Fact Sheet: The Advisory Guidelines System Best Achieves the Purposes of Sentencing.*

Seventy-five percent of district court judges believe that the advisory guidelines system best achieves the purposes of sentencing; 8% would prefer no guidelines at all, 14% would prefer mandatory guidelines with jury factfinding *if* there were fewer mandatory minimums; and only 3% would prefer the pre-*Booker* mandatory guidelines.[1]

The advisory guidelines system better achieves the purposes of sentencing than the mandatory system before *Booker*, a presumptive guidelines system recently proposed by the Commission, or mandatory rules subject to jury factfinding:

- Judges may impose individualized sentences, taking into account circumstances of the offense and characteristics of the defendant that are relevant to the purposes of sentencing, but that the guidelines omit, discourage or prohibit,[2] and may vary when the guideline sentence fails to achieve § 3553(a)'s objectives even in a mine-run case.[3]
- Sentencing judges and appeals courts generate sentencing data and reasons that the Commission can use, and has used, to revise the guidelines to better achieve the purposes of sentencing, as originally intended by Congress and strongly encouraged by the Supreme Court. Judicial feedback provides useful information to the Commission, brings transparency to its rulemaking, and encourages the Commission to explain its guidelines.
- Supreme Court and lower court sentencing decisions helped inspire the following:
    - Reduction in the crack guidelines in 2007 and 2010[4]
    - Elimination of recency points in 2010[5]
    - Slight expansion of zones B and C in 2010[6]
    - Reduction in enhancements under § 2L1.2 for stale prior convictions in 2011[7]
    - Review and report on guidelines applicable to child pornography offenses[8]

As the Commission revises the guidelines to make more sense, judges follow them more often. The rate of non-government sponsored below guideline sentences dropped from 18.7% in the last quarter of 2010 to 16.9% in the third quarter of 2011, concurrent with the decrease in guideline ranges for crack cocaine offenses and the elimination of recency points, both effective November 1, 2010.[9]

There has been no undue leniency by judges.

- The median decrease when judges depart or vary was 12 months before *Booker*, has been 12-13 months since *Booker*,[10] and the median percent decrease is less than before *Booker*.[11]
- Average sentence length was roughly 46 months before *Booker*, and is 43.3 months as of the third quarter of 2011.[12] The small decrease is almost solely attributable to crack cases (due to variances and reduced guideline ranges), and a substantial increase in prosecutions of immigration cases under 8 U.S.C. § 1326(a) (with a statutory maximum of two years and a low guideline range).[13] Average sentence length has remained the same or slightly increased for all other offenses,[14] except that average sentence length has substantially increased for fraud offenses,[15] and child pornography offenses.[16]
- The guidelines' recommendation of prison in nearly every case continues to be followed.[17] The imposition of straight prison continues to increase, and probation and other alternatives continue to decline, even for some offenses that do not include large numbers of non-

citizens.[18] For example, in 2003, 89.3% of defendants convicted of firearms offenses received straight prison and 4.8% received probation, but in 2011, 92.3% received straight prison and 2.8% received probation. In 2003, 59.6% of defendants convicted of fraud offenses received straight prison and 20.1% of received probation, but in 2011, 70.7% received straight prison and 13.8% received probation.[19]

Prosecutors seek or agree with the vast majority of sentences outside the guideline range.

- The government moved for sentences below the guideline range in 27.7% of all cases in the third quarter of 2011.[20]
- In May 2010, the Attorney General announced that prosecutors may request variances consistent with § 3553(a) with supervisory approval because "[u]nwarranted disparities" can result from "a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case."[21]
- Government-sponsored below range sentences for reasons other than cooperation or fast track have grown from 2.9% of cases in 2005 to 4.3% of cases in 2011.[22] The rate is 15.1% in child pornography cases.[23]
- The government agrees to or does not oppose more than half of sentences classified as "non-government sponsored below range."[24]
- The government appeals as many sentences as it did before *Booker* and its success rate is as high as before *Booker*.
    - In fiscal year 2010, the government raised 156 issues on appeal; thirty of those issues involved § 3553(a) which the government won 60% of the time.[25]
    - When the guidelines were mandatory in 1998, the government raised 122 issues on appeal; 41 of those issues related to departures which it won 61% of the time.
    - In 1999, the government raised 54 issues on appeal; 25 were related to departures which it won 33% of the time.
    - In 2003, under the PROTECT Act standard, the government raised 173 issues on appeal; 63 related to departures which it won 73% of the time.[26]

Proposals for legislative change would create upheaval with nothing gained and much lost.

- **The advisory guidelines** exert a strong gravitational pull, as the data above demonstrates.

- **The Commission's proposals** to give the guidelines and policy statements "substantial weight" at sentencing and on appeal would spawn extensive litigation and likely be held unconstitutional. The Supreme Court has rejected all devices that implicitly or explicitly require or permit the guidelines or policy statements to be given special "weight" at sentencing.[27] Similarly, the heightened standards of review for non-guideline sentences the Commission proposes "come[] too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[28]
- The Commission's proposals would suppress the judicial feedback and transparency that has prompted the Commission to review, revise, and better explain the guidelines, and would discourage courts from taking into account relevant factors that the guidelines omit, prohibit and discourage.
- As the Commission acknowledges: "Each Supreme Court case has required the Commission to increase its efforts to provide meaningful guidance to the courts and the

entire criminal justice system, and to ensure that the guidelines continue to reflect the purposes of sentencing."[29] Meaningful guidance that reflects the purposes of sentencing is the key to strong and effective guidelines. Making them more mandatory is not.

- **A mandatory system with jury factfinding** would require ranges that are wider than variances are today. The median decrease since *Booker* was decided is 12-13 months. One proposal for mandatory rules with jury factfinding would have ranges varying from 15 months to 286 months in width, with 75% of the ranges over 50 months wide.[30] Rather than 258 narrow ranges with gravitational pull, such a system would invite wider variation than exists today.
- Appellate review under such a system would be virtually non-existent and far less effective than the reasonableness standard of review.
    - A jury verdict in favor of the defendant would not be appealable by the government.[31]
    - A jury verdict against the defendant would be reversible only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[32]
    - Most sentences would not be appealable at all because they would be decided conclusively by plea bargains.
- There would be no judicial feedback to the Commission through decisions in real cases because sentences would be determined by plea bargains or juries.
- Such a system would likely put an end to the Commission; Congress would decide the Commission was unnecessary, or the Supreme Court would decide that the Commission violated the Separation of Powers as it would not be making rules for the Judiciary's own business of finding facts and choosing an appropriate sentence, but for prosecutors to charge and prove to a jury beyond a reasonable doubt.[33]
- Judges, prosecutors, the Federal Defenders, and the organized private defense bar do not support such a system.[34]

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[1] U.S. Sent'g Comm'n, Results of Survey of United States District Judges January 2010 through March 2010, tbl. 19 (June 2010). 634 judges answered this question; there are 677 federal district court judgeships, some of which are not filled. *See* Federal Judgeships, http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx.

[2] *See Pepper v. United States*, 131 S. Ct. 1229 (2011); *Gall v. United States*, 552 U.S. 38 (2007).

[3] *Rita v. United States*, 551 U.S. 338, 351, 357 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).

[4] U.S. Sent'g Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy, Chapter 6 (May 2007) (describing *Booker*, the pending *Claiborne* case, and lower court decisions as a reason for 2007 amendment and need for further change); 72 Fed. Reg. 28558, 28573 (May 21, 2007) (urging Congress to take further action).

[5] USSG, amend. 742 (Nov. 1, 2010) (citing below-guideline sentences based on criminal history issues in cases in which recency points were added as a reason for amendment).

[6] USSG, amend. 738 (Nov. 1, 2010) (citing judicial feedback as a reason for amendment).

[7] USSG, amend. 754 (Nov. 1, 2011) (citing appellate decisions finding unwarranted uniformity in requiring same increase regardless of age of conviction).

[8] U.S. Sent'g Comm'n, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); U.S. Sent'g Comm'n, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010).

[9] U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbl. 4 (June 30, 2011).

[10] *See* U.S. Sent'g Comm'n, 2003-2004 Sourcebook of Federal Sentencing Statistics, tbl. 31A; USSC, 2005-2010 Sourcebook of Federal Sentencing Statistics, tbls. 31A-31D; U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbls. 10-13 (June 30, 2011); Testimony of James E. Felman on Behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the House of Representatives, Appendix (Oct. 12, 2011).

[11] *See* U.S. Sent'g Comm'n, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 31A (40%); 2004 Sourcebook of Federal Sentencing Statistics, tbl. 31A (35.1% pre-*Blakely*, 37.5% post-*Blakely*); U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbls. 10, 12 (June 30, 2011) (over 90% of downward departures and variances are 34.8% or less below the range).

[12] *See* U.S. Sent'g Comm'n, 2001-2007 Sourcebook of Federal Sentencing Statistics, tbl. 13; U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbl. 19, figs. C-I (June 30, 2011).

[13] *Id*., fig. G, I.

[14] *Id*., figs. C-I.

[15] *Id*., fig. D.

[16] *Id*., tbl. 19 (119.5 months); U.S. Sent'g Comm'n, 2005 Sourcebook of Federal Sentencing Statistics, tbl. 13 (75 months before *Booker*, 78.6 months after *Booker*).

[17] U.S. Sent'g Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* 12 (2009).

[18] *See* U.S. Sent'g Comm'n, Sourcebook of Federal Sentencing Statistics, tbl.12 (1991-2010); U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbl. 18 (June 30, 2011).

[19] *See* U.S. Sent'g Comm'n, 2003 Sourcebook of Federal Sentencing Statistics, tbl.12; U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbl. 18 (June 30, 2011).

[20] *Id*.

[21] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1, 3 (May 19, 2010).

[22] *See* U.S. Sent'g Comm'n, 2005 Sourcebook, tbl. 26; U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Third Quarter Release, tbl. 1 (June 30, 2011).

[23] *Id*., tbl. 3.

[24] First, the government did not object to 46% (3,332 of 7,266) defense motions for a below range sentence classified as "non-government sponsored" in 2010. U.S. Sent'g Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, tbl.28A. Second, because the statement of reasons form does not provide a checkbox for the court to indicate the government's position regarding reasons not addressed in a plea agreement or motion by a party, there is no information on the government's position in 4,773 such instances, all of which are classified as "non-government sponsored." *Id*. Since defense attorneys generally raise all non-frivolous grounds for below range sentences and judges do not raise meritless grounds *sua sponte*, it is likely that the government did not object to a significant portion of these sentences. Third, in 3,246 cases classified as "non-government sponsored" below range, the Commission did not receive sufficient information to determine the government's position or whether the source was a plea agreement, a motion by a party, or something else. *Id*. Since a large majority of cases for which information was available were government sponsored, it is reasonable to assume that the government sponsored or acquiesced in a large portion of cases where information was not available.

[25] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls.56A, 58.

[26] *See* USSC, 1998 Sourcebook of Federal Sentencing Statistics, tbl. 56 (5K2.0, 5H1.6, 5H1.4 and 5K2.13 are departure issues); USSC, 1999 Sourcebook of Federal Sentencing Statistics, tbl. 58 (5K2.0, 4A1.3, 5H1.6, and 5H1.12 are departure issues); USSC, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 58 (5K2.0, 4A1.3, 5H1.6, 5K2.13, 5H1.4, 5H1.10, and 5H1.11 are departure issues).

[27] *See Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall v. United States*, 552 U.S. 38, 50, 51, 53-60 (2007); *Kimbrough v. United States*, 552 U.S. 85, 90-91, 108-111 (2007); *Nelson v. United States*, 129 S. Ct. 890, 891-92 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009); *Pepper v. United States*, 131 S. Ct. 1229, 1241-43, 1246-50 (2011). One Justice has argued, to no avail, that the guidelines and policy statements be given "some significant weight." *Gall*, 552 U.S. at 68 (Alito, J., dissenting).

[28] *Gall*, 552 U.S. at 47.

[29] Commission Testimony at 61.

[30] William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305, 345 (2011).

[31] *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

[32] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[33] *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989).

[34] *See* U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19; Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010); Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to the Hon. F. James Sensenbrenner and the Hon. Robert C. (Bobby) Scott (Oct. 11, 2011); Testimony of James E. Felman on behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives (Oct. 12, 2011) .