

Now What? The Post-Booker Challenge for Congress and the Sentencing Commission

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Right after the Supreme Court's January 2005 decision in *United States v. Booker*¹ transformed the federal sentencing guidelines from mandates to advice, many commentators urged Congress to allow the advisory guideline system created by *Booker* to remain in place for a period of time. The near consensus recommendation was that Congress should give the advisory guideline system at least a year to develop in order to see how district judges would use their new sentencing discretion and how circuit judges would review sentences for reasonableness. For example, the American Bar Association issued a report in the weeks after *Booker* that stated:



Congress should take the full amount of time necessary to determine the desirability and efficacy of this new [*Booker*] regime. It is too early to tell for certain whether this system will satisfy Congress's policy concerns as reflected in the Sentencing Reform Act of 1984, but there does not seem to be any compelling reason not to take the time to find out. The minimum amount of time necessary for this task is 12 months. If after that time the Congress is unsatisfied with the results under advisory guidelines, it can always enact corrective legislation. If such legislation is enacted before that time, the opportunity to learn whether advisory guidelines can work will have been squandered.²

With this one-year suggested observation period having now come to a close, this Issue of the *Federal Sentencing Reporter* seeks to take stock concerning the state and direction of federal sentencing in order to assess what Congress and the U.S. Sentencing Commission should do now in response to *Booker* and post-*Booker* developments. This Issue includes pieces that result from a public call for commentary, as well as primary materials and other original articles that take a variety of perspectives on the past, current, and future federal sentencing landscape.

I. Taking Stock

All the materials in this Issue highlight not only that *Booker*'s transformation of the federal sentencing guidelines from mandates to advice has had expected and unexpected results, but also that it still remains surprisingly unclear whether the decision has significantly or only slightly altered the day-to-day realities of the federal sentencing system. Not surprisingly, as documented by the articles and other materials in this Issue, judges, prosecutors, defense attorneys, and commentators have a range of different views about what *Booker* means, about how to gauge and assess its impact, and about how policy makers ought to respond.

In early March 2006, the U.S. Sentencing Commission released a massive report, simply entitled "Report on the Impact of *United States v. Booker* on Federal Sentencing," which presented a lot of data and intricate analysis of sentencing outcomes in the lower federal courts in the year following the *Booker* decision.³ This report, which runs a total of 277 pages, includes an extraordinary amount of basic data and analysis, although it conspicuously avoided making any policy assessments of the current state and likely development of the post-*Booker* federal sentencing regime. The executive summary of the report, which is reprinted in this Issue, highlights the report's major findings and

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concludes by suggesting that the Commission views its new responsibility in terms of “inform[ing] careful consideration of the evolving post-*Booker* federal sentencing system.”

Though the post-*Booker* system is certainly “evolving,” the report from the U.S. Sentencing Commission confirms the same basic story that emerged from the Commission’s early releases of post-*Booker* data. The report spotlights that *Booker* has not radically altered many central features of the federal sentencing system: Guideline calculations based on judicial fact-finding, and within-guideline sentencing outcomes, remain the norm. The post-*Booker* report reveals a distinct decline in the national average of “within range” guideline sentences, but a within-guideline sentence is still imposed in nearly two out of every three cases.⁴ And, when a below-guideline sentence is imposed, that result is still twice as likely to be the result of a prosecutor’s recommendation than the result of an independent determination by the sentencing judge.⁵ Moreover, the Commission reports that “[t]he severity of sentences imposed has not changed substantially across time” before and after *Booker*.⁶ Taking stock based on the Commission’s *Booker* report, one might conclude that the remarkable *Booker* remedy has demonstrated a remarkable ability to achieve a remarkable stability within the federal sentencing system despite a declaration that the federal sentencing guidelines had been operating in an unconstitutional manner.

But, of course, there is a lot more to say about *Booker* and post-*Booker* developments than just to note surprising stability. (Indeed, because *Booker* only addressed basic questions about the guidelines’ status, all federal sentencing participants—case-specific actors such as judges, prosecutors, defense attorneys, probation officers, as well as system-wide policy makers such as members of Congress and the Commission—still confront uncertainty about federal sentencing laws and procedures even a full year after *Booker*.) Tellingly, as evidenced by the other materials in this Issue, perspectives on the past, current, and future state of federal sentencing tend to depend largely on one’s perspective after *Booker* we see varied assessments from judges, lawyers, and commentators who had varied views about the soundness of the federal sentencing guidelines before *Booker* recast their status.

Federal judges—particularly federal district judges who may be the biggest beneficiaries of the conversion of the guidelines from mandates to advice—seem to be generally supportive of the *Booker* remedy and encouraged by post-*Booker* developments. This reality is revealed in this Issue through the article authored by Wisconsin District Judge Lynn Adelman and Jon Deitrich and the reprinted testimony of Utah District Judge Paul Cassell on behalf of the Judicial Conference that was submitted to a House Judiciary Subcommittee during a hearing concerning *Booker* in mid-March. In contrast, federal prosecutors—especially because they perhaps lost the most power as a result of the *Booker* remedy and perhaps have the most to gain from a certain type of mandatory sentencing system—continue to express concerns about post-*Booker* developments. This reality is revealed in this Issue through the reprinted testimony of Principal Associate Deputy Attorney General William Mercer also submitted at the House *Booker* hearing, which asserted that sentencing “consistency and accountability are eroding” as a result of the *Booker* ruling. Meanwhile, federal defense attorneys—who cannot help but view the *Booker* remedy as a mixed blessing—have concerns about the post-*Booker* world, though defense complaints center on the fact that *Booker* has thus far failed to significantly impact district courts’ sentencing practices and that some courts are adhering to the guidelines as a matter of course. This reality is revealed in this Issue through articles authored not only by defense attorneys, but also by commentators who are concerned with the business-as-usual tenor of many post-*Booker* developments in the lower federal courts.

Summarizing these realities, one might come to view *Booker* and post-*Booker* developments like the elephant in the parable of the Blind Men and the Elephant: It seems that everyone has a different view of *Booker* and its aftermath depending on his or her professional position and personal perspective. In light of the diverse judgments about the post-*Booker* world, perhaps all federal sentencing participants and commentators should appreciate that everyone examining and assessing the federal sentencing system may be at least partially blind and that perceptions of the guidelines, past and present, may be greatly influenced by viewing the system from a particular vantage point.

II. Moving Forward

In light of the diverse perspectives on the sentencing system created by *Booker*, it is no surprise that Congress and the U.S. Sentencing Commission have received diverse assessments concerning what should be done now. The pieces in this Issue—which includes sections of a report from the Consti-

tution Project's Sentencing Initiative that explains its "Principles for the Design and Reform of Sentencing Systems"—lay out a number of considerations and concrete proposals for both Congress and the Commission as they consider possible post-*Booker* reforms. And though I have much to say about the development and possible reform of the post-*Booker* system,⁷ in this context I will close by spotlighting the importance of stability (and the risks of instability) as policy makers consider future federal sentencing reforms.

Professor Frank Bowman has recently observed that "a [sentencing] system in which so much is unsettled and is likely to remain so for years to come is a distraction from the core objectives of criminal justice at best, and is likely to prove a breeding ground for regional disparity and individual unfairness."⁸ This astute and well-stated observation highlights a reason why the remarkable stability resulting from the remarkable remedy engineered by Justice Breyer in *Booker* does merit praise. The virtues of stability at this moment in the history of federal sentencing reform, and the risk of instability that could result from any misguided *Booker* fix proposal, should not be underappreciated. The last three years—starting with the enactment of the PROTECT Act⁹ in April 2003, through the ruling in *Blakely v. Washington*¹⁰ in June 2004, and the *Booker* ruling in January 2005—have been a period of extraordinary turmoil and uncertainty in the federal sentencing system. It is clear that all the constitutional uncertainty and legal turmoil has exacted a toll on participants in the federal criminal justice system. All of the case-level sentencing decision makers—judges, prosecutors, defense attorneys, and probation officers—have been forced to spend considerable time sorting through an ever-changing sentencing landscape.

Such turbulence not only produces a significant drain on the entire federal criminal justice system, but also undermines the congressional goals of predictability and uniformity in sentencing. And because a range of tangible and intangible harms could flow from continued instability and uncertainty in the federal criminal justice system, members of Congress and Sentencing Commissioners should be fully aware and acutely concerned that any major changes to the federal sentencing structure in the wake of *Booker* threatens continued instability and uncertainty.

Any significant and far-reaching legislative *Booker* fix would risk further disrupting a federal sentencing system that is still adjusting to the considerable turmoil and uncertainty resulting from many recent shocks. Especially because the current post-*Booker* federal sentencing world is not so obviously broken, policy makers in Congress and the Commission should appreciate that, at least in the short term, a program of careful study and cautious consideration of modulated incremental changes, if any changes are deemed needed at all, is likely to provide the soundest course for the post-*Booker* federal sentencing system.

Notes

¹ 543 U.S. 220 (2005).

² ABA CRIMINAL JUSTICE SECTION, REPORT AND RECOMMENDATION ON *BOOKER* (Jan. 2005), reprinted in 17 FED. SENT'G REP. 335, 336–37 (2005); see also Jack King, *NACDL Leadership, Former U.S. Attorneys, Judge, Warn Congress on Perils of Hasty Federal Sentencing 'Reform,'* CHAMPION, Apr. 2005, at 6, 6 (discussing widespread advice given to Congress to avoid "any quick legislative fixes to the federal sentencing guidelines").

³ U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (Mar. 2006) [hereinafter *USSC Booker Report*] available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

⁴ *Id.* at vi-vii.

⁵ *Id.*

⁶ *Id.* at vii.

⁷ See Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341 (2006); Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. (forthcoming 2006); Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1; Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005).

⁸ See Posting of Frank Bowman to Legal Affairs, http://legalaffairs.org/webexclusive/debateclub_sentencing0106.msp (Jan. 19, 2006, 08:50).

⁹ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

¹⁰ 542 U.S. 296 (2004).