ROBERT G. McCAMPBELL
UNITED STATES ATTORNEY
WESTERN DISTRICT OF OKLAHOMA
CHAIR, ATTORNEY GENERAL'S ADVISORY SUBCOMMITTEE ON SENTENCING

UNITED STATES SENTENCING COMMISSION

FEDERAL SENTENCING AFTER BOOKER

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INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission–

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] One body considering action in light of *Booker* is the Congress.

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

[2] *Id.* at 768.

Additionally, this Commission has important decisions to make as a result of *Booker*, and I appreciate this opportunity to appear before you.

In considering the consequences of *Booker* for the future of sentencing, this Commission 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 Commission can begin to make decisions on its reaction to the Supreme Court's decisions in *Booker* and *Blakely*.[3] The Department of Justice is committed to working with the Commission, 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 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

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

[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).

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 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 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 legislative 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 Commission's Fifteen Year Report completed in November noted that "[r]igorous statistical study both inside and outside the Commission

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[6] *United States v. Wilson*, 350 F.Supp.2d 910, 2005 WL 78552, at *4 (D. Utah 2005).

[7] *Id. at *12*.

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

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[8] *See* FIFTEEN YEAR REPORT, *supra* note 6, at 140.

[9] *See id.* at 97-98.

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 and deterrent effects arise from a sentencing guidelines system which is tough, fair, and predictable. As we all react to the new situation created by *Booker*, 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.

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[10] BUREAU IF 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. Judge Cassell cites several studies, including Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Seven That Do Not*, 18 J. Econ. Perspective 163 (2004); Joanna Shepherd, *Police, Prosecutors, Criminals and Determinate Sentencing: The Truth About Truth in Sentencing Laws*, 45 J. L. & Econ. 509 (2002); Joanna Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. Legal Stud. 159 (2002); James Q. Wilson, *Prisons in a Free Society*, 117 Pub. Interest 37 (1994); Thomas Marrell and Carlisle Moody, *Prison Population Growth and Crime Reduction*, 10 J. Quantitative Criminol. 109 (1994); John Donahue III and Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. Legal Stud. 1 (1998).

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.

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 this Commission last November, there was widespread agreement among 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

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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.

solutions [advisory guidelines] ignore the will of the ultimate decision-maker in this area."[16] Others testifying at the hearings in November expressed similar views.[17]

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. In fact, Professor David Yellen made this observation at the Commission's hearings in November.[18]

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.

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

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[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] Professor Susan R. Klein, Transcript of Testimony at Sentencing Commission, at p. 4 (Nov. 17, 2004), available at http://www.ussc.gov/hearings/11_16_04/nov04hear.htm ("Recently Bill Stuntz from Harvard has suggested voluntary guidelines. I think this would be a mistake. I don't think one could fill the purposes underlying the Federal Sentencing Reform Act of 1984 with voluntary guidelines."). Senior Legal Research Fellow and Adjunct Professor Paul Rosenweig, at p. 11, available at http://www.ussc.gov/hearings/11_16_04/nov04hear.htm ("I think that an advisory system is simply a code for indeterminate sentencing, plain and simple. And I don't think that that's the long-term way to go."). Professor Stephen Saltzburg, Transcript of Testimony before the Sentencing Commission (Nov. 16, 2004), available at http://ussc.gov/hearings/11_16_04/111604-paneltwo.pdf at p. 10 ("There's no chance of advisory guidelines over the long haul. I mean it would be inconsistent with what happened in 1984. It wouldn't have teeth. And it just wouldn't sell. I don't think it would sell in Congress. I don't think it would sell to the American people. And I agree with Professor Bibas on that. It just doesn't work."). Professor Saltzburg does state that advisory guidelines might not be a bad idea in the short term.

[18] Professor David Yellen, Transcript of Testimony before Sentencing Commission (Nov. 17, 2004), available at: http://www.ussc.gov/hearings/11_17_04/111704-paneltwo.pdf at p. 2. ("I share the view of the earlier panel that advisory guidelines do not make sense in the federal system because of how far-flung it is and I don't think it would be much guidance at all. In the D.C. system, obviously every judge is in the same courthouse. They all have lunch together. There's a culture of compliance that may well develop that wouldn't in the federal system.").

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.[19]

We have, however, already encountered judges who have exercised their new-found 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 reasonable doubt.[20] In Nebraska, the court used this

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[19] *United States v. Crosby*, 2005 WL 240916 (2d. Cir. 2005); *United States v. Hughes*, 396 F.3d 374, 2005 WL 147059 (4th Cir. 2005).

[20] 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

system to impose a sentence of 36 months for an aggravated illegal reentry after deportation, when the guideline range was 57-71 months.[21]

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 choose 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.

One question the Commission has posed for this hearing is the extent to which courts are required to "consider" the Guidelines. Justice Breyer's majority opinion in *Booker* makes it clear that a court's duty is to not only consult the Guidelines Manual, but to consider the actual guidelines range for that defendant. The opinion notes that the Sentencing Reform Act as modified by the *Booker* opinion "requires a sentencing court to consider guideline 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)."[22] The Breyer majority reaffirms its view later in the opinion. "The Act nonetheless requires judges to consider the Guidelines 'sentencing range established for the applicable category of offense committed by the applicable category of defendant,' § 3553(a)(4). . . ."[23] As noted, therefore, § 3553(a)(4) continues to require that the court consider the actual Guidelines range for the defendant.

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.

[21] *Huerta-Rodriguez*, 2005 WL 318640, Case No. 8:04 CR365 (D. Neb. Feb. 1 2005); *See also United States v. Barkley*, Case No. 04-CR-119 (N.D. Okla. Jan. 24, 2005).

[22] *Booker,* 125 S.Ct. at 757.

[23] *Booker,* 125 S.Ct. at 764.

Courts considering the issue after the *Booker* opinion have agreed. The Second Circuit, in the *Crosby* case, noted that a court must calculate the sentencing range.[24] Judge Cassell in the *Wilson* opinion adopts the same reasoning. "Obviously the court cannot comply with *Booker*'s mandate to 'consider' the Guidelines sentence before imposing a final sentence unless the Guidelines sentence is available."[25]

A sentencing court's "consideration" of the guidelines range does not give that court the power to veto the work of the Commission. However, it appears that some courts may attempt to do so in the new advisory guidelines system. For example, one court has indicated that it feels free to reject the Commission's guidelines for drug trafficking.

> However, for policy reasons and because statutory mandatory minima dictated many terms of the drug-trafficking guidelines, the Commission departed from past practices in setting offense levels for such crimes as fraud and drug trafficking. *Id*. at 15. Consequently, and based also on its own experience and familiarity with state court sentencing, the court finds Guideline ranges of imprisonment for those crimes are less reliable appraisals of fair sentences.[26]

In another case, a sentencing court effectively vetoed § 2L1.2.[27] The court stated that the Commission's treatment of unlawful reentry offenses in § 2L1.2 was "unusual,"[28] and quoted a law review article opining that the Commission passed the guideline with insufficient

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[24] *United States v. Crosby*, 2005 WL 240916, at *5 (2d. Cir. 2005). The *Crosby* court, at n. 10, specifically rejected the argument that §3553(a)(4)'s language regarding considering the applicable range could be read to mean consideration of the ranges in general. It means consideration of the applicable range for the defendant before the court.

[25] *United States v. Wilson*, 2005 WL 78552, Case No. 2: 03-CR-00882 PGC (D. Utah Jan. 13, 2005), slip op. at p. 26.

[26] *United States v. Huerta-Rodriguez*, 2005 WL 318640, at *4 (D. Neb. 2005), footnotes omitted.

[27] *United States v. Galvez-Barrios*, 2005 WL 323703, (E.D. Wis. 2005).

[28] *Id*. at *3.

discussion.[29] The court further made its own assessment that the 16 level enhancement based on the defendant's prior serious felony, § 2L1.2(b)(1)(A) "seems far out of proportion to any reasonable assessment of dangerousness."[30] The court concluded by rejecting the guideline range. "Considering all of the above factors, I concluded that the advisory guideline range in the present case was somewhat greater than necessary to satisfy the purposes of sentencing."[31] The process used here is problematic. *Booker*'s direction that district courts must consult and consider the guidelines range does not leave individual courts free to effectively veto guidelines with which they disagree. Allowing individual judges to pick and choose the guidelines with which they agree will directly undermine Congress' goal in the Sentencing Reform Act of reducing disparity.

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."[32] 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,[33] these requirements may, like the *Booker* opinion itself, be ignored under a purely advisory system.

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[29] *Id.* The article quoted is Robert J. McWhirter and Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Reentry Cases*, 8 Fed. Sen. Rep. 275, 276 (Mar./Apr. 1996).

[30] *Id.* at *4.

[31] *Id.* at *5. The defendant received a sentence of 36 months when the guideline range was 57 - 70 months.

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

[33] 18 U.S.C. §§ 3553(a)(4), (a)(5), and (a)(6).

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.[34] 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.[35] 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 the client's business afloat and the fact that the conviction resulted in financial distress for the defendant.[36] In California, a judge sentenced four men,

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

[35] USSG §5H1.4

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

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."[37] Meanwhile, other defendants in the same district in California have 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 have urged 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 saved prosecutorial resources, and should retain control of who

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

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."[38] The Department believes that guideline sentences are presumptively reasonable, and that sentences outside the guidelines become less reasonable the more they 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 this 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".[39]

Sentences within the Guidelines range after *Booker* are not only presumptively reasonable, they are not subject to appeal. 18 U.S.C. § 3742(a), which remains unchanged by *Booker*, allows a defendant to appeal sentences above the Guidelines range but, assuming the

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

[39] *Id.* at 767.

Guidelines range was properly calculated and the sentence is lawfully imposed, makes no provision for a defendant to appeal a sentence within or below the Guidelines range. *See United States v. Ruiz*, 536 U.S. 622, 627 (2002) (§ 3742 does not extend to claims the district court abused discretion in refusing to depart from the Guidelines). This reading of section 3742(a)(1) also comports with Congress' intent to provide for only limited appellate review. *See e.g.*, Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, at 149 (Section 3742 "establishes a limited practice of appellate review of [federal] sentences"); *United States v. Franz*, 886 F.2d 973, 979 (7th Cir. 1989) ("it is evident that Congress did not intend section 3742 to be a vehicle for the appeal of every sentence and that Congress considered appellate review of most sentences within the guidelines to be unnecessary"). Similarly, § 3742(b) allows appeals by the government of sentences below the Guidelines range, but makes no provision for appeal of sentences within or above the Guidelines range.

The Department is disappointed that the *de novo* standard established by the PROTECT Act for sentences outside the applicable range is no longer the law. This standard allowed for sufficiently rigorous review to ensure consistent sentencing in the district courts. For example, the Fourth Circuit reviewed *de novo* a district court's 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.[40] 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

[40] *United States v. May*, 359 F.3d 683 (4th Cir. 2004).

court found that the departures were not warranted.[41]

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 the Commission, Congress and others to create a lasting system that advances these goals.

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[41] *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).

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