

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR
Robert D. Evans
rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL
Denise A. Cardman
(202) 662-1761
cardmand@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766
driscollk@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL
R. Larson Frisby
(202) 662-1098
frisbyr@staff.abanet.org

Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Kenneth J. Goldsmith
(202) 662-1789
goldsmithk@staff.abanet.org

Ellen McBarnette
(202) 662-1767
mcbarnete@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS/LEGISLATIVE COUNSEL
Julie M. Strandlie
(202) 662-1764
strandlj@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT
Hayden Gregory
(202) 662-1772
gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL
Rita C. Aguilar
(202) 662-1780
aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT
Julie Pasatiempo
(202) 662-1776
jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES
Sharon Greene
(202) 662-1014
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER
Rhonda J. McMillion
(202) 662-1017
mcmillionr@staff.abanet.org

March 11, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: New ABA Policy regarding the implications of the *Booker/Fanfan*
decisions for the Federal Sentencing Guidelines

Dear Mr. Chairman and Senator Leahy:

On behalf of the American Bar Association ("ABA"), I write to advise you and your colleagues on the Committee that the ABA House of Delegates met last month to consider the recent Supreme Court decisions in *United States v. Booker* and *United States v. Fanfan* and the implications of these decisions for the Federal Sentencing Guidelines. As a result of this process, the ABA has now adopted new recommendations regarding the overall sentencing system. A copy of these Recommendations and a Report in support of them is attached. Please note that only the resolutions are adopted ABA policy.

The ABA recommends that the Congress take no immediate legislative action, and that it not rush to any judgments regarding advisory guidelines until it is able to ascertain that legislation is both necessary and likely to be beneficial. We recommend that in the short term, the United States Sentencing Commission be directed to assemble and analyze all available data regarding sentences imposed under *Booker* and submit a report with recommendations to the Congress within 12 months. While awaiting this report, the Congress may wish to 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 option.

While it is much too early to tell, we believe the advisory guidelines system may well yield excellent results. We believe in the majority of cases courts will continue to sentence within the range suggested by the guidelines. This appears to be the case so far, according to the data referenced by Sentencing Commission Chair Ricardo Hinojosa in his testimony before a House Subcommittee on February 10, 2005. In light of the requirement under 18 U.S.C. § 3553(c) that any court desiring to sentence outside the guideline range state the reason for doing so both “with specificity” and in writing, it should not be difficult for the Sentencing Commission to determine whether and to what extent this trend continues. To the extent judges sentence outside the guidelines range, while explaining precisely why they are doing so, this will provide invaluable insight into the guidelines themselves and the extent to which they have adequately taken into account all of the relevant purposes of sentencing.

The ABA specifically recommends that the Congress not move to enact additional mandatory minimum sentences or so-called “topless” guidelines. We have consistently advocated the repeal of existing mandatory minimum sentences as poor sentencing policy in light of the numerous considerations appropriate to the determination of a just sentence. The principle of eliminating unwarranted disparity requires that dissimilar offenders be treated differently, and mandatory minimums are antithetical to this goal. We also join the bi-partisan Constitution Project in urging the Congress not to adopt “topless” guidelines. As explained in greater detail in our attached Report, such legislation is both constitutionally suspect and poor sentencing policy.

Finally, in the event that careful consideration of the data assembled and analyzed by the Sentencing Commission over the coming year demonstrates that advisory guidelines yield a degree of disparity the Congress finds unacceptable, we have set forth in our Recommendations and supporting Report a very specific and concrete plan for an alternative system of simplified binding guidelines. We are cautiously optimistic that the *Booker* remedy will work well, but if this proves not to be the case, our careful consideration of the other various alternatives leads us to conclude that the best approach may well be to dramatically simplify the guidelines, present critical culpability factors to juries, and allow judges to sentence within a range greater than the present limit of 25%.

In sum, we believe the advisory guideline system may work well, and there is no compelling reason not to take the time to find out. If the Congress is unsatisfied with the results of advisory guidelines after an appropriate period of study, it can always enact corrective legislation. If legislation is enacted too soon, the opportunity to learn whether advisory guidelines can work will have been wasted.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA’s position on these issues, please contact our senior legislative counsel for criminal justice issues, Kevin Driscoll, at (202) 662-1766.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: Members, Committee on the Judiciary