

**Testimony of Michael J. Fitzpatrick  
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I would like to thank the United States Sentencing Commission for giving me the opportunity to address this group today. On behalf of the United States Probation Department, I am pleased to welcome you to the Southern District of New York.

Those of us who work in the Southern District of New York sit in the cradle of the federal judiciary. The Judiciary Act of 1789, which created the Supreme Court, the circuit courts, and the district courts, was enacted by Congress when it sat in session in Federal Hall, which is only several blocks away from this courthouse. The District Court for New York, which was later split into four districts, including the Southern District, first sat on November 3, 1789, making it the first district court to sit under the sovereignty of the United States. Of equal importance to the probation department is the fact that in 1927, the first salaried federal probation officer was appointed in the Southern District of New York.

When I consider the role of the probation officer in relation to the judge in the sentencing process, I find that it can be compared to the roles of personnel on a ship (an appropriate analogy as we sit in the Court of International Trade). The probation officer can be likened to the navigator. The role of the navigator is to plan the journey, to advise the captain of the estimated time of arrival at ports of call, and to identify any potential hazards and makes plans to avoid them. The probation officer plans the journey to sentencing by conducting a presentence investigation and computing an accurate guideline range; the probation officer keeps the captain, or in our case the judge, on schedule by meeting the deadlines for 1<sup>st</sup> and 2<sup>nd</sup> disclosures and identifies hazards by investigating

any areas where the judge can depart from the guidelines, or can cite 3553(a) factors as a means of a variance. The judge, who fills the role of the captain in this example, will have the final decision by imposing a sentence, and does so after weighing information provided by the probation officer.

I have already mentioned the Southern District of New York's historical significance in relation to the establishment of the federal court system. The Southern District of New York is also prominent in the formulation of the federal sentencing guidelines. United States District Judge Marvin E. Frankel sat in the Southern District from 1965 through 1978. Frankel's book, *Criminal Sentences: Law Without Order* (1973) was a principal influence on the sentencing reform movement which led to the creation of the federal sentencing guidelines. Drawing on his experiences as a federal judge, Frankel argued that unrestrained sentencing discretion on the part of individual judges resulted in arbitrary sentences and wide disparity between the sentences imposed on similar defendants for similar crimes. His proposal to create a commission on sentencing has been credited as being the foundation for sentencing commissions which were created in the late 1970s and early 1980s, first in the states of Minnesota, Washington, and Pennsylvania, and eventually in the grandest of these agencies, the United States Sentencing Commission.

In recent years, the Supreme Court has issued several decisions which have had a major impact on the sentencing guidelines. These decisions are notable on their own, but I believe they take on even greater significance when they are viewed within the context of the state of sentencing in 2005. Only two years earlier, in 2003 Congress had amended the Sentencing Reform Act when it passed the Feeney Amendment of the Protect Act. The Feeney Amendment contained numerous provisions which would have a negative impact on the district court's ability to depart from the guidelines. review. The amendment substituted a de novo appellate review as opposed to the previous abuse of discretion standard. It barred district courts whose departures have been reversed

on appeal from giving a new reason to depart again on remand. The amendment required the Sentencing Commission to collect and report more data on departures, and it required the Department of Justice to report its efforts to oppose unwarranted departures. It instructed the Sentencing Commission to amend the Guidelines within 180 days "to ensure that the incidence of downward departures are [sic] substantially reduced." It also imposed a two-year moratorium on guideline amendments that created new downward departure grounds.

This amendment, to say the least, was not popular with the federal judiciary. In December of 2003, 27 federal judges from around the country issued a statement calling for repeal of the Feeney Amendment. The Judicial Conference of the United States Courts voted unanimously to support overturning the law. And it wasn't long before the Supreme Court weighed in. Starting with United States v. Booker in 2005, which rendered the federal sentencing guidelines as advisory, and then with United States v. Gall in 2007, which established an abuse of discretion standard for appellate review of sentencing, the Feeney Amendment has been nullified, and the district court has been granted greater sentencing discretion.

More recently, in December of 2008, the Second Circuit in United States v. Cavera conducted an *en banc* review of a case from the Eastern District of New York. In this decision, the court affirmed the decision of the district court, and provided a clear explanation of the guidelines. The court held that the guidelines are the "starting point and the initial benchmark for sentencing." But in the same opinion, the Court also held that "a district court may not presume that a Guidelines sentence is reasonable. It must instead conduct its own independent review of the sentencing factors."

In determining the effect of Booker and these subsequent options, one can look at the departure rates in the Southern District of New York and see a clear relationship between these decisions and sentencing decisions as they relate to the guidelines.

In 2003, a pre-Booker year, 78.4% of offenders received sentences within the guideline range, 13.2 % received a downward departure based upon substantial assistance; 8.3% received a downward departure; and 0.1% received an upward departure.

In 2006, a post-Booker year, 58.2% of offenders received sentences within the guideline range, 15.2% received a government sponsored downward departure; 7.9% received a non-government sponsored downward departure; 18.2% received a non-guideline below range sentence, and 0.2% received an upward departure

In 2008, a post-Booker and post-Gall year, 44.4% of offenders received sentences within the guideline range, 20.2 % received a government sponsored downward departure; 5.0% received a non-government sponsored downward departure; 30.0% received a non-guideline below range sentence, and 0.3% received an upward departure

I believe the guidelines, as they exist in their present form in the Second Circuit, satisfy Judge Frankel's concerns, and also allow the judge the opportunity to consider all of the 3553(a) factors when imposing sentence. In the Gall case, the Court gave new legitimacy to the competency of the district court in sentencing, by acknowledging the sentencing judge is "in a superior position to find facts and judge their import under 3553(a) in the individual case."

As a matter of substantive sentencing policy, a system of carefully thought-out guidelines that are subject to broad judicial discretion to depart, but accorded respect by the courts and followed more often than not is a highly desirable system for the federal courts. It would be difficult to not have a starting point when imposing sentence, and by calculating an offender's criminal history and assigning a severity to an offense, a judge has an excellent point at which to start. And now, with the freedom to not only depart from the guidelines, but by also having the ability to use 3553(a) factors to vary from the guidelines, judges have the ability to take into consideration factors not considered by the guidelines. The role of the probation officer will be to conduct thorough investigations, calculate appropriate guideline ranges, and identify all possible areas for departure and variance. By doing so, the probation officer help the sentencing judge when they craft their sentencing decisions.

## References

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