

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that, in light of the United States Supreme Court's decisions in *United States v. Booker*, 2005 WL 50108 (January 12, 2005), the American Bar Association urges the United States Congress to take the following steps to assure that federal sentencing practices are effective, fair and just and effectuate the goals of sentencing set forth in the Sentencing Reform Act:

1. Permit federal courts to use advisory guidelines while Congress carefully examines sentencing practices under such guidelines;

2. Forthwith direct the United States Sentencing Commission to assemble and analyze all available data regarding sentences imposed under *Booker*, including the information required by 18 U.S.C. § 3553 (c) regarding sentences outside the guidelines, and submit a Report with recommendations to the Congress within 12 months; and

3. While awaiting the Report from the Sentencing Commission on the data, conduct hearings and solicit input from all constituents within the federal criminal justice system regarding the wisdom and efficacy of the post-*Booker* procedure and how it compares to any available legislative options as well as state sentencing guidelines systems; and

FURTHER RESOLVED, that Should Congress determine that use of advisory guidelines results in unwarranted disparities, Congress should consider, as a substitute for advisory guidelines, the following actions:

1. Simplify the guidelines either by adding a limited number of critical culpability factors as elements of each offense to be determined by the jury, or by directing the Commission to identify sentencing factors to be determined by the jury;

2. Revise the 25% rule to allow expanded sentencing ranges derived from the jury verdicts;

3. Permit downward departures from these ranges under the same standard applicable to the existing guidelines; and

4. Leave to the Judicial Conference of the United States and the Rules Enabling Act process the task of identifying and proposing any necessary procedural revisions such as

bifurcation of proceedings, rules of discovery regarding sentencing factors, and additional jury instructions.

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Report

I. Introduction

In August 2004, the House of Delegates approved recommendations of the ABA Justice Kennedy Commission. Among the recommendations in Report 121A approved by the House were the following:

A. “[T]he American Bar Association urges that states, territories and the federal government . . . [e]mploy sentencing systems that guide judicial discretion consistent with *Blakely v. Washington*, 124 S.Ct. 2531 (June 24, 2004), to avoid unwarranted and inequitable disparities in sentencing among like offenses and offenders, but permit courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence.”

B. “[T]he American Bar Association recommends that the Congress:

(1) Repeal the 25 percent rule in 28 U.S.C. §994(b)(2) to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing guidelines and consider state guideline systems that have proven successful.

(2) Reinstate the abuse of discretion standard of appellate review of sentencing departures, in deference to the district court’s knowledge of the offender and in the interests of judicial economy. . . .”

On January 12, 2005, in *United States v. Booker*, discussed below, the United States Supreme Court held in one 5-4 opinion that the sentencing guidelines violate the Sixth Amendment right to jury trial to the extent that sentences may be increased from one guideline range to another based on facts not proved beyond a reasonable doubt to a jury. In a second 5-4 opinion, the Court held that, to carry out congressional intent, two federal statutory provisions governing sentencing are invalid, and as a result the federal sentencing guidelines are advisory.

The Supreme Court recognized that Congress may choose to modify the Sentencing Reform Act of 1984 to take account of the *Booker* decision, and both Houses of Congress have expressed concern about the effect of *Booker* on federal sentencing. The Criminal Justice Section anticipated that the decision in *Booker* might result in some or all of federal sentencing practice being held invalid. It appointed a working group, which considered various alternative decisions that might come from the Court and the position that the American Bar Association should take in response to those decisions. Although the Supreme Court's ultimate decision took a slightly different form from any anticipated by the working group, the end result was not far removed from one of the principal alternatives the group had considered. Once the decision came down, the working group – apart from its judicial members who were consulted but not asked to support a recommendation and its Department of Justice members— arrived at a consensus that received the approval of the Criminal Justice Section and is reflected in the recommendation that this Report explains.

The result of the decision in *Booker* is to leave federal sentencing practice consistent with ABA policy, as reflected in the ABA Standards for Criminal Justice: Sentencing (3d ed. 1994) , and in the recommendations of the ABA Justice Kennedy Commission. Because a number of members of Congress have expressed an interest in adopting legislation to respond to *Booker*, it is important that the ABA give additional attention to sentencing and to the specific question of what, if anything, is the optimal congressional response. This Report explains the rationale for the recommendation which we recommend to the House of Delegates.

II. The Booker Decision

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2002), the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), the Court clarified that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”

Blakely cast doubt upon the constitutional validity of the Federal Sentencing Guidelines. The Court’s opinion in *United States v. Booker*, 2005 WL 50108 (U.S. Jan 12, 2005), settles that uncertainty.

Writing for a majority of five justices, Justice’s Stevens’ opinion holds that because the federal guidelines permit sentences to be increased on the basis of facts found only by the judge and by a preponderance of the evidence, the guidelines violate the sixth amendment as construed in *Blakely*. This opinion was not surprising to many observers in light of *Blakely*.

More surprising was the other 5-4 opinion. Justice Breyer’s opinion for a different majority (Justice Ginsburg was the 5th vote for both majorities) addresses the appropriate remedy in light of this constitutional problem with the guidelines as written. Concluding that the guidelines did not have to be stricken as a whole, Justice Breyer’s opinion saves the guidelines from constitutional infirmity by striking those parts of them that render them mandatory and the provision requiring appellate review of sentences under a *de novo* standard of review. Sentencing judges are now required to consider guidelines ranges, but are permitted to tailor sentences in light of other statutory concerns as well. This “makes the guidelines effectively advisory.” Appellate review of sentences will now be under a more deferential standard of review – one of overall “reasonableness.”

III. Summary of Recommendations

The recommendation consists of three parts:

1. The Congress should not rush to reject the concept of advisory guidelines until it is able to ascertain that such action is both necessary and likely to be beneficial through the means suggested below.¹

¹ Leaving advisory guidelines in place does not signify that the current guidelines are satisfactory in all respects. Nor does it mean that amendments might not improve the current guidelines. For example, in August 2004, the House of Delegates adopted policy (Report 303) urging Congress to reverse certain recent narrow amendments to the Sentencing Guidelines, including an amendment requiring entities to waive attorney-client and work product protections as a condition for cooperation with the government. The proposed recommendation would not affect

2. The Congress should forthwith direct the United States Sentencing Commission to assemble and analyze all available data regarding sentences imposed under *Booker*, including the information regarding sentences outside the guidelines required by the Feeney Amendment, and submit a Report with recommendations to the Congress within 12 months.
3. While awaiting the Report from the Sentencing Commission on the data, the Congress should conduct hearings and solicit input from all constituents within the federal criminal justice system regarding the wisdom and efficacy of the post-*Booker* procedure and how it compares to any available legislative options as well as state sentencing guidelines systems.

In short, the recommendation urges that Congress proceed with deliberation and caution. The recommendation is supported by the following analysis.

IV. Advisory Guidelines Should Be Given a Chance To Work

The remedial majority in *Booker* reached a result that was not anticipated. Advisory guidelines, coupled with appellate review under a “reasonableness” standard, differs from the mandatory guidelines system because – to avoid constitutional infirmity – sentencing ranges resulting from judicial fact-finding are now advisory rather than mandatory. The *Booker* remedy does not, however, represent a return to pre-guidelines practice. Rather, the current system differs importantly from the pre-guidelines era because now there exist precise guidelines capturing and weighing most of the relevant sentencing factors for consideration by sentencing judges. In addition, there remains a system of appellate review to ensure that sentences are imposed in accordance with law.

In short, *Booker* yields an innovative mix of sentencing procedures that may well yield excellent results that are consistent with policies the ABA has endorsed for many years. Indeed, this new system, which relies upon the concept of presumptive sentences for ordinary cases, yet permits a court to fashion a sentence

this and other existing ABA policies.

outside the guidelines in unusual cases, appears to strike the sort of salutary balance between rule and discretion that is contemplated in ABA policy. *See* ABA Standards for Criminal Justice: Sentencing (3d ed. 1994). *See also* the Report of the ABA Justice Kennedy Commission at 6 (“A combination of guidance and an ability to depart offers some hope of a sentencing system in which offenders are treated alike, while differences among offenders are not overlooked.”)

Precisely because of the novelty of the *Booker* remedy, the Congress should take the full amount of time necessary to determine the desirability and efficacy of this new 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.

There are three arguments why this new system should not be permitted to operate on an interim basis for this period of time: first, the new system could produce large numbers of unduly lenient or harsh results; second, it could be difficult to evaluate the new system; and third, there might exist a readily available and obviously superior alternative. None of these concerns justifies a hasty congressional response.

A. Advisory guidelines may not greatly change the status quo

Congress has previously expressed concern about the degree of judicial compliance with the guidelines, notably in the 2003 Protect Act. A critical aspect of the Protect Act and its so-called Feeney Amendment was the addition of language to 18 U.S.C. § 3553(c) requiring courts desiring to sentence outside the guidelines range to state their reasons for doing so both “with specificity” and in writing. These specifically stated written reasons must then be submitted directly to the United States Sentencing Commission for review and analysis. *These provisions of the Feeney Amendment are unaffected by Booker and remain binding law.*

It is highly probable that judges will continue to sentence within the guideline range precisely because to do otherwise requires specific reasons, in writing, which will then be submitted to the Sentencing Commission. Sentences under advisory guidelines also may closely mirror those dictated by mandatory guidelines because the remaining section 3553(a) factors – just punishment, adequate deterrence, protection of the public, and rehabilitation – are much less specific than the guidelines and in many instances are already taken into consideration by the guidelines themselves. For that reason, one district court has already declared that it will give “heavy weight” to the guidelines and will depart from them only “in unusual cases for clearly identified and persuasive reasons.” *United States v. Wilson*, Case No. 2:03-CR-00882 PGC (D. Utah 1/13/05) (Cassell, J.).

An additional reason to believe judges will not frequently impose sentences outside the guideline ranges is the process of appellate review. *Booker* struck only one section of the law relating to sentencing appeals – 18 U.S.C. § 3742(e) – governing the appellate standard of review. *Booker* did not, however, strike any part of sections 3742(a), (b), or (f). It is unclear whether these remaining sections authorize an appeal of a sentence within a properly calculated guideline range. Even if such appeals are permitted, appellate courts are likely to find sentences imposed within the guidelines range unreasonable only in rare instances. Because district courts will recognize that sentences within the applicable guideline range are more likely to be upheld on appeal, this may be a further reason to expect that they will not sentence outside the guideline range except in unusual cases. Moreover, in those cases where district courts do impose a sentence outside the guidelines range, there will then clearly be appellate review. As the “reasonableness” standard of review evolves in the appellate courts, the number of sentences outside the applicable guideline ranges is unlikely to differ significantly from the pre-*Booker* data.

Yet another reason to expect general compliance with advisory sentencing guidelines is that judges have generally followed the guidelines governing the revocation of supervised release, which have always been advisory in nature. It is our understanding that these guidelines have worked well, and have not been the subject of a large number of amendments over the years.

The experience of the various states that have employed advisory guidelines

also suggests the likelihood that federal judges will continue to sentence within guidelines ranges as a routine matter. See Kim Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, forthcoming in 17 *Federal Sentencing Reporter* ____ (2005)(available at Sentencing.typepad.com/sentencing_law_policy/files/fsr_advisory_guidelines_draft.doc) (describing compliance rates among states with advisory guideline systems). While there is a great variety among these state systems, it appears that judges recognize the institutional advantages of guidelines and tend to follow them in most cases. The reasons for the effectiveness of these state advisory systems would likely be a fruitful area of further investigation for the Sentencing Commission as well as the Congress.

B. Advisory guidelines will not be difficult to evaluate

It will not be difficult to evaluate with precision the manner in which the new system operates. The Feeney Amendment to section 3553(c) will not only tend to reduce the impact of *Booker*, it will also make it quite easy to study that impact.

As noted in *Booker*, “the Sentencing Commission remains in place, writing guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the guidelines accordingly.” Given the information required to be transmitted under section 3553(c) as modified by the Feeney Amendment, the Commission will be able to determine the precise number of cases involving sentences outside the guideline range, the reasons for such sentences, the types of cases involved, the districts involved, as well as the degree to which the sentences imposed differed from the guidelines ranges. And all of this data may in turn be compared to pre-*Booker* data to precisely quantify the extent, manner, and reasons for any differences in sentencing patterns between the mandatory and advisory systems.

C. There is no readily available obviously superior alternative to advisory guidelines

The final consideration for Congress in determining whether to study the new advisory system for 12 months is the extent to which there exists some readily

available obviously superior alternative to doing so. There are no good “quick fixes.”

Two approaches that present significant disadvantages and few advantages are the addition of more mandatory minimum penalties, and the so-called “Bowman fix.” The ABA has consistently advocated the repeal of the existing mandatory minimums (and did so again in approving ABA Justice Kennedy Recommendation 121A). Indeed, even if mandatory minimums were not poor sentencing policy, given the number and variety of federal offenses the establishment of mandatory minimums as an alternative to guidelines would seem to be an extraordinary undertaking.

The “Bowman fix” presents numerous problems. First, this “fix” will itself be unconstitutional if the Court overrules *Harris v. United States*, 536 U.S. 545 (2002)(5-4 decision upholding application of mandatory minimum based on judicial fact-finding). It is difficult in principle to draw a constitutional line between the determination of facts which raise the sentencing ceiling from the determination of facts which raise the sentencing floor. Justice Breyer, who cast the critical fifth vote in *Harris*, recognized this in his separate concurring opinion, in which he explained that he could not “easily distinguish *Apprendi* ... from this case in terms of logic.” Justice Breyer joined the majority in *Harris* because he did not agree with the majority in *Apprendi*, and therefore did not “yet accept its rule.” Now that a majority of the Court has applied *Apprendi* to the Washington state guidelines in *Blakely* and to the federal sentencing guidelines in *Booker*, it seems at least strongly possible that Justice Breyer will now be forced to accept the rule in *Apprendi* and change his vote on the *Harris* issue. For this reason, the “Bowman fix” rests on a foundation that is, at best, of questionable constitutional validity. Given the turmoil that has followed *Blakely* and *Booker*, it would be a mistake to reformulate federal sentencing practice on a foundation that may itself be declared unconstitutional and raise a new round of ex post facto issues when Congress is compelled to fix federal sentencing for a second time.

Second, even if the “Bowman fix” were clearly constitutional, which it is not, it is not a balanced approach to sentencing. This approach essentially converts the guidelines into a very complex system of mandatory minimums, and does nothing to control unwarranted disparity generated by unfairly harsh sentences. Indeed, it essentially sends the message that there is no concern with

sentences that are unduly harsh, so long as no one is punished too leniently. Ironically, it would not be surprising if those most likely to suffer from unwarranted severity are those who choose to exercise their jury trial rights so recently protected in *Blakely* and *Booker*. When the ABA approved the ABA Justice Kennedy Commission, it recommended repeal of mandatory minimums precisely because they tend to lead to unwarranted disparity and severity. The Bowman approach is inconsistent not only with ABA policy with basic fairness.

Finally, this approach is essentially an emergency response to an unanticipated Court ruling rather than a well reasoned analysis of ideal sentencing policy. The federal courts of this nation serve as an example for the fifty states as well as other nations around the world. The federal courts should sentence under a legislative scheme that represents the best we can achieve when starting from scratch, rather than by hastily putting a band-aid on what remains of a very complex system created under assumptions about the Sixth Amendment which have now been rejected by the Supreme Court.

V. The Ex Post Facto Clause Will Delay Implementation of Any New System

The Ex Post Facto Clause of the Constitution will preclude the application of any new sentencing system to crimes committed before its enactment if it exposes a defendant to a more severe sentence. This means that regardless of Congress' level of satisfaction with the concept of advisory guidelines, any new legislation in this area likely will not affect any crimes committed prior to its enactment. As most federal crimes take months, if not years, to investigate and prosecute, the *Booker* advisory guidelines system will be applicable for many cases in the foreseeable future irrespective of immediate Congressional action. Given this reality, there is no compelling reason not to take at least 12 months – a period in which advisory guidelines will be operating in most cases anyway – and study the manner in which this system operates and the results it achieves.

VI. Consideration of an Alternative Solution

The preceding sections make the case that there is no immediate need for the Congress to enact new legislation until the advisory system under *Booker* has been given careful study in practice. But, it is important to recognize that, if, after

12 months, the data shows advisory guidelines are generating unacceptable degrees of disparity, Congress may then wish to consider returning to mandatory guidelines based on jury fact-finding. If there is unwarranted disparity, Congress may feel a need to act quickly. It is important, therefore, for the ABA to consider what alternative Congress might consider once the data have been gathered and carefully examined.

One possibility is the remedy suggested by the *Booker* dissenters on this issue – leave the mandatory guidelines in place but present all upward adjustments to the jury. Such an approach appears fair in principle and might well be workable. It is such an obvious alternative that it should be evaluated fully and promptly. Accordingly, Congress should request the Sentencing Commission to include in its Report to Congress any data it can gather from districts which took this approach during the period between *Blakely* and *Booker*.

Another possible alternative that deserves consideration if an advisory guideline system proves to be problematic is simplifying the guidelines by reducing both the number of offense levels and the number of adjustments and presenting the remaining, more essential, culpability factors to the jury. The factors could be guideline factors established by the Commission or elements of offenses prescribed by Congress. By proposing an alternative as a backup, the recommendation does not imply that advisory guidelines will prove unsuccessful or that an alternative will be found preferable.

This Report describes in four steps how such an approach might look. Once the steps are set forth, it is easy to see why no alternative is simple and sufficient time is needed to evaluate not only advisory guidelines but also the alternatives that might be offered.

First, certain critical culpability factors would be charged in the indictment and presented to the jury. The jury's verdict would yield a sentencing range within the existing statutory range that would ordinarily be binding upon the district court. Decisions regarding which guidelines factors are to be alleged in a charging instrument and proved to a jury and which should be relegated to "within range" consideration are ideally suited to a body such as the United States Sentencing Commission. It could consider, for example, in controlled substances cases (which account for nearly half of the cases) to focus on the factors of drug

quantity and type and role in the offense. Similarly, sentencing for economic crimes might focus on loss and role in the offense. In light of the critique that the current guidelines overemphasize quantity to the detriment of role, these two factors could be merged through a table where quantity runs down the vertical axis and role runs across the horizontal axis. This would permit a wider variety of policy choices including, for example, setting the punishment for minimal role in an offload lower than that for being the kingpin in a distribution network involving less quantity.

Second, as part of the process of simplifying the guidelines as set forth in step one, strong consideration should be given to a modification of the 25% or six-month limitation on sentencing ranges. The number of culpability factors is a trade-off related to both complexity and the width of the sentencing ranges which result – as more factors are submitted to the jury, the system becomes more complex but the resulting sentencing ranges can be narrowed. The SRA limited sentencing ranges to 25% or 6 months and allowed them to overlap. This resulted in a sentencing table with 43 levels. The ABA has urged Congress to repeal the 25% rule – a reform specifically recommended after careful study by the Kennedy Commission. ABA policy, if accepted by Congress, would result in a more workable system that relied on an increased role for juries and could result in simplifying the sentencing table from 43 levels to 10 levels, which could look something like this:

1. 0- 1 year
- 2 1 - 2 years
- 3 2 - 3 years
- 4 3 - 4.5 years
- 5 4.5 - 6.75 years
- 6 6.75 - 10 years
- 7 10 - 15 years
- 8 15 - 22.5 years
- 9 22.5 - 30 years
- 10 30 years - Life

As with the present table, criminal history could be accounted for through horizontal expansion of the table. To allow sufficient flexibility in this process, a few additional offense levels could be added as needed.

Third, because there is nothing in *Booker* that would prohibit downward departures, a simplification of the guidelines should preserve the ability of a district judge to depart downward based upon mitigating circumstances of a kind or to a degree not adequately considered by either the elements presented to the jury or the “within-range” advisory guidelines. Although a defendant would not be able to appeal from any sentence within the guideline range, there could perhaps be a right of appeal similar to the existing one where the court declines to depart as a matter of law rather than fact. The government would be entitled to appeal downward departures both on legal and factual grounds. Because *Booker* holds that the guideline maximum is the statutory maximum, upward departures from the range established by the jury’s verdict would be impermissible. Thus, aggravating factors that would justify an upward departure from the existing guidelines would need to be added as elements for jury consideration to support an increase in the otherwise applicable range.

Fourth, there are a number of procedural issues which would need to be addressed. For example, there may be circumstances in which it will be necessary or prudent to bifurcate the jury’s consideration of some elements in a manner similar to the practice in civil cases involving punitive damages. In addition, jury instructions and rules of criminal procedure would need to reflect the new system. The parties would need to be required to exchange information relating to the new “sentencing” elements of the offense in the same manner as the existing elements of the offense. With appropriate rules in place, the risk of undue prosecutorial leverage through the shift to what is essentially a charged offense rather than a real offense system may be lessened. A prosecutor will have a difficult time leveraging a defendant to plead guilty to an unduly severe charge if the defendant is provided with the government’s evidence and can evaluate the likelihood of a jury conviction on such a charge.

Such an alternative system could be considered independent of a discussion of the length of sentences and whether they should be the same or different from present severity levels. It could focus on the an appropriate balance to be struck between what must be presented to the jury and the avoidance of undue complexity.

VII. Conclusion

The system of mandatory guidelines conceived by Congress and drafted by the Sentencing Commission can no longer stand in light of the Court's Sixth Amendment jurisprudence. The recommendation urges Congress to take the time necessary to study and evaluate the new system rather than moving immediately to a hastily enacted alternative. This Report emphasizes that (1) there is no reason to anticipate wide divergence from the guidelines due to the Feeney Amendment's reporting requirements, appellate review of sentences outside guideline ranges, and the high rate of compliance in other jurisdictions with advisory guidelines; (2) the Feeney Amendment will ensure ready access to the critical data needed to evaluate compliance with the guidelines; and (3) there are no obviously better solutions in the near term, and cases sentenced in the near term will likely be governed by advisory guidelines in any event due to the Ex Post Facto Clause. 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. If not, any alternative should be carefully drafted and appropriately tested before it is enacted.