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Testimony of Professor Frank O. Bowman, III

Floyd R. Gibson Missouri Endowed Professor of Law
University of Missouri School of Law

I. Introduction

Let me begin with what might seem to be a semantic quibble, but a point which should have some importance in how one thinks about the subject of this panel. The panel is titled "Restoring Mandatory Guidelines," a choice of words which subtly, but significantly, mischaracterizes both where we were before *Booker* and where we are now, and may serve to distort our conversation about where we ought to go in the future.

First, the phrase "Restoring *Mandatory* Guidelines" implies that the guidelines as they existed pre-Booker were "mandatory" in the same sense of the word that is intended when one uses the phrase "*mandatory* minimum sentence." And of course that was not true. Throughout the period from November 1, 1987 to January 2005, the guidelines were presumptive – strongly presumptive at some times and less presumptive at others -- but presumptive only and judges always had discretionary power to sentence outside the guideline range. Indeed, in the decade from 1991-2001, the guidelines became less presumptive every single year, with more than 80% of all defendants sentenced within the applicable guideline range in 1991, but only 64% sentenced within range in 2001.[1] Changed prosecutorial policies of the Bush administration Justice Department beginning in 2001 and passage of the PROTECT Act in 2003 reversed the liberalizing trend, but in FY 2003, the last full year of sentencing data before the *Blakely-Booker* convulsion began, only 69.4% of defendants were sentenced within range.[2] In that year, even if one excludes substantial assistance departures as being not fully discretionary with the court, judges were nonetheless sentencing outside the range 14.6% of the time, or roughly one in every seven defendants.[3] One may fairly argue that this percentage was too small, but one cannot fairly claim that pre-*Booker* judges had *no* discretionary departure authority.

Second, the phrase "*Restoring* Mandatory Guidelines" implies that the post-*Booker* guidelines system is *not* mandatory, when in at least one critical sense it is. Procedurally, the guidelines are every bit as binding as they ever were. The guidelines themselves remain in place, almost unchanged. Probation officers are legally obliged to write presentence reports that are

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[1] U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53, Fig. G (2004) [hereinafter "2003 SOURCEBOOK"]; U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 51, Fig. G (2002).
[2] 2003 SOURCEBOOK, *supra* note 1, at 57, tbl. 26.
[3] Id. at tbls. 26 and 26A. Even if one treats those departures that the Commission coded as "government initiated" as somehow not counting, judges were still sentencing 8.3% of defendants, about one in twelve, outside the range (7.5% downward and 0.8% upward).

virtually identical to those they wrote before 2005. The parties are obliged to make the same sorts of factual presentations and legal arguments they made before 2005. District judges remain legally obliged, on pain of appellate reversal, to make the same multifarious findings of fact and to correctly apply the same voluminous rules to those facts to determine a guidelines range. Then, once the old familiar dance is complete, the judge imposes a sentence, having been solemnly enjoined by the United Supreme Court that she must on no account accord a presumption of correctness, or indeed any more weight than any other factor, to the results of the mandatory process she and the parties just completed. Even the courts of appeals retain much of their old pre-*Booker* burden inasmuch as they remain obliged to entertain and decide questions regarding interpretation of guidelines rules, even though they now have little authority to insist that district courts sentence within the guidelines range. In short, all of the procedural and computational complexities that were so often the source of pre-*Booker* complaints about the guidelines remain mandatory, even as the product of that process has been declared the next thing to a legal nullity.

Third, the phrase "*Restoring Mandatory* Guidelines" implies, perhaps unintentionally, that any significant reform of the existing post-Booker advisory system must involve a reversion to a system as strongly presumptive and as narrowly restrictive of judicial sentencing discretion as the pre-*Booker* guidelines. That need not be the case. One can conceive of a wide array of alternative guideline architectures that would comply with the Court's post-*Booker* constitutional rules and provide more legal constraint on district court sentencing discretion than the existing advisory regime. Some would be very strongly presumptive in character. Others would be much, much less so.

In sum, the question we should be asking today is not whether to "restore mandatory guidelines," but whether we can design, enact, and then administer an *improved* guidelines structure. This, of course, begs the dual questions of whether the current advisory system is performing well enough to merit retention, and if not, what alternative system could reasonably assure sufficient improvement to make the travail of trying to create it worth the effort.

In this testimony, I advance three arguments:

First, the post-*Booker* advisory system retains most of the flaws of the system it replaced, while adding new ones, and its sole relative advantage – that of conferring additional (and effectively unreviewable) discretion on sentencing judges – is insufficient to justify its retention as a permanent system.

Second, there exist a number of constitutionally permissible alternatives to the court-created *Booker* system, one of which -- that originally proposed by the Constitution Project and more recently endorsed by Judge Sessions – is markedly superior to the present system.

Third, the really difficult problem is not designing a sentencing mechanism better than either the pre- or post-*Booker* guidelines, but ensuring that such a system, once in place, does not replicate the experience of the pre-*Booker* guidelines and become a one-way upward ratchet prescribing ever higher sentences. I offer suggestions about how it might be solved.

II. The Post-*Booker* Advisory System

Considered on its own merits, the system bequeathed us by *Booker* is indefensible. It retains virtually every feature excoriated by critics of the original sentencing guidelines. Its extreme 'advisoriness,' while partially ameliorating some problems with the original guidelines, reintroduces the very concerns about unreviewable judicial arbitrariness that spawned the structured sentencing movement in the first place. More importantly, the post-*Booker* system does not solve the biggest problem with the pre-*Booker* system – that its architecture and institutional arrangements predisposed the Commission's rule-making process to become a one-way upward ratchet which raised sentences often and lowered them virtually never.

The original guidelines were condemned as too complicated,[4] both because they contained so many rules that were purportedly difficult to understand and, more tellingly, because they required parties to litigate and judges to adjudicate too many gradations of too many categories of facts. But the current system is even more complicated than the old, retaining all the old rules and requiring all the old litigation, and then layering on a new terminal phase in which "§3553(a) factors" must be identified and weighed alongside the results of the guideline calculation to produce a final sentence.

The old guidelines were criticized because their many factual findings fed into a grid that subdivided the universe of possible sentences into 258 boxes which critics said served largely to create a reassuring illusion of rationally calibrated allocations of punishment. But the advisory system still uses the exact same grid.

The old guidelines were derided because the numerous judge-found facts that determined a defendant's guideline range were said to be a tail that wagged the sentencing dog, i.e., that post-conviction judge-found facts had a far greater influence on a defendant's final sentence than the jury-found elements of the crime. But the same description applies to the post-*Booker* advisory system. *Booker*'s "solution" to the tail-wags-dog problem was not to eliminate or even reduce the number of judge-found sentence-affecting facts enumerated in federal statutes and guidelines, but was instead to imagine that, by declaring the Guidelines advisory, those facts would no longer move the dog of sentencing outcomes. But, of course, the dog still moves. In FY 2010 and FY 2011, about 55% of all federal defendants were sentenced within the applicable guideline

[4] See, e.g., KATE STITH AND JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 3, 91-93 (1998); José A. Cabranes, *Letter to the Editor: Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11 (the guidelines are "a byzantine system of rules"); Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180 (1985).

range,[5] and even among defendants sentenced outside the range, the range (determined by all those judicial findings of facts) still exercises a substantial anchoring effect. Given that, in the five years immediately preceding *Blakely*, guidelines compliance averaged around 65%,[6] the best one can say about the advisory system is that the guidelines tail is still wagging the sentencing dog, but about 10% less vigorously.

Curiously, the constitutional value those advancing the tail-wags-dog critique ostensibly sought to protect – the power of juries to decide sentence-affecting facts – has quietly vanished from the post-*Booker* conversation. If concern for jury power was ever more than a convenient stick with which to beat a system unpopular on other grounds, it may be worth noting that the practical effect of Booker on jury participation in sentence-determinative fact-finding has, if anything, been negative. The percentage of federal defendants convicted by trial, rather than plea, already low before *Booker*, has declined steadily since 2006,[7] and in FY 2011dropped to 3.1%,[8] the second lowest level in history.[9]

More importantly, the real procedural deficiency of the pre-*Booker* guidelines was never the absence of jury participation, but the low level of due process protection afforded defendants seeking to contest aggravating guidelines facts.[10] The government's burden of proof was a mere preponderance. The defendant had no discovery rights, other than the government's general *Brady* obligation to disclose favorable evidence,[11] no right of confrontation or cross-examination,[12] and not even a right to an adversarial hearing in many instances.[13] Even though, as noted above, the advisory guidelines continue to either determine or strongly influence the sentences of the vast majority of federal defendants, the former dearth of procedural due process persists. And precisely because the guidelines are now legally advisory, the argument for increasing procedural protections for guidelines fact-finding is dramatically weaker. As I wrote in 2010:

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[5] U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Tbl. N (2011) [hereinafter "2010 SOURCEBOOK"] (55% of defendants sentenced within range in FY 2010); U.S. Sentencing Commission, Preliminary Quarterly Data Report, at 1 tbl. 1 (4th Quarter Release, through Oct. 31, 2011) (54.7% of defendants sentenced within range in FY 2011).
[6] 2003 SOURCEBOOK, *supra* note 1, Fig. G.
[7] 2010 SOURCEBOOK, *supra* note 5, at Fig. C.
[8] U.S. Sentencing Commission, Preliminary Quarterly Data Report, at 42 tbl. 22 (4th Quarter Release, through Oct. 31, 2011).
[9] 2003 SOURCEBOOK, *supra* note 1, Fig. C (showing that, in 2002, the federal trial rate hit its all-time low of 2.9%).
[10] *See, e.g.*, James E. Felman, The Need for Procedural Reform in Federal Criminal Cases, 17 FED. SENT. RPTR. 261 (2005); Jose A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go From Here?* 44 St. Louis U. L.J. 271, 274-75 (2000); Richard Smith-Monahan, *Unfinished Business: The Changes Necessary to Make Guidelines Sentencing Fair*, 12 FED. SENT. RPTR. 219 (2000).
[11] U.S. v. Guerrero, 894 F.2d 261 (7th Cir. 1990).
[12] U.S. v. Berry, 258 F.3d 971 (9th Cir. 2001).
[13] ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK §6A1.3 Authors' Discussion §4 (2010-2011 ed.)

> Defendants [after Booker] are poorly placed to demand new procedural protections for the determination of Guidelines facts the Court insists have no legal consequence. If anything, the effect of *Booker* and its progeny will surely be to diminish due process protections in federal sentencing as trial and appellate judges become less and less concerned about accuracy in an "advisory" system. For anyone seriously concerned about the tail-wags-dog problem, *Booker* has created the worst of all worlds – a complex system of fact-dependent rules, which in truth heavily influence outcomes, but in which judges are cavalier about facts because the rules have no formal legal force.[14]

The old guidelines were criticized as the product of an opaque rule-making process not subject to the APA or other openness in government laws or to judicial review.[15] Relatedly, many observers complained that Commission rulemaking was subject to congressional micromanagement, either by direct amendment of guidelines, statutory directive, or informal pressure. While the Commission has taken laudable voluntary steps to open up its processes in recent years, its institutional position in the government and the laws governing its rulemaking processes are unaffected by *Booker*.

Perceptive critics of the pre-*Booker* guidelines were concerned that they abolished parole and with it the opportunity for a later second look at the appropriateness of the original judge-imposed sentence.[16] Of course, this feature survives *Booker.* Thus, the legal authority to determine how much time a defendant will actually serve, which before 1987 was shared between district judges and the U.S. Parole Commission, and from 1987-2005 was shared between the Sentencing Commission and both district and appellate judges, is now effectively the sole province of individual district judges. In short, district judges now wield near-absolute power to determine the length of a defendant's incarceration, far more real-world sentencing power than at any time since the advent of a federal parole authority in 1910.[17]

The old guidelines were also disparaged for taking insufficient account of the individual characteristics of criminal defendants in setting offense levels and thus sentencing ranges. Critics noted that the guidelines prescribed precise increments of increased or reduced punishment for a multitude of offense-related factors, but included no such correlation between personal characteristics (other than criminal history) and offense level. Moreover, the old guidelines declared many such characteristics to be banned or "not ordinarily relevant" in

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[14] Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. OF CHICAGO L. REV. 367, 469 (2010).
[15] Ronald Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991); Kate Stith and Karen Dunn, A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch, 58 Stan. L. Rev. 217, 229 (2005).
[16] See generally, Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005).
[17] U.S. Department of Justice, *History of the Federal Parole System*, at 1, available at http://www.justice.gov/uspc/history.pdf.

awarding a departure outside the guidelines range.[18] But the advisory guidelines have exactly the same structure. Calculation of the guideline range is still focused almost exclusively on offense characteristics and criminal history. And though the Commission has cautiously modified the wording of several sections of Chapter 5H relating to age, mental or emotional condition, and physical condition to permit consideration of these factors in departing from the range in a few more cases,[19] the Commission has provided no guidance to courts in determining when or how these factors should be considered other than to say that it should be done in unusual or atypical cases. The real difference between the present system and the one it replaced lies not in any material improvement in the Guidelines themselves, but in the fact that judges are now legally at liberty to ignore them.

Here, at last, we come to the crux of the matter – the point that explains the surpassingly odd spectacle of folks who spent the first two decades of the guidelines era vehemently denouncing the guidelines for precisely the deficiencies listed above now mounting an impassioned defense of a post-*Booker* system that retains virtually every flaw they previously deplored.

This precipitous reversal at least makes institutional sense in the case of judicial guidelines critics. For many judges, the main problem with the guidelines, particularly after the 2003 PROTECT Act, was their tight constraint of judicial sentencing discretion. Now, although some judges may consider the required fact-finding and guideline-calculating a nuisance, it is a ritual to which they are accustomed, it provides them with reassuring benchmarks for routine cases, and *Booker* has freed them either to use or ignore the results as suits them in particular cases. Of course, judges must provide some explanation for their sentences, but the reality is that any explanation not flamboyantly exceeding the boundaries of rationality will now survive appellate scrutiny. In short, district judges like advisory guidelines because they restore lost institutional authority.

The affection of the defense community for advisory guidelines is based, not in concerns about process or the sanctity of judicial discretion, but in perceptions about outcomes. The true ground of the defense community's objection to the old guidelines was never their structural and procedural defects. It was their severity. In the early days, the severity critique was primarily directed at drug cases, but over time the concern broadened to include many other offense classifications, recent high-profile examples including white collar crime and pornography. The defense community's support of advisory guidelines is only explainable as the outgrowth of a perception that the advisory system produces more favorable (i.e., more lenient) sentences for some appreciable class of defendants.

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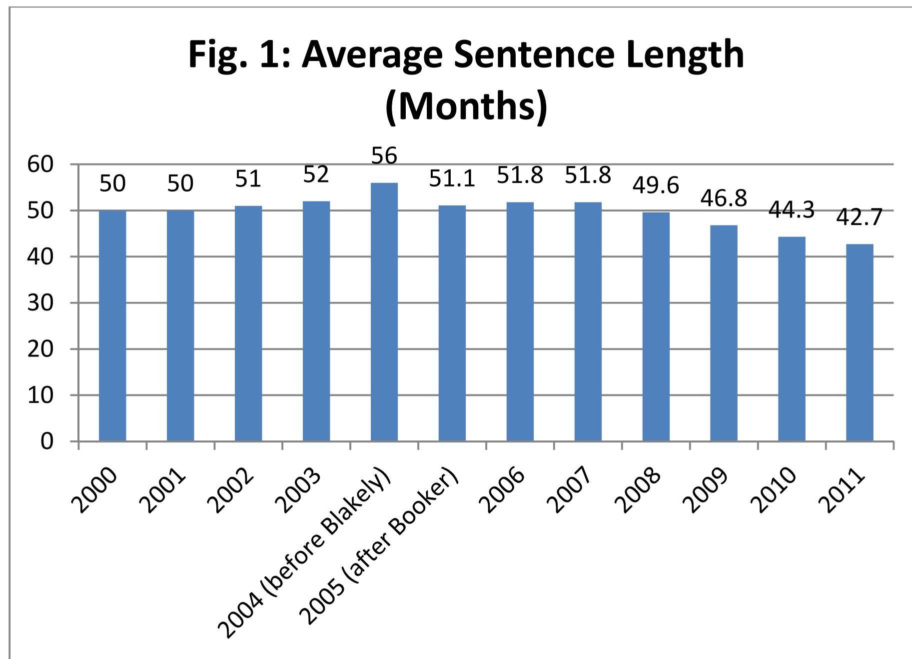
[18] *See, e.g.*, U.S.S.G. §5H1.1-5H1.6 (2004) (identifying various personal characteristics as "not ordinarily relevant" to a departure).

[19] *See, e.g.*, U.S.S.G. §5H1.4 (2010) ("Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.").

This perception has some basis in fact. After all, in FY 2011, 43.6% of all defendants were sentenced below the applicable guideline range as compared to only 29.7% in FY 2003 (the last full year of sentencing data before the *Blakely* decision in 2004).[20] If about 14% more defendants are now receiving below-range sentences, then surely some of them are receiving shorter sentences than would have been the case before *Booker*. This intuition seems to be borne out by Figure 1, which shows a notable decline in the length of the average federal sentence beginning in 2008, the year following the Supreme Court's December 10, 2007 decisions in *Kimbrough* and *Gall* which made clear that the guidelines were henceforth to be really and truly advisory.



Moreover, as Figure 2 below illustrates, during the last decade, there has been a near-perfect inverse correlation between sentence severity and the exercise of judicial sentencing discretion. As the percentage of sentences outside the applicable range increases, the length of the average sentence decreases, and vice versa.

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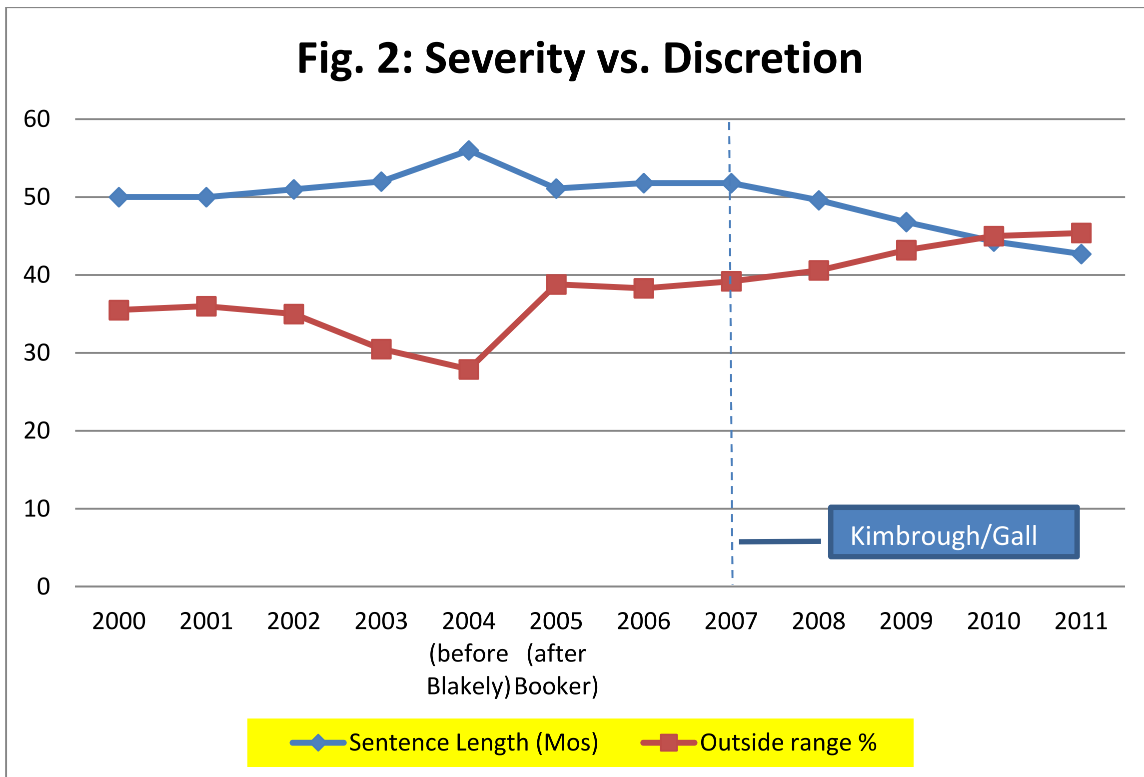
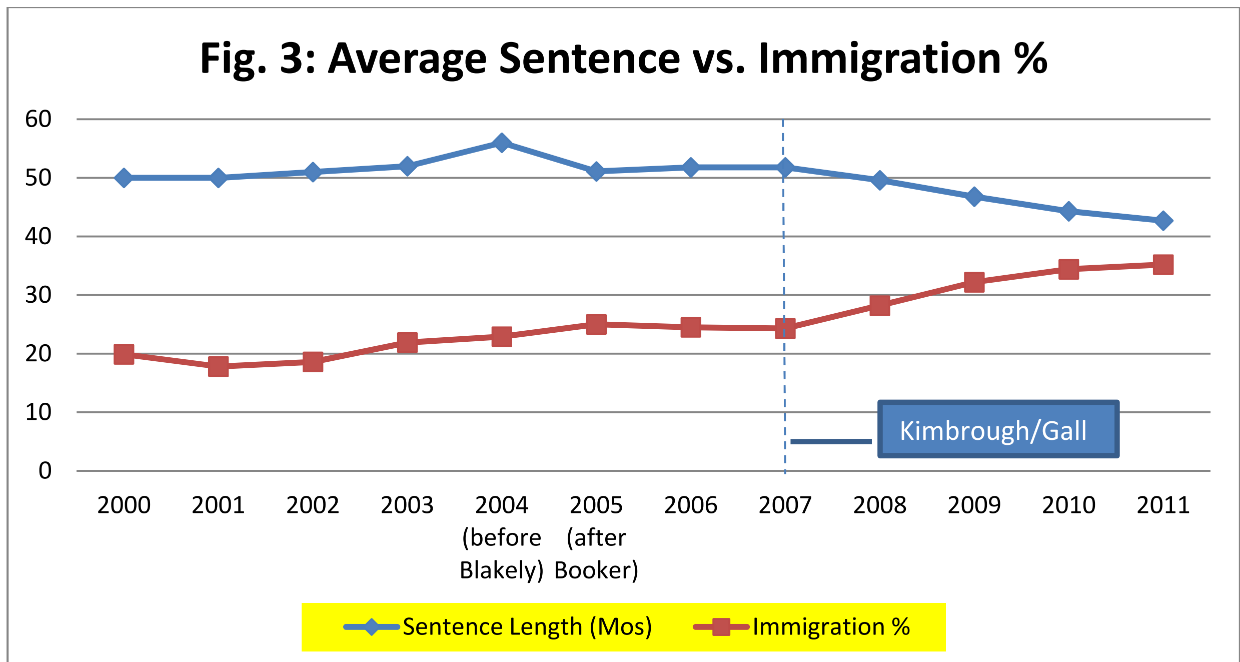
[20] *Compare* U.S. Sentencing Commission, Preliminary Quarterly Data Report, tbl. 1 (4th Quarter Release, through Oct. 31, 2011), *with* 2003 SOURCEBOOK, supra note 1, at tbl. 26.



However, a closer look at the data suggests that the recent decline in average sentence length is, at best, only partially attributable to the newly advisory character of the guidelines. It is widely understood that some of the recent decline in average sentence length is probably attributable, not to discretionary choices by judges, but to changes in statutes and guidelines governing crack and powder cocaine. What is less appreciated is that the marked decline in average federal sentence beginning in 2008 correlates directly with the recent explosion in relatively low-sentence immigration prosecutions. Figure 3 illustrates the point. FY 2008 may have been the year in which judges reading *Kimbrough* and *Gall* first understood that they had a green light to vary from the guidelines at will, but probably more importantly it also marked the beginning of a huge upsurge in immigration cases, which went from 17,592 or 24.2% of all federal cases in 2007[21] to roughly 30,000 or 35.2% of all cases in 2011.[22] Given that the average sentence for an immigration case is 16.3 months, as compared to 70.2 months for drug trafficking, 82.7 months for firearms, and 22.7 months for fraud,[23] the downward pressure exerted on the federal average sentence of this one change in case mix is immense.

[21] U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, tbl. 3 (2008).
[22] U.S. Sentencing Commission, Preliminary Quarterly Data Report 40-41 (4th Quarter Release, through Oct. 31, 2011).
[23] *Id.* at 31, tbl. 19.



The tenuousness of the correlation between declining national average sentence severity and post-*Booker* judicial discretion is reinforced by inspection of the Commission's most recent data on average sentence within offense types. It appears that, since 2006, the average sentence for crack cases has declined sharply; average powder cocaine, marijuana, and illegal reentry sentences have dropped slightly; average sentences for alien smuggling, methamphetamine, and heroin cases have held roughly steady; and average firearms and property crime sentences have increased.[24]

These figures hold mixed messages for policy advocates. The defense community is surely right in thinking that advisory Guidelines have produced lower sentences for some thousands of defendants each year. Given the slow, but steady, increase in below-range sentences since 2007, they would also be right in thinking (even if they may not be impolitic enough to say it) that the percentage of defendants benefiting from this phenomenon is likely to increase steadily over time. On the other hand, those who fear that advisory guidelines have opened the floodgates of judicial leniency should be reassured that nothing apocalyptic has occurred so far and that average sentences for most classes of defendants are, at most, only slightly lower than historic averages in the guidelines period.

The foregoing observations go far to explain the lack of agitation among the front-line sentencing actors for a thorough-going reform of the post-*Booker* status quo. For persons enmeshed in an operating system and highly attuned to any change in incremental advantage or disadvantage to their own positions, it makes perfect sense to ask, not whether *Booker* produced the best possible system, or even a system that, dispassionately considered, is very good, but

[24] *Id.* at Figs. C-I.

simply whether the *Booker* system is *incrementally better or worse for them* than its predecessor. Judges and defense lawyers have concluded that they are incrementally better off. The Justice Department seems to have concluded that it is, so far, not so much worse off as to make it worthwhile to press for a thorough reform.

The perspective of the Commission, of Congress, and the public at large ought to be rather less parochial. If, as I believe to be true, the pre-*Booker* guidelines system was so flawed as to require complete overhaul, then the question before us now is whether *Booker* remedied enough of those flaws to make the post-*Booker* advisory system a desirable long-term mechanism for sentencing federal defendants. I do not believe the post-*Booker* system meets that standard.

For example, the real severity problem with the pre-*Booker* guidelines was not that sentence levels were set about right for most classes of cases, but that judges had too little discretionary authority to make adjustments for the few extraordinary exceptions. The problem was that, as a result partly of some initial decisions in 1987 and partly of a long process of factor-creep thereafter, the guidelines often prescribed unnecessarily lengthy sentences for entire categories of defendants. Making the Guidelines advisory does not solve this problem. It gives a relatively few defendants relief by allowing judges to disregard rules they think too severe, but it does not change the rules themselves. So long as the rules prescribe unduly lengthy sentences, our post-*Booker* experience suggests that most defendants for whom those sentences are prescribed will get them, or at best sentences only slightly lower. And the question of who gets the guidelines sentence and who does not will be based far more on the personal predilections of the judge assigned the case than the particular characteristics of the defendant.

Supporters of the advisory system make much of the proliferation of "feedback" to the Commission in the form of an increased number of variances from the Guidelines. They claim that the Commission will react to this new source of information about judicial sentencing preferences by embarking on rounds of corrective amendments. I confess to skepticism.

First, the problem with the pre-*Booker* system was *never* an absence of feedback from judges (or any of the other system actors) about their concerns with the guidelines. The Commission has always been at the delivery end of a fire hose of feedback. The problem before *Booker* was that the Commission was unwilling or unable to change the rules in response to the feedback they had.

Second, the Commission has been more active in the last several years in passing ameliorative amendments to the Guidelines, making commendable strides on crack and some other issues. But I confess to thinking that its ability to make these strides has had far more to do with the fact that Democrats gained control of both the House and Senate in January 2007 and won the presidency effective January 2009 than with any *Booker*-generated increase in the volume or quality of judicial feedback to the Commission.

Third, even in the more hospitable recent environment, the Commission has been unable to address some glaringly obvious problem areas. For example, it has been almost universally recognized since 2003 that the sentences prescribed by the Guidelines for high-end white collar offenders are so high as to be practically worthless.[25] Observers on both the political left and right, as well as judges, the defense bar, advocacy groups, and the Justice Department, have been providing "feedback" on this issue for years signaling that they are actively seeking or at least amenable to reform. Yet the Commission has not acted. No fair-minded person would attribute this inaction to either a lack of awareness or a lack of good will on the part of the Commission. Yet nothing has happened.

The problem is that the structural and institutional deficiencies in the pre-*Booker* guidelines rule-making system remain essentially unaddressed by *Booker*. I will not reiterate the complete analysis of this phenomenon that I have provided elsewhere.[26] Suffice it to say that the combination of the guidelines' complexity, the desire of the Justice Department for case-level control and rule-making influence, the persistent political incentives for Congress to legislate harsher sentences, and the Sentencing Commission's institutional inability to resist the alliance of congress and the executive whenever they seek "tough" sentences made the guidelines rule-making process a one-way upward ratchet before *Booker*. I see nothing in the post-*Booker* arrangements that materially alters this reality. I fail to see how an "advisory" system which maintains the same bad rules and the same structural inability to fix them is magically transformed into a desirable outcome simply by virtue of conferring on individual judges the authority to ignore at will the rules they happen to dislike.

Which brings me to my final concern about the post-*Booker* system. Supporters of the post-*Booker* system whose approval rests on the additional "feedback" provided by district court variances are embracing a extra-legal mechanism which has few, if any, analogues in Anglo-American jurisprudence. In any other setting, when district courts apply or interpret or adjudicate challenges to agency rules, their decisions not only bind the parties, but are appealable to courts of appeals, and in the end form part of the web of legislation and interpretive judicial precedent that binds subsequent litigants, judges, and sometimes the rule-making agency itself. That is, they are part of the process of making law. Yet, in the "advisory" world, district judges routinely make decisions that are effectively unreviewable as to substance. Because they are effectively unreviewable, they are incapable of creating precedent binding other courts. And because they bind neither courts nor the Commission itself, to the Commission they represent nothing more than data points in an opinion poll. If one is to have sentencing rules at all, it seems to me that the appropriate "feedback loop" when judges apply those rules to punish other human beings is the normal operation of the adjudicative process.

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[25] *See, e.g.*, Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 Fed. Sent. Rptr. 167 (2008).

[26] Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUMBIA L. REV. 1315 (2005).

Before *Booker*, the federal sentencing system needed fundamental revision. *Booker* did not change that reality.

III. The Objectives of a New System

If the current advisory system is to be replaced, we must be reasonably confident that the replacement: (a) is constitutional under the post-*Booke*r rules, (b) gives reasonable, but not unlimited, play to individualized sentencing and judicial discretion, (c) prescribes sentences that reasonably effectuate the utilitarian goals of crime control while conforming more closely to most people's moral intuition about severity than many of the current guidelines, and (d) is capable of evolution without becoming a one-way upward ratchet.

IV. Constitutionally permissible guidelines architectures

Given the current state of post-*Booker* Sixth Amendment jurisprudence,[27] there are at least five constitutionally permissible, operationally practicable basic sentencing architectures:

1) Return to pre-guidelines discretionary sentencing: One might abandon the entire structured sentencing enterprise and revert to the pre-1987 federal status quo in which district judges had unguided and virtually unreviewable discretion to impose a sentence anywhere

[27] The current status of Sixth Amendment Jury Clause law appears to be this:

(1) The Sixth Amendment Jury Clause requires that a jury find beyond a reasonable doubt, or the defendant admit, any fact that, if proven, exposes the defendant to an increase in his maximum theoretically possible sentence, unless (a) the fact relates to criminal history, United States v. Almendarez-Torres, 523 U.S. 224, 226-27, 235 (1998), or (b) the fact increases the maximum sentence by empowering a judge to impose consecutive sentences on counts of conviction arising from conduct different in character or committed at separate times. Oregon v. Ice, 555 U.S. 160 (2009).

(2) The defendant has no right to jury determination either of facts that increase his required minimum sentence or of facts that reduce his possible maximum sentence.

(3) Legislatures or sentencing commissions may create guidelines or other rules that correlate judge-found facts to sentencing ranges within the space between statutory minimum and statutory maximum sentences: (a) If application of these rules can increase the maximum sentence above that legally authorized based purely on the fact of conviction, then the rules must be "advisory," rather than "mandatory" or "presumptive," which means that the ranges the rules prescribe can be of sufficient legal consequence that a sentence imposed outside such a range may be reversed on appeal unless accompanied by a rational explanation for the deviation, but a trial judge may not consider such a range as "presumptively correct," even though a court of appeals may treat a sentence within it as "presumptively reasonable." (b) If these sentencing rules are drafted so that their application does not increase the maximum sentence above that legally authorized based purely on the fact of conviction—for example, by writing guidelines that only raise or lower minimum sentences—then mandatory or presumptive guidelines appear constitutionally unobjectionable. See Bowman, *Debacle*, *supra* note 13, at 460-61.

between the statutory maximum and minimum sentence as traditionally defined. This would be constitutional.[28] No institutional actor in federal sentencing favors this approach.

2) "*Blakely*-ized" guidelines: At the other extreme, one might simply require that juries find all facts now specified by the guidelines that would increase a defendant's offense level. This would be constitutional, but it would be both procedurally burdensome and even more restrictive of judicial discretion than the guidelines in their pre-*Booker* form.[29] So far as I know, no institutional actor in federal sentencing favors this approach.

3) "Topless" guidelines: This architecture takes advantage of the Supreme Court's decisions in *McMillan v. Pennsylvania*[30] and *Harris v. United States*[31] that facts which increase a defendant's minimum sentence may be found by judges rather than juries. It would leave the pre-*Booker* federal guidelines essentially unchanged, with the single key exception that post-conviction judicial findings of fact regarding offense level would produce sentencing ranges with minimums as presumptive as they were before prior to *Booker*, but maximums that would be merely advisory. In 2004, I suggested this approach as a temporary expedient in response to *Blakely*[32] and, for a time, it was the preferred remedy of the Justice Department.[33] However, the approach was always subject to the objection that it asymmetrically favored the government, as well as the nagging concern that the Supreme Court might abandon the rule of *McMillan* and *Harris* upon which its constitutionality depended.[34] The Justice Department no longer seems enamored of this approach and I am aware of no other institutional actors currently supporting it.

4) "No-base-offense-level" guidelines: It would, in my opinion, be possible to reinstitute legally binding guidelines systems based on post-conviction findings of fact by judges, and do so constitutionally, by the simple expedient of eliminating "base offense levels" or their equivalents from the guidelines design. I have described this guidelines architecture previously,[35] but it has

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[28] Williams v. New York, 337 U.S. 241 (1949).

[29] *Blakely*-ized guidelines would be more restrictive of judicial discretion than pre-*Booker* guidelines: (1) The pre-*Booker* requirement that judges find guidelines-affecting facts accorded judges a degree of implicit discretionary authority insofar as decisions on closely contested issues of fact have an inescapable discretionary component. (2) In *Blakely*-ized guidelines, the upper limit of the defendant's potential sentence would be set by jury-found facts, thus barring any higher sentence and eliminating a judge's pre-*Booker* discretionary power to "depart" upward.

[30] 477 U.S. 79 (1986).

[31] 536 U.S. 545, 548, 568 (2002).

[32] For discussion of various iterations of this proposal and of critical response to it, see Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. OF CHICAGO LEG. FORUM 149, 195-96.

[33] Id. at 196 n. 205; Testimony of William W. Mercer, Principal Assoc. Deputy Atty. General, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives. March 16, 2006, at 7 (available at http://judiciary.house.gov/media/pdfs/mercer031606.pdf).

[34] I confess to finding this eventuality unlikely because the Court would not only have to overrule both *McMillan* and *Harris*, but would have to find that the jury right extended not only to facts that raised the *mandatory* minimum sentence, but also to those which raised the *presumptive* minimum sentence. But then, so far, I have not been particularly adept at predicting the Court's decisions in this area.

[35] I alluded to it in a law review article, but did not elaborate on the concept. See, Bowman, *Debacle, supra* note 13, at 460.

not been generally discussed before this hearing. Its constitutionality flows from the three essential points of the *Apprendi-Blakely-Booker* line of cases. First, the government must allege and prove beyond a reasonable doubt to a jury each and every element of a criminal offense. Second, an element is any fact that increases the statutory maximum sentence of an offense. And third, what Justice Ginsburg identified as "*Apprendi*'s bright-line rule" -- "The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant."[36]

In short, the key moment for the Sixth Amendment jury right is the moment at which the jury has rendered its verdict or the defendant entered his plea. If, at that moment, the law correlates the jury's verdict or defendant's plea with a maximum penalty above which the judge may not sentence a defendant without finding some additional fact, that maximum penalty becomes the "statutory maximum sentence." Any fact, proof of which would permit the judge to impose a sentence above that maximum sentence, becomes an "element" requiring submission to a jury. It was this focus on the sentencing options available to the judge at the moment of conviction without further fact-finding that rendered the Washington, California, and federal guidelines sentencing regimes unconstitutional. In each case, the jury's verdict had two sentencing effects - first, it set the absolute outside limits on the judge's sentencing discretion in the form of statutory maximum and minimum sentences as traditionally understood, and second, it created a presumptive sentencing range (or in the case of California, a presumptive single-point sentence) based purely on the fact of conviction. In all three of the invalidated systems, a judge could impose a sentence above the presumptive sentence or range, but in all of them the judge could not do legally so without finding some fact(s) in addition to those found by the jury (or admitted by the defendant).

The Washington state guidelines invalidated in *Blakely v. Washington*[37] prescribed for each offense in the Washington criminal code a presumptive sentencing range based purely on the fact of conviction.[38] This range was customarily somewhere in the middle of the broader span between the statutorily designated minimum and maximum sentences for the crime. After conviction, the judge could sentence the defendant above (or below) the presumptive range if, but only if, he made findings of aggravating (or mitigating) facts not included within the offense of conviction.[39] However, in no case could the judge sentence the defendant to more than the maximum sentence prescribed by statute for the offense of conviction.

The California guidelines system invalidated in *Cunningham v. California*[40] functioned similarly, except that the fact of conviction generated both a statutory minimum-to-statutory-

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[36] Cunningham v. California, 549 U.S. at 288-89 (quoting *Blakely v. Washington*, 542 U.S. at 303).
[37] 542 U.S. 296 (2004).
[38] Wash. Rev. Code Ann. §9.94A.370 (West 1998), recodified at §9.94A.530 (West).
[39] Wash. Rev. Code Ann. §9.94A.390 (West 1998), recodified at §9.94A.525 (West); §9.94A.120 (West 1998), recodified at §9.94A.505 (West).
[40] 549 U.S. 270 (2007).

maximum range and a presumptive single-point sentence within that range – the so-called "middle term." By law, the sentencing judge was obliged to impose the middle term unless the judge found "circumstances in aggravation or mitigation of the crime."[41] If, but only if, the court found an aggravating circumstance, it was permitted, but not required, to impose an upper term sentence.[42]

Finally, for the vast majority of federal crimes, the federal guidelines set a "base offense level," i.e., an offense level generated purely by the fact of conviction of a particular crime. This base offense level, in conjunction with the defendant's criminal history (which need not be found by a jury pursuant to *U.S. v. Almendarez-Torres*), produces a sentencing range identifiable at the moment of conviction. The constitutional flaw in the federal guidelines was thus that every increase in offense level above the base level required at least one judicially-found fact, as did any departure above the top of the final sentencing range. Particularly because most federal guidelines were designed with relatively low base offense levels and multiple potential upward level adjustments, much and maybe most of the customary judicial fact-finding activity in a workaday federal sentencing had the effect of raising the defendant's maximum sentence above the top of the range associated with the base offense level. Accordingly, since judicial findings of fact raised the defendant's maximum sentencing exposure higher than that authorized by the base offense level created by conviction alone, the process was found to violate *Blakely*.[43]

I believe one could create guidelines that meet the Court's Sixth Amendment test by eliminating the correlation between the mere fact of conviction and any particular guideline offense level. In such a system, at the moment of conviction, it would be impossible to determine "solely on the basis of facts reflected in the jury verdict or admitted by the defendant"[44] any maximum limit on the judge's sentencing authority other than the statutory maximum in the traditional sense. For example, a conviction of one count of mail fraud would, standing alone, have no sentencing consequence other than to authorize a maximum sentence of thirty years pursuant to 18 U.S.C. Sec. 1343. At the time of the verdict or plea, the defendant, his lawyer, the prosecutor, and the judge might be able to form a good estimate of what facts the sentencing judge might later find and thus how subsequent guidelines calculations would pan out, but as a matter of law, no guideline maximum would be generated until the sentencing proceeding was concluded. The final guideline range would be determined by judicial findings, but the guideline maximum would almost invariably be below, and would never exceed, the statutory maximum sentence determined by the jury-found elements of the offense. Thus, there would be no Sixth Amendment violation.

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[41] Cal. Penal Code Sec. 1170(b).
[42] See Cunningham, 549 U.S. at 278-79.
[43] There are several existing guidelines, notably 2D1.1, which do not assign base offense levels based purely on the fact of conviction. In my view, these guidelines are constitutional as written. However, the existence of some constitutional enclaves within a structure that, for the most part, uses an unconstitutional design is not enough to save the whole.
[44] Cunningham v. California, 549 U.S. at 288-89 (quoting *Blakely v. Washington*, 542 U.S. at 303).

This approach would certainly be better than "topless guidelines" inasmuch as it would not require an unfair asymmetry. Like the "topless" model, it could be invalidated by the Court if they were to reverse *Harris* because it, too, would involve correlating judge-found facts with increases in a presumptive minimum sentence. Otherwise, I am hard pressed to see a constitutional flaw based on the Sixth Amendment as the Court has construed it. The most obvious objection to this approach is not that it is constitutionally defective, but that it could be employed to resurrect the guidelines, with all the flaws enumerated above, virtually unchanged. For that reason, I do not favor its adoption.

5) Constitution Project / FSR / Judge Sessions guidelines: In 2005-2006, the Constitution Project Sentencing Initiative, a bipartisan panel of experts chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann and including luminaries such as then-Judge Samuel Alito, Judge Jon O. Newman, Judge Paul G. Cassell, Judge Nancy Gertner, Thomas W. Hillier, II, and James Felman, studied the post-Booker sentencing landscape and formulated a set of "Principles for the Design and Reform of Sentencing Systems."[45] The group also prepared a set of "Recommendations for Federal Criminal Sentencing in a Post-*Booker* World."[46] The group recommended that, in the near term, the advisory system created by *Booker* should be carefully studied and incrementally improved.[47] But the group went further to suggest a framework for a revised federal guidelines system should the advisory system ultimately be found wanting.[48]

The Constitution Project guidelines framework rested on five basic elements. First, the sentencing grid should be markedly simplified by widening sentencing ranges and reducing the number of offense levels from 43 to something on the order of ten.[49] Second, the defendant's position on the vertical offense seriousness axis of the grid (and thus his sentencing range) would be determined by facts found by juries.[50] Third, if it were thought wise to guide judicial sentencing discretion within the widened ranges, the rules or standards providing that guidance

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[45] Available at http://www.constitutionproject.org/pdf/34.pdf. The distinguished group also included Zachary Carter, Isabel Gomez, Miriam Krinsky, Norman Maleng, Thomas Perez, and Professor Ronald F. Wright. Dean David Yellen of Loyola University Law School and I were the reporters for the Project.

[46] http://www.constitutionproject.org/pdf/33.pdf; also at 18 FED. SENT. RPTR. 310 (2006). Justice Alito was nominated to the Supreme Court in the interval between the adoption of the general principles and the more specific federal recommendations. He participated in the formulation of the general principles, but not in formulating the federal recommendations.

[47] Id. at 311.

[48] Id. at 312-17.

[49] Id. at 314. It should be noted that several members of the Constitution Project Sentencing Initiative, including James Felman, Thomas Hillier, and Judge Gertner, do not believe that the advisory system has been found wanting and currently support its continuance. *See* Testimony of James Felman on behalf of American Bar Association for this hearing; Thomas W. Hillier II and Amy Baron-Evans, *Six Years After Booker, the Evolution Has Just Begun*, 23 FED. SENT. RPTR. 132 (2010); Letter of Thomas W. Hillier II to Judiciary Committee, U.S. House of Representatives, October 11, 2011, available at http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/Hillier111011.pdf ; Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. LAW & POLICY REV. 262 (2009).

[50] Id. at 314-15.

should not be unduly detailed or restrictive.[51] Fourth, there should be ample provision for discretionary judicial departures below the jury-created sentencing ranges (including departures for what is now called substantial assistance).[52] Fifth, the Committee emphasized the importance to any improved sentencing system of requiring sentencing judges to provide "careful statements of reasons."[53]

After the Constitution Project Sentencing Initiative completed its reports, an ad hoc working group of lawyers and academics[54] took those reports a step further and drafted a set of Model Federal Sentencing Guidelines employing the principles established by the Constitution Project. These Model Guidelines were published in Volume 18, Number 6 of the Federal Sentencing Reporter (June 2006). I am submitting this volume of FSR as an addendum to this testimony.

In 2011, Judge William Sessions, former chair of the Sentencing Commission, published an excellent article advocating adoption of simplified presumptive guidelines with the same essential features recommended by the Constitution Project and the Model Guidelines Working Group.[55] I understand he is also appearing as a witness in this hearing to describe his proposal.

V. Recommendations

A. Adopt the Constitution Project/FSR/Sessions model

In my view, the Constitution Project/FSR/Sessions model represents the most desirable option among the constitutionally permissible architectures. All the variations on this theme so far proposed, though they differ in their details, combine a solution to the technical constitutional problem posed by *Blakely* with structural modifications designed to address many of the major substantive criticisms of the pre-*Booker* guidelines.

1. They would be simpler than the existing guidelines, requiring fewer findings of fact. This simplicity would make jury involvement practical (unlike the option of *Blakely*-

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[51] Id. at 316-17.
[52] Id. at 316. Though the constraints of the *Blakely* rule would bar "departures" above the top of jury-created ranges based on judge-found aggravating facts, the Constitution Project group recommended that there should be a mechanism for charging and proving to juries a designated set of extraordinary aggravating factors that would justify exemplary sentences in unusual cases.
[53] Id. at 317.
[54] The group included Mary Price, General Counsel of Families Against Mandatory Minimums, Beverly Dyer and Amy Baron-Evans of the Federal Public and Community Defenders, James Felman of Kynes, Markman & Felman, P.A., Professor Steven Chanenson of Villanova, Professor Nora Demleitner (now Dean of Washington & Lee Law School), Professor Michael O'Hear of Marquette, and myself. This group took no position on whether, and if so when, the model they helped formulate should replace the post-*Booker* advisory guidelines. Several of them, James Felman and Amy Baron-Evans and perhaps others, currently favor retention of the post-*Booker* system. *See, e.g.*, Testimony of James Felman for this hearing, and Amy Baron-Evans and Kate Stith, *Booker Rules*, __ U. PENN. L. REV. __ (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987041.
[55] 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. OF LAW & POLITICS 305 (2011).

izing the existing guidelines) because juries would be asked to find only a few facts in addition to the conventional elements now confided to their charge. It should also make the post-conviction judicial sentencing process simpler.

2. The system's relative simplicity should give political actors fewer opportunities for micromanaging sentencing outcomes.
3. The wider ranges would give judges more room for the operation of judicial discretion, while placing some reasonable presumptive limits on that discretion.
4. Various mechanisms have been suggested for constraining or guiding judicial discretion within the wider presumptive ranges.[56] My current view is that the best approach both in substance and in relation to potential constitutional challenges is simply to write advisory guidelines enumerating aggravating and mitigating factors that judges should consider in exercising their discretion to sentence near the bottom, in the middle, or towards the top of the range.
5. In this system, the ranges created by jury findings would be presumptive only. In order for such a system to meet its policy objectives, the judge must have substantial discretionary departure authority to impose a sentence below the jury-determined range and the decision to depart should be subject to appellate review. While it is difficult to articulate a precise standard in advance, the degree of departure authority and the standard of review should no more restrictive than that granted by the Supreme Court in *United States v. Koon*.[57] In my view, a system structured in this way would balance the need for some legal constraint on judicial sentencing discretion with the need for ample judicial authority to individualize sentences in particular cases.
6. Because of the Court's decision in *Booker*, there could be no discretionary authority to depart above the jury determined presumptive guidelines range. However, it would be possible to create a mechanism for presenting to juries some predetermined set of factors that, if found, would permit a judge to sentence above the otherwise applicable range in truly egregious or aggravated cases.
7. This system would also permit meaningful, though appropriately deferential, appellate review of district court sentencing decisions within jury created ranges. A real difficulty in any post-*Booker* system is designing a process of appellate review for sentences within statutory maxima and minima that does not run afoul of the *Blakely* construct of what an "element" is. For example, Justice Scalia believes that any substantive review of a sentencing judge's choice of sentence within the statutory maximum and minimum runs afoul of *Blakely* because the appellate court's ruling would have the effect of creating by common law certain zones above which a

[56] See, e.g., Bowman, *Beyond Band-Aids*, supra note 29, at 204-211; Bowman, *Determining the Sentencing Range and the Sentence Within Range: Model Sentencing Guidelines §§ 1.2 – 1.8*, 18 FED. SENT. RPTR. 323 (2006); Sessions, *supra* note 53.
[57] 518 U.S. 81 (1996).

defendant could not be sentenced without the sentencing court finding particular facts.[58] However, I think the majority of the Court would accept a regime requiring that a judge provide a statement of reasons for assignment of a within-range sentence and that the judge's sentence and his explanation be reviewable on a reasonableness standard.

B. Sentence length

Essential to the success of a new structured model would be a genuine and bipartisan effort to re-examine and, where appropriate, recalibrate the federal sentencing scale for all offenses. This will sound to some like code for a broad-based effort to reduce federal sentence length. But I hope it will be remembered that the first seventeen years of my professional life were spent primarily as a federal and state prosecutor and, while I may have mellowed a bit with age, I still believe in stern punishments for those who have done evil. The problem with many corners of the federal sentencing guidelines is that, with the accretion of amendments over 25 years, they have gradually become divorced from any rational calculation of how much punishment of what type best meets the objectives of a society that deserves both protection *and* an intelligent allocation of the resources it contributes to fighting crime.

The latter point deserves our particular attention. In past debates over federal sentence length, the cost of protracted imprisonment of numerous defendants was never a limiting consideration. That may no longer be the case. Concern over deficit financing of the federal budget is now bipartisan. And I am reliably informed that the cost of running the Bureau of Prisons is becoming so high that the Justice Department is facing the prospect of cutting programs devoted to catching criminals now on the street in order to pay for the cost of incarcerating those already in prison. A better balance can surely be achieved.

Moreover, those whose focus is primarily on ensuring appropriately severe punishment should remember something that everyone involved in the day-to-day operation of federal criminal law already knows – rules, whether "mandatory" or "advisory," that prescribe sentences significantly higher than can be supported by ordinary intuitions of justice will be ignored or evaded. Professor Heise and I documented this phenomenon in drug cases a decade ago.[59] A current, and even more glaring, example is the sentencing of high-loss corporate offenders. Guidelines for these cases are now pitched so high, calling for multi-decade sentences for virtually every defendant of even moderate culpability, that no one pays them any serious attention. Prosecutors and judges alike would be far better served by fraud guidelines that prescribed sentences that, while tough, could be rationally imposed.

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[58] See, Bowman, *Debacle*, supra note 13, at 444-47 (discussing Justice Scalia's concurrence in Rita v. United States, 551 U.S. 338 (2007)).

[59] Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002).

While I may be naïve, it should be possible, over a reasonable interval, to work out between the institutional actors a system that prescribes appropriately stern, but realistic, sentences and arrives at an equilibrium between judicial discretion and legislative will.

VI. "A Republic … If You Can Keep It"

Even if the post-*Booker* system is undesirable, and even if one can design a materially better system that, at its inception, calibrates sentences rationally and provides appropriate balance between general rules and individualizing discretion, how do you keep it? What assurance is there that the new system will not degenerate in undesirable ways? To this there are two answers:

First, there can be no absolute assurances. The nature of human systems is that they change. Flawed systems sometimes improve. Even the best-designed system will to some extent degrade on contact with messy reality. However, I do not think that the chimera of a perpetually perfect system should be a permanent barrier to enacting a system better than what we now have.

Second, the forces that combined to transform the 1987 guidelines into a one-way upward ratchet are sufficiently strong that one should not adopt a new system without accounting for those forces. In the end, this may be the single hardest problem facing the would-be reformer of federal sentencing. Time and space preclude a full exploration of this problem; however, I would suggest, tentatively and subject to later elaboration, that a solution would: (a) combine the Constitution Project/FSR/Sessions architecture with (b) a reconfiguration of the Sentencing Commission and its relation to the judiciary.

A. The Constitution Project/FSR/Sessions architecture should be less subject to ill-considered legislative manipulation than the current guidelines in either their pre- or post-*Booker* forms. Simplifying the sentencing table, widening the ranges, and thus reducing the number of intersections between ranges should reduce the temptation to "tweak" a guideline for political effect. It should also enable the Commission to respond to most expressions of congressional concern by altering the advisory guidelines directed at judicial sentencing discretion within ranges. While congressional suggestions and directives would undoubtedly continue, this system should enable the Commission to accommodate congressional concerns with less distortion of the guidelines design and less of an upward ratchet effect.

B. The Sentencing Commission's rulemaking process should be made more akin to that required of other independent agencies by the Administrative Procedures Act and other governmental openness statutes, and (2) a mechanism for direct judicial review of the Commission's rules should be devised. These are not novel suggestions, having been advanced at various times by Professors Ronald Wright and Kate Stith.[60] Both have suggested that better, more open, more procedurally regular rule-making procedures would generate better rules. I

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[60] *See supra*, note 15.

agree, but my primary interest in this reform flows from the intuition that more rigorous rulemaking reviewable by the courts should *also* provide the Commission's rules more insulation from short-term political pressure. I anticipate developing this proposal further in the coming months and hope to be able to share the results with the Commission in due course.