

EDITOR'S OBSERVATIONS

Assessing Federal Sentencing After *Booker*

DOUGLAS A. BERMAN

FSR Editor; Professor of Law at The Ohio State University Moritz College of Law

"Ours, of course, is not the last word: The ball now 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."

— Justice Breyer, writing for the Court in *United States v. Booker*

"If it ain't broke, don't fix it."

— Proverb



The origins, rationale, and meaning of the Supreme Court's decision in *United States v. Booker*¹ are all fascinating topics worthy of extended examination and analysis. But, for federal policy makers and practitioners (not to mention federal defendants), the most pressing concern is the impact of *Booker* on the current realities and future direction of the federal sentencing system. This Issue of *FSR* examines the state of federal sentencing after *Booker* and gives particular attention to whether, when, and how Congress should respond to *Booker*. Justice Breyer stressed in the remedial portion of the Court's *Booker* opinion that Congress could choose to redesign the federal sentencing system in the wake of *Booker*. But an old proverb, which says "if it ain't broke, don't fix it," perhaps counsels caution as Congress contemplates any "*Booker* fix."

As this Issue goes to press, the federal sentencing system has now had over six months to assess and adjust to *Booker*'s unexpected remedy for "curing" the federal sentencing guidelines of the Sixth Amendment problems with judicial fact-finding identified in *Apprendi v. New Jersey*² and *Blakely v. Washington*.³ The article and extensive primary materials in this Issue highlight that it is now possible to identify the basic contours of federal sentencing after *Booker*, but they also suggest it may still be too early to reach firm conclusions about the current state and future development of federal sentencing policy and practice. The items in this Issue reveal that an initial challenge for policy makers and practitioners is to assess whether and how the post-*Booker* federal sentencing system may be broken in order to be able, in turn, to assess what sort of legislative fix might be needed.

I. Viewing *Booker* in a Broader Federal Sentencing Context

Though the remedy adopted by the Supreme Court in *Booker* changed the federal sentencing guidelines from mandates to advice, the decision may not have radically transformed essential federal sentencing dynamics. Indeed, in testimony presented at a hearing convened by a House of Representatives subcommittee a month after the *Booker* decision, U.S. Sentencing Commission Chair Judge Ricardo Hinojosa stressed that *Booker* did not alter many central features of the federal sentencing system. In his testimony, which is reprinted in this Issue, Judge Hinojosa highlighted the central role of the guidelines and the Commission even after *Booker*, and he explained that the Commission believed sentencing courts should still be giving "substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose."

Similarly, the thoughtful article in this Issue authored by the Honorable James Carr, Chief Judge of the U.S. District Court of the Northern District of Ohio, sets forth a dozen insights that collectively

Federal Sentencing Reporter, Vol. 17, No. 5, pp. 291–294, ISSN 1053-9867 electronic ISSN 1533-8363

©2005 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website at www.ucpress.edu/journals/rights.htm.

suggest that post-*Booker* sentencing may not be too different from pre-*Booker* sentencing. Chief Judge Carr details why the influence and impact of prosecutors and appellate courts ensures that the new sentencing discretion *Booker* gives to district judges likely will not dramatically alter the day-to-day realities of the federal sentencing system.

But Chief Judge Carr's article also explains why pre-*Booker* sentencing should not be the gold standard for assessing the federal system after *Booker*. Noting the imbalance resulting from unregulated prosecutorial power within a mandatory guideline system, Chief Judge Carr celebrates the fact that "*Booker* has restored discretion [to judges that] is regulated, reviewable, and restricted." In his words: "Since *Booker*, we have balance and control. Before we had neither."

These sentiments are echoed in post-*Booker* work of the Constitution Project's Sentencing Initiative and the *Blakely* Task Force of the American Bar Association's Criminal Justice Section. The Constitution Project's Sentencing Initiative, a bipartisan, blue-ribbon committee created after the Supreme Court's decision in *Blakely*, released in June what it calls "Principles for the Design and Reform of Sentencing Systems." Reprinted in this Issue, these aspirational principles for criminal sentencing systems in the United States include a statement of "several serious deficiencies" in "the federal sentencing guidelines as applied prior to *United States v. Booker*." Notably, these principles champion a judge-centered sentencing guidelines system, managed by a sentencing commission and regulated by appellate review, that seems in perfect harmony with the basic themes and specific mandates in Justice Breyer's remedial opinion for the Court in *Booker*.

Similarly, the *Blakely* Task Force of the ABA's Criminal Justice Section seems quite keen on the new federal sentencing world created by the *Booker* decision. The ABA Task Force Report, which is reprinted in this Issue, asserts that "*Booker* yields an innovative mix of sentencing procedures that may yield excellent results [through its] salutary balance between rule and discretion." This report also contends that the "advisory remedy crafted in *Booker* may well prove as good as or even better than the mandatory guidelines in achieving the original objectives of the Sentencing Reform Act." The ABA Task Force urges Congress to allow the current advisory system to remain in place for at least twelve months to allow sufficient time to evaluate its efficacy; it also states that if advisory guidelines appear unacceptable after this period of study, then Congress should consider developing a simplified federal sentencing system that complies with the jury trial rights identified in *Blakely*.

Of course, the *Booker* remedy has not received praise from all quarters. In testimony presented at the House hearing right after the *Booker* decision, Assistant Attorney General Christopher Wray suggested that there would be a "need for legislative action" in response to *Booker*. Wray's testimony, which is reprinted in this Issue, identified "vulnerabilities that are inherent in advisory guidelines," and he emphasized concerns about the potential for greater sentencing disparity in the wake of *Booker*. Wray also spotlighted a distinct and important concern for the Justice Department, namely that an advisory guideline system might result in "reduced incentive for defendants to enter early plea agreements or cooperation agreements with the government."

II. Considering Proposed Legislative Responses to *Booker*

Though most early reactions to *Booker* were cautious and seemed to adopt a wait-and-see philosophy, proposals for specific legislative responses eventually emerged. The most surprising and provocative proposal appeared as a sudden add-on to a House drug sentencing bill, H.R. 1528, entitled "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005." Right before a scheduled hearing in April on the main provisions of this bill, a new elaborate section 12 was tacked on with provisions that would essentially forbid judicial consideration of nearly all mitigating factors as a basis for sentencing below guideline ranges. Section 12 also proposed significant procedural restrictions on any possible remaining grounds for downward departure from the guidelines (except for departures based on a prosecutor's motion for an early plea agreement or substantial assistance in the prosecution of others).

The broad and far-reaching provisions of section 12 of H.R. 1528, which are reprinted in this Issue, generated potent criticisms. Many institutions and individuals identified problems and imbalances that this proposed response to *Booker* would engender, and in this Issue we reprint three of the many letters sent to Congress that assailed the basic approach and specific provisions of section 12 of H.R. 1528. These three letters, from Professor Frank Bowman and the Committee on Criminal Law of the U.S. Judicial Conference and federal public defenders, provide an extensive array of legal, policy, and practical reasons why section 12's response to *Booker* could profoundly harm the operation of the federal sentencing system. Significantly, the negative reaction to section 12 and other provisions

of H.R. 1528 seemed to have some impact: the bill received only limited support in the House subcommittee that first considered it, and months later the bill is still stalled in the House and no corresponding legislation is under consideration in the Senate.

Though the proposed legislative response to *Booker* found in section 12 of H.R. 1528 seems now to have limited support, the Justice Department in June decided to begin advocating its own legislative response to *Booker*. In a major policy speech delivered to a conference of the National Center for Victims of Crime, Attorney General Alberto Gonzales discussed the impact of *Booker* on federal sentencing and asserted that the “advisory guidelines system we currently have can and must be improved.” In his speech, which is reprinted in this Issue, Gonzales provided anecdotal accounts of problems created by *Booker*, and he claimed that, since *Booker*, there has been “an increased disparity in sentences, and a drift toward lesser sentences.” He closed his speech by saying that he favored “the construction of a minimum guideline system”:

Under such a system, the sentencing court would be bound by the guidelines minimum, just as it was before the *Booker* decision. The guidelines maximum, however, would remain advisory, and the court would be bound to consider it, but not bound to adhere to it, just as it is today under *Booker*.

The general reaction to Gonzales’s suggested response to *Booker*, perhaps because it was set forth in tentative terms and without proposed legislative language, was somewhat muted. Still, a number of newspaper editorials, echoing growing criticisms of harsh mandatory minimum sentencing statutes, spoke out against the idea of creating a “minimum guideline system.” And, shortly after the Gonzales speech, the National Association of Criminal Defense Lawyers completed a lengthy report entitled “Truth in Sentencing? The Gonzales Cases.” The report, which is reprinted in this Issue, examined in depth four specific cases that Gonzales cited as evidence that a legislative response to *Booker* was needed. The NACDL report, after its analysis of these four cases, concluded that none of them “reflects a failure of the judiciary or of the sentencing system.”

III. Examining the Data and Charting a Measured Response

The speech by Attorney General Gonzales highlights that it is dangerously easy to focus post-*Booker* analysis on a few specific cases. And, because headline-making cases have always had unique purchase in the development of sentencing laws and policies, the intense scrutiny of post-*Booker* developments presents a unique risk that anecdotes and rhetoric will unduly shape debates over the future development of the federal sentencing system. One post-*Booker* challenge for those concerned about the future of the federal sentencing system, and especially for the U.S. Sentencing Commission, is to ensure that policy makers appreciate (1) that in a huge federal system, with thousands of sentencings every month, there will inevitably be a few questionable decisions, and (2) that no definitive conclusions should be drawn, or broad legislation enacted, based on a few anecdotal accounts and sound-bite critiques of post-*Booker* realities.

To its great credit, in the wake of *Booker*, the U.S. Sentencing Commission has been taking an active role in the public dialogue over the current state and the future direction of federal sentencing, particularly through its regular dissemination of “real-time” post-*Booker* sentencing data. Nearly every month, the Commission has reported on post-*Booker* sentencings in an effort to ensure that cumulative sentencing data play an integral and effective role in the debate over whether and how Congress should respond to *Booker*.

In this Issue, we reprint a small portion of the data that the Commission released concerning the first six months of district court sentencing after *Booker*. Though there are many stories to be drawn from this sentencing data, it is hard to reach any firm conclusions about exactly what all the post-*Booker* data means. Because average and median sentence lengths seem stable after *Booker*, it is hard to find a lot of support for the contention made by Attorney General Gonzales that we are experiencing a “drift toward lesser sentences.” And yet, because there are more sentences below the guidelines now than there were before *Booker*, the overall sentence length data could reflect a change in the mix of cases masking a genuine shift in the sentencing decisions of district judges. Notably, the Commission’s circuit-by-circuit post-*Booker* data perhaps do support Gonzales’s concern that after *Booker* we are seeing “increased disparity in sentences.” And yet, significant circuit-by-circuit differences in departure rates were common before *Booker*, and different rates of prosecutor departure motions have also always had a role in geographical variations in the application of the guidelines. Though

the Commission's post-*Booker* data suggest that the *Booker* decision has not—at least not yet—produced a radical change in federal sentencing outcomes, a lot more data and analysis are needed before even this tentative conclusion can be reached with real confidence.

Ultimately, the sentencing data combines with all the sentencing insights and commentary in this Issue to highlight that the U.S. Sentencing Commission has a critical role and unique responsibilities in the analysis and development of the federal sentencing system in the wake of *Booker*. The Sentencing Commission is the only institution that, by virtue of its information and perspective, can take a truly comprehensive and balanced view of the entire federal sentencing landscape. 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. But only the Sentencing Commission will be able to examine and assess the development of this common law with an eye on cumulative sentencing data to determine whether the central goals of federal sentencing reform are being served in the operation of an advisory guideline system.

Consequently, not only should the Commission continue to assemble and make publicly available post-*Booker* sentencing data, but it should also produce reports that explore the pros and cons of various potential short-term and long-term responses to *Booker*. Through such reports, the Commission can help frame and shape Congress's examination of the post-*Booker* world and possible legislative action. Encouragingly, the Sentencing Commission's recent statement of priorities, which is reprinted in this Issue, details that the Commission is focused on continuing "its work with the congressional, executive, and judicial branches of the government and other interested parties on appropriate responses to *United States v. Booker*." In addition, the Commission says it is planning "a report on the effects of *Booker* on federal sentencing, including an analysis of sentencing data collected within the first year of that decision."

In the end, it would seem quite wise for both Congress and the Sentencing Commission to continue to hold off making substantial changes to the federal sentencing system, at least until the Supreme Court's post-*Blakely* jurisprudence has settled down. Even though *Booker* 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. After *Booker*, it is still difficult to make major structural changes to the guidelines with any constitutional confidence because of the continued uncertainty that surrounds *Harris v. United States*,⁴ which now allows judges to find facts that establish minimum sentences, and *Almendarez-Torres v. United States*,⁵ which now allows judges to find "prior conviction" facts that enhance sentences. (Notably, the uncertain precedents of *Harris* and *Almendarez-Torres*, both of which were 5-4 rulings are made even more uncertain by the ongoing transitions in the composition of the Supreme Court.) And, beyond fundamental constitutional concerns, a host of complicated, challenging, and possibly unforeseen transition issues would likely accompany any major structural changes to the federal sentencing guidelines.

In other words, any significant and far-reaching legislative *Booker* fix would further disrupt a federal sentencing system that has just been through a year of considerable turmoil following the Supreme Court's *Blakely* ruling. Because the current post-*Booker* federal sentencing world is not so obviously broken, perhaps the old adage counsels against any dramatic fix-it effort. Instead, 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* development of the federal sentencing system.

Notes

¹ 125 S. Ct. 738 (2005).

² 530 U.S. 466 (2000).

³ 124 S. Ct. 2531 (2004).

⁴ 536 U.S. 545 (2002).

⁵ 523 U.S. 224 (1998).