Seeking to Fix Only What's Obviously Broke in the post-*Booker* Federal Sentencing System

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Judge Saris and members of the Commission, thank you for the kind invitation to present my views about federal sentencing reform options. It is a pleasure and honor to again share my perspective on the evolution and future development of federal sentencing law, now more than seven years after the Supreme Court's landmark opinion in *United States v. Booker*.

My thoughts now about modern federal sentencing keep getting drawn to the folk wisdom which says "if it ain't broke, don't fix it." Indeed, as I consider potential reforms to the federal sentencing system circa 2012, a corollary comes to mind: "try to fix only what's obviously broke, and don't risk breaking what ain't obviously broke." Stating my views in less folksy terms, I believe that the current federal guideline sentencing system is working fairly well, though there are a few obvious problems which call for the U.S. Sentencing Commission's focused and sustained attention. Via these brief comments, I will explain why I think the current state of federal sentencing should be considered pretty sound, and then outline how I think the post-*Booker* federal sentencing system could be made even sounder.

What Ain't Broke: Low Crime Rates and High Affinity Rates in the Post-*Booker* Era

My assertion that the current federal sentencing system is working fairly well is based principally on the quantitative metric of national crime rates and on a qualitative judgment concerning the views of those directly involved in the day-to-day administration of the federal criminal justice system. Though the intricacies of national crime rates and the viewpoints of front-line sentencing actors can be subject to varied interpretations, the basics are crystal clear:

(1) national crime rates have continued to decline to historically low levels during the post-*Booker* era of federal sentencing, and (2) those directly involved in the federal criminal justice system generally believe that the *Booker* ruling improved the administration of sentencing justice (or, at the very least, they recognize that the current advisory guideline system may be the most functional of all possible constitutional sentencing structures absent a major overhaul of the federal criminal code).

A sentencing system which contributes to low crime rates ***or*** which achieves "high affinity" rates among sentencing participants would justify praise on that basis alone. When considering any significant reforms to the federal sentencing system, this Commission should appreciate that the post-*Booker* era of federal sentencing has been a period of ***both*** low crime rates ***and*** high affinity for the system from those involved in its day-to-day administration.

Of course, few (if any) criminologists claim the *Booker* ruling and an advisory federal guideline system has played a significant (or any) role in the great modern crime decline. Still, few (if any) criminologists claim that the *Booker* ruling and an advisory federal guideline system has disrupted whatever forces and factors have resulted in historic reductions in crimes rates over the last two decades. Indeed, because criminologists have struggled to figure out precisely why crime rates have dramatically declined in recent years, any major criminal justice reforms should proceed with great caution: something is "working" to reduce crime nationwide even though we cannot quite figure out what; major changes to the federal sentencing status quo may not be wise unless and until we can be confident that the changes will not adversely impact the positive crime trends that have continued apace through the post-*Booker* era.

Meanwhile, many federal district judges — as well as many federal defense attorneys and even some federal prosecutors — claim that the *Booker* ruling and an advisory federal guideline system has played a significant role in their greater affinity for modern federal sentencing law and practice. As members of this Commission know from its recent survey, most federal district judges favor the current advisory guidelines system; by a huge margin, district judges believe the current system best achieves the purposes of sentencing set forth by Congress in the Sentencing Reform Act as compared to potential alternatives.[1] Similarly, federal

[1] *See* U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl. 19 (June 2010) [hereinafter USSC, *Survey Results*] (reporting that 75% of district judges who responded to survey believed that the current advisory guidelines system best achieves the purposes of sentencing, and that no alternative system was supported as an alternative by even 15% of the responding judges).

prosecutors and defense attorneys who work with the advisory guideline system on a day-to-day basis have repeatedly demonstrated, through both word and deed, their support for all the essential structural elements of the post-*Booker* sentencing system.[2] Though some Justice Department officials have expressed concerns about the potential for increased sentencing disparities, and though some defense attorneys have expressed concern about the particulars of many guidelines, there has been no serious advocacy coming from either federal prosecutors or the defense bar for any significant structural reforms to the post-*Booker* federal sentencing system.

Those persons involved in the administration of the federal criminal justice system on a day-to-day basis are generally supportive of the modern sentencing structure because, at least in the district courts, the move to an advisory guideline system has generally made federal sentencing decision-making more balanced, transparent, and proportional by (1) improving the balance between the application of structured sentencing rules and the broader purposes of sentencing, and the between the impact of judicial and prosecutorial discretion at sentencing; (2) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances and to state expressly at sentencing the purpose-based reasons their sentencing judgments; and (3) reordering sentencing outcomes so that those defendants most deserving of reduced (or increased) sentences are getting the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines.

Put simply and with folk wisdom in mind, all of those working most closely with the federal sentencing system think it ain't broke: after now more than seven years of experience with the advisory guidelines, front-line sentencing participants still believe *Booker*'s structural changes have been mostly for the better and have furthered the basic goals pursued by Congress when it enacted the Sentencing Reform Act. Consequently, I have a very hard time seeing just why this Commission should be urging or supporting any kind of so-called "*Booker* fix" when any such fix seems like a solution in search of a problem.

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[2] *See generally* Written Testimony of James E. Felman on Behalf of American Bar Association submitted to the Subcommittee on Crime, Terrorism and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (October 12, 2011); Letter from Thomas W. Hillier, II, on behalf of Federal Public and Community Defenders to Chair Sensenbrenner and Representative Scott of the Subcommittee on Crime, Terrorism and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (October 11, 2011); Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010) (noting that the Attorney General's working group with conducting "a comprehensive review of federal sentencing and corrections policy" ultimately "supported the current advisory Sentencing Guidelines system").

What's Obviously Broke: Undue Sentencing *Severity* (Fostering Greater Disparity)

Because *Booker* increased judicial sentencing discretion by making the guidelines advisory, it is understandable we hear concerns expressed about the potential for increased disparities in federal sentencing outcomes. But, as members of this Commission know well, there is serious debate and on-going uncertainty as to (1) whether the move to an advisory guideline system has truly increased federal sentencing disparities, (2) whether (opaque and unreviewable) prosecutorial charging and bargaining discretion accounts for any disparities more than the exercise of (transparent and reviewable) judicial sentencing discretion, and (3) whether any new disparities are truly "unwarranted" or instead reflect legitimate sentencing factors given Congress's stated sentencing purposes in the Sentencing Reform Act. In fact, this Commission's recent report to Congress on mandatory minimum penalties, the Commission's prior survey of district judges, and new independent research ***all*** strongly indicate that, to the extent that there is a major problem with unwarranted sentencing disparities in the modern federal sentencing system, such disparities are principally attributable to the operation of mandatory minimum sentencing provisions as impacted by the exercise of prosecutorial discretion.[3]

Critically, in addition to documenting that "different charging and plea practices have developed in various districts that result in the disparate application of certain mandatory minimum penalties," this Commission's recent report to Congress also highlighted that it is those "mandatory minimum penalties that are considered excessively severe [which] tend to be applied inconsistently."[4] This unsurprising finding provides a critical lesson for anyone concerned about potential disparities in the modern federal sentencing system, and it accounts for why I strongly believe that, at this important moment in the evolution and reform of federal sentencing law and policy, this Commission should expressly and forcefully shift its focus for federal sentencing reforms to the enduring problem of unwarranted ***severity*** in the federal sentencing system. What

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[3] *See* U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 345-46 (Oct. 2011) [hereinafter USSC, *Report on Mandatory Minimum Penalties*] (recognizing that "different charging and plea practices have developed in various districts that result in the disparate application of certain mandatory minimum penalties"); USSC, *Survey Results*, supra note 1, tbl. 16 (reporting that majority of district judges who responded to survey believed that "Statutory Mandatory Minimums" and "Charging Decisions" were the "most significant contributors" to unwarranted sentencing disparities); M. Marit Rehavi & Sonja B Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, U. of Mich. Law and Econ. Empirical Legal Studies Research Paper, at 2-3 (Jan. 15, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377&download=yes## (reporting on original research indicating considerable racial disparities in the charging and bargaining decisions by federal prosecutors with the "most striking racial disparities ... in the rates of bringing charges that carry mandatory-minimum penalties").

[4] USSC, *Report on Mandatory Minimum Penalties*, *supra* note 3, at 345-46, 368.

the Commission discovered in its study of the application of statutory mandatory minimum penalties also applies in the application of an advisory guideline system: unwarranted sentencing severity is often the root cause of any unwarranted sentencing disparity, and thus efforts to reduce unwarranted sentencing severity are likely to serve as the most effective way to reduce unwarranted sentencing disparity.

The post-*Booker* experiences with the crack guidelines provides a high-profile and very important example of how unwarranted sentencing severity can be the root cause of disparities and how justified reductions in guideline severity can help reduce disparities: anecdotal reports and cumulative sentencing data indicate that wide-spread and forceful criticisms of the severity of the crack guidelines — from this Commission and from others — accounted for why many (but not all) federal judges often varied from the long prison terms these guidelines recommended before recent changes, and these same sources suggest that reductions in the severity of the crack guidelines following enactment of the Fair Sentencing Act has now reduced the number of variances in these cases.

Tellingly and unsurprisingly, the types of offenses for which there has most often been expressions of special concerns about potential disparities in the post-*Booker* era — *e.g.*, high-loss fraud offenses, some drug offenses, and child pornography downloading offenses — all involve sentencing guidelines with the most severe and jurisprudentially questionable upward enhancements, and guidelines which often recommended very long prison terms even for first offenders with significant mitigating circumstances. Because these problematically harsh guidelines regularly recommend lengthy prison terms even for relatively less serious offenders, it is almost inevitable that different district judges will reach different good-faith judgments about whether and how much to depart from these "broken guidelines" in light of the mandate from Congress that judges impose sentences "sufficient, but not greater than necessary" to achieve the purposes of punishment set forth in the Sentencing Reform Act. If this Commission were to reform problematically harsh guidelines so that they better differentiate among mitigated and aggravated offenders — *i.e.*, if this Commission were to commit itself to fixing those guidelines that are obviously broken as evidenced by high variance rates rather than worrying about how to engineer a "*Booker* fix" — it is very likely that all judges nationwide will show more respect for, and more regularly sentence within, the the new and improved guidelines.

Moving beyond the connection between unwarranted severity and unwarranted disparity, this Commission should expressly recognize and fully appreciate that recent comments and actions by members of all three branches of the federal government reveal that everyone focused on modern federal criminal justice realities has serious and sustained concerns about the undue severity of at least some aspects of federal sentencing law.

Consider, to begin, the past and recent sentencing work of Congress. In the pre-*Booker* period, Congress quite frequently enacted sentencing provisions with increased mandatory minimum sentencing provisions and the 2003 PROTECT Act even directly amended the guidelines to make them more severe in addition to adding or increasing mandatory minimum sentencing provisions. Since *Booker*, however, there have been fewer such congressional enactments and the most consequential sentencing legislation passed in recent years was the historic Fair Sentencing Act which significantly lowered mandatory minimum sentences and directed this Commission to lower significantly the guideline ranges for all crack offenses. (In this setting, it also bears recalling that Congress has not sought since *Booker* to alter the key provision in 18 U.S.C. § 3553(a) that still expressly requires judges to impose sentences that are "sufficient, but not greater than necessary" to achieve the purposes set out in the Sentencing Reform Act, while only urging judges to "consider" the need to avoid unwarranted sentencing disparities. This reality provides enduring textual evidence that Congress still wishes that the federal judiciary (which, of course, includes the U.S. Sentencing Commission) be concerned about unwarranted sentencing severity as much, if not more, than unwarranted sentencing disparity.)

Moring from the work of the legislative branch to that of the executive branch, the U.S. Department of Justice has in recent years been a clear and cogent advocate for reasoned and reasonable reductions to the most unduly severe federal sentencing laws. The Justice Department was, for example, a vocal and consistent advocate for the types of sentencing reforms that found expression in the Fair Sentencing Act, and the Department had even urged Congress to reduce crack sentencing terms even more than Congress ultimately did. In addition, in a discussion of the work of Attorney General Eric Holder's Sentencing and Corrections Working Group published in the *Federal Sentencing Reporter*, Assistant Attorney General Lanny Breuer stated expressly that the Working Group had identified "real and substantial excesses in prison terms meted out under mandatory sentencing laws for some nonviolent

offenders" and that the "Working Group study led to the conclusion that some reform of these laws is needed."[5] And the Justice Department recently stressed in its letter to the Commission just a few months ago that it believe the federal prison population continues to grow at an unsustainable rate and that corrections costs are consuming a harmfully disproportionate portion of federal criminal justice expenditures.[6] In these ways, the executive branch is expressing view that unwarranted sentencing severity is now the most pressing problem in the federal criminal justice system and that this Commission needs to make addressing this problem its top priority.

Finally, this Commission can look either to its recent survey of district judges, or to the testimony and comments it regularly hears from federal judges in formal and informal settings, or to the basic patterns of sentencing outcomes since *United States v. Booker* to confirm what the Commission has sometimes itself spotlighted about the sentencing perspectives of the federal judiciary: judges generally view guidelines for certain offenses and offenders, particularly for non-violent drug and white-collar offenses, as much too severe. In all these ways, members of the judicial branch are telling this Commission that unwarranted sentencing severity is an enduring problem that demands its attention.

With all these points in mind, I return yet again to my folk wisdom: it remains unclear whether the federal system is broke with respect to sentencing disparities, and if it is this is a product of unduly severe mandatory minimum sentencing provisions and broken sentencing guidelines. This reality, particularly when considered in conjunction with the words and deeds of all three branches of the federal government regarding the undue severity of at least some aspects of federal sentencing law, make obvious that the undue severity of some parts of the federal sentencing system is what is most obviously broke and most desperately merits this Commission's attention.

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[5] Breuer, *supra* note 2, at 112.

[6] *See* Letter from Lanny A. Breuer and Jonathan Wroblewski, Department of Justice, to the Honorable Patti B. Saris, Chair of the U.S. Sentencing Commission (Sept. 2, 2011), *available at* http://sentencing.typepad.com/files/doj-annual-letter-2011-to-ussc.pdf.

What's Obviously Broke but Perhaps Harder for this Commission to Fix:
Fair Process in District Courts and Substantive Reasonableness Review in the Circuits

At the risk of distracting from my goal of forcefully asserting that this Commission can and should be principally concerned with fixing those guidelines which recommend unduly severe sentences, I will conclude by very briefly reviewing two other structural concerns I have about the current operation of the post-*Booker* advisory guideline sentencing system.

Fair process in the district courts. The nature of post-*Booker* discussions of federal sentencing make it too easy to forget that *Booker* was fundamentally about the sentencing procedures demanded by the Constitution. Ultimately, the *Booker* ruling and the reactions it engendered highlight the link between the substance and the procedures of modern sentencing reforms. But since the *Booker* ruling, this Commission has given limited attention to fundamental procedural issues — such as notice to parties, burdens of proof, appropriate fact-finders, evidentiary rules and hearing processes — even though these matters play a central role in the actual application of general sentencing rules to specific cases. In prior writings, I have urged sentencing commissions to take an active role in developing the procedures necessary to achieve the substantive goals of modern sentencing reforms, and I continue to believe this Commission is well-suited to the task of establishing sound and uniform sentencing procedures.[7]

Of particular concern, I urge the Commission to consider anew complaints that the federal sentencing process still fails to provide defendants fair notice and lacks transparency concerning the facts and factors which can impact a defendant's sentence during the plea negotiation process. Though an enduring challenge for this institution, I still believe the Commission should explore potential procedural mechanisms which might improve the notice defendants receive concerning guideline factors and should try to enhance the transparency of presentencing charging and plea bargaining decisions. In addition, though perhaps not a matter of constitutional necessity, I still strongly believe the standard of proof for fact-finding at sentencing should be higher than the civil proof standard of preponderance of the evidence, especially for any fact that can increase a recommended guideline range significantly. Even though a lesser burden of proof may be constitutionally permissible in federal sentencings after

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[7] *See generally* Douglas A. Berman, *Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. Crim. L. & Criminology 653 (2005); Douglas A. Berman*, Appreciating* Apprendi*: Developing Sentencing Procedures in the Shadow of the Constitution*, 67 Crim. L. Bulletin 627 (2001).

Booker because the guidelines are advisory, the fundamental procedurals principles articulated by the Supreme Court in many cases strongly suggest that, as a matter of policy, it is not fair or just to apply a civil standard of proof when resolving factual issues in a criminal case that can have defined and potentially severe punishment consequences for a defendant.

Substantive reasonableness review in the circuit courts. This Commission has suggested that Congress codify the "presumption of reasonableness" for within-guideline sentences that some circuits adopted after *Booker*. Beyond the fact that the codification of such an appellate review standard could raise serious constitutional concerns in light of *Booker* and its progeny, any further embrace or endorsement of this very odd "presumption" strikes me as unsound as a matter of sentencing law and policy.

To begin, I call the presumption of reasonableness for within-guideline sentences "very odd" because, despite its repeated reference and application in the circuits which have adopted it, I am still yet to see a single appellate ruling which thoroughly explores — or, for that matter, even expressly discusses —when and how this "presumption" can be rebutted by an appellant and what might be the legal consequences of any such (phantom) rebuttal. It is very hard to understand why this Commission or Congress should embrace a so-called "presumption of reasonableness" for within-guideline sentences when it is hard understand what the presumption really means and how it is to be applied in the review of sentences for reasonableness.

Of course, the presumption of reasonableness for within-guideline sentences may not seem "very odd" if one just hopes it serves to make the guidelines a "sentencing safe-harbor" for district courts so that any and every within-guideline sentences is functionally immune from substantive reasonableness review. (Practically, this has been the true import of the so-called "presumption": not a single within-guideline sentence has ever been found substantively unreasonable in the circuits that have embraced this so-called "presumption."[8]) But even if it were sound as a matter of constitutional law and sentencing policy for properly-calculated within-guideline sentences to be immune from substantive review — which I do not think it is — it would be much wiser and more efficient for the Commission to seek this ultimate end by

[8] The remarkable fact that some circuits readily relied on the so-called "presumption" to declare reasonable within-guideline sentences based on the old unfair crack guidelines even ***after*** Congress had statutorily required the reduction of these guidelines through the passage of the Fair Sentencing Act, *see, e.g.*, *United States v. Brewer*, 624 F.3d 900 (8th Cir. 2010); *United States v. Lewis*, 625 F.3d 1224 (10th Cir. 2010); *United States v. Hudson*, 429 Fed. Appx. 870 (11th Cir. 2011), spotlights that this "presumption" is conceptually bankrupt as a means to provide any real substantive review of a sentence's reasonableness in light of the requirements of the Sentencing Reform Act.

simply urging Congress to make within-guideline sentences not subject to appeal rather than by codifying the very odd (and seemingly unrebuttable) "presumption of reasonableness."

Most importantly, Congress's commands in 18 U.S.C. § 3553(a) — which still guide district court sentencing and appellate review for reasonableness ***and*** which still serve as guideposts for this Commission's work — provide no textual basis whatsoever for finding a guideline sentence "presumptively" reasonable. The text of § 3553(a) directs a sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment, and this Commission has never asserted or even fairly suggested that ***all*** of its guidelines comply with that mandate in ***all*** cases. Indeed, given that the guidelines expressly ***encourage*** departures in some cases — as well as the fact that the Commission has sometimes stated in its research publications that certain guidelines (like the severe career-offender enhancement) can sometimes operate to undermine the sentencing goals set forth by Congress in § 3553(a)(2) —a blanket presumption of reasonableness for all within-guideline sentences is ultimately tone-deaf to Congress's commands in 18 U.S.C. § 3553(a), which are the only proper statutory metric for assessing the reasonableness of any particular federal sentence on appeal.

In keeping with my comments about the importance of making unwarranted sentencing severity the priority for all future federal sentencing reform, I believe this Commission ought to be making a sustained and regular practice of expressly identifying and repeatedly referencing — for the benefit of both district and circuit courts — which guidelines in general and which sentencing enhancements in particular its research and experience reveal to be the most unduly severe and thus the most likely to sometimes result in recommended sentencing ranges that are "greater than necessary" to comply with the purposes of punishment set forth in the Sentencing Reform Act. Aided by the Commission's work in this regard, district courts can then more effectively exercise their independent judgment as to whether and when a particular guideline should be followed, and circuit courts can then more appropriately assess whether and when a sentence challenges on appeal should be deemed reasonable in light of congressional commands.

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In closing, let me reiterate my thanks to this Commission for allowing me present my views about the state of federal sentencing and offer to respond to any questions you may have.