Neb. Feb. 1, 2005), concluded following *Booker* that “the Due Process Clause is implicated whenever a judge determines a fact by a standard lower than ‘beyond a reasonable doubt’ if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact.” I see significant merit in the contention that the Constitution's Due Process Clause should be understood to require that facts which can lead to enhanced sentence be established beyond a reasonable doubt. After all, the Supreme Court stressed in *In re Winship* that this heightened

proof standard provides “concrete substance for the presumption of innocence — that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.”<sup>10</sup> Moreover, even if a lesser burden of proof may still be constitutionally permissible at sentencing after *Booker*, the fundamental principles articulated by the Supreme Court in *Jones*, *Apprendi*, *Blakely* and *Booker* suggest that, as a matter of policy, it is not fair or just to apply a civil standard of proof when resolving factual issues in a criminal case that can have defined and potentially severe punishment consequences for a defendant.

Notably, the Sentencing Reform Act does not speak to the burden of proof issue at all. And though the commentary to guidelines § 6A1.3 states that the Commission “believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns” in resolving factual disputes, this provision is overdue for reexamination in the wake of the Supreme Court’s decisions in *Jones*, *Apprendi*, *Blakely* and *Booker*. Justice Breyer writing for the Court in *Booker* and many others have understandably spotlighted the administrative challenges and potentially harmful consequences of forcing prosecutors to plead and prove all aggravating “guideline facts” to a jury, but nothing in the *Booker* decision or in other commentary I have seen provides a compelling conceptual justification for allowing aggravating guideline facts which can significantly enhance sentences to be proven only by the civil standard of preponderance of the evidence. This Commission should give steady attention to courts’ post-*Booker* approaches to burden-of-proof issues, and should reexamine the policy statements and commentary in guidelines § 6A1.3 in light of recent Supreme Court and lower court jurisprudence and broader public policy concerns.

---

<sup>10</sup> 397 U.S. 358, 363 (1970).

## **II. THE IMPORTANCE OF DATA**

The remarkable remedy that the Supreme Court devised in *Booker* presents a remarkable opportunity for the federal courts to develop a frequently discussed, but historically elusive, common law of sentencing. Many advocates and observers have rightly noted that the soundness and efficacy of the federal sentencing system *Booker* has created cannot be sensibly assessed until judges and other actors have had sufficient time and opportunity to fully analyze and adjust to the new sentencing dynamics of an advisory guideline system.

Though nobody can be entirely certain how the federal sentencing system will develop in the wake of *Booker*, it is clear that every actor and institution in the federal system is closely monitoring major district and circuit court decisions and other post-*Booker* developments. But because headline-making cases have always had unique purchase in the development of sentencing laws and policies, the hyper-observation of post-*Booker* developments presents a unique risk that anecdotal accounts of particular cases may unduly impact and shape public debates over the future development of the federal sentencing system.

These realities heighten the responsibility of, and challenges for, this Commission to ensure that key policy-makers and the others federal sentencing actors focus on data rather than anecdote when assessing the federal sentencing system after *Booker*. Many persons working within the system will develop anecdotal impressions of the post-*Booker* sentencing landscape, but only this Commission will be able to examine and assess the cumulative sentencing data to determine whether and how the purposes of punishment specified in 18 U.S.C. § 3553(a)(2) are being effectively served in the operation of an advisory guideline sentencing system.

Importantly, the challenge for this Commission will lie not only in collecting and

analyzing post-*Booker* sentencing data, but also in presenting this data accurately and effectively. I am a bit fearful of significant confusion in future discussions of post-*Booker* sentencing data because we do not even have a settled nomenclature for sentences that are neither within the guidelines nor represent “old-world” departures: the Second Circuit in its *Crosby* decision suggested the term “non-Guidelines sentence,” Judge Cassell in his second *Wilson* opinion coined the term “variance,” and some federal defenders are championing the term “statutory sentence.” In addition to helping to establish a definitive nomenclature, the Commission has a broader role in ensuring that the discussion of post-*Booker* sentencing data is as clear and as cogent as possible.

Further, the effective and efficient collection and dissemination of post-*Booker* sentencing data could itself help achieve the basic goals of sentencing reform by providing judges with helpful information about other judges’ sentencing choices. Professor Marc Miller has recently written of the considerable virtues of a “sentencing information system” which would furnish sentencing judges with detailed information to place an offense and offender into a larger context.<sup>11</sup> As a common law of sentencing begins to evolve, the Commission’s data analysis could help ensure that judges’ sentencing decisions are informed by how similar offenses and offenders have been sentenced before by the same judge, by other judges in the same courthouse, by other judges in the same region, and by other judges throughout the country.

For all these reasons, the Commission should, on a regularized and rapid timetable, assemble and make publically available the post-*Booker* federal sentencing data it is collecting. As suggested earlier, I believe the Commission should make a public commitment to produce, at least for the next full year, quarterly reports to Congress concerning post-*Booker* sentencing

---

<sup>11</sup> See Marc L. Miller, *Sentencing Reform “Reform” through Sentencing Information Systems*, in *THE FUTURE OF IMPRISONMENT* 121 (Michael Tonry ed. 2004); Marc Miller, *Illuminating Sentencing: Transparency, Data and Discourse*, 105 COLUM. L. REV. \_\_\_\_ (May 2005).

developments. Moreover, these reports should include not only sentencing data but also concrete and specific recommendations concerning potential short-term and long-term legislative responses to *Booker*. Through such quarterly reports and recommendations, the Commission will help frame and shape Congress's examination of the post-*Booker* world and possible legislative action. And, in addition to being an enormous asset to Congress and all the persons working within the federal sentencing system, such quarterly reports and recommendations would also be enormously valuable to the many researchers and public policy groups that are contemplating the future of federal sentencing in the wake of *Booker*.

As suggested earlier, the Commission's post-*Booker* data analyses should be especially attentive to the distinctions between first-time, non-violent offenders and repeat, violent offenders. Based on pre-*Blakely* departure data, I suspect that judges will often adhere to guideline sentences in cases involving repeat and violent offenders, and that the imposition of non-Guidelines sentences (or variances or statutory sentences) will be most common in cases involving first-time and non-violent offenders. Relatedly, the Commission's post-*Booker* data analyses also ought to draw heavily upon the many insights and perspectives on pre-*Blakely* federal sentencing set forth in the Commission's Fifteen-Year Report. Only this Commission will be able to integrate post-*Booker* developments with the comprehensive pre-*Blakely* assessment of the operation and efficacies of the federal sentencing guidelines to be found in the Fifteen-Year Report.

### **III. THE IMPORTANCE OF LEAVING WELL ENOUGH ALONE (FOR NOW)**

I share the consensus view that it would be wise for Congress and this Commission to hold off making substantial changes to the federal sentencing system until we can observe and analyze how the Supreme Court's *Booker* remedy actually operates in lower courts. I want to close my comments stressing that litigation realities remain central to my "go slow" advice because, even though *Booker* partially clarified the legal meaning and impact of *Blakely* for the federal sentencing system, any effort to significantly alter the structure of federal sentencing remains legally treacherous and fraught with doctrinal uncertainty.

As in November, I wish to reiterate a point made by Commissioners John Steer and Judge William Sessions in their Joint Prepared Testimony to the Senate Judiciary Committee in July as part of the Judiciary Committee's hearing on "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines." In their testimony, Commissioner Steer and Judge Sessions said:

[I]f Congress determines that legislation is appropriate, it should be the goal of any legislation to address problem areas as definitively as possible without burdening the system with a host of new issues that have to be litigated.

Because I agree strongly with this sentiment, I continue to believe this Commission ought to start with a presumption against any major structural changes to the federal sentencing guidelines in the wake of *Booker* and *Fanfan*. With an particular eye on litigation realities, I believe a cautious and carefully planned process of modulated incremental post-*Booker* changes, if any changes are deemed essential, will provide the soundest course for future federal sentencing reforms.

Two legal considerations principally inform my "go slow and incrementally" advice. First, after *Booker*, it remains extremely difficult to make major structural changes to the guidelines with any constitutional confidence because of the continued uncertainty that surrounds

*Harris v. United States*, 536 U.S. 545 (2002), allowing judges to find facts that establish minimum sentences, and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), allowing judges to find “prior conviction” facts that enhance sentences. (Notably, the uncertainty which surrounds *Harris* and *Almendarez-Torres*, both of which were 5-4 rulings by the Supreme Court, is exacerbated by anticipated transitions in the composition of the Supreme Court in coming years.) Second, Ex Post Facto doctrines entail that any Congressional or Commission action now would only have prospective application and would have no ameliorative impact on the uncertainty that surrounds cases that are currently pending in the federal system. Indeed, the circuit splits that have already developed in the consideration of “pipeline cases” after *Booker* highlights that a host of complicated, challenging and possibly unforeseen transition issues necessarily accompany any major structural changes to the federal sentencing guidelines.

Consequently, as this Commission monitors post-*Booker* developments and data, it should also work with Congress to plan a process for making cautious and modulated incremental changes to the existing guidelines and thereby ensure that any identified post-*Booker* sentencing problems are remedied through precise and carefully circumscribed legislation or guideline amendments. I believe that incremental reforms might seek to simplify parts of the overall guideline structure and also, as suggested above, give new consideration to offender circumstances and the procedural rules which govern guideline sentencing. More generally, incremental reform can and should also seek to address those problems with the existing guidelines that the Commission has effectively identified through its Fifteen-Year Report.

In closing, let me reiterate my thanks to this Commission for allowing me present my views about the state of federal sentencing and offer to respond to any questions you may have.