Testimony of Daniel P. Collins
before the United States Sentencing Commission
February 16, 2005

Judge Hinojosa and members of the Commission, I wish to thank you for the opportunity to testify before you today. I believe that the U.S. Sentencing Commission has a critical role to play in helping to ensure that, in the aftermath of the United States Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the goals of the Sentencing Reform Act of 1984 can continue to be achieved in a manner that is consistent with the Constitution.

My perspective on federal sentencing policy is informed by my service over a total of nearly eight years in various capacities in the Justice Department. During the 1990s, I served three and one-half years as a federal prosecutor in the U.S. Attorney' Office in Los Angeles. More recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. During my time as an ADAG, I testified several times before Congress concerning a variety of provisions that were ultimately enacted into law in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003. The PROTECT Act enacted some of the most significant reforms in federal sentencing policy since the original enactment of the Sentencing Reform Act of 1984. I also helped to develop the Administration's 2002 proposal to strengthen federal sentencing of identity theft crimes, a proposal that I was pleased to see ultimately enacted into law as the Identity Theft Penalty Enhancement Act. I also helped coordinate the Department's 2003 review and revision of its policies on charging of criminal offenses, plea bargaining, sentencing recommendations, and sentencing appeals. While my views on federal sentencing policy are influenced by my prior experiences working on such

matters in the Government, I am now back in private practice in Los Angeles, and I wish to emphasize that the views I offer today are solely my own.

The Need for Legislation

I had the privilege of appearing last week on a panel that also included Judge Hinojosa, the Chairman of this Commission, at a hearing held by a Subcommittee of the House Judiciary Committee concerning the *Booker* decision. I will not repeat here everything I said there, but since one of the topics for this Commission hearing is the potential need for new legislation, I will briefly summarize the recommendation I made last week to the House Judiciary Committee.

In my view, the Guidelines sentence system, as it existed before the decision in *Booker*, was a success by almost every measure. The Guidelines have, together with analogous systems at the state level, helped to reduce crime and ensure public safety, while at the same time respecting and fostering important values of proportionality, consistency, and fairness. Accordingly, I believe that Congress should act to rebuild the federal sentencing system so that it can function most nearly as it did before *Booker*.

Because the critical flaw in the Guidelines under *Booker* and *Blakely* is that, in the absence of particular findings, the Guidelines set a legally enforceable *maximum* sentence that is *below* the theoretical statutory maximum, *Booker*, 125 S. Ct. at 751; *Blakely*, 124 S. Ct. at 2540, the simple solution for Congress to adopt is to get rid of those maxima. In other words, the Sentencing Guidelines should be fully restored exactly as they were before, with the sole exception that, in *every* case, the top of the authorized range would be the statutory maximum. Because *Booker* is unambiguously clear in stating that the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range," 125 S. Ct. at 750, there can be little doubt that this revised system would satisfy *Booker* and *Blakely*.

Although such a system would eliminate the protection previously afforded by the top of the Guidelines range, the empirical data shows that, in practice, very few sentences were ever imposed above the range. For example, in the last fiscal year for which data are publicly available, upward departures occurred in only 457 of 58,684 cases sentenced nationwide — a grand total of 0.8%. Given the proclivities demonstrated by this data, there is little reason to think that many judges will in fact take advantage of the increased flexibility at the top of the range.

However, because the widened ranges employed by this proposal would generally violate the requirement in 28 U.S.C. § 994(b)(2) that the top of a range not exceed more than 25% of the bottom of the range, this across-the-board reform can only be accomplished by Congress, and not by this Commission. Moreover, restoration of the *de novo* review provisions of 18 U.S.C. § 3742(e) — an important PROTECT Act reform that should be reinstituted — would likewise also take an act of Congress.

The Authority of this Commission

Although I favor legislative action as the ultimate solution to the problems created by *Booker*, that does not mean that I believe that the Commission should simply sit by and do nothing. On the contrary, the Commission has an ongoing obligation, under existing law, to adopt guidelines and policy statements that will best carry out the purposes of the Sentencing Reform Act, as it exists today. In that regard, there are, I think, a number of measures the Commission may wish to consider taking now, no matter what happens in Congress.

Before I summarize some of the issues I think the Commission should consider, it makes sense to summarize briefly the extent to which the *Booker* decision does and does not leave this Commission's authority undisturbed. Under 28 U.S.C. § 994(a)(1), the Commission has

authority to promulgate "guidelines" that govern the determination of the kinds of sentences to be imposed and the appropriate magnitude of such sentences. Section 994(a)(2) grants the Commission the authority to prescribe "general policy statements regarding application of the guidelines *or any other aspect of sentencing* or sentence implementation that *in the view of the Commission* would further the purposes set forth in section 3553(a)(2) …." 28 U.S.C. § 994(a)(2) (emphasis added). Prior to *Booker*, the Supreme Court had held that "[t]he principle that the Guidelines Manual is binding on federal courts *applies as well to policy statements*." *Stinson v. United States*, 508 U.S. 36, 42 (1993) (emphasis added).

With respect to the sentencing determinations to be made by district courts, *Booker* only severs 18 U.S.C. § 3553(b)(1), the provision that (in the absence of grounds for departure) compels imposition of a sentence "of the kind, and within the range, referred to in subsection (a)(4)." *See Booker*, 125 S. Ct. at 764-65. Although the provision that made the ranges binding has been severed, *Booker* leaves intact section 3553(a)(4), which requires the district court to "consider" the "sentencing range" established under the "guidelines." Because a "sentencing range" is just that — a range — and not a command, the remaining instruction to "consider" such ranges leaves the guidelines ranges advisory, and not mandatory.

Booker also leaves undisturbed the provision of § 3553(a)(5) that requires the district court to consider "any pertinent policy statement" issued by the Commission. To the extent that a policy statement merely interprets a "guideline," it can be no more mandatory than the "guideline" it interprets. But not all policy statements merely interpret guidelines, and those that do not may well remain binding: because such a "policy statement" is *itself* prescriptive, the obligation to "consider" such a "policy statement" would become, in effect, an obligation to *comply with* a requirement set forth in that policy statement. The distinction may not amount to

much after *Booker*, though, because any such policy statement that sought to *prescribe* the imposition of *specified* terms of imprisonment is, in effect, a "guideline," whose ranges (1) are no longer binding and (2) must still comply with the 25% limitation.

Booker also excises 18 U.S.C. § 3742(e), which had established the applicable standards of review on appeal, and replaces those various standards with a single standard of "reasonableness," which is to be judged in light of the sentencing factors set forth in 18 U.S.C. § 3553(a). *See Booker*, 125 S. Ct. at 765-66. Those sentencing factors include the "sentencing range" established under the guidelines. 18 U.S.C. § 3553(a)(4).

The decision in *Booker* leaves undisturbed the remaining powers of this Commission. As before, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." 125 S. Ct. at 767.

Steps the Commission Should Consider

There are several steps that the Commission may wish to consider taking, in light of *Booker*, in exercising its remaining powers.

First, and most importantly, the Commission should strongly consider developing and issuing a policy statement under 28 U.S.C. § 994(a)(2) that would provide general guidance for determining when a sentence is "reasonable" in light of the factors specified under 18 U.S.C. § 3553(a). As explained above, such a policy statement could not purport to *require* imposition of a *specified* sentence. But it could assist in providing discipline to what is otherwise a very open-ended inquiry after *Booker*. After all, it remains the role of this Commission, and not the courts as a whole, to "establish sentencing policies and practices for the Federal criminal justice

system that," *inter alia*, "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." *See* 28 U.S.C. § 991(b). To avoid confusion, such a policy statement (which would only have significance unless and until Congress passes legislation amending the Sentencing Reform Act in light of *Booker*) should be issued as a stand-alone new policy statement. That is, the Commission should *not* amend or eliminate *existing* policy statements, because such a course could end up unduly complicating any congressional efforts to reinstitute the guidelines system.

What might a stand-alone policy statement implementing *Booker* say? It could probably safely say, at a minimum, that a sentence *within* the guidelines range is conclusively deemed to be reasonable. *Booker* did not sever the threshold requirements for obtaining review of a sentence under 18 U.S.C. § 3742(a), (b), and (c), and such a presumption seems consonant with those threshold requirements (and with common sense).

Another safe harbor might be cases in which the *unadjusted* guidelines range is high enough to *include the statutory maximum*. As explained above, such cases do not raise any Sixth Amendment issue. Thus, for example, the Commission might provide that, in such cases, any sentence outside the applicable range is presumptively *unreasonable* in the absence of a ground that would have justified a downward departure under the pre-*Booker* guidelines.

Beyond these two safe harbors, however, matters are more complicated. A firm rule that a sentence *above* the guidelines range is unreasonable in the absence of specified findings (however framed) starts to look a lot like the old guidelines system and may well create another *Booker* problem. To avoid a Sixth Amendment problem, any such policy statement cannot create a *right* to a maximum sentence below the statutory maximum. A policy statement can *guide* a court's discretion to go above the guidelines range, but the discretion must be real and must exist in every case. Anything that seeks to eliminate that discretion seems, as a general

matter, likely to create a *Booker* problem under Justice Stevens' majority opinion on the Sixth Amendment issue and also seems inconsistent with the remedy crafted in Justice Breyer's separate majority opinion.

That does not mean, however, that the Commission cannot act to guide and, even in some respects, to limit the discretion to go above (or below) the guidelines range. Thus, for example, there are certain factors that, as a matter of statute, are always inappropriate, such as race, sex, national origin, creed, and socioeconomic status. 28 U.S.C. § 994(d). These factors are made always improper under the policy statement in U.S.S.G. § 5H1.10, and nothing in *Booker* affects that. There are additional factors that are classified as "general[ly] inappropriate[]," such as "education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). The treatment of these factors in the current Guidelines Manual is more variegated, and is largely framed in terms of when a "departure" is warranted. *See, e.g.*, U.S.S.G. § 5H1.5 (employment record) (policy statement). The Commission may wish to consider issuing a new policy statement that emphasizes the general inappropriateness of relying upon such factors, post-*Booker*, in determining *any* sentence in light of the factors in § 3553(a), *i.e.*, this new policy statement would not be framed solely in terms of "departures."

The Commission might also consider adopting a policy statement requiring a district court, before it selects a sentence outside the applicable guidelines range, to explain with specificity why such a sentence is *reasonable* in light of the factors set forth in 18 U.S.C. § 3553(a). In this regard, it is notable that the required specificity for outside-the-range sentences in 18 U.S.C. § 3553(c) was *not* severed in *Booker*, nor did *Booker* sever the provisions of 18 U.S.C. § 3742(f)(2), which allow a Court of Appeals to vacate sentences outside the range

when there is an inadequate explanation for doing so. The Commission therefore could probably adopt a policy statement establishing that the failure to provide an adequate articulation of the reasons for going outside the range, without more, renders a sentence unreasonable.

In terms of sentencing procedure, the Commission may wish to make clear that the prior notice requirement of Fed. R. Crim. P. 32(h) and U.S.S.G. § 6A1.4 will fully apply, post-*Booker*, to all sentences that are outside the guidelines range. The value of this prior-notice requirement, I think, survives the demise in *Booker* of the need to invoke a formal "departure."

There is one additional puzzle remaining from *Booker* that I think should be carefully considered by the Commission. The Court specifically severed *only* 18 U.S.C. § 3553(b)(1), leaving intact 18 U.S.C. § 3553(b)(2). Section 3553(b)(2), which was added by the PROTECT Act, sharply limits *downward* departure authority in certain cases involving certain crimes against children and sex offenses, but *without* imposing any comparable restrictions upon *upward* departures. It is difficult to know whether the Court meant to leave open the possibility that a different severability analysis would apply to § 3553(b)(2) than applied to § 3553(b)(1). The Court's severability analysis under § 3553(b)(1) relied heavily on its conclusion that a "one-way lever" — in which there were limits on the ability to *reduce* sentences, but not to *increase* them — was not "compatible with Congress' intent." *Booker*, 125 S. Ct. at 768. Exactly the opposite is true with respect to § 3553(b)(2), which on its face shows a greater desire to limit sentences downwards than upwards. It may well be that, under a proper severability analysis, the only language in section 3553(b)(2) that should be severed is the requirement that the aggravating circumstance justifying an above-range sentence be one that is "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Conceivably, the Commission might lend further support to such a conclusion

by eliminating any existing restraints in the Guidelines Manual on upward departures in such cases. Whether such an action by the Commission is in fact permissible or desirable may warrant additional study.

Collectively, these measures fall far short of what the Sentencing Reform Act envisioned, and that is why I think legislative action is required. But these measures would properly invoke this Commission's power to set federal sentencing policy within the confines set by Congress, and would help reduce the inevitable confusion wrought by the *Booker* decision.

* * * * *

I would be pleased to answer any questions the Commissioners may have.