

Claiborne and Rita—Booker Cleanup or Continued Confusion?

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After the Supreme Court recast the Federal Sentencing Guidelines from mandates to advice, many commentators suggested permitting the advisory guideline system created by *United States v. Booker*¹ to remain in place for some time. Congress was urged to resist any quick “legislative fix” in order to see how district judges would exercise their new sentencing discretion and how circuit judges would review sentences for reasonableness.² Whether by design or by necessity, Congress heeded this advice: the advisory guideline system created by the *Booker* remedial opinion has now been the law of the federal sentencing land for more than two full years.

But where Congress has so far decided not to tread, the Supreme Court has now returned: in November 2006, the Court granted certiorari in *Claiborne v. United States* and *Rita v. United States*, two cases exploring the constitutionality and soundness of the sentencing standards that have developed in lower courts after *Booker*.³ When granting cert in *Claiborne*, a case in which the Eighth Circuit reversed a below-Guideline sentence as unreasonable, the Supreme Court expressly asked whether it is “consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances.”⁴ When granting cert in *Rita*, a case in which the Fourth Circuit affirmed a within-Guideline sentence, the Supreme Court expressly asked whether it is “consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences” and whether that presumption can “justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence.”⁵

This Issue of *FSR*, which goes to press as *Claiborne* and *Rita* are pending before the Supreme Court, seeks to provide both context and concepts for understanding the federal sentencing realities that may have prompted the *Claiborne* and *Rita* cert grants and that may impact the Court’s decisions. The articles in this Issue, some of which directly address federal sentencing realities in *Booker*’s wake and some of which address broader issues concerning the operation of guideline systems, provide varied perspectives on whether and how *Claiborne* and *Rita* could impact the current state and future direction of post-*Booker* federal sentencing.

The information, insights, and ideas in the articles that follow are not readily summarized. But all the pieces point to two broad themes that have potentially profound implications not only for *Claiborne* and *Rita* but also for the future of all structured sentencing efforts. One theme, which is most prominent in the articles by Professor Frank Bowman and Judge Nancy Gertner, is the difficulty of integrating the Supreme Court’s Sixth Amendment jurisprudence and a judge-centered sentencing system. The other theme, which is particularly prominent in other articles in this Issue, is the difficulty of integrating formal sentencing doctrines and practical sentencing dynamics.

I. Enduring Constitutional Challenges following *Booker*

I have argued elsewhere that *Booker*’s dueling opinions might be harmonized around the concept of sentencing as a distinct criminal justice enterprise that requires the exercise of reasoned judgment.⁶ But, even if some conceptual order might be found within *Booker*, Professor Bowman appropriately



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spotlights how disconnected post-*Booker* realities have been from the jury trial provision that purportedly drives the Supreme Court's modern Sixth Amendment jurisprudence. As he spotlights:

[W]e have watched the Court decide a series of cases nominally about the Sixth Amendment right to a jury trial that have had virtually no practical effect on how many cases are decided by juries or even on the issues decided by juries in those cases that go to trial. Particularly in the federal system, the locus of the *Rita* and *Claiborne* cases, the effect of the new Sixth Amendment regime on jury practice has been nil. The jury trial rate in federal courts is now lower than it was before *Booker*. And in those cases that go to trial, juries decide no more facts related to sentencing than they did before *Booker*. The entire debate about the post-*Booker* federal sentencing world has had nothing to do with juries, and everything to do with the allocation of sentencing power between the judiciary (trial and appellate), Congress, and federal prosecutors.

Ironically, Professor Bowman's observations ultimately reveal both the impetus for and the impediments to the Supreme Court's recent Sixth Amendment work. The Court's modern Sixth Amendment jurisprudence is avowedly a response by a majority of Justices to modern criminal justice systems that now tend to marginalize the significance and value of jury trials.⁷ But the *Booker* remedy of judge-centered advisory guidelines engineered by Justice Breyer—over the dissent of four of the five Justices driving the new Sixth Amendment jurisprudence—provides a ready blueprint and almost endorses continuing to marginalize the significance and value of jury trials. Unsurprisingly, the same structural forces and institutional players that have belittled jury trial rights and prompted the Supreme Court to give the Sixth Amendment new life are now employing the *Booker* remedy as a means to continue to belittle jury trial rights.

Significantly, in resolving a case this Term about *Blakely's* reach, the Supreme Court in *Cunningham v. California*⁸ asserted that "*Booker's* remedy for the Federal Guidelines . . . is not a recipe for rendering our Sixth Amendment case law toothless."⁹ And yet, the bite of the Sixth Amendment has not been evident in federal sentencing proceedings in lower courts since *Booker*; notably, Sixth Amendment issues were not even directly addressed by the lower courts that decided *Claiborne* and *Rita*. The certiorari questions, along with the Court's work in *Cunningham*, suggest that some Justices might be eager to use *Claiborne* and *Rita* as vehicles for sharpening the meaning and impact of the Sixth Amendment for the federal sentencing system. However, unless a majority of Justices are prepared to dramatically revise the *Booker* remedy—or decides to revise still evolving Sixth Amendment doctrines—the Court is unlikely to find a simple means in *Claiborne* and *Rita* to integrate its Sixth Amendment jurisprudence with the federal system's elaborate judge-centered sentencing structure.

II. Enduring Practical Challenges following *Booker*

Though the Justices may have granted certiorari in *Claiborne* and *Rita* to explore constitutional issues that persist after *Booker*, the other commentaries in this Issue showcase a distinct practical concern that lurks within the post-*Booker* debate over federal sentencing. As highlighted by all the articles discussing post-*Booker* developments in lower courts, the formalities of federal sentencing doctrine may ultimately be less important than the realities of federal sentencing practice.

Not only have jury trial rights been largely forgotten after *Booker*, but as applied in the lower courts the *Booker* ruling has not even managed to move the federal sentencing process away from guideline minutiae toward the broader sentencing goals Congress set out in 18 U.S.C. § 3553(a). After *Booker*, the Courts of Appeals have repeatedly declared that district judges must still painstakingly calculate precise guideline sentencing ranges, and they have also generally demanded a detailed explanation for a deviation from—and especially any deviation below—the purportedly advisory guideline range. Some Justices may view *Claiborne* and *Rita* as an opportunity to reiterate and further elaborate on *Booker's* instructions that lower courts must now follow the broad mandates in 18 U.S.C. § 3553(a) and need not always show fealty to the debatable (and sometimes unexplained) policy choices of the U.S. Sentencing Commission reflected in the Guidelines.

As spotlighted by many pieces in this and prior FSR Issues, lower courts and the Sentencing Commission after *Booker* continue to cling to the Guidelines like Linus clutching his security blanket. This reaction to *Booker* likely reflects an understandable pragmatism about the post-*Booker* world: some judges may be embracing the current Guidelines because they worry that Congress might overreact to any migration from the Guidelines or because they believe that only a Guideline-centric sentencing process can foster fair and effective sentencing outcomes. But rather than fear

Congress or the unknown, federal judges and the Sentencing Commission should champion sound principles over pragmatism and should recognize the potential virtues of a post-*Booker* sentencing process emphasizing the exercise of reasoned judgment focused on the provisions of § 3553(a).

In those courtrooms and cases in which district judges have thoughtfully explored the provisions of § 3553(a) after *Booker*, the move away from a Guideline-centric sentencing process has generally furthered, not frustrated, the goals pursued by Congress when it enacted the Sentencing Reform Act.¹⁰ Indeed, as the Supreme Court approaches *Claiborne* and *Rita*, it should realize that the pre-*Booker* Guideline-centric sentencing process may have itself undermined, rather than enhanced, the goal of greater sentencing consistency in the federal system.¹¹ Moreover, though achieving greater sentencing consistency was one goal of the Sentencing Reform Act of 1984, it was not the only goal. 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. A close and careful look at the underlying facts in *Claiborne* and *Rita*, both of which involve defendants who committed relatively minor crimes but faced significant prison terms because of various questionable Guideline enhancements, should help the Justices appreciate that the substantive principles set forth in § 3553(a), and not merely the Guidelines' many diktats, provide the soundest guide for the exercise of federal sentencing discretion.

Ultimately, what exactly the Supreme Court says in *Claiborne* and *Rita* may be somewhat less important than how it says it. The deep modern divisions within the Court about the reach and application of the Sixth Amendment, and especially how these divisions found expression in two hard-to-harmonize opinions in *Booker*, may in part account for continuing uncertainty and confusion about the current state and future direction of federal sentencing law and policy. For federal litigants eager to resolve current sentencing disputes and for federal policy-makers contemplating possible future reforms, having a *clear* set of sentencing ground rules may be much more important than having a *perfect* set of rules.

Significantly, *Claiborne* and *Rita* present the first significant opportunity for the Court's two new Justices—Chief Justice John Roberts and Associate Justice Samuel Alito—to weigh in on long-standing sentencing debates. Notably, these two new Justices could be viewed as the yin and yang of federal sentencing law and policy: former federal prosecutor (and *FSR* author) Justice Alito had lots of exposure to modern federal sentencing realities on the Third Circuit and through his involvement with the Constitution Project's Sentencing Initiative; former civil lawyer Chief Justice Roberts comes at these issues without much history and experience, and he may be far more interested in achieving consensus among the Justices than in achieving any particular outcome. For the sake of all participants in the federal sentencing system, it may behoove Chief Justice Roberts to urge both old and new Justices to work together in *Claiborne* and *Rita* to provide a set of clear, cogent, and comprehensible rules to guide current and future federal sentencing decision making.

Notes

¹ 543 U.S. 220 (2005).

² See generally Douglas A. Berman, *Assessing Federal Sentencing after Booker*, 17 FED. SENT. REP. 291, 291-94 (2005) (reviewing and endorsing recommendations for Congress to take a "cautious, wait-and-see" approach to any legislative response to *Booker*).

³ See 127 S. Ct. 551 (Nov. 3, 2006).

⁴ *Id.*

⁵ *Id.*

⁶ See Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387 (2006); see also Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 54-71 (2006).

⁷ In a remarkable concurring opinion in *Ring v. Arizona*, Justice Scalia explained that his interest in giving the Sixth Amendment's jury trial right more bite followed from his disquiet concerning "the accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict." See *Ring v. Arizona*, 536 U.S. 584, 611-12 (2002) (Scalia, J., concurring). Similarly, the Court's majority ruling in *Blakely v. Washington* explained that its modern Sixth Amendment jurisprudence is animated by "the need to give intelligible content to the right of a jury trial" which is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). And, in *Booker*, Justice Stevens' opinion for the Court champions the importance of "enforcement of the Sixth Amendment's guarantee of a jury trial in today's world." Claiming the constitutional ruling in *Booker* is "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance," Justice Stevens speaks grandly of the Court's modern Sixth Amendment holdings as an effort to ensure, in light of modern sentencing

reforms, that the “right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government.” *Booker*, 543 U.S. at 236-37.

⁸ 127 S. Ct. 856 (2007).

⁹ *Id.* at 859.

¹⁰ For a fuller development of these points, see Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUSTON L. REV. 341 (2006).

¹¹ See generally Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (convincingly arguing that the Guidelines *increased* disparity in the federal sentencing system); see also U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) (spotlighting the Guidelines’ inability to regulate prosecutorial discretion and noting the increased impact of that discretion in the federal guideline sentencing system).