Testimony of Bruce Fein on the Effects of U.S. v. Booker on the Federal Sentencing Guidelines before the United States Sentencing Commission

Wednesday, February 16, 2005

Dear Mr. Chairman and Members of the Commission:

I am grateful for the opportunity to share my views on federal sentencing in the aftermath of United States v. Booker. Two key holdings in the case are crucial. First, neither the Commission nor Congress can establish sentencing rules that permit a judge as opposed to a jury to enhance a sentence above statutory or commission maximum based on fact-finding (other than a prior conviction) by a preponderance of the evidence consistent with the constitutional right to a jury trial. Second, to remedy the unconstitutionality of the mandatory Federal Sentencing Guidelines, the pertinent congressional statutes will be interpreted as requiring federal judges to "consult" or seriously consider the guidelines in sentencing, and to subject sentencing decisions to appellate review for "reasonableness," not de novo but with due deference to the sentencing judge. As to the latter holding, Congress may by simple legislation alter its sentencing rules short of reinstating mandatory guidelines administered by a judge.

To clarify sentencing in the wake of Booker, I would recommend the following. The procedures for bringing information to the sentencing court by a probation officer and the defendant should remain undisturbed. But Congress should enact legislation declaring specific and general deterrence as the primary objectives in sentencing, and rehabilitation or retribution of secondary or tertiary concern. The legislation should state that Federal Sentencing Guidelines should be consulted as informative in determining what sentence would best achieve the deterrence goal. The law should further direct the sentencing judge to issue an opinion explaining the deterrence rationale of every sentence, and why a greater or lesser sentence would not have been superior. The

opinions should not be sealed, but open to public scrutiny. In exceptional cases where a deterrence objective in lieu of rehabilitation or retribution would occasion a sentence that would "shock the conscience," the sentencing judge should be authorized to substitute either of the latter as the North star of the sentence.

All cases of recidivism, whether the new crime is federal or state, should be reported to the Administrative Office of United States Courts for annual compilation and distribution. That database will assist federal judges in imposing sentences that better deter crime.

Booker forbids federal judges from presuming that a sentence within the guidelines is, ipso facto, "reasonable." Such a presumption would make the guidelines mandatory, not advisory, at least for purposes of the constitutional right to jury trial.

The "reasonableness" standard of appellate review embraced by Justice Breyer in his remedial opinion stands on a statutory, not a constitutional plane. Thus, Congress may amend the standard by simple legislation. After Booker, sentences within the guidelines wear no greater trappings of legality than sentences without. To establish de novo review for only the former thus would seem contrary to that principle because sentences endorsed by the guidelines would enjoy a legal premium. The appellate review provisions of 18 U.S.Code 3742 should be amended to establish an abuse of discretion standard pivoting on the overarching deterrence objective of sentencing.

Booker left undisturbed the authority of federal judges to consult substantial assistance, fast track programs, or acceptance of responsibility in imposing a sentence. If the remedial holding of Booker is not superceded by a statute of the type I have recommended, then defendants will be more reluctant to accept a plea bargain or offer

cooperation. Stripped of their mandatory quality, the Federal Sentencing Guidelines are less threatening to the freedom of defendants, and correspondingly diminish the leverage of the prosecutor in plea bargaining. Booker is too recent to make confidant projections about the magnitude of the diminishment.

Booker permits Congress to prohibit federal judges from considering certain factors at sentencing, for example, retribution, rehabilitation, the defendant's education level or martial status. Booker permits federal judges to consider factors prohibited by the Federal Sentencing Guidelines as long as they consult the prohibition in imposing sentences. Sentencing to achieve deterrence is too fact-specific to warrant a statute declaring in advance that a particular fact shall never be considered.

A May 2001 Maryland Commission Report on Sentencing Guidelines showed that the purely advisory guidelines in Maryland were followed in less than 40% of all cases. In contrast, the corresponding voluntary guidelines in Virginia, Pennsylvania, and Minnesota were followed in 77.4%, 88%, and 75% of the cases, respectively. Mandatory guidelines in Kansas, Washington, and North Carolina commanded adherence in 87.6%, 90.4%, and 81% of the cases, respectively. These comparisons suggest that voluntary guidelines may work almost as effectively as their mandatory counterparts in achieving more uniform sentences, although the details of each scheme are unique. More intense study must be completed before seeking to extrapolate predictions from state experience for the Federal Sentencing Guidelines post-Booker.

In conclusion, the loadstar for federal sentencing changes should be deterrence. The incidence of crime is determined by numerous factors. But one major factor is imprisonment that prevents guilty from committing additional crimes. Crime statistics,

human nature, and intuition counsel that stricter sentencing would reduce crime while more lenient sentencing would jump its incidence. At sentencing, it is more important that the innocent be protected from new crimes than that the guilty serve a sentence marginally more severe than in hindsight might have been necessary to avoid recidivism.