PROGRAM

8:00 a.m. to 8:30 a.m.	**Registration**
8:30 a.m. to 9:00 a.m.	**Odds and Ends** *Nick Drees*, Federal Public Defender
9:00 a.m. to 9:45 a.m.	**Supreme Court & Eighth Circuit Update** ***John Messina,*** Research & Writing Attorney
9:45 a.m. to 10:15 a.m.	***Booker* Strategies** *B. John Burns*, Assistant Federal Defender
10:15 a.m. to 10:30 a.m.	**Break**
10:30 a.m. to 11:30 a.m.	**Panel Discussion - Sentencing Experiences Under *United States v. Booker*** ***John Messina, B. John Burns, Terry McAtee, Tim Ross-Boon & Priscilla Forsyth***, Research & Writing Attorney & Assistant Federal Defenders
11:30 a.m. to 1:00 p.m.	**Lunch (On your own)**
1:00 p.m. to 1:45 p.m.	**Representing "Enemy Combatants"** *Angela Campbell*, Assistant Federal Defender
1:45 p.m. to 2:15 p.m.	**Issues Applicable to Probation & Supervised Release** *Robert Wicsher,* Assistant Federal Public Defender
2:15 p.m. to 2:45 p.m.	**924(c) Prosecutions** *Kevin Cmelik*, Assistant Federal Defender
2:45 p.m. to 3:00 p.m.	**Break**
3:00 p.m. to 3:30 p.m.	**Discovery Procedures/Plea Agreements** *Steve O'Meara*, First Assistant U.S. Attorney Southern District of Iowa
3:30 p.m. to 4:30 p.m.	**Ethics** *Steve Wandro*, Attorney at Law

NICK DREES

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PROFESSIONAL: Federal Public Defender, Northern and Southern Districts of Iowa (1999-Present); Assistant Federal Public Defender, Southern District of Iowa (1994-1999); Assistant Public Defender, Polk County Public Defender's Office (1991-1994); Law Clerk for the Honorable Donald E. O'Brien, U.S. District Court for Northern Iowa (1989-1991)

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PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2005-Present); Assistant Attorney General (1998-2005); Administrative Law Judge (1997-1998); Assistant Appellate Defender (1991-1997); Assistant County Attorney (1987-1991)

STEPHEN O'MEARA

EDUCATION: He graduated from the Creighton University School of Law, and, although not receiving a degree, has attended Drake University and the University of Iowa for graduate studies in public administration and social work

PROFESSIONAL: First Assistant U.S. Attorney - Southern District of Iowa. He served from September of 2003, to June of 2004, as the interim United States Attorney for the Southern District of Iowa. He served for approximately seven years as the Criminal Division Chief for the district, which includes offices in both Des Moines and the Quad Cities. He has been an Assistant U.S. Attorney (AUSA) since February of 1989. He has been practicing law in Iowa and Nebraska since 1974. His prior experience has included approximately 9 years of private practice, approximately 12 years as the Page County Attorney, and approximately 3 years as an Assistant Iowa Attorney General. He has served as an adjunct instructor in law at the Drake University School of Law. He has taught criminal trial advocacy for the National Advocacy Center for the U.S. Department of Justice.

STEVE WANDRO

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ODDS & ENDS

PRESENTED BY

NICK DREES
FEDERAL PUBLIC DEFENDER

QUESTIONS ABOUT CJA VOUCHERS?

CONTACT:

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Panel Administrator
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or

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QUESTIONS ABOUT CLE/SEMINAR MATTERS?

CONTACT:

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Asst. Panel Administrator
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nancy_lanoue@fd.org

CJA VOUCHER WORKSHEET
NORTHERN DISTRICT

CASE NAME AND NUMBER_____

CASE DISPOSITION CODE _____

ARE ALL BOXES COMPLETED CORRECTLY?: _____ **YES** _____ **NO**

HAVE OTHER VOUCHERS BEEN SUBMITTED?: _____ **YES** _____ **NO**

IF YES:	**FROM WHOM:**	**AMOUNT TO DATE:**
	_____	_____
	_____	_____
	_____	_____

IS VOUCHER BEING SUBMITTED *MORE* THAN 45 DAYS *AFTER* COMPLETION OF CASE? _____

		2005		**2006**
DATES OF SERVICE:	**From**	_____	**From**	_____
	To	_____	**To**	_____

IN-COURT HOURS:

a.	Arraignment	_____ hours	_____ hours
b.	Bail & Detention Hearing	_____ hours	_____ hours
c.	Motion Hearings	_____ hours	_____ hours
d.	Trial	_____ hours	_____ hours
e.	Sentencing Hearings	_____ hours	_____ hours
f.	Revocation Hearings	_____ hours	_____ hours
g.	Appeals Court	_____ hours	_____ hours
h.	Other	_____ hours	_____ hours

_____ hours x $90= _____ hours x $92=

Total $ _____ **Total $** _____ **TOTAL $**_____

OUT-COURT HOURS:

a.	Interviews/Conf.	_____ hours	_____ hours
b.	Obtain/Review Records	_____ hours	_____ hours
c.	Leg. Research/Brief Wr.	_____ hours	_____ hours
d.	Travel Time	_____ hours	_____ hours
e.	Invest/ Other Work	_____ hours	_____ hours
		_____ hours x $90=	_____ hours x $92=
		Total $ _____	**Total $** _____ **TOTAL $**_____

TRAVEL EXPENSE

From:	1/01/03	_____ Miles @ .36	=	$_____
	1/01/04	_____ Miles @ .37.5	=	$_____
	2/04/05	_____ Miles @ .40.5	=	$_____
	9/01/05	_____ Miles @ .48.5	=	$_____
	1/01/06	_____ Miles @ .44.5	=	$_____
			Total	$_____ **TOTAL $**_____

OTHER EXPENSES

Parking		$ _____
Meals		$ _____
Lodging		$_____
Copy	____ Copies @ .10 per page =	$_____
Postage		$_____
Phone		$ _____
Fax		$_____
Other		$_____
	Total	$_____ **TOTAL $** _____

Total $ _____

CJA VOUCHER WORKSHEET
SOUTHERN DISTRICT

CASE NAME AND NUMBER_____

CASE DISPOSITION CODE _____

ARE ALL BOXES COMPLETED CORRECTLY?: _____ **YES** _____ **NO**

HAVE OTHER VOUCHERS BEEN SUBMITTED?: _____ **YES** _____ **NO**

IF YES:	**FROM WHOM:**	**AMOUNT TO DATE:**
	_____	_____
	_____	_____
	_____	_____

IS VOUCHER BEING SUBMITTED *MORE* THAN 45 DAYS *AFTER* COMPLETION OF CASE? _____

		2005		**2006**
DATES OF SERVICE:	**From**	_____	**From**	_____
	To	_____	**To**	_____

IN-COURT HOURS:

a.	Arraignment	_____ hours	_____ hours
b.	Bail & Detention Hearing	_____ hours	_____ hours
c.	Motion Hearings	_____ hours	_____ hours
d.	Trial	_____ hours	_____ hours
e.	Sentencing Hearings	_____ hours	_____ hours
f.	Revocation Hearings	_____ hours	_____ hours
g.	Appeals Court	_____ hours	_____ hours
h.	Other	_____ hours	_____ hours

_____ hours x $90= _____ hours x $92=

Total $ _____ **Total $** _____ **TOTAL $**_____

OUT-COURT HOURS:

a.	Interviews/Conf.	_____ hours	_____ hours
b.	Obtain/Review Records	_____ hours	_____ hours
c.	Leg. Research/Brief Wr.	_____ hours	_____ hours
d.	Travel Time	_____ hours	_____ hours
e.	Invest/ Other Work	_____ hours	_____ hours
		_____ hours x $90=	_____ hours x $92=
		Total $ _____	**Total $** _____ **TOTAL $**_____

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From:	1/01/03	_____ Miles @ .36	=	$_____
	1/01/04	_____ Miles @ .37.5	=	$_____
	2/04/05	_____ Miles @ .40.5	=	$_____
	9/01/05	_____ Miles @ .48.5	=	$_____
	1/01/06	_____ Miles @ .44.5	=	$_____
			Total	$_____ **TOTAL $**_____

OTHER EXPENSES

Parking		$ _____
Meals		$ _____
Lodging		$_____
Copy	____ Copies @ .25 per page =	$_____
Postage		$_____
Phone		$ _____
Fax		$_____
Other		$_____
	Total	$_____ **TOTAL $** _____

Total $ _____

CASE DISPOSITION CODES

	DISPOSITION TYPE	CODE
District Court	Dismissed	1
	Acquitted by court, or government motion for judgment of acquittal granted	2
	Acquitted by jury	3
	Convicted/final plea guilty	4
	Convicted/final plea nolo	5
	Convicted/court trial	8
	Convicted/jury trial	9
	Mistrial	C
	Not Guilty/insane/court trial	E
	Guilty/insane/court trial	F
	Not guilty/insane/jury trial	G
	Guilty/insane/jury trial	H
	Other (PTD matters, other reps. Transfers)	X
Appeals	Affirmed	A
	Reversed	R
	Remanded*	O
	Reversed in Part/Affirmed in Part	RA
	Affirmed in Part/Reversed in Part	AR
	Dismissed	1
Death Penalty	Acquitted on Death Counts, Convicted on other counts	AC
	Death	DD
	Life	LL
	Term of Years	YY
Probation, Parole or Supervised Release	Revoked	RV
	Restored	RS
Habeas/Petitions/ Writs	Granted	GR
	Denied	DE

* Use Remanded if the disposition at the circuit court requires further proceedings in the lower court (e.g., re-sentencing, new trial, etc.) although the appellate court's decision may reflect codes "RA" or "AR."

BOOKER STRATEGIES
PRESENTED BY

B. JOHN BURNS
ASSISTANT FEDERAL DEFENDER

MEMORANDUM

To: Federal Public Defenders & Community Defender Organizations

From: Amy Baron-Evans & Anne Blanchard, Sentencing Resource Counsel
Andrea Taylor, Defender Services Training Branch

Date: February 6, 2006

Re: Post-*Booker* Strategy Session, January 29-30, 2006, Los Angeles Biltmore Hotel

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This memorandum summarizes the results of the Post-*Booker* Strategy Session, held on January 29-30, 2006, at the Los Angeles Biltmore Hotel. The Session was organized by the Defender Services Training Branch with the goal of developing the thinking on three areas of post-Booker litigation–procedural arguments (standard of proof, notice, and evidentiary issues), disparity arguments (fast track, crack-powder, state-federal, and cooperators), and sentencing mitigation.

The Session participants included representatives from each Circuit. The participants were: Amy Baron-Evans, David Beneman, Henry Bemporad, Anne Blanchard, Michael Caruso, Sarah Gannett, Carl Gunn, Steve Kalar, Jerome Kearney, Marianne Mariano, David McColgin, Alonzo Padilla, David Porter, Martin Richey, Steve Sady, Alison Siegler, Brett Sweitzer, Andrea Taylor, Melody Walcott, and Andrew Wise.

Procedural Arguments

The argument that sentencing courts after *Booker* are required to apply the "beyond a reasonable doubt" standard in fact-finding is getting little traction nationally. Although the argument is worth preserving, participants agreed that a better approach is identifying for courts instances in which a higher standard ought to be applied because of the stakes involved or the quality of the evidence at issue, and encouraging them to exercise their discretion regarding the standard of proof in those instances. For a comprehensive discussion of this approach and analysis of pre and post-Booker caselaw, *see* "The Due Process Approach to Sentencing Justice: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy," draft available now at www.fd.org, forthcoming in Volume 18, No. 2 of *Federal Sentencing Reporter*. A court might choose to apply the beyond a reasonable doubt standard when considering cooperator testimony of questionable credibility. Or, a court might decide to use the beyond a reasonable doubt standard to help it determine the weight to give the advisory guidelines. For a discussion of these approaches, *see United States v. Gray*, 362 F. Supp. 2d 714 (S.D.W.V. 2005). Alternatively, defenders may wish to remind courts how rigorous the preponderance standard can be by reference to use of the standard in civil cases.

Similarly, given the stakes involved in federal sentencing, courts should take a closer look at the quality of the evidence on which they are basing their sentences. Although most courts do

not feel obliged to apply *Crawford* at sentencing, defenders may wish to encourage courts to exercise their discretion to apply this and other evidentiary rules to assure the reliability of sentencing fact-finding. One promising argument is that, in doing so, courts will be promoting respect for the law–one of the 3553(a) factors.

Many courts are adopting the view that the Guidelines, though advisory, enjoy a "presumption of reasonableness." In those courts, there is an even stronger basis for seeking higher burdens of proof and evidentiary standards because the presumption operates to make the Guidelines mandatory again.

After *Booker*, the Federal Rules of Criminal Procedure are being revised so that Rule 32(h) requires courts to give notice if they intend to rely on any ground not discussed in the PSR or the parties' submissions. Defenders should be aware that, in most districts, Probation makes a confidential written or oral recommendation to the court which may include facts or sentencing rationales that are not disclosed elsewhere. We may wish to encourage courts to share the recommendations.

Disparity Arguments

When the government urges the court to cleave to the Guidelines to prevent disparity in sentencing, defenders should point out (1) that the Guidelines are not rational or well-crafted; (2) that there will be no disparity among defendants who have similar 3553(a) factors as the client being sentenced; (3) that Breyer's remedial opinion recognized that Booker would result in less uniformity vis-a-vis the Guidelines; and (4) that unwarranted disparity is only one of many 3553(a) factors.

Briefing and documentary support for a variety of *defense* disparity arguments, including fast-track and crack-powder, is available at www.fd.org (available from any computer) and www.fpdforums.org (available only from a defender office computer).

Recent case law suggests that defenders must be careful to individualize their disparity arguments. *See United States v. Pho*, 433 F.3d 53 (1st Cir. 2006). Although we may want to argue that the Guidelines are not well-conceived, we must also show how their failings play out in our individual clients' cases. For instance, the crack guidelines are based on the mistaken belief that crack dealing is more violent than other drug dealing, they are not, and that is borne out in client's case (he is a family man, he did not have a gun, he has no history of violent conduct, etc.).

Some Courts have rejected defense disparity arguments based on Congress's apparent approval of certain types of disparity, like the fast-track program. In doing so, however, Congress assumed that the disparity was warranted, or had a rational basis–*i.e.*, that the fast-track program was needed in certain border jurisdictions. Defenders should continue to develop FOIA and discovery requests to reveal the arbitrary, capricious, or even retaliatory practices underlying programs like fast-track, Project Exile, and Project Trigger-Lock.

Sentencing Mitigation

Participants shared many creative examples of sentencing mitigation–having a family member narrate a slide show, using video to offer the testimony of illegal alien family members who are afraid to come to court, asking graduate students to testify about "a day in the life" of a client from the reservation, or taping off the size of a standard BOP cell in the well of the courtroom.

Defenders are currently doing a better job at sentencing mitigation than the government is at aggravation. We should anticipate the government beginning to emphasize victim impact and to request the opportunity to examine our clients to challenge our mental health evidence. We should be able to learn strategies for addressing these government approaches from our death penalty community.

Participants agreed that we could be doing a better job of presenting sentencing "cost-benefit analyses" to the court. We should be developing sentencing alternatives to incarceration and showing the court how those alternatives are less expensive and more effective than what the BOP can offer. For example, numerous studies (including some by the DOJ) demonstrate that long sentences do not deter criminal conduct, especially among drug offenders.

To protect our record, defenders should consider submitting "proposed findings of fact and conclusions of law" comparable to those submitted in civil litigation with their sentencing memoranda.

Defenders are encouraged to use the timekeeping system to document the extra work that Booker has created, such as more hours of sentencing investigation more time invested in training and reading to stay current. Offices may wish to request additional resources from the Administrative Office for experts, investigators, paralegals, etc. The Training Branch welcomes suggestions for future training.

Ideas in need of follow-up:

1. Draft FOIA request for requests to DOJ for fast track designation (per Cassell's discussion of rejection of Utah's request).

2. Develop section on fpdforums.org to park creative mitigation samples.

3. Draft sample motion on "efficiency" and "effectiveness" of our proposed sentence,
   (A) incorporating cost vs. savings projections and
   (B) empirical data on success of non-incarceration alternatives for recidivism

4. Draft an annotated checklist for how to best exploit the non-recidivating potential of the def. (e.g. drug-free in prior year)

5. Develop resource guide for formulating concrete alternative sentencing options

ENFORCING THE NEW SENTENCING LAW

Advanced Federal Criminal Appellate Practice Seminar
March 10, 2006

Amy Baron-Evans, Sentencing Resource Counsel
Federal Public and Community Defenders

This memorandum covers some legal and historical authorities intended to be useful in briefing issues arising from the government's well-orchestrated effort to maintain the sentencing system held unconstitutional in United States v. Booker, 543 U.S. 220 (2005). While it varies somewhat among districts and circuits, the statistics indicate that not much has changed.[1] A disturbing trend has been noted in the Seventh and Eighth Circuits of upholding within- and above-guideline sentences and reversing below-guideline sentences.[2]

Part I describes the new sentencing system put in place by Booker. Part II describes Department of Justice directives after Booker. Following those directives, the government is arguing (1) that the guideline range must be given substantial weight in the district court and a presumption of reasonableness on appeal (addressed in Part III), (2) that the courts of appeals have no jurisdiction to review a correctly-calculated within-guideline range sentence (addressed in Part IV), and (3) that certain factors are off limits as a categorical matter (addressed in Part V).

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[1] The percentage of sentences below the guideline range has increased only somewhat, and average sentence length is the same as it was following the PROTECT Act. According to the Commission's statistics, judges are sentencing below the guideline range without a government motion in only 12.8% of cases, See U.S. Sentencing Commission, Special Post-Booker Coding Project at 7 (Prepared Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_010506.pdf, up only 2 ½% from the 10.4% the Commission reported for 2001 in its Report to Congress on downward departures following the Feeney Amendment. U.S.S.C., Report to Congress: Downward Departures from the Federal Sentencing Guidelines Executive Summary at v (October 2003). Because the Commission did not separate fast track departures from all downward departures until sometime in 2003, the Feeney Amendment was enacted in 2003, and Blakely was decided in 2004, is not possible to tell with complete accuracy to what extent sentences below the guideline range imposed by judges without a government motion or acquiescence have changed. However, according to the most recent data, the percentage of sentences below the guideline range, both government-sponsored and court-imposed, has gone from 35.4% in 2001, to 34.2% in 2002, to 29.7% in 2003 (the year of the PROTECT Act), to 27.1% in 2004 (pre-Blakely), to 37.2% in 2005 (post-Booker). See U.S. Sentencing Commission, Special Post-Booker Coding Project at 7 (Prepared Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_010506.pdf. The percentage of sentences above the range has doubled, from .6-.8% to 1.7%. Id. The average length of sentences for the most frequently applied guidelines has gone from 50 months in 2000 and 2001 to 51 months in 2002, to 52 months in 2003, to 56 months in 2004 (pre-Blakely), and remained at 56 months in 2005 (post-Booker). Id. at 13-15.

[2] See Sentencing Law and Policy,
http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/reasonableness_.html;
http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/the_ugly_look_o.html.

On February 7, 2006, the First Circuit heard en banc oral argument on the first and second issues in two cases, one a defendant's appeal of a within-guideline sentence and the other a defendant's appeal of an above-guideline sentence.[3] The court, during oral argument, seemed dismissive of the government's argument on the second issue. It remains to be seen how the court will rule on the first issue, though Judge Selya disparaged the government's argument as one that would create a system that was "just a little bit unconstitutional."

There is now a circuit split, with the Third Circuit and possibly the Eleventh declining to adopt a presumption of reasonableness,[4] and the Fourth, Fifth, Seventh, Eighth and Tenth adopting the presumption, albeit without analysis of the statutory language or constitutional implications.[5] The Sixth Circuit adopted the presumption in one case,[6] but explained more recently that this was "in fact rather unimportant" because the district court must follow the "statutory mandate to 'impose a sentence sufficient, but not greater than necessary' to comply with the purposes of sentencing in section 3553(a)(2)" and in doing so must "consider[] all of the relevant section 3553(a) factors," and the court of appeals must engage in "meaningful review" of sentences within and outside an applicable guideline range.[7] Early on, the Second Circuit indicated that it would not adopt any such presumption and has more recently confirmed that view.[8] A panel of the Ninth Circuit slipped the presumption into a footnote, then issued an order deleting that sentence.[9]

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[3] In United States v. Jimenez-Beltre, No. 05-1268, and United States v. Scherrer, No. 05-1705, the court asked the parties to address (1) the proper approach to a post-Booker sentence in the district court and the relationship of the guidelines to that determination, and (2) the proper approach to take on appeal in reviewing a post-Booker sentence.

[4] United States v. Cooper, __ F.3d __, 2006 WL 330324 (3d Cir. Feb. 14, 2006); United States v. Lisbon, slip op., 2006 WL 306343 *2 (11th Cir. Feb. 10, 2006) ("A sentence within the guidelines range is not presumptively reasonable.") (unpublished).

[5] United States v. Kristl, No. 05-1067 (10th Cir. Feb. 17, 2006); United States v. Green, __ F.3d __, 2006 WL 267217 (4th Cir. Feb. 6, 2006); United States v. Alonzo, 2006 WL 39119 (5th Cir. Jan. 9, 2006); United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005).

[6] United States v. Williams, __ F.3d __, 2006 WL 224067 (6th Cir. Jan. 31, 2006).

[7] United States v. Foreman, __ F.3d __, 2006 WL 287365, *5 & n.1 (Feb. 8, 2006).

[8] United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005) ("we decline to fashion any *per se* rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline."); United States v. Claudillo-Marquez, 2006 WL 224182 **3-4 (2d Cir. Jan. 30, 2006) (unpublished).

[9] United States v. Guerrero-Velasquez, No. 05-30066 (9th Cir. Jan. 19, 2006, amended Feb. 7, 2006), see http://www.ca9.uscourts.gov/ca9/newopinions.nsf/3180B7508C9A29FF8825710D0081BEA5/$file/0530066.pdf?openelement.

The Supreme Court is likely to resolve the issue of whether, in order to avoid violating the Sixth Amendment, the guidelines must be truly "advisory" (as it said in Booker) or "presumptive" (as some courts have nonetheless held).[10] These issues should be preserved and litigated in the district courts and the court of appeals, and raised in petitions for certiorari as appropriate. You may also want to look at the amicus briefs filed by the Federal Defenders and the National Association of Criminal Defense Lawyers in Jimenez-Beltre and Scherrer (available on the First Circuit blog), and there is an excellent blog on presumptive reasonableness on the Ninth Circuit blog at http://circuit9.blogspot.com/2006/02/guidelines-appeals-presumption-of.html.

I. The New Sentencing Law

In United States v. Booker, 543 U.S. 220 (2005), a majority of the Supreme Court (the merits majority) held that judicial factfinding under the Sentencing Reform Act of 1984 ("SRA" or "Act") as written violated the Sixth Amendment because it required judges to increase the guideline range above that authorized by the jury's verdict or the defendant's admission, and then, under § 3553(b)(1), to impose a sentence within that range unless there was a ground for departure of a kind or to a degree not taken into account by the Sentencing Commission in formulating the Guidelines.[11] The departure authority contained in § 3553(b)(1) "does not avoid the constitutional issue, just as it did not in Blakely itself."[12]

To effectuate what Congress would have intended had it known that the SRA as written violated the Sixth Amendment, and to permit judges to continue to find facts without violating the Sixth Amendment, another majority (the remedy majority) re-wrote the SRA: It excised § 3553(b)(1), and also § 3742(e), the appellate review section, because it reflected "the Guidelines' mandatory nature," and in particular, *de novo* review, since it made Guidelines sentencing "even more mandatory than it had been."[13] This made the guidelines "advisory" and the remainder of the Act constitutional.[14]

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[10] On February 21, 2006, the Supreme Court granted certiorari in Cunningham v. California, No. 05-6551, where the issue is whether California's determinate sentencing scheme is unconstitutional. It is unclear whether this will have any bearing on whether treating the Guidelines as "presumptively reasonable" is constitutional or not. To obtain the documents, go to http://www.fdap.org/PostCunninghamCertGrProcedures.htm.

[11] Id. at 233-35, 244.

[12] Id. at 234.

[13] Id. at 259, 261. Additional excisions are necessary to comply with the Sixth Amendment. See, e.g., United States v. Selioutsky, 409 F.3d 114,116-117 (2d Cir. 2005) (Booker rationale requires excision of §3553(b)(2)); United States v. Bolano, 409 F.3d 1045, 1047 (8th Cir. 2005) (same regarding §3553(f)).

[14] Id. at 245, 259.

After these excisions, 18 U.S.C. § 3553(a) is now the governing law in the district court; reasonableness with reference to § 3553(a) is the standard of review on appeal.[15] What spares judicial factfinding from unconstitutionality is the courts' duty to faithfully apply § 3553(a) as written.[16] A faithful application of the statute requires judges to independently evaluate the seriousness of the offense, the need for deterrence and incapacitation, and the treatment and rehabilitation needs of the defendant, in light of all of the factors that are pertinent in the case, and then to impose a minimally-sufficient sentence to satisfy the statutory sentencing purposes.[17]

The role of the guidelines in the statutory structure is "advisory."[18] It is important to recognize, as the Commission has explained, that the standard set forth in the now-excised §3553(b)(1) (requiring a sentence within the guideline range unless a circumstance of a kind or degree not taken into consideration by the Sentencing Commission in formulating the Guidelines) was adopted during the legislative process in 1978 to ensure that the guidelines were "presumptive" rather than "advisory" as they had originally been conceived.[19] In other words, the guidelines in the system just struck down were "presumptive" (because of the authority to depart) but this did not avoid the constitutional infirmity.[20]

After Booker, the primary sentencing mandate and organizing principle for all sentencing decisions is that the court "**shall**" impose a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing: just punishment in light of the seriousness of the offense, respect for law, deterrence, incapacitation if necessary to

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[15] Id. at 259-61.

[16] Id. at 259-60.

[17] See United States v.Pho, 433 F.3d 53, 64 (1st Cir.2006) (district court may not "construct[] a new sentencing range based on the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 ratio embedded in the sentencing guidelines," but "we do not intend to diminish the discretion that, after Booker, district courts enjoy in sentencing matters or to suggest that, in a drug-trafficking case, the nature of the contraband and/or the severity of a projected guideline sentence may not be taken into account on a case-by-case basis.").

[18] Id. at 245.

[19] U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (Fifteen Year Report) at 7, 16-18 (2004), available at http://www.ussc.gov/15_year/15year.htm. See also Marc Miller & Ronald Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Discretion, 2 Buff. Crim. L. Rev. 723 (1999) (recounting adoption of "presumptively reasonable" guidelines in the original SRA).

[20] Id. at 234.

protect the public, and needed rehabilitation and treatment.[21] In determining that "particular sentence," the court "**shall** consider" (1) the history and characteristics of the defendant and the circumstances of the offense (including for the first time all *mitigating* characteristics and circumstances), (2) the sentencing purposes just described, (3) the kinds of sentences available (which need not be the kinds recommended in § 5C1.1 but must comply with any applicable statute), (4) the "advisory" guideline range (neither mandatory nor presumptive), (5) the Commission's policy statements about departures and other matters (also "advisory"), (6) the need to avoid *unwarranted* disparities among defendants with similar records convicted of similar conduct (*not* the need to avoid sentences different from the guideline range), and (7) the need to provide restitution to victims, if any.[22]

The requirement that the sentence be minimally sufficient to satisfy the statutory purposes of sentencing is not just one consideration in sentencing; it is a cap above which the Court is statutorily prohibited from sentencing; the sentencing guideline range is statutorily subordinate to it.

Just recently, in United States v. Foreman, the Sixth Circuit recognized the primacy of the "sufficient but not greater than necessary" mandate in district courts' sentencing decisions.[23] Otherwise, it has been articulated by the courts of appeals in only a few cases and not consistently.[24] However, this sentencing principle dates back to the 1800s, influenced the Founding Fathers in their views about punishment,[25] is implicit or explicit in the guideline systems of most states[26] and in the Model Penal Code,[27] and

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[21] 18 U.S.C. § 3553(a)(2).

[22] 18 U.S.C. § 3553(a)(1)-(7).

[23] See United States v. Foreman, __ F.3d__, 2006 WL 287365, **5-6 & n.1 (6th Cir. Feb. 8, 2006).

[24] United States v. Williams, __ F.3d __, 2006 WL 68559 *4 (11th Cir. Jan. 13, 2006) (affirming district court's conclusion that "its final sentence of 90 months' imprisonment was 'sufficient, but not greater than necessary' to punish, deter, and rehabilitate Williams."); United States v. Cawthorn, 419 F.3d 793, 802 (8th Cir. 2005) ("district court's duty" is that it "shall impose a sentence sufficient but not greater than necessary"); United States v. Neufeld, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005) (a "more-than-adequate sentence would conflict with § 3553(a)'s injunction against greater-than-necessary sentences"); United States v. Soto, 2005 WL 281178 (3d Cir. Oct. 27, 2005) (the sentence must be "adequate and appropriate, not greater than necessary"); United States v. Acosta-Luna, 2005 WL 1415565 (10th Cir. June 17, 2005) (the "provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing").

[25] Garry Wills, Inventing America 94 (1979); David McCullough, John Adams 66-67 (2001); Jeremy Bentham, The Rationale of Punishment 23 (1830) ("All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

[26] Richard S. Frase, Punishment Purposes, 58 Stan. L. Rev. 67, 68 (2005).

is clearly stated in section 3553(a), which now governs sentencing. Its rationale is that severe penalties are costly to the public, usually harmful to offenders, and have uncertain and limited deterrent value, so the preference is for the least punishment necessary for the public welfare.[28]

As a matter of statutory construction, the guideline range, listed in subsection (4) of the statute, is subordinate to the minimally sufficient mandate stated in the first sentence. Courts tend to calculate it first because it is the only factor with a number attached to it. It seems unobjectionable for the court to calculate that factor first, then once calculated, to "throw[] this ingredient into the section 3553(a) mix," and consider it in light of the minimally sufficient mandate and other factors material to the case.[29] This does not make it the primary sentencing mandate or organizing principle of the sentencing decision. To the contrary, § 3553(a) "lists the Sentencing Guidelines as one factor to be considered in imposing sentence."[30]

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[27] Model Penal Code: Sentencing § 1.02(2)(a)(iii) (Preliminary Draft No. 3 2004).

[28] Frase, supra note 26, at 68; Norval Morris, The Future of Imprisonment 59-62 (1974).

[29] United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006).

[30] Booker, 543 U.S. at 233-34. See also United States v. Gorsuch, 404 F.3d 543, 545(1st Cir. 2005) ("the district court must consider the sentencing guidelines – but only on an advisory basis – and also must consider the other statutory factors set forth in 18 U.S.C. § 3553(a) . . .") (emphasis supplied); United States v. Green, 426 F.3d 64, 65 (1st Cir. 2005) ("the district court must still consult the guidelines as one of several factors in resentencing . . . ."); United States v. Robinson, 433 F.3d 31, 35 (1st Cir. 2006) ("After Booker, the Guidelines are merely advisory, which means that a district court has considerable leeway to impose a sentence that falls outside of the range suggested by the Guidelines.").

II. DOJ's Directives to Advocate Preservation of the Unconstitutional Sentencing System

Two weeks after Booker was decided, Main Justice (DOJ) issued a directive to all line prosecutors ordering them to urge the courts to violate the statute and with it, the Sixth Amendment. The directive said that prosecutors (1) "must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases," (2) "must oppose" any sentence that "is below what the United States believes is the appropriate Sentencing Guidelines range," and (3) must report "sentences outside the appropriate Sentencing Guideline range." DOJ would ensure "consistent and judicious positions in pursuing sentencing appeals."[31]

III. The Underpinnings of the Substantial Weight/Presumptively Reasonable Argument Are Constitutionally, Statutorily, and Factually Wrong.

A. The System Advocated by the Government Has Been Held Unconstitutional.

An example of DOJ's "consistent and judicious" appeals strategy is found in the government's brief in Jimenez-Beltre, where it argued that (1) "in formulating the Guidelines, the Commission was required to and has considered all of the §3553(a) factors," (2) one of the only practical ways to maintain uniformity is to follow the Guidelines, (3) thus, "a correctly-calculated Guidelines sentence is presumptively reasonable," and a "defendant can rebut the presumption of reasonableness 'only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a)," which (according to the government) the Commission already considered in formulating the Guidelines. [32]

Even if this were an accurate rendition of the statutory directives to the Commission and the Guidelines that resulted (and it is not, see C and D, infra), it is indistinguishable for constitutional purposes from the pre-Booker system. As the merits majority held, a system that "permit[s] departures from the prescribed sentencing range in cases in which the judge 'finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence

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[31] Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf.

[32] This theory was first posited by Judge Cassell of the District of Utah in support of affording the Guidelines "heavy weight" in the district court. United States v. Wilson, 350 F.Supp.2d 910 (D. Utah Jan. 13, 2005) (Cassell, J.). Judge Gertner has exposed many of its historical and factual inaccuracies in United States v. Jaber, 362 F.Supp.2d 365, 370-76 (D. Mass. 2005) (Gertner, J.).

different from that described' . . . does not avoid the constitutional issue, just as it did not in Blakely itself."[33]

As noted above, the pre-Booker system was a "presumptive" guideline system. See Part I, supra. The authority to depart for reasons of a kind or degree not considered by the Commission in that "presumptive" system did not avoid the Sixth Amendment problem. The "presumptive" guideline system advocated by the government would violate the Sixth Amendment as well.

B. The Government's Theory Violates Basic Canons of Statutory Construction.

It is a basic canon of statutory construction that a statute should not be construed to render any of its provisions inoperative, superfluous, or insignificant.[34] The system advocated by the government, which assumes that the guidelines already reflect the requirements of § 3553(a), would swallow, negate and render insignificant subsections (1), (2), (3), (6) and (7) of the statute.

C. The Government's Theory Relies on the Incorrect Assumption that the Statutory Directives to the Commission and to the District Court Are the Same.

28 U.S.C. §§ 991 and 994, which contain directives to the Commission regarding how to formulate guidelines, and § 3553(a), which tells the district courts how to impose sentence, are not congruent.

Minimally Sufficient Mandate. Among other things set forth in Subpart D below, Congress directed the Sentencing Commission to establish sentencing policies and practices that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)."[35] In contrast, Congress directed sentencing courts "in imposing a sentence" that they "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]."[36] District courts are subject to the minimally sufficient limitation, while the Sentencing Commission is not. (As will be seen in Subpart D, the Commission acknowledges that its guidelines are greater than necessary to serve sentencing goals and even dis-serve them in important respects.)

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[33] Booker, 543 U.S. at 234.

[34] See Duncan v. Walker, 533 U.S. 167, 174 (2001); Collautti v. Franklin, 439 U.S. 379, 392 (1979); Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas, 417 F.3d 216, 222 n.8 (1st Cir. 2005); Herman v. Hector I. Nieves Ttransp., Inc., 244 F.3d 32, 36 (1st Cir. 2001).

[35] 28 U.S.C. § 991(b)(1)(A).

[36] 28 U.S.C. § 3553(a).

Mitigating History, Characteristics, and Circumstances Prohibited or Discouraged. In determining the "particular sentence" which is sufficient but not greater than necessary, the district court must consider all of the purposes and factors listed in § 3553(a), including the "nature and circumstances of the offense and the history and characteristics of the defendant."[37] Further, "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of the defendant which a district court "may receive and consider for the purpose of imposing an appropriate sentence."[38]

In contrast, the Guidelines' policy statements prohibit,[39] discourage[40] hedge with limitations and exceptions,[41] or simply do not mention the defendant's mitigating characteristics and mitigating circumstances of the offense. Some of the restrictions the Commission placed on mitigating factors were at the direction of Congress but many were not. Congress directed the Commission to make the Guidelines completely neutral as to race, gender, national origin, creed, and socio-economic status.[42] The Commission prohibited those factors, and, on its own, prohibited drug or alcohol dependence, gambling addiction, lack of guidance as a youth, similar circumstances indicating a disadvantaged background, and post-sentencing rehabilitation on re-sentencing. Congress said that the Commission must assure that "the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[43] The Commission responded by strictly limiting consideration of not only those factors, but the additional factors of age, mental and emotional conditions,

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[37] Id.

[38] 18 U.S.C. § 3661.

[39] See U.S.S.G. § 5H1.10 (race, gender, national origin, creed, and socio-economic status); § 5H1.4 (drug or alcohol dependence and gambling addiction); § 5H1.12 (lack of guidance as a youth and similar circumstances indicating a disadvantaged background); § 5K2.19 (post-sentencing rehabilitation on re-sentencing).

[40] See U.S.S.G. § 5H1.1 (age), § 5H1.2 (education and vocational skills), § 5H1.3 (mental and emotional conditions not meeting the diminished capacity standard), § 5H1.4 (physical condition or appearance), § 5H1.5 (employment record), § 5H1.6 (family ties and responsibilities), § 5H1.11 (military, civic, charitable or public service, good works).

[41] See U.S.S.G. § 5K2.10 (victim's conduct), § 5K2.11 (lesser harms), § 5K2.12 (coercion and duress), § 5K2.13 (diminished capacity), § 5K2.16 (voluntary disclosure), § 5K2.19 (post-sentencing rehabilitation efforts), § 5K2.20 (aberrant behavior), and § 5K2.23 (discharged terms of imprisonment).

[42] See 28 U.S.C. § 994(d).

[43] See 28 U.S.C. § 994(e).

physical condition or appearance, and military, civic, charitable or public service, and good works. As many have noted and a review of these provisions reveals, the Commission did not explain its prohibitions and restrictions or cite to any sentencing purposes, data or research, and departed from past practice in doing so.[44]

Whatever the impetus (Congress or the Commission on its own), the Guidelines' policy statements do not reflect the same individualized sentencing required by § 3553(a). Thus, the First Circuit has recognized that these previously prohibited or discouraged factors may now be fully considered in sentencing.[45]

Aggravating Factors Over-Represented. In contrast to mitigating offender characteristics and offense circumstances, the Guidelines fully (and excessively, see Subpart C infra) reflect one aggravating characteristic of the defendant (criminal history) and a seemingly infinite and ever-increasing sea of aggravating offense circumstances.[46]

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[44] E.g., Marc Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1225 (April 2004); Michael M. O'Hear, The Original Intent of Uniformity in Sentencing, at 31-37, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: http://ssrn.com/abstract=800831.

[45] United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005) (that defendant was caretaker for brain damaged son may be considered under 3553(a) though there were alternative means of care and thus not ground for departure); United States v. MacKinnon, 401 F.3d 8,11 (1st Cir. 2005) (remanding for re-sentencing where district court had said that career offender guideline produced a sentence that was "unjust, excessive and obscene"); United States v. Heldeman, 402 F.3d 220 (1st Cir. 2005) (district court may have imposed lower sentence based on advanced age and medical condition, and that "unlawful activities were the exception to an otherwise lawful medical practice," though "these factors do not approach what is required to justify a downward departure"); United States v. Morin, 403 F.3d 41 (1st Cir. 2005) (defendant "could raise other arguments under advisory guidelines that were previously precluded"); United States v. Gorsuch, 404 F.3d 543 (1st Cir. 2005) ("serious mental illness, maternal responsibilities, and lack of a criminal record may be more relevant than under the pre-Booker regime of mandatory guidelines"); United States v. Lewis, 406 F.3d 11, 21-22 (1st Cir. 2005) (remanding for re-sentencing where district court may have imposed a different sentence based on its "expressed concern that Lewis's Guidelines range was significantly higher than that of his co-defendant, despite being sentenced on the same charges," and that the guideline sentence of 319 months was "a virtual life sentence" given the defendant's age of 38); United States v. Meada, 408 F.3d 14 (1st Cir. 2005) (remanding for re-sentencing because court may not have attached same sentencing consequences to perjury); United States v. Burhoe, 409 F.3d 5 (1st Cir. 2005) (remanding for re-sentencing where court could not depart based on restrictions in §5K2.13); United States v. Wilkerson, 411 F.3d 1, 10 (1st Cir. 2005) (court could consider "horrible young life"); United States v. Bisanti, 414 F.3d 168, 173-74 (1st Cir. 2005) (though not allowed as grounds for departure, court could consider mitigating facts that defendant was ripped off and given bad advice, that he voluntarily returned to this country to face charges, that he had no previous record, and family circumstances); United States v. Lata, 415 F.3d 107, 113 (1st Cir. 2005) (though age and infirmity were discouraged bases for departure, they may be considered under 3553(a), especially if they diminish the risk of re-offense).

[46] O'Hear, supra note 44.

In assessing its work over the first fifteen years, the Sentencing Commission has identified some guidelines that produce sentences that are too severe, but none that are not severe enough. Thus, it is highly probable that the guideline range already takes into account whatever factor the government may argue for a sentence above the guideline range, and it should be extremely difficult for a judge to justify a sentence higher than the guideline range as insufficient to meet the goals of sentencing. Where the judge gave such a sentence, careful attention should be paid to whether the reasons are already reflected in the base offense level, specific offense characteristics, and/or criminal history rules that produced the guideline range.

D. The Sentencing Commission Acknowledges that the Guidelines Produce Sentences that Are Disproportionate to the Seriousness of the Offense and the Risk of Recidivism in Many Cases, that it Has Only Partially Achieved the Goal of Eliminating Unwarranted Disparity While Providing for Warranted Individualized Sentencing, and that Unwarranted Disparity Persists Under the Guidelines and is Inherent in Many of the Guidelines' Most Basic and Pervasive Rules.

The authorities in this subpart can be used to factually rebut the government's claim that the Guidelines reflect the purposes of sentencing and other factors set forth in § 3553(a). Subsection 1 sets forth the statutory directives the Commission was to follow in formulating the Guidelines. Subsection 2 is a brief summary of what the experts say about whether the Commission has carried out those directives; the answer is a resounding "no." Subsection 3 sets forth a fairly comprehensive summary of the problems the Commission itself has identified in its Fifteen Year Report and a few of its other publications. A few examples should be enough, as relevant to the case.

Two caveats: First, this does not replace arguments, individualized to the defendant and the offense, that the sentence was or was not sufficient but not greater than necessary to achieve the goals of sentencing based on the factors that are material in the case. Second, avoid citing actions by the Commission that could be construed as *required* by Congress. In United States v. Pho, the First Circuit interpreted Congress' inaction with respect to the powder/crack disparity as a reflection of congressional intent that the disparate ratio be reflected in the Guidelines, and held that the district court therefore was not free to replace that ratio with a different ratio in calculating the guideline range.[47] Taken to its logical conclusion, the "congressional intent" rationale would mean that all of the guidelines are mandatory, since Congress allowed them all to become law and dictated explicit increases on a number of occasions.[48] As Justice Scalia said, "any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."[49] Implicitly recognizing

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[47] United States v. Pho, 433 F.3d 53 (1st Cir.2006).

[48] See, e.g., United States v. Perry, 389 F.Supp.2d 278, 307 n.33 (D.R.I. 2005).

[49] Booker, 543 U.S. at 311 (Scalia, J., dissenting in part).

that the government's broad "congressional intent" rationale would collide with Booker's holding that the Guidelines must be treated as advisory, the First Circuit made clear that, while the district court may not literally replace the 100:1 ratio as a categorical matter, the court may exercise its discretion not to impose a sentence within the range if the nature of the drug (or other circumstances) do not support the severity of that range in the particular case.[50] Nonetheless, for the purpose of demonstrating that the government's contention that the Guidelines already reflect § 3553(a) purposes and factors is wrong, it is enough, and safest, to focus on the Commission's actions that were not dictated by Congress. As set forth in subsection 3, the Fifteen Year Report does a fairly accurate job of distinguishing between guideline rules that were the product of congressional directives and those that were due to the Commission's own actions.

1. Statutory Directives to the Commission In Formulation of Guidelines

In 28 U.S.C. § 991(b), Congress directed the Sentencing Commission to:

> (1) establish sentencing policies and practices for the Federal criminal justice system that --
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
>
> (2) develop means of measuring the degree to which sentencing practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.[51]

Congress directed the Sentencing Commission, in formulating guidelines, to "promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection (b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities,"[52] to "take into account the nature and capacity of [correctional] facilities" and "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,"[53] and to periodically review

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[50] Pho, 433 F.3d at 64.

[51] See 28 U.S.C. § 991(b).

[52] 28 U.S.C. § 994(g).

[53] 28 U.S.C. § 994(g).

and revise the guidelines based on consultation with authorities in the field and representatives from all aspects of the criminal justice system, including the Judicial Conference, the Bureau of Prisons, U.S. Probation, the Federal Public Defenders, and the Department of Justice.[54]

According to then-Commissioner Breyer, the primary drafter of the initial set of Guidelines, "the Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years. Thus, the system is 'evolutionary'--the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time."[55]

In its Fifteen Year Report, the Commission described the components of guideline development as (1) "collaboration among policymakers, implementers, and other stakeholders," (2) "utilization of specialized criminological and sentencing expertise," and (3) "political accountability through Executive participation and Legislative directives and review."[56] The first component is required by 28 U.S.C. § 994(o), and envisions a "highly collaborative process, so that the Guidelines would be grounded in "reason and practicality," and to ensure that the essential participants regarded them as "legitimate and credible."[57] The second component is envisioned by 28 U.S.C. §§ 991(b)(1)(C) and (b)(2), as set forth above. The third is required by 28 U.S.C. § 991(a) (DOJ has *ex officio* non-voting seat on the Commission), 28 U.S.C. § 994(p) (Commission submits amendments to Congress by May 1 and they become law no earlier than 180 days later and no later than the following November), and whatever directives Congress issues.

2. Brief Summary of Assessment of the Commission's Work by Experts and Observers.

According to experts and close observers, the Sentencing Commission has failed to review and revise the guidelines based on its own data, collaboration with frontline actors, or the purposes of sentencing.[58] Average sentence length has more than doubled

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[54] 28 U.S.C. § 994(o).

[55] Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988).

[56] Fifteen Year Report at 19.

[57] Id. at 19-20.

[58] See, e.g., United States v. Jaber, 362 F.Supp.2d 365, 370-76 (D. Mass. 2005) (explaining in detail the historical reasons why guidelines do not reflect the purposes of punishment); Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 419 (1992) ("Since their introduction in 1987, however, the federal sentencing guidelines have not been designed or applied in a manner explicitly intended to achieve specific purposes of sentencing."); Paul J. Hofer & Mark H.

as annual amendments have, except in rare instances, made punishment only more and more severe, creating unwarranted disparity and inappropriate uniformity in the process. From the outset, the Commission did not develop the Guidelines based on the purposes of sentencing in § 3553(a)(2) but purportedly on empirical data. However, more often than not, the Guidelines were promulgated without justification in the data and information before the Commission and without explanation. Increasingly, the upward ratchet has been driven by the demands of DOJ, backed with implicit or explicit threats to go to Congress, or pursuant to congressional directives at DOJ's instance or with its acquiescence. Congress and DOJ lack the Commission's intended neutrality and competence, which is why an independent expert body was created in the first place. However, the Commission has not acted as an expert body when free of congressional interference. This appears to have bred disrespect for the Commission by DOJ and Congress, and clearly has created a lack of confidence in its work on the part of judges, defense lawyers, line prosecutors, and experts in the field.[59]

Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 33-34 (2003) (no Commission has ever articulated a philosophy of sentencing ranking the purposes of sentencing because the original Commission could not agree on one, but two purposes – severity proportionate to seriousness of offense and risk of recidivism – can be "discovered" as primary in the guidelines; however, the guidelines in notable instances produce sentences that are disproportionate to the resulting harm and personal culpability; for example, formulation of drug guidelines was "far from independent or based on consideration of past practice or the purposes of sentencing"); Richard S. Frase, Punishment Purposes, 58 Stan. L. Rev. 67 (2005) (Guidelines "lack a principled basis," but section 3553(a) reflects the "limiting retributivism" model most widely followed in the United States and could bring "needed coherence" to federal sentencing).

[59] See, e.g., Michael M. O'Hear, The Original Intent of Uniformity in Sentencing, at 31-37, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: http://ssrn.com/abstract=800831; Albert W. Alschuler, Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 Stan.L.Rev. 85 (2005); Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315 (2005); Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); Report of the ABA Justice Kennedy Commission, Summary of Recommendations, available at http://www.abanet.org/media/kencomm/summaryrec.pdf; Marc L. Miller, Sentencing Equality Pathology, 54 Emory L. J. 271, 277 (2005); Michael Tonry, The Functions of Sentencing and Sentencing Reform, 58 Stan. L. Rev. 37 (October 2005); Rachel E. Barkow, Our Federal System of Sentencing, 58 Stan. L. Rev. 119 (October 2005); Frank O. Bowman, III, Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform, 58 Stan. L. Rev. 235 (October 2005); Jeffrey Parker & Michael Block, The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001 (2001); Marc Miller & Ronald Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Discretion, 2 Buff. Crim. L. Rev. 723 (1999); Marc Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1224-27 (April 2004); Letter to Sentencing Commission from Federal Public and Community Defenders Re: Report on Federal Sentencing Since *United States v. Booker* at 2, 4-6, 10, 12-15, January 10, 2006, available now at

The Commission's work, moreover, does not have the same reliability as that of other agencies. It is not subject to the Administrative Procedures Act, other than a notice and comment period.[60] Because the Guidelines cannot be challenged as arbitrary and capricious,[61] the Commission has only occasionally attempted to justify Guideline increases.[62]

3. The Commission's Assessment of its Work Through 2002.

The Commission's Fifteen Year Report and some of its other publications acknowledge many ways in which the Guidelines do not effectively (meaning efficiently, proportionately and fairly) achieve the purposes of sentencing and other statutory directives, including minimizing prison overcrowding and avoiding unwarranted disparity. (The Report cites a number of articles that are critical of the Commission's work, and some of that criticism is interspersed with the Commission's own statements below. It is also worth reading Albert W. Alschuler, Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 Stan. L. Rev. 85 (2005), which points out some important omissions and misstatements in the Report.)

a. Purposes of Sentencing

The Commission "never explicitly articulated a philosophy of sentencing" prioritizing the purposes of punishment because the Commission could not agree on one, but the Guidelines "reflect" a "primary emphasis on punishment proportionate to the seriousness of the offense," and "lengthier incarceration for offenders most likely to recidivate."[63] (What this means is that the Commission has never tried to formulate guidelines based on sentencing purposes; the two purposes noted in the Report were "discovered" by Commission staff through a process of "rational reconstruction" of what the purposes "must be" given what the rules are, though the rules are flawed even in achieving those two purposes.[64])

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http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/defenders_advis.html , forthcoming in Volume 18 of the Federal Sentencing Reporter.

[60] 28 U.S.C. § 994(x).

[61] Jose Cabranes & Kate Stith, Fear of Judging: Sentencing Guidelines in the Federal Courts 57 (1998); Joseph W. Luby, Reigning in the Junior Varsity Congress: A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines, 77 Wash. U. L.Q. 1199, 1221 (1999).

[62] See Frank O. Bowman III, Pour Encourager Les Autres?, 1 Ohio State J. Crim. L. 373, 390 (2004).

[63] Fifteen Year Report at 14, 80.

[64] See Hofer & Allenbaugh, supra note 58. Hofer is a Senior Research Associate at the Commission. Allenbaugh is a former staff attorney. They note that "the Guidelines require a

Hence, after fifteen years (now eighteen), the Commission still does not claim to know that the Guidelines effectively meet the purposes of sentencing:

> Increasing certainty and severity . . . were not intended as ends in themselves, but as *means* to the ends of just punishment and crime control through deterrence and incapacitation. Analyses currently underway at the Commission will measure the degree to which the increases in sentence certainty and severity have been "effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code."[65]

The Commission is *currently* analyzing ways to make criminal history category a better predictor of risk of recidivism (see Criminal History, infra), and is *currently* assessing the deterrent and other crime control effects of the Guidelines.[66]

Regarding deterrence, the Commission's Senior Research Associate has noted elsewhere that research on deterrence, both general and specific "has not yet yielded findings that can inform the design of specific guideline provisions."[67] Incarceration has little effect on reducing drug crime because drug crime is driven by demand, and low-level dealers and couriers are easily replaced.[68] Nor do lengthy terms of incarceration have a deterrent effect on white-collar offenders, presumably the most rational group of offenders.[69] Importantly, the Commission was advised by a deterrence researcher that certainty is more important to deterrence than severity.[70] Thus, added sentence length for the purpose of deterrence is unwarranted.

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potentially false precision in the measurement of some offense harms, notably drug quantity, while undervaluing the importance of individual offender culpability in the proper assessment of offense seriousness." Id. at 24; see also id. at 33-35, 68-73.

[65] Fifteen Year Report at 139 (emphasis in original); see also id. at 11 (results of research regarding whether the Guidelines best accomplish the purposes of sentencing will be addressed in a recidivism study underway and other future reports).

[66] Id. at 13.

[67] See Hofer & Allenbaugh, supra note 58, at 61-62.

[68] See The Sentencing Project, Incarceration and Crime: A Complex Relationship at 6-7 (2005).

[69] See Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 35 (Cambridge University Press) (2002); David Weisburd et al., Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995).

[70] Hofer & Allenbaugh, supra note 58, at 61 n. 192.

Rehabilitation was not taken into account in formulating the guidelines, other than requiring judges to assess the need for training and treatment in imposing conditions of probation or supervised release.[71]

Departures were intended to "maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices" as required by 28 U.S.C. § 991(b)(1)(B), to "allow fine-tuning of sentences when literal application of a guideline would fail to achieve the guideline's intended purpose," and to provide a feedback mechanism to the Commission.[72] However, as both Justice Breyer and the Commission's Senior Research Associate note elsewhere, the Commission and appellate courts treated the departure power more restrictively than originally intended.[73]

While the Commission maintains a large data collection as a way of responding to the statutory mandates to "develop means of measuring the degree to which sentencing is effective in meeting the purposes of sentencing" and to "reflect advancement in the knowledge of human behavior,"[74] the data includes no information about mitigating characteristics of the offender or mitigating circumstances of the offense unless the court actually departed.[75] (Moreover, though the Commission does not acknowledge it, many observers contend that the Commission does not use this data in formulating guidelines. See supra note 58.)

b. Undue Severity

When punishment is disproportionate to the offense, it squanders resources, creates disrespect for law, and fails to achieve just punishment.

i. Generally

The average prison term served by federal offenders has more than doubled since the Guidelines went into effect.[76] This dramatic increase in severity has occurred partly as a result of legislation that overrode or ignored the Commission's research and collaboration, but also as a result of the Commission's own "substantial independent

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[71] Fifteen Year Report at 13.

[72] Id. at 33.

[73] Hofer & Allenbaugh, supra note 58, at 83; Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180, **30, 35 (Jan./Feb. 1999)

[74] Fifteen Year Report at 20.

[75] Id. at 119.

[76] Id. at 10, 46, 139.

contribution."[77] The initial Commission used data on past sentencing practices as a starting point, but for fraud, drug trafficking, immigration offenses, robbery of an individual, murder, aggravated assault, and rape, "the Commission, either on its own initiative or in response to congressional actions, established guidelines that were significantly more severe than past practice."[78]

At the outset and increasingly over time, "[t]he guidelines have had effects on severity that are independent of mandatory minimum penalty statutes," and "[m]any offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums."[79] Independent of mandatory minimums, the Guidelines account for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and a doubling of sentences for firearm trafficking and illegal firearm possession under 18 U.S.C. § 922(g).[80] The effects of the Economic Crimes Package and Sarbanes-Oxley amendments were not available at the time the Report was written.[81]

"Clearly, the guidelines have had an effect on sentencing independent of statutory minimum penalties. In addition, while the guidelines have been generally used to increase sentence severity, they *can be* used to decrease sentence severity for targeted offenses or offenders, *if* policymakers choose to do so."[82]

According to the Report, the original Commission did not intend that an endless number of complex adjustments would be added to the Guidelines; rather, departures were supposed to allow fine-tuning for differences. Instead, "factor creep" has occurred: "As more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[83] Referencing a recent speech by Justice Breyer, the Report states that "[c]omplex rules with many adjustments may foster a perception of a precise

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[77] Id., Executive Summary at vi, xvii; id.at 44.

[78] Id. at 47. The Commission never explained these increases in any document or dataset. See, e.g., Miller & Wright, supra note 19.

[79] Id. at 138.

[80] Id. at 139; see also id. at 54, 62, 64, Fig. 2.13.

[81] Id. at 56.

[82] Id. at 140 (emphasis supplied).

[83] Id. at 137, citing Barry Ruback & Jonathan Wroblewski, The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (Complexity of Guidelines has created a "façade of precision" which "undermines the goals of sentencing.").

moral calculus, but on closer inspection this precision proves false."[84] In response to "pressure," adjustments were added "without a sound policy basis" and without a need having been "demonstrated empirically."[85] The research cited at this point in the Report recounts a history of the Commission acting in response to real or perceived pressures by law-and-order interests within and outside the Commission, rather than data and the purposes of sentencing.[86]

At the outset, many recommended that home, community and intermittent confinement be used as a cost-saving measure for some offenders who would otherwise be imprisoned, but those sanctions have been used almost exclusively to increase the severity of punishment for offenders who would otherwise receive simple probation.[87] A majority of judges responding to a 2002 survey urged greater availability of probation with confinement conditions, especially for drug offenders.[88] The Commission has not studied non-prison alternatives as a more effective and less costly way to satisfy sentencing purposes in certain cases or classes of cases.[89] Only recently has it suggested that rehabilitation programs focused on drug treatment and education may have a high cost/benefit ratio.[90] Meanwhile, mandatory minimum laws, the drug guidelines independent of mandatory minimums, and the career offender guideline misdirect resources from the kingpins, traffickers, and repeat offenders Congress had in mind (in the Anti-Drug Abuse Act and 28 U.S.C. § 994(h)) toward low-level, low-recidivist offenders.[91]

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[84] Fifteen Year Report at 137. See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999) ("The precision is false. For this reason, I believe the commission should review the present guidelines, acting forcefully to diminish significantly the number of offense characteristics attached to individual crimes.").

[85] Fifteen Year Report at 138.

[86] See Jeffrey S. Parker & Michael K. Block, The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?, 27 Am. Crim. L. Rev. 289 (1989); Jeffrey S. Parker & Michael K. Block, The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001 (2001); Aaron Rappaport, The State of Severity, 12 Fed. Sent. R. 3 (July/August 1999); Barry Ruback & Jonathan Wroblewski, The Federal Sentencing Guidelines, Psychological and Policy Reasons for Simplification, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001).

[87] Fifteen Year Report at 44.

[88] Id. at 44-45.

[89] Defenders' Letter, supra note 59, at 14-15.

[90] See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 16 (May 2004), available at http://www.ussc.gov/research.htm

[91] Fifteen Year Report at 132, 134.

As sentences increased dramatically for federal crimes, so did the federal prison population, now the largest in the country,[92] which is remarkable given that federal jurisdiction over criminal matters is, theoretically, limited.[93] The federal prison population has increased from 24,000 in 1980 to over 188,000 today,[94] at a cost of over $4 billion per year.[95] As of 2004, the Bureau of Prisons was 40% overcapacity.[96]

Congress directed the Commission to formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[97] "Controlling prison populations and correctional budgets, while protecting the public by reserving prison space for the most dangerous offenders, has been one of the noteworthy successes of sentencing reform and sentencing guidelines in the states."[98] "To date, the guidelines have been used . . . to increase the certainty and severity of punishment," not "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[99]

ii. Particular Offense Guidelines

The Report discusses the four most frequently applied guidelines, those for drug trafficking, economic crimes, immigration offenses, and firearms offenses. The discussion of the drug guidelines is helpful in that the Commission acknowledges that

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[92] Id. at 40.

[93] United States v. Morrison, 529 U.S. 598 (2000).

[94] http://www.bop.gov/news/quick.jsp#1.

[95] FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) ($23,205.59 per inmate in FY 2004), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) ($22,632 per federal inmate in FY 2001), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt.

[96] U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2004 at 7, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf.

[97] 28 U.S.C. § 994(g).

[98] Fifteen Year Report at 77-78; see also U.S. Department of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, Executive Summary 5 (resources used to incarcerate low-level drug offenders "could be used more efficiently to promote other criminal justice needs").

[99] Fifteen Year Report at 77; see also Dale Parent, What Did the United States Sentencing Commission Miss?, 101 Yale L.J. 1773, 1784 (1992) ("The Commission ignored this congressional directive and developed its guidelines without concern for their effects on prison populations.").

they result in penalties that are too severe and create unwarranted disparity and inappropriate uniformity. The drug guidelines have influenced the severity and structure of other guidelines as well. The Report's discussion of the other three most frequently applied guidelines provides a starting point, which you can build on with further research. Note that Congress sometimes gives specific directives to increase guideline penalties, but often tells the Commission to study whether increased penalties are warranted, or makes a general "sense of Congress" statement that increased penalties may be warranted, or simply creates a new offense with no directive at all. The Fifteen Year Report tends to refer to any of these congressional inputs as "directives."[100] It is important to check the "reason for amendment" (if any) in Appendix C of the Guidelines Manual, then check the legislation itself.

Drug Trafficking Guidelines, Role in the Offense, Relevant Conduct. Drug trafficking offenses have comprised the largest proportion of the federal docket for over three decades. The number of drug cases has increased every year. Increases in sentence length for drug offenses are "the major cause of federal prison population growth over the past fifteen years," and a "primary cause" of racial disparity in sentencing.[101]

The Report criticizes mandatory minimum penalties for creating unwarranted uniformity, unwarranted disparity, and undue severity, and for bypassing collaboration with essential participants and criminological research as sources of sentencing policy development.[102] However, the Report essentially acknowledges that the Commission took a bad idea and made it worse.

Congress' contribution The initial Commission intended to use the quantity of pure drug (as the Parole Commission had), but Congress in the Anti-Drug Abuse Act of 1986 (ADAA) codified quantity-based thresholds for five and ten-year mandatory minimums based on the weight of a "mixture or substance containing a detectable amount" of drugs, which the Commission adopted so as not to conflict with the ADAA. Mitigating factors may take the guideline sentence below the mandatory minimum sentence, in which case the mandatory minimum trumps the guideline sentence. This "creates disparity by treating less culpable offenders the same as more culpable ones." Congress intended to establish a two-tiered penalty structure with five-year mandatory minimums for "managers of the retail traffic," and ten-year mandatory minimums for "manufacturers or the heads of organizations."[103]

The Commission's contribution The Commission extended the quantity-based approach of the ADAA across 17 different levels below, between and above the two

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[100] Fifteen Year Report at 21-22.

[101] Id. at 47-48, 76.

[102] Id. at 15, 22.

[103] Id. at 48.

threshold amounts specified in the ADAA. There is no contemporaneous explanation of why the Commission did this, which "is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population." The Commission added a variety of aggravating factors which increase the sentence above that dictated by the quantity. The drug trafficking guideline in combination with the relevant conduct rule increased "prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[104] About 25% of the average drug trafficking sentence of 73 months in 2001 was attributable to guideline increases above the mandatory minimum penalty.[105] The Commission decided not to give more weight to other potentially significant factors such as role in the offense because if so, guideline sentences would be lower than mandatory minimum sentences in a large number of cases.[106] (N.B.: This apparently dictated the extent of role in the offense for *all* offenses under the Guidelines.)

Thus, "the importance of quantity was greatly elevated compared to other offense characteristics." The Commission is aware of several problems with this approach: (1) Experts expressed doubt that drug quantity "was a reliable measure of offense seriousness, or that it could be determined with sufficient precision to justify seventeen meaningful distinctions among offenders." (2) The Commission recognized that "quantity served as a poor proxy for offense seriousness" at least if the weight was affected by dilutants, carrier media, or humidity. It developed a different weighing method for LSD, "but arbitrary variations due to weight of inactive ingredients remain." (3) "[R]esearch suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators." (4) Drug quantity is "a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making."[107]

Over 50% of drug offenders are in Criminal History Category I,[108] and of all federal offenders, drug offenders are the least likely to recidivate.[109] Tying punishment to mandatory minimum quantities, enhanced by the guidelines, sweeps in low-level

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[104] Id. at 48-49.

[105] Id. at 54.

[106] Id. at 48-49.

[107] Id. at 50.

[108] Id. at 54-55.

[109] See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 13 & Exh. 11 (May 2004), available at http://www.ussc.gov/research.htm

offenders and punishes them as harshly as kingpins. This misdirects law enforcement resources from the kingpins and traffickers Congress had in mind.[110]

Given these problems, experts have called for a "fundamental re-examination of the role of quantity under the guidelines." Thirty-one percent of judges surveyed "listed drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing," with "73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses." Senator Jeff Sessions asked the Commission in 2000 to identify ways to better target the most culpable and dangerous offenders.[111]

While the Commission identified ways in which drug quantity might underestimate offense seriousness and promulgated commentary encouraging upward departures under these circumstances, see U.S.S.G. § 2D1.1, comment. (nn. 1, 9, 12, 15, 16), comment. (backg'd.),[112] it has not encouraged downward departure to account for the many ways in which drug quantity overstates offense seriousness. The Commission's Senior Research Associate has written that the Guidelines' failure to encourage departure when drug amount overstates the seriousness of the offense is a serious shortcoming, as the drug guideline is "most in need of rationalizing interpretation."[113]

The Commission has recommended reducing the 100:1 powder to crack ratio because "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine," but Congress has not yet acted on that recommendation. In addition, at Congress' direction, the Commission provided a two-level reduction for some offenders who meet safety valve criteria in 1995, and expanded it to all qualified offenders in 2001. In 2002 it capped the quantity-based offense level at 30 for those who receive a mitigating role adjustment, but in 2004 *increased* the cap to 30, 31, 33, or 34 depending on the offense level, based on "concerns" about "proportionality."[114]

By 1991, average drug offense sentence length was two and a half times what it was before the Guidelines, then decreased by about 20% in the late 1990s, though it was still more than double what it was before the Guidelines.[115] Taking into account all

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[110] Fifteen Year Report at 48-55, 132, 134.

[111] Id. at 52.

[112] Id. at 50.

[113] Hofer & Allenbaugh, supra note 58, at 78-79.

[114] Fifteen Year Report. at 51, 131-32; U.S.S.G., App. C, Amend. 515, 624, 640, 668.

[115] Drug trafficking sentences showed an upward trend since 2000, with the average increasing from 72 months in 2000 to 83 months in 2004 (pre-Blakely) and remaining at 83 months in 2005 (post-Booker). U.S. Sentencing Commission, Special Post-Booker Coding Project at 13-15, Jan.

possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns."[136]

c. **Criminal History**

Criminal history may be relevant to all of the § 3553(a)(2) purposes – just punishment (according to the Commission, those with aggravated criminal backgrounds are more culpable in the instant offense), the need to deter the defendant from committing further crimes (recidivism prediction), the need to incapacitate the defendant to protect the public from further crimes of the defendant (same), and the need for treatment, rehabilitation and other correctional treatment in the most effective manner (there may be little or no need for correctional treatment if it is unlikely the defendant will recidivate, or has a high potential for rehabilitation, or the root cause, such as addiction, would be better addressed through treatment than lengthy incarceration).

If the Guidelines exclude considerations that reduce the risk of recidivism, or include factors without predictive value that increase the criminal history score, then the criminal history rules produce sentences that are too severe.

Recidivism Reports (a Component of the Fifteen Year Report). The Sentencing Commission has released three reports in its series on recidivism, all available at http://www.ussc.gov/research.htm. Releases 1 and 3 are summarized below. Release 2, Recidivism and the "First Offender," is not included here because I have not reviewed it yet.

The CHC rules were not based on the Commission's own direct empirical evidence because (1) of time pressures, and (2) unlike all other known recidivism scales, CHC seeks not only to predict recidivism, but, more subjectively, to punish repeat offenders for longer on the theory that they are more culpable. See Release 1 at 1-2; Release 3 at 2-4. The Commission was supposed to incorporate empirical research and data as it became available, but hasn't yet. See Release 1 at 2.

Release 1: Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines The difference between the rate of recidivism (defined as re-conviction, re-arrest with no information regarding conviction, and supervision revocation within 2 years) between CHC V and CHC VI is almost nonexistent. Id. at 9 & Exhibit 5. What accounts for this is the inclusion of people who are in CHC VI because of the Career Offender Guideline, who recidivate at a lower rate than a person with 13 CH points or more. Id. at 9. This means that career offender status is not justified by an increased risk of recidivism.

The number of CH points is a better predictor of recidivism than CHC category, and the difference is statistically significant. Id. at 10-11. Taken literally, this would be

[136] United States v. Serna, 435 F.3d 1046, 1049 (9th Cir. 2006).

of help to defendants with a number of points with an associated recidivism rate that does not follow the general upward curve. For example, the rate for defendants with 18 points is the same for defendants with 5 points. The rate for defendants with 19 points is the same for defendants with 9 points. See Table 4. The rate of re-conviction within 2 years for defendants with 19 points is less than that for defendants with 0 points. Id. (One may wonder if this indicates that the CHC rules are not very reliable overall.)

The rules fail to reflect numerous factors that indicate a reduced risk of recidivism. Women recidivate at a lower rate than men, and the difference is even greater in CHC V and VI. Id. at 11 & Exhibit 9. "Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50. Id. at 12 & Exhibit 9. Stable employment in the year prior to arrest is associated with a lower risk of recidivism. Id. at 12 & Exhibit 10. Recidivism rates decrease with educational level (no high school, high school, some college, college degree). Id. at 12 & Exhibit 10. (However, in CHC V, recidivism rates are higher for those with a college education than those with less than a high school education.) Recidivism rates are associated with marital status (never married, divorced, married). Id. at 12 & Exhibit 10.

Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate, and *drug offenders are the least of all except in CHC I.* Id. at 13 & Exhibit 11.

In CHC I, II, III, IV and VI, recidivism rates are lower for those without illicit drug use in the year prior to the offense. In CHC V, the recidivism rate is lower for illicit drug users. Id. at 13 & Exhibit 10.

The Offense Level is not a predictor of recidivism. Id. at 13 & Exhibit 11.

Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences. Id. at 13 & Exhibit 12.

Conclusions: (1) If the point is to predict recidivism CHC V & VI should be combined. Id. at 15. (2) Rehabilitation programs focused on drug use or education would have a high cost-benefit value. Id. at 16. (and should be used instead of incarceration where appropriate) (3) Legally permissible offender characteristics should be incorporated into the CHC computation. Id. at 16. (But they haven't been yet.)

Release 3: A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score This study compares the SFS used by the Parole Commission and the CHC under the Guidelines in terms of predictive ability, with a view to simplifying CHC in light of the possibility that aspects of priors such as type, recency and length of imposed sentence will be deemed beyond the fact of conviction under Apprendi and Blakely.

The SFS method is a better predictor of recidivism than is the CHC. Id. at 12. This release is somewhat opaque in that it mentions several ways in which the SFS and

CHC criteria are different without saying whether those differences contribute to the superior predictive ability of the SFS. There are three factors that it clearly states make SFS a better predictor than CHC:

Violence: SFS has no violence component/CHC adds 1 point for each prior conviction of a crime of violence otherwise uncounted, USSG 4A1.1(f). The predictive power of USSG 4A1.1(f) is statistically insignificant. Id. at 7, 11, 15. (Thus, it should be removed from the guidelines and not followed in the meantime.)

Age: Under the SFS, the older the defendant is and the fewer the number of prior commitments, the less likelihood of recidivism, and defendants over 41 get an automatic reduction./Under CHC, age is not accounted for at all. Age is a powerful component of recidivism prediction, which the Guidelines do not take into account. Id. at 8, 13-15.

First or Near-First Offender Status: Minimal or no prior involvement with the criminal justice system is also a powerful predictor of recidivism, which the Guidelines do not take into account. Id. at 15.

Fifteen Year Report. The Career Offender guideline has a racially disparate impact on Blacks that is not warranted by an increased risk of recidivism. Most Black offenders fall within the Career Offender guideline based on prior controlled substance offenses, most likely because drug sales in impoverished minority neighborhoods take place outside where they are easier to detect.[137]

The racial disparity is not warranted because the recidivism rate for offenders whose "career offenders" status is based on controlled substance offenses is no more than that for offenders in the criminal history category in which they would have been placed under the normal criminal history rules.[138] This means that career offender status is unwarranted in any case in which the predicates are controlled substance offenses, regardless of the defendant's race. The career offender guideline "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses."[139]

The use of non-moving violations in the criminal history score may also adversely affect minorities.[140]

"Crime of Violence" Career Offender Predicates. The following information is not taken from a Commission report. The Commission has defined both "controlled

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[137] Fifteen Year Report at 133-34.

[138] Id.

[139] Id. at 134.

[140] Id.

substance offense" and "crime of violence" more broadly than Congress required in 28 U.S.C. § 994(h), so that it commonly reaches offenders who are not the "repeat violent offenders and repeat drug traffickers" Congress had in mind.[141] Because the "otherwise" clause includes as "crimes of violence" offenses that do not involve or substantially risk the intentional use of force against another, career offender predicates include offenses that are not violent, such as failure to pull over for a police cruiser, unlawful use of a motor vehicle, child neglect, breaking and entering an unoccupied commercial building, and pickpocketing. By covering any offense that is "punishable by more than one year," the guideline sweeps in misdemeanors and other minor offenses under state laws that do not attempt to calibrate the maximum penalty according to the seriousness of the offense, while ignoring more salient indicators such as the actual sentence served.[142]

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[141] S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

[142] See NACDL Report: Truth in Sentencing? The Gonzales Cases, 17 Fed. Sent. Rep. 327, **7-11 (June 2005) (defendant was classified as a career offender based on possession of less than 1 gram of crack and three "crimes of violence" classified as non-violent misdemeanors under state law, all committed at the age of 17, to which he pled guilty on the same day when he was 18, and for which he received a suspended sentence and served 7 months when revoked).

As hinted at in the Fifteen Year Report, driving offenses classified as "crimes of violence" is another potential source of racial disparity: Some driving offenses have been characterized as "crimes of violence" by the federal courts, for example, Failure to Stop for a Blue Light under South Carolina law.[143] Many courts and commentators have recognized, and many studies have shown, that Blacks are stopped by the police and not charged with any crime or only with traffic offenses in disproportionate numbers, often called "driving while black."[144]

First Offenders. Congress directed the Commission to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[145] The Commission recognizes the need to act on this directive, but has never done so.[146]

d. The Purposes of Sentencing (Not the Guidelines) Are the Appropriate Measure of Warranted or Unwarranted Disparity.

The government claims that the only practical way to maintain uniformity is to accord the guidelines substantial weight in the district court and presumptive reasonableness in the court of appeals. Acceptance of the government's uniformity argument would restore presumptive guidelines, ignore § 3553(a) as written, and assume

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[143] United States v. James, 337 F.3d 387, 391 (4th Cir. 2003).

[144] See Bingham v. City of Manhattan Beach, 341 F.3d 939, 954 (9th Cir. 2003); Washington v. Lambert, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996); Smith v. City of Gretna Police Dept., 175 F. Supp.2d 870, 874 (E.D. La. 2001); Martinez v. Village of Mount Prospect, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000); United States v. Leviner, 31 F. Supp.2d 23, 33 (D. Mass. 1998); David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 341-52 (1998); Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board, 28 Colum. Hum. Rts. L. Rev. 551, 554-69 (1997); Jennifer A. Larrabee, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & Pl'y 291, 296 (1997); David Harris, Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology, 544, 560-69 (1997); Christopher Hall, Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong and the Evolution of Police Discretion, 76 Tex. L. Rev. 1083, 1088 (1998); Matthew Dolan, Summit Addresses Biased Police Stops Officials, Citizens Discuss Solutions in the Shadow of Hampton Incident, The Virginian-Pilot and The Ledger-Star, Norfolk, Va., November 22, 1998, Al; Rick Sarlat, Racial Profiling on Interstates is Under Attack: Pa. Legislation drafted, The Philadelphia Tribune, May 26, 1998, 1A.

[145] 28 U.S.C. § 994(j).

[146] See http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf http://www.ussc.gov/SIMPLE/crimhist.htm; http://www.ussc.gov/MINUTES/4_5_02.htm.

that the guidelines are an appropriate measure of warranted or unwarranted disparity when they are not. The government's uniformity argument is an invitation to re-write section 3553(a) based on policy, i.e., legislate from the bench. It has surface appeal, since a primary objective of the SRA was to do away with the disparity that resulted from unfettered judicial discretion and the utter lack of reliability in factfinding. Section 3553(a), however, does not create a system of unfettered discretion. It imposes a structure for judicial decision-making based on enumerated considerations. Given that the Guidelines themselves allow and promote unwarranted disparity in many areas, see below, the case for choosing the Guidelines over the purposes of sentencing as the benchmark for unwarranted disparity is exceedingly weak.[147]

Constitutional Implications/Statutory Construction. Blakely and Booker rejected the uniformity of the Guidelines. As the Booker remedial majority said, "We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure." [148] This is the price of constitutionality. Moreover, if the guideline range was the benchmark of unwarranted disparity, all subsections of § 3553(a) other than (3) and (4) would be rendered inoperative, superfluous, or insignificant, in violation of principles of statutory construction.

According to the Commission and Others, Warranted or Unwarranted Differences Are Measured With Reference to the Purposes of Sentencing, Not the Guidelines. The Sentencing Commission defines unwarranted disparity as follows: "Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are *relevant to the purposes of sentencing*."[149] There is no unwarranted disparity "when sentencing decisions are based only on offense and offender characteristics related to the seriousness of the offense, the offender's risk of recidivism, or some other legitimate purpose of sentencing."[150]

The Congress that enacted the SRA said, "Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to

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[147] Excellent articles on this topic include Michael M. O'Hear, The Original Intent of Uniformity in Sentencing, at 31-37, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: http://ssrn.com/abstract=800831; Albert W. Alschuler, Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 Stan.L.Rev. 85 (2005); Marc Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1218-19 (April 2004).

[148] Booker, 543 U.S. at 263.

[149] Fifteen Year Report at 113 (emphasis supplied and in original).

[150] Id. at 80.

Cross-references (the number of which has quintupled since the Guidelines' inception) are used by some prosecutors and judges, viewed as optional by others, and not always used as intended.[166]

The complexity of the Guidelines increases the risk that judges will apply the rules differently.[167]

Racial, Ethnic and Gender Disparity/Unnecessary and Ineffective Rules. Racial, ethnic and gender disparity is "built into the sentencing rules themselves. . . . Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing."[168]

When a rule has a disproportionate impact on a demographic group, there is a heightened need to determine whether the rule "is a necessary and effective means to achieve the purposes of sentencing."[169] "A rule that serves no clear purpose would be questionable in any event, but rules that adversely affect a particular group deserve extra scrutiny."[170]

The Guidelines were promulgated in part over a concern about racial disparity. However, the sentencing gap between White and minority offenders was small in the pre-

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(2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusuion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

[165]U.S. Sentencing Commission, Relevant Conduct and Real Offense Sentencing (Staff Discussion Paper, 1996); 57 Fed. Reg. 62832, 62848 (1992); 58 Fed. Reg. 67522, 67541 (1993); 62 Fed. Reg. 152, 161 (1997); 61 Fed. Reg. 34,465 (1996).

[166] Fifteen Year Report at 83.

[167] Id. at 15.

[168] Id. at 135.

[169] Id. at 113-14.

[170] Id. at 131.

Guideline era, but has widened considerably in the Guidelines era. By 1994, the number of months of imprisonment for Blacks was nearly double that for Whites, and has narrowed only slightly since then. Black offenders are 20% more likely to be sentenced to imprisonment than White offenders, and Hispanic offenders are 40% more likely to be sentenced to imprisonment than White offenders. Black males, Black drug trafficking offenders, and all Hispanic offenders are sentenced above the minimum required sentence (either the mandatory minimum or the bottom of the guideline range) more frequently than similar White offenders. Most of the gap is due to differences in the seriousness of the offense and criminal history, and little is likely due to intentional discrimination by judges, but *a statistically significant part of it is due to sentencing rules that are not clearly needed to serve the purposes of sentencing*, in particular, the harsher treatment of crack, drug trafficking generally, firearms, and career offenders.[171] Mandatory minimum penalties apply disproportionately to minority offenders.[172] There may be other rules that adversely affect minorities without a clear justification, including the use of non-moving violations in criminal history score.[173]

The gap between the sentencing of men and women has also widened in the Guidelines era. A typical male drug offender is twice as likely as a female to be sentenced to prison, sentence length is 25-30% longer for men in all types of cases, women get larger downward departures, and are more likely to get an alternative sentencing option. This may be warranted by lesser involvement by women, greater family responsibilities and greater separation from their families caused by the relative scarcity of prisons for women, or it may be unwarranted disparity driven by paternalism or an incorrect assumption that men do not have family responsibilities.[174]

Pre-Sentence Reports. There is wide variation in the depth, quality and evenhandedness of probation officers in their investigation and presentation of facts in the pre-sentence report, which results in similar defendants being treated differently and different defendants being treated similarly.[175]

Factor Manipulation. Manipulation of sentencing factors by prosecutors and police in undercover investigations (e.g., inducement to cook the powder, repeated transactions, transactions in a prohibited location) is a "significant source of continuing disparity in the federal system."[176] This is built into the Guidelines because the factors

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[171] Id. at 48, 115-18, Fig. 4.2, 122-27, 131-34, 141.

[172] Id. at 119.

[173] Id. at 134.

[174] Id. at 117-18, 127-29, 130.

[175] Id. at 84.

[176] Id. at 82.

have definite numbers of months assigned to them that are known to law enforcement and cooperators.

Regional Disparity/Prosecutorial Practices and Policies. Regional disparity persists under the Guidelines, and even increased for drug trafficking offenses.[177] Inter-judge disparity was reduced by the Guidelines, but not for immigration or robbery offenses.[178] Most inter-judge disparity is explained by case differences.[179] Most regional disparity is not explained by case differences but by different charging and plea policies in U.S. Attorneys' offices.[180] This results in sentences that are disproportionately lenient, and disproportionately severe. This disparity is unwarranted and unlikely to change under DOJ policies.[181]

Charging and plea bargaining policies are determined more by the local U.S. Attorney's Office than by Main Justice.[182] There is considerable regional variation in the rates and circumstances under which prosecutors file § 851 notices, § 924(c) charges, and mandatory minimum charges, use fast track dispositions (charge bargains and § 5K3.1 departures), and move under § 5K1.1, § 3553(e), Rule 35(b), and § 3E1.1(b).[183]

Based on concerns that the Guidelines would transfer power to prosecutors and thus increase disparities in sentencing, relevant conduct rules, cross references, multiple count rules, and policy statements regulating plea bargaining were included in the Guidelines.[184] According to the Commission, some of the mechanisms intended to ameliorate the effects of prosecutorial charging and plea bargaining decisions "are not working as intended," and some "tend to work in one direction," i.e., to the disadvantage of defendants. "The relevant conduct rule, for example, can increase sentences to account for criminal conduct that was not charged or that was dismissed prior to sentencing. But there is no guidelines mechanism to decrease sentences for an offender who, for example, is convicted of several counts of 18 U.S.C. § 924(c) and is therefore subject to multiple consecutive mandatory penalty enhancements. If some offenders are

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[177] Id. at 94, 98, 108, 140.

[178] Id. at 97-99, 140.

[179] Id. at 101-102.

[180] Id. at 86, 87-88, 94, 100.

[181] Id. at 141-42.

[182] Id. at 84.

[183] Id. at 85, 89-92, 102, 103, 106.

[184] Id. at 10, 25-27, 28.

charged in this manner and others are not, there is little a judge can do to compensate for the resulting sentencing disparity."[185]

Chief probation officers and judges believe that much of the sentencing discretion judges once had has been transferred to prosecutors under the Guidelines. Id. at 86. Most judges believe that plea bargains are a source of unwarranted disparity. Id. at 86.

"Fact bargaining" may result in unwarranted disparity.[186]

The Commission's empirical analysis shows that "[a]mong discretionary mechanisms within the guidelines system, substantial assistance departures contribute the greatest amount to variation in sentences, while judges' use of the guidelines range contributes the least."[187] Rates of substantial assistance departures vary widely among districts, and while the Commission cannot be sure whether disparity resulting from substantial assistance motions (or lack thereof) is warranted or not because the government does not make the nature of the cooperation available to the Commission, research shows that policies and practices are irregular and inconsistent, and that Blacks consistently receive substantial assistance departures at a lower rate.[188]

The use of fast track charge bargains and departures was only revealed to the Commission after the PROTECT Act was passed. Whether it creates unwarranted disparity cannot be evaluated without data. The Justice Department had not yet provided such data.[189] (But see Part V.B, infra.) However, the Commission estimated that in 2001, approximately 40% of the downward departures that the DOJ reported to Congress as judicial departures were in fact government-initiated fast track departures (which does not include fast track charge bargains), and that judges departed without a government motion in only about 10.9 % of cases.[190] The highest departure rates by district and the greatest variation among districts was due to government-initiated fast track departures.[191]

Departures. The Commission does not know if the disproportionate rates of departure and placement within range among different racial, ethnic and gender groups is warranted or unwarranted because it keeps no data on mitigating characteristics or

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[185] Id. at 92.

[186] Id. at 85-86, 89.

[187] Id. at 102, 141.

[188] Id. at 103-05, 141.

[189] Id. at 106-07.

[190] Id. at 111.

[191] Id. at 112.

circumstances present in the case unless a departure was granted, and has no information on the type of assistance given in § 5K1.1 cases.[192] Whether the regional variation in judicial departure rates is warranted or unwarranted is a subject of ongoing debate and unresolved by the Commission.[193] The lack of data on mitigating factors unless a departure was granted impedes resolution of the issue. However, judges' decisions are stated on the record and subject to appeal, while prosecutors' are not.[194]

IV. The Courts of Appeals Do Have Jurisdiction to Review Sentences Within a Correctly Calculated Guideline Range for Unreasonableness.

The Booker remedial majority said that "despite the absence of § 3553(b)(1), the Act continues to provide for appeals from sentencing decisions (*irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a)*)." Booker, 543 U.S. at 260 (emphasis supplied). The phrase "in the exercise of his discretionary power" modifies and is applicable to sentences that are either "within or outside" the Guidelines range. If it were otherwise, the Court would have said "irrespective of whether the trial judge sentences within the Guidelines range, or outside the Guidelines range in the exercise of his discretionary power under § 3553(a)." If the Court had said that, it would mean that the Guidelines which it had just said were advisory were instead mandatory because only a sentence outside the Guidelines range could be imposed in the district court's discretionary power under § 3553(a).

Justice Scalia confirmed this interpretation in his dissent, stating that the reasonableness standard of review "appl[ies] across the board to all sentencing appeals, even to sentences within 'the applicable guideline range,' where there is no legal error or misapplication of the guidelines." Id. at 311.

After the statement regarding the right to appeal irrespective of whether the sentence is within or outside the guideline range, the Court cited "§ 3742(a) (appeal by defendant); 3742(b) (appeal by Government)." Section 3742(a) provides for appeals of sentences "imposed in violation of law" and sentences "imposed as a result of an incorrect application of the sentencing guidelines." A correctly calculated within guideline sentence that is greater than necessary to achieve the purposes of sentencing in § 3553(a)(2), or was imposed without considering those purposes, or was imposed without considering any of the other factors listed in § 3553(a) that were present in the case, or that otherwise gave the guideline range controlling or presumptive weight was "imposed in violation of law," and was "an incorrect application of the guidelines."

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[192] Id. at 119, 130, 131.

[193] Id. at 112.

[194] Id. at 82.

All courts of appeals to address the issue have held that they *do* have jurisdiction to review sentences within a correctly calculated guideline range for unreasonableness. United States v. Mickelson, __ F.3d __, 2006 WL 27687 (8th Cir. 2006); United States v. Talley, 431 F.3d 784 (11th Cir. 2005); United States v. Morales-Chaires, 430 F.3d 1124, 1128 (10th Cir. 2005); United States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005).

V. Placing Certain Factors Off Limits as a Categorical Matter is Inconsistent with Booker.

A. Powder/Crack Disparity[195]

The Pho Decision. In Pho the First Circuit rejected Judge Torres' use (in a post-Booker sentencing) of "reconstituted" or "jerry-built" guidelines ranges derived by the substitution of a 20:1 crack cocaine/powder cocaine ratio for the 100:1 ratio set by Congress in 21 U.S.C. § 841 and used by the Sentencing Commission in the sentencing guidelines. It described the district court's approach as "a categorical, policy-based rejection of the 100:1 ratio [which] amounted to error as a matter of law." (2006 WL 20574, *8).

The court also held that "regardless of length, a sentence based on an error of law is per se unreasonable." (2006 WL 20574,*7), and suggested that the reasonableness standard functions the same way as the abuse of discretion standard. This would require deference to district court judgment, but not to district court interpretations of issues of abstract law. Appellate review of claimed errors of law is non-deferential.

While the decision rejects the across-the-board substitution of a different ratio for all cases as a matter of policy, and is problematic in a number of respects, the opinion should be read only as precluding the development of alternative guidelines based on a policy determination by a particular district court judge. *It does not foreclose arguments based on the disparate treatment of crack and powder cocaine, or the disproportionately severe sentences for crack offenders, under the guidelines.* At 2006 WL 20574, *12, after describing the disparity as "a problem that has tormented many enlightened observers ever since Congress promulgated the 100:1 ratio," the court states: "By the same token, we do not intend to diminish the discretion that, after *Booker*, district courts enjoy in sentencing matters or to suggest that, in a drug-trafficking case, *the nature of the contraband and/or the severity of a projected guideline sentence* may not be taken into account on a case-by-case basis." (emphasis added)

Working With the Decision in the District Court. Using this recognition, a district court could say that in the case before it, the advisory guidelines sentence driven by the nature of the contraband overstates the culpability of the defendant in the particular case; for example, the particular offense did not involve serious violence or other offenses, did not involve minors, was an offense committed by an addict, involved a quantity of drugs or role in the offense that did not suggest the defendant was a major

[195] This section was written almost entirely by Judy Mizner.

dealer, or otherwise showed that, in light of all of the purposes of 3553(a), a different sentence is required. By focusing on the particular case and not creating an across-the-board policy or an alternative guideline, the district court can comply with *Pho* while addressing sentencing inequities for a particular defendant.

A few areas of the opinion for further analysis and possible challenge. In its discussion of § 3553(a), the court ignores the first sentence of the statute ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)..") and a significant component of § 3553(a)(6), which reads in its entirety "the need to avoid unwarranted sentence disparities among defendants with similar records *who have been found guilty of similar conduct*" (italicized language omitted in opinion).

In rejecting the district court's actions, the Court relies on the need to accept congressional policy and congressional intent in this area. However, while the Commission's use of 100:1 ratio in guidelines may be consistent with congressional intent that "a substantial term of imprisonment" be imposed on those convicted of "trafficking in a substantial quantity of a controlled substance" (2006 WL 20574, *2) that ratio is not required to comport with Congressional intent. Indeed, as the May 2002 Commission Report concludes, "there is no authoritative legislative history that explains Congress's rationale for selecting the 100 to 1 drug quantity ratio for powder cocaine and crack cocaine offenses." (at p.7). Further, the Sentencing Commission acknowledged in its Fifteen Year Report (at p.49) that the Commission did not contemporaneously explain its decision to incorporate the mandatory minimum quantities, including the powder/crack ratio, in increments below, between and above the mandatory minimum threshold levels.

The court asserts that "Congress's purpose in creating a guideline sentencing scheme was to promote uniformity in federal sentences based on the '*real conduct* that underlies the crime of conviction'" (quoting *Booker*). But the nature of the drug is not the essence of the real conduct of a drug offense. Assessing real conduct requires a broader analysis. Was the defendant a mule, a runner, an addict distributing to support a habit or a large-scale distributor seeking only profit? Did the offense involve violence or coercion? Was it part of a long running scheme or a one-time transaction?

B. Fast Track Disparity

The government claims that the absence of a fast track program in the district does not create "unwarranted" disparity because Congress approved the disparity created by the Attorney General's designation of some districts for fast track programs and not others and the disparity is warranted by an explosion of immigration cases in some districts. This is false.

As the district court found in United States v. Medrano-Duran, 386 F. Supp.2d 943 (N.D. Ill. 2005), based on documents submitted to it by the government,[196] (1) the Attorney General approved a charge bargain method in five districts, which is not the four-level departure Congress authorized, see PROTECT Act, Pub. L. 108-21 § 401(m)(2)(B), and that the Commission promulgated, see USSG § 5K3.1, and results in more of a reduction than does a 4-level departure, and (2) in five of the approved districts (Nebraska, Idaho, North Dakota, Oregon and the Western District of Washington), each AUSA handles between .58 and 3.32 immigration cases per year.

In a report to Congress, the Commission stated: "Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders." See U.S. Sentencing Commission, Report to Congress: Downward Departures from the Federal Sentencing Guidelines 66-67 (October 2003), available at http://www.ussc.gov/departrpt03/departrpt03.pdf.

Thus far, there is no court of appeals decision from a government appeal of a lower sentence based on absence of fast track. In cases where the defendant claimed on appeal that the district court erred by not imposing a non-Guideline sentence on that basis, the D.C. and Tenth Circuits affirmed but did not preclude it as a basis for consideration. United States v. Simpson, 2005 WL 3370060 **8-10 (D.C. Cir. Dec. 13, 2005); United States v. Morales-Chaires, 2005 WL 3307395 (10th Cir. Dec. 7, 2005). The Eighth Circuit came close to precluding it, though apparently without knowing that fast track programs in a number of districts are not the type authorized by Congress or justified by heavy immigration caseloads, but left it available as a basis for variance if combined with some other consideration. United States v. Sebastian, __ F.3d __, 2006 WL 265507 (8th Cir. 2006) ("to require the district court to vary from the advisory guidelines based solely on the existence of early disposition programs in other districts would conflict with" Congress' and the Attorney General's decisions).

In United States v. Martinez-Flores, 428 F.3d 22, 30 n.3 (1st Cir. 2005), the First Circuit rejected, on plain error grounds, an argument that the district court would have imposed a different sentence under Booker based on fast track disparity. The Court said that the defendant had not shown a reasonable likelihood that the district court would have considered the disparity unwarranted because the district court had said "it was 'not free to simply give every other defendant who comes before me the benefit of the [fast track] program *that might have some pragmatic justification in particular districts but is not justified here.*'" In addition, Judge Lynch wrote in *dicta* that "[i]t is arguable even post-Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied)

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[196] See United States v. Medrano-Duran, N.D. Illinois, Document 19 at 8, 22-37, available on PACER at https://ecf.ilnd.uscourts.gov/cgi-bin/show_case_doc?19,143476,,,,,7745517,1.

statement in the PROTECT Act provision that such disparities are acceptable." Neither the district court nor the court of appeals appears to have been aware that the fast track programs approved by the Attorney General deviate from those Congress authorized and are not justified by overwhelming case needs. If the Court were to adopt this as a holding, it would seem to violate § 3553(a) and the Sixth Amendment.

C. Other Government Practices that Create Disparity

United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005) (Lynch, J.) is an odd case in that it puts certain factors off limits "as a matter of law" without stopping to consider whether that might be inconsistent with Booker. Those factors were burdening the right to trial, deceiving the court, and violating the guidelines' policy statements to "punish the government" for "illegal fact bargaining." The opinion creates the opportunity for the government to argue that any of its actions that create the disparities detailed in Part III are simply off limits. However, those disparities were not the basis of the district court's decision and were not considered by the court of appeals. The opinion should not control cases in which those issues are raised.

The government had entered into a plea agreement with the defendant that mentioned no weapon and agreed not to oppose a minimal role adjustment. A pre-plea pre-sentence report was prepared, which mentioned no gun and discussed but rejected a role reduction. The deal fell apart and the defendant went to trial, where the government presented evidence that a gun was found under his bed and that he played more than a minimal role. Judge Young refused to apply the weapon enhancement and gave the four-level role reduction because the government's fact bargaining and change of position burdened the defendant's right to trial, deceived the court, and was prohibited by § 6B1.4 of the Guidelines. As the First Circuit repeatedly said, Judge Young was "punishing the government." The mistake Judge Young made was to find facts (weapon and role) that appear not to have been so clearly proved, then to reject the resulting increases to punish the government for the fact bargaining he so dislikes. The decision holds that each of Judge Young's reasons was an impermissible factor as a "matter of law." Fact bargaining is a permissible "artifact" of a plea bargaining system; defendants who do not benefit from it because they go to trial cannot complain that it is illegal, absent vindictiveness. Section 6B1.4 is only a policy statement so (even under mandatory guidelines) was merely advisory. Finally, the court found that Judge Young could not have been deceived (though he found as a fact that he was deceived) because although he was not apprised in the pre-plea pre-sentence report of all the facts the government later relied on, he was apprised of all the information before the actual sentencing. (Hmmm.) The case was remanded for re-sentencing under Booker subject to the Court of Appeals' prohibitions.

Since the sentencing was before Booker, Judge Young did not put any of this in terms of the § 3553(a) framework. He might have relied, for example, on unwarranted disparity vis a vis equally culpable co-defendants arising from relevant conduct facts with questionable factual support. See Lewis, 406 F.3d at 21 (remanding for re-sentencing where district court may have imposed a different sentence based on its "expressed

concern that Lewis's Guidelines range was significantly higher than that of his co-defendant, despite being sentenced on the same charges"); United States v. Gray, 362 F.Supp.2d 714, 720-24 (S.D. W. Va. Mar. 17, 2005) (judging how much weight to give government's evidence by evaluating its reliability under both the preponderance and beyond a reasonable doubt standards). The Court of Appeals focused on ensuring that the district court not "punish the government" for legal plea bargaining, and the case should be limited to that rationale.

If the government attempts to use the case as authority for the proposition that the district courts cannot rely on § 3553(a)(6) to correct for unwarranted disparity stemming from the government's actions, stress that Yeje-Cabrera did not address at all the concept of unwarranted disparity, point out relevant support in the Sentencing Commission's reports, and argue that prohibiting consideration of any § 3553(a) factor is contrary to the new sentencing law and is to effectively re-instate mandatory guidelines. Any case is distinguishable because Judge Young made no findings that the sentence was greater than necessary to achieve the purposes of punishment, or created unwarranted disparity, or any other finding under 3553(a); the defendant/appellee did not argue, and the First Circuit did not address, whether putting any factor off limits is effectively to reinstate a mandatory guideline system; and the case was not about disparity at all but about punishing the government for fact bargaining, which Judge Young said was illegal but the court of appeals said was legal.

DISPARITY: NOT A REASON TO " FIX" *BOOKER*

Lynn Adelman[1]
Jon Deitrich[2]

A year has passed since the Supreme Court decided *Booker* and, according to the Sentencing Commission's data, little has changed. In most cases, district courts continue to impose sentences within the guidelines. Nevertheless, the Attorney General and others have called for legislation reinstating mandatory sentencing in order to avoid disparity. As in the buildup to the Sentencing Reform Act ("SRA") in the 1970s and 80s, the proponents of mandates rely primarily on anecdotes rather than evidence.[3]

For three reasons, Congress should permit the present system to continue. First, there is no evidence that *Booker* has created unwarranted disparity. Second, mandatory guidelines do not eliminate disparity but merely move the discretion that is its source from one place in the criminal justice system to another. Finally, mandatory sentencing laws result in unfairness in many cases, and this unfairness outweighs the benefit of any reduction in disparity that they might produce. We address these points in more detail below.

I. *Booker* Has Not Created Unwarranted Disparity

The Sentencing Commission's post-*Booker* data indicate that district courts are sentencing within the guidelines in nearly 62% of all cases, only 6% lower than in the four years before *Booker*.[4] Moreover, since *Booker*, average sentence length has remained constant.[5] Although sentencing patterns among the circuits vary, these variations existed before *Booker* and are primarily the result of differing prosecutorial practices regarding motions for departures based on substantial assistance.[6] Nation-wide, the rate of sentences outside the range remains stable.

Finally, to the extent that some post-*Booker* sentences differ from the guidelines, it is impossible to determine whether such variations are "unwarranted" absent analysis of the reasons for the sentence, which the data do not provide. What the data do show is that the variations from the range, up and down, have been modest,[7] and the consistency of the average sentence further demonstrates that judges are applying a balanced approach. In sum, at the present time, the argument that mandates are needed to eliminate unwarranted disparity is utterly unsupported by evidence.

II. Mandatory Sentencing Laws Do Not Eliminate Disparity

In addition, pre-*Booker* experience teaches that mandatory guidelines do not reduce disparity in sentencing but merely relocate the discretion that is its source and make the disparity less visible. Discretion in the criminal justice system is like mercury: if pushed out of one space, it flows to another. Thus, when the creators of the mandatory guidelines reduced judges' discretion to influence sentences, they increased that of prosecutors, law enforcement officials, and even probation officers.[8]

Any system of criminal justice is going to involve the exercise of discretion. That being the case, it seems to us preferable to have neutral judges, selected by the President and confirmed by the Senate, exercise such discretion, rather than partisans operating out of public view and largely free from scrutiny. When the Attorney General and others argue that mandatory sentencing laws are needed to eliminate disparity, they focus only on judicial decisions, which are transparent and subject to appellate review and thus the least objectionable source of disparity in the system.

III. Mandatory Sentencing Laws Create Unfairness, Which Outweighs the Benefit of Any Reduction in Disparity

Finally, when they were mandatory, the guidelines were unfair because in many cases they were overly harsh and so rigid that judges could not ameliorate their harshness. One statistic is illustrative: in the ten years before the guidelines took effect, the average sentence was 28 months (with 13 months actually served); under the guidelines, the average sentence rose to 50 months (with 43 months actually served).[9] Guideline sentences were high because of the philosophy of their creators and because the politics of sentencing are such that any mandatory sentencing code will tilt high. Worse than their harshness, however, was the guidelines' inflexibility. Judges could not fully consider many traditionally relevant sentencing factors such as the defendant's character,[10] and they could not depart from the guidelines except in the most unusual cases.[11] Thus, the guidelines frequently forced judges to impose sentences they believed to be unfair.

By making the guidelines advisory, *Booker* conferred on judges the power to be fair. Nevertheless, because some judges will hew closely to the guidelines while others will impose statutory sentences in a significant number of cases,[12] it is possible that *Booker* may ultimately result in some additional disparity. However, in a system that gives judges the discretion to be fair, some disparity is inevitable. This is so because sentencing is an art not a science, and there is no one "right" sentence.[13] No sentencing system should force judges to incarcerate defendants for longer than they reasonably believe necessary.

The disparity arguments typically propounded by the proponents of mandates provide no reason to alter the system established by *Booker*. First, proponents argue that it is unfair when one judge imposes a lower sentence than another under similar

circumstances: The sentence one receives should not depend upon the judge one draws. However, the remedy they suggest – that both defendants serve more time in prison – is far more unfair. It is of no benefit to the defendant who draws the longer sentence, and it means that many defendants will be confined for longer than necessary, with all of the attendant human and economic costs, simply to ensure the appearance of fairness. The taxpayers will bear the increased costs of incarceration;[14] the defendants will suffer the emotional and physical trauma of additional incarceration;[15] and their families and communities will be deprived of their presence for extended periods of time.[16] In practice, mandatory guidelines simply mean longer sentences for everyone, a cost that outweighs the largely symbolic benefit.[17]

Second, proponents of uniformity may argue, as they did in the days before the SRA, that disparate sentences cause hurt feelings, breeding resentment among prisoners and interfering with effective rehabilitation and prison management.[18] However, this notion seems far-fetched and we are unaware of any studies supporting it. Further, rehabilitation has been rejected as a goal of imprisonment,[19] so any alleged interference with it is largely irrelevant.

Third, proponents of mandates might argue that under *Booker* some sentences will be too low. However, this is not a disparity argument but a law enforcement argument. If proponents of hard guidelines believe that without mandates judges will impose sentences insufficient to reflect the severity of the crime or to protect the public they should say so. Crime control and incapacitation are important goals. But they are not the same thing as disparity. Those who are actually pressing law enforcement arguments should not dress them up as equitable ones. Nor, absent evidence, should they allege that judges will

fail to protect the public unless forced to by a code.[20]

Finally, some early proponents of restricting judicial discretion were concerned that without mandates judges would sentence too harshly.[21] Such concerns seem far removed from the goals of today's sentencing "reformers," who are concerned only about the possibility of reduced prison terms.[22] Moreover, the post-*Booker* data indicate that sentences above the guidelines remain rare.[23] Finally, appellate review remains available for any unreasonable sentence, be it too high or too low.

IV. Leave *Booker* Alone

In sum, the arguments against *Booker* based on disparity fail. In fact, it is fair to say that *Booker* gets us "as close to an ideal system as we may ever get – rules moderated by mercy."[24] Even if we can imagine a better system than that created by *Booker*, no such system is going to come from this Congress, which is on record as hostile to judicial discretion. In the current political climate, any *Booker* "fix" will mean one thing: a system of mandatory minimum sentences.[25] Yet nearly every serious student of federal sentencing – even those who supported the mandatory guidelines – has come to recognize that mandatory minimums are unfair. They disallow any consideration of individual circumstances and effectively transfer sentencing authority from judges to prosecutors, whose charging decisions, rather than the offender's conduct and background, drive the sentence.

The message to Congress must, therefore, be to permit the present system to continue. Trust district judges to exercise discretion informed by the advisory guidelines and loosely regulated by the appellate courts. In short: leave *Booker* alone.

1.United States District Court Judge for the Eastern District of Wisconsin.

2.Law Clerk, Judge Lynn Adelman, Eastern District of Wisconsin.

3.On the issue of pre-guideline claims of disparity, see KATE STITH AND JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 107 (1998) (citing review by Douglas McDonald and Kenneth Carlson, which noted: "Only a few studies examined actual Federal sentencing decisions prior to the introduction of the guidelines. Together, they showed that sentencing was not greatly dependent on the judge one drew. . . . Differences clearly thought to be unwarranted (e.g., by the offender's race or ethnicity) were found to be uniformly small or statistically insignificant."); *see also United States v. Smith*, 359 F. Supp. 2d 771, 780 (E.D. Wis. 2005) (noting that racial disparity in sentencing worsened greatly after the guidelines: "Before the guidelines took effect, white federal defendants received an average sentence of 51 months and blacks an average of 55 months. After the guidelines took effect, the average sentence for whites dropped to 50 months, but the average sentence for blacks increased to 71 months."). On the issue of post-*Booker* calls for mandatory guidelines to avoid disparity, see Lynn Adelman & Jon Deitrich, *AG's Misguided Proposals*, NAT'L L.J., Sept. 19, 2005, at 30; *see also* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *Truth in Sentencing? The Gonzales Cases*, http://www.nacdl.org/__852566CF0070A126.nsf/0/2605351C3A1768E7852570370069 7993?Open (providing context on cases cited by Attorney General Gonzales in his calls for mandatory minimum guidelines).

4.U.S. SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT 7 (Dec. 1, 2005).

5.*Id.* at 13-15.

6.*See generally* U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 60-62, App. B (2003).

7.U.S. SENTENCING COMMISSION, *supra* note 4, at 22, 24.

8.*See, e.g.*, Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187; Daniel J. Freed, *Reforming the Commission: Internal Rules and Revised Guidelines*, 9 FED. SENT. REP. 64 (Sept./Oct. 1996); John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENT. REP. 314 (May 1996/June 1996); Marc Miller and Daniel J. Freed, *Perspectives on Disparity in Guideline Research*, 4 FED. SENT. REP. 123 (Nov./Dec. 1991); Stephen J. Schulhofer and Ilene H. Nagel, *The Federal Sentencing Guidelines: Ten Years Later: Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 Nw. U.L. Rev. 1284

(Summer 1997).

9.*See* STITH AND CABRANES, *supra* note 3, at 63.

10.*See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1715 (June 1992) (noting that no provisions of the guidelines evoked greater dismay than those declaring that most personal characteristics of an offender were "not ordinarily relevant").

11. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Guidelines*, 76 NOTRE DAME L. REV. 21, 60 (2000) ("Complaints about the Guidelines' inflexibility recognized, and often stressed, that an overly restrictive departure jurisprudence was at the heart of the problem.").

12.Since *Booker*, courts and commentators have struggled to come up with a term for a sentence outside the guideline range pursuant to the 18 U.S.C. § 3553(a) factors. "Departure" is not appropriate because it refers to a determination made within the context of the guidelines. "Variance" is also inappropriate because it suggests that the guidelines remain the norm, a concept that is inconsistent with *Booker* and the structure of § 3553(a). We have used the term "non-guideline sentence," but it is clumsy and also presumes the supremacy of the guidelines. We agree with the terminology recently suggested by David L. McCoglin and Brett G. Sweitzer: a sentence outside the guidelines imposed under § 3553(a) should be called a "statutory sentence." A sentence within the guidelines should be called a "guideline sentence," and a sentence imposed pursuant to a departure under the Sentencing Commission's policy statements a "departure sentence." *See* David L. McCoglin and Brett G. Sweitzer, *Post-Booker Sentencing Strategies*, THE CHAMPION, November 2005, at 50, 56 n.43.

13.*See* STITH AND CABRANES, *supra* note 3, at 177 ("'We have to abandon the arrogant belief that the world is merely a puzzle to be solved, a machine with instructions for use waiting to be discovered, a body of information to be fed into a computer in the hope that, sooner or later, it will spit out a universal solution.'") (quoting Vaclav Havel).

14.The Administrative Office of the U.S. Courts indicates that sending a defendant to prison costs $1933.80 per month, while community confinement costs $1675.23/month and supervision just $287.73/month.

15.*See, e.g.*, Alison Liebling, *Prison Suicide and Prisoner Coping*, 26 CRIME AND JUST. 283 (1999).

16.*See, e.g.*, John Hagan and Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME AND JUST. 121 (1999); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 284-85 (Mar. 2004).

17.Or, as Professor Alschuler has said, they produce equal nonsense for everyone. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (Summer 1991); *see also* ANATOLE FRANCE, THE RED LILY 95 (1894) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.").

18.*See, e.g.*, MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 42-44 (1973).

19.*See* 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.").

20.We also note that the argument, propounded by the Attorney General and others, that the mandatory guidelines contributed to the decline in the crime rate is specious. *See United States v. Jaber*, 362 F. Supp. 2d 365, 375 (D. Mass. 2005) ("Indeed, most studies attribute falling crime rates to factors other than incarceration rates, much less to the Federal Sentencing Guidelines."). Likewise, we find spurious the argument, propounded by many early advocates of reform, that without mandates criminals will gamble on encountering an indulgent judge, reducing the deterrent effect of the law. There is no recent data demonstrating that criminals engage in such consideration prior to offending. Two decades of harsh federal sentences – and a ballooning prison population – have surely disabused any notion that violating federal law is a sound wager. Again, the data show that judges continue to impose substantial sentences post-*Booker*. (To the extent that there is a "lottery" nowadays, it lies primarily in the prosecutorial decision whether to prosecute at the state or federal level. *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721 (2002)). Finally, the Attorney General has worried that without hard guidelines defendants will have less incentive to cooperate, but again the data do not support his concern. U.S. SENTENCING COMMISSION, *supra* note 4, at 7. And, the continued existence of statutory mandatory minimums in certain cases ensures that those offenders will still have a strong incentive to assist the government.

21.*See, e.g.*, FRANKEL, supra note 17, at 17.

22.For instance, Congress's goal in passing the so-called Feeney Amendment to the PROTECT Act of 2003 was to "substantially reduce[]" the "incidence of downward departures." Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003). And, in his speeches calling for institution of mandatory sentencing, Attorney General Gonzales relies on several examples of sentences below the guidelines and claims that there has been a "drift toward lesser sentences." Adelman & Deitrich, *supra* note 3. The latter claim is demonstrably untrue, U.S. SENTENCING COMMISSION, *supra* note 4, at 15 (noting that the average sentence has remained 56 months post-*Booker*), but the Attorney General's speeches well reflect the sentiments of those who call for a return to mandatory sentences.

23.U.S. SENTENCING COMMISSION, *supra* note 4, at 1, 7 (noting that after *Booker* 1.4% of sentences are above the range, compared to 0.8% before *Booker*).

24.Robb London, *Aftermath*, SUMMER 2005 HARVARD LAW BULLETIN 6 (quoting William Stuntz).

25.In fact, such a bill has already been introduced. *See* Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005). Under the law as it now stands, a system of mandatory minimum (e.g., "topless") guidelines would not run afoul of *Apprendi* and its progeny. *See Harris v. United States*, 536 U.S. 545 (2002). However, extension of the *Apprendi* rule to mandatory minimums may be forthcoming. *See, e.g.*, *United States v. Malouf*, 377 F. Supp. 2d 315, 324-25 (D. Mass. 2005) (casting doubt on *Harris* in light of *Blakely* and *Booker*); *see also Harris*, 536 U.S. at 569 (Breyer, J., concurring in the judgment) (noting that *Apprendi* cannot easily be distinguished from mandatory minimums in term of logic, and expressing disapproval of mandatory minimums in terms of policy); *id.* at 572-73 (Thomas, J., dissenting) (arguing that *McMillan v. Pennsylvania* should be overruled in light of *Apprendi*); *Apprendi v. New Jersey*, 530 U.S. 466, 522 (2000) (Thomas, J., concurring) (arguing that *Apprendi* rule should apply to mandatory minimums because such laws entitle the government to more than it would otherwise be entitled). Should Justice Breyer come to accept *Apprendi*, at least as a matter of stare decisis, *Harris* will fall. Thus, should Congress enact H.R. 1528 or some bill like it, the "fix" may be short-lived.

Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt

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A number of circuits have now decided that, in reviewing a sentence for reasonableness, the defendant must overcome a rebuttable presumption that a sentence within the Guidelines range is reasonable.[1] The First, Third, and maybe the Eleventh Circuits disagree.[2] The Ninth Circuit retracted a footnote buying into the presumption in *United States v. Guerrero-Velasquez*.[3]

The presumption of reasonableness is problematic for several reasons. The text of the Supreme Court's remedial opinion in *Booker*[4] appears to specifically contemplate a reasonableness review unfettered by any presumption that a guideline sentence is reasonable. Such a presumption would recapitulate the same type of authority the mandatory Guidelines had over the ultimate sentence. And the presumption some circuits are reading into the Guidelines is the type of presumption that the Supreme Court has only permitted in criminal cases where the relevant facts have been proved beyond a reasonable doubt. For those circuits in which the judicial gloss of a presumption has been adopted, defense counsel have stronger reasons for asserting the reasonable doubt standard at sentencing, both under the Doctrine of Constitutional Avoidance and directly under *In re Winship*.[5]

The Presumption Has No Basis in *Booker* or the Statutes

The cases creating a presumption of reasonableness find no support in statutes or in the *Booker* opinion. On the contrary, Justice Breyer's remedial *Booker* opinion contemplates a reasonableness review unencumbered by special deference for the guidelines. After the excision of the mandatory portions of the Guidelines, the Court noted that the remaining appellate rights did not accord special deference to the Guidelines over other relevant sentencing factors: "[T]he Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a))."[6]

Justice Breyer clearly stated that, with § 3742(e) excised, the standard of review would have to be implied from the remainder of the statute, which did not include special consideration for the Guidelines range.[7] He pointed out that, under the old regime, appellate judges reviewed for reasonableness both the degree of departures and sentences for crimes without guidelines—16.7 percent of sentencing appeals.[8] Justice Breyer then stated that this same standard would apply to all sentencing appeals "across the board": "And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would Justice Scalia what he calls the 'daunting prospect,' of applying such a standard across the board."[9]

In fact, a presumption of reasonableness negates what Justice Breyer saw as the check on discordance in the system—that the Sentencing Commission would "continue to collect and study appellate court decision making."[10] Based on the untrammeled reasonableness review, the Sentencing Commission could modify the guidelines, "encouraging what it finds to be better sentencing practices."[11] A judicial presumption would skew the data rather than inform the supervising body regarding areas in need of adjustment.

The sacrifice of some uniformity is the necessary consequence of refusal to accord Sixth Amendment protections to sentence-enhancing facts: "We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."[12]

The Originating Cases Failed to Establish a Doctrinal Source for a Presumption

So where did this presumption of reasonableness come from? Tracing back the precedent, there is nothing but a general citation to *Booker* and uniformity to support this radical curtailment of appellate rights. The accompanying chart diagrams the spread of what we can call the Presumption of Reasonableness Virus. When a questionable proposition begins to harden into law, it is useful to trace the cases back to see the force of reasoning or precedent in the originating cases. The diffusion of the presumption is a classic: The cases that have recently exploded into publication all have their origins in three cases, none of which rely on any statute or *Booker* holding.

The presumption began in three separate cases decided within a month of each other in the summer of 2005: *Mykytiuk* in the Seventh Circuit,[13] *Lincoln* in the Eighth Circuit,[14] and the unpublished *Gonzalez* in the Third Circuit.[15] The *Gonzalez* case has now been rejected

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by the Third Circuit in *Cooper*, which explicitly disclaims any presumption of reasonableness.[16] *Mykytiuk* just cited generally to *Booker* and then spelled out the presumption with no language or reasoning other than the importance of uniformity under the Guidelines system.[17] *Lincoln* provided a "Cf." cite to a footnote in a previous case on the need to compute the guidelines correctly to make a reasonableness determination.[18] From this dearth of authority, the presumption has been replicated without analysis, incubating in numerous unpublished opinions before the recent outbreak, which has suddenly resulted in a plurality rule.[19]

The presumption of reasonableness emerged in the Ninth Circuit as dicta in a footnote before the court filed an amended opinion deleting the reference in *Velasquez-Guerrero*.[20] The Ninth Circuit got it right several days earlier in *Cantrell*,[21] in which the court pointed out that, after *Booker*, review must be based on all the § 3553(a) factors with no special status for the guideline range.[22] The presumption source cases do not support the extreme step of adding an anti-defendant presumption to sentencing appeals.

The Presumption of Reasonableness Invites Sixth Amendment Violations through the Back Door

As pointed out in Justice Stevens' merits opinion in *Booker*, the mandatory guidelines system was not really mandatory—judges were allowed to depart based on a wide range of circumstances.[23] Some departures were encouraged, others were discouraged, and some simply involved facts outside of the heartland for the particular offense.[24] Justice Stevens noted that, superficially, the judge's ability to depart made the statutory maximum the relevant maximum under an *Apprendi* analysis.[25] But because departures are not available in every case, and because in most cases the Guidelines account for all relevant factors, the significance of the Guidelines on an individual's freedom required full Sixth Amendment trial rights for facts that increased the offense level.[26] A presumption that a sentence within the Guidelines range is reasonable implicates the same interest in liberty that was decisive in *Booker*. The deference for the Guidelines range created by a judicial presumption is difficult to distinguish from the mandatory Guidelines denounced in the first *Booker* opinion. In fact, the Sentencing Commission characterized the pre-*Booker* regime as "presumptive" sentencing in its recent fifteen-year report.[27]

Even without the presumption, some judges' deference for the Guidelines jeopardizes Sixth Amendment rights. Some district court judges have freed themselves from the Guidelines while others hold tight with an icy grip. The range of authority accorded the Guidelines range makes Sixth Amendment review a moving target—and provides one of the strongest arguments for a reasonable doubt standard. The circuit courts have demonstrated notable reluctance to give effect to *Apprendi* and its progeny—especially in the context of retroactivity.[28] By solidifying the Guidelines' force into a presumption, the courts are again failing to give full effect to the Supreme Court's Sixth Amendment jurisprudence.

A Presumption of Reasonableness Requires Proof of Enhancing Factors beyond a Reasonable Doubt

Let's assume that a sentence within the Guidelines range is protected by a presumption of reasonableness on appellate review. Even aside from the *Booker* substantive opinion, doesn't such an effect require that the necessary facts for the Guidelines range to apply be proved beyond a reasonable doubt? In the context of burden-shifting presumptions in criminal cases, the Supreme Court has consistently articulated a standard that permits the government to shift the burden to the defendant only if the operative facts for harsher punishment have been proved beyond a reasonable doubt.

In *Ulster County v. Allen*, the Court distinguished between permissive inferences or presumptions—which place no burden on the defendant—and mandatory presumptions—which are "a far more troublesome evidentiary device" because they affect both the burden of proof and the allocation of proof.[29] "For it may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts."[30] The judicial presumption of Guidelines' reasonableness has the same effect: without necessarily requiring proof of the operative facts beyond a reasonable doubt, the burden shifts to the defendant to show that the sentence based on constitutionally unreliable facts is unreasonable.

The analysis is similar to a comparison between *Mullaney*—one of the pillars upon which *Apprendi* was built—and its doppelganger, *Patterson*.[31] In *Mullaney*, under peculiarities of Maine state law, the defendant bore the burden of proving by a preponderance heat of passion or sudden provocation, which would negate malice aforethought necessary for a murder conviction. In a resounding elaboration on the importance of the reasonable doubt standard, the Court reversed because the allocation of the burden of proof unconstitutionally diluted the government's obligation to prove malice aforethought to the jury beyond a reasonable doubt.[32] As summarized in *Patterson*, "Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation."[33]

In contrast, in *Patterson*, the Court upheld the shifting of the burden of proof to the defendant to establish manslaughter facts once the government proved intentional murder beyond a reasonable doubt. The key to the Court's analysis was that the State had proved all the facts necessary for the greatest punishment beyond a reasonable doubt. "The death, the intent to kill, and causation are

the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder"; "if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances."[34] Just as "it is not in the province of a legislature to declare an individual guilty or presumptively guilty of a crime,"[35] the judiciary is not authorized to create a presumption based on facts—usually constituting separate crimes—not proved beyond a reasonable doubt.

The Supreme Court's cases on presumptions and burden-shifting have consistently provided maximum protection to the reasonable doubt standard. In *Sandstrom* and *Francis*, the Court held that a presumption that diluted the State's burden of proof required reversal under *Winship* and *Patterson*.[36] The rights at issue were so fundamental that the Court applied them retroactively in *Yates*.[37] Yet the circuit courts appear to be stampeding toward a standard for appellate review that derogates those same rights, with no statutory or Supreme Court support for the judicial creation of the presumption.

The fashion for a presumption of reasonableness may pass or it may catch on. With the emergence of a circuit conflict, the issue should be pursued through rehearing en banc and to the Supreme Court. Regardless of how the issue is eventually resolved, defense counsel need to litigate the presumption, both as an unauthorized judicial gloss on *Booker* and as another argument in favor of the reasonable doubt standard.

Notes

1 *See, e.g., United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006); *United States v. Smith*, No. 05-30313, 2006 WL 367011 at *2 (5th Cir. Feb. 17, 2006); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Williams*, 436 F3d 706, 708 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005).

2 *United States v. Jimenez-Beltre*, NO. 05-1268, 2006, WL 562154 at *2 (1st Cir. mar. 9, 2006) (en banc); *United States v. Cooper*, 437 F.3d 324, 331-32 (3rd Cir. 2006); *see United States v. Lisbon*, No. 05-12637, 2006 WL 306343 at *2 (11th Cir. Feb. 10, 2006).

3 *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. 2006), *as amended by* 2006 WL 278911 (9th Cir. Feb. 7, 2006).

4 *Booker v. United States*, 543 U.S. 220 (2005).

5 *See, e.g., United States v. Pimental*, 367 F.Supp.2d 143, 152 (D.Mass. 2005); *United States v. Okai*, No. 4:05CR19, 2005 WL 2042301 at *10 (D.Neb. 2005); *see generally* http://circuit9.blogspot.com/2005/04/blog-summary.html (collecting reasonable doubt blogs).

6 *Booker*, 125 S.Ct. at 765.

7 *Id.*

8 *Id.*

9 *Id.* at 766 (internal citations omitted).

10 *Id.*

11 *Id.*

12 *Id.* at 766-67.

13 *Mykytiuk*, 415 F.3d at 608.

14 *Lincoln*, 413 F.3d at 717.

15 *United States v. Gonzalez*, 134 Fed.Appx. 595, 598 (3rd Cir. 2005).

16 *Cooper*, 437 F.3d at 331-32.

17 *Mykytiuk*, 415 F.3d at 608.

18 *Lincoln*, 413 F.3d at 717 (citing United States v. Marcussen, 403 F.3d 982, 985 n.4 (8th Cir. 2005)).

19 *See supra* note 1.

20 *See supra* note 3; *see also* Douglas A. Berman, *Notable (and sneaky?) Footnote in Ninth Circuit Ruling*, SENTENCING LAW AND POLICY, Jan. 19, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/notable_and_sne.html.

21 *United States v. Cantrell*, 433 F.3d 1269 (9th Cir. Jan. 13, 2006).

22 *Id.* at 1279.

23 *Booker*, 125 S.Ct. at 750-51.

24 *Koon v. United States*, 518 U.S. 81, 93-94 (1996).

25 *Booker*, 125 S.Ct. at 750.

26 *Id.* at 750-51.

27 U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 8 (2004).

28 *See* Stephen R. Sady, *Retroactivity of* Apprendi *and* Blakely: *Supreme Court Review Needed*, NINTH CIRCUIT BLOG, Dec. 16, 2005, http://circuit9.blogspot.com/2005/12/retroactivity-of-apprendi-and-blakely.html.

29 *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157 (1979).

30 *Id.* at 159.

31 *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977).

32 *Mullaney*, 421 U.S. at 704.

33 *Patterson*, 432 U.S. at 214.

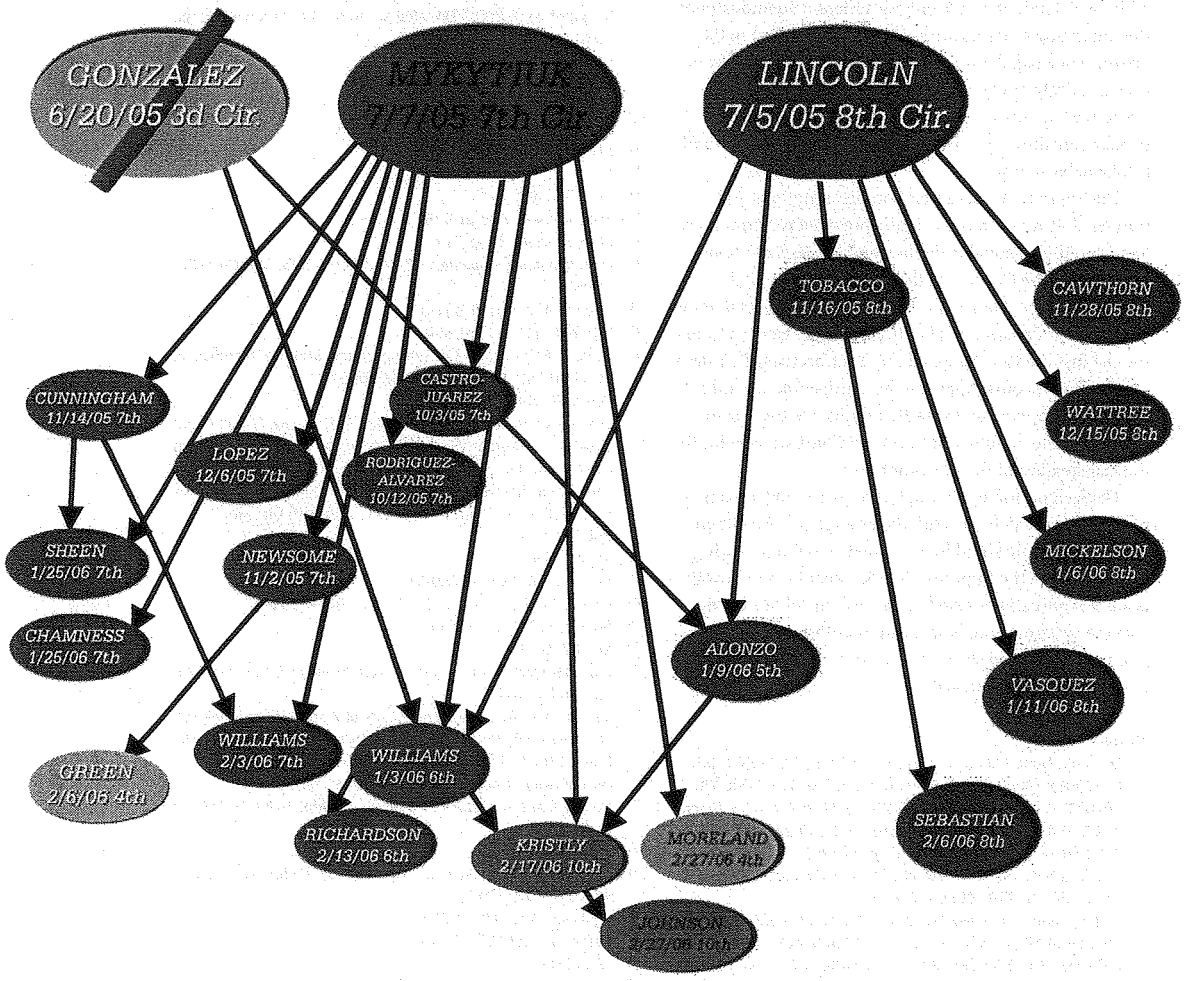
34 *Id.* at 206.

35 *Id.* at 210.

36 *Sandstrom v. Montana*, 442 U.S. 510, 519 (1979); *Francis v. Franklin*, 471 U.S. 307, 317 (1985).

37 *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988).

Presumption of Reasonableness Proliferation



IMMEDIATE AND LONG-TERM EFFECTS OF *UNITED STATES V. BOOKER*: More Discretion, More Disparity, or Better Reasoned Sentences?

Paul J. Hofer[†]

INTRODUCTION

Since the United States Supreme Court's decision in *United States v. Booker*,[1] the percentage of federal sentences within the range recommended by the federal sentencing guidelines has decreased. Different observers have relied on this change as evidence that the post-*Booker* sentencing system is either better or worse than the system it replaced. These preliminary evaluations have rested to a great extent on two criteria—increased judicial discretion and increased sentencing disparity. This article scrutinizes these criteria and argues that, in their simplest form, neither provides sufficient content to evaluate changes in sentencing practices. Ultimately, sentencing must be evaluated against its success at achieving the substantive purposes of sentencing. For discretion to be used wisely and unwarranted disparity reduced, an agreement must exist about sentencing purposes and the priorities among those purposes. Fair and effective sentencing requires that the decisions of the United States Sentencing Commission ("the Commission"), the courts, and Congress be grounded in a common punishment philosophy and a mutual respect for the roles of each participant in the federal sentencing process.

Part I of this article examines rates of within- and outside-range sentences over the past fifteen years—focusing especially on developments since 2002—and explores some of the influences on changes in these rates. Part II analyzes the concepts of judicial discretion and disparity to see how much they can tell us about good sentencing practices. The function of

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† Senior Research Associate, United States Sentencing Commission. The views expressed in this article are those of the author and do not reflect the policies or positions of the United States Sentencing Commission. I wish to thank Regina Stone-Harris, Supreme Court Fellow 2005–2006, for helpful editorial and substantive suggestions, and Patricia Valentino for editorial and research assistance.

1. 543 U.S. 220 (2005).

discretion is analyzed to see when it increases disparity and when it might reduce it. The importance of two types of reasons are discussed—the reasons policymakers provide for the rules they create, and the reasons judges give for the sentences they impose—with analysis of the dilemmas created when either type of reason is unclear. Part III explores why a common sentencing philosophy that explains and justifies the sentencing guidelines and statutes is essential if judges are to exercise discretion wisely and avoid unwarranted disparity. Finally, the conclusion briefly reviews how the Commission, the courts, and Congress might help establish better reasoned sentencing.

I. AN EXAMINATION OF CHANGES IN FEDERAL SENTENCING

The post-*Booker* decrease in within-range sentences is better understood in the context of long-term trends in federal sentencing. The most recent account of those trends is reported in the Commission's 2004 study of the first fifteen years of federal sentencing under the Sentencing Reform Act of 1984 ("SRA").[2] That report contains detailed data on long-term trends in incarceration rates and average sentence lengths from Fiscal Years ("FY") 1984 through 2002 for a wide variety of crimes.[3] Those data end, however, before the April 2003 enactment of the PROTECT Act,[4] which Congress passed to substantially reduce the incidence of downward departures from the guidelines. In addition, two recent Supreme Court cases can be expected to have affected federal sentencing. In June 2004, the Court decided *Blakely v. Washington*,[5] which held the Washington State sentencing guideline system unconstitutional on Sixth Amendment grounds and cast doubt on the federal system.[6] In January 2005, the Court decided *Booker*, which found the same infirmity in the federal guidelines but salvaged the system by making the guidelines "effectively advisory."[7]

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2. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) [hereinafter FIFTEEN YEAR REVIEW].

3. The federal fiscal year runs from October 1 of the preceding year until September 30 of the named year.

4. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of the U.S.C.).

5. 424 U.S. 296 (2004).

6. A description of varied federal practices during this period can be found at USSC, *Preliminary Findings: Federal Sentencing Practices Subsequent to the Supreme Court's Decision in Blakely v. Washington*, 17 FED. SENT'G REP. (2004).

7. 543 U.S. 220 (2005).

A. The Role of Doctrinal Change in Long-term Trends

Figure 1[8] shows the four major types of sentences that have been reported by the Commission in its *Annual Reports* and *Sourcebooks* throughout the guidelines era[9]: within-range sentences and three types of outside-range sentences. These include upward departures, and two types of downward departures, § 5K1.1 departures for substantial assistance in the prosecution of other persons[10] and other downward departures. Other downward departures could be based on aggravating or mitigating circumstances identified by the judge or agreed to by the parties in a plea agreement.[11]

Figure 1 shows gradual long-term trends with incremental changes in departure rates. It does not show dramatic breaks at previous points when the law governing departures was changed. For example, the line on Figure 1 at November 1994, shows the effective date of guideline amendment 508. That amendment was implemented at the request of the Judicial Conference of the United States to expressly authorize departures based on a "combination of . . . characteristics or circumstances."[12] Some observers hoped that the amendment would liberalize departures, while others feared it would "open the floodgates" for downward departures. The figure shows that the amendment had little, if any, effect on departure rates.[13] A similar response can be seen to the Supreme Court's decision in *Koon v. United States*[14] in June 1996. The *Koon* decision established a nationwide "abuse-of-discretion" standard for appellate review of guideline departures.[15] Some recent commentators have blamed *Koon* for an increase in downward departures.[16] But although downward departures did increase after *Koon*,

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8. *See infra* fig.1.

9. These data were contained in U.S. SENTENCING COMM'N, ANNUAL REPORT, 1990–1995, and in the reformatted SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 1996–2005. The data from 1995 to 2003 are available at the Commission website, http://www.ussc.gov/annrpts.htm (last visited Feb. 14, 2006).

10. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

11. *See infra* note 24.

12. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 508 (1994).

13. Restrictive appellate decisions may have undone whatever liberalizing effect this amendment might have had. *See, e.g.*, United States v. Dyce, 91 F.3d 1462, 1468–71 (D.C. Cir. 1996) (reversing departure based on the "totality of circumstances" when none of the factors cited by the district court could alone serve as a basis for departure.)

14. 518 U.S. 81 (1996).

15. *Koon*, 518 U.S. at 99–100.

16. Testimony of Daniel P. Collins, Associate Deputy Attorney General, *Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary*, ?? Cong., ?? Sess. (March 11, 2003); William W. Mercer, *Assessing Compliance with the U.S. Sentencing*

offenders whom the government certified met the program criteria. The newly authorized government-sponsored departure was added to the *Guidelines Manual* at § 5K3.1, effective October 27, 2003.[25]

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These developments alerted both the courts and the Commission to the need to more carefully distinguish between downward departures that were initiated, encouraged, or at least tacitly approved by the prosecution from those that were initiated by the judge.[26] Many judges felt they had been unfairly blamed for a growth in the downward departure rate that was due in large measure to the actions of prosecutors.[27] In response, the Administrative Office of the United States Courts modified the form that judges use to report the reasons for imposing a sentence. The modified Statement of Reasons form more clearly differentiates between types of downward departure. Further, the Commission, in its October 2003 report, *Downward Departures from the Federal Sentencing Guidelines*, began to distinguish government-sponsored departures from other downward departures.[28] In addition to USSG § 5K1.1 and § 5K3.1, the Commission included in the new category other government-sponsored departures that were made for reasons such as "pursuant to a plea agreement," "deportation," and "savings to government."[29]

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Figure 2[30] uses this new distinction between government-sponsored and other downward departures to show month-to-month rates of within-range and outside-range sentences from October 2001 through October 2005. The graph excludes the six months of unsettled period between the *Blakely* decision in June 2004 and *Booker* in January 2005. The graph includes fourteen months of data from when the PROTECT Act was signed into law until the decision in *Booker*, and ten months of data following the decision.

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25. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 651. The legislation and amendment are described in Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357, 373–77 (2004).

26. *See, e.g.*, *id.* at 377–81.

27. Letter from U.S. Sentencing Commissioners et al. to Sens. Orrin Hatch and Patrick Leahy, United States Congress, regarding: Feeney Amendments to S. 151/H.R.1104 (Apr. 2, 2003), *reprinted in* 15 FED. SENT'G REP. 341, 343–44 (2003).

28. U.S. SENTENCING COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 59 (2003) [hereinafter DEPARTURES REPORT].

29. The Commission's methods for distinguishing government-sponsored from other downward departures were refined beginning in FY2003. In Figure 2, the rates for fiscal years before 2003 were calculated by combining several reported reasons for departure that indicated government sponsorship. *Id.* at 59 n.130. In later years, plea agreements and the new Statement of Reasons form were scrutinized to more accurately identify government-sponsored departures. *Id.*

30. *See infra* fig.2.

There is little doubt that the PROTECT Act decreased the rate of non-government-sponsored downward departures. The downward trend that began prior to the Act continued in the months following it, settling in at between 4.5 and 5 percent in the last few months of FY2004. The government-sponsored departure rate showed little trend and was about four to five times greater than non-government-sponsored downward departures during this period—approximately 21 to 24 percent of all cases.

Quantifying the Act's precise effect on non-government-sponsored downward departures is difficult for several reasons. The date of the Act is shown on Figure 1 with the line at April 2003. While downward departure rates decreased after that date, to some extent they were continuing the trend that began several months before. In addition, the changes created by the Act did not take place all at once. Some of the restrictions on downward departures took affect upon signing of the Act, while Commission-developed guideline amendments were not effective until the end of October 2003. Many changes could not immediately apply to all cases sentenced after the Act or effective date of the guideline amendments due to ex post facto considerations.[31] Whatever their precise contributions, the combination of the various aspects of the Act and the factors accounting for the pre-existing trend helped to reduce non-government downward departures to their lowest rates since the early 1990s.

[Insert Figure 2 about here]

C. The Immediate Effect of Booker

And then came *Booker*. It held that Sixth Amendment protections apply to fact finding that raises the maximum of a mandatory guideline range, but solved the problem by excising certain provision of the SRA to render the federal guidelines "effectively advisory." Academic and professional observers are still analyzing the opinion, along with its growing body of case law, and are struggling to evaluate its implications.[32] These analyses

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31. The ex post facto clause in Article I, § 9 of the United States Constitution has been held to require that cases be sentenced under the guidelines in effect at the time the crime was committed, not sentenced, if later changes increase the severity of the applicable sentence. *See* USSG § 1B1.11 (p.s.).

32. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 716 (2005) (explaining that the standard of reasonableness for appellate review "will either considerably gut the Guidelines or transform them back into (unconstitutional) mandatory guidelines"); Frank O. Bowman, III, *Beyond Band-Aids: A*

will not be repeated here. It is remarkable, however, to note the wide-ranging views on the meaning of the opinion and its likely impact. A few commentators have suggested that the decision fundamentally re-conceptualizes federal sentencing and requires a radical restructuring of the system.[33] Another has suggested that the dueling merits and remedial opinions in the case may contain the seeds of their own destruction, as appellate review leads to either additional constitutional violations or a legislative response that may itself raise constitutional questions.[34] A growing number of observers, however, have come to question whether the decision will fundamentally alter the system in the long run.[35]

Time alone will tell, but we can learn a few things from the data in the first months following the decision (the only data available at the time of this writing). Figure 2 shows that changes in the rates of non-government-sponsored below-range sentences are more dramatic following *Booker* than following any previous change in sentencing law during the guidelines era. Immediately after the decision the non-government-sponsored below-range rate jumped to 14.7 percent. It then dropped back slightly in the following months, varying between 11.4 and 13.4 percent. This represents about a tripling of the rate of non-government-sponsored below-range sentences compared to the PROTECT Act era. Upward departures have also doubled to a rate of about 1.7 percent following the decision. To attribute all of this change to *Booker* requires more sophisticated analyses to control for the effects of other changes that may have occurred over the same time period, such as changes in the types of cases being sentenced. But the effect at the time of the decision is so dramatic that it seems certain that *Booker* had a significant independent effect.

While *Booker*'s impact seems clear and significant, some have wondered why it has not been even more substantial. Commentators have been

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Proposal for Reconfiguring Federal Sentencing After Booker, 2005 U. CHI. LEGAL F. 149, 182 (2005) (describing the "puzzlement" of "figuring out what *Booker* means").

33. Timothy Lynch, *One Cheer for* United States v. Booker, CATO SUPREME COURT REV. 2004–2005, 215, 232 (2005) (calling *Booker* a "landmark case" and calling for additional reform of the federal criminal code); Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 231–33 (2005) (arguing for reconstitution of the Commission and reconceptualization of how sentencing policy is developed, communicated, and reviewed).

34. Craig Green, Booker & Fanfan*: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 423 (2005) (arguing that either reasonableness review will establish new factors to which constitutional protections may attach, or Congress will reestablish mandatory sentencing, raising additional constitutional questions).

35. Bowman, *supra* note 32, at 185 (arguing that the marriage of reasonableness review and duty to consider 18 U.S.C. § 3553(a) means that the guidelines retain the "force of law" even after *Booker*); Berman, *supra* note 19.

surprised that judges, freed from the mandatory constraints of the guidelines, have continued to sentence within-range over 60 percent of the time. Those who predict considerable long-term stability in the system may also be intrigued by what appears, upon visual inspection of the graph, to be a possible beginning of a downward trend in outside-range sentences from the initial high rates in the first few months following the decision. It is hard to know what, if anything, to make of this. The number of months is still too small to establish the statistical significance of any emerging trend. The large number of continuances granted in the *Blakely* interim period may make the cases sentenced in the first few months following *Booker* unrepresentative of the normal caseload. But it is a trend worth watching, as the appellate courts give substance to "reasonableness" review, as discussed further below.

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It is also worth noting that, at least so far, the increase in the rates of below-range sentences has not resulted in decreases in sentence lengths for most types of offenses. The latest data available from the Commission's website on the average lengths of sentences for various types of crimes shows that the median sentence under three of the four most-used guidelines—drug trafficking, immigration, and theft or fraud—has remained unchanged following *Booker* compared to pre-*Blakely* FY2004.[36] Median firearm sentences fell, but by just three months to thirty-seven months. Like rates of below-guideline-range sentences, average sentences are also affected by a variety of factors, including changes in the types of cases being sentenced. Additional analyses are needed to sort out the contributions of various factors.

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II. DISCRETION AND DISPARITY: TWO INCOMPLETE WAYS TO THINK ABOUT RECENT TRENDS

Those who trust judges and dislike the federal sentencing guidelines have applauded the decrease in within-guideline-range sentences, claiming that *Booker* has restored "much needed discretion" to the federal sentencing system.[37] Those more skeptical of judges and of decentralized, discretionary decision making have criticized these same changes. Attorney General Alberto Gonzales has argued that

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36. U.S. SENTENCING COMM'N, POST-*BOOKER* SENTENCING UPDATE 15 (Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_010506.pdf (last viewed Jan 23, 2006).

37. Barry Scheck, *The President's Column*, THE CHAMPION, Jan./Feb. 2005, at 4 (president of the National Association of Criminal Defense Lawyers, favoring the changes created by *Booker*).

> it is inevitable over time that, with so many different individual judges involved, exercising their own individual discretion, in so many different jurisdictions, shorter sentences and disparities among sentences will occur under a system of advisory guidelines.
>
> . . .
>
> And, indeed, the evidence the Department [of Justice] has seen since the *Booker* decision suggests an increasing disparity in sentences.[38]

In making this prediction, the Attorney General cited the Commission data available at the time of his speech, in addition to several specific cases in which judges imposed sentences below the guideline range.[39] The data available at that time were similar to the data reviewed in the section above.

Are changes in the rates of within-range sentences sufficient to support any of these claims? Are they sufficient to demonstrate that the system is better or worse than the pre-*Booker* or pre-PROTECT Act system? This section argues that the mere fact that a sentence is outside the guideline range is insufficient to prove either that it reflects a wise use of discretion or that it creates unwarranted disparity. The concepts of discretion and disparity are adequate, in themselves, to provide a framework to evaluate a sentencing system. Discretion and disparity are incomplete ideas that must be given content by a conception of what discretion is for, and what purposes of sentencing we are trying to achieve. Ultimately, we need a shared *philosophy of sentencing* that prioritizes the purposes of sentencing, defines unwarranted disparity, and determines when discretion should be exercised.[40] In a later section, I argue that we actually already *have* such a common philosophy, but it is too little recognized and has not taken its rightful place in our national debate about the future of federal sentencing.

A. Discretion

Some commentators have cheered *Booker* because it seems to have returned at least some discretion to federal judges.[41] Guidelines that were

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38. Alberto Gonzales, U.S. Att'y Gen., Sentencing Guidelines Speech (June 21, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm (last visited Feb. 17, 2006).

39. *Id.*

40. *See infra* Part III.

41. Lynch, *supra* note 33, at 234 (calling *Booker* a "marginal improvement" by transferring power from prosecutors to judges, and calling for more judicial discretion in sentencing).

once "mandatory" are now "effectively advisory."[42] While courts are still ordinarily required to determine the guideline range and to consider it when imposing sentence,[43] the statutory language declaring that the court "shall impose" a within-range sentence unless a departure can be justified has been stricken by the remedial opinion in *Booker*.[44] And although sentences continue to be subject to appellate review when a sentence is outside the guideline range,[45] the standard of review is now simply "reasonableness." The de novo statutory standard for review of departures put in place by the PROTECT Act has been eliminated.[46]

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1. Degrees of Presumptiveness between Mandatory and Advisory

Before considering discretion more deeply, it's worthwhile to consider just how much judicial discretion has actually been affected by *Booker*. While the shift from "mandatory" to "advisory" guidelines solved the constitutional problem identified in the merits opinion, the practical effects of this shift in nomenclature have not been obvious to all observers.[47] Professor Kevin Reitz, the reporter for the American Law Institute's revision of the Model Penal Code's sentencing section and a careful student of guideline systems, has gone so far as to describe the shift as "little more than legal jargon . . . and part of the distorted terminology that has cropped

42. United States v. Booker, 543 U.S. 220, 222 (2005).

43. *See* United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) (normally the judge must find all facts relevant to sentencing and determine the applicable Guidelines range); United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005) (a district court must first make the appropriate findings of fact and calculate the Guidelines range); United States v. Mares, 402 F.3d 511, 518–19 (5th Cir. 2005) (ordinarily, the sentencing judge must determine the applicable Guidelines range in the same manner as before *Booker/Fanfan*; this process includes finding all facts relevant to sentencing using a preponderance of the evidence standard); United States v. Stone, 432 F.3d 651, 655 (6th Cir. 2005) ("District courts . . . must, therefore, calculate the Guideline range as they would have done prior to *Booker*."); United States v. Gonzalez-Huerta, 403 F.3d 727, 731 (10th Cir. 2005) (federal district courts "are still required to consider the Guidelines in determining sentences, but they are not required to impose a sentence within the Guidelines range"); United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005) (sentencing involves two steps—first, calculate the Guidelines range; then consider the § 3553(a) factors to determine a reasonable sentence).

44. *Booker*, 543 U.S. at 250, 259 (striking language in 18 U.S.C. § 3553(b)(1) stating that judges "shall impose" the within-range sentence except in circumstances in which departure was permitted)..

45. 18 U.S.C. § 3742 (a), (b).

46. *Booker*, 543 U.S. at 224 (striking 18 U.S.C. 3742(e) and the *de novo* standard of appellate review for departures).

47. *See supra* note 432.

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up in the [Supreme] Court's new Sixth Amendment jurisprudence."[48] Labels like "mandatory," "advisory," or "voluntary" are overly simplistic for characterizing differences among guideline systems and mask many hard questions about how the guidelines will be considered and enforced.[49]

Somewhat better is the concept of "presumptive" guidelines, though these, too, come in a variety of flavors.[50] One can argue that the federal guidelines were presumptive before *Booker* and remain presumptive today, though to a degree that is not yet clear. Nor were the federal guidelines static prior to *Booker*.[51] The degree of presumptiveness was constantly in flux as Commission[52] and Congress-directed[53] guideline amendments, statutory changes, and appellate rulings altered the circumstances in which outside-guidelines-range sentences were permitted. Because most features of the pre-*Booker* system remain in place—including detailed procedures surrounding the pre-sentence investigation and report, fact finding at the sentencing hearing, and appellate review[54]—Prof. Reitz has argued that, even after *Booker*, the federal guidelines "remain as restrictive of judicial sentencing discretion as any system in the United States."[55]

Much will depend, of course, on the courts of appeals. Several circuits have already developed a presumption in favor of the reasonableness of within-range sentences,[56] so it seems likely that review of outside-range

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48. Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156 (2005).

49. *Id.* at 156–57.

50. *Id.* at 157.

51. *Id.* at 172.

52. The Commission has made numerous amendments in the life of the guidelines that have altered when departures were permitted. Most of these eliminated or restricted a ground for departure that had been recognized by the courts, although a few authorized new grounds for departure.

53. For a review of Congress-directed changes in the departure standard in both the legislative debates leading to passage of the Sentencing Reform Act ("SRA") and during the guidelines era through the PROTECT Act, see DEPARTURES REPORT, *supra* note 28, at app. B. It is noteworthy that in the debates leading to passage of the SRA, Congress explicitly rejected a proposal by Sen. Gary Hart to make the guidelines mandatory, settling on a standard for within-range sentences subject to appellate review instead.

54. 18 U.S.C. § 3742 (2000).

55. Reitz, *supra* note 48, at 171.

56. *See* United States v. Alonzo, No. 05-20130, 2006 WL 39119, at 3 (5th Cir. Jan. 9, 2006) ("We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable. . . . We . . . decline [however] to find a properly calculated Guidelines sentence reasonable per se."); United States v. Gonzalez, 134 F. App'x 595, 598 (3d Cir. 2005) ("Although the Sentencing Guidelines are not mandatory, sentences within the prescribed range are presumptively reasonable."); United States v. Williams, 425 F.3d 478, 480–81 (7th Cir. 2005) (a Guidelines sentence is presumptively

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sentences will give the standard much of its meaning. One way of understanding *Booker* is that it has changed the standard governing when courts are permitted to impose an outside-guidelines-range sentence. Previously, courts were required by the now-excised portion of 18 U.S.C. § 3553(b)(1) to identify an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[57] Now they can impose an outside-range sentence whenever it is "reasonable." So far the circuits have not developed clear guidance as to the requirements of reasonableness, and a growing number of commentators question whether a detailed jurisprudence will ever develop, for both practical and legal reasons.[58] Circuit courts may require little more than some articulated link between the sentence imposed and the statutory factors listed at 18 U.S.C. § 3553(a), which *Booker* said should continue to guide judges' sentencing decisions. If so, *Booker* may indeed result in a highly discretionary system with only general standards to guide decision making, which makes the question of the function and value of discretion all the more pressing.

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2. What Discretion Is and Isn't For

Commentators who have applauded the return of discretion have not explained why discretion is such a great thing.[59] In fact, the bulk of criminal justice scholarship in recent decades has characterized discretion as a potential problem, leading at best to arbitrary decision making and at worst

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reasonable); United States v. Tobacco, 428 F.3d 1148, 1151 (8th Cir. 2005) (a sentence within the Guidelines range is presumptively reasonable).

57. This standard still exists as a policy statement, though it was excised from the statute. U.S. SENTENCING GUIDELINES MANUAL § 5K2.2 (2005).

58. Klein, *supra* note 32, at 733 ("I predict that eventually, after the kinks are worked out, there will be no meaningful review of sentencing post-*Booker*."); Green, *supra* note 34, at 423–24 (arguing that reasonableness review could establish new factors to which constitutional protections may attach, leading to its own demise).

59. One well-known analysis of sentencing under the guidelines notes problems created by the continuing discretion of prosecutors, probation officers, and defense counsel, and argues that their discretion is less consonant with constitutional values than the open exercise of judicial discretion. KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 126–42 (1998). The book emphasizes that sentencing is a moral ritual, and offers proposals for how judicial decisions might be guided by standards other than the guidelines. *Id.* at 143–77. It provides little positive defense of discretion, however. *Id.* at 126–42.

to outright discrimination and abuse.[60] This was certainly a major point of Marvin Frankel's *Criminal Sentencing: Law Without Order*,[61] the book that helped launch the sentencing reform movement.[62] The same is true of *Struggle for Justice*, another founding document of sentencing reform, which contains a detailed rebuttal to scholars who had defended discretion as necessary to the equitable and efficient management of criminal justice.[63] Given this background, it behooves champions of discretion to provide an explanation of what discretion is for, how it improves sentencing, and how its potential abuses might be kept in check.

Among legal scholars, one well-known analysis of judicial discretion is by Ronald Dworkin in *Taking Rights Seriously*. There he distinguishes between a weak and strong sense of discretion, with the former necessary and justified but the latter much more problematic.[64] Judges must exercise discretion in the weak sense because they cannot apply the rules and standards governing their decisions mechanically.[65] They must use judgment, because the rules are often vague and their meaning in some contexts is unclear.[66] This is an unavoidable consequence of several facts about human language and intelligence; no human rulemaker can fully anticipate and identify all the circumstances and combinations of factors that are relevant to their purposes.[67] Human language is insufficiently precise to accurately distinguish all the circumstances and represent their interactions and proper weights in every situation.[68] In addition, there are practical limitations on the complexity of a system of rules that limit its ability to prescribe the proper course of action for every conceivable situation.[69] So, courts need discretion to apply general rules to the circumstances of each case and tailor the rules so that they effectively

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60. *See generally* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990 (1993) (summarizing reform efforts to control discretion in policing, bail setting, plea bargaining, and sentencing).

61. *See generally* MARVIN. E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

62. *E.g.*, STITH & CABRANES, *supra* note 59, at 106.

63. Am. Friends Serv. Comm., STRUGGLE FOR JUSTICE 124–44 (1971).

64. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 31–39 (1977).

65. *Id.* at 33–34.

66. *Id.* at 35–36.

67. *Id.* at 36–38.

68. *Id.* at 38–39.

69. Many commentators have suggested that the federal sentencing guidelines go too far in trying to anticipate every relevant circumstance, resulting in excess complexity. *See* Barry Ruback & Jonathon Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739 (2001).

achieve their purposes in situations that the rulemaker could not fully anticipate and describe.

The importance of discretion in this weak sense was accepted by Congress and the Commission at the inception of the guidelines era. The original Commission wrote that the departure power was necessary because of "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."[70] Guideline rules were not intended to apply whenever a case fell within their "linguistic" categories. The departure power required judges to inquire whether there was something about the case that should result in a different sentence. The guidelines directed judges' attention to considerations the Commission found relevant, but these were not necessarily exhaustive nor expected to function as intended in every situation. For example, the loss table at *U.S. Sentencing Guidelines Manual* § 2B1.1 provides for offense level increases in economic crimes based on the amount of pecuniary harm caused by the offense. But the commentary explicitly recognizes that there may be cases where monetary loss "understates" or "overstates" the seriousness of the offense and where departure would be appropriate.

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Congress also recognized an important role for judges in adapting the purposes of sentencing to the circumstances of the particular case.

> The Committee does not intend the guidelines be imposed in a mechanistic fashion . . . if [the judge] considers the guideline range inappropriate because of factors not taken into consideration by the sentencing commission, he is free to sentence the defendant above or below the guideline range as long as he explains his reasons for doing so.[71]

The guidelines were explicitly *not* made mandatory but were made presumptive, subject to the exercise of reasoned discretion on the part of the judge.

At the same time, however, Congress believed that sentencing reform was needed to provide detailed guidance to judges because under the prior system "each judge is left to apply his own ideas of the purposes of sentencing . . . and [as] a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes."[72] Under the SRA,[73] "[f]or the first time, Federal law will assure that

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70. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. (historical background) (Part A.1.4(b)).

71. S. REP. NO. 97-307, 97th Cong. 1st Sess. 6 (1981) at 10–11.

72. *Id.* at 5.

73. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

the Federal criminal justice system will adhere to *a consistent sentencing philosophy*."[74] Judges were given discretion in a weak sense, but were not intended to use it to substitute their own policy preferences and philosophy for those of the system as a whole. Deciding what purposes to pursue on a judge-by-judge and case-by-case basis would invariably result in disparity, as the research reviewed in a later section clearly shows.

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The same principles and concerns that underlie the SRA apply to sentencing today. After *Booker*, judges have discretion, but they should not take it to be license. They are not free to sentence however they see fit without regard to any legal principles or standards. Judges are bound under the terms of *Booker* to consider the factors at 18 U.S.C. § 3553(a), including the Commission's guidelines and policy statements and the statutory purposes of sentencing. Importantly, judges are also bound by section 3553(a)(6) to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." All of these act to constrain judicial discretion, and if taken seriously, the need to avoid unwarranted disparity requires judges to identify the philosophy of the system and to sentence consistent with that philosophy.

Not all commentators have agreed that after *Booker* judges must still concern themselves with the policies and philosophy of the system, rather than their own preferences. Some have gone so far as to argue that *Booker* should be understood as granting judges discretion to disagree with the policy choices of the Commission and pursue whatever purposes they deem fit in a given case.[75] A later section discusses why judges must attempt to discern the philosophy underlying the guidelines if they are to take seriously the joint statutory commands to pursue the purposes of sentencing *and* avoid unwarranted disparity. But first, the other incomplete idea that has dominated discussions of the federal sentencing system must be discussed.

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B. Disparity

Some academic commentators have encouraged a shift away from excessive concern with disparity,[76] but the concept appears to be alive and well. Concern over disparity continues to be heard in legislative discussions

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74. S. REP. NO. 98-225, at 59 (1983) (emphasis supplied).

75. Klein, *supra* note 32, at 721 (arguing that the extensive list of authorized purposes at 18 U.S.C. section 3553(a) along with statutory authority at section 3661 to consider any information concerning the background, character, and conduct of the defendant grants judges "free reign").

76. Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 274–76 (2005).

of sentencing policy, as in the debates leading to the PROTECT Act and recent suggestions that a "fix" may be needed for the post-*Booker* federal system. It seems unlikely this concern will disappear, because eliminating disparity defends a cardinal principle of our legal system—equal justice under the law through similar treatment of similar cases. It is important to be clear what we mean by disparity, however; it is a notoriously ambiguous concept—indeed, an empty idea.[77] Disparity gets its content from the purposes of sentencing. Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take into account relevant differences among offenders.

1. Disparity resulting from unwarranted different treatment

The most egregious form of unwarranted disparity is different treatment based on race, ethnicity, or other immutable characteristics. This form of disparity is given its own name—discrimination—and it continues to motivate concern over sentencing practices.[78] Explaining the need for the PROTECT Act, Representative Thomas Feeney wrote that prior to the guidelines "sentences were wildly disparate among similar cases that involved criminals of different races and socioeconomic backgrounds."[79] The implication is that guidelines were needed to control this different treatment, and that departures from the guidelines might reintroduce it. Other reviews of the available research on pre-guidelines sentencing reached different conclusions,[80] but there is no disagreement that if discrimination exists, it is a problem.

Statistical studies of sentencing under the guidelines prior to the PROTECT Act and *Booker* did reveal some differences in treatment of Hispanic and African-American offenders that could not be explained by legally relevant factors on which data were available.[81] These effects were unstable from year to year, however, suggesting that deeply-rooted stereotypes or prejudice were unlikely explanations. The effects were also

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77. *See generally* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336 (1997).

78. RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 72 (Alfred Blumstein et al. eds., 1983).

79. Rep. Tom Feeney, *Reaffirming the 1984 Sentencing Reforms*, 27 HAMLINE L. REV. 383, 383 (2004).

80. MCDONALD & CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? (1993) (finding little evidence of racial discrimination in the federal courts in the preguidelines era, but a significant adverse impact of the differential treatment of crack and powder cocaine in the guidelines era).

81. FIFTEEN YEAR REVIEW, *supra* note 2, at 120–34.

less than the impact of gender, or the effect of the differential sentencing of crack versus powder cocaine, which disproportionately affects Black offenders.[82] All in all, guarding against racial and ethnic discrimination by judges appears to be less a concern than guarding against sentencing rules that adversely affect particular groups and are poorly designed to achieve our sentencing goals.[83]

The source of disparity receiving the greatest attention prior to enactment of the SRA was differential treatment based on the judge to which a case was assigned. The evidence for this, though arguably overstated in some of the research and debate, was far more compelling than the evidence of racial discrimination.[84] Studies of judicial decision making demonstrated that different views among judges regarding the causes of crime, the effectiveness of correctional interventions, and the purposes of punishment were the primary causes of differential treatment.[85] This stands to reason: a judge who believes that offenders can be rehabilitated and that the main goal of sentencing is to prevent future crime would sentence differently from a judge who believes treatment is ineffective and that sentencing should punish for past misdeeds. There is evidence that the guidelines lessened the influence of judicial philosophy on sentences,[86] though some have argued that the effect was too small to matter or that the guidelines create disparities of their own.[87] Disputes over whether the guidelines

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82. *Id.*

83. *Id.* at 131–34.

84. For a review of these studies, see Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 262–96 (1999); see also Joel Waldfogel, *Does Inter-Judge Disparity Justify Empirically Based Sentencing Guidelines?*, 18 INT'L REV. L. & ECON. 293, 294–300 (1998) (criticizing evidence of inter-judge disparity prior to the guidelines).

85. JOHN HOGARTH, SENTENCING AS A HUMAN PROCESS 22, 210–27 (1971); Kevin Clancy et al., *Sentence Decision Making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 525 (1981); Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically From Principles of Punishment*, 33 RUTGERS L. REV. 799, 801–17 (1981).

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86. Hofer et al., *supra* note 84, at 294 (finding modest reduction in the primary judge effect for most offenses); James M. Anderson, et al., *Measuring Inter-judge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 294 (1999) (finding guidelines reduced average influence of judges on sentences by about a month). The reported reduction in the "primary judge effect" in these studies was an average across all cases. Hofer et al., *supra* note 84, at 296. Because judges differ in their approach to various types of cases, with some more harsh on drugs and less on white collar, or vice versa, differences among judges become greater as cases are disaggregated. *Id.* at 297. In other words, modest reductions in the primary judge effect represent more substantial reductions in disparity at the specific case level.

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87. Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 85 (2005). Alschuler makes a variety of provocative

reduced disparity prior to *Booker* will surely continue and more quality research is always useful. The various types and sources of disparity must be isolated, because only by identifying the different ways that disparity arises can we know how to redress it.

2. Disparity resulting from unwarranted similar treatment

Disparity is created just as surely by similar treatment of different cases as by different treatment of similar cases. When rules fail to make relevant distinctions among offenders, following the rules rigidly creates unwarranted uniformity—just another name for unwarranted disparity. This is why the *Guidelines Manual* encourages judges to depart in numerous circumstances when the rules fail to take into account relevant offense or offender characteristics.[88] Departure is sometimes needed to *prevent* disparity.

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arguments that the guidelines have failed to reduce disparity and may have increased it. *Id.* Full analysis of these arguments is beyond the scope of this paper but some touch on themes explored here. Several of Alschuler's examples of guidelines-created disparity involve guidelines that incorporate mandatory minimum penalty statutes. *Id.* at 117. Whether responsibility for this disparity is fairly attributed to the Commission and the guidelines, or to Congress and the statutes is open to dispute. Elsewhere, Alschuler uncritically repeats the claims of several researchers that mandatory minimum statutes may account for the *reduction* in inter-judge disparity reported in several studies. *Id.* at 96–100. These studies could not adequately isolate the effects of the statutes from the guidelines, and there is little doubt that, in general, mandatory minimums create disparity, for reasons reported in this paper and in the FIFTEEN YEAR REVIEW, *supra* note 2, at 88–92. Alschuler criticizes the FIFTEEN YEAR REVIEW for highlighting reductions in inter-judge disparity that were found using the best possible "natural experiment" method, and suggests the review overstates the guidelines' success. But he cites the review repeatedly for its considerable evidence that many types of disparity continue or may have worsened in the guidelines era. Alschuler, *supra*, at 89–95. Like the present paper, Professor Alschuler argues that the success of the guidelines at reducing disparity must ultimately be judged by their success at promoting sentences consistent with a coherent philosophy. *Id.* at 85, 95, 116. But he offers no affirmative statement of what that philosophy is or should be.

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88. Examples of such encouragement can be found throughout Chapter Two of the *Guidelines Manual*, for example, U.S. SENTENCING GUIDELINES MANUAL § 2A1.1 cmt. 2(B) (First Degree Murder) ("If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted."); *Id.* § 2A2.4 cmt. 3 (Obstructing or Impeding Officers) ("The base offense level does not assume any significant disruption of government functions. In [such cases] an upward departure may be warranted."); *Id.* § 2D1.5 cmt. 2 (Continuing Criminal Enterprise; Attempt or Conspiracy) ("If . . . the defendant sanctioned the use of violence . . . an upward departure may be warranted."); *Id.* § 2M3.1 cmt. 2 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) ("The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security . . . . When revelation is likely to cause little or no harm, a downward departure may be warranted."); *Id.* § 2N2.1 cmt. 1 (Violations of

In debates over federal sentencing, commentators sometimes point to any deviation from a rule as evidence of unwarranted disparity. For example, in the debates leading to the PROTECT Act, higher rates of departure under certain guidelines were cited as ipso facto evidence of greater disparity among those offenses. In the emerging debate over the post-*Booker* system, the Attorney General characterized increased rates of below-range sentences as evidence of "increasing disparity in sentences . . . ." The mere fact that a sentence is outside the range doesn't establish that it is disparate, however. It depends on the reasons. Some guidelines cover a broader range of conduct than others and may be expected to show higher outside-range rates. Other guidelines may have been set to punish crimes more or less serious than those now commonly falling under their terms. It is at least logically possible that rates of outside-range sentences were too low for some guidelines prior to *Booker* because restrictions on departures prevented or discouraged judges from departing in cases in which the guidelines do not work as well as they should.

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The Commission has argued in the context of mandatory minimum penalty statutes that unwarranted uniformity arises from blanket application of blunt rules to a wide variety of cases of differing seriousness and culpability.[89] The same is true of guidelines if judges apply rules even when they do a poor job of achieving their purposes.[90] The departure power,

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Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Devise, Cosmetic, or Agricultural Product) ("This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted.").

89. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19 (1991), *available at* http://www.ussc.gov/r_congress/MANMIN.pdf.

90. One of the mysteries of sentencing under the guidelines is why judges have so rarely departed in drug trafficking cases when drug quantity does a poor job of measuring the seriousness of the particular case, for example, when low level participants in a conspiracy are implicated in large quantities of drugs over which they had no control and reaped no profits. The frequent failure of drug quantity to track offense seriousness has been one of the most persistent criticisms of the guidelines. Catherine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount is a Poor Indicator of Relative Culpability*, 4 FED. SENT'G REP. 226, 226–28 (1990); Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 BROOK. L. REV. 643, 653–56 (1995); Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471 (2000). Even Breyer, a former Commissioner, and current Supreme Court Justice, has noted that the exact amount of drugs or monetary loss involved in an offense gives the Guidelines a "false precision" that may not properly reflect the moral foundation on which the guidelines rest. Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Address at Univ. of Neb. College of Law: Federal Sentencing Guidelines Revisited (Nov. 18, 1998), *in* 11 FED. SENT'G REP. 180 (1999). It is noteworthy that the guidelines encourage departure when monetary loss fails to adequately reflect the seriousness of the offense, but contains no such encouragement for drug quantity. *See supra*

which is not generally available with mandatory minimum statutes, was intended to prevent this over-broad application. But disparity arising from departure has received much more attention than disparity arising from over-broad application of rules that fail to capture relevant distinctions among offenders. In fact, there is reason to believe that over-broad rule application creates as much disparity as unwarranted variation.

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As reported in the Commission's *Fifteen Year Review* in 2002, 6,000 offenders were sentenced above the guideline range applicable to their crime because of a mandatory minimum penalty that exceeded the top of the range.[91] These offenders received sentences as severe as offenders who committed more serious crimes, as measured by the detailed guideline adjustments that apply to their cases. Another 3,000 had their guideline range restricted above the otherwise applicable minimum.[92] This happens because the statutes fail to adjust, as the guidelines do, for a defendant's minor role in an offense, or for their acceptance of responsibility for their crime,[93] or because offenders were convicted of a statute carrying a mandatory minimum penalty enhancement that exceeded the enhancement applicable under the guidelines.[94] These 9,000 offenders, who were disproportionately Black and Hispanic, are only slightly fewer than the 9,865 offenders who received a downward departure in 2002.[95] Even if Congress is correct that some of these downward departures are unjustified, at least *some* of them reflect mitigating factors actually present in the case (and some of the 9,000 receiving a mandatory minimum likely have mitigating circumstances as well).[96] Thus, it is fair to conclude that the mandatory minimum penalty statutes created more disparity in 2002 than did downward departures.[97]

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note 88. As discussed further below, confusion over what a guideline is trying to do, and how it means to do it may, ironically, lead to it being followed more rigidly than when the reasons for the rule are clear and its ineffectiveness in a particular case more apparent. *See infra* Part III.

91. FIFTEEN YEAR REVIEW, *supra* note 2, at 91.

92. *Id.*

93. *Id.*

94. Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41 (2000) (showing that mandatory minimum firearms statutes are applied disparately and result in disproportionate sentencing).

95. *Id.*

96. *Id.*

97. *Id.* This does not include disparity arising from mandatory minimum drug penalties that fail to accurately reflect the seriousness of the crime, such as the five- and ten-year minimum required of offenders who possess or traffic respectively, five or fifty or more grams of crack cocaine.

Citing departure data from that same year, Congress enacted the PROTECT Act to restrict non-government-sponsored downward departures, but did not repeal or reconsider the mandatory minimum penalty statutes, as many observers have urged before and since.[98] Events like this make it difficult to argue with those who believe many in Congress are no longer serious about reducing disparity,[99] but instead use disparity-talk as a cover to further restrict judicial discretion, empower prosecutors, and pursue harsher sentences divorced from any comprehensive philosophy of punishment.

3. Disparity resulting from piecemeal policymaking

Members of Congress surely believe they are acting with good reason when they pass sentencing legislation, including mandatory minimum penalties. But unlike judges, who are required to justify their decisions by stating their reasons for sentencing in each case,[100] Congress is under no legal obligation to justify itself or ensure that the purposes it pursues are consistent from crime-to-crime and time-to-time. The legislative histories of sentencing statutes reveal a mishmash of rationales involving deterrence, incapacitation, punishment, and other purposes. There was some interest in identifying a federal sentencing philosophy during the development of the SRA, but "Congress was ambivalent about prioritization of purposes and largely fudged the issue."[101] As a result, Congress, while hoping that federal sentencing would adhere to a consistent philosophy, failed to establish one. The philosophy of the guidelines was left to the Sentencing Commission, while sentencing statutes need meet no test for consistency and legislation proceeds on a largely ad hoc basis.

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Piecemeal policymaking is especially problematic if one of our goals is proportionality of punishment—fitting the severity of punishment to the seriousness of the crime. As argued in the section below, this is, in fact, the

98. AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION, RECOMMENDATIONS ON PUNISHMENT, INCARCERATION AND SENTENCING 1 (2004), *available at* http://www.abanews.org/kencomm/rep121a.pdf (recommending repeal of mandatory minimums); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)* 56 STAN. L. REV. 1017, 1018–19, 1044–48 (2004) (reviewing other authorities urging repeal, and arguing that tough sentencing guidelines make mandatory penalty statutes unnecessary and possibly counter-productive).

99. Alschuler, *supra* note 87, at 116 ("It is difficult to believe that Congress cares about sentencing disparity in the slightest.").

100. 18 U.S.C. § 3553(c) (2000).

101. Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENT'G REP. 326, 326–27 (1991) (describing congressional ambivalence over purposes of sentencing).

primary purpose of our sentencing system. It requires careful attention to the relative harmfulness of different offenses and each offender's culpability for that harm. But there is no legal obligation for Congress to ensure the proportionality of statutory penalties for different crimes and no mechanism of judicial review to achieve it if the statutes get it wrong.[102] A crime that is in the news may appear very serious and be assigned more severe penalties than crimes more harmful by objective measures.[103] A particularly heinous instance of a crime may affect penalties for less serious instances that fall under the broad terms of a statute. Harms once attributed to a crime may prove overstated with further research, but the severe penalties linger.[104] Further, there is no obligation for Congress to keep statutory penalties up-to-date. Thus, stiff penalties imposed to stem the tide of a drug epidemic, such as crack or methamphetamine, may continue long after the epidemic has passed and any deterrent value has abated.

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The disconnect between Congress's concern with sentencing disparity and the lack of any mechanism, apart from self-regulation, to ensure the consistency of its own legislation creates huge problems for federal sentencing. Congress has ultimate authority over sentencing policy and has directly or indirectly set the penalties for most offenders sentenced in federal courts, either through mandatory minimum statutes or directives to the Commission to set the guidelines for particular crimes at particular levels.[105] This ultimate authority comes with a special responsibility to legislate penalties with restraint and care. Just as disparity is created if judges choose which purposes to pursue on a case-by-case basis, Congress creates disparity through piecemeal legislation.

This is one reason the SRA established a Sentencing Commission and assigned it the task of developing a comprehensive sentencing system to cover all crimes. The Commission must be sensitive to the system as a

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102. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 645–51 (2005) (reviewing Supreme Court Eighth Amendment jurisprudence and arguing that neither it nor procedural guarantees recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny are adequate to protect against legislatively imposed disproportionate penalties).

103. Sara Sun Beale, *News Media Coverage of Crime: How, Why, and Who Cares?*, presentation at the Hoffinger Colloquium, Center for Research in Crime and Justice of the New York University School of Law (Nov. 29, 2001).

104. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 21–31, 95 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf [hereinafter COCAINE AND FEDERAL SENTENCING 2002] (reporting research demonstrating that "crack babies" are not harmed as much as reported at the peak of the crack epidemic, no more harmed than babies exposed to powder cocaine, and less harmed than babies exposed to alcohol).

105. FIFTEEN YEAR REVIEW, *supra* note 2, at app. B.

whole, and the relationships among penalties for different crimes. The Commission seeks to avoid anomalies where the severity of punishment fails to match the seriousness of the offense, as measured by economic impact,[106] victim harm,[107] or offender culpability.[108] The Commission can also use its extensive database to target prison resources on the types of offenders statistically shown to be the most dangerous, rather than rely on a simplistic "two-" or "three-strikes-you're-out" formulea.[109]

Commentators have not agreed that the Commission always gets it right, or that the guidelines—even those designed by the Commission without the constraint of mandatory minimum statutes or specific Congressional directives—implement a consistent sentencing philosophy.[110] Judges, and even former Commissioners, have criticized the guidelines lack of an explicit philosophy.[111] To help rationalize Commission actions some observers have called for heightened judicial review of the Commission or enactment of new legislation making the Commission subject to the review

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106. *See generally* KENNETH COHEN ET AL., U.S. SENTENCING COMM'N, NO ELECTRONIC THEFT ACT: POLICY DEVELOPMENT TEAM REPORT (1999), *available at* http://www.ussc.gov/publicat/netrpt99.pdf.

107. U.S. SENTENCING COMM'N, ADEQUACY OF PENALTIES FOR FRAUD OFFENSES INVOLVING ELDERLY VICTIMS 4 (1995), *available at* http://www.ussc.gov/r_congress/fraud.pdf.

108. *See generally* COCAINE AND FEDERAL SENTENCING 2002, *supra* note 104; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995), *available at* http://www.ussc.gov/crack/execsum.pdf;.

109. *See generally* U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES (2004), *available at* http://www.ussc.gov/publicat/Recidivism_General.pdf. *See also* FIFTEEN YEAR REVIEW, *supra* note 2, at 133–34 (demonstrating that inclusion, per Congressional directive, of prior drug trafficking offenses in the definition of a career offender places such offenders in a guideline range far higher than justified by their risk of recidivism).

110. Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 371 (1989) ("The U.S. Sentencing Commission . . . paid little attention to defining a sentencing rationale."); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 419 (1992) ("the federal sentencing guidelines have not been designed or applied in a manner explicitly intended to achieve specific purposes of sentencing.")

111. United States v. Blarek, 7 F.Supp. 2d 192, 203 (E.D.N.Y. 1998) (asserting the Commission's premise—that it need not choose a philosophy of sentencing as a practical matter—is flawed);

procedures of the Administrative Procedures Act.[112] But this won't rationalize federal sentencing because whatever judicial review Commission actions receive, it will not be matched by review of Congressional actions—there is simply no legal basis for it. Yet, Congressional actions continue to control sentences in the majority of cases.

Piecemeal policymaking by either Congress or the Commission results in penalties that are disproportionate, ineffective, and wasteful. The SRA envisioned policymaking that would "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"[113] by a Commission that would "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."[114] *Booker* left the Sentencing Commission in place "writing Guidelines, collecting information . . . undertaking research, and revising the Guidelines accordingly."[115] But this ideal model of policy development envisioned in the SRA was never fully implemented prior to *Booker*.[116] Is there any possibility that it might come to fruition now? What kind of sentencing system would give judges appropriate discretion while avoiding unwarranted disparity?

III. FINDING A COMMON PHILOSOPHY FOR FEDERAL SENTENCING

Congress was right to hope twenty years ago that under the SRA "[f]or the first time, Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy."[117] There is simply no other way to achieve the goals of sentencing reform. A common philosophy provides benchmarks to guide policymaking and assess progress. It distinguishes relevant from irrelevant differences among cases, defines unwarranted disparity, and provides the standards needed to guide the wise use of discretion. Reducing unwarranted disparity requires a commitment to implementing a common sentencing philosophy on the part of judges, Congress, and the Sentencing Commission.

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112. Joseph Luby, *Reigning in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199 (1999); Stith & Dunn, *supra* note 33.

113. 28 U.S.C. § 991(b)(1)(C).

114. 28 U.S.C. § 991(b)(2).

115. United States v. Booker, 543 U.S. 220, 264 (2005).

116. FIFTEEN YEAR REVIEW, *supra* note 2, at 143.

117. S. REP. NO. 98-225, at 59 (1983).

A. Why We Need a Common Philosophy and the Challenge of Finding It

To be useful in practical decision making, a sentencing philosophy for a guidelines system should articulate the purposes the guideline rules are meant to achieve. If there are potential conflicts, as indeed there are, a sentencing philosophy must prioritize the purposes and explain how conflicts among them should be resolved.[118] Importantly, it should also explain *how* the rules are meant to accomplish their purposes. Such an explanation is especially needed when the rules are not *direct* measures of the morally relevant dimensions, but "proxies" or "rules-of-thumb" that *usually* work, for example, to rank crimes according to their seriousness, but that may go wrong in some circumstances.

In the absence of a clearly articulated philosophy, judges face a dilemma. Congress has instructed them to pursue a comprehensive list of sentencing purposes *and* avoid unwarranted sentencing disparity. Congress also requires them to provide reasons for the sentences they impose, and if a sentence is outside the guideline range, to state those reasons with "specificity," and in writing.[119] Judges must articulate their reasons for sentencing outside the guideline range even if the reasons that Congress or the Commission set the guideline range at a particular level are completely unclear, or, if known, are inconsistent or insufficiently precise to explain exactly how the rule is intended to work. Faced with nearly impossible demands, judges have three options for trying to faithfully pursue their statutory mandates.[120] None of them, however, is easy or completely satisfactory.

1. Option One: Don't worry about the purpose of the guidelines, it's taken care of

One way judges can attempt to fulfill their statutory obligations is to simply assume that the guidelines achieve the purposes of sentencing without trying to figure out exactly how they do so. If the words of the guidelines are sufficiently clear, they can be applied literally and a within-range sentence imposed. Under this approach, the reason for the sentence is that it is the penalty called for by the guidelines. The judge can simply check the within-range box on the Statement of Reasons form.

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118. Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987) (outlining requirements for an ideal sentencing system).

119. 18 U.S.C. § 3553(c)(2).

120. For another characterization of the options facing judges between "mandatory" guidelines and "free at last" *see* Honorable Nancy Gertner, *Sentencing Reform When Everyone Behaves Badly*, 57 ME. L. REV. 569 (2005).

This option may seem a model of objective judging guaranteed to control discretion and eliminate disparity. It is not, however, the model of the guideline system pre-*Booker*, and it would be strange if it became the model now that the guidelines are no longer "mandatory." Pre-*Booker*, sentencing did not stop with the guidelines' rules. Judges were instructed to ask whether there was an aggravating or mitigating circumstance that should result in an outside-range sentence.[121] *Booker* eliminated the departure standard, so the question is what should replace it. Guideline commentary sometimes alerts judges to factors the Commission thought relevant but did not include in the rules.[122] But that guidance was never meant to be exhaustive,[123] and unfortunately the explanations given by the Commission or by Congress are often too general or inconsistent to guide discretion in a particular case.[124] Without a clear and consistent explanation of how the rules are intended to work, judges are left without an essential tool of legal reasoning and may feel little choice but to apply the rules mechanically. Ironically, when the reasons for a rule are most unclear (and thus, most

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121. 18 U.S.C. § 3553(b).

122. *See supra* note 107.

123. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(2)(B) (2005).

124. An example of this problem is the use of drug quantity in the drug trafficking guideline. While the Commission was developing the guideline, Congress passed the Anti-Drug Abuse Act of 1986. The Act established five- and ten-year mandatory minimum penalties for trafficking in various quantities of drugs. With no more explanation than "further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses" (U.S. SENTENCING GUIDELINES MANUAL, § 2D1.1, cmt. background (2005)), the Commission extrapolated from the two quantity thresholds in the statute to create a 17-level drug quantity table with graduated penalties between probation and 293 months.

As a general matter, this structure is intended to match the severity of punishment to the seriousness of the crime. But Congress and the Commission have given inconsistent explanations of how the guideline is intended to achieve this. Quantity can be a direct measure of a drug trafficking crime's *harm*, just as the amount of toxic substance released into a river can be a measure of an environmental crime's harm. But quantity can also be a measure of an offender's *culpability* to the extent it reflects the offender's position within the drug distribution network. Congress appears to have understood the relation between quantity and offense seriousness this way. The legislative history surrounding the Anti-Drug Abuse Act describes the quantities tied to ten-year mandatory minimum penalties as typical of "kingpins," and "masterminds," those "who are responsible for creating and delivering very large quantities." The quantities tied to five-year minimum penalties were thought to be typical of "managers of the retail traffic," "the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities. H.R. REP. NO. 99-845, at 16–17 (1986).

Having two different ways that quantity might measure a drug crime's seriousness is not better than having one. Without knowing how the rule is meant to operate, there is no way to recognize when it fails. Is the rule working or failing when large numbers of street-level dealers, mules, and other low-level conspirators are subject to lengthy penalties that Congress once indicated were intended for kingpins? *See* COCAINE AND FEDERAL SENTENCING 2002, *supra* note 104, at 43 fig.9.

suspect) the harder it becomes to identify a good reason to depart from the rule.[125] This is not a prescription for a healthy and well-functioning guidelines system.

There are good reasons to generally follow the guidelines. These were well stated by Judge Paul G. Cassell in a law review article and a pair of influential opinions, *U. S. v. Wilson I* and *II*, which set the terms of judicial discussion of post-*Booker* sentencing.[126] For one, Congress directed the Commission to write guidelines to achieve the same statutory purposes that judges are instructed to pursue at sentencing.[127] The guidelines provide a much-needed uniform standard to guide the hundreds of judges throughout the country. The Commission is an expert agency equipped with a research mandate and the ability to consult with a wide range of participants in the federal criminal justice system.[128] It has access to data and uses a notice-and-comment rule-making procedure that is unavailable to sentencing judges. Congress reviews the guidelines before they become effective and has directed the Commission to promulgate certain guidelines in a particular manner. Further, empirical research on what punishments the public believes are deserved for various crimes, and on the crime control effects of

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125. The controversy over crack cocaine sentencing may be an example of the dilemma created by rules with poorly articulated reasons. In *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006) the First Circuit vacated and remanded a sentence below the guideline range that was based on the sentencing court's finding that the 100-to-1 crack to powder quantity ratio leads to excessively harsh sentences for crack cocaine. The Circuit Court held that after *Booker*, the discretion of trial judges was limited to individualizing sentences based on case-specific circumstances relevant to the purposes of sentencing, not categorical policy disagreements with Congress. *Id.* at 57.

Disparity will inevitably result if judges are free to simply disagree with the policy choices of Congress and the Commission. But how can sentencing courts identify case-specific factors that should result in an outside-range sentence without knowing how the quantity ratio relates to Congressional purposes? The First Circuit recognized that the Commission superimposed the guidelines on the statutory framework, and declared "it would be illogical to set the [statutory] maximum and minimum sentences on one construct and then to use some other, essentially antithetic construct as the basis for fashioning sentences within the range . . . . Such a patchwork sentencing scheme would run counter to Congress's goal of eliminating disparities . . . ." *Id.* at 57. But, as discussed in the note above, multiple and conflicting constructs have already been offered to explain the drug guideline and it is unclear when drug quantity works as intended.

126. *See* Cassell, *supra* note 98; United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005) (holding that the guidelines deserve "heavy weight" and that the court would impose a sentence outside the guideline range only "in unusual cases for clearly identified and persuasive reasons."); United States v. Wilson, 355 F. Supp. 1269 (D. Utah 2005) (responding to criticism of opinion and criticizing other approaches). Some of the premises of Judge Cassell's analysis are criticized by Judge Nancy Gertner in *United States v. Jaber*, 362 F. Supp. 2d 365 (D. Mass 2005).

127. 28 U.S.C. § 991(a)(1)(A).

128. 28 U.S.C. § 991(b)(2); § 994(g), (m), (o).

imprisonment, support that the guidelines generally achieve the purposes of sentencing.

These reasons favor giving the guidelines "heavy" or "substantial" weight as many judges have chosen to do.[129] But these reasons alone provide no rationale for *ever* deviating from the guideline range. This would make the guidelines more mandatory than they were before *Booker*. Judge Cassell recognizes this and says he will impose sentences outside the guideline range, but only "in unusual cases for clearly identified and persuasive reasons."[130] Left unclear is what kind of reasons could be persuasive if the guidelines reflect the expertise of the Commission, the authority of Congress, and generally work so well.[131] A fully functioning guidelines system requires not only a rationale for following the guidelines, but also a rationale that identifies the circumstances when they should not be followed.

2. Option Two: Decide on your own purposes and how to achieve them

Perhaps a sentence outside the guideline range can be justified whenever a particular judge believes it would better serve the statutory purposes that he or she believes should apply to the case. Under this option, judges would act as both philosophers and criminologists, deciding which purposes to pursue and the likelihood that a particular sentence would achieve them. The rules would be tested against each judge's personal understanding of the purposes of sentencing and the priorities among them and the costs and benefits of various criminal sanctions.

Some courts appear to understand *Booker* to grant them discretion in this strong sense.[132] The remedial opinion in *Booker* instructs courts to "take

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129. United States v. Wanning, 354 F. Supp. 2d 1056 (D. Neb. 2005) (a sentencing judge should give substantial weight to the Guidelines range); United States v. Peach, 356 F. Supp. 2d 1018 (D. N.D. 2005) (the Guidelines are presumptively reasonable and carry substantial weight in determining an appropriate and reasonable sentence); United States v. Corral-Alvarez, 381 F. Supp. 2d 1286 (D. N.M. 2005) (the court will rely heavily on the Guidelines sentence and deviate from the Guidelines in only the most unusual cases); United States v. Musick, No. 203-CR-62, 2005 WL 1278429 (E.D. Tenn. Feb. 2, 2005) (Guidelines are still entitled to substantial weight in the sentencing decision; the court will deviate from the Guidelines only when the Guidelines range is clearly outweighed by some other factor(s) set forth in § 3553(a).).

130. *Wilson*, 350 F. Supp. 2d at 912.

131. Perhaps a hint can be found in Judge Cassell's law review article, *supra* note 98, where he notes several areas where the guidelines *fail* to track public opinion about just punishment and may in particular cases fail to target high-rate offenders and high-cost crimes.

132. An early example of this approach is found in United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005) in which Judge Lynn Adelman held that judges could no longer

account of the Guidelines together with other sentencing goals" and to impose sentences that reflect all four statutory purposes.[133] Taken at face value this certainly appears to give judges a wide range of options, since the statutory purposes encompass most of the traditional justifications for punishment that have been advanced over the last few centuries. Thus far, judges have imposed outside-range sentences in pursuit of all of the statutory purposes.[134] Although sentencing judges must articulate their reasons for imposing sentence, the courts of appeals have not required them to explain how they select or prioritize the purposes nor how the sentence is meant to achieve its goal.[135] An articulated link between the sentence and at least one of the statutory factors appears to suffice.

The problem with this approach is that it constrains far too little to have any reasonable prospect of achieving the statutory command to "avoid unwarranted disparities." The statutory purposes pull in different directions in some cases, and the governing statute does not prioritize the purposes or

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"uncritically" apply the guidelines but must treat them "as just one of a number of sentencing factors." *See also* United States v. Myers, 353 F. Supp. 2d 1026 (S.D. Iowa 2005) (the court will give the Guidelines sentence the same weight as the § 3553(a) factors because treating the Guidelines range as presumptively reasonable makes the Guidelines mandatory); United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019 (D. Neb. 2005) (treating the Guidelines as presumptively reasonable in every case circumvents *Booker's* substantive holding and defies the directive that the court consider the factors in § 3553(a)); United States v. Moreland, 366 F. Supp. 2d 416 (S.D. W. Va. 2005) (in determining an appropriate sentence, the court will not give greater weight to the Guidelines than the § 3553(a) factors; the court will not consider the Guideline range as presumptively reasonable); United States v. Pacheco-Soto, 386 F. Supp. 2d 1198 (D. N.M. 2005) (the Guidelines sentence is only one of the factors a district judge must consider in sentencing a defendant).

133. United States v. Booker, 543 U.S. 220, 259 (2005).

134. Commission data show that all four statutory purposes of punishment have been cited by sentencing judges when sentencing outside the guideline range post-*Booker*.

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135. United States v. Dieken, 432 F.3d 906, 909 (8th Cir. 2006) ("we do not require a district court to categorically rehearse each of the section 3553(a) factors on the record when it imposes a sentence as long as it is clear that they were considered."); United States v. Scott, 426 F.3d 1324, 1327 (11th Cir. 2005) (stating that "nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors"); United States v. McBride, 434 F.3d 470, 476 n.3 (6th Cir. 2006) ("While the district court need not explicitly reference each of the section 3553(a) factors, there must still be sufficient evidence in the record to affirmatively demonstrate the court's consideration of them.); United States v. Sanchez, 429 F.3d 753 (8th Cir. 2005) ("A sentence is reasonable and not an abuse of discretion if the sentencing court considers the matters contained in 18 U.S.C. § 3553(a), does not consider inappropriate matters, and makes no clear error of judgment."); United States v. Talley, 431 F.3d 784 (11th Cir. 2005) (our review for reasonableness is deferential; the sentence must achieve the purposes of sentencing set out in § 3553(a)).

explain how conflicts among them are to be resolved.[136] The purposes are simply too general, and their requirements too unclear, to adequately guide decision making. For example, the statute mandates that the sentence "protect the public from further crimes of the defendant."[137] Apart from the question of how a judge is to predict recidivism risk, this general directive places no limit on the amount of prison time a judge may impose. As another example, the statute requires judges to impose sentences that "afford adequate deterrence,"[138] but no guidance exists about whether a judge should consult the latest research or rely on "common sense." Nothing ensures that all judges will read the same research or agree about what constitutes common sense.

If neither Congress nor the Commission has prioritized the purposes or explained with any specificity how the guidelines were designed to achieve them, judges can hardly be blamed for doing the best they can in light of their own sentencing philosophies and criminological expertise. But it is hard to see how the "discordant symphony"[139] predicted by Justice Scalia in his *Booker* dissent can be avoided if judges choose which purposes are important and how to pursue them on a judge-by-judge and case-by-case basis.

3. Option Three: Find the philosophy of the guidelines and apply it when you can

The third option involves neither rigid adherence to the guideline rules nor substitution of each judges' own policy preferences for those of the system as a whole. It requires judges to identify the theory of punishment that makes the best sense of the guidelines, that is, the "consistent sentencing philosophy" that Congress hoped to establish by enacting the SRA. From there, judges must discover how particular guideline rules aim to implement this philosophy, and determine whether they work as intended in the circumstances of a particular case. The best reason to impose an outside-range sentence is if the *guidelines' own purposes* would be better served by such a sentence. Exercising discretion to imposean outside-range sentence would then *prevent* disparity by accounting for relevant circumstances that the guideline rules ignore.

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136. Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 26–28 (1987) (examining inherent conflict between deterrence, desert, incapacitation, and rehabilitation in sentencing and giving examples).

137. 18 U.S.C. § 3553(a)(2)(C).

138. 18 U.S.C. § 3553(a)(2)(B).

139. United States v. Booker, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting).

This option requires judges to engage in rigorous legal reasoning and a kind of statutory construction. But the task is not foreign to judges—it is an application of normal methods of judicial interpretation. A previous article discussed the process of "rational reconstruction" of the guidelines' philosophy and applied it to federal sentencing prior to *Booker*.[140] Though the legal environment has changed, the same conditions that recommended this approach then are still present. In brief, judges are encouraged to examine the content and structure of the guideline rules as a whole and test them against each of the statutory purposes of sentencing. This provides a sense of what the rules are trying to accomplish and the priorities among the different purposes. The method is the same used by judges or scholars whenever they examine a body of law and construct the best understanding that makes the most sense of the rules. This does not mean, of course, that there won't be room for disagreement over how the rules should be understood and applied. Some rules are anomalous, or appear mistaken or simply inconsistent. But most fit a pattern.

B. "Limiting Retributivism" and "Modified Just Desert"

1. How the guidelines prioritize the statutory purposes

The philosophy that best fits the guidelines is "limiting retributivism," called in one of its versions "modified just deserts."[141] Under this theory, the primary purpose of sentencing is to match the severity of punishment to the seriousness of the crime.[142] This achieves the first statutory purpose of punishment; "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[143] A crime's seriousness depends on the harms it causes and the individual offender's culpability for those harms. Crime seriousness does not, however, fix a precise quantum of punishment; it sets lower and upper limits. Within these limits, other purposes can be pursued.

The guidelines' philosophy is a "hybrid" that gives top priority to just punishment but also accommodates the other statutory purposes. Imprisonment is extended somewhat for offenders with criminal histories,

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140. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

141. Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83 (Michael Tonry ed., 2004).

142. *Id.*

143. 18 U.S.C. § 3553(a)(2)(A).

because they are more likely to recidivate and incarcerating them longer protects the public. Deterrence is achieved as a side benefit of just punishment but the specifics of the guideline rules are tuned to proportionate punishment rather than deterrence.[144] For example, the rules take account of many different harms, but not the likelihood of detection of a particular type of crime, as would be expected if the rules were designed to maximize deterrence. Rehabilitation is taken into account through treatment and training in prison and through conditions of probation or supervised release following imprisonment. Rehabilitation is plainly given the lowest priority under the guidelines, however, and can be pursued only within limits set by the other purposes.[145]

The federal guidelines' two-dimensional Sentencing Table gives visual expression to the two purposes of punishment that best explain the guideline rules. The guidelines measure the seriousness of an offense in Chapters 2 and 3 of the *Guidelines Manual.* The "offense level" is made up of a "base offense level"—estimating the seriousness of a generic crime of that type—modified by "specific offense characteristics" representing additional harms or aggravating and mitigating circumstances that increase or decrease the level. Offenders' risk of recidivism is measured in Chapter 4 by a "criminal history score" determined by the number of prior convictions, the length of the sentences that were imposed for each, and how recently the offender was convicted or incarcerated for the prior offense. The primary purpose of the score is to incapacitate more dangerous offenders for longer periods of time, which it succeeds at doing.[146]

More detailed evidence that limiting retributivism best fits the guidelines is provided in the previous paper and readers who want further proof are encouraged to consult it. Other scholars and judges who have examined the theory underlying the federal guidelines have reached a similar

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144. Paul H. Robinson & John M. Darley, *The Utility of Desert,* 91 NW. U. L. REV. 453 (1997).

145. The introduction to the guidelines governing probation state that probation can be imposed "provided that the terms and conditions of probation can be fashioned so as to meet fully the [first three] statutory purposes of sentencing," namely just punishment, deterrence, and protection of the public. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. B, introductory cmt. (2005). It is not surprising that rehabilitation is given the lowest priority, because it was disfavored by both liberals and conservatives at the time the SRA was drafted. Liberals believed that offenders were incarcerated for longer periods than they deserved in order to rehabilitate them, hence the directive in the SRA "[t]he Commission shall insure that the Guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ." 28 U.S.C. § 994(k).

146. USSC, *supra* note 109.

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conclusion[147]—although, in fairness, the finding has not been unanimous.[148] The original Commission cited works discussing limiting retributivism in the report accompanying the initial promulgation of the guidelines.[149] All things considered, limiting retributivism seems a fair starting point for developing a post-*Booker* jurisprudence of federal sentencing.

2. The modern consensus

Though sentencing policy is seen as controversial, lost in all the campaigning and debating is a surprising fact: when people sit down to actually design a comprehensive sentencing system there is remarkable consensus. Limiting retributivism turns out to be the theory underlying every other sentencing guideline system in the United States.[150] Psychological research, sophisticated public opinion polls, and the experience of every sentencing commission all converge on this common philosophy. Proportionate punishment is built, in a rough way, into all criminal codes, which grade the seriousness of offenses from petty misdemeanors to aggravated felonies, and assign a range of minimum and maximum penalties. Criminal codes also increasingly emphasize the importance of incapacitation, through enactment of enhanced penalties for repeat offenders and in numerous other ways. Every state guideline system incorporates these two dimensions, including some systems that began with

147. Frank O. Bowman III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 316–17, 357 (2000); United States v. Leviner, 31 F. Supp. 2d 23, 32 (D. Mass. 1998) (examining language and structure of the firearm sentencing statutes and guidelines to infer that they were designed to assess the culpability of defendants).

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148. Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003) (examining several aspects of the guidelines and concluding that utilitarianism is the most plausible justification for the majority of the rules). Rappaport agrees with Hofer and Allenbaugh that the guidelines' offense level determination is plausibly an attempt to measure offense seriousness, though he finds many of its details better fit a utilitarian interpretation. He believes that criminal history and substantial assistance are best understood as utilitarian measures to incapacitate and incentivize defendants. Most signficantly, Rappaport argues for "horizontal consistency" and against "hybrid" interpretations that permit a mix of retributive and utilitarian considerations. *Id.*

149. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16 n.58 (1987). These include Norval Morris, *Punishment, Desert and Rehabilitation*, *in* SENTENCING 257 (Hyman Gross & Andrew von Hirsch eds., 1981) and John Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J.L. & PSYCHIATRY 103 (1982).

150. Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363 (1997); Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83 (Michael Tonry ed., 2004); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

a more one-dimensional approach.[151] Limiting retributivism is our nation's reining sentencing philosophy.

There are good reasons for this: limiting retributivism fits most peoples' moral judgments about crime and punishment.[152] Psychological research has consistently shown, for example, that people are sensitive to factors associated with just deserts when making sentencing decisions and relatively insensitive to factors associated with deterrence theory.[153] This helps explain why, in a major empirical study, the sentences recommended by the federal sentencing guidelines closely track the average sentences imposed by a random sample of American adults.[154] Both the guidelines and the public track limiting retributivism.

3. Practical implications of the guidelines' philosophy

The guidelines' philosophy can provide practical guidance to policymakers and to judges. For example, once we recognize that the purpose of the guidelines offense level is to measure the seriousness of the crime, we can better recognize when it works and when it fails. There will still be uncertainties, and judges will need to fill in gaps and sometimes speculate or choose between competing theories of how a particular guideline was meant to work. But the aim of the analysis is clearer and more narrow than choosing among all the purposes of punishment. If something about the circumstances of a case makes the crime more or less serious than other crimes receiving that offense level, those circumstances can justify an outside-range sentence. If the crime is of similar seriousness as others at that offense level, the guidelines should be applied.[155] Similarly,

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151. Richard Frase, *Purposes of Punishment Under the Minnesota Sentencing Guidelines*, 13 CRIM. JUST. ETHICS 11 (1994) (demonstrating that Minnesota guidelines have moved away from a pure just desert model toward incorporating elements of incapacitation).

152. *See generally* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

153. Kevin Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. OF PERSONALITY AND SOC. PSYCH. 284 (2002) (reporting results of empirical studies of sentencing judgments).

154. Peter H. Rossi & Richard A. Berk, JUST PUNISHMENT: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997) (reporting results of interviews with random sample of 1500 adults living in continental United States). While this survey supports the general theory underlying the guidelines, it also demonstrates several areas of divergence between the guidelines and public opinion, which are summarized in Cassell, *supra* note 98. The general agreement between the punishment levels specified in the guidelines and mainstream public opinion does not lessen the need to examine the circumstances of each case to determine if factors are present that make the case more or less serious than is typical.

155. The dilemma created by multiple rationales offered by Congress and the Commission for the use of quantity in the drug guideline was discussed in previous footnotes. To resolve this

once we recognize that the criminal history score aims to sort offenders according to their risk of recidivism, we can ask if this offender is more or less dangerous than other offenders in his criminal history category.

The approach to applying and departing from the guidelines advocated here differs from the departure jurisprudence of the pre-*Booker* era. Prior to *Booker*, the statutory standard served as a starting point for departure analysis, but in truth, it didn't work very well. Departure jurisprudence and the "heartland" concept that grew up as part of it was widely criticized as unprincipled and vague.[156] This jurisprudence demonstrably failed to prevent significant disparity in departure rates among different districts and circuits.[157] *Booker* presents an opportunity to try again.

In some respects, the approach advocated here may narrow judicial discretion compared to pre-*Booker* departure jurisprudence. Some of the recognized grounds for departure in the pre-*Booker* era are hard to reconcile with an attempt to ensure that the offense level tracks the seriousness of the offense.[158] In other respects, a re-examination of the guideline rules in light of their purposes calls into question some of the restrictions on departure

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dilemma may require courts to choose which rationale they think makes the most sense and apply the guideline consistent with that understanding. In some cases, both rationales lead to the same result. For example, if a street level drug dealer is investigated over a long time period, held accountable for a large amount of highly diluted drug, the guidelines may recommend a sentence over ten years, the length Congress suggested for kingpins or masterminds. Both rationales suggest the offense level exaggerates the seriousness of the offense. The dilution made the crime less harmful than other drug crimes of that amount, and the quantity placed the offender in a category with more culpable distributors. Conversely, if evidence suggests a person is a significant organizer of a drug distribution scheme, but fortuities of the arrest link him to a relatively modest amount of highly pure drug, a sentence above the range would be needed to properly track the seriousness of the offense.

156. Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999) (demonstrating ambiguity of the "heartland" concept and arguing that departure jurisprudence is incoherent); Daniel Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits of the Discretion of Sentencers*, YALE L. J. 101 (1992) (arguing that the original Commission restricted departures more than necessary); Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000) (arguing that judges should consider all four statutory purposes and make reasoned departures when appropriate); Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need For Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999) (arguing that common law of departures could eventually emerge from appellate review of reasoned departures).

157. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2003), tbl.26A. Rates of non-government initiated downward departures varied among districts within the states from a high of 22.8 percent to a low of 1.2.

158. For example, departures based on a defendant's good employment record, alcohol or drug addiction, assistance to the judicial system, or excellent progress in rehabilitation after arrest have little to do with the seriousness of the offense.

that developed through the pre-*Booker* years.[159] If these restrictions acted to prevent judges from more accurately reflecting the seriousness of different offenses or the dangerousness of different offenders, then they did not serve to reduce disparity or make sentencing more effective. They should be re-examined. If this happened in a careful and principled manner, *Booker* really could lead to better reasoned sentencing.

IV. CONCLUSION

The attention *Booker* has drawn to federal sentencing has created an opportunity for reflection and perhaps for reform. Observers have urged a "go-slow" approach to give the full effects of the new advisory system time to emerge and be carefully evaluated.[160] The American Bar Association resolved that Congress should permit the advisory system to operate, at least temporarily, while carefully examining evolving sentencing practices.[161] Others have argued it is simply too early to know how appellate review will shape the new federal system. "Congress might want to leave the specifics of appellate review largely alone and allow the appellate courts to resolve some of the post-*Booker* uncertainty."[162] The full implications of *Booker* won't be clear until the courts make clear what makes a sentence reasonable.

A. The Continuing Viability of Guidelines and Sentencing Commissions

Most sentencing experts continue to endorse sentencing commissions and sentencing guidelines as the best hope for achieving fair and effective sentencing. Evidence for this is the prominence of sentencing commissions

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159. In 2003, pursuant to a directive in the PROTECT Act to reduce the incidence of downward departures, the Commission added a number of restrictions on downward departures that were not clearly tied to the guidelines' purposes. For example, the extent of downward departure in cases where the criminal history category inadequately tracked the recidivism risk of offenders subject to the career offender guideline USSG § 4B1.1 was limited to one level. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 651 (2005). No explanation for this restriction was offered, and there is evidence that inclusion of prior drug offenses as predicates for career offender status dramatically overstates the recidivism risk of these offenders, who also happen to be disproportionately African-American. *See* FIFTEEN YEAR REVIEW, *supra* note 2, at 133–34.

160. Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1 (2005) (calling on Congress to reexamine long-standing problems with federal sentencing).

161. American Bar Association, Criminal Justice Section, *Report on* Booker *and Recommendation*, (Jan. 2005), *reprinted in* 17 FED. SENT'G REP. 335 (2005).

162. Steven L. Chanenson, *Guidance From Above and Beyond*, 58 STAN. L. REV. 175, 177 (2005).

and guidelines in the Report of the American Law Institute committee to restate the sentencing provisions of the Model Penal Code, which is currently under development.[163] In addition to expert commissions and guidelines of an appropriate degree of presumptiveness, the ALI report also embraces limiting retributivism as the model code's governing philosophy. Notably, however, the ALI report takes pain to distance itself from the pre-*Booker* federal guidelines, citing the complexity, rigidity, and other problems of the pre-*Booker* system.

It is also worth noting that the "effectively advisory" guideline system established by *Booker* for the federal courts is not the first or only advisory guideline system in the United States. Several states have always had advisory or "voluntary" guidelines. The Executive Directors of the sentencing commissions in two of these jurisdictions recently reviewed the evidence and argued that advisory systems have several advantages over more mandatory systems and can successfully achieve the goals of sentencing reform.[164] "We predict that advisory guidelines can be a success in the federal system. Whether advisory guidelines will be given a chance to succeed is another matter."[165]

Clearly, some sort of guidelines system for the federal courts remains viable post-*Booker*. If progress is to be made toward improving the federal system it will require coordinated actions by sentencing and appellate courts, Congress, and the Sentencing Commission. It will require mutual respect for the roles of each participant in policy development and in guideline implementation. The federal sentencing system has undergone repeated shocks over the past three years and considerable uncertainty remains. Mo additional changes should be made without careful evaluation of the new advisory system and consultation and deliberation among the major stakeholders.

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163. Kevin R. Reitz, reporter, MODEL PENAL CODE: SENTENCING REPORT (American Law Institute, 2003). A blue ribbon panel organized by the Constitution Project also endorsed sentencing guidelines and commissions, but suggest that the federal system requires simplification, decreased rigidity, and a reduction of the guidelines' current emphasis on quantifiable factors. Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems, reprinted in* 17 FSR 341 (2005).

164. Kim H. Hunt and Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT REP. 233 (2005).

165. *Id.* at 239.

B. Important Roles for the Courts, Congress, and the Commission

1. The Courts

For over a year, the new advisory guidelines system has been in the hands of the courts. While *Booker* has had a more immediate impact on rates of within-range sentences than any other legal change in the guidelines era, sentencing practices remain within the broad limits established in earlier years under the guidelines. The guidelines have not been ignored or abandoned by the sentencing courts. They continue to be considered and accorded, in most if not all cases, substantial weight.

Many sentencing judges engage in thoughtful consideration of the Commission's guidelines and policy statements, as well as the statutory factors found at 18 U.S.C. 3553(a), and issue illuminating sentencing opinions. To contribute to a fruitful conversation among the courts, the Commission, and Congress, sentencing judges need to articulate, with specificity, why the guidelines fail to achieve their purposes in cases where an outside-range sentence is imposed. A detailed statement of reasons or written sentencing opinion can provide valuable feedback to the Commission and explain to the appellate courts how the guidelines failed in a particular case. Unfortunately, in many cases the reasons given for the sentence are cursory. Simply referring to the statutory purpose being pursued is not enough to explain how the sentence is intended to achieve that purpose.

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Appellate review remains at an early stage of development. Requirements for the adequacy and specificity of the reasons for sentences provided by sentencing judges are just beginning to take shape. Which reasons will, or will not, be considered adequate to justify a sentence outside the guideline range have only begun to emerge. To channel discretion sufficiently to avoid unwarranted disparity, the jurisprudence of outside-range sentences will need enough detail to identify a philosophy of sentencing for the federal courts and a theory of how the guideline rules implement that philosophy. This is a tall order, and the experience of pre-*Booker* departure jurisprudence is not a cause for optimism. The hoped-for "common law of sentencing" never developed sufficiently to avoid significant differences in rates of departure among districts.[166] Other than

166. Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need For Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999) (arguing Pre-*Booker* that a common law of departures could eventually emerge from appellate review of reasoned departures).

the ambiguous "heartland" concept, the jurisprudence of departures revealed little about when a sentence outside the range was justified, and why.[167]

If judges wish to retain the discretion *Booker* has given them, they need to develop a jurisprudence of sentencing sufficient to channel discretion and avoid disparity. The theory of the guidelines described in this paper is an attempt to assist with this process by filling gaps left by Congress's and the Commission's failure to articulate a consistent philosophy for federal sentencing. If more courts were to engage in the development of a common law of sentencing, perhaps a jurisprudence for the post-*Booker* era would emerge that retains flexibility to tailor sentences to the particulars of individual cases but avoids a "discordant symphony" where each judge decides on a case-by-case basis which purposes to pursue and how to pursue them.

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2. Congress

Ultimate authority and responsibility for federal sentencing rests with Congress. Congress created the Sentencing Commission and the guidelines system and sets the statutory minimum and maximum penalties for every federal crime. Congress could replace the guidelines with a mandatory penalty system. But the same reasons favoring a guidelines system that motivated the SRA in 1984 remain valid today. The constitutional protections recognized by *Booker* required some modification of that system, but they do not dictate its wholesale abandonment. Neither do other policy considerations or the experience of the first year of sentencing in the new era mandate radical revision of the system.

If sentencing judges strike out on their own and appellate review proves insufficient to channel judicial discretion, Congress may feel additional legislation is necessary. Some of the legislative proposals made subsequent to *Booker* are cause for concern because they would not lead to better reasoned sentencing. Since *Booker*, much proposed crime legislation has contained new mandatory minimum penalties. The Attorney General has spoken of the advantages of a "minimum guideline system" that would restore the restrictions on below-guideline-range sentences that existed

167. Paul J. Hofer, *Discretion to Depart After* Koon v. United States, 9 Fed Sent R. 8 (1996) (arguing that the heartland concept was ambiguous and insufficient to adequately channel discretion).

before *Booker* and could possibly add more. One proposed bill, HR 1528, included a section that would have eliminated most grounds for downward departure, including some that are relevant to sentences implementing a limiting retributivist philosophy.

The key to any legislative change would be to ensure that any new restrictions eliminate inappropriate sentences while preserving judges' ability to take into account relevant circumstances not adequately covered by the guideline rules. Professor Kevin Reitz, a national expert on guidelines systems, has suggested that, in lieu of re-engineering the system, if Congress wishes to ensure greater enforceability of the guidelines it should consider revision of the standards of appellate review at 18 U.S.C. § 3742.[168] This could help ensure, for example, that judges adequately consider the factors at 18 U.S.C. § 3553(a), particularly the "need to avoid unwarranted sentencing disparities." Other changes, such as strengthening the requirement to state the reasons for any sentence outside the guideline range "with specificity,"[169] might help ensure that the federal system has sufficient rigor to achieve Congress's goals.

Most important, Congress should concern itself with disparity arising from its own actions before addressing any disparity arising from increased discretion accorded judges. Mandatory minimum statutes create unwarranted disparity and should be repealed, starting with those that have been most clearly shown to lead to disproportionate sentences.[170] Piecemeal sentencing legislation of all types should be avoided, whether mandatory minimum penalties or overly specific directives to the Commission. Such legislation often creates anomalies and inefficiencies that could be avoided if the Commission were allowed to do the job that Congress originally gave it. It's been over twenty years since enactment of the SRA. It's time to really try sentencing reform the way it was intended.[171]

3. The Commission

As the Supreme Court stated in *Booker,* "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the

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168. Reitz, *supra* note 39, at 172.

169. 18 U.S.C. §3553(c).

170. U.S. Sentencing Commission, COCAINE AND FEDERAL SENTENCING POLICY (May 2002).

171. *See* FIFTEEN YEAR REVIEW, pages 143-146 for a description of which components of sentencing reform have been only partially implemented.

Guidelines accordingly."[172] As the contours of the new system take shape, it is important to consider what else the Commission might do to foster better reasoned sentencing.

With the guidelines now less mandatory, their authority depends less on the sheer force of law and more on the quality of the reasons the Commission gives for them. Judges have accorded the guidelines "substantial weight" based on evidence they were well designed to achieve the purposes of sentencing. To the extent that was and remains true, the guidelines deserve judicial deference. But too often it has been unclear what the guidelines seek to accomplish and how a particular guideline was meant to accomplish it. In some cases the best or only explanation for a guideline is just that Congress required it. Without knowing, with some specificity, the reasons for the guideline rules, it is difficult to know if they are working as intended. The Commission has improved the quality of its explanations and "reasons for amendment" in recent years but it needs to do more. It should consider revisiting those parts of the *Guidelines Manual* that explain the reasoning behind the guidelines and explain the theory underlying sentences outside the guideline range.

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The Commission retains the duty to promulgate "general policy statements regarding application of the guidelines or *any other aspect of sentencing* or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code."[173] The Commission also has the power to "make recommendations to Congress concerning the modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy."[174] These broad grants of authority may provide tools for the Commission to help shape the post-*Booker* sentencing system to better achieve an appropriate balance between discretion and guidance.

In one important area the Commission has so far declined to use its authority to help shape the modified system. Prior to *Booker*, the Commission promulgated policy statements and other commentary that sought to channel when and how courts sentenced outside the guideline range. The departure policy statements in Chapter Five and other commentary throughout the *Guidelines Manual* played an important role in the case law governing departures. Courts gave considerable deference to the Commission's encouragement or discouragement of departure in

172. *Booker* at 767.
173. 28 U.S.C. § 994(a)(2) (emphasis supplied)
174. 28 U.S.C. 995((1)(20).

various circumstances, as seems appropriate since the Commission is best situated to know what the guidelines are trying to do and what they have and have not taken into consideration. These policy statements concerning departure remain operative, and courts are bound by 18 U.S.C. § 3553(a)(5) to consider them.

The Commission has so far declined, however, to offer guidance regarding judges' new discretion to sentence outside the guideline range. Such guidance would, of course, be non-binding. But it could prove helpful to sentencing courts in understanding the reasons behind the guideline rules. It could also prove useful to Appellate Courts when they review the reasonableness of any decision to sentence outside the range. Departure jurisprudence in the pre-*Booker* world at its best was an ongoing conversation among sentencing courts, appellate courts, and the Commission regarding how courts should exercise their discretion. The Commission has the option to re-join this conversation today.

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Panel Discussion - Sentencing Experiences Under *United States v. Booker*

Presented by

John Messina, John Burns,
Terry McAtee, Tim Ross-Boon
& Priscilla Forsyth

Research & Writing Attorney
& Assistant Federal Defenders

VARIANCE SCORECARD

UPWARD VARIANCES

UPWARD VARIANCES REVERSED

☺ ***Kendall*** (155%)

100%--

90------

80------

70------

60------

50 % ----------

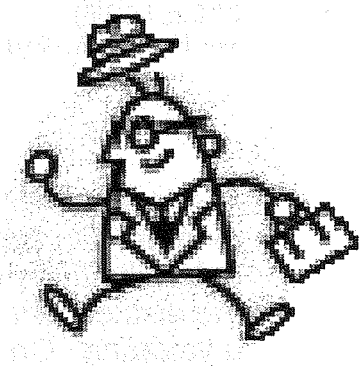
40------

30------

20------

10------

0--------



	Guideline	Sentence	Variance	Result
United States v. Kendall, 2006 WL 1145539 (8th Cir., 5/2/06) (Bye, Heaney, Melloy)	27-33	84	+ 155%	Reversed

Defendant was originally sentenced as a career offender to 84 months. On appeal the circuit rejected the career offender determination and remanded for resentencing. Upon resentencing the district court reimposed the 84 month sentence and justified it as a variance. On review, however, the circuit rejects the "extraordinary" variance. Defendant was a run-of-the-mill meth manufacturing defendant who was "low on the chain." He had a prior burglary conviction and several drunk driving convictions, but "not the type of extraordinary record to justify an extraordinary variance."

UPWARD VARIANCES AFFIRMED

100 % — ☐ ***Long Soldier*** (100%)

90------

80------

70------

60------ — ☐ ***Porter*** (69%)

☐ ***Larrabee*** (54%)

50 % ----------

40------

30------ — ☐ ***Winters*** (26%)

☐ ***Sitting Bear*** (21%)

20------

10------ — ☐ ***Anderson*** (10%)

☐ ***Kelly*** (10%)

0-------- — ☐ ***Ademi*** (2%)

	Guideline	Sentence	Variance	Result
United States v. Anderson, 440 F.3d 1013 (8th Cir. 2006) (Loken, Hansen, Melloy)	87-108	120	+ 11%	Affirmed

Investment scheme defendant who defrauded twenty-two victims of a total of more than one million dollars. Originally sentenced to 108 months. On remand for resentencing a different judge increased the sentence to the statutory maximum of 120 months. (While the original appeal was pending, defendant filed liens against the property of the original sentencing judge).

	Guideline	Sentence	Variance	Result
United States v. Porter, 439 F.3d 845 (8th Cir. 2006) (Bye, Beam, Gruender)	57-71	120	+ 69%	Affirmed

Felon in possession defendant who had terrorized his estranged spouse and kidnapped their two children. The kids were still missing at the time of sentencing. The district court said, "There seems to be no point at which Mr. Porter is willing to stop in his desire to inflict injury and pain on Mrs. Porter." The circuit easily upholds the variance under the "unique facts" of the case.

	Guideline	Sentence	Variance	Result
United States v. Bah, 439 F.3d 423 (8th Cir. 2006) (Beam, Gruender) (Bye)	10-16	30	+ 88%	?

Northern district case. Majority found error in the district court's guidelines calculation and therefore reversed without determining the reasonableness of the upward variance. Judge Bye concurred in the result only. He concluded that this "extraordinary" upward variance was not supported by extraordinary circumstances.

	Guideline	Sentence	Variance	Result
United States v. Ademi, 439 F.3d 964 (8th Cir. 2006) (Bye, Beam, Gruender)	37-46	47	+ 2%	Affirmed

Illegal alien pled guilty to possessing a firearm and harboring an illegal alien. Defendant physically abused the harbored alien, who worked at defendant's restaurant. Defendant's abuse "was particularly reprehensible because the employee, an illegal alien, could not complain to authorities. . . ." The circuit finds the sentence reasonable, noting that the district court varied "by only one month."

	Guideline	Sentence	Variance	Result
United States v. Kelly, Jr., 436 F.3d 992 (8th Cir. 2006) (Melloy, Colloton, Benton)	70-87	96	+ 10%	Affirmed

Felon in possession. Domestic violence case involving use of firearm to shoot at victim's car.

"One factor in § 3553(a)(5) is 'any pertinent policy statement.' The sentencing guidelines state that the 'discharge of a firearm might warrant a substantial increase.'"

	Guideline	Sentence	Variance	Result
United States v. Sitting Bear and *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (Murphy, Hansen, Smith)	151-88	228	+21%	Affirmed

Child abuse/torture case resulting in death of four-year-old. District court stated: "This is such an aggravated case. It is one thing to cause the death of your child. But with this amount of torture that was going on I am, of course, going to take that into account in sentencing here."

	Guideline	Sentence	Variance	Result
United States v. Larrabee, 436 F.3d 890 (8th Cir. 2006) (Murphy, Gruender)	188-235	363	+ 54%	Affirmed

Second degree murder case arising under pre-amended guideline range. The range for defendant under the current guideline would be 360 to life. Defendant had a long record of violence and there were aggravating circumstances surrounding the offense.

	Guideline	Sentence	Variance	Result
United States v. Sitting Bear and *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (Murphy, Hansen, Smith)	151-88	228	+21%	Affirmed

Child abuse/torture case resulting in death of four-year-old. District court stated: "This is such an aggravated case. It is one thing to cause the death of your child. But with this amount of torture that was going on I am, of course, going to take that into account in sentencing here."

	Guideline	Sentence	Variance	Result
United States v. Larrabee, 436 F.3d 890 (8th Cir. 2006) (Murphy, Gruender)	188-235	363	+ 54%	Affirmed

Second degree murder case arising under pre-amended guideline range. The range for defendant under the current guideline would be 360 to life. Defendant had a long record of violence and there were aggravating circumstances surrounding the offense.

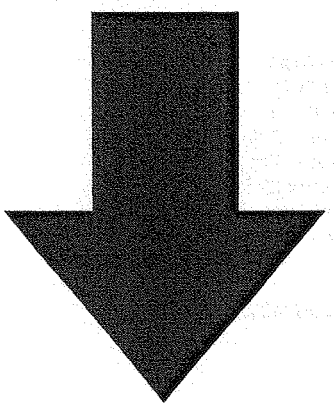
	Guideline	Sentence	Variance	Result
United States v. Long Soldier, 431 F.3d 1120 (8th Cir. 2005) (Murphy, McMillian, Gruender)	0-6	12	+ 100%	Affirmed

Defendant pled guilty to making false statements to obtain food stamps. He was initially allowed to remain free on bond pending sentencing, but was revoked for a public intoxication offense. District court varied upward in light of the bond violation and defendant's "lengthy criminal record, history of failing to comply with conditions of probation and supervised release, unwillingness to gain employment, and chronic substance abuse."

	Guideline	Sentence	Variance	Result
United States v. Winters, 416 F.3d 856 (8th Cir. 2005) (Murphy, Smith) (Heaney)	177-91	240	+ 26%	Affirmed (2 to1)

Gang-related reservation manslaughter/924(c) case. "The facts offer nothing, other than Winters's voluntary diminished capacity, to ameliorate the abject brutality of an execution-style slaying of an unarmed person. The district court aptly described it as malicious and senseless."

Downward Variances



DOWNWARD VARIANCES REVERSED OR REMANDED

100 % — ☐ ***Givens*** (100%)

90------

☐ ***Lazenby*** (83%)

80------

70------ — ☐ ***Shafer*** (70%)
☐ ***Myers*** (68%)
☐ ***Rivera*** (68%)
☐ ***Feemster*** (67%)

60------ — ☐ ***Claiborne*** (59%)
☐ ***McMannus*** (58%)
☐ ***Bryant*** (57%)
☐ ***Brinton*** (54%)

50 % ----------

☐ ***Gatewood*** (43%)

40------

30------

20------

10------

0-------

DOWNWARD VARIANCES AFFIRMED

100 % ☐ ***Hadash*** (100%)

90------

80------

70------

60------

50 % ----------

☐ ***Berni*** (49%)

40------

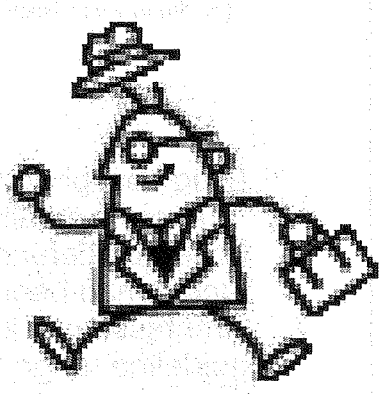
☐ ***Kicklighter*** (36%)

30------

20------

10------

0--------



	Guideline	Sentence	Variance	Result
United States v. Bryant, 2006 WL 1227748 (2006) (Wollman, Fagg, Riley)	70-87	30	- 57%	Reversed

Drug conspiracy defendant was a "mid-level dealer" who sold crack "on nearly a daily basis for approximately two years." Variance was based on defendant's limited prior criminal history (Cat. I) and the fact he had been drug-free for nine months. The circuit finds such circumstances insufficient for "such a drastic reduction from the guideline range." Circuit notes that the guideline range had already taken account of defendant's limited criminal history as well as the application of the safety valve. Thus, "it was unreasonable for the district court to use that criminal history as a justification for an extraordinary variance such as this one."

	Guideline	Sentence	Variance	Result
United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006) (Loken, Wollman, Riley)	37-46	15	-59%	Reversed

Safety-valve defendant avoided 60-month minimum. District court varied "because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future." Circuit finds that the "extraordinary variance" was not supported by "extraordinary circumstances." Lack of criminal history was compensated by safety-valve sentencing; drug quantity was taken into account in the guidelines range; defendant's case involved two drug offenses–the second committed just six months after arrest on the first. Defendant "has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency."

	Guideline	Sentence	Variance	Result
United States v. Givens, 443 F.3d 642 (8th Cir. 2006) (Wollman, Beam, Riley)	24-30	0	- 100%	Reversed

Departure/variance case involving a Nebraska cattle rancher who lied about his collateral to secure an operating loan. Defendant had been an upstanding citizen apart from this offense, which he self-reported to the authorities. District court departed because of "extraordinary post-offense rehabilitation," and a desire to keep defendant at work in the community and at his new cattle operation. District court also considered the agricultural concerns and struggles that prompt good men like defendant to commit fraud. District court also thought the bank-victim was somewhat to blame because it "had to have known that the numbers weren't right."

The circuit rejects the departure and finds the overall sentence unreasonable. The defendant's forthright acceptance, and the desire to limit jail time to allow defendant to "retain his worth in the community," were valid considerations, but did not justify "departing so drastically" from the guidelines. The agricultural struggles and the victim's alleged blameworthiness were not proper considerations. "We agree with the government that the 'prison is not the answer' sentence doesn't pass muster in this case."

	Guideline	Sentence	Variance	Result
United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006) (Loken, Melloy)	70-87	12	- 83%	Reversed
United States v. Goodwin, 439 F.3d 928 (8th Cir. 2006) (Loken, Melloy)	87-108	87	0%	Reversed

Two cases out of the Northern District of Iowa, one by Judge Bennett, one by Judge Reade. The defendants were participants in the same drug conspiracy and had similar levels of involvement. The circuit had little trouble reversing Lazenby's 83% variance. While she had shown significant rehabilitative behavior, the totality of the circumstances were not sufficiently extraordinary to support this extraordinary variance.

Interestingly, the circuit also reverses Goodwin's *guideline range* sentence. The court cites several circumstances that make Goodwin's case "highly unusual." There was unexplained disparity in the drug quantity stipulations of Goodwin and Lazenby; Goodwin's early plea and pledge of cooperation had likely forced guilty pleas by the other conspirators, yet she did not receive a 5K1.1 motion because her assistance wasn't needed; also, the district court gave "too much weight to the prosecutor's statement that she was not authorized to support a downward variance." Finally, the district court "gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators. . . ."

	Guideline	Sentence	Variance	Result
United States v. Rivera, 439 F.3d 446 (8th Cir. 2006) (Melloy, Colloton, Benton)	188-235	60	- 68%	Remanded

Career offender sought leniency in this drug conspiracy case based upon his limited role, overrepresentation of his criminal history, family considerations and other factors. District court stated simply that the statutory minimum was "sufficient penalty under the circumstances that have been placed here in the record." The circuit remanded for further explication. "[W]e are left with an inadequate record upon which to determine whether the district court felt a Guidelines departure was appropriate, what non-Guidelines 3553(a) factors predominated, and what combination of departures and variances warranted a sixty-month sentence."

	Guideline	Sentence	Variance	Result
United States v. Myers, 439 F.3d 415 (8th Cir. 2006) (Beam, Smith) (Bye)	37-46	12	- 68%	Remanded (2 to 1)

Possession of unregistered firearm. Defendant's guideline range included enhancements for possession of a destructive device and use of weapon in connection with another felony (assault). District court did not make factual findings regarding wildly divergent accounts of offense conduct. "The only section 3553(a) factor identified by the district court that weighs toward a more lenient sentence is Myers' lack of criminal history. Inasmuch as a guidelines sentence reflects a defendant's criminal history, a wide divergence from the guidelines sentence based solely on this single criterion would conflict with the need to avoid unwarranted sentence disparities. . . ."

Remanded for "more explicit and thorough consideration" of the § 3553(a) factors.

	Guideline	Sentence	Variance	Result
United States v. Berni, 439 F.3d 990 (8th Cir. 2006) (Melloy, Fagg, Benton)	188-235	96	- 49%	Affirmed

Defendant's challenge to reasonableness of his sentence rejected in this hybrid substantial assistance/variance case. "The district court properly calculated the advisory Guidelines range, permissibly applied a section 5K1.1 departure, and took that resulting range and departure into account along with the other 18 U.S.C. § 3553(a) factors to arrive at the sentence of ninety-six months."

	Guideline	Sentence	Variance	Result
United States v. Gatewood, 438 F.3d 894 (8th Cir. 2006) (Loken, Wollman, Riley)	63-78	36	- 43%	Reversed

Felon in possession defendant who used the gun to commit a robbery. District court gave "no explanation" for its variance. Circuit finds no basis for leniency, noting that defendant "used a stolen shotgun to aggressively threaten a grocery store cashier while robbing the store." Circuit rejects argument that defendant's history of drug abuse warranted variance. "Gatewood has a lengthy history of drug abuse without the extraordinary and successful effort to turn his life around demonstrated by the defendant in *United States v. Kicklighter*, 413 F.3d 915, 917 (8th Cir. 2005). . . ."

	Guideline	Sentence	Variance	Result
United States v. Shafer, 438 F.3d 1225 (8th Cir. 2006) (Loken, Wollman, Riley)	60	48 (concurrent with state sentence)	- 20% (- 70%)	Reversed

No mitigating circumstances for this defendant, who hired a 15-year-old for production of an amateur pornographic video. Defendant had an extensive criminal history, including recent convictions for theft and witness intimidation. In addition to the 20% variance, the 48-month sentence was ordered to run concurrently with a 36-month term on the theft and intimidation offenses. With credit, defendant would only serve 18 months for the federal offense. "[T]he combined impact of the variance . . . and the dubious concurrent sentence result in a total variance of up to seventy percent below the statutory maximum. . . . Nothing in the sentencing record appears to us to justify any variance, and certainly not a variance of this extraordinary magnitude."

	Guideline	Sentence	Variance	Result
United States v. McMannus, 436 F.3d 871 (8th Cir. 2006) (Gruender, Murphy)	57-71	24	- 58%	Reversed

"[T]he district court failed to provide any explanation for imposing a sentence . . . 33 months below the low end of the presumptively reasonable guidelines range. While we can identify factors that may warrant a minor variance . . ., e.g., McMannus put himself through community college while on pretrial release, we find nothing in the record which would justify a variance of this magnitude . . . ."

	Guideline	Sentence	Variance	Result
United States v. Brinton, 436 F.3d 871 (8th Cir. 2006) (Gruender, Murphy)	262-327	120	- 54%	Reversed

Variance based primarily on Brinton's lack of prior criminal history points. "[W]e do not believe that Brinton's lack of criminal history, which is one of the considerations that determined her advisory range, or anything else in the record justifies a variance of this magnitude."

	Guideline	Sentence	Variance	Result
United States v. Feemster, 435 F.3d 881 (8th Cir. 2006) (Smith, Heaney, Benton)	360 - Life	120	- 67%	Remanded

Twenty-four-year-old career offender's guidelines sentence had tripled based upon crimes committed as a juvenile. The district court based its variance solely on the overrepresented criminal history. However, "Booker mandates that the sentencing court go further, and consider all factors enumerated in § 3553(a)." Circuit therefore remands for "more explicit and thorough consideration of all factors enumerated in § 3553(a)."

	Guideline	Sentence	Variance	Result
United States v. Kicklighter, 413 F.3d 915 (8th Cir. 2005) (Arnold, Lay, Benton)	188-235	120	- 36%	Affirmed

Drug defendant who exhibited extraordinary rehabilitation over a two-year period. Father's testimony and defendant's allocution were key.

	Guideline	Sentence	Variance	Result
United States v. Hadash, 408 F.3d 1080 (8th Cir. 2005) (Wollman, Heaney, Murphy)	12-18	Probation	-100%	Affirmed

Maintenance worker for postal service stole six firearms from the mail recovery center, pled guilty to a § 922(j) offense. "Hadash was simply 'a law abiding citizen, who [did] an incredibly dumb thing.'"

Proposed Amendments to the U.S. Sentencing Guidelines - 2006

(Effective November 1, 2006, unless Congress acts to the contrary)

1. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (§1B1.13).
   a. New guideline permits court to reduce term if BOP Director moves under 18 USC § 3582(c) and court finds
      i. extraordinary and compelling reasons warrant reduction, or defendant is at least 70 and has served at least 30 years in prison on current sentence; and
      ii. defendant is not a danger to another person or the community's safety.

2. Drugs (§2D1.1) & Offenses Committed While on Release (§3C1.3)
   a. Adds cross reference to second-degree murder guideline (§2A1.2) if victim killed during drug offense.
   b. Clarifies use of drug equivalency table.
   c. Strikes §2J1.7 and replaces it with new enhancement at §3C1:

      "Commission of Offense While on Release
      If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels."

      According to the commission, creating this chapter 3 adjustment "ensures the enhancement is not overlooked . . ."

3. 5-part amendment responds to recently-enacted legislation:
   a. Veterans' Memorial Preservation and Recognition Act of 2003 creates new offense that prohibits destruction of veterans' memorials
   b. Plant Protection Act of 2002 created new offense for knowingly importing, exporting plants, plant products, biological control organisms, and similar products for distribution or sale.
   c. Clean Diamond Trade Act of 2003 prohibits importation of "conflict diamonds" (so called because profits are used to fund rebel or military activities).
   d. Unborn Victims of Violence Act of 2004 creates new offense for causing death or serious bodily injury to a fetus while engaging in conduct that violates any of over 60 listed offenses. Statutory maximum is same as if injury or death had occurred to the fetus's mother.
   e. Amendment creates new guideline, §2X5.2, that covers all class A misdemeanors not otherwise referenced to a more specific guideline.

4. Intelligence Reform and Terrorism Prevention Act of 2004.
   a. Amends §2L1.1(b) by adding 2 levels for smuggling aliens if conduct is part of ongoing commercial enterprise, aliens were transported in groups of 10 or more either in a manner that endangered their lives or the aliens presented a health risk to people of U.S.
   b. Act creates other offenses–Participation in Nuclear and Weapons of Threats in the

U.S.; Production of Radiological Dispersal Devices; Production, Dispersal, or Threat to Use Variola Virus–which are placed at §2M6.1 (Weapons of Mass Destruction).

c. Act prohibits production of missile systems designed to destroy aircraft. Amendment refers violations to §2K2.1 (Firearms) because these weapons are covered as destructive devices.

5. Copyright (§2B5.3) - Amendment repromulgates earlier temporary, emergency amendment to copyright guideline (§2B5.3).
   a. Provides 2-level increase if offense involved a pre-release work.
   b. Expands definition of "uploading."
   c. Allows court to make reasonable estimate of infringement amount when court cannot determine number of infringing items.

6. Steroids (§2D1.1) - Amendment repromulgates earlier temporary, emergency amendment implementing Anabolic Steroid Control Act of 2004.
   a. Increases penalties for offenses involving anabolic steroids.
   b. Eliminates distinction between anabolic steroids and other Schedule III substances when steroid is in pill, capsule, tablet or liquid form.
   c. Instructs court to make reasonable estimate of amount involved for other forms.
   d. Adds two enhancements for distribution of steroid with masking agent and for distribution to an athlete.
   e. Instructs court to apply abuse of position of trust increase to coach who uses position to influence athlete to use steroid.

7. False Domain Names and Spam
   a. New guideline at §3C1.4 (False Registration of Domain Names) provides 2-level increase if defendant knowingly falsely registered internet domain name and used the name in course of committing felony offense.
   b. CAN-SPAM Act of 2003 prohibits transmission of commercial electronic messages that contain "sexually oriented material" unless such messages include certain mark, notices, and information. Amendment refers new offense to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials).

8. International and Domestic Terrorism
   a. Amendment repromulgates earlier emergency amendment increasing penalties for offenses under 18 USC §§ 1001 and 1505 if they involved international or domestic terrorism. Refers convictions under these circumstances to §2J1.2 (Obstruction of Justice) and adds a 12-level increase.

9. Firearms (§2K2.1)
   a. Deletes references in base offense level sections to "firearm described in 18 USC

§ 921(a)(30)" because semiautomatic assault weapons are no longer banned and replaces them with "semiautomatic firearm capable of accepting a large capacity magazine." Also substitutes similar language in §5K2.17, which provides upward departure for use of these weapons.

b. Provides 4-level increase for trafficking of firearms, which encompasses transporting, transferring or otherwise disposing of two or more firearms while knowing or having reason to believe recipient could not lawfully possess firearm or intended to use it unlawfully.

c. Provides for 4-level increase (instead of current 2 levels) for offenses involving altered or obliterated serial numbers.

d. Resolves circuit conflict regarding use of firearm "in connection with" burglary and drug offenses. Increase applies if firearm facilitated or had potential to facilitate another felony. Applies in burglaries even if defendant merely took firearm during course of burglary. Applies to drug offenses if firearm found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia.

10. Alien Smuggling and Fraudulent Use of Passports

a. Increases punishment under §2L1.1 for defendants convicted of smuggling aliens if alien is inadmissible because of "security or related grounds."

b. Two-level increase if defendant smuggled, transported, or harbored a minor unaccompanied by minor's parents.

c. For smuggling offenses involving death, increases offense level if any person died as a result of offense and expands cross-references to offenses other than murder.

d. Two-level increase if alien involuntarily detained through coercion or threat.

e. Adds 4-level increase to §2L2.1 for fraudulent use of passport.

f. Adds 2-level increase to §§2L2.1 and 2L2.2 for fraudulent use of foreign passport.

11. Obstruction of Justice (§3C1.1)

a. Amendment addresses circuit conflict regarding whether pre-investigative conduct can form basis for obstruction of justice increase. Commission adopts majority view, which allows increase if conduct was purposefully calculated, and likely, to thwart investigation or prosecution of offense of conviction.

12. Crime Victims' Rights (§6A1.5)

a. Creates new policy statement in response to the Justice for All Act of 2004, which provides various rights for crime victims, including right to be "reasonably heard at any public proceeding . . . involving release, plea, sentencing . . ."

13. Culpability Score in Sentencing Organizations (§8C2.5)

a. Amendment deletes language in application note that addressed effect of waiver of attorney-client privilege on culpability score.

A. INTRODUCTION

This report assesses the impact of *United States v. Booker*[1] on federal sentencing. The report is prepared pursuant to the general statutory authority of the United States Sentencing Commission (the "Commission") under 28 U.S.C. §§ 994-995, and the specific responsibilities enumerated in 28 U.S.C. § 995(a)(14) and (15), which require the Commission to publish data concerning the sentencing process and to collect and systematically disseminate information concerning the actual sentences imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a).

On June 24, 2004, the Supreme Court decided *Blakely v. Washington,*[2] invalidating a sentence imposed under the State of Washington's sentencing guideline system. The Supreme Court held that the Washington guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines,[3] the decision had an immediate impact on the federal criminal justice system. Following *Blakely*, district and circuit courts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines.

On January 12, 2005, the Supreme Court decided *Booker,* applying *Blakely* to the federal guideline system and determining that the mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. The Court remedied the Sixth Amendment violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that had existed for almost 20 years into an advisory one.

The uniformity that had been a hallmark of mandatory federal guideline sentencing no longer was readily apparent as courts began to address new issues raised by *Booker*. For example, some district courts began to consider only facts proved beyond a reasonable doubt at sentencing, reasoning that *Booker* required this elevated standard. Others continued to apply the preponderance standard generally accepted before *Booker*. Some district courts continued to use settled procedures for imposing sentences; others created new procedures to implement the decision. Some district courts fashioned sentences without any consideration of the applicable guideline range. In fashioning a sentence outside the applicable guideline range, some district courts decided to forego an analysis of whether a departure under the guidelines would be warranted and instead relied only on *Booker* to impose the sentence. The majority of district courts, however, considered the applicable guideline range first, considered guideline departure reasons under the guidelines, and then decided whether consideration of the factors listed in 18 U.S.C. § 3553(a) warranted imposition of an out-of-range sentence. While some of these questions have been answered by the courts of appeal, others remain unresolved.

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[1] 543 U.S. 220 (2005).
[2] 542 U.S. 296 (2004).
[3] *Id.* at 304, n.9.

B. POST-BOOKER APPELLATE JURISPRUDENCE

As Chapter 2 illustrates, the appellate case law remains at an early stage of development. Requirements for the adequacy and specificity of the reasons for sentences provided by sentencing judges are just now beginning to take shape. Appellate jurisprudence setting forth the reasons that will, or will not, be considered reasonable for imposing a sentence outside the guideline range has just begun to emerge. However, the system has begun to settle as the appellate courts decide issues arising after *Booker*. For example, the circuit courts now have uniformly agreed that all post-*Booker* sentencing must begin with calculation of the applicable guideline range. As each respective circuit arrived at this conclusion, the district courts in that circuit began to use more uniform procedures to impose sentences. Six circuits — the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth — now have held that a sentence within the properly calculated guideline range is presumptively reasonable. Only one circuit has concluded that a sentence within the properly calculated guideline range is unreasonable. As appellate jurisprudence evolves, uncertainties are resolved, the system becomes more predictable, and a more complete picture of the impact of *Booker* on federal sentences can be developed.

C. IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM

A lack of uniformity that existed pre-*Booker* in the reporting of sentencing information to the Commission, especially the reporting of reasons for the sentence imposed, was exacerbated post-*Booker*. Statutory amendments made by The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2004[4] required courts to submit sentencing documentation to the Commission, including the statement of reasons for imposing a particular sentence. Courts were not required, however, to use a standard form for reporting those reasons, although the Judicial Conference of the United States had developed a form for such use. The form, including all of its early iterations that existed prior to *Booker,* was not adequate to fully capture sentencing decisions made post-*Booker*.

As will be discussed in further detail in Chapter 3, the Judicial Conference, working closely with the Commission, revised the Statement of Reasons form[5] to encapsulate post-*Booker* changes in the sentencing guideline system. The revised form, approved in June, 2005, allows for a more complete picture of post-*Booker* sentencing practices. However, the revised form was not adopted until 6 months after the decision. Consequently, for the 6-month period preceding adoption of the revised form, courts used old forms, modified the forms, or created their own. Much of the improvement brought by the revised form, therefore, was not immediately realized. Moreover, use of the revised form has not been adopted by all courts. As of the date of this report, approximately two-thirds of the 94 federal districts have implemented use of the revised form to varying degrees.[6]

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[4] Pub. L. No. 108–21, 117 Stat. 650, hereinafter the "PROTECT Act." *See also* 28 U.S.C. § 994(w) and 18 U.S.C. § 3553(c).

[5] *See* Statement of Reasons AO245B (Rev. 06/05), reproduced in Appendix A.

[6] The advisory committee for the Federal Rules of Criminal Procedure has taken steps to impose uniformity with respect to use of the statement of reasons form. *See* Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States). Congress also has taken steps to address this documentation issue through the Patriot Act conference report. *See* sec. 735 of H.Rep. 109–174, Pt. I

Such changes in practice and procedure have had an impact upon the Commission's data collection and analysis. One of the assumptions upon which the Commission's historical analysis of data is based is the relatively uniform application of the guidelines. This assumption is not necessarily valid after *Booker*. The differences in practice and procedure that resulted from *Booker* are not entirely quantifiable, and this impacts the quality of the data collected.

Booker also necessitated changes in the methodology used by the Commission in the collection and analysis of the data. The Commission had to refine the categorization of sentences in relation to the final guideline range.[7] The new methodology implemented in response to *Booker* uses 11 categories designed to collect and report the nuances of sentencing under the advisory guideline system. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limitations, and incomplete or unclear documentation often makes it difficult to characterize individual cases as falling into these categories. Moreover, because the reliability of any analyses conducted by the Commission directly correlates to the quality of the information collected, the results reported herein may not provide a complete picture of the system's adaptation to advisory guidelines.

D. FINDINGS FROM DATA ANALYSIS

For the reasons described in Part C of this executive summary, some degree of caution should be exercised in drawing conclusions from the post-*Booker* data collected and analyzed thus far. Nevertheless, a number of conclusions reasonably can be drawn and are described in Chapters 4 through 6.

1. National Sentencing Trends

Chapter 4 of this report details the results of the Commission's data analyses of the impact of *Booker* generally on federal sentencing. For ease of discussion, the terms "within-range," "above-range," and "below-range" are used throughout this report to describe sentences in relation to the applicable guideline range. Many of the analyses in Chapter 4 compare historical guideline trends and trends in the post-*Booker* system. In sum, these analyses yielded the following findings:[8]

- The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*. The

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2005 (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission.").

[7] For a comprehensive discussion of the new methodology, *see* Appendix B.

[8] Unless otherwise noted, findings discussed throughout this report are based on data contained in Commission, Special Post-*Booker* Coding Project One Year Report, contained in Appendix D.

conformance rate in the pre-PROTECT Act period was 90.6 percent. The conformance rate in the post-PROTECT Act period was 91.9 percent.[9]

- The severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased.

- With respect to within-range sentences, patterns for selecting the point at which to sentence within the range are unchanged after *Booker*. Approximately 60 percent of within-range sentences are still imposed at the minimum, or bottom, of the applicable guideline range.

- The rate of imposition of sentences of imprisonment has not decreased. Offenders are still being incarcerated in the vast majority of cases.

- The rate of imposition of above-range sentences doubled to a rate of 1.6 percent after *Booker*.

- The rate of government-sponsored, below-range sentences has increased slightly after *Booker* to a rate of 23.7 percent, with substantial assistance departures accounting for 14.4 percent, Early Disposition Program departures accounting for 6.7 percent, and other government-sponsored downward departures accounting for 2.6 percent.

- The rate of imposition of non-government-sponsored, below-range sentences has increased after *Booker* to a rate of 12.5 percent.

- In approximately two-thirds of cases involving non-government-sponsored, below-range sentences, the extent of the reductions granted are less than 40 percent below the minimum of the range. Courts have granted small sentence reductions, of 9 percent or less, at a higher rate after *Booker* than before. Courts have granted 100 percent sentence reductions, to probation, at a lower rate after *Booker* than before.

- The imposition of non-government-sponsored, below-range sentences often is accompanied by a citation to *Booker* or factors under 18 U.S.C. § 3553(a).

- The use of guideline departure reasons remains prevalent in many cases involving the imposition of non-government-sponsored, below-range sentences, including those citing *Booker* or factors under 18 U.S.C. § 3553(a).

- Multivariate analysis[10] indicates that four factors associated with the decision to impose a below-range sentence are different after *Booker* but not before: the

[9] For purposes of this report, the pre-PROTECT Act period is the 7-month period from October, 2002 through April, 2003. The post-PROTECT Act period is a 13-month period from mid-2003 through mid-2004. The post-*Booker* period is a 1-year period generally in 2005.

application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. However, most factors associated with this decision are the same after *Booker*.

2. Regional and Demographic Differences in Sentencing Practices

Chapter 5 of this report details the results of the Commission's data analyses of *Booker's* impact on regional and demographic differences in federal sentencing practices. In sum, these analyses yielded the following findings:

- The regional differences in sentencing practices that existed before *Booker* continue to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*.

- Fifty-two of the 94 districts, or 55 percent, have rates of imposition of within-range sentences at or above the national average of 62.2 percent. Forty-two districts have rates of imposition of within-range sentences below the national average. In 33 of these 42 districts, the rates of imposition of government-sponsored, below-range sentences exceed the rates of imposition of other below-range sentences.

- Multivariate analysis conducted on post-*Booker* data reveals that male offenders continue to be associated with higher sentences than female offenders. Such an association is found every year from 1999 through the post-*Booker* period. Associations between demographic factors and sentence length should be viewed with caution because there are unmeasured factors, such as violent criminal history or bail decisions, statistically associated with demographic factors that the analysis may not take into account.

- Multivariate analysis conducted on post-*Booker* data reveals that black offenders are associated with sentences that are 4.9 percent higher than white offenders. Such an association was not found in the post-PROTECT Act period but did appear in 4 of the 7 time periods analyzed from 1999 through the post-*Booker* period.

- Multivariate analysis conducted on post-*Booker* data reveals that offenders of "other" races (mostly Native American offenders) are associated with sentences that are 10.8 percent higher than white offenders. This association also was found in 2 of the 7 time periods from 1999 through the post-*Booker* period.

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[10] Multivariate analysis is one statistical method to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The purpose of conducting multivariate analysis is to determine whether any sentencing changes were statistically significant after controlling for relevant factors for which data are available. For a detailed discussion of the multivariate analyses undertaken for this report, *see* Appendix B.

- Multivariate analysis conducted on post-*Booker* data reveals that there is no statistical difference between the sentence length of Hispanic offenders and the sentence length of white offenders.

3. Specific Sentencing Issues

Chapter 6 of this report details the results of the Commission's data analyses of *Booker*'s impact on specific sentencing issues. In sum, these analyses yielded the following findings:

a. Cooperation Reductions without a Government Motion

- Non-government-sponsored, below-range sentences based on the defendant's cooperation with authorities, *i.e.*, below-range sentences granted for substantial assistance without a government motion for such, occur post-*Booker*. Post-*Booker*, there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government-sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with authorities was the only reason cited. In 230 of these cases, it was one of a combination of reasons for the below-range sentence.

b. Sex Offenses

- The average length of sentences for cases sentenced under each of the criminal sexual abuse guidelines has remained fairly constant.

- The rate of imposition of below-range sentences has declined continuously for criminal sexual abuse cases, and that decline was indicated post-*Booker* as well. The rate of imposition of below-range sentences in criminal sexual abuse cases is approximately the same as the rate for all cases post-*Booker*.

- The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased post-*Booker*.

- The rate of imposition of below-range sentences for cases involving the sexual abuse of a minor decreased post-PROTECT Act but increased post-*Booker*. The increased rate post-*Booker* was less than what the rate had been pre-PROTECT Act.

- The rate of imposition of above-range sentences increased post-*Booker* for criminal sexual abuse offenses and abusive sexual contact offenses but declined for offenses involving the sexual abuse of a minor.

- The majority of below-range sentences in cases involving criminal sexual abuse are imposed for offenders with little or no criminal history.

- Consistent with the trend seen in the national post-*Booker* data for cases overall, the average length of sentences has increased for cases sentenced under the sexual exploitation, *i.e.*, child pornography, guidelines.

- The rate of imposition of below-range sentences for sexual exploitation offenses has increased over time.

- The rate of imposition of above-range sentences has decreased over time for cases involving production of child pornography and trafficking in child pornography and has increased over time for cases involving possession of child pornography.

c. Crack Cocaine Offenses

- Courts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3353(a) to impose below-range sentences in crack cocaine cases. Courts do not often explicitly cite crack cocaine/cocaine power sentencing disparity as a reason to impose below-range sentences in crack cocaine cases.

d. First Offenders

- The rate of imposition of below-range sentences for first offenders increased after *Booker*.

- The rate of imposition of above-range sentences for first offenders also increased after *Booker*.

- The proportion of first offenders receiving prison sentences has remained essentially the same, as has the average length of sentences imposed.

e. Career Offenders

- The rate of imposition of below-range sentences for career offenders increased after *Booker*. The majority of the cases in which below-range sentences are being imposed for career offenders are drug trafficking cases.

- The average length of sentences imposed for career offenders has decreased after *Booker*. This continues the pattern that existed before *Booker*.

f. Early Disposition Programs

- Sentencing courts in districts without early disposition programs (EDP)[11] report relatively low rates of imposition of below-range sentences. In its 2003 Departure Report, the Commission expressed concern that these districts increasingly might grant below-range sentences to reach outcomes for similarly-situated defendants similar to the outcomes that would be reached in EDP districts. The data do not reflect that these concerns generally have been realized. In districts without EDP, the data do not reflect widespread use of *Booker* to grant below-range sentences to reflect sentences available in EDP districts.

E. CONCLUSION

The Commission intends to continue its outreach and training efforts and to regularly release updated, real-time data on rates of imposition of within-range and out-of-range sentences, types of sentences imposed, average sentence lengths, the reasons judges report for sentencing outside the guidelines system, and the results of sentencing appeals. Uniform and complete statements of reasons and timely reporting to the Commission by the district courts can provide valuable feedback to Congress, the Commission, the courts, and all others in the federal criminal justice community regarding the long-term impact of *Booker* on the federal sentencing system. This report is an important part of the Commission's efforts to inform careful consideration of the evolving post-*Booker* federal sentencing system.

[11] For a detailed discussion of Early Disposition Programs, *see* Chapter 6, Part G of this report.

REPRESENTING "ENEMY COMBATANTS"

PRESENTED BY

ANGELA CAMPBELL
ASSISTANT FEDERAL DEFENDER

Woodrow Wilson School
Princeton University

February 27, 2006

WHO'S AT GUANTANAMO, ANYWAY?

P. SABIN WILLETT

Who's at Guantanamo, anyway?

That's what I was wondering one hot day last July when I walked across a prison yard so silent and sterile as to be a little eerie. Nothing grew in the yard: no grass or flower or tree or even weed. A sailor had offered my escort the formal greeting: "Honor Bound." The soldier returning salute was supposed to respond, "To Defend Freedom," but he mumbled. It's hard to get the word, "freedom" out there.

We were walking toward a hut. Inside was a man chained to the floor. His name was Adel. My firm had filed a habeas case for him the previous March, but I'd never seen him or spoken to him before. Was he a terrorist? One of the worst of the worst?

You might be excused for thinking so. Three weeks before I got to Guantanamo, the Vice President said, "The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban." Even Karl Kastle on National Public Radio describes Guantanamo as a "terrorist detention facility."

But something was off, right from the first minute. Something about the young man's gentle smile, his calm didn't fit. On that day last July I discovered what our President, and his lawyers at the justice department, had kept secret from the public, and even from the court. That the military had concluded that Adel was innocent. Not a terrorist. Not an enemy soldier. Not a criminal. Never been on a battlefield. He'd been sold to U.S. forces from the soil of Pakistan, a nation with whom we have never been at war.

That's who's at Guantanamo. And he's not alone.

The Geneva Conventions

Let us begin with a few readings from scripture. Today's lessons are taken from the international law of armed conflict. Here is the first. From the third Geneva Convention. A soldier of the enemy is no criminal. When he tries to kill an American soldier on the battlefield, he engages in an honorable profession. Any soldier, of any enemy. He may be a Nazi of the Third Reich; a suicide bomber of the Empire of the Rising Sun; he may be a Viet Cong fighter who wore no uniform; he may be a member of the Taliban. When you declare a war you make of your opponent a soldier, which is to say, a person of honor. It is not for me to question the wisdom of Congress's decision to authorize the military to go after Al Qaeda and those responsible for the 9/11 attacks. But they did. And under Geneva, the enemy soldier must be treated as our own soldier would, housed, fed, attended by doctors, as a

soldier would; granted letters from home, as a soldier would; sent home when hostilities end, as a soldier would be.

Here is a second inflexible premise of Geneva. Torture is unthinkable. The prisoner, whether a lawful combatant under article 17 of the third, or unlawful under article 31 of the fourth convention, cannot even be coercively interrogated. That means no beatings, no waterboardings, no smearing of menstrual blood, no threats, no intimidation, no stress positions, no round-the-clock assaults with light or Limp Bizkit or Rotweilers, no withholding of benefits or even promises of privileges.

To round us out, a third rule. A nation engaging in international armed conflict must release prisoners of war promptly upon the end of hostilities, or determination that a given prisoner is not an enemy soldier. This rule follows from the first. You hold a prisoner of war in protective custody to stop him shooting at you. When the shooting stops, you let him go.

For long years, these rules were honored in this Country. No more.

On December 22, 2005, a federal judge ruled in Adel's case. It was the first ruling on the merits of any Guantanamo habeas case. The judge said the imprisonment was illegal. But he went on to say that it could do nothing about it. Adel is a refugee from communist china, a dissident. He cannot be returned there because the Chinese would torture him, or worse. The judge concluded he could not order his release within the continental US, because that would be to infringe on the President's control of immigration.

For the first time in the history of our judiciary, a federal judge concluded that he was powerless to relieve an illegal imprisonment.

Our military has known that Adel is not an enemy soldier for years. It concluded a review process, which was a formality, on March 26, 2005. Three days later, it filed a paper in the court meant to suggest he was a terrorist. The paper fooled the court until we met him last July. That month we asked for his immediate release. The President refused, arguing that he has a "wind up power." Releasing the innocent is "winding up" his warmaking power and so he can do it in an "orderly" fashion. How long does this power last, the judge asked? "As long as it takes," said the president's lawyer.

What authority was there for this? The authority of history, the government said. When World War II ended, it took some time to repatriate the German and Italian and Japanese prisoners of war. This was the same thing. Hearing of this later, one of my partners said, "You should talk to Louie."

Was he a lawyer?

Better: a barber, and like all barbers, an historian.

Louie is an *old* barber – he remembers Boston of 1944, when, before VE day, the Italian POWs had been turned loose on the streets. The resonant fact in Louie's mind half a century ago was that these Italians were permitted to flirt with young girls, a fact made more intolerable by the failure of the young girls to mind.

Turned loose? We dug into the archives. When Italy surrendered in 1943, eighteen months before VE day, Italian prisoners held at Fort Mackay in South Boston could not be repatriated

– the Italian peninsula remained in chaos – but yet they had to be released under Geneva's predecessors, the Geneva Convention of 1929 and Hague IV Convention of 1907. So they were released from the camps, billeted in a soldier's barracks, and given jobs and leave among the community. There were no reports of torture, although there were some of betrothal.

Our Justice Department cited only one written authority for unlimited detention power, an article. We looked everywhere for it. We went to the Boston Public Library and the Atheneum and because up in Boston we have no access to Princeton we had to settle for the Widener Library at Harvard and none of them had this article. Finally we found it, deep in the stacks of the New York Public Library. The article talked about this wind up power. It cited one historical example. This example indeed dealt with the power of indefinite postwar incarceration of prisoners. The example was Joseph Stalin.

If it makes anyone else here a little uneasy when our Department of Justice – when your Department of Justice relies on Stalin as authority for its conduct, you are in good company. The former general counsel of the Navy agrees with you. A major assigned to prosecute a war crimes case writes,

"When I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged."

Who is at Guantanamo?

A professor at Seton Hall this month published a study analyzing the data from the Military's own tribunals. He ignored completely and utterly anything and everything any prisoner or prisoner's lawyer contended. He relied exclusively on the military's conclusions. Here's what he found.

Vice President Cheney says these men were picked up on the battlefield. What do the data show? Five percent were picked up on the battlefield. Ninety five percent were not.

How did we get the rest? We distributed leaflets. Here is a smiling Afghan. He says:

> "Get wealth and power beyond your dreams... You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."

Eighty-six percent were sold to us by people who got the flyers.

Vice President Cheney says they men are Al Qaeda fighters. What do the data show? Eight percent are al Qaeda fighters. Ninety two percent are not.

Vice President Cheney says they committed hostile acts against Americans or their allies. What do the data say? 55% of the detainees committed no hostile act against the US or its allies or any one else. By the way, "hostile act" is construed extremely broadly. Fleeing

from the bombing by US forces is a hostile act. Being sold to US forces is a hostile act. Possessing a Kalashnikov rifle is a hostile act. It has been estimated that there were upwards of 10 million Kalashnikovs in Afghanistan in 2001, and only 8 million adult males. An adult Afghan male who hadn't possessed a Kalashnikov was harder to find than an adult Texan male who hadn't possessed a hunting rifle. If you walked into a restaurant in Kabul, you found Kalashnikovs hanging on the coat rack.

So how many, say, fired a shot at US forces? A vanishingly small percentage.

For 60% of the detainees, the only hook by which they are deemed enemy combatants is that they were "associated with" the Taliban. But you have to understand that in 2001 in Afghanistan, the Taliban was pervasive. Except in a few strongholds of the Northern Alliance, they controlled every village, every town, every guesthouse. If you traveled to Kabul and stayed in a guesthouse, you associated with the Taliban. If you were conscripted against your will into a Taliban militia, you "associated with" the Taliban. For two Saudis held at Guantanamo, their association with the Taliban is that the Taliban held them in prison as enemies of its regime.

I'm not making this up.

Who's at Guantanamo? Privates, orphans, the poor, conscripts, cooks, drivers. The mayors, the ministers, the Taliban generals – they're not there. Take Sayed Rahmutullah Hashemi. He joined the Taliban as a young man. He became a party spokesman. Osama bin Laden came to his office. Is Rahmutullah at Guantanamo? No. He is a Freshman at Yale.

Some of his former Taliban colleagues are now in the Afghan parliament we helped create. The desperately poor kids they employed as drivers and cooks sit in Guantanamo.

The last lie, the whopper, the huge one, is that Guantanamo holds terrorists. The President, the Vice President, their amen chorus in the Senate, they all tell you relentlessly, that these people are terrorists. I don't say that there is no terrorist there, although four years later not a single person has been convicted of a single terrorist act – but when you review the data, when you search it for anything remotely like a terrorist act – an act of violence against persons or property, when you search the military records for bombing or bombmaking or the teaching of bombmaking or the fundraising for it – when you search hundreds and hundreds of military records for this, you find that that is, most of all, who *isn't* at Guantanamo.

Here let me make a confession to you, not as a lawyer, but as a citizen. If there is anyone in Guantanamo who conspired in the 9/11 murders, then I would like to see him tried. If he is guilty I hope he is convicted. If tried and convicted by a court martial duly constituted under the Uniform Code of Military Justice, I would shed no tear for the ultimate sentence.

All that we lawyers have been asking for, for four years, is a hearing. A chance to show whether someone really is an enemy combatant or not.

Odd things used to happen when Guantanamo cases used to come up for an actual hearing, and there was a chance of finding out who's at Guantanamo. Shafiq Rasul is an example. After the government had worked to dismiss the habeas case, and succeeded, and succeeded again, and through two years held Rasul in prison, what happened after his case came under Supreme Court scrutiny?

They released him.

What happened to Moazzem Begg? Another worst of the worst? What happened to Moazzem Begg after the fortuity that he happened to get a lawyer and she started doing the fearless things lawyers do, and the story of what our government had done to Moazzem Begg became public?

They released him.

Mamdouh Habib?

When the story of his torture in Egypt surfaced, they released him.

They told us these people were the worst of the worst, and yet rather than prove it, rather than protect you and me from them, they released them before a judge could see any facts.

The Nazi war criminals were tried in the sunlight. When Robert Jackson summed for the prosecution, he said this:

> "Of one thing we may be sure. The future will never have to ask, with misgiving: "What could the Nazis have said in their favor?" History will know that whatever could be said, they were allowed to say. The extraordinary fairness of these hearings is an attribute of our strength."

The world has never doubted the judgment at Nuremberg. But in no Gitmo habeas case has the President been willing to let a federal judge hear a single fact about the worst of the worst.

The War on Terror

I invite you to examine for a moment this global war on terror. The proposition is that so long as an undeclared global war is pending against a common noun, the President has the following powers.

First, he can seize anyone, anywhere in the world, and transport him or her to Guantanamo Bay, where he may hold him without criminal charge or process. He may do so even after he has determined that the person was taken by mistake, as in Adel's case. As long as the war on terror lasts.

Second, he can bug your phone, or your computer, or your bedroom, without a warrant, as long as the war on terror lasts.

Third, although on December 30, 2005 he signed an act of Congress that forbids anyone in our government from participating in torture, anywhere on earth, he can ignore this law as long as the war on terror lasts.

So I want you to ask a question. How long will the war on terror last?

One way to get a sense of how long it will last, is to consider how long terror has lasted already.

We can all agree that terrorism has flourished in the Middle East since the Balfour Declaration in 1917. Palestinians engaged in terrorist acts against Jews and, latterly, Israelis. Israelis, and before 1948, Zionists, engaged in terrorist acts against Palestinians. Palestinians murdered 59 Jews in Hebron in August, 1929, to pick one obscenity from a thousand. The Israeli Baruch Goldstein murdered 29 Palestinians at prayer in February 1994, to pick another from a thousand more.

How far do you want to go back with terrorism? To Tsarist Russia, when the "anarchists" – we'd call them terrorists today – attacked civilians and in 1881, murdered Tsar Alexander II?

To 1867, when the Fenians, precursors of the Irish Republican Army, began bombings in England?

To the Paris of the 1790s, when the Committee of Public Safety wreaked havoc on civilians – a time known as the "Terror?"

To 1717, when the pirate Blackbeard terrorized Charleston, South Carolina?

Shall we go back to the 17th Century, when the murder of civilians, the destruction of homes and crops and livestock was the commonest form of conflict on this continent between the indigenous people and the invading Europeans, and an English general won naming rights for a small college in my home state – perhaps you've heard of Amherst – a general whose chief exploit was the deployment of bioterrorism through distribution of smallpox-infested blankets to the natives.

Shall we go back to the late 15th Century, and ask the Arawaks – if we could find one – whether terrorism was practiced by Columbus?

Or shall we simply go all the way back to the Zealots, in the 1st Century A.D., murdering Romans and Jewish citizens viewed as collaborators?

How long has terror lasted? Since history was recorded.

Where is terror today? In Chechnya and Tibet, in India and Indonesia and the Philippines, the Basque areas of Spain, Somalia, Rwanda, El Salvador, in regions of Turkey, all over Iraq, Israel, the Palestinian territories, In the 16th Street Baptist Church in Birmingham, Alabama. In Oklahoma City. In a farmer's field in Pennsylvania and on Manhattan Island.

You never quite know who might be a terrorist. Egyptian President Anwar Al-Sadat in the 1940s founded a "murder society" to attack British civilians in the canal zone. Ariel Sharon, stood at the gates of Sabra and Shatilla. Menachem Begin, another Prime Minister of Israel, in 1946 he blew up the King David Hotel in Jerusalem and laid waste to the village of Deir Yassin.

We need to acknowledge, if we are thoughtful people, that terror is everywhere, and has been with us always, and involves all kind of people who later get called "men of peace."

My point is not that we should not struggle against terrorism. It is to ask, does any person in this room, does any single thoughtful person on this campus think she will live to see the *end* of terrorism? And thus the end of the global war against it? Do you think you'll watch on TV as the Emperor of Terror comes aboard a Navy warship to sign the instrument of

surrender? A phenomenon that has run down from the 1st Century to the 21st, you think George Bush is the measure of? Your grandchildren will never see that ticker-tape parade.
So can we at least be honest with ourselves. When we say the President has special powers during the global war on terror, we are saying he has them forever. Always and forever can the President lock people up at Guantanamo without meaningful judicial review. Always and forever he can ignore the Congress's ban of torture, as he vowed to do last December 30. Always and forever he can ignore the FISA court, and tap your phone, download your I-Mac, and go snuffling through your trash. Especially here. There are all kinds of strange people wandering around old Nassau with funny hats on their heads, talking strange languages. Muslims, I hear. Who knows what they're up to? And the non-Muslims talk to the Muslims sometimes. Better bug their phones too. Or maybe we should just detain them. Take them to Guantanamo, where the writ of habeas corpus has been abolished.

The Writ of Habeas Corpus

Now what is habeas corpus? A quaint Latin subjunctive, I used to think, the last refuge of a serial murderer who has exhausted all the courts of Texas or Florida.

But the writ of habeas corpus is much more than that. For seven centuries it protected the least of us from the greatest, the humble subject or citizen from her king or president. Its roots run back to Runnymede itself. This ancient common-law right is so important that it is the only one singled out by the Constitution of the United States for recognition.

Habeas is this simple proposition: that whenever it imprisons a human being, the executive can be required to justify that imprisonment in law. Power, desire, fiat – these are not justifications. There must be law. And if there is no law, a judge must order the prisoner freed.

You'd think that point was settled. And yet we find the President's lawyers advocating the proposition that he may seize people on the streets of Sarajevo or Doha or Bangkok, shackle them, hood them, send them to a desert island, and there hold them in prison, forever, without saying why. That he may conduct tribunals in which the defendant never sees a lawyer – or even the critical evidence. We find all of this done in the name of security, under the premise that our generation faces a threat that our grandfathers did not: as if Americans were not killed at Pearl Harbor and Normandy; as if Americans did not fear the U-boats off Long Island or the Japanese Kamikazis; as if Washington felt no threat in 1862 by the encampment of an enemy army at Sharpsburg, Maryland, fifty-six miles away. And we find, on December 30, a pliant and docile Congress, a parliament of mice, doing his bidding and trying to abolish a legal right that has been a hallmark of freedom for seven centuries.

The Uighurs

Which brings me back to Adel, who is a strange footnote to this whole sordid business. He is at Guantanamo this afternoon, and will be there tonight, and when you wake up in the morning, and the next day, and the next.

Adel's case demonstrates it's all a show. It doesn't matter whether they are enemy combatants or not, whether the military tribunals clear them or they don't. They sit in prison at the President's pleasure anyway.

But the Uighurs are a distant people. They come from a part of central Asia none of us has ever seen. And in the dark corners of our hearts, maybe a few of us are willing to forget that these Uighurs bleed if you cut them, that they have children, and parents and wives, that they long for a good joke and nice lamb kebab, and a six-year old to wiggle in the lap, and a garden to dig in, and the noise and clatter of a family meal, and the touch of a hand that wears no rubber glove. If a few Uighurs get caught up in the war on terror, well, stuff happens. Small price to pay, eh?

Captain Yee

So let's talk about the price in more approachable terms. Since we are in the Garden State, let's talk about a real son of New Jersey. His name is James Yee. He used to be a captain in the United States Army. Yee is an all-American story. Lutheran church. High school wrestling team. Joined the long gray line at West Point.

In his twenties he converted to Islam. He was assigned to be the chaplain at Guantanamo Bay in 2002. In September 2003, in Jacksonville Florida, on his way to join his wife and daughter on his first leave from the base, He was arrested. They took his papers and his laptop. They cuffed him and hooded him as they do to the Guantanamo prisoners, and they took him to the brig at the Charleston Navy Yard, where he was put in solitary. He was charged with treason, with aiding the enemy, and with taking classified information from the base.

Imagine being Captain Yee for a moment. You have sworn an oath to defend the constitution. You have promised to do so with your life. You have devoted your whole education, your entire career, to the Army. You have been promoted to captain. And in the space of 24 hours you are put in solitary confinement, accused of betraying your nation, and held to face the death penalty.

Base Commander Major Gen. Geoffrey D. Miller led the charge against Captain Yee. This is the same General Miller who exported Guantanamo torture tactics to Abu Ghraib. Who recently beat a retreat to the Fifth Amendment during the courts martial of soldiers under his command. General Miller was up to his medals in Captain Yee's case. He all but wrote the press release. And how the press responded – they bayed for Captain Yee like hounds. It was all over Fox and CNN and USA Today. Traitor ! Terrorist! Muslim! Classified documents! They staked out his home in Seattle. They interviewed his neighbors. Yee's wife was frightened half to death. General Miller's people told her he was a terrorist, he was disloyal, he was having affairs with other women.

After a month of this hysteria, Captain Yee's lawyer made a request. The classified documents that my client took from the base, may I see them? No, said the military. The lawyer is a former Lt. Commander in the Coast Guard, but the military said, you don't have clearance. All right, said the lawyer, show me the nonsecret documents. We haven't determined which is which yet, said the military. This was more than a month after Capt. Yee had been thrown in solitary. Chew on that one for a bit.

The lawyer pressed for a hearing, the prosecutors for delay. Captain Yee's solitary imprisonment continued.

But here is the difference between Captain Yee and my client, Adel. Captain Yee is a citizen. The government has not yet succeeded in stripping all rights from citizens. They've tried –

ask Messrs. Hamdi and Padilla – but they haven't yet succeeded. There is, at least in theory, still a constitution that protects citizens, global war on terror notwithstanding. So finally the military judge insisted that the government proceed to trial. At this point, what did General Miller do? First, he came skulking around for a deal. Plead guilty and we'll reduce the sentence. But General Miller was dealing with something unfamiliar to him: a man of honor. Captain Yee said, you can throw me in solitary for seventy days or seventy thousand, and I will not plead guilty. You charged me with treason, General. You threatened me and my wife and wrecked my career. Bring it.

He didn't bring it. General Miller dropped it. The treason, the classified information, the aiding the enemy. All dropped. He didn't proceed to trial on those charges, or lesser charges, because there was no evidence, none, of the slightest wrongdoing. There was never any evidence. Not a shred. Not one iota. Not a single witness. Not a single piece of paper. Nothing. Ever. From beginning to end it was a public relations exercise, a conscious and deliberate falsehood, a lie conceived and prosecuted by the architect of Abu Ghraib, Major General Geoffrey D. Miller. Please remember that name. It deserves to be remembered.

When the charges were dropped, it wasn't much of a story on Fox, or CNN, or in USA Today.

Did General Miller apologize to this Army Captain, this officer under his command whom he had betrayed? Whom he'd thrown in to the brig for 76 days? No, he slunk ahead with one last charge: adultery. Adultery is indeed an offence under the Uniform Code of Military Justice. In the military it generally is ignored. Sometimes there are quiet administrative reprimands. There's your war on terrorism: a trumped up charge against a Muslim, with a lot of noisy press, followed by a shameful retreat, and one last parting shot, a mean-spirited adultery charge. That is your government, hard at work on the war on terror, here in New Jersey.

The adultery was reversed, by the way, by a more senior general.

Why Care?

Now you might ask, why care about this? I don't mean legally, I mean ethically. Why volunteer your time to represent these men? It's the war on terror, isn't it? So what if somebody is roughed up a little in Kandahar or Bagram – there are horrors in Darfur and New Orleans. So what if a few Uighurs pay the price – we have reservists from Vermont losing mortgages. Injustices abound in the world. Why care about this particular one? The question ought to be asked.

I can tell you why the JAG officers care. Because of American troops in the field. You want 19-year-old Americans treated like human beings? Or do you want to see Iraqi thugs dressing up prisoners in Gitmo orange and cutting off their heads on the Internet? Does anyone think there isn't a connection? Not JAG.

With me there is another point, and I make no bones about it. I want my flag back. My country has been hijacked and I want it back. If we care about being a civilized people, then it is precisely in times of fear that we have to hold fastest to our rule of law. We already have the tools to deal with fanatics who blow up buildings and murder the innocent. We knew how to deal with Timothy McVeigh and not surrender our souls.

During the Viet Nam war, a protestor stood outside the White house, with a candle. Every night, for weeks. He stood in the cold, in the rain. One day a reporter came up to him, and asked, "Do you really think, with your candle, you're going to change White House Policy?" "No," he said, "I'm sure I won't change White House policy. But that's not why I'm doing this."

"Then why are you doing this?" the reporter asked.

"So that White House policy doesn't change me."

Can I bring you any good news? Only a little. Adel's story made its way to the press, and thence to Sweden, where a Uighur woman was living as a refugee. On July 28, 2005, I listened on a telephone as she wept. She is Adel's sister, and for long years thought he was dead. You see, no one knows who is in Guantanamo. A few weeks later, with the help of some judicial pressure, we organized a very unusual event at Gitmo. A phone call between these two people, Adel and his sister. I saw Adel again late in August, after that call. The sleepy-eyed man had come to life. Before, he told me, "it was as though I had evaporated from the earth." A phone call – so small a thing.

Closing

May I say, by the way that you have invited to speak to you this afternoon the least competent lawyer in America. This is a rather dismaying to me, and not without its disagreeable implications for the Wilson School, but it is an objective fact. Incompetence may be all around you, but only I have failed to obtain release of men whose imprisonment a federal judge says is unlawful. And so I count myself lucky to have received your invitation, and fear you may think me ungracious if I close with you truthfully.

Because the truth is, I hold you responsible for Guantanamo. Personally. Until you close it down, you're the ones keeping it open. It is no good wringing one's hands about the Bush administration. Democracy is the civic expression of the law of principal and agent. You and I are responsible for what he does. If at Bagram Air Base they murder a taxi driver called Dilawar by hanging him from his arms, if at Abu Ghraib they leer at naked men stacked like cordwood and take their photographs, if at Guantanamo they leave a man in solitary confinement until he talks to himself and tears the hair from his scalp, if a woman smears on a devout muslim what she says is her menstrual blood, if they ship a man to Egypt and there make shift to drown him until he signs a confession, if they use the strappado on a man in Morocco, if they imprison men in secret even after their own tribunal has acquitted them, and hide that fact from court and countrymen, and if you and I have not done all that we can to renounce this, and to stop it happening – if we have not written and telephoned and emailed our congressman and our senators and our president and our local newspapers, and if we have not given a hundred dollars or fifty or even ten to Amnesty International and the Center for Constitutional Rights, then you and I are responsible for it. We might as well have done it ourselves.

"Things fall apart; the centre cannot hold," Yeats wrote. "Mere anarchy is loosed upon the world ... The best lack all conviction, while the worst Are full of passionate intensity."

The best lack all conviction. We make wars for lies and the best do not demand the truth. We watch our young men killed, maimed, paralyzed every day and the best do not demand an end. A habeas corpus judge rules that innocent men are held at guantanamo and eight days

later the Congress abolishes habeas corpus. The best lack all conviction. We drop bombs on villages in Pakistan oblivious even to our own interest. Do we think the dozens of women and children slain that day had no fathers, brothers, sons? Do we not think that for every enemy it struck down, America in that bombing gave birth to a dozen, two dozen, to fifty people sworn to hate us forever, sworn to believe forever the worst that is said of us?

The best lack all conviction. That is the problem.

A nation that hides behind the high water mark and permits its stewards to act like animals so long as they do it just over the horizon is not a strong nation, but a puny and a feeble one. And it is a damned foolish nation if it does not think it will soon reap at home what it sows abroad.

The rule of law is not coming back on its own. It will come back only when the best get conviction again. When you go out and grab hold of it by the ears and drag it back. In the ballot box and the courtroom and the newspaper and the classroom and the public street. You in this room are young and bright and strong and you can, if you choose, drag it back. But only if you have conviction.

I have a favor to ask. Can you remember where you were in January, 2002? Think back. Now reflect for a moment on what has happened in your life since then. Where you've been. What you've done. Whom you've loved. Who has loved you. With me? Have that in mind? Okay, here's my request. On behalf of Adel, who is a real man, with real people to love, and real people who love him, grant me thirty seconds. Imagine that none of those things in your life happened, none of those events, because every single one of those days since January 2002, you had been cut off in a prison, just outside the map of the world. Even though the military determined there was no basis to hold you. And imagine the Congress of the United States voted to deny you the chance to ask a judge to make it right. Spend thirty seconds thinking about that.

Thirty seconds is longer than you think. Thank you. I am grateful for that half a minute. And for your kind invitation to come here today.

So who's at Guantanamo? The truth is, the answer to the question, is – You. And me. Until we shut it down, it imprisons all of us.

One more thing. I was last at Guantanamo in January. As my escort led me into the prison facility, to Camp Five, where I was to meet a client, we saw big construction cranes against the sky. You see, they're building Camp Six.

Thank you very much.

* * *

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[PEGC – 2006.03.01 – CBG]

*542 U.S. 466, *; 124 S. Ct. 2686, **;*
*159 L. Ed. 2d 548, ***; 2004 U.S. LEXIS 4760*

SHAFIQ **RASUL,** et al., Petitioners v. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, et al. FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al., Petitioners v. UNITED STATES et al.

(No. 03-334), (No. 03-343)

SUPREME COURT OF THE UNITED STATES

542 U.S. 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548; 2004 U.S. LEXIS 4760; 72 U.S.L.W. 4596; 2004 Fla. L. Weekly Fed. S 457

April 20, 2004, Argued
June 28, 2004, Decided *

* Together with No. 03-343, Al Odah et al. v. United States et al., also on certiorari to the same court.

NOTICE:
The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Al Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 2003 U.S. App. LEXIS 4250 (2003)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:
PROCEDURAL POSTURE: Petitioner aliens filed various actions challenging the legality of their detention at the Guantanamo Bay Naval Base. They invoked the court's jurisdiction under 28 U.S.C.S. §§ 1331 and 1350 and asserted various causes of action including federal habeas corpus. The United States Court of Appeals for the District of Columbia Circuit affirmed dismissal for want of jurisdiction. The aliens petitioned for a writ of certiorari.

OVERVIEW: The U.S. military had held the aliens, along with approximately 640 other non-Americans captured abroad, at the Naval Base at Guantanamo Bay. The court distinguished them from the Eisentrager detainees in important respects: They were not nationals of countries at war with the United States, and they denied that they have engaged in or plotted acts of aggression against the United States; they had never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they had been imprisoned in territory over which the United States exercised exclusive jurisdiction and control. No party questioned the district court's jurisdiction over the aliens' custodians. The court held that 28 U.S.C.S. § 2241 required nothing more and that it conferred on the district court jurisdiction to hear the habeas corpus challenges. Furthermore, the fact that the aliens were being held in military custody was immaterial to the question of the district court's jurisdiction over their nonhabeas statutory claims. 28 U.S.C.S. § 1350 explicitly conferred the privilege of suing for an actionable tort on aliens.

OUTCOME: The judgment of the circuit court was reversed and the case was remanded for the district court to consider in the first instance the merits of the aliens' claims.

CORE TERMS: alien, prisoner, detainee, territory, custody, territorial jurisdiction, detained, military, writ of habeas corpus, detention, habeas corpus, sovereign, enemy, treaty, abroad, captured, jurisdictional, sovereignty, custodian, hostilities, legality, lease, federal district, territorial, parte, confinement, convicted, domestic, confined, confer

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Constitutional Law > Congressional Duties & Powers > Lower Federal Courts
Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
HN1 Congress has granted federal district courts, within their respective jurisdictions, the authority to hear applications for habeas corpus by any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C.S. § 2241(a), (c)(3).

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
Governments > Courts > Authority to Adjudicate
HN2 The United States Supreme Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
HN3 The United States Supreme Court has held that a prisoner's presence within the territorial jurisdiction of the district court is not an invariable prerequisite to the exercise of district court jurisdiction under the federal habeas statute. Rather, because the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts within its respective jurisdiction within the meaning of 28 U.S.C.S. § 2241 as long as the custodian can be reached by service of process.

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
HN4 Whatever traction the presumption that congressional legislation does not to have extraterritorial application unless such intent is clearly manifested might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
Constitutional Law > The Judiciary > General Overview
Criminal Law & Procedure > Habeas Corpus > Procedure > Filing of Petition > Jurisdiction
HN5 By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
Governments > Courts > Authority to Adjudicate
Immigration Law > Constitutional Foundations > Statutory Application & Interpretation
HN6 Aliens held at the Guantanamo Bay Naval Base, no less than American citizens, are entitled to invoke the federal courts' authority under 28 U.S.C.S. § 2241.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Alienage Jurisdiction > General Overview
Immigration Law > Judicial Review > Habeas Corpus > Detentions
HN7 The courts of the United States have traditionally been open to nonresident aliens. And indeed, 28 U.S.C.S. § 1350 explicitly confers the privilege of suing for an actionable tort committed in violation of the law of nations or a treaty of the United States on aliens alone.

DECISION: [*548]** Federal District Court held to have jurisdiction, under federal habeas corpus provision (28 USCS § 2241), to review legality of executive detention of some foreign nationals who were incarcerated at Guantanamo Bay Naval Base in Cuba.

SUMMARY: From 2002 and onward, more than 600 persons who had been captured abroad during hostilities between the United States and the Taliban regime in Afghanistan were held in executive detention at the Guantanamo Bay Naval Base in Cuba. This naval base was occupied by the United States under a lease and treaty recognizing Cuba's ultimate sovereignty, but giving the United States complete jurisdiction and control.

From among these detainees, two Australian citizens and 12 Kuwaiti citizens filed various actions in the United States District Court for the District of Columbia against the United States and some federal and military officials. The plaintiffs (1) denied having engaged in or plotted acts of aggression against the United States; and (2) alleged that they were being held in federal custody in violation of the laws of the United States, in that they had been imprisoned without having been charged with any wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court's jurisdiction was invoked under the federal-question statute (28 USCS § 1331), the Alien Tort Statute (28 USCS § 1350), and a federal habeas corpus provision (28 USCS § 2241(c)(3)) that authorized Federal District Courts to entertain habeas corpus applications by persons claiming to be held in custody "in violation of the Constitution or **[***549]** laws or treaties of the United States." The plaintiffs asserted causes of action under statutes such as § 1350 and the general federal habeas corpus statute (28 USCS §§ 2241-2243).

The District Court, construing all of the actions as petitions for writs of habeas corpus, dismissed the actions for want of jurisdiction, on the asserted ground that aliens detained outside the sovereign territory of the United States could not invoke a habeas corpus petition (215 F Supp 2d 55). The United States Court of Appeals for the District of Columbia Circuit, in affirming, concluded that the privilege of litigation in United States courts did not extend to aliens in military custody who had no presence in any territory over which the United States was sovereign (355 US App DC 189, 321 F3d 1134).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Stevens, J., joined by O'Connor, Souter, Ginsburg, and Breyer, JJ., it was held that the District Court had jurisdiction, under 28 USCS § 2241, to review the legality of the plaintiffs' detention, for:

(1) The plaintiffs were not nationals of countries at war with the United States.

(2) A presumption against the extraterritorial application of congressional legislation had no application to the operation of § 2241 with respect to persons detained within the territorial jurisdiction of the United States.

(3) There was little reason to think that Congress intended the geographical coverage of § 2241 to vary depending on the detainee's citizenship, given that § 2241 (a) would have created federal-court jurisdiction over the claims of a United States citizen held at the Guantanamo base, and (b) drew no distinction between United States citizens and aliens held

in federal custody.

(4) Application of § 2241 to persons detained at the base was consistent with the historical reach of the writ of habeas corpus.

(5) No party questioned the District Court's jurisdiction over the plaintiffs' custodians.

Kennedy, J., concurring in the judgment, expressed the view that (1) federal courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo base, in light of (a) the base's status as a United States territory in every practical respect and as a territory far removed from any hostilities, and (b) the indefinite pretrial detention of the detainees; and (2) although there were circumstances in which the courts maintained the power and the responsibility to protect persons from unlawful detention even where military affairs were implicated, there was a realm of political authority over military affairs where the judicial power could not enter.

Scalia, J., joined by Rehnquist, Ch. J., and Thomas, J., dissenting, expressed the view that (1) the majority opinion's holding contradicted a half-century-old Supreme Court precedent on which the military had undoubtedly relied, and (2) the President of the United States--as Commander in Chief--and his subordinates had had every reason to expect that the internment of combatants at the Guantanamo base would not have the consequence of **[***550]** bringing the cumbersome machinery of United States domestic courts into military affairs.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
HABEAS CORPUS §5
-- federal-court jurisdiction -- foreign detainees at naval base
Headnote: [1A] [1B] [1C] [1D] [1E] [1F]

A Federal District Court had jurisdiction, under a federal habeas corpus provision (28 USCS § 2241), to review the legality of the executive detention of some foreign nationals who were incarcerated at the Guantanamo Bay Naval Base in Cuba--a territory over which the United States exercised plenary and exclusive jurisdiction, but not ultimate sovereignty--where:

(1) The foreign nationals, although captured abroad in connection with hostilities, (a) were not nationals of countries at war with the United States; (b) denied having engaged in or plotted acts of aggression against the United States; and (c) alleged that they were being held in federal custody in violation of the laws of the United States, in that they had been imprisoned without having been (i) charged with any wrongdoing, (ii) permitted to consult counsel, or (iii) provided access to courts or other tribunals.

(2) A presumption against the extraterritorial application of congressional legislation had no application to the operation of § 2241 with respect to persons detained within the territorial jurisdiction of the United States.

(3) There was little reason to think that Congress intended the geographical coverage of § 2241 to vary depending on the detainee's citizenship, given that § 2241 (a) would have created federal-court jurisdiction over the claims of a United States citizen held at the base in question, and (b) drew no distinction between United States citizens and aliens held in federal custody.

(4) Application of § 2241 to persons detained at the base was consistent with the historical reach of the writ of habeas corpus.

(5) No party questioned the District Court's jurisdiction over the foreign nationals' custodians.

[*LEdHN2]**
HABEAS CORPUS §41
-- persons in custody -- incarceration at naval base
Headnote: [2A] [2B]

The allegations of some foreign nationals who were incarcerated at the Guantanamo Bay Naval Base in Cuba and who challenged the legality of their detention under the general federal habeas corpus statute (28 USCS §§ 2241-2243)--that, although they had engaged neither in combat nor in acts of terrorism against the United States, they had been held in executive detention for more than 2 years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing--described "custody in violation of the Constitution or laws or treaties of the United States" within the meaning of 28 USCS § 2241(c)(3), which authorizes Federal District Courts to entertain habeas corpus applications by persons claiming to be held in such custody. **[***551]**

[*LEdHN3]**
COURTS §256
COURTS §405
-- jurisdiction -- federal question -- aliens -- military custody
Headnote: [3]

With respect to some foreign nationals who were incarcerated at a United States naval base in Cuba and who invoked the jurisdiction of a Federal District Court under the federal-question statute (28 USCS § 1331) and the Alien Tort Statute (28 USCS § 1350) in order to challenge the legality of their detention, the fact that such foreign nationals were being held in military custody was immaterial to the question of the District Court's jurisdiction over their claims, for nothing in any of the United States Supreme Court's cases categorically excluded aliens detained in military custody outside the United States from the privilege of litigation in United States courts.

SYLLABUS: Pursuant to Congress' joint resolution authorizing the use of necessary and appropriate force against nations, organizations, or persons that **[***552]** planned, authorized, committed, or aided in the September 11, 2001, al Qaeda terrorist attacks, the President sent Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners, 2 Australians and 12 Kuwaitis captured abroad during the hostilities, are being held in military custody at the Guantanamo Bay, Cuba, Naval Base, which the United States occupies under a lease and treaty recognizing Cuba's ultimate sovereignty, but giving this country complete jurisdiction and control for so long as it does not abandon the leased areas. Petitioners filed suits under federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court construed the suits as habeas petitions and dismissed them for want of jurisdiction, holding that, under *Johnson* v. *Eisentrager,* 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936, aliens detained outside United States sovereign territory may not invoke habeas relief. The Court of Appeals affirmed.

Held:

United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.

(a) The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U.S.C. § 2241 [28 USCS § 2241], which authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States," §§ 2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

(1) The Court rejects respondents' primary submission that these cases are controlled by *Eisentrager*'s holding that a District Court lacked authority to grant habeas relief to German citizens captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in occupied Germany. Reversing a Court of Appeals judgment finding jurisdiction, the *Eisentrager* Court found six critical facts: The German prisoners were (a) enemy aliens who (b) had never been or resided in the United States, (c) were captured outside U. S. territory and there held in military custody, (d) were there tried and convicted by the military (e) for offenses committed there, and (f) were imprisoned there at all times. 339 U.S., at 777, 94 L. Ed. 1255, 70 S. Ct. 936. Petitioners here differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. The *Eisentrager* Court also made clear that all six of the noted critical facts were relevant only to the question of the prisoners' *constitutional* entitlement to habeas **[***553]** review. *Ibid.* The Court's only statement on their *statutory* entitlement was a passing reference to its absence. *Id.,* at 768, 94 L. Ed. 1255, 70 S. Ct. 936. This cursory treatment is explained by the Court's then-recent decision in *Ahrens* v. *Clark,* 335 U.S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443, in which it held that the District Court for the District of Columbia lacked jurisdiction to entertain the habeas claims of aliens detained at Ellis Island because the habeas statute's phrase "within their respective jurisdictions" required the petitioners' presence within the court's territorial jurisdiction, *id.,* at 192, 92 L. Ed. 1898, 68 S. Ct. 1443. However, the Court later held, in *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 494-495, 35 L. Ed. 2d 443, 93 S. Ct. 1123, that such presence is not "an invariable prerequisite" to the exercise of § 2241 jurisdiction because habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts "within [its] respective jurisdiction" if the custodian can be reached by service of process. Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* does not preclude the exercise of § 2241 jurisdiction over petitioners' claims.

(2) Also rejected is respondents' contention that § 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent, *EEOC* v. *Arabian American Oil Co.,* 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227. That presumption has no application to the operation of the habeas statute with respect to persons detained within "the [United States'] territorial jurisdiction." *Foley Bros., Inc.* v. *Filardo,* 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses. Respondents concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' § 2241 authority.

(3) Petitioners contend that they are being held in federal custody in violation of United States laws, and the District Court's jurisdiction over petitioners' custodians is unquestioned,

cf. *Braden,* 410 U.S., at 495, 35 L. Ed. 443, 93, S. Ct. 1123. Section 2241 requires nothing more and therefore confers jurisdiction on the District Court.

(b) The District Court also has jurisdiction to hear the *Al Odah* petitioners' complaint invoking 28 U.S.C. § 1331, the federal question statute, and § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U. S. courts. Nothing in *Eisentrager* or any other of the Court's cases categorically excludes aliens detained in military custody outside the United States from that privilege. United States **[***554]** courts have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit,* 208 U.S. 570, 578, 52 L. Ed. 625, 28 S. Ct. 337. And indeed, § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners are being held in military custody is immaterial.

(c) Whether and what further proceedings may become necessary after respondents respond to the merits of petitioners' claims are not here addressed. 321 F.3d 1134

, reversed and remanded.

COUNSEL: **John J. Gibbons** argued the cause for petitioners.

Theodore B. Olson argued the cause for respondents.

JUDGES: Stevens, J., delivered the opinion of the Court, in which O'Connor, Souter, Ginsburg, and Breyer, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined.

OPINIONBY: STEVENS

OPINION: **[*470]** **[**2690]** Justice **Stevens** delivered the opinion of the Court.

[*LEdHR1A]** [1A]↑ These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U. S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224. Acting pursuant to that authorization, the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities **[*471]** between the United States and the Taliban. n1 Since early 2002, the U. S. military has held them--along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad--at the Naval Base at Guantanamo Bay. Brief for United States 6. The United States occupies the Base, which comprises 45

square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the **[***555]** Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of **[**2691]** the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." n2 In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo." n3

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n1 When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody.

n2 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement). A supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of "two thousand dollars, in gold coin of the United States" and to maintain "permanent fences" around the base. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I-II, T. S. No. 426.

n3 Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat 1683, T. S. No. 866 (hereinafter 1934 Treaty).

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In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has **[*472]** ever engaged in any terrorist acts. n4 They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. App. 29, 77, 108. n5

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n4 Relatives of the Kuwaiti detainees allege that the detainees were taken captive "by local villagers seeking promised bounties or other financial rewards" while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U. S. custody. App. 24-25. The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was turned over to the United States. *Id.,* at 84. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U. S. custody. *Id.,* at 110-111.

n5 David Hicks has since been permitted to meet with counsel. Brief for United States 9.

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The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. *Id.,* at 98-99, 124-126. Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. *Id.,* at 34. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the court's jurisdiction under 28 U.S.C. §§ 1331 and 1350 [28 USCS §§ 1331 and 1350], among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706 [5 USCS §§ 555, 702, 706]; the Alien Tort Statute, 28 U.S.C. § 1350 [28 USCS § 1350]; and the general federal habeas corpus statute, §§ 2241-2243. App. 19.

Construing all three actions as petitions for writs of habeas corpus, the District Court dismissed them **[***556]** for want of jurisdiction. The court held, in reliance on our opinion in *Johnson* v. *Eisentrager,* 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), that "aliens detained outside the sovereign territory of the United States **[*473]** [may not] invok[e] a petition for a writ of habeas corpus." 215 F. Supp. 2d 55, 68 (DC 2002). The Court of Appeals affirmed. Reading *Eisentrager* to hold that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" 321 F.3d 1134, 1144 **[**2692]** (CADC 2003) (quoting *Eisentrager,* 339 U.S., at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936), it held that the District Court lacked jurisdiction over petitioners' habeas actions, as well as their remaining federal statutory claims that do not sound in habeas. We granted certiorari, 540 U.S. 1003, 540 U.S. 1003, 157 L. Ed. 2d 407, 124 S. Ct. 534 (2003), and now reverse.

II

HN1 Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a), (c)(3) [28 USCS §§ 2241(a), (c)(3)]. The statute traces its ancestry to the first grant of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. See *Felker* v. *Turpin,* 518 U.S. 651, 659-660, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996).

Habeas corpus is, however, "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Williams* v. *Kaiser,* 323 U.S. 471, 484, n. 2, 89 L. Ed. 398, 65 S. Ct. 363 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago, became "an integral part of our common-law heritage" by the time the **[*474]** Colonies achieved independence, *Preiser* v. *Rodriguez,* 411 U.S. 475, 485, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973), and received explicit recognition in the Constitution, which forbids suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2.

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus "beyond the limits that obtained during the 17th and 18th centuries." *Swain* v. *Pressley,* 430 U.S. 372, 380, n. 13, 51 L. Ed. 2d 411, 97 S. Ct. 1224 (1977). But "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v.

St. Cyr, 533 U.S. 289, 301, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001). See also *Brown* v. *Allen,* 344 U.S. 443, 533, 97 L. Ed. 469, 73 S. Ct. 397 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without **[***557]** judicial trial"). As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U. S. custody:

> "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 218-219, 97 L. Ed. 956, 73 S. Ct. 625 (1953) (dissenting opinion).

Consistent with the historic purpose of the writ, *HN2*this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in **[**2693]** wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte* **[*475]** *Milligan,* 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin,* 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942), and its insular possessions, *In re Yamashita,* 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946).

[*LEdHR1B]** [1B] The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." n6

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n6 1903 Lease Agreement, Art. III.

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III

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager.* In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager* v. *Forrestal,* 84 U.S. App. D.C. 396, 174 F.2d 961, 963 (CADC 1949). In reversing that determination, this Court summarized the six critical facts in the case:

> "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.* To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory **[*476]** and there held in military **[***558]** custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U.S., at 777, 94 L. Ed. 1255, 70 S. Ct. 936.

On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears." *Id.,* at 781, 94 L. Ed. 1255, 70 S. Ct. 936.

[*LEdHR1C]** [1C]↑ Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. **[**2694]** *Id.*, at 777, 94 L. Ed. 1255, 70 S. Ct. 936. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.,* at 768, 94 L. Ed. 1255, 70 S. Ct. 936.

Reference to the historical context in which *Eisentrager* was decided explains why the opinion devoted so little attention to question of statutory jurisdiction. In 1948, just two months after the *Eisentrager* petitioners filed their petition for habeas corpus in the U. S. District Court for the District of Columbia, this Court issued its decision in *Ahrens* v. *Clark,* 335 U.S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443, a case concerning the application of the habeas statute to the petitions of 120 Germans who were **[*477]** then being detained at Ellis Island, New York, for deportation to Germany. The *Ahrens* detainees had also filed their petitions in the U. S. District Court for the District of Columbia, naming the Attorney General as the respondent. Reading the phrase "within their respective jurisdictions" as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims. *Id.,* at 192, 92 L. Ed. 1898, 68 S. Ct. 1443. *Ahrens* expressly reserved the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.,* 192, 92 L. Ed. 1898, 68 S. Ct. 1443, n. 4 But as the dissent noted, if the presence of the petitioner in the territorial jurisdiction of a federal district court were truly a jurisdictional requirement, there could be only one response to that question. *Id.,* at 209, 92 L. Ed. 1898, 68 S. Ct. 1443 (opinion of Rutledge, J.). n7

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n7 Justice Rutledge wrote:

"[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had . . . ." 335 U.S., at 209, 92 L. Ed. 1898, 68 S. Ct. 1443.

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[*559]** When the District Court for the District of Columbia reviewed the German prisoners' habeas application in *Eisentrager*, it thus dismissed their action on the authority of *Ahrens*. See *Eisentrager,* 339 U.S., at 767, 790, 94 L. Ed. 1255, 70 S. Ct. 936. Although the Court of Appeals reversed the District Court, it implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*. The Court of Appeals instead held that petitioners had a constitutional right to habeas corpus secured by the Suspension Clause, U.S. Const., Art. I, § 9, cl. 2, reasoning that "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal **[*478]** jurisdictional statute." *Eisentrager* v. *Forrestal,* 174 F.2d at 965. In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to "fundamentals." 174 F.2d, at 963. In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that "nothing in our statutes" conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to "fundamentals" on its own terms. 339 U.S., at 768, 94 L. Ed. 1255, 70 S. Ct. 936. n8

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n8 Although Justice Scalia disputes the basis for the Court of Appeals' holding, *post,* at _____, 159 L. Ed. 2d, at 567, what is most pertinent for present purposes is that this Court clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds. *Eisentrager,* 339 U.S., at 767, 94 L. Ed. 1255, 70 S. Ct. 936 ("[The Court of Appeals] concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; [and] that, *although no statutory jurisdiction of such cases is given*, courts must be held to possess it as part of the judicial power of the United States . . ." (emphasis added)).

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[2695]** Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 495, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973), HN3 this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian **[*479]** can be reached by service of process." 410 U.S., at 494-495, 35 L. Ed. 2d 443, 93 S. Ct. 1123*Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the

continuing vitality of that decision. " 410 U.S., at **[***560]** 497, 35 L. Ed. 2d, 93 S. Ct. 1123. These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.,* at 498, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (citing *Burns* v. *Wilson,* 346 U.S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953), rehearing denied, 346 U.S. 844, 851-852, 98 L. Ed. 363, 74 S. Ct. 3 (opinion of Frankfurter, J.); *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955); *Hirota* v. *MacArthur,* 338 U.S. 197, 199, 93 L. Ed. 1902, 69 S. Ct. 197 (1948) (Douglas, J., concurring)). *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all. 410 U.S., at 499-500, 35 L. Ed. 2d 443, 93 S. Ct. 1123.

Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims. n9

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n9 The dissent argues that *Braden* did not overrule *Ahrens*' jurisdictional holding, but simply distinguished it. *Post,* at _____, 159 L. Ed. 2d, at 569. Of course, *Braden* itself indicated otherwise, 410 U.S., at 495-500, 35 L. Ed. 2d 443, 93 S. Ct. 1123, and a long line of judicial and scholarly interpretations, beginning with then-Justice Rehnquist's dissenting opinion, have so understood the decision. See, *e.g., id.,* at 502, 35 L. Ed. 2d 443, 93 S. Ct. 1123 ("Today the Court overrules *Ahrens*"); *Moore* v. *Olson*, 368 F.3d 757, 758 (CA7 2004) ("[A]fter *Braden* . . ., which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue"); *Armentero* v. *INS*, 340 F.3d 1058, 1063 (CA9 2003) ("[T]he Court in *[Braden]* declared that *Ahrens* was overruled" (citations omitted)); *Henderson* v. *INS,* 157 F.3d 106, 126, n. 20 (CA2 1998) ("On the issue of territorial jurisdiction, *Ahrens* was subsequently overruled by *Braden*"); *Chatman-Bey* v. *Thornburgh,* 274 U.S. App. D.C. 398, 864 F.2d 804, 811 (CADC 1988) (en banc) ("[I]n *Braden*, the Court cut back substantially on *Ahrens* (and indeed overruled its territorially-based jurisdictional holding)"). See also, *e.g., Patterson* v. *McLean Credit Union,* 485 U.S. 617, 618, 99 L. Ed. 2d 879, 108 S. Ct. 1419 (1988) *(per curiam);* Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, App. A (1988).

The dissent also disingenuously contends that the continuing vitality of *Ahrens*' jurisdictional holding is irrelevant to the question presented in these cases, "inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager.*" *Post,* at _____, 159 L. Ed. 2d, at 569. But what Justice Scalia describes as *Eisentrager*'s statutory holding--"that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States," *post,* at _____, 159 L. Ed. 2d, at 569--is little more than the rule of *Ahrens* cloaked in the garb of *Eisentrager*'s facts. To contend plausibly that this holding survived *Braden*, Justice Scalia at a minimum must find a textual basis for the rule other than the phrase "within their respective jurisdictions"--a phrase which, after *Braden*, can no longer be read to require the habeas petitioner's physical presence within the territorial jurisdiction of a federal district court. Two references to the district of confinement in provisions relating to recordkeeping and pleading requirements in proceedings before circuit judges hardly suffice in that regard. See *post,* at _____, 159 L. Ed. 2d, at 566 (citing 28 U.S.C. §§ 2241(a), 2242 [28 USCS §§ 2241(a), 2242]).

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[*480] [2696]** IV

[*LEdHR1D]** [1D] Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on § 2241 through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC* v. *Arabian American Oil Co.,* 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 **[***561]** (1991). HN4 Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. *Foley Bros., Inc.* v. *Filardo,* 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949). HN5 By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 **[*481]** Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. n10 HN6 Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

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n10 Justice Scalia appears to agree that neither the plain text of the statute nor his interpretation of that text provides a basis for treating American citizens differently from aliens. *Post,* at _____, 159 L. Ed. 2d, at 571. But resisting the practical consequences of his position, he suggests that he might nevertheless recognize an "atextual exception" to his statutory rule for citizens held beyond the territorial jurisdiction of the federal district courts. *Ibid.*

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Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, n11 as well as the claims of **[**2697]** persons **[*482]** detained in the so-called "exempt jurisdictions," where ordinary writs did not run, n12 and all **[***562]** other dominions under the sovereign's control. n13 As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King* v *Cowle,* 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K. B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya,* [1960] 1 Q. B. 241, 303 (C. A.) (Lord Evershed, M. R.). n14

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N11 See, *e.g., King* v *Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett* v *Stewart,* 20 How. St. Tr. 1, 79-82 (K. B. 1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica);

Case of the Hottentot Venus, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810) (reviewing the habeas petition of a "native of *South Africa*" allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, *e.g., United States* v. *Villato,* 2 Dall. 370, 2 U.S. 370, 1 L. Ed. 419 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera,* 7 F. Cas. 853, F. Cas. No. 3967 (CC Mass 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard,* 30 F. Cas. 131, F. Cas. No. 17810(CC NY 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

n12 See, *e.g., Bourn's Case,* Cro. Jac. 543, 79 Eng. Rep. 465 (K. B. 1619) (writ issued to the Cinque-Ports town of Dover); *Alder* v *Puisy,* 1 Freeman 12, 89 Eng. Rep. 10 (K. B. 1671) (same); *Jobson's Case,* Latch 160, 82 Eng. Rep. 325 (K. B. 1626) (entertaining the habeas petition of a prisoner held in the County Palatine of Durham). See also 3 W. Blackstone, Commentaries on the Laws of England 79 (1769) (hereinafter Blackstone) ("[A]ll prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue . . . to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king" (footnotes omitted)); R. Sharpe, Law of Habeas Corpus 188-189 (2d ed. 1989) (describing the "extraordinary territorial ambit" of the writ at common law).

n13 See, *e.g., King* v *Overton,* 1 Sid. 387, 82 Eng. Rep. 1173 (K. B. 1668) (writ issued to Isle of Jersey); *King* v *Salmon,* 2 Keble 450, 84 Eng. Rep. 282 (K. B. 1669) (same). See also 3 Blackstone 131 (habeas corpus "run[s] into all parts of the king's dominions: for the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted" (footnotes omitted)); M. Hale, History of the Common Law 120-121 (C. Gray ed. 1971) (writ of habeas corpus runs to the Channel Islands, even though "they are not Parcel of the Realm of England").

n14 *Ex parte Mwenya* held that the writ ran to a territory described as a "foreign country within which [the Crown] ha[d] power and jurisdiction by treaty, grant, usage, sufferance, and other lawful means." *Ex parte Mwenya,* 1 Q. B., at 265 (internal quotation marks omitted). See also *King* v *The Earl of Crewe ex parte Sekgome,* [1910] 2 K. B. 576, 606 (C. A.) (Williams, L. J.) (concluding that the writ would run to such a territory); *id.,* at 618 (Farwell, L. J.) (same). As Lord Justice Sellers explained:

"Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. . . . 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned.'" 1 Q. B., at 310.

Justice Scalia cites *In re Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939), for the broad proposition that habeas corpus has been categorically unavailable to aliens held outside sovereign territory. *Post,* at _____, 159 L. Ed. 2d, at 576. *Ex parte Mwenya,* however, casts considerable doubt on this narrow view of the territorial reach of the writ. See *Ex parte Mwenya,* 1 Q. B., at 295 (Lord Evershed, M. R.) (noting that *In re Ning Yi-Ching* relied on Lord Justice Kennedy's opinion in *Ex parte Sekgome* concerning the territorial reach of the writ, despite the opinions of two members of the court who "took a different view upon this matter"). And *In re Ning Yi-Ching* itself made quite clear that "the remedy of *habeas corpus*

was not confined to British subjects," but would extend to "any person . . . detained" within reach of the writ. 56 T. L. R., at 5 (citing *Ex parte Sekgome,* 2 K. B., at 620 (Kennedy, L. J.)). Moreover, the result in that case can be explained by the peculiar nature of British control over the area where the petitioners, four Chinese nationals accused of various criminal offenses, were being held pending transfer to the local district court. Although the treaties governing the British Concession at Tientsin did confer on Britain "certain rights of administration and control," "the right to administer justice" to Chinese nationals was not among them. 56 T. L. R., at 4-6.

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[*483] **[***LEdHR1E]** **[**2698]** [1E] **[***LEdHR2A]** [2A] In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. n15 No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden,* 410 U.S., at 495, 35 L. Ed. 2d 443, 93 S. Ct. 1123. Section 2241, **[*484]** by its terms, requires nothing **[***563]** more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

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n1

[*LEdHR2B]** [2B] Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing--unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) [28 USCS § 2241(c)(3)]. Cf. *United States* v. *Verdugo-Urquidez,* 494 U.S. 259, 277-278, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Kennedy, J., concurring), and cases cited therein.

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V

[*LEdHR3]** [3] In addition to invoking the District Court's jurisdiction under § 2241, the *Al Odah* petitioners' complaint invoked the court's jurisdiction under 28 U.S.C. § 1331 [28 USCS § 1331], the federal question statute, as well as § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed the claims founded on § 1331 and § 1350 for lack of jurisdiction, even to the extent that these claims "deal only with conditions of confinement and do not sound in habeas," because petitioners lack the "privilege of litigation" in U. S. courts. 321 F.3d, at 1144 (internal quotation marks omitted). Specifically, the court held that because petitioners' § 1331 and § 1350 claims "necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute," they, like claims founded on the habeas statute itself, must be "beyond the jurisdiction of the federal courts." *Id.*, at 1144-1145, 355 U.S. App. D.C. 189

As explained above, *Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the

United States from the "'privilege of litigation'" in U. S. courts. 321 F.3d, at 1139. HN7 The courts of the United States have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit,* 208 U.S. 570, 578, 52 L. Ed. 625, 28 S. Ct. 337 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the **[*485]** protection of their rights"). And indeed, **[**2699]** 28 U.S.C. § 1350 [28 USCS § 1350] explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.

VI

[*LEdHR1F]** [1F] Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

It is so ordered. **[***564]**

CONCURBY: KENNEDY

CONCUR: Justice **Kennedy,** concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course. Justice Scalia exposes the weakness in the Court's conclusion that *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973), "overruled the statutory predicate to *Eisentrager*'s holding," *ante,* at _____ - _____, 159 L. Ed. 2d, at 559-560. As he explains, the Court's approach is not a plausible reading of *Braden* or *Johnson* v. *Eisentrager,* 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950). In my view, the correct course is to follow the framework of *Eisentrager.*

Eisentrager considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the constitutional **[*486]** command of the separation of powers. The issue before the Court was whether the Judiciary could exercise jurisdiction over the claims of German prisoners held in the Landsberg prison in Germany following the cessation of hostilities in Europe. The Court concluded the petition could not be entertained. The petition was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.

The Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. *Id.*, at 770, 94 L. Ed. 1255, 70 S. Ct. 936. Citizenship provides a longstanding basis for jurisdiction, the Court noted, and among aliens physical presence within the United States also "gave the Judiciary power to act." *Id.*, at 769, 771, 94 L. Ed. 1255, 70 S. Ct. 936. This contrasted with the "essential pattern for seasonable Executive constraint of enemy aliens." *Id.*, at 773, 94 L. Ed. 1255, 70 S. Ct. 936. The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection," *id.*, at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936, whereas in *Eisentrager* "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign," *id.,* at 778, 94 L. Ed. 1255, 70 S. Ct. 936. The Court next noted that the prisoners in *Eisentrager* "were actual enemies"

of the United States, proven to be so at trial, and thus could not justify "a limited opening of our courts" to distinguish the "many [aliens] of friendly personal disposition to whom the **[**2700]** status of enemy" was unproven. *Id.*, at 778, 94 L. Ed. 1255, 70 S. Ct. 936. Finally, the Court considered the extent to which jurisdiction would "hamper the war effort and bring aid and comfort to the enemy." *Id.*, at 779, 94 L. Ed. 1255, 70 S. Ct. 936. Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction **[***565]** for the courts to hear the prisoner's claims.

[*487] The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated. See also *Ex parte Milligan,* 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866).

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it. *Eisentrager, supra,* at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without **[*488]** benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. 339 U.S., at 778, 94 L. Ed. 1255, 70 S. Ct. 936. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

[2701]** In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating **[***566]** automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager.* For these reasons, I concur in the judgment of the Court.

DISSENTBY: SCALIA

DISSENT: Justice **Scalia,** with whom the **Chief Justice** and Justice **Thomas** join, dissenting.

The Court today holds that the habeas statute, 28 U.S.C. § 2241 [28 USCS § 2241], extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson* v. *Eisentrager,* 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950). The Court's contention that *Eisentrager* was somehow negated **[*489]** by *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973) --a decision that dealt with a different issue and did not so much as mention *Eisentrager*--is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change § 2241, and dissent from the Court's unprecedented holding.

I

As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994) (citations omitted). The petitioners do not argue that the Constitution independently requires jurisdiction here. n1 Accordingly, this case turns on the words of § 2241, a text the Court today largely ignores. Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee. Section 2241(a) states:

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n1 See Tr. of Oral Arg. 5 ("Question: And you don't raise the issue of any potential jurisdiction on the basis of the Constitution alone. We are here debating the jurisdiction under the Habeas Statute, is that right? [Answer]: That's correct . . .").

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> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" (Emphasis added).

It further requires that "[t]he order of a circuit judge shall be entered in the records of *the* district court of *the district wherein the restraint complained of is had.*" 28 U.S.C. § 2241(a) [28 USCS § 2241(a)] (emphases added). And § 2242 provides that a petition "addressed to the Supreme Court, a justice thereof or a circuit judge . . . **[*490]** shall state the reasons for not making application to *the* district court of *the district in which the applicant is held.*" (Emphases added). No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee. Here, as the Court allows, see *ante*, at ____, 159 L. Ed. **[***567]** 2d, at 559, the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is

the end of this case.

[2702]** The Court asserts, however, that the decisions of this Court have placed a gloss on the phrase "within their respective jurisdictions" in § 2241 which allows jurisdiction in this case. That is not so. In fact, the only case in point holds just the opposite (and just what the statute plainly says). That case is *Eisentrager*, but to fully understand its implications for the present dispute, I must also discuss our decisions in the earlier case of *Ahrens* v. *Clark,* 335 U.S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443 (1948), and the later case of *Braden.*

In *Ahrens*, the Court considered "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of habeas corpus." 335 U.S., at 189, 92 L. Ed. 1898, 68 S. Ct. 1443 (construing 28 U.S.C. § 452, the statutory precursor to § 2241). The *Ahrens* detainees were held at Ellis Island, New York, but brought their petitions in the District Court for the District of Columbia. Interpreting "within their respective jurisdictions," the Court held that a district court has jurisdiction to issue the writ only on behalf of petitioners detained within its territorial jurisdiction. It was "not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." 335 U.S., at 190, 92 L. Ed. 1898, 68 S. Ct. 1443.

Ahrens explicitly reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, at 192, n. 4 92 L. Ed. 1898, 68 S. Ct. 1443 That question, the same question **[*491]** presented to this Court today, was shortly thereafter resolved in *Eisentrager* insofar as noncitizens are concerned. *Eisentrager* involved petitions for writs of habeas corpus filed in the District Court for the District of Columbia by German nationals imprisoned in Landsberg Prison, Germany. The District Court, relying on *Ahrens*, dismissed the petitions because the petitioners were not located within its territorial jurisdiction. The Court of Appeals reversed. According to the Court today, the Court of Appeals "implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*," and "[i]n essence . . . concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'" *Ante*, at _____, 159 L. Ed. 2d, at 559. That is not so. The Court of Appeals concluded that there *was* statutory jurisdiction. It arrived at that conclusion by applying the canon of constitutional avoidance: "[I]f the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result." *Eisentrager* v. *Forrestal*, 84 U.S. App. D.C. 396, 174 F.2d 961, 966 (CADC 1949). In cases where there was no territorial jurisdiction over the detainee, the Court of Appeals held, the writ would lie at the place of a respondent with directive power over the detainee. "It is not too violent an interpretation of 'custody' to construe it as including those who have directive custody, as well as **[***568]** those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements . . . . *The statute must be so construed*, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision." *Id.*, at 967 (emphasis added). n2

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N2 The parties' submissions to the Court in *Eisentrager* construed the Court of Appeals' decision as I do. See Pet. for Cert., O. T. 1949, No. 306, pp 8-9 ("[T]he court felt constrained to construe the habeas corpus jurisdictional statute--despite its reference to the 'respective jurisdictions' of the various courts and the gloss put on that terminology in the *Ahrens* and previous decisions--to permit a petition to be filed in the district court with territorial jurisdiction over the officials who have directive authority over the immediate jailer in Germany"); Brief for Respondent, O. T. 1949, No. 306, p 9 ("Respondent contends that the U. S. Court of Appeals . . . was correct in its holding that the statute, 28 U.S.C. 2241[28 USCS § 2241], provides that the U. S. District Court for the District of Columbia has

jurisdiction to entertain the petition for a writ of habeas corpus in the case at bar"). Indeed, the briefing in *Eisentrager* was mainly devoted to the question of whether there was statutory jurisdiction. See, *e.g.*, Brief for Petitioner, O. T. 1949, No. 306, pp 15-59; Brief for Respondent, O. T. 1949, No. 306, pp 9-27, 38-49.

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[*492] **[**2703]** This Court's judgment in *Eisentrager* reversed the Court of Appeals. The opinion was largely devoted to rejecting the lower court's constitutional analysis, since the doctrine of constitutional avoidance underlay its statutory conclusion. But the opinion *had* to pass judgment on whether the statute granted jurisdiction, since that was the basis for the judgments of both lower courts. A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment that rested upon a statutorily conferred right. n3 **[*493]** And absence of a right to the writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "Nothing in the text of the Constitution extends such a right, *nor does anything in our statutes.*" 339 U.S., at 768, 94 L. Ed. 1255, 70 S. Ct. 936 (emphasis added). "[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment *were all beyond the territorial jurisdiction of any court of the United States.*" *Id.*, at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936. See also *id.*, at 781, 94 L. Ed. 1255, 70 S. Ct. 936 (concluding that **[***569]** "no right to the writ of *habeas corpus* appears"); *id.*, at 790, 94 L. Ed. 1255, 70 S. Ct. 936 (finding "no basis for invoking federal judicial power in any district"). The brevity of the Court's statutory analysis signifies nothing more than that the Court considered it obvious (as indeed it is) that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.

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n3 The Court does not seriously dispute my analysis of the Court of Appeals' holding in *Eisentrager.* Instead, it argues that this Court in *Eisentrager* "understood the Court of Appeals' decision to rest on constitutional and not statutory grounds." *Ante*, at _____, n 8, 159 L. Ed. 2d, at 559. That is inherently implausible, given that the Court of Appeals' opinion clearly reached a statutory holding, and that both parties argued the case to this Court on that basis, see n 2, *supra.* The only evidence of misunderstanding the Court adduces today is the *Eisentrager* Court's description of the Court of Appeals' reasoning as "that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States . . . ." 339 U.S., at 767, 94 L. Ed. 1255, 70 S. Ct. 936. That is no misunderstanding, but an entirely accurate description of the Court of Appeals' reasoning--the penultimate step of that reasoning rather than its conclusion. The Court of Appeals went on to hold that, in light of the constitutional imperative, the statute should be interpreted as supplying jurisdiction. See *Eisentrager* v. *Forrestal*, 84 U.S. App. D.C. 396, 174 F.2d 961, 965-967 (CADC 1949). This Court in *Eisentrager* undoubtedly understood that, which is why it immediately followed the foregoing description with a description of the Court of Appeals' *conclusion* tied to the language of the habeas statute: "[w]here deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer." 339 U.S., at 767, 94 L. Ed. 1255, 70 S. Ct. 936.

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Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today. To do so neatly and cleanly, it must either argue that our

decision in *Braden* overruled *Eisentrager*, or admit that *it* is overruling *Eisentrager.* The former **[**2704]** course would not pass the laugh test, inasmuch as *Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never *mentioned Eisentrager.* And the latter course would require the Court to explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, *and*, having set it aside, to explain why the habeas statute does not mean what it plainly says. So instead the Court tries an oblique course: "*Braden*," it claims, "overruled *the statutory predicate* **[*494]** to *Eisentrager*'s holding," *ante*, at ____, 159 L. Ed. 2d, at 560 (emphasis added), by which it means the statutory analysis of *Ahrens.* Even assuming, for the moment, that *Braden* overruled some aspect of *Ahrens*, inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*, it is hard to see how any of that case's "statutory predicate" could have been impaired.

But in fact *Braden* did not overrule *Ahrens;* it distinguished *Ahrens. Braden* dealt with a habeas petitioner incarcerated in Alabama. The petitioner filed an application for a writ of habeas corpus in Kentucky, challenging an indictment that had been filed against him in that Commonwealth and naming as respondent the Kentucky court in which the proceedings were pending. This Court held that Braden was in custody because a detainer had been issued against him by Kentucky, and was being executed by Alabama, serving as an agent for Kentucky. We found that jurisdiction existed in Kentucky for Braden's petition challenging the Kentucky detainer, notwithstanding his physical confinement in Alabama. *Braden* was careful to *distinguish* that situation from the general rule established in *Ahrens.*

> "A further, *critical* development since our decision in *Ahrens* is the emergence of *new classes of prisoners* who are able to petition for habeas corpus because of the adoption of a more expansive definition of the 'custody' requirement of the habeas statute. The overruling of *McNally* v. *Hill,* 293 U.S. 131, [79 L. Ed. 238, 55 S. Ct. 24] (1934), made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of **[***570]** the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his **[*495]** dispute is with the Commonwealth of Kentucky, not the State of Alabama. *Under these circumstances*, it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama." 410 U.S., at 498-499, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (citations and footnotes omitted; emphases added).

This cannot conceivably be construed as an overturning of the *Ahrens* rule *in other circumstances.* See also *Braden*, *supra*, at 499-500, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (noting that *Ahrens* does not establish "an inflexible jurisdictional rule dictating the choice of an inconvenient forum *even in a class of cases which could not have been foreseen at the time of that decision*" (emphasis added)). Thus, *Braden* stands for the proposition, and only the proposition, that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement. Outside that class of cases, *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*). Where, as here, **[**2705]** present physical custody is at issue, *Braden* is inapposite, and *Eisentrager* unquestionably controls. n4

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n4 The Court points to Court of Appeals cases that have described *Braden* as "overruling" *Ahrens.* See *ante*, at ____, n 9, 159 L. Ed. 2d, at 560. Even if that description (rather than what I think the correct one, "distinguishing") is accepted, it would not support the Court's view that *Ahrens* was overruled *with regard to the point on which Eisentrager relied.* The *ratio decidendi* of *Braden* does not call into question the principle of *Ahrens* applied in *Eisentrager*: that habeas challenge to present physical confinement must be made in the district where the physical confinement exists. The Court is unable to produce a single authority that agrees with its conclusion that *Braden* overruled *Eisentrager.*

Justice Kennedy recognizes that *Eisentrager* controls, *ante*, at ____, 159 L. Ed. 2d, at 564 (opinion concurring in judgment), but misconstrues that opinion. He thinks it makes jurisdiction under the habeas statute turn on the circumstances of the detainees' confinement--including, apparently, the availability of legal proceedings and the length of detention, see *ante*, at ____ - ____, 159 L. Ed. 2d, at 565-566. The *Eisentrager* Court mentioned those circumstances, however, only in the course of its *constitutional* analysis, and not in its application of the statute. It is quite impossible to read § 2241 as conditioning its geographic scope upon them. Among the consequences of making jurisdiction turn upon circumstances of confinement are (1) that courts would *always* have authority to inquire into circumstances of confinement, and (2) that the Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus. And among the questions this approach raises: When does definite detention become indefinite? How much process will suffice to stave off jurisdiction? If there is a terrorist attack at Guantanamo Bay, will the area suddenly fall outside the habeas statute because it is no longer "far removed from any hostilities," *ante*, at ____, 159 L. Ed. 2d, at 565? Justice Kennedy's approach provides enticing law-school-exam imponderables in an area where certainty is called for.

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[*496] The considerations of forum convenience that drove the analysis in *Braden* do not call into question *Eisentrager*'s holding. The *Braden* opinion is littered with venue reasoning of the following sort: "The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined." 410 U.S., at 494, 35 L. Ed. 2d 443, 93 S. Ct. 1123. Of course nothing could **[***571]** be *more* inconvenient than what the Court (on the alleged authority of *Braden*) prescribes today: a domestic hearing for persons held abroad, dealing with events that transpired abroad.

Attempting to paint *Braden* as a refutation of *Ahrens* (and thereby, it is suggested, *Eisentrager*), today's Court imprecisely describes *Braden* as citing with approval post-*Ahrens* cases in which "habeas petitioners" located overseas were allowed to proceed (without consideration of the jurisdictional issue) in the District Court for the District of Columbia. *Ante*, at ____, 159 L. Ed. 2d, at 559. In fact, what *Braden* said is that "[w]here *American citizens* confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the **[*497]** petitioners' absence from the district does not present a jurisdictional obstacle to consideration of the claim." 410 U.S., at 498, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (emphasis added). Of course "the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis* v. *Casey,* 518 U.S. 343, 352, n. 2, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996) (citing cases), but we need not "overrule" those implicit holdings to decide this case. Since *Eisentrager itself* made

an exception for such cases, they in no way impugn its holding. "With the citizen," *Eisentrager* said, "we are now little concerned, except to set his case apart *as untouched by this decision* and to take measure of the difference between his status and that of all **[**2706]** categories of aliens." 339 U.S., at 769, 94 L. Ed. 1255, 70 S. Ct. 936. The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad--justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas. Neither party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts; but the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, *and why Eisentrager was wrong.* Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal **[*498]** courts even though it has never before been thought to be within their jurisdiction--and thus making it a foolish place to have housed alien wartime detainees.

II

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of **[***572]** the earth. Part III of its opinion asserts that *Braden* stands for the proposition that "a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" *Ante*, at _____, 159 L. Ed. 2d, at 559. Endorsement of that proposition is repeated in Part IV. *Ante*, at _____, 159 L. Ed. 2d, at 563 ("Section 2241, by its terms, requires nothing more [than the District Court's jurisdiction over petitioners' custodians]").

The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. See, *e.g.*, Department of Army, G. Lewis & J. Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, Pamphlet No. 20-213, p 244 (1955) (noting that, "[b]y the end of hostilities [in World War II], U. S. forces had in custody approximately two million enemy soldiers"). A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints--real or contrived--about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the Court says that the "[p]etitioners' allegations . . . unquestionably describe 'custody in violation **[*499]** of the Constitution or laws or treaties of the United States.'" *Ante*, at _____, n 15, 159 L. Ed. 2d, at 562 (citing **[**2707]** *United States* v. *Verdugo-Urquidez,* 494 U.S. 259, 277-278, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Kennedy, J., concurring)). From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.

Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a

more circumspect Court in *Eisentrager*:

> "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the **[***573]** military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U.S., at 778-779, 94 L. Ed. 1255, 70 S. Ct. 936.

These results should not be brought about lightly, and certainly not without a textual basis in the statute and on the **[*500]** strength of nothing more than a decision dealing with an Alabama prisoner's ability to seek habeas in Kentucky.

III

Part IV of the Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. The Court might have made an effort (a vain one, as I shall discuss) to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg Prison in Germany and Guantanamo Bay Naval Base. But Part III flatly rejected such an approach, holding that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." *Ante*, at _____, 159 L. Ed. 2d, at 560. That rejection is repeated at the end of Part IV: "In the end, the answer to the question presented is clear . . . . No party questions the District Court's jurisdiction over petitioners' custodians. . . . Section 2241, by its terms, requires nothing more." *Ante*, at _____ - _____, 159 L. Ed. 2d, at 562-563. Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here. The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application.

Nevertheless, the Court spends most of Part IV rejecting respondents' invocation of that doctrine on the peculiar ground that it has no application to Guantanamo Bay. Of course if the Court is right about that, not only § 2241 but presumably *all* United States law applies there--including, for example, the federal cause of action recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), which would allow prisoners to sue their captors for damages. Fortunately, however, the **[**2708]** Court's irrelevant discussion also happens to be wrong.

The Court gives only two reasons why the presumption against extraterritorial effect does not apply to Guantanamo Bay. First, the Court says (without any further elaboration) **[*501]** that "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base [under the terms of a 1903 lease agreement], and may continue to exercise

such control permanently if it so chooses [under the terms of a 1934 Treaty]." *Ante*, at _____, 159 L. Ed. 2d, at 561; see *ante*, at _____ - _____, 159 L. Ed. 2d, at 554-555. But that lease agreement explicitly recognized "the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418, and the Executive Branch--whose head is "exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Eisentrager*, *supra*, at 789-- --affirms that the lease and **[***574]** treaty do not render Guantanamo Bay the sovereign territory of the United States, see Brief for Respondents 21.

The Court does not explain how "complete jurisdiction and control" without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if "jurisdiction and control" rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.

The second and last reason the Court gives for the proposition that domestic law applies to Guantanamo Bay is the Solicitor General's concession that there would be habeas jurisdiction over a United States citizen in Guantanamo Bay. "Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Ante*, at _____ - _____, 159 L. Ed. 2d, at 561. But the reason the Solicitor General conceded there would be jurisdiction over a detainee who was a United States citizen had *nothing to do* with the special status of Guantanamo Bay: "Our answer to that question, **[*502]** Justice Souter, is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it." Tr. of Oral Arg. 40. See also *id.*, at 27-28. And *that* position --the position that United States citizens throughout the world may be entitled to habeas corpus rights--is precisely the position that this Court adopted in *Eisentrager*, see 339 U.S., at 769-770, 94 L. Ed. 1255, 70 S. Ct. 936, even while holding that aliens abroad *did not have* habeas corpus rights. Quite obviously, the Court's second reason has no force whatever.

The last part of the Court's Part IV analysis digresses from the point that the presumption against extraterritorial application does not apply to Guantanamo Bay. Rather, it is directed to the contention that the Court's approach to habeas jurisdiction--applying it to aliens abroad--is "consistent with the historical reach of the writ." *Ante*, at _____, 159 L. Ed. 2d, at 561. None of the authorities it cites comes close to supporting that claim. Its first set of authorities involves claims by aliens detained in what is indisputably domestic territory. *Ante*, at _____, n 11, 159 L. Ed. 2d, at 561. Those cases are irrelevant because they do not purport to address the territorial reach of the writ. The remaining **[**2709]** cases involve issuance of the writ to "'exempt jurisdictions'" and "other dominions under the sovereign's control." *Ante*, at _____ - _____, and nn 12-13, 159 L. Ed. 2d, at 561-562. These cases are inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects.

"Exempt jurisdictions"--the Cinque Ports and Counties Palatine (located in modern-day England)--were local franchises granted by the Crown. See 1 W. Holdsworth, History of English Law 108, 532 (7th ed. rev. 1956); 3 W. Blackstone, Commentaries **[***575]** *78-*79 (hereinafter Blackstone). These jurisdictions were "exempt" in the sense that the Crown had ceded management of municipal affairs to local authorities, whose courts had exclusive jurisdiction **[*503]** over private disputes among residents (although review was still available in the royal courts by writ of error). See *id.*, at *79. Habeas jurisdiction nevertheless extended to those regions on the theory that the delegation of the King's authority did not include his own prerogative writs. *Ibid.;* R. Sharpe, Law of Habeas Corpus

188-189 (2d ed. 1989) (hereinafter Sharpe). Guantanamo Bay involves no comparable local delegation of pre-existing sovereign authority.

The cases involving "other dominions under the sovereign's control" fare no better. These cases stand only for the proposition that the writ extended to dominions of the Crown outside England proper. The authorities relating to Jersey and the other Channel Islands, for example, see *ante*, at _____, n 13, 159 L. Ed. 2d, at 562, involve territories that are "dominions of the crown of Great Britain" even though not "part of the kingdom of England," 1 Blackstone *102-*105, much as were the colonies in America, *id.*, at *104-*105, and Scotland, Ireland, and Wales, *id.*, at *93. See also *King* v *Cowle*, 2 Burr. 834, 853-854, 97 Eng. Rep. 587, 598 (K. B. 1759) (even if Berwick was "no part of the realm of England," it was still a "dominion of the Crown"). All of the dominions in the cases the Court cites--and all of the territories Blackstone lists as dominions, see 1 Blackstone *93-*106--are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.

The Court's historical analysis fails for yet another reason: To the extent the writ's "extraordinary territorial ambit" did extend to exempt jurisdictions, outlying dominions, and the like, that extension applied only to British *subjects*. The very sources the majority relies on say so: Sharpe explains the "broader ambit" of the writ on the ground that it is "said to depend not on the ordinary jurisdiction of the court for its effectiveness, but upon the authority of the sovereign over **[*504]** all her *subjects*." Sharpe, *supra*, at 188 (emphasis added). Likewise, Blackstone explained that the writ "run[s] into all parts of the king's dominions" because "the king is at all times entitled to have an account why the liberty of any of his *subjects* is restrained." 3 Blackstone *131 (emphasis added). *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), which can hardly be viewed as evidence of the *historic* scope of the writ, only confirms the ongoing relevance of the sovereign-subject relationship to the scope of the writ. There, the question was whether "the Court of Queen's Bench can be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained" in Northern Rhodesia, which was at the time a protectorate of the Crown. *Id.*, at 300 (Lord Evershed M. R.). Each judge made clear that the detainee's status as a subject was material to the resolution of the case. See *id.*, at 300, 302 (Lord Evershed, M. R.); *id.*, at 305 **[**2710]** (Romer, L. J.) ("[I]t is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her **[***576]** subjects in that territory"); *id.*, at 311 (Sellers, L. J.) ("I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate"). None of the exempt-jurisdiction or dominion cases the Court cites involves someone not a subject of the Crown.

The rule against issuing the writ to aliens in foreign lands was still the law when, in *In re Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939), an English court considered the habeas claims of four Chinese subjects detained on criminal charges in Tientsin, China, an area over which Britain had by treaty acquired a lease and "therewith exercised certain rights of administration and control." *Id.*, at 4. The court held that Tientsin was a foreign territory, and that the writ would not **[*505]** issue to a foreigner detained there. The Solicitor-General had argued that "[t]here was no case on record in which a writ of *habeas corpus* had been obtained on behalf of a foreign subject on foreign territory," *id.*, at 5, and the court "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm," *id.*, at 6. n5

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n5 The Court argues at some length that *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), calls into question my reliance on *In re Ning Yi-Ching*. See *ante*, at ____, n 14, 159 L. Ed. 2d, at 562. But as I have explained, see *supra*, at ____ - ____, 159 L. Ed. 2d, at 575-576, *Mwenya* dealt with a British subject and the court went out of its way to explain that its expansive description of the scope of the writ was premised on that fact. The Court cites not a single case holding that aliens held outside the territory of the sovereign were within reach of the writ.

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In sum, the Court's treatment of Guantanamo Bay, like its treatment of § 2241, is a wrenching departure from precedent. n6

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n6 The Court grasps at two other bases for jurisdiction: the Alien Tort Statute (ATS), 28 U.S.C. § 1350[28 USCS § 1350], and the federal-question statute, 28 U.S.C. § 1331[28 USCS § 1331]. The former is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument. See Pet. for Cert. in No. 03-334, p 2, n 1 ("Petitioners withdraw any reliance on the Alien Tort Claims Act . . ."); Brief for Petitioners in No. 03-343, p 13; Tr. of Oral Arg. 6.

With respect to § 1331, petitioners assert a variety of claims arising under the Constitution, treaties, and laws of the United States. In *Eisentrager*, though the Court's holding focused on § 2241, its analysis spoke more broadly: "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S., at 777-778, 94 L. Ed. 1255, 70 S. Ct. 936. That reasoning dooms petitioners' claims under § 1331, at least where Congress has erected a jurisdictional bar to their raising such claims in habeas.

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[*506] * * *

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the **[**2711]** cumbersome machinery of our domestic **[***577]** courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, n7 instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their

confinement, see *Rumsfeld* v *Padilla, ante*, whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish--and, as a result, to forum shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.

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n7 It could, for example, provide for jurisdiction by placing Guantanamo Bay within the territory of an existing district court; or by creating a district court for Guantanamo Bay, as it did for the Panama Canal Zone, see 22 U.S.C. § 3841(a) [22 USCS § 3841(a)] (repealed 1979).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

REFERENCES: Go To Full Text Opinion

Go to Supreme Court Brief(s)

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3C Am Jur 2d, Aliens and Citizens §§ 2583 , 2584; 39 Am Jur 2d, Habeas Corpus and Postconviction Remedies §§ 18, 90, 104

28 USCS § 2241

L Ed Digest, Habeas Corpus § 5

L Ed Index, Aliens

Annotation References

When is person "in custody" in violation of Federal Constitution, so as to be eligible for relief under federal habeas corpus legislation--Supreme Court cases. 104 L Ed 2d 1122.

Jurisdiction of federal court to grant writ of habeas corpus in proceeding concerning alien detainees held outside the United States. 192 ALR Fed 595.

Construction and application of Alien Tort Statute (28 U.S.C.A. § 1350 [28 U.S.C.S. § 1350]), providing for federal jurisdiction over alien's action for tort committed in violation of law of nations or treaty of United States. 116 ALR Fed 387.

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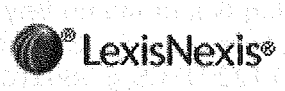

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IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

SHARBAT KHAN, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba Petitioner	CIVIL ACTION (HABEAS CORPUS)
V.	No: 05-cv-00890
GEORGE W. BUSH President of the United States The White House 1600 Pennsylvania Avenue, N.W. Washington, D.C. 20500;	Judge Collyer
DONALD RUMSFELD Secretary, United States Department of Defense 1000 Defense Pentagon Washington, D.C. 20301;	
ARMY BRIG. GEN. JAY HOOD Commander, Joint Task Force - GTMO JTF-GTMO APO AE 09360; and	
ARMY COL. MIKE BUMGARNER Commander, Joint Detention Operations Group - JTF-GTMO APO AE 09360,	
Respondents	

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Sharbat Khan seeks relief under the Great Writ. Petitioner is a citizen of Afghanistan, who filed a pro se request for habeas corpus relief with this Court, which was docketed on April 29, 2005. Petitioner is a civilian wrongly classified as an "enemy combatant" by the President of the United States, and is being held virtually incommunicado in military

custody at the United States Naval Station at Guantanamo Bay, Cuba ("Guantanamo Bay"). Petitioner is being detained without lawful basis, without charge, without access to counsel and without being afforded any fair process by which he might challenge his detention. Petitioner is being held under color and authority of the executive branch, and in violation of the Constitution, laws and treaties of the United States as well as in violation of customary international law and fundamental human rights. Accordingly, this Court should issue a Writ of Habeas Corpus compelling Respondents either to release Petitioner or to establish in this Court a lawful basis for his detention. This Court should also order injunctive and declaratory relief.

Pursuant to the President's authority as Commander-in-Chief, his authority under the laws and usages of war, or under the November 13 Executive Order, Respondents George W. Bush, President of the United States, Donald H. Rumsfeld, U.S. Secretary of Defense, Army Brigadier General Jay Hood, Commander of Joint Task Force-GTMO, and Army Colonel Mike Bumgarner, Commander, Joint Detention Operations Group, Joint Task Force-GTMO, are either ultimately responsible for, or have been charged with the responsibility of, maintaining the custody and control of the detained prisoners, including Petitioner, at Guantanamo Bay.

I. JURISDICTION

1. Petitioner Sharbat Kahn brings this action under 28 U.S.C. §§ 2241(a), (c)(1), (c)(3) and 2242. Respondents are detaining Petitioner "under or by color of the authority of the United States" and "in violation of the Constitution or laws or treaties of the United States." *Id.* at § 2241(a)(1), (a)(3). Petitioner further invokes this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202; 5 U.S.C. § 701 *et seq.*; and Articles I and II of the Constitution of the United States, and the Fifth, Sixth, and Eighth Amendments thereto. Because he seeks declaratory relief, Petitioner also relies on Fed. R. Civ. P. 57.

2. This Court is empowered under 28 U.S.C. § 2241 to grant this Writ of Habeas Corpus, and to entertain the Petition filed under 28 U.S.C. § 2242. This Court is further empowered to declare the rights and other legal relations of the parties herein under 28 U.S.C. §

2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdiction, and also to issue all writs necessary or appropriate in aid of its jurisdiction by 28 U.S.C. § 1651.

II. PARTIES

3. Petitioner Sharbat Khan is presently incarcerated at Guantanamo Bay Naval Station, and held in Respondents' unlawful custody and control. He is believed to be a citizen of Afghanistan.

4. Respondent George W. Bush is the President of the United States and Commander-in-Chief of the armed forces of the United States. Petitioner is being detained pursuant to President Bush's authority as Commander-in-Chief and under the laws and usages of war or, alternatively, pursuant to the Executive Order of November 13, 2001, entitled Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) ("Executive Order"). President Bush is responsible for Petitioner's unlawful detention and is sued in his official capacity.

5. Respondent Donald Rumsfeld is the Secretary of the United States Department of Defense. Pursuant to either the Executive Order or the President's authority as Commander-in-Chief, and under the laws and usages of war, Respondent Rumsfeld has been charged with maintaining custody and control over Petitioner, and is responsible therefor. He is sued in his official capacity.

6. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force-GTMO, the task force that has control of the detention operation at Guantanamo Bay. He has supervisory responsibility for Petitioner and is sued in his official capacity.

7. Respondent Army Colonel Mike Bumgarner is the Commander of the Joint Detention Operations Group and the JTF-GTMO detention camps, including the U.S. facility where Petitioner is presently held. He is the immediate custodian responsible for Petitioner's detention and is sued in his official capacity.

8. Respondents are directly responsible for any activities undertaken by or under the supervision of any agents or employees acting on their behalf, or of agents or employees of private contractors ("contractor employees") with whom any agency under Respondents' authority or supervision has contracted for the provision of services at Guantanamo Bay. All references to Respondents' actions in this Petition include activities performed by Respondents' agents or employees, other government agents or employees, or contractor employees.

III. STATEMENT OF FACTS

A. The Petitioner

9. Upon information and belief, Petitioner Sharbat Khan is not, and never was an enemy alien, lawful or unlawful belligerent, or combatant of any kind under any definition adopted by the Government in any civil or military proceedings. Upon information and belief, Petitioner is not, nor has he ever been, an "enemy combatant" who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who were engaged in an armed conflict against the United States there." *Hamdi v. Rumsfeld*, 542 U.S. 507, 591, 124 S. Ct. 2633, 2639 (2004).

10. Upon information and belief, Petitioner Sharbat Khan, was present in Afghanistan, but did not take up arms against United States forces, and did not support forces hostile to or engaged in armed conflict with the United States. Petitioner asserts that he was a poor, nomad shepherd, living in Afghanistan at the time of his arrest. Upon information and belief, he was arrested, jailed and potentially tortured by American forces and taken to Guantanamo Bay.

11. Petitioner seeks to enforce his rights to a judicial determination by an appropriate and lawful authority of the lawfulness of his detention. Petitioner also seeks to enforce his right to a judicial determination as to whether there is a lawful and factual basis for Respondents' determination that he is either an "enemy combatant" as defined by the United States Supreme Court in *Hamdi*, 524 U.S. 507, or an "enemy combatant" as that term is defined and used by the

Executive in the Combatant Status Review Tribunals.

12. The United States has not shown that Petitioner was a member of the Taliban, of the armed forces of Afghanistan, or of Al Qaeda prior to his detention. Nor has it shown that Petitioner committed any violent acts against any American person or property. Furthermore, the United States has failed to show that Petitioner had any involvement, direct or indirect, in the terrorist attacks on the United States on September 11, 2001, in the ensuing armed conflict, or in any acts of international terrorism attributed by the United States to Al Qaeda or any other terrorist group. Petitioner remains incarcerated at Guantanamo Bay Naval Station, a territory over which the United States exercises exclusive jurisdiction and control.

13. Petitioner has not been afforded any procedures that satisfy his rights under the most fundamental common law notions of due process, the Constitution of the United States, the laws and treaties of the United States, or customary international law.

14. Upon information and belief, Petitioner Sharbat Khan desires to pursue in United States courts every available legal challenge to the lawfulness of his detention.

B. The Joint Resolution

15. In the wake of the September 11, 2001, attacks, the United States, at the direction of President Bush, began a military campaign in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized President Bush to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Jan. 18, 2001) ("Joint Resolution").

16. As Petitioner did not participate in the armed conflict, he is not properly detained pursuant to President Bush's authority as Commander-in-Chief, under the laws and usages of war, or the Joint Resolution.

17. Petitioner is not, and has never been, a member of Al Qaeda or any other terrorist

group. Prior to his detention, he did not commit or espouse any violent act against any American person or property. He had no involvement, direct or indirect, in the terrorist attacks on the United States on September 11, 2001, or any act of international terrorism attributed by the United States to Al Qaeda or any other terrorist group. As he did not participate in the armed conflict at any point in time, he is not properly subject to President Bush's authority as Commander-in-Chief or under the laws and usages of war, nor to the detention order issued by President Bush.

C. The Executive Order

18. On November 13, 2001, President Bush issued an Executive Order authorizing Respondent Rumsfeld to detain indefinitely anyone President Bush has "reason to believe":

> i. is or was a member of the organization known as al Qaeda;
>
> ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

See Executive Order, 66 Fed. Reg. 57,833 § 2 (Nov. 13, 2001). The Executive Order was neither authorized nor directed by Congress, and is beyond the scope of the Joint Resolution of September 18, 2001.

19. The Executive Order purports to vest President Bush with the sole discretion to identify individuals who fall within its purview. It establishes no standards governing the exercise of his discretion. The Executive Order contains no notification provision for informing a detainee of the charges he may face. The Executive Order authorizes detainees to be confined indefinitely without charges. It contains no provision for a detainee to be notified of his rights under domestic and international law, and provides neither the right to counsel, nor rights to notice of consular protection or to consular access at the detainee's request. It provides no

recourse to a neutral tribunal to review the basis for or the legality of a detainee's continued detention and contains no provision for recourse to an Article III court. In fact, the Executive Order purports to expressly bar review by any court. *Id.* at § 6 (b) (2) ("the individual shall not be privileged to seek any remedy or maintain any proceeding . . . in any court of the United States, or any state thereof"). The Executive Order authorizes indefinite and unreviewable detention, based on nothing more than President Bush's written determination that an individual is subject to its terms which, since not reviewable by any court, may be based on false evidence, evidence obtained through torture, or even no evidence at all.

20. The Executive Order was promulgated in the United States and in this judicial district. The decision to incarcerate Petitioner was made by Respondents in the United States and in this judicial district. The decision to detain Petitioner at Guantanamo Bay Naval Station was made in the United States and in this judicial district. The decision to continue detaining Petitioner was, and is, being made by Respondents in the United States and in this judicial district.

21. Upon information and belief, the United States has not shown that President Bush has certified or determined in any manner, in writing or otherwise, that Petitioner is subject to the Executive Order.

22. Petitioner is not properly subject to the Executive Order.

23. The United States has not shown that Petitioner was, and is, detained lawfully either pursuant to the Executive Order, President Bush's authority as Commander-in-Chief, or the laws and usages of war, in that Petitioner was denied the process due to him under the common law and the Due Process Clause of the Fifth Amendment to the Constitution of the United States, domestic civil and military law, as well as international law.

D. Guantanamo Bay Naval Station

24. On or about January 11, 2002, the United States Military began transporting prisoners, some of whom were captured in or near Afghanistan, to Camp X-Ray at the

Guantanamo Bay Naval Station. In April 2002, all prisoners were transferred to Camp Delta, a more permanent prison facility at the Naval Station. Currently, prisoners are housed in Camp Delta and Camp V, an additional maximum-security interrogation and detention center, as well as in Camps I, II, III and IV.

25. Prisoners incarcerated at Guantanamo Bay Naval Station are entitled to test the legality of their detention in the federal courts. *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004).

26. On a date unknown to counsel for Petitioner, but known to Respondents, the United States transferred Petitioner Sharbat Khan to Guantanamo Bay Naval Station, where, upon information and belief, he currently resides in the custody and control of Respondents.

E. The Conditions of Detention at Guantanamo Bay

27. The United States military has held Petitioner at Guantanamo Bay Naval Station virtually incommunicado.

28. Upon information and belief, Petitioner has been interrogated and subjected to threats and "stress and duress" techniques such as sleep deprivation, forced sitting for hours and "environmental manipulation" including as exposure to extreme heat or cold. Potentially he has been subjected to worse treatment by Respondents' agents.

29. Upon information and belief, Petitioner has been or will be forced to provide involuntary statements to Respondents' agents at Guantanamo and has been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice and the Central Intelligence Agency, though he has not been charged with an offense and has not been notified of any pending or contemplated charges. He has not appeared before a lawful military or civilian tribunal, and has not been provided access to counsel or the means to contact and secure counsel. He has not been adequately informed of his rights under the United States Constitution, the regulations of the United States Military, the Geneva Convention, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, the 1954 Convention Relating to the Status of Refugees, or customary

international law. Indeed, Respondents have taken the position that detainees should not be informed of these rights. As a result, Petitioner has been denied any ability to protect or to vindicate his rights under domestic and international law.

30. Upon information and belief, the United States has held detainees at Guantanamo Bay under conditions that violate their constitutional and international rights to dignity and freedom from torture, and from cruel, inhuman and degrading treatment or punishment.[1]

31. Many of these violations—including isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror—are actual interrogation techniques approved for use at Guantanamo Bay by the most senior Department of Defense lawyer. *See* Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense (Nov. 27, 2002); Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations (Apr. 4, 2003).

32. Approved interrogation techniques appear to have resulted in the death of detainees while in Respondents' custody in Iraq, and in other abuses at Bagram Air Force base. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005; *Iraqi Died While Hung from Wrists*, ASSOC. PRESS, Feb. 17, 2005; *Papers Reveal Bagram Abuse*, THE GUARDIAN, Feb. 18, 2005.

33. Some military lawyers have objected to and tried to stop the abusive interrogations at Guantanamo Bay. *Military Lawyers Objected to Interrogation Methods at*

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[1] *See, e.g.*, Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 830-115, Ch. 12-13, AMR 51/063/2005 (13 May 2005); Physicians for Human Rights, "Break Them Down: Systematic Use of Psychological Torture by US Forces," Ch. 3 (2005); United Nations Press Release, "United Nations Human Rights Experts Express Continued Concern About Situation of Guantánamo Bay Detainees," Feb. 4, 2005; International Committee of the Red Cross, Press Release, "The ICRC's Work at Guantánamo Bay," Nov. 30, 2004; International Committee of the Red Cross, Operational Update, "US Detention Related to the Events of September 11, 2001 and Its Aftermath - the Role of the ICRC," July 26, 2004; Amnesty International, *United States of America Dignity Denied: Torture and Accountability in the "War on Terror"* at 22 (Oct. 27, 2004) (available at http://web.amnesty.org/library/Index/ENGAMR 511452004); *see also* Barry C. Scheck, *Abuse of Detainees at Guantánamo Bay*, The Nat'l Assoc. Of Criminal Defense Lawyers Champion, Nov. 2004, at 4-5.

Guantanamo Sources Say, N.Y. DAILY NEWS, Feb. 13, 2005 ("Judge Advocates—uniformed legal advisers known as JAGs who were assigned to a secret war crimes task force—repeatedly objected to aggressive interrogations by a separate intelligence unit at Camp Delta, where Taliban and al-Qaida suspects have been jailed since January 2002. The military lawyers' actions had never been disclosed and are the first known cases of lower-level officers resisting interrogations at the Cuban camp that might constitute torture.").

34. Upon information and belief, Respondents contend that Petitioner should not be informed of his rights under the laws or Constitution of the United States, the regulations of the United States Military, the Geneva Convention, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and the 1954 Convention Relating to the Status of Refugees or customary international law. As a result, upon information and belief, Petitioner lacks awareness of his rights under domestic and international law.

35. The International Committee of the Red Cross ("ICRC") has charged the United States Military with intentionally using psychological and physical coercion on prisoners at Guantanamo Bay during interrogations that was "tantamount to torture." *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1. The report includes claims that doctors and other medical workers at Guantanamo Bay participated in planning for interrogations. *Id.*; *see also* M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go to War*, N.E. J. MED., Jan. 6, 2005, at 3-4. Since details of the ICRC's report emerged, new revelations of abuse and torture at Guantanamo Bay have appeared, including Federal Bureau of Investigation memos detailing torture and "highly aggressive interrogation techniques," including 24-plus hour interrogations involving temperature extremes, dogs, prolonged isolation, and loud music.[2] The Associated Press has reported allegations that female interrogators at Guantanamo

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[2] *See, e.g.*, Carol D. Leonnig, *Guantánamo Detainee Says Beating Injured Spine; Now in Wheelchair Egyptian-Born Teacher Objects to Plan to Send Him to Native Land*, Washington Post, Aug. 13, 2005, at A18; Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 83-115, Ch. 12-13, AMR 51/063/2005 (13 May 2005); *Guantánamo: An Icon of Lawlessness*, Amnesty International, Jan. 6, 2005, at 3-5; *see also* Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, New York Times, Jan. 1, 2005, at A11; Carol D. Leonnig, *Further Detainee*

Bay have used sexual taunting, including smearing fake menstrual blood on a detainee's face, to try to break Muslim detainees. *Gitmo Soldier Details Sexual Tactics*, ASSOC. PRESS, Jan. 27, 2005; *see also* Eric Saar & Viveca Novak, INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER'S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO (2005); Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 89-90, Ch. 12, AMR 51/063/2005 (13 May 2005).

36. In fact, some of the well-publicized and egregious interrogation techniques used in the Abu Ghraib torture incidents – such as aggressive use of dogs, sexual humiliation, stress positions and sense deprivation – were pioneered at Guantánamo. *See* Josh White, *Abu Ghraib Dog Tactics Came From Guantánamo; Testimony Further Links Procedures at 2 Facilities*, Washington Post, July 27, 2005, at A14; and Josh White, *Abu Ghraib Tactics Were First Used at Guantánamo*, Washington Post, July 14, 2005 at A1.

37. On information and belief, the unlawful and unconstitutional interrogation techniques used by Respondents at Guantanamo Bay include not only physical and psychological abuse, but also other impermissible conduct contrary to due process requirements, including having agents of the Government present themselves as lawyers for the detainees during meetings with the detainees for the purpose of extracting information from the detainees. *See* Sam Hannel, *Lawyers Describe Guantanamo Detainees*, SEATTLE POST-INTELLIGENCER, Jan. 19, 2005. Moreover, military defense lawyers have been instructed to materially limit their representation disfavorably to their detainee clients in violation of due process. *See* David Johnston & Neil Lewis, "Lawyer Says Military Tried To Coerce Detainee's Plea," *NY Times,* June 16, 2005 at A25 (Late Ed.).

38. Respondents, acting individually or through their agents, have stated that

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Abuse Alleged; Guantánamo Prison Cited in FBI Memos, Washington Post, Dec. 26, 2004, at A1; Neil A. Lewis and David Johnston, *New F.B.I. Memos Describe Abuses of Iraq Inmates*, New York Times, Dec. 21, 2004, at A1, Dan Eggen and R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees of Guantánamo Bay*, Washington Post, Dec. 21, 2004, at A1; Neil A. Lewis, *F.B.I. Memos Critized Practices at Guantánamo*, New York Times, Dec. 7, 2004, at A19.

whatever limitations apply on coercive interrogation techniques used by United States Military officials under the auspices of the Department of Defense do not apply to interrogations conducted by agents of the Central Intelligence Agency or other entities controlled by President Bush. *See e.g.,* Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 27-43, Ch. 5, AMR 51/063/2005 (13 May 2005). Eric Lichtblau, *Gonzales Says '02 Policy on Detainees Doesn't Bind CIA*, N.Y. TIMES, Jan. 19, 2005, at A17; Dan Eggen and Charles Babington, *Torture by U.S. Personnel Illegal, Gonzales Tells Senate*, Washington Post, Jan. 18, 2005, at A4.

39. In published statements, President Bush and Secretary Rumsfeld, and predecessors of Hood and Bumgarner, respectively, Lenhert and Carrico, have proclaimed that the United States may hold the detainees under their current conditions indefinitely. See, e.g., Roland Watson, *The Times* (London), Jan. 18, 2002 ("Donald Rumsfeld, the U.S. Defense Secretary, suggested last night that Al-Qaeda prisoners could be held indefinitely at the base. He said that the detention of some would be open-ended as the United States tried to build a case against them."); Lynne Sladky, Assoc. Press, Jan. 22, 2002 ("Marine Brig. Gen. Mike Lehnert, who is in charge of the detention mission, defended the temporary cells where detainees are being held . . . . 'We have to look at Camp X-ray as a work in progress . . .' Lehnert told CNN. Lehnert said plans are to build a more permanent prison 'exactly in accordance with federal prison standards . . . ."); John Mintz, *Extended Detention in Cuba Mulled*, Washington Post, February 13, 2002. ("As the Bush Administration nears completion of new rules for conducting military trials of foreign detainees, U.S. officials say they envision the naval base at Guantanamo Bay, Cuba, as a site for the tribunals and as a terrorist penal colony for many years to come.").

40. According to the Department of Defense, even detainees who are adjudged innocent of all charges by a military commission may nevertheless be kept in detention at Guantanamo Bay indefinitely. *See* Department of Defense Press Background Briefing of July 3, 2003, *at* http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html (last visited Nov. 1,

2005).

41. Counsel for Respondents have also consistently maintained that the United States has reserved the right to hold the detained prisoners, including Petitioner, under their current conditions indefinitely. *See In re Guantanamo Detainee Cases*, Nos. 02-CV-0299 (CKK) *et al.*, (D.D.C.), Tr. of Dec. 1, 2004, Or. Argument on Mot. to Dismiss, at 22-24 (statements of Principle Deputy Assoc. Atty. Gen. Brian Boyle); *see also* Dana Priest, *Long-Term Plan Sought for Terror Suspects*, Washington Post, Jan. 2, 2005, at Al. In fact, Respondents have failed to release detainees even after they have been found to be non-enemy combatants by the Combatant Status Review Tribunals.[3] Moreover, the United States Government has also acknowledged plans to begin constructing a new, more permanent facility at Guantanamo Bay. Christopher Cooper, *In Guantanamo, Prisoners Languish in a Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at Al; *Guantanamo Takes on the Look of Permanency*, ASSOC. PRESS, Jan. 9, 2005.

F. Rendition

42. During interrogations, detainees have also been threatened with "rendition" or transfer to countries that routinely practice torture. Upon information and belief, the United States has secretly transferred detainees to such countries without complying with the applicable legal requirements for extradition. This practice, known as "rendition" or "extraordinary rendition," is used to facilitate interrogation by means of torture. *See* Craig Whitlock, *New Swedish Documents Illuminate CIA Action: Probe Finds 'Rendition' Of Terror Suspects Illegal*, Washington Post, May 21, 2005, at A1; Jane Mayer, *Outsourcing Torture: The Secret History of American's "Extraordinary Rendition" Program*, The New Yorker, Feb. 14, 2005, at 106.

43. The United States' practice of rendition has been well documented by various major American and international news organizations, including, *inter alia*, The New York

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[3] *See* Robin Wright, *Chinese Detainees Are Men Without a Country; 15 Muslims, Cleared of Terrorism Charges, Remain at Guantánamo With Nowhere to Go*, Washington Post, August 24, 2005, at A1 (Final Ed.); Ben Fox, *U.S. to Ease Conditions for Some Detainees*, Chicago Trib., Aug. 11, 2005 at C4.

Times, Washington Post, the Los Angeles Times, and the British Broadcasting Corporation ("BBC"). According to news accounts,

> Since September 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries . . . whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics—including torture and threats to families—that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogations, the sources said.

Rajiv Chanrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, Washington Post, Mar. 11, 2002, at Al; *see also* Dana Priest, *Long Term Plan Sought for Terror Suspects*, Washington Post, Jan. 2, 2005, at Al ("The transfers, called 'renditions,' depend on arrangements between the United States and other countries, such as Egypt . . . that agree to have local security services hold certain suspects in their facilities for interrogation by CIA and foreign liaison officers.").

44. In fact, the U.S. Government has recently announced its intention to render many Guantánamo detainees to countries which have a poor record of respecting human rights and which engage in torture.[4] Moreover, upon belief and information, the Government is conditioning such rendering of detainees to their home countries on the requirement that the home country imprison the detainee, without regard to the detainee's individual factual or legal situation.[5]

45. Moreover, the Washington Post reports that it has confirmed that prisoners are

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[4] *See e.g.*, Matthew Waxman, *Beyond Guatanamo*, Wash. Times Aug. 20, 2005, at A14; Robin Wright and Josh White, *U.S. Holding Talks on Return of Detainees; Administration Close to Reaching agreements With 10 Muslim Governments*, Wash. Times, August 9, 2005, at A13; Neil Lewis, *Guantanamo Detention Site Is Being Transformed, U.S. Says*, NY Times, August 6, 2005, at A8 (Late Ed.); Paul Richter, *U.S. to Repatriate 110 Afghans Jailed at Guantanamo Bay*, LA Times, Aug. 5, 2005 at A18.

[5] *See* Robin Wright and Josh White, *U.S. Holding Talks on Return of Detainees; Administration Close to Reaching Agreements With 10 Muslim Governments*, Washington Post, August 9, 2005, at A13; BBC Worldwide Monitoring, "USA to release 107 Yemens from Guantanamo Bay," August 10, 2005 (available form LEXIS MWP90 file) ("The US authorities declared few days ago that they would extradite detainees from Guantanamo Bay to Afghanistan, Saudi Arabia and Yemen on the condition [that they are] to be put in jail.").

being held by the CIA in secret prisons in Eastern Europe, referred to as "black sites" in U.S. government documentation. In these facilities, which "were built and are maintained with congressionally appropriated funds," prisoners are "[k]ept in dark, sometimes underground cells, [and] have no legal rights, and no one outside the CIA is allowed to talk with or even see them." Diana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Washington Post, November 2, 2005 at A01. The Post also reports that some of these secretly held individuals have been at Guantanamo Bay. *Id.*

46. Rendition back to Afghanistan puts Petitioner at risk of further torture and human rights abuses. Afghanistan has a history of abuse of prisoners. *See, Human Rights Watch Report on Afghanistan, 2005,* at http://hrw.org/reports/2005/afghanistan0605/4.htm#_Toc105552347 ; Sharon Herbaugh, "Civilians Tell of Captivity, Torture by Rebels," Associated Press, June 6, 1992.[6]

47. Upon information and belief, Petitioner is at risk of being rendered, returned or transferred without lawful procedures to a country that engages in torture during interrogations and incarceration and/or permits indefinite detention without process.

IV. CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

COMMON LAW DUE PROCESS AND DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES - UNLAWFUL DEPRIVATION OF LIBERTY

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[6]Quoting an interview with released Hazara prisoner, "'We were kept in containers, so many of us that we couldn't sit down. They wouldn't give us food or water,' said Nadir Ali, a 22-year-old Hazara candymaker who was held with [. . .] others at an abandoned interrogation center of the former secret police. He was clutching his right arm, which was swollen and probably broken from the blows with rifle butts and chains." It is unknown how the new government in Afghanistan will impact prisoners' rights.

48. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

49. By the actions described above, Respondents, acting under color of law, have violated and continue to violate common-law principles of due process as well as the Due Process Clause of the Fifth Amendment to the Constitution of the United States. President Bush has ordered the prolonged, indefinite, and arbitrary detention of individuals, without due process of law, and the remaining Respondents have implemented those orders. Respondents' actions deny Petitioner the process accorded to persons seized and detained by the armed forces of the United States in times of armed conflict as established by, *inter alia*, the Uniform Code of Military Justice ("UCMJ"), Army Regulation 190-8, Articles 3 and 5 of the Third and Fourth Geneva Conventions, and customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

50. To the extent that Petitioner's detention purports to be authorized by the Executive Order, that Order violates the Fifth Amendment of the Constitution of the United States on its face and as applied to Petitioner.

51. To the extent that Petitioner's detention is without basis in law and violates the common law principles of due process embodied in 28 U.S.C. § 2241 (c)(1), Petitioner's detention is unlawful.

52. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court may deem appropriate.

SECOND CLAIM FOR RELIEF

DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES – UNLAWFUL CONDITIONS OF CONFINEMENT

53. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

54. By the actions described above, Respondents, acting under color of law, have violated and continue to violate Petitioner's right to be free from unlawful conditions of confinement, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

55. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court may deem appropriate.

THIRD CLAIM FOR RELIEF

GENEVA CONVENTIONS - ARBITRARY DENIAL OF DUE PROCESS

56. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

57. By the actions described above, Respondents, acting under color of law, have denied and continue to deny Petitioner the process accorded to persons seized and detained by the armed forces of the United States in times of armed conflict, as established by specific provisions of the Third and Fourth Geneva Conventions.

58. Violations of the Geneva Conventions are direct treaty violations, violate customary international law, and give rise to an enforceable claim by Petitioner under 28 U.S.C. § 2241 (c)(3).

59. Respondents are liable for the conduct described above insofar as they set the conditions at Guantanamo Bay Naval Station, and directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, and/or conspired to violate the Geneva Conventions.

60. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court may deem appropriate.

FOURTH CLAIM FOR RELIEF

INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW - ARBITRARY DENIAL OF DUE PROCESS

61. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

62. By the actions described above, Respondents have denied and continue to deny Petitioner the process due to persons seized and detained by the armed forces of the United States in times of armed conflict as establish by customary international humanitarian and human rights law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

63. Because Respondents are detaining Petitioner "under or by color of the authority of the United States," they are violating 28 U.S.C. § 2241(c)(1), and because Respondents are detaining Petitioner "in violation of the Constitution or laws or treaties of the United States," they are also violating 28 U.S.C. § 2241(c)(3).

64. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court may deem appropriate.

FIFTH CLAIM FOR RELIEF

ALIEN TORT STATUTE - TORTURE

65. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

66. On information and belief, Respondents directed, ordered, confirmed, ratified, and/or conspired together and with others to bring about acts that deliberately and intentionally inflicted severe physical and psychological abuse and agony upon detainees in order to obtain coerced information or confessions from them, punish or intimidate them, or for other purposes.

On information and belief, such abuses include, *inter alia*, that detainees have been placed in constant vulnerability to repeated interrogation and severe beatings; kept in cages with no privacy; shackled with heavy chains and irons; subjected to solitary confinement or the threat of solitary confinement for prolonged periods of time for minor rule infractions; interrogated while shackled and chained in painful positions; exposed to extremes of temperature; subjected to violent behavior or the threat of violence; threatened with rendition to countries that practice torture; sexually humiliated; denied access to counsel and family; deprived of adequate medical care; and subjected to repeated psychological abuse.

67. The acts described herein constitute torture in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violate customary international law prohibiting torture as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

68. Respondents are liable for said conduct because they directed, ordered, confirmed, ratified, and/or conspired together and with others to commit the acts of torture against detainees, including Petitioner..

69. On information and belief, Petitioner was and continues to be subject to the same physically and psychologically abusive conditions as other detainees, and is entitled to habeas corpus, declaratory, and injunctive relief and other relief as the Court may deem appropriate.

SIXTH CLAIM FOR RELIEF

ALIEN TORT STATUTE - WAR CRIMES

70. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

71. By the actions described above, Respondents' acts directing, ordering, confirming, ratifying, and/or conspiring to bring about the torture and other inhumane treatment of detainees constitute war crimes and/or crimes against humanity in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violate, among others, the Fourth Geneva

Convention, Common Article III of the Geneva Conventions, and Additional Protocols I and II of the Geneva Conventions as well as customary international law prohibiting war crimes as reflected, expressed, and defined in other multilateral treaties and international instruments, international and domestic judicial decisions, and other authorities.

72. As a result of Respondents' unlawful conduct, upon information and belief, detainees have been and are being forced to suffer severe physical and psychological abuse and agony. Furthermore, upon information and belief, Petitioner was and continues to be subject to the same conditions as other detainees, and therefore is entitled to habeas corpus, declaratory, and injunctive relief, and such other relief as the Court may deem appropriate.

SEVENTH CLAIM FOR RELIEF

ALIEN TORT STATUTE - CRUEL, INHUMAN OR DEGRADING TREATMENT

73. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

74. Upon information and belief, the acts described herein intentionally and grossly humiliated and debased detainees, including Petitioner, forced them to act against their respective wills and consciences, filled them with fear and anguish, and damaged them physically and/or morally.

75. The acts described herein constitute cruel, inhuman or degrading treatment in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violate customary international law prohibiting cruel, inhuman or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

76. Respondents are liable for said conduct in that they directed, ordered, confirmed, ratified, and/or conspired together and with others to cause the cruel, inhuman or degrading treatment of detainees, including Petitioner.

77. Upon information and belief, Petitioner was and continues to be subject to the

severe physical and psychological abuse and agony, and is entitled to habeas corpus, declaratory, and injunctive relief, as well as other relief to be determined at trial.

EIGHTH CLAIM FOR RELIEF

ALIEN TORT STATUTE - ARBITRARY ARREST AND PROLONGED ARBITRARY DETENTION

78. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

79. The acts described herein constitute arbitrary arrest and detention of Petitioner in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violate customary international law prohibiting arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

80. Respondents are liable for said conduct in that they directed, ordered, confirmed, ratified, and/or conspired together and with others to bring about the arbitrary arrest and prolonged arbitrary detention of detainees, including Petitioner, in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violate customary international law prohibiting arbitrary arrest and prolonged arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

81. As a result of Respondents' unlawful conduct, Petitioner, upon information and belief, has been and are being deprived of his freedom, separated from his families, and forced to suffer severe physical and mental abuse. Petitioner, upon information and belief, is therefore entitled to habeas corpus, declaratory, and injunctive relief, and such other relief as the Court may deem appropriate.

NINTH CLAIM FOR RELIEF

ALIEN TORT STATUTE - ENFORCED DISAPPEARANCE

82. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

83. By the actions described above, it is believed that Respondents directed, ordered, confirmed, ratified, and/or conspired to bring about the enforced disappearance of Petitioner in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violate customary international law prohibiting enforced disappearances as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

84. As a result of Respondents' unlawful conduct, Petitioner has been and is being deprived of his freedom, separated from his families, and forced to suffer severe physical and mental abuse. Petitioner is therefore entitled to habeas corpus, declaratory, and injunctive relief, and such other relief as the Court may deem appropriate.

TENTH CLAIM FOR RELIEF

ARTICLE II OF THE UNITED STATES CONSTITUTION - UNLAWFUL DETENTION

85. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

86. The United States has not shown that Petitioner is, or was, an enemy alien, a lawful or unlawful belligerent, or a combatant of any kind. The Executive lacks the authority to order or direct military officials to detain civilians who are seized far from the theater of war or occupied territory or who were not "carrying a weapon against American troops on a foreign battlefield." *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2642 n.l (2004).

87. By the actions described above, President Bush has exceeded and continues to exceed the executive's authority under Article II of the Constitution of the United States by

authorizing, ordering and directing that military officials seize Petitioner and transfer him to military detention, and by authorizing and ordering the continued military detention of all detainees, including Petitioner, at Guantanamo Bay Naval Station. All of the Respondents acted and continue to act without lawful authority by directing, ordering, and/or supervising the seizure and military detention of Petitioner.

88. President Bush's Executive Order authorizing the military seizure and detention of detainees by the Respondents is *ultra vires* and illegal in that it exceeds the executive's authority under Article II of the Constitution of the United States. Accordingly, the Executive Order is void on its face, and as applied to Petitioner.

89. To the extent that Respondents assert that their authority to detain Petitioner derives from a source other than the Executive Order, including, without limitation, the executive's inherent authority to conduct foreign affairs or to serve as Commander-in-Chief of the United States Armed Forces, whether from Article II of the Constitution of the United States or otherwise, Respondents lack that authority as a matter of fact and law.

90. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief as well as any other relief the Court may deem appropriate.

ELEVENTH CLAIM FOR RELIEF

APA - ARBITRARY AND CAPRICIOUS UNLAWFUL DETENTION

91. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

92. The Uniform Code of Military Justice, "UCMJ" governs the detention of persons by the armed forces of the United States. Army Regulation 190-8 prohibits the detention of civilians who were seized away from the field of battle or outside occupied territory or who were not engaged in combat against the United States. *See* Army Reg. 190-8 at 1-6(g) ("Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what

acts they have committed and what penalty should be imposed").

93. By arbitrarily and capriciously detaining Petitioner in military custody, Respondents have acted and continue to act *ultra vires* and unlawfully in violation of Army Reg. 190-8 and other provisions of the UCMJ.

94. Respondents' violation of Army Regulation 190-8 and the UCMJ gives rise to a cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

95. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court may deem appropriate.

TWELFTH CLAIM FOR RELIEF

APA - ARBITRARY AND CAPRICIOUS DENIAL OF DUE PROCESS

96. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

97. By the actions described above, Respondents, acting under color of law, have arbitrarily and capriciously denied and continue to deny Petitioner the process accorded to persons seized and detained by the United States Military in times of armed conflict as established by the UCMJ and Army Regulation 190-8, resulting in a violation of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

98. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court many deem appropriate.

THIRTEENTH CLAIM FOR RELIEF

APA - TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

99. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

100. By the actions described above, Respondents have acted and continue to act arbitrarily and capriciously by directing, ordering, confirming, ratifying, and/or conspiring to unlawfully subject detainees to torture and/or cruel, inhuman or degrading treatment in violation

of the UCMJ and Army Regulation 190-8, thereby violating the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. Upon information and belief, Petitioner is subject to the same conditions.

101. Accordingly, Petitioner is entitled to declaratory and injunctive relief, as well as any other relief the Court may deem appropriate.

FOURTEENTH CLAIM FOR RELIEF

DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION - UNLAWFUL RENDITION

102. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

103. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a violation of Petitioner's rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

104. Accordingly, Petitioner is entitled to declaratory and injunctive relief, as well as any other relief the Court may deem appropriate.

FIFTEENTH CLAIM FOR RELIEF

VIOLATION OF THE RIGHT TO COUNSEL AND TO ACCESS TO THE COURTS

105. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

106. Respondents have consistently contrived to intrude upon Petitioner's right to consult with counsel by conditioning counsel's access to Petitioner on unreasonable terms, including classification/declassification procedures, all in violation of Petitioner's attorney-client privilege, his work product privilege, and the Fifth and Sixth Amendments to the U.S. Constitution.

SIXTEENTH CLAIM FOR RELIEF

CONVENTION AGAINST TORTURE, CONVENTION RELATING TO THE STATUS OF REFUGEES AND GENEVA CONVENTION - UNLAWFUL RENDITION

107. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

108. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a direct violation of his rights under the Third and Fourth Geneva Conventions, the Covenant Against Torture and the 1954 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

109. Accordingly, Petitioner is entitled to habeas corpus, declaratory and injunctive relief, as well as any other relief the Court may deem appropriate.

SEVENTEENTH CLAIM FOR RELIEF

ALIEN TORT STATUTES - UNLAWFUL RENDITION

110. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

111. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a violation of his rights under 28 U.S.C. §§ 2241 and 2242, and under customary international law which may be vindicated under the Alien Tort Statute, 28 U.S.C. § 1350.

112. Accordingly, Petitioner is entitled to habeas corpus, declaratory, and injunctive relief, as well as any other relief the Court may deem appropriate.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief and requests that this Court:

1. Grant the Writ of Habeas Corpus and order Respondents to release Petitioner from his current unlawful detention;

2. Order that Petitioner be brought before the Court or before a Magistrate Judge assigned by the Court to vindicate his rights;

3. Order that Petitioner cannot be transferred to any other country without the knowing consent and written agreement of Petitioner (obtained voluntarily and without duress) and Petitioner's counsel while this action is pending;

4. Order that Petitioner cannot be delivered, transferred, returned, or rendered to a country where there is a foreseeable and imminent risk that he will be subject to torture;

5. Order Respondents to allow counsel to meet and confer with Petitioner in private and to engage in unmonitored attorney-client conversations;

6. Order Respondents to cease all interrogations of Petitioner, direct or indirect, while this litigation is pending;

7. Order Respondents to cease all acts of torture and cruel, inhuman and degrading treatment of Petitioner;

8. Order and declare the Executive Order of November 13, 2001, *ultra vires* and unlawful as applied to Petitioner;

9. Order and declare that the prolonged, indefinite, and restrictive detention of Petitioner without due process is arbitrary and unlawful and a deprivation of liberty without due process; and

10. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the common law, the Constitution of the United States, federal statutory law, international law and the treaties to which the United States is a party.

Respectfully submitted,

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Dated: December 13, 2005

Original filed.
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U.S. Department of Justice

Issues Applicable to Probation & Supervised Release

Presented by

Robert Wicsher
Assistant Federal Defender

FEDERAL PUBLIC DEFENDER
NORTHERN AND SOUTHERN DISTRICTS OF IOWA

TERMINATION, MODIFICATION AND REVOCATION: ISSUES APPLICABLE TO PROBATION AND SUPERVISED RELEASE

BY ROBERT A. WICHSER
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SIOUX CITY, IOWA

It ain't over till it's over.
-- Yogi Berra

OVERVIEW: THIS PRESENTATION WILL REVIEW THE ELEMENTS OF PROBATION AND SUPERVISED RELEASE WITHIN THE CONTEXT OF TERMINATION, MODIFICATION AND REVOCATION OF THOSE SPECIFIC CONDITIONS IN THE OVERALL CONTEXT OF A CRIMINAL SENTENCE.

I. DEFINITIONAL BASICS

A. Probation

Probation is a sentence under which the defendant is not imprisoned, but is allowed to remain free as long as he complies with conditions imposed by the court. Like imprisonment [18 U.S.C. §3581(a)] and fines [18 U.S.C. §3571(a)], probation is a sentence in itself, rather than suspension of a sentence of imprisonment. U.S.S.G. Ch. 5, Pt. B, intro. comment.; *see also* 18 U.S.C. §3561(a). The court may use probation as an alternative to imprisonment if it can fashion terms and conditions of probation that fully meet the statutory purposes of sentencing, including [U.S.S.G. Ch. 5, Pt. B, intro. (comment)]:

- Promoting respect for law
- Providing just punishment
- Achieving general deterrence

- Protecting the public from further crimes by the individual defendant.

When Permitted

The court may sentence a defendant who has been found guilty of an offense to a term of probation unless the court is prohibited from doing so by statute.

Statutory Length of Terms

In determining whether to impose a sentence of probation and the initial length of a term of probation, the court must consider the factors set forth in 18 U.S.C. §3553(a), relating to the imposition of sentence. The terms of probation authorized by statute are :

- Not less than one year or more than five years for a felony
- Not more than five years for a misdemeanor
- Up to one year for an infraction

Under the sentencing guidelines, a court has discretion to establish the length of a term of probation within two broad ranges based on the applicable guideline offense level. When sentencing the defendant to a term of probation, the court must impose a term of [U.S.S.G. §5B1.2]:

- At least one year, but not more than five years, for offense level six or greater
- Not more than three years for offense levels below six

When Prohibited by Statute

The court may not impose a sentence of probation when:

- An individual is convicted of a Class A felony [death or life imprisonment - 18 U.S.C. §3559(a)(1)] or a Class B felony [25 years or more maximum term of imprisonment established by a statute defining an offense - 18 U.S.C. §3559 (a)(2)]
- The offense of conviction is one for which probation is expressly precluded by statute [*see, e.g.*, 21 U.S.C. §841 (b)(1)(A), (b)(1)(B) (establishing penalties for drug offenses based upon quantities of drugs)
- The court sentences the defendant at the same time to a term of imprisonment for the same or a different offense that is not a petty offense

When Authorized in Guidelines

The sentencing guidelines provide for a sentence of probation when:

- The applicable guideline range is in Zone A of the Sentencing Table (minimum imprisonment of zero months) [U.S.S.G. §§5B1.1(a), 5C1.1, comment. (n.2)]

- The applicable guideline range is in Zone B (minimum imprisonment of at least one but not more than six months), so long as the court imposes conditions requiring intermittent or community confinement or home detention sufficient to satisfy the minimum term of imprisonment specified in the guideline range [U.S.S.G. §§5B1.1(a), 5C1.1(c)(3), comment. (n.3)]

When the applicable guideline range is in Zone C or D of the Sentencing Table (minimum imprisonment of eight months or more), the sentencing guidelines provide that the court may not impose a sentence of probation. *See* U.S.S.G. §5C1.1(d), (f).

B. Supervised Release

Supervised release is a term of post-release, probation-like supervision, which a court imposes as part of a term of imprisonment to commence after imprisonment. 18 U.S.C. §3583(a). Supervised release remains valid after the Supreme Court's decision in *United States v. Booker,* 125 S. Ct. 738, 764-65 (2005) (noting in dictum validity of supervised release). *See also United States v. Coleman,* 404 F.3d 1103 (2005) (supervised release among the provisions of the Sentencing Reform Act that the Court recognized as constitutionally valid). Unlike probation, supervised release is not a sentence. It is part of the punishment for the underlying offense. *United States v. Meeks*, 25 F.3d 1117, 1121 (2d Cir. 1994). Accordingly, the court must advise a defendant who pleads guilty of the maximum term of supervised release the court may impose. FRCrP 11(b)(1)(H).

WHEN REQUIRED

By Statute

A court must impose a term of supervised release when [18 U.S.C. §3583(a)]:

- It is required by a specific statute. *See, e.g.,* 21 U.S.C. §841(b)(1)(A)-(D) (in addition to imprisonment, required minimum terms of supervised release for specified drug offenses) *or*

- The defendant is convicted for the first time of a domestic violence offense as defined in 18 U.S.C. §3561(b).

Under Guidelines

When the court has sentenced the defendant to a term of imprisonment of more than one year, the guidelines direct the court to impose a term of supervised release, absent departure. U.S.S.G. §§5D1.1(a); 5D1.1, comment. (n.1). The court may depart from the guidelines and not impose a term of supervised release if the court determines such a term is not required to [U.S.S.G. §5D1.1, comment. (n.1)]:

- Protect the public welfare
- Enforce a financial condition
- Provide drug or alcohol treatment or testing
- Facilitate defendant's reintegration into the community
- Accomplish any other sentencing purpose authorized by statute

LENGTH OF TERM

By Statute

Unlike the length of a term of probation, which the court determines by the nature of the offense of conviction (felony, misdemeanor or infraction) and applicable guideline offense level, the court determines the length of a term of supervised release by the classification of the offense of conviction, unless a statute defining an offense provides for a greater term. Examples of statutes that provide for a greater term include: 21 U.S.C. §841(b)(1)(A) - (D) (establishing mandatory minimum terms of supervised release for drug offenses); 18 U.S.C. §3583(j) (terrorism: any term of years or life); 18 U.S.C. §3583(k) (minor victim: any term of years or life)]. 18 U.S.C. §3583(b); U.S.S.G. §5D1.2(b) (minimum terms of supervised release required by statute).

The authorized statutory maximum terms are:

- For Class A or B felony—not more than 5 years
- For Class C or D felony—not more than 3 years
- For Class E felony or misdemeanor (other than a petty offense)—not more than one year

Under Guidelines

The sentencing guidelines minimum and maximum terms of supervised release are [U.S.S.G. §5D1.2(a)]:

- For a Class A or B felony—at least three, but not more than five, years
- For a Class C or D felony—at least two, but not more than three, years
- For a Class E felony or Class A misdemeanor —one year

For classification of offenses based on the length of a term of imprisonment authorized by the statute defining an offense, see 18 U.S.C. §3559(a). For guideline terms of supervised release related to terrorism and certain sex offenses respectively, see U.S.S.G. §5D1.2(a) (mandatory term) and §5D1.2(c) ps, (recommended term).

Effect of *Booker*

In *United States v. Booker,* 125 S. Ct. 738, 756-57 (2005), the Supreme Court held that the sentencing guidelines are no longer mandatory, but instead "advisory." A sentencing court must "consider" the sentencing guideline range along with the broad sentencing factors listed in 18 U.S.C. §3553(a). *United States v. Booker,* 125 S. Ct. at 767. ("district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," subject to review on appeal for "unreasonableness."). In the wake of *Booker,* courts have not agreed on the weight to be afforded the guidelines. However, *see United States v. Lincoln,* 413 F. 3d. 716, 717 (8th Cir. 2005) (guidelines are "presumptively reasonable").

II. Early Termination

Probation

A court may terminate a sentence of probation before the term has run and discharge the defendant. The court may terminate the term early on the defendant's motion or the court's own motion. The court may terminate probation early after considering the factors set forth in 18 U.S.C. §3553(a), relating to imposition of a sentence, to the extent they are applicable, and when the court is satisfied that termination is warranted by the defendant's conduct and is in the interest of justice. 18 U.S.C. §3564(c).

Federal Rule of Criminal Procedure 32.1(c) governs procedure for early termination of probation. 18 U.S.C. §3564(c). The government must be notified of the relief sought and a hearing must be held when the government objects. FRCrP 32.1(c).

The court may terminate probation [18 U.S.C. §3564(c)]:

- At any time after one year of probation in the case of a felony, or

- At any time during the sentence of probation in the case of a misdemeanor or an infraction

Supervised Release

After considering the sentencing factors relevant to imposition of a term of supervised release [18 U.S.C. §3553(a), the court may terminate supervised release at any time after one year of supervised release when the court is satisfied that termination is warranted by the defendant's conduct and is in the interest of justice. 18 U.S.C. §3583(e)(1).

The court will consider early termination on the defendant's motion or on the court's own motion. Federal Rule of Criminal Procedure 32.1(c) governs procedure for early termination of supervised release. 18 U.S.C. §3583(e)(1). The government must be notified of a motion for early termination or when the court intends to terminate on its own motion. The court must hold a hearing if the government objects to the relief sought. FRCrP 32.1(c).

Hearing

The court need not hold a hearing before terminating probation or supervised release early if the attorney for the government does not object after receiving notice of the motion for termination and a reasonable opportunity to object. If the prosecutor objects, the court must hold a hearing. FRCrP 32.1(c). The probation officer does not have separate standing to object. *See* 18 U.S.C. §3583(e)(1); FRCrP 32.1(c).

III. EXTENSION OF LENGTH OF TERM OR MODIFICATION OF CONDITIONS

A. Extension of Term

Probation

When the court sentences a defendant to less than the maximum authorized term of probation, the court may extend the term of probation, after a hearing, at any time prior to expiration or termination of probation. The court must consider the sentencing factors applicable to the initial determination of the length of a sentence of probation [18 U.S.C. §3553(a)]. 18 U.S.C. §3564(d).

Supervised Release

At any time prior to the expiration or termination of a term of supervised release, a court may extend the term if it originally imposed less than the maximum authorized term. 18 U.S.C. §3583(e)(2). The court must consider the sentencing factors applicable to the initial imposition of a term of supervised release. 18 U.S.C. §3583(e)(2). Federal

Rule of Criminal Procedure 32.1(c) governs procedure for extension of a term of supervised release. *Id.*

Requirements

A court may extend a sentence of probation or a term of supervised release with or without finding a violation of a condition of supervision. However, because extension of a term of supervision places the person under continued restriction, the court must hold a hearing and ensure that the defendant has the assistance of counsel before extending or unfavorably modifying a term, unless the defendant waives a hearing and counsel. FRCrP 32.1(c).

A hearing and warning by a magistrate judge is not required for a valid waiver. A probation officer may accept a waiver.

At times a person under supervision who has violated a condition of probation or supervised release may avoid revocation by agreeing to an extension of a term of supervision. An extension under such circumstances, or where the probationer or releasee's conduct merely verges on a violation, will allow an opportunity for rehabilitative or corrective action.

B. Modification of Conditions

Nature of Conditions

At sentencing, the court will establish mandatory conditions of a sentence of probation or term of supervised release, including conditions which prohibit further criminal activity by the person under supervision; prohibit drug possession and use, and mandate testing; and, conditions related to a fine, restitution and a change in the person's economic circumstances [18 U.S.C. §3563(a)(probation)]. For a complete list of mandatory conditions of probation, see 18 U.S.C. §3563(a); U.S.S.G. §5B1.3(a); for mandatory conditions of supervised release, see 18 U.S.C. §3583(d); U.S.S.G. §5D1.3(a).

In addition to mandatory conditions, the court has discretion to impose other conditions that are reasonably related to the factors the court must consider in imposing sentence and involve only such restrictions of liberty and property as are necessary to achieve the purposes of sentencing [18 U.S.C. §3553(a)(2)]. For a list of discretionary conditions of probation, see 18 U.S.C. §3563(b); for supervised release discretionary conditions, see 18 U.S.C. §3583(d).

The Sentencing Guidelines recommend that the court impose a list of so-called "standard" conditions, several of which, according to the Sentencing Commission, are an "expansion of the conditions required by statute." *See* U.S.S.G. §5B1.3(c), p.s.

(probation); U.S.S.G. §5D1.3(c), p.s. (supervised release). The guidelines also recommend "special" conditions where appropriate in a particular case. *See* U.S.S.G. §5B1.3(d),(e), p.s. (probation); §5D1.3(d),(e), p.s. (supervised release).

When

The court may modify, reduce or enlarge conditions of a sentence of probation or term of supervised release at any time prior to the expiration or termination of the sentence or term. 18 U.S.C. §3563(c) (probation); 18 U.S.C. §3583(e)(2) (supervised release).

Requirements

The court may modify conditions of a sentence of probation or term of supervised release after considering the sentencing factors [18 U.S.C. §3553(a) applicable to the initial setting of conditions of supervision. 18 U.S.C. §3563(c) (probation); 18 U.S.C. §3583(e)(2) (supervised release). The court is not required to find a violation of a condition of supervision before modifying conditions.

C. Procedure

Modification in Defendant's Favor

The court may modify conditions of probation or supervised release in a manner favorable to a person on probation or supervised release on a motion by that individual or on the court's own motion. FRCrP 32.1(c)(2). If the attorney for the government does not object after notice and a reasonable opportunity to do so, the court need not hold a hearing. FRCrP 32.1(c)(2). If the prosecutor objects, the court must hold a hearing. FRCrP 32.5(c)(2).

Modification Unfavorable to Defendant

The court must hold a hearing and ensure that the person under supervision has the assistance of counsel before the court may modify conditions of probation or supervised release in a manner unfavorable to the person on supervision, unless the individual knowingly and intelligently waives the right to a hearing and assistance of counsel. FRCrP 32.1(c). A hearing is required whenever the court extends a term of probation or supervised release, absent a valid waiver. FRCrP 32.1(c)(2)(B).

IV. Revocation

A. General Principles

1. Authority to Revoke

The court's authority to revoke a sentence of probation and resentence the probationer, or revoke a term of supervised release and impose a term of imprisonment, is governed by statute, and addressed in policy statements issued by the Sentencing Commission. You must consider both in representing an individual in a revocation proceeding. The procedure for revocation is governed by FRCrP 32.1.

***Booker* Implications**

Revocation Guidelines: Advisory Only

In its Remedy Opinion in *United States v. Booker*, 125 S. Ct. 738, 757 (2005), the Supreme Court rendered the Sentencing Guidelines "effectively advisory" (rather than mandatory), and established a "reasonableness" standard of review of sentences in all cases. *Id.* at 765. Prior to *Booker,* courts similarly viewed the policy statements regarding revocation of probation and supervised release as "advisory," i.e., they must be considered by the court in revocation proceedings but are not binding. *United States v. Crosby,* 397 F.3d 103, 116 (2d Cir. 2005) (citing cases to the effect that all courts of appeals have held that the policy statements in Chapter 7 of the Sentencing Guidelines, concerning revocation of supervised release, are advisory and non-binding). Thus, *Booker* caused no change in the non-binding nature of the Chapter 7 policy statements.

Given the fact that the probation and supervised release revocation policy statements are advisory, a sentence outside the the advisory guideline range, imposed upon revocation, is not considered as a "departure" in the traditional sense. *United States v. Roen,* 360 F. Supp. 2d 926, 928 (E.D. Wis. 2005) (courts imposing sentence higher or lower than guideline range are not required to cite factors that take the case outside the heartland, but only to explain why the sentence imposed was necessary and reasonable in light of all of the relevant sentencing factors under 18 U.S.C. §3553(a)).

Standard of Review: Reasonableness

Before *Booker*, supervised release revocation cases were treated as cases in which there was no applicable sentencing guideline (as opposed to a policy statement) [18 U.S.C. §3742(e)(4)]; as such, the standard of review was "plainly unreasonbable." *See United States v. White Face,* 383 F.3d 733, 737 (8th Cir. 2004). Under *Booker,* however, the courts of appeals will determine whether a sentence imposed upon revocation is "reasonable" and whether it was imposed after the district court had "considered" most of the sentencing factors listed in 18 U.S.C. §3553(a), including policy statements issued by the Sentencing Commission concerning revocation of probation and supervised release [18 U.S.C. §3553(a)(4)(B)]. Thus, *Booker's* reasonableness standard is treated the same as the now excised "plainly unreasonable" standard in 18 U.S.C. §3742(e)(4). *United States v. Cotton,* 399 F.3d 913, 916 (8th Cir. 2005).

2. Discretionary Revocation

a. In General

A court presented with an alleged violation of a condition of supervision will engage in a two-step process:

- Make a finding, *i.e.,* a factual determination, whether the probationer or person on supervised release has violated a condition of supervision

- If the court finds a violation, determine whether the finding warrants continuation of the person on supervision or revocation.

b. Probation

What The Court May Do

If the defendant violates a condition of probation at any time prior to expiration or termination of the sentence of probation, the court may, after a hearing pursuant to FRCrP 32.1 and after considering the sentencing factors set forth in 18 U.S.C. §3553(a) to the extent they apply:

- Continue the person on probation, with or without extending the term or modifying or enlarging the conditions of probation or

- Revoke the sentence of probation and resentence the individual under subchapter A, *i.e.,* 18 U.S.C. §§3551- 3559

Statutory Sentences Upon Revocation

Upon revocation of probation, the court may resentence the defendant to any appropriate sentence available under 18 U.S.C. §§3551-3559, *i.e.,* the general provisions for sentencing. 18 U.S.C. §3565(a)(2) (1994).

The 1994 amendment to 18 U.S.C. §3565(a)(2) (effective September 13, 1994) eliminated language that limited the court to a sentence available under the sentencing guidelines calculated at the time of the initial sentence.

In cases to which the 1994 amendment applies, *i.e.,* cases in which the criminal conduct underlying the original conviction occurred after the effective date of the 1994 amendment, the court is not limited to the guideline range available for the original sentence. It may resentence to any sentence permitted for the original offense consistent with 18 U.S.C. §§3551-3559, the general sentencing provisions of the Sentencing Reform Act. This rule is consistent with the general principle that the sentence imposed for a violation of probation is for the original criminal conduct rather than for the conduct that led to the violation. The court does have discretion, however, to resentence after revocation to the range available at the time of the original sentencing.

The court of appeals will uphold a sentence given after probation revocation if it is: (a) consistent with the purposes of sentencing [18 U.S.C. §3553(a)]; (b) imposed after a consideration of the Chapter 7 advisory policy statements [18 U.S.C. §3553(a)(4)(B)]; and, (c) "reasonable." As a practical matter, it makes little difference whether the "reasonableness" standard of review is measured under the "plainly unreasonable" test of pre-*Booker* case law or the *Booker*-created "reasonableness" test.

Retroactive Application and Ex Post Facto Clause

The potentially more serious sanctions in regard to probation revocation under the 1994 amendment to 18 U.S.C. §3565(a)(2) appear to be limited to defendants whose original offense of conviction occurred after the effective date of the amendment. The Supreme Court has determined that the applicable event for *ex post facto* purposes is the commission of the criminal offense which led to the original conviction, not the violation of supervision. *Johnson v. United States,* 529 U.S. 694 (2000); *but see United States v. Byrd,* 116 F. 3d 770, 773, n.1 (finding no "plain error" where district court applied 1994 amended version of 18 U.S.C. §3565 to probation revocation where original offense of conviction occurred prior to the effective date of the statute and defendant failed to object in the district court). The Sentencing Guidelines also suggest that probation violations should be treated as punishment related to the original offense of conviction, rather than to the conduct giving rise to the revocation. *See* U.S.S.G., Ch. 7, Pt. A(3)(b). Courts have interpreted companion supervised release provisions enacted in 1994 to apply only where the original offense of conviction occurred after the effective date of the 1994 amendments.

c. Supervised Release

What The Court May Do

When the court finds, pursuant to FRCrP 32.1(b), that a person has violated a condition of supervised release, then, upon considering the sentencing factors applicable to the original imposition of sentence [18 U.S.C. §3553(a), the court may revoke a term of supervised release and require the person to serve, in prison, all or part of the term of supervised release authorized by statute [18 U.S.C. §3583(b)] for the offense that resulted in the term of supervised release, without credit for time previously served on post-release supervision. 18 U.S.C. §3583(e)(3) (1994). However, the person whose term is revoked may not be required to serve:

- More than 5 years in prison if the offense of conviction that resulted in the term of supervised release is classified [18 U.S.C. §3559(a)] as a Class A felony

- More than 3 years in prison if the offense of conviction is a Class B felony

- More than 2 years in prison if the offense of conviction is a Class C or D felony

- More than one year in any other case

A court is authorized to order home confinement during nonworking hours as an alternative to incarceration, with or without telephone or electronic monitoring. 18 U.S.C. §3583(e)(4) (1998).

Supervised Release Following Revocation – The Problem of Stacking

When the court revokes supervised release and requires the defendant to serve a term of imprisonment that is less than the maximum term of imprisonment authorized upon revocation of supervised release [18 U.S.C. §3583(e)(3)], the court may "stack" terms of supervised release, *i.e.,* impose a new term of supervised release upon release from imprisonment. 18 U.S.C. §3583(h) (1994); U.S.S.G. §7B1.3, p.s., comment. (n.6). The length of the new term of supervised release must not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment imposed upon revocation of supervised release. 18 U.S.C. §3583(h) (1994); *accord*, U.S.S.G. §7B1.3(g)(2), p.s. Thus, once the statutory maximum period of confinement established by §3583(e)(3) has been exhausted, supervised release is at an end. *United States v. Merced,* 263 F. 3d 34 (2nd Cir. 2001).

3. Mandatory Revocation

In General

When a court finds that, prior to expiration or termination of a term of supervision, a person has violated certain conditions of probation or supervised release, revocation and imprisonment are required by statute. 18 U.S.C. §3565(b) (1994) (probation); 18 U.S.C. §3583(g) (1994) (supervised release). Conduct which requires mandatory revocation and imprisonment includes:

- Possessing a controlled substance in violation of a mandatory condition of supervision prohibiting unlawful possession of a controlled substance [18 U.S.C. §3563(a)(3) (probation); 18 U.S.C. §3583(d) (supervised release)]

- Possessing a firearm, as defined in 18 U.S.C. §921, in violation of federal law or otherwise in violation of a condition of supervision prohibiting possession of a firearm [18 U.S.C §3563(b) (probation); 18 U.S.C. §3583(d) (supervised release)]

- Refusing to comply with drug testing for use of controlled substances, in violation of a mandatory condition of supervision prohibiting such use and requiring testing, unless the court ameliorates or suspends testing for a defendant with a low risk of future substance abuse [18 U.S.C. §§3563(a)(4), 3583(d)]

- As part of mandatory drug testing, testing positive for illegal controlled substances more than three times over the course of one year [18 U.S.C. §3563(a)(5) (probation); 18 U.S.C. §3583(d) (supervised release)].

When the court finds that the defendant has engaged in the above conduct while on probation, the court must revoke the sentence of probation and resentence the defendant under 18 U.S.C. §§3551-3559 to a sentence that includes a term of imprisonment. 18 U.S.C. §3565(b) (1994). For a person on supervised release, the court must revoke the term of supervised release and require the person to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under 18 U.S.C. §3583(e)(3). 18 U.S.C. §3583(g) (1994).

Substance Abuse Treatment Programs

Before a court may revoke probation or supervised release and impose a sentence of imprisonment on a person who fails a drug test, the court must consider whether the availability of appropriate substance abuse treatment programs or the person's current or past participation in such a program warrants an exception from the requirement of mandatory revocation and imprisonment. 18 U.S.C. §3563(a) (probation); 18 U.S.C. §3583(d) (supervised release); *accord*, U.S.S.G. §7B1.4, p.s. comment. (n. 6).

4. Sentencing Commission Policy Statements

In General

The Sentencing Commission has promulgated a single set of policy statements that address both revocation of probation and supervised release. U.S.S.G. Ch.7, Pt. A, intro. comment. With respect to certain misconduct that violates one or more conditions of supervision, the policy statements appear to remove a court's statutory discretion whether to revoke supervision or continue the person on supervision and, instead, require revocation. *See* U.S.S.G. §7B1.3(a), p.s. The policy statements also prescribe the sentence the court is to impose upon revocation. U.S.S.G. §§7B1.3(b), p.s., 7B1.4, p.s.

Policy Statements Not Binding

In determining whether to revoke probation or supervised release or to continue a person on supervision, and the sentence to impose in the event of revocation, the

court must weigh many of the sentencing factors that must be considered in imposing the initial sentence. 18 U.S.C. §3565(a) (probation); 18 U.S.C. §3583(e) (supervised release). Among the sentencing factors the court must consider are pertinent guidelines or policy statements promulgated by the Sentencing Commission. 18 U.S.C. §3553(a)(4)(B) (1994).

The Sentencing Commission has promulgated policy statements that address only probation and supervised release revocation. Accordingly, in exercising its discretion in sentencing, the court must consider, but is not bound by, the policy statements.

Grades of Violations

The policy statements divide conduct that violates conditions of supervision into three broad grades. The grades vary from serious, new, felonious conduct to less serious criminal conduct, and conduct that does not constitute a crime [U.S.S.G. §7B1.1(a), p.s.]:

- Grade A: Commission of a federal or state felony that is a crime of violence, or a controlled substance offense, or involves possession of a firearm or destructive device of a type described in 26 U.S.C. §5845(a); or any other federal or state felony punishable by imprisonment exceeding 20 years
- Grade B: Commission of any other federal or state felony
- Grade C: Commission of a federal, state or local offense punishable by a term of imprisonment of one year or less, or a violation of any other condition of supervision

Consecutive Sentences

Statute

When a person is serving an undischarged term of imprisonment and is sentenced to prison for violation of probation or supervised release, the court has discretion to run the sentence concurrently or consecutively. 18 U.S.C. §3584(a).

Chapter Seven Policy Statements

Chapter Seven policy statements seek to channel the district court's discretion regarding concurrent or consecutive sentences. The court should order defendant to serve a term of imprisonment imposed upon revocation of probation or supervised

release consecutively to any sentence of imprisonment the defendant is serving at the time of revocation. Moreover, the new term should be served consecutively whether or not the sentence defendant is serving resulted from the conduct that is the basis of the revocation. U.S.S.G. §7B1.3(f), p.s. Similarly, the court should impose a sentence of imprisonment upon conviction for new criminal conduct to run consecutively to a term of imprisonment previously imposed upon revocation of probation or supervised release. U.S.S.G. §7B1.3, p.s. comment. (n.4). The court should impose separate punishment for the breach of the trust inherent in conditions of supervision in addition to a sentence imposed upon conviction for new criminal conduct. U.S.S.G. Ch. 7, Pt. A, intro comment. *But see United States v. Schaefer,* 107 F. 3d 1280, 1285-86 (7th Cir. 1997) (holding that district court retains discretion to order concurrent sentences pursuant to 18 U. S. C. §3584(a) and citing other circuits in agreement).

A. Procedure

1. Initiation

Government Motion

A probation officer or attorney for the government may initiate proceedings for revocation of probation or supervised release by filing a petition or motion to show cause alleging violation of one or more conditions of supervision. The petition or motion is filed with the district court that imposed the original sentence or the court to which supervision jurisdiction over the person has been transferred [18 U.S.C. §3605]. The petition or motion may request the court to issue:

- A notice, served by certified mail on the person under supervision, to appear for a revocation hearing
- A summons to appear for a revocation hearing, served on the person under supervision by the United States Marshal or any person authorized to serve a summons in a civil action [FRCrP 4(a)(issuance), 4(b)(form), 4(c)(service)]
- A warrant for the person's arrest, executed by the United States Marshal or the probation officer [18 U.S.C. §3606]

Delayed Revocation

The court retains power to revoke a sentence of probation or term of supervised release, for violation of a condition of supervision, after the sentence or term has expired, if the court issues a warrant or summons before expiration of the sentence or term *i.e.,* a pre-expiration warrant or summons, based upon a violation occurring before expiration of the sentence or term. 18 U.S.C. §3565(c) (1994) (probation); 18 U.S.C. §3583(i) (1994) (supervised release). The court must hold a revocation hearing within a reasonable time after issuance of a warrant or summons, within a period after expiration

reasonably necessary for adjudication. Rule 32.1(b)(2) also requires the district court to hold a revocation hearing "within a reasonable time in the district having jurisdiction."

Notice

A person accused of violating a condition of supervision is entitled to written notice of the alleged violation. FRCrP 32.1(b)(2)(A); *see also* FRCrP 32.1(a)(3)(A) (notice at initial appearance for alleged violation); FRCrP 32.1(b)(1)(B)(i) (notice at preliminary revocation hearing).

Normally, a notice, summons or arrest warrant will be served with a copy of the petition for revocation or motion to show cause. The petition or motion must contain, at a minimum:

- The specific condition of supervision the person is alleged to have violated
- The date of violation
- Basic facts constituting the violation, including, if applicable, the specific criminal statute alleged to have been violated.

2. Preliminary Proceedings

Initial Appearance

When a person on supervision is arrested and held in custody for an alleged violation of a condition of supervision, the person must be taken "without unnecessary delay" for an initial appearance before a magistrate judge. FRCrP 32.1(a)(1). The initial appearance must take place in the district where the person is held in custody, whether or not that district is the district where the alleged violation occurred. FRCrP 32.1(a)(1)(A),(B). However, when the person is held in custody in a district other than where the alleged violation occurred, the initial appearance may also take place in an adjacent district, if the appearance can occur more promptly there. *Id.*

At the time of an initial appearance, the magistrate judge must inform a person held in custody, or a person who voluntarily appears in response to a summons for a violation of supervision, of the following :

- The alleged violation of probation or supervised release
- The right to retained or appointed counsel
- The right, if held in custody, to a preliminary revocation hearing under Rule 32.1(b)(1)

Preliminary Hearing

The purpose of the preliminary hearing is to determine whether there is sufficient probable cause to believe that the person violated a condition of probation or supervised release to hold the person for a full revocation hearing. FRCrP 32.1(b)(1)(A). The magistrate judge need not hold a preliminary hearing unless the person is held in custody on the alleged violation.

The person is entitled to a prompt preliminary hearing, unless waived. The person must be given:

- Notice of the preliminary hearing, its purpose and the alleged violation
- An opportunity to appear and present evidence;
- Upon request, the opportunity to question witnesses against the person unless, for good cause, the judge or magistrate judge decides that justice does not require the appearance of the witness and
- Notice of the person's right to be represented by retained or appointed counsel. For appointment of counsel when a person is charged with a probation or supervised release violation, see 18 U.S.C. §3006A(a)(1)(C) (probation) and §3006A(a)(1)(E) (supervised release)

If the court finds probable cause at the preliminary hearing, the person will be held for a final revocation hearing. If the court does not find probable cause, the court must dismiss the proceedings. FRCrP 32.1(b)(1)(C).

Jurisdiction — Arrest In Another District

A person on probation or supervised release may be arrested for a violation of a condition of supervision in a district other than the district having jurisdiction to conduct a revocation hearing. The district having jurisdiction is the district in which the sentence of probation or term of supervised release was imposed or the district to which supervision jurisdiction over the person has been transferred pursuant to 18 U.S.C. §3605.

When a person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

- Proceed under FRCrP 32.1, if jurisdiction over the person is transferred to the district of arrest, pursuant to 18 U.S.C. §3605
- If the alleged violation of a condition of supervision occurred in the district of arrest, hold a prompt preliminary hearing and either (i)

transfer the person to the district having jurisdiction to conduct a revocation hearing if probable cause is found, or (ii) dismiss the proceeding if probable cause is not found and so notify the district that has jurisdiction

- If the alleged violation did not occur in the district of arrest, transfer the person to the district having jurisdiction to conduct a revocation hearing upon production of certified copies of the judgment of conviction, the arrest warrant and application for the arrest warrant. The magistrate judge must also conduct an identity hearing to determine whether the person is the person named in the arrest warrant

The magistrate judge has authority to determine bail (*i.e.*, conditions of release) for a probationer or person on supervised release who is arrested in a district other than the district having jurisdiction to conduct a revocation hearing.

Bail Pending Further Revocation Proceedings

The magistrate judge may release on bail or detain a probationer or supervised releasee pending further revocation proceedings. FRCrP 32.1(a)(6). In determining the person's eligibility for release from custody, the magistrate judge must follow the provisions of 18 U.S.C. §3143(a) with respect to defendants found guilty of an offense and awaiting imposition or execution of sentence. FRCrP 32.1(a)(6). The person must establish by clear and convincing evidence that he or she is not likely to flee or pose a danger to the safety of any other person or the community. If the magistrate judge makes such findings, the magistrate judge must order the release of the person under the least restrictive conditions of release that will reasonably assure the person's appearance for further revocation proceedings and the safety of the community. 18 U.S.C. §3143(a). The standard is the same as that governing release pending trial.

3. Final Revocation Hearing

Governing Law

Rule 32.1(b)(2) governs revocation hearings. The Rule is a codification of minimum due process standards for revocation proceedings. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation). The Supreme Court has never rcognized a Sixth Amendment right to have a jury decide the facts relevant to the revocation of supervised release. *Morrissey v. Brewer,* at 480 (revocation of parole is not part of the criminal process). Accordingly, the Sixth Amendment issues decided in *United States v. Booker*, 125 S. Ct., 738 (2005), are not present with respect to fact-finding in revocation proceedings. *See also United States v. Work,* 409 F.3d 484, 491 (1st. Cir. 2005) (discussing revocation of supervised release, and stating that "[t]he law is clear that once the

original sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections").

Requirements

The court must hold the final revocation hearing within a reasonable time in the district having jurisdiction, unless the supervised person waives the hearing. The person must be given:

- Written notice of the alleged violation
- Disclosure of the evidence against the person
- An opportunity to appear, present evidence, and question adverse witnesses, unless the court determines that the interests of justice do not require the witness to appear
- Notice of the right to be represented by retained or appointed counsel

The procedural safeguards for a final revocation hearing are stricter than those required for a preliminary revocation hearing.

Right of Allocution

Effective December 1, 2005, FRCrP 32.1(b)(2)(E) specifically provides for a right of allocution prior to sentencing for a probation or supervised release violation. FRCrP 32.1(b)(2)(E) (the person shall have "an opportunity to make a statement and present any information in mitigation").

Final Revocation Hearing Before Magistrate Judge

Probation Violations

Under 18 U.S.C. §3401, a magistrate judge has authority to conduct a probation revocation hearing only when [*United States v. Colacurcio,* 84 F. 3d 326, 329 (9th Cir. 1996)]:

- The defendant's probation was imposed for a misdemeanor [18 U.S.C.§3401(b)]
- The defendant consented to trial, judgment and sentence by a magistrate judge [18 U.S.C. §3401(b)] *and*
- The defendant initially was sentenced by a magistrate judge [18 U.S.C. §3401(d)]

Accordingly, a district court judge cannot delegate to a magistrate judge the authority to conduct a probation violation hearing for a report and recommendation where the defendant was sentenced by the district court judge and the defendant objects to the delegation.

Supervised Release Violations

Congress has elected to treat supervised release differently from probation. Supervised release is governed by 18 U.S.C. §3583 and is imposed after imprisonment, while probation is governed by 18 U.S.C. §§3661-3566 and is imposed in lieu of imprisonment.

A magistrate judge may conduct final revocation hearings in supervised release cases upon referral by a district court judge, subject to *de novo* review by the judge. 18 U.S.C. §3401(i) (1992).

Rules of Evidence

General Rule – Federal Rules of Evidence Do Not Apply

Except for privileges [FRE 501], the Federal Rules of Evidence do not apply at a revocation hearing. FRE 1101(d)(3) (probation revocation); *see also United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) (holding in case of first impression that Federal Rules of Evidence do not apply in supervised release revocation proceedings).

Hearsay

The government may introduce hearsay when the court finds that it is reliable. *United States v. Zentgraf*, 20 F.3d 906, 910 (8th Cir. 1994) (accomplice's post-arrest confession implicating defendant independently corroborated and not made to curry favor with government). Thus, the opportunity to question adverse witnesses provided in FRCrP 32.1(b)(2)(C) is not absolute. *United States v. O'Meara*, 33 F.3d 20 (8th Cir. 1994).

Exclusionary Rule

The government may introduce evidence obtained in violation of a probationer or supervised releasee's Fourth Amendment right to be free from unreasonable searches and seizures. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364 (1998) (federal exclusionary rule does not bar introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights). *See, e.g., United States v. Hebert*, 201 F.3d 1103 (9th Cir. 2000) (applying *Scott* to supervised release revocation hearing).

Discovery

Before the Hearing

Rule 32.1(b)(2) provides a probationer or supervised releasee with procedural due process rights in connection with a revocation hearing, including the right to disclosure of the evidence which is used against the person. FRCrP 32.1(b)(2)(A)-(D); *see, e.g.,* FRCrP 32.1(b)(2)(B) ("[t]he person is entitled to...disclosure of the evidence against the person"). The language used does not limit disclosure to the revocation hearing itself. One district court has interpreted it to require disclosure of adverse evidence prior to the revocation hearing. *United States v. Dixon,* 187 F. Supp. 2d 601, 603 (S.D.W.Va. 2002). A similar requirement exists with respect to notice of the alleged violations, to assure that such notice is given in advance of the final revocation hearing. FRCrP 32.1(a)(3) (notice at initial appearance); FRCrP 32.1(b)(1)(B) (notice at preliminary hearing).

During Hearing

After a witness testifies on direct examination during a preliminary or final revocation hearing, the attorney who called the witness must produce for opposing counsel any statement of the witness in possession of the attorney that relates to the witness' testimony. FRCrP 32.1(e) (incorporating FRCrP 26.2(a)-(d) and (f)).

When the government calls a law enforcement officer or probation officer to testify, request any report made or adopted by the witness which relates to the witness' testimony. FRCrP 26.2(f)(1). When a witness other than a law enforcement or probation officer testifies, request any written record or report which is a substantially verbatim recital of an oral statement made by the witness, recorded contemporaneously with the making of the statement. FRCrP 26.2(f)(2).

Often a law enforcement or probation officer will offer hearsay testimony to support an alleged violation of a condition of supervision, such as the testimony of a victim of a criminal offense alleged to have been committed during the supervision term. Request any report made or adopted by such a witness that contains the hearsay declarant's statements. FRCrP 32.1(e).

Standard of Proof

Probation Revocation

The government need not prove an alleged violation of a condition of probation beyond a reasonable doubt. *United States v. Leigh,* 276 F. 3d 1011, 1012 (8th Cir. 2002) (only necessary that district court be reasonably satisfied that violation occurred); *United States v. Gordon*, 961 F.2d 426, 429 (3d Cir. 1992) (court may revoke probation when reasonably satisfied that defendant violated condition, without proof beyond reasonable doubt). The district court must find only that the government's proof, when reasonably viewed, satisfies the court that a violation occurred.

Supervised Release Revocation

The government must establish a violation of a condition of supervised release by a preponderance of the evidence for revocation. 18 U.S.C. §3583(e)(3).

A district court may find a violation of a condition of probation or supervised release based on the court's own finding of new criminal conduct, even if the person is later acquitted of all charges arising from the same conduct; all criminal charges arising from the same conduct are dismissed prior to trial; or the person's criminal conviction is subsequently overturned. Thus, the court need only find that new criminal conduct has occurred, by a preponderance of the evidence, to find a violation.

Appeal

Jurisdiction

A court of appeals has jurisdiction to review a sentence imposed (i) upon revocation of probation or supervised release, under 18 U.S.C. §3742(a), and (ii) as a final decision under 28 U.S.C. §1291 (1988).

Standard of Review

The district court has broad discretion in determining whether to revoke probation. The appellate court reviews the district court's determination for an abuse of discretion. *United States v. Carothers,* 337 F.3d 1017, 1919 (8th Cir. 2003) (standard of review: clear error with respect to findings of fact and abuse of discretion for decision to revoke supervised release).

Despite the higher burden of proof for the government to establish a violation of a condition of supervised release for revocation [18 U.S.C. §3583(e)(3)], the appellate court reviews the district court's determination for an abuse of discretion, just as with a revocation of probation.

Bail Pending Appeal

The standards governing release and detention pending sentence or appeal from a judgment of conviction [18 U.S.C. §3143; Fed.R.App. P. 9(b)], do not apply to an appeal from an order revoking supervised release. Release pending appeal of an order revoking supervised release will be granted only on a showing of exceptional circumstances, such as substantial claims upon which the appellant has a high probability of success, a serious deterioration of health while incarcerated, and unusual delay in the appeal process. *United States v. Lodhi*, 21 F.3d 606 (5th Cir. 1994).

V. RECENT CASES OF NOTE

United States v. Heidebur, 417 F.3d 1002 (8th Cir. 2005)

Procedural History:

Defendant pled guilty to one count of possession of materials involving the sexual exploitation of a minor. He was sentenced to 60 months' imprisonment and two years of supervised release. After he had completed his prison term, the government filed a petition requesting that the conditions of his supervised release be modified. The United States District Court for the Eastern District of Missouri granted the petition. Defendant appealed.

Overview:

Having been convicted of possessing materials involving the sexual exploitation of his 12-year-old stepdaughter, defendant was not in a position to argue that it was inappropriate for the district court to require him to participate in a sex-offense specific treatment program. In view of the seriousness of the underlying offense, the appropriateness of the treatment program being required, the improbability that the program will significantly interfere with the defendant's employment, and the probation officer's testimony that a loss of employment would not be considered a violation if caused by the required treatment, the minimal deprivation of liberty that might result from that special condition was not greater that that which was reasonably necessary under the circumstances. Also, the special condition prohibiting him from contact with the children under the age of 18 unless the probation officer had given prior written permission or defendant reported such contact to the probation officer within 24 hours was justified, and the deprivation of liberty that might result was not greater than that which was reasonably necessary under the circumstances.

United States v. Crume, 422 F.3d 728 (8th Cir. 2005)

Procedural History:

Defendant was convicted and sentenced before the United States District Court for the Northern District of Iowa, for knowingly receiving child pornography in violation of 18 U.S.C. § 2252A (a)(2)(A) and knowingly possessing child pornography in violation of 18 U. S. C. § 2252A(a)(5)(B). Defendant appealed the convictions and sentence, including his special conditions of supervised release.

Overview:

Defendant contended that he was entitled to a new trial because the district court permitted his probation officer to describe briefly one image of child pornography found on a computer disk in his apartment. Although the trial court initially overruled defendant's objection, it later reversed course and instructed the jury to disregard that portion of the officer's testimony. Therefore, even if the evidence was not admissible, any error was cured. As to the sentence, the district court pronounced three sentences. The parties and the appellate court agreed that the appellate court's task would be to

review a 262-month sentence. Defendant argued that the district court erred in enhancing his offense level for obstruction of justice; however, the district court's findings that he had made threats toward others were not clearly erroneous. The district court also did not err in making an upward departure based on an alleged likelihood to recidivate. As to the district court's conditions of release, which completely barred defendant's access to computers and the Internet, the district court should have imposed a more narrowly tailored restriction.

United States v. Mark, 425 F.3d 505 (8th Cir. 2005)

Procedural History:

Defendant sought review of a decision of the United States District Court for the District of Nebraska, which accepted defendant's plea of guilty and convicted defendant of possession of child pornography, in violation of 18 U, S. C. § 2252(a)(4)(B). Defendant challenged the sentence imposed and claimed that the district court abused its discretion by assigning certain conditions to his supervised release.

Overview:

Defendant challenged the district court's refusal to impose a departure based on defendant's assertion that he suffered from "involuntary intoxication" at the time the crimes were committed, because he had been improperly medicated for his bipolar condition. The district court determined that it could not consider a departure based upon the effects of the medicine, because "diminished capacity" could not be considered in child pornography cases, as contemplated by U. S. Sentencing Guidelines Manual § 5K2.13. The court rejected defendant's attempts to distinguish his claim as "involuntary intoxication" because the elimination of the departure for child pornography cases was still broad enough to apply. The court found that the conditions of supervised release related to defendant's visitation with his own children were reasonable and properly addressed defendant's concerns about conflicting requirements with the state court. The court held that the condition of supervised release that prohibited defendant from using any computer with internet and e-mail access was overly broad and the district court needed to evaluate whether or not is could impose a less restrictive condition.

United States v. Levering, 2006 U.S. App. LEXIS 6577 (8th Cir. March 17, 2006)

Procedural History:

Defendant pled guilty to knowingly using force to engage in a sexual act with a minor, 18 U. S. C. §§ 2241(c) and 1153. The United States District Court for the District of Nebraska sentenced his to imprisonment and supervised release with a special condition prohibiting him from having any contact or residing with any minor female children unless he obtained prior, written approval from his probation officer. Defendant appealed.

Overview:

The district court did not abuse its discretion by imposing the special condition because he had pled guilty to the forcible rape of a female juvenile and thus, requiring prior approval before he had contact with minors was a reasonable means of ensuring that such contact remained appropriate. The special condition was not an improper delegation of judicial power to the probation officer as the district court gave no indication that it would not retain ultimate authority over all of the conditions of defendant's supervised release. Rather, the district court had indicated the importance of it having some input on the issue of defendant's contact with female juveniles.

924(c) Prosecutions

Presented by

Kevin Cmelik
Assistant Federal Defender

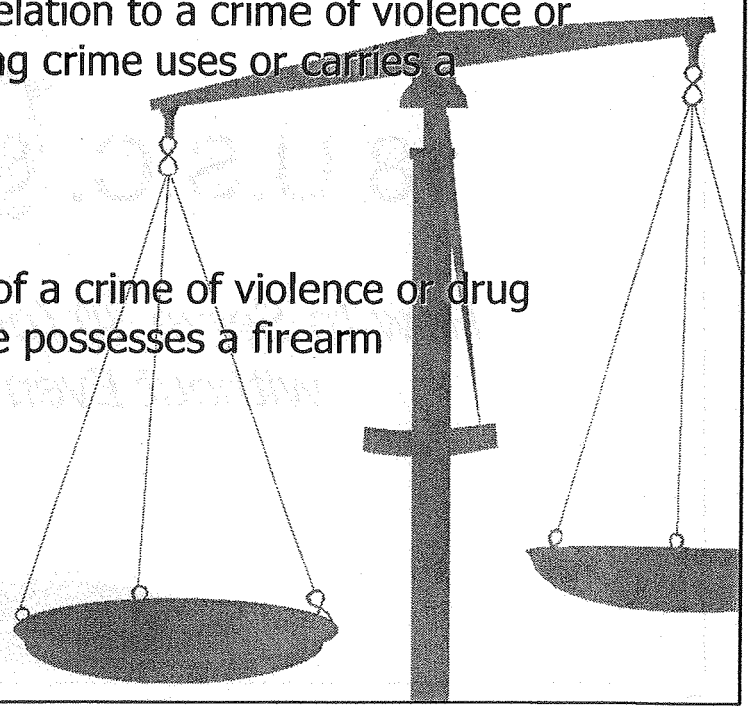
18 U.S.C. § 924(c)

How to Serve 30 (or more) Years without Even Trying

18 U.S.C. § 924(c)

- During and in relation to a crime of violence or a drug trafficking crime uses or carries a firearm

- In furtherance of a crime of violence or drug trafficking crime possesses a firearm



18 USC 924(c)

- (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime uses or carries a firearm, shall, be sentenced to im s,

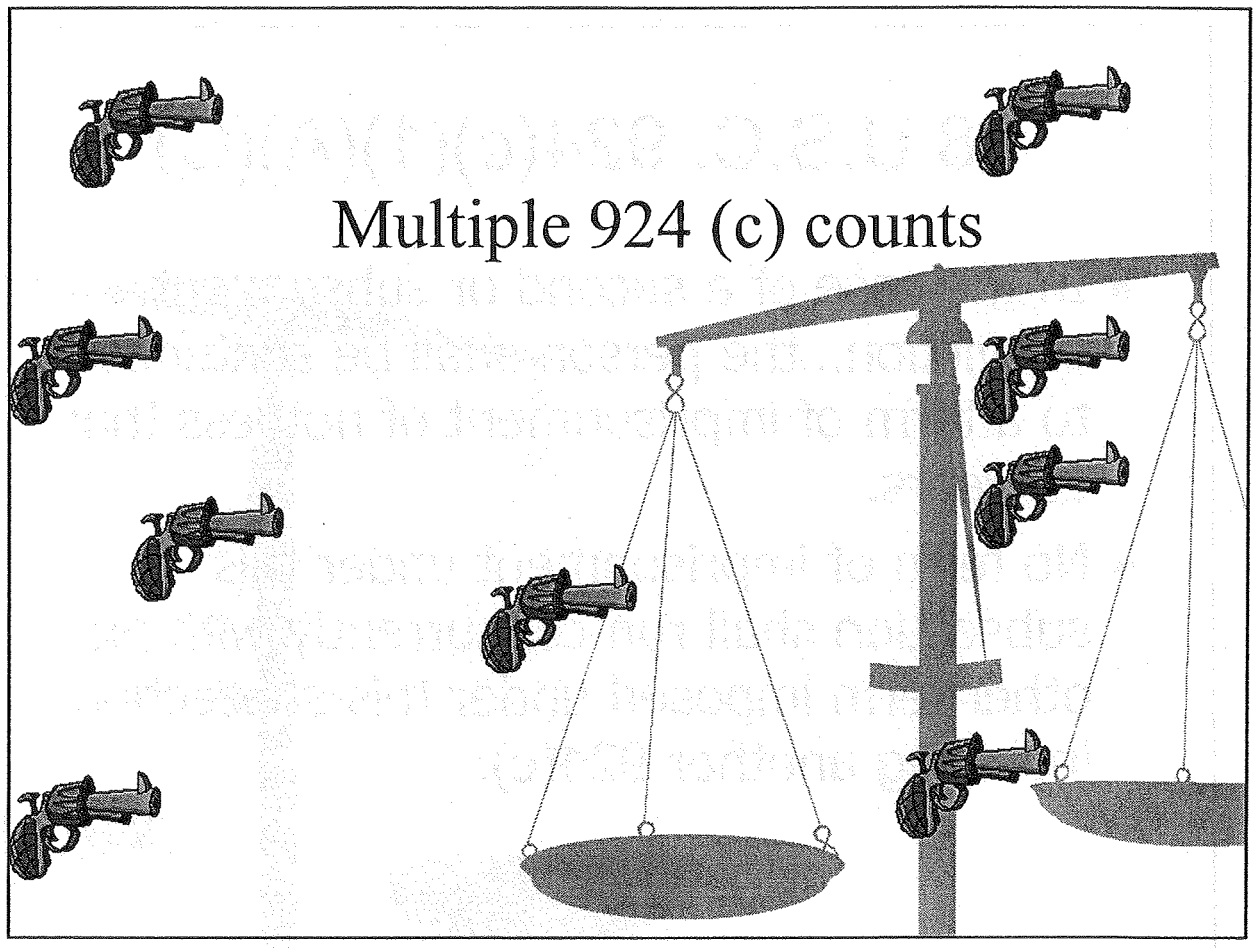
apply the definition from Bailey v. United States, that is, actively employing the firearm by brandishing, displaying, bartering with, striking with, or firing

18 USC 924(c)

- (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime uses or carries a firearm, shall, be sentenced to im[illegible]s,

keep on or about a person available for immediate use, to remove, transport, or convey

Gamboa


Multiple 924 (c) counts

18 U.S.C. 924(c)(1)(A)(C)

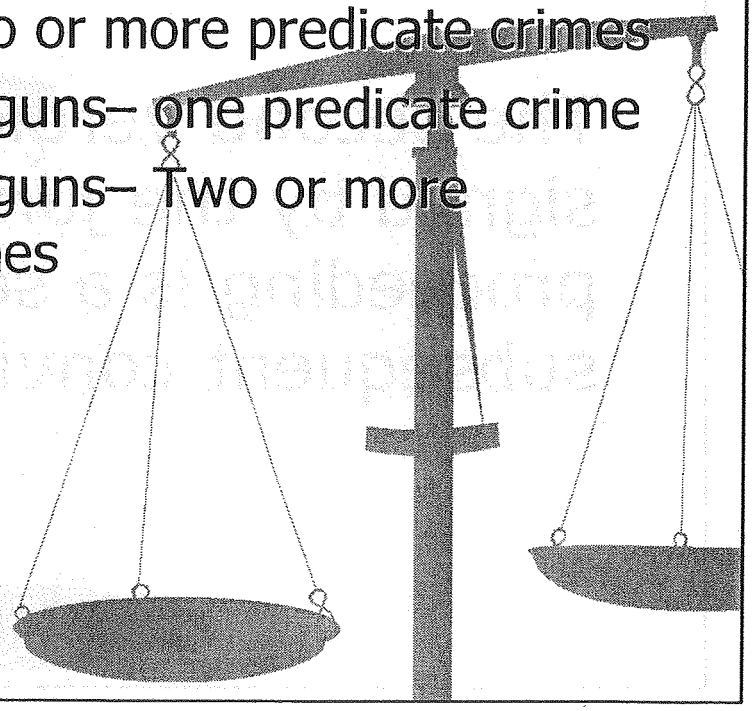
- In the case of a second or subsequent conviction…the person shall be sentenced to a term of imprisonment of not less than 25 years.
- No term of imprisonment under this subsection shall run concurrently with any other term imposed under this subsection including another 924(c).

Deal v United States, 508 U.S. 129 (1993)

The second verdict form signed by the jury in a single proceeding is a second and subsequent conviction

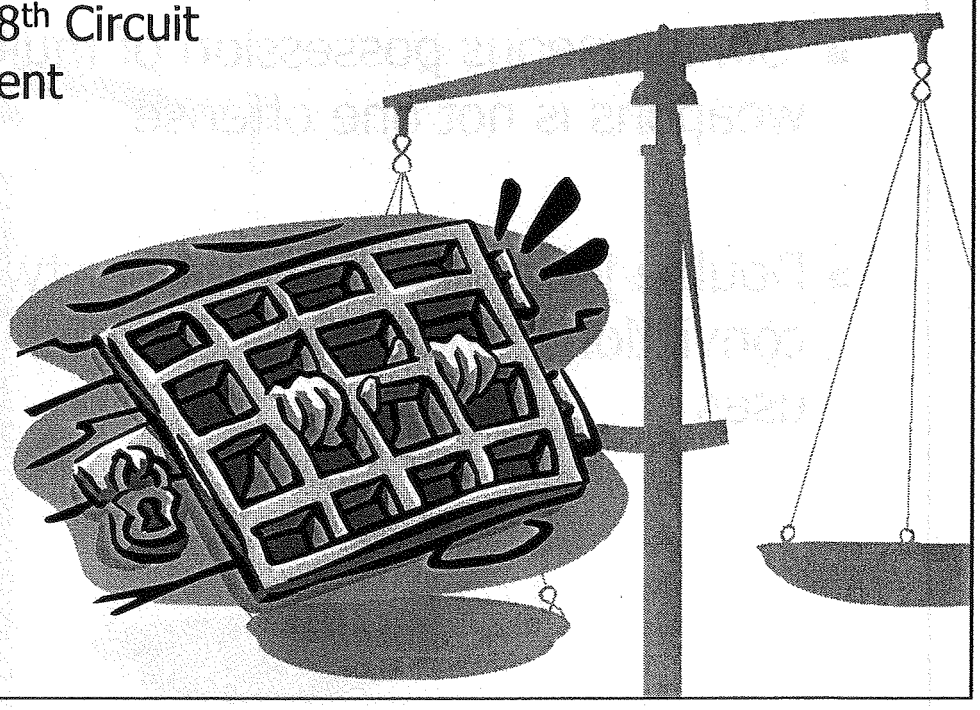
Scenarios

1. One gun– Two or more predicate crimes
2. Two or more guns– one predicate crime
3. Two or more guns– Two or more predicate crimes



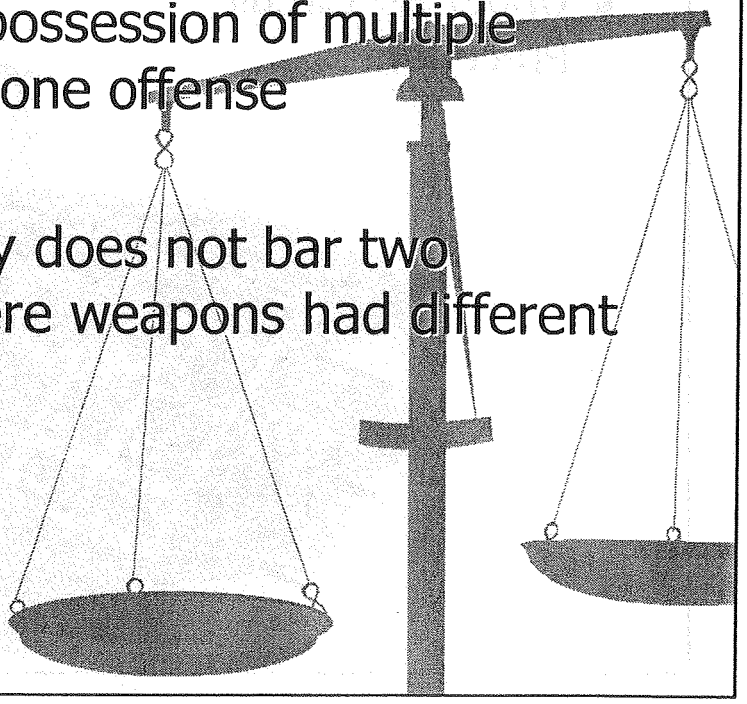
Result?

- Under 8th Circuit Precedent



United States v. Lucas, 932 F.2d 1210 (8th Cir. 1991)

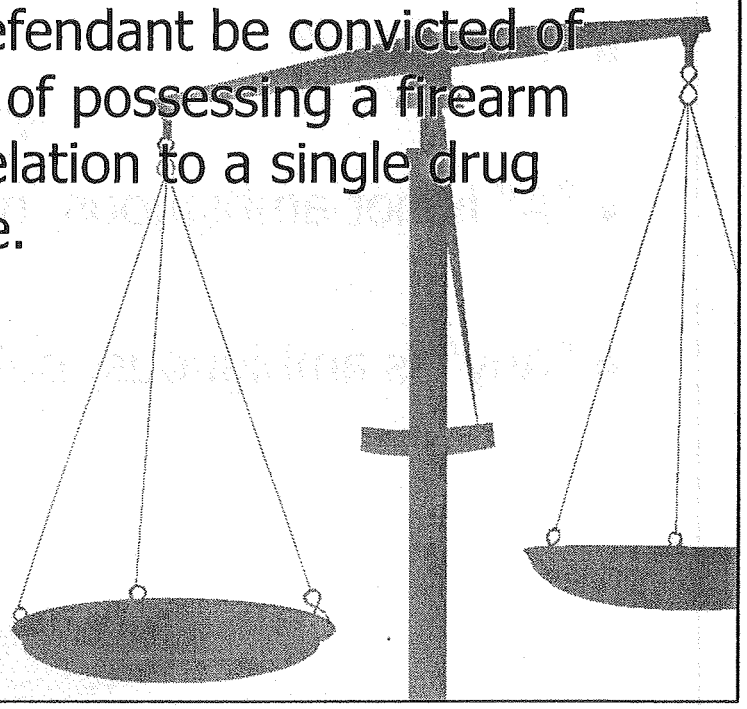
- Simultaneous possession of multiple weapons is not one offense
- Double jeopardy does not bar two convictions where weapons had different uses



United States v. Freisinger, 937 F.2d 383 (8th Cir. 1991)

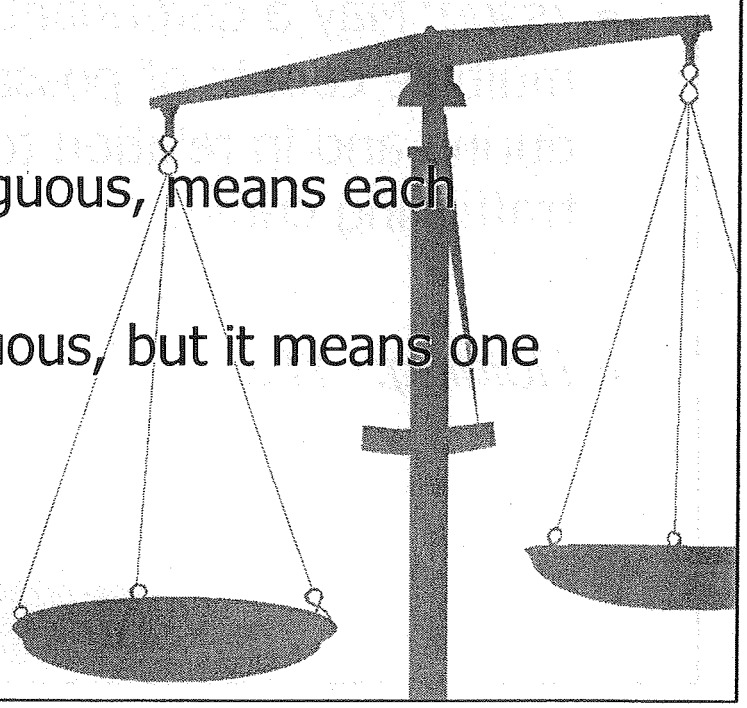
- *Issue:* May a defendant be convicted of multiple counts of possessing a firearm during and in relation to a single drug trafficking crime.

- *Holding: YES.*



Rationale

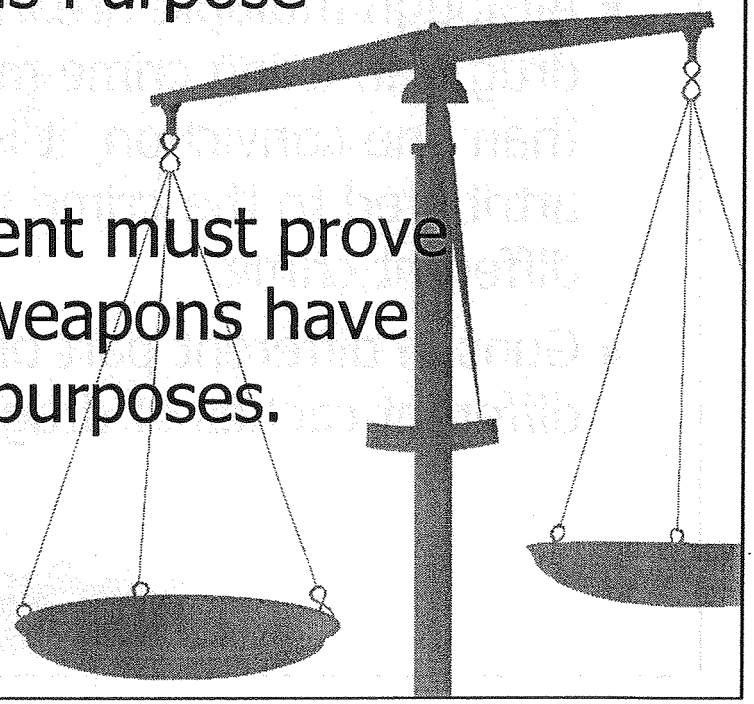
- "a" ≠ "any"
- "A" is not ambiguous, means each
- "Any" is ambiguous, but it means one



United States v. Canterbury, 2 F.3d 305 (8th Cir. 1993)

- Although multiple firearms during one drug trafficking crime may support more than one conviction, it is the "use" attributed to the crime that creates a different crime.
- Guns in different part of the homes with different caches of drugs

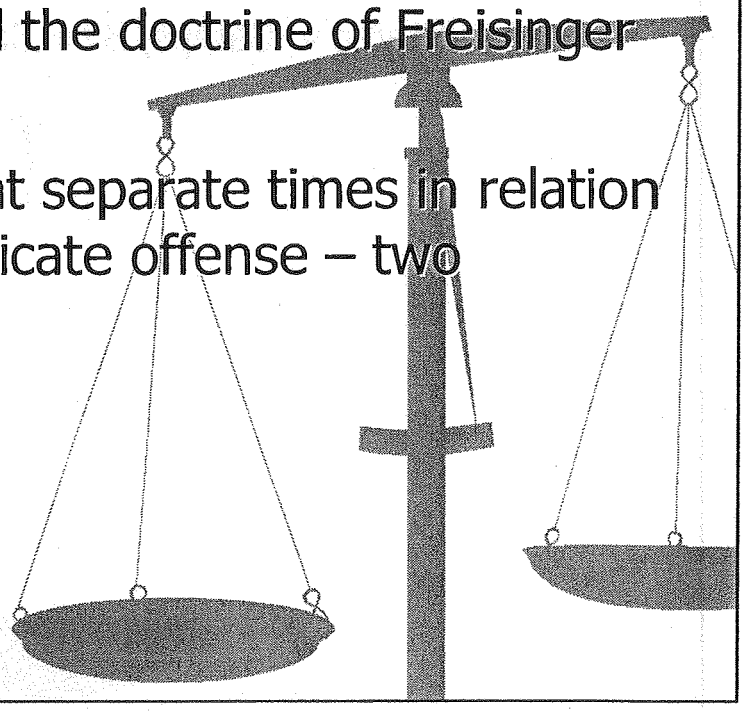
Use equals Purpose



Government must prove multiple weapons have different purposes.

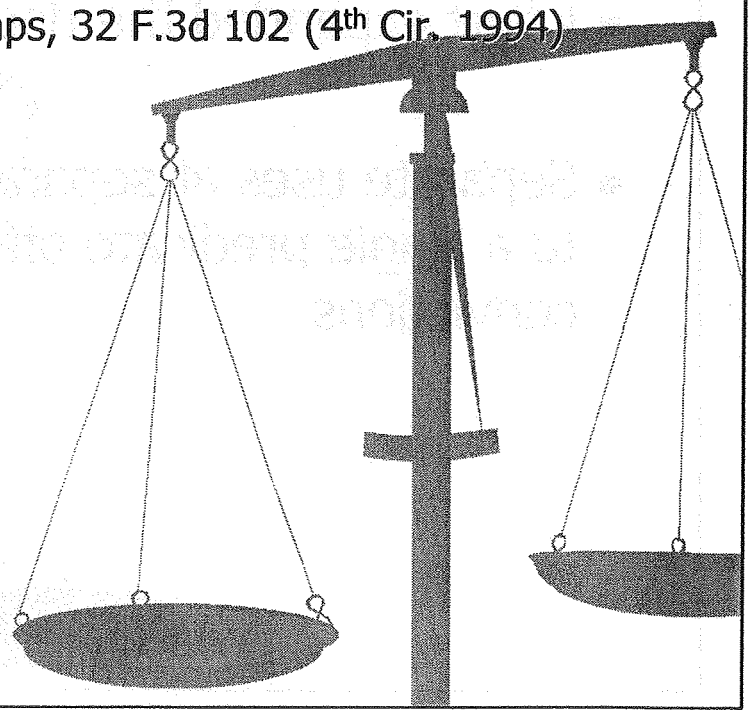
United States v. Mabry, 3 F.3d 244 (8th Cir. 1993)

- Court expanded the doctrine of Freisinger
- Separate uses at separate times in relation to a single predicate offense – two convictions



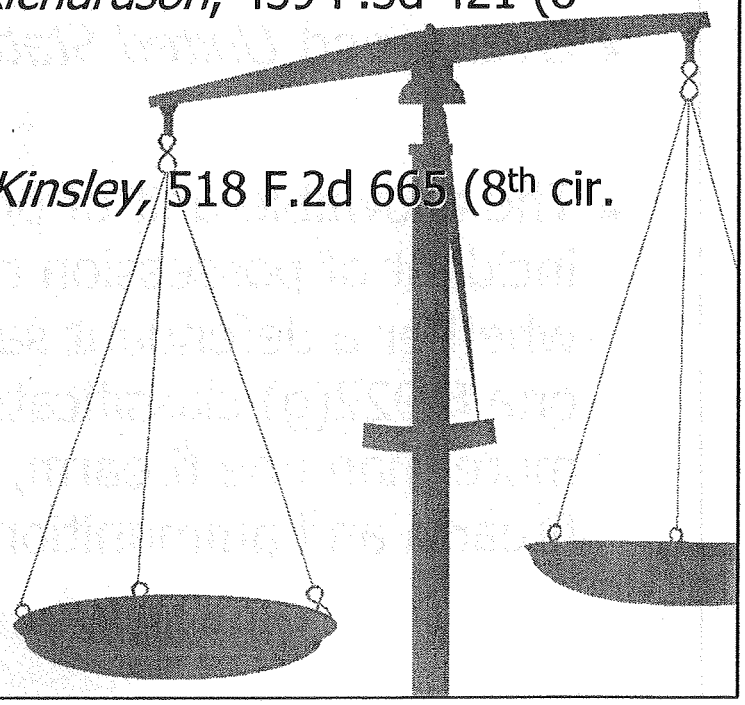
Other Authority

- United States v. Camps, 32 F.3d 102 (4th Cir. 1994)



One step back

- *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2005)
- *United States v. Kinsley*, 518 F.2d 665 (8th cir. 1975)



Richardson

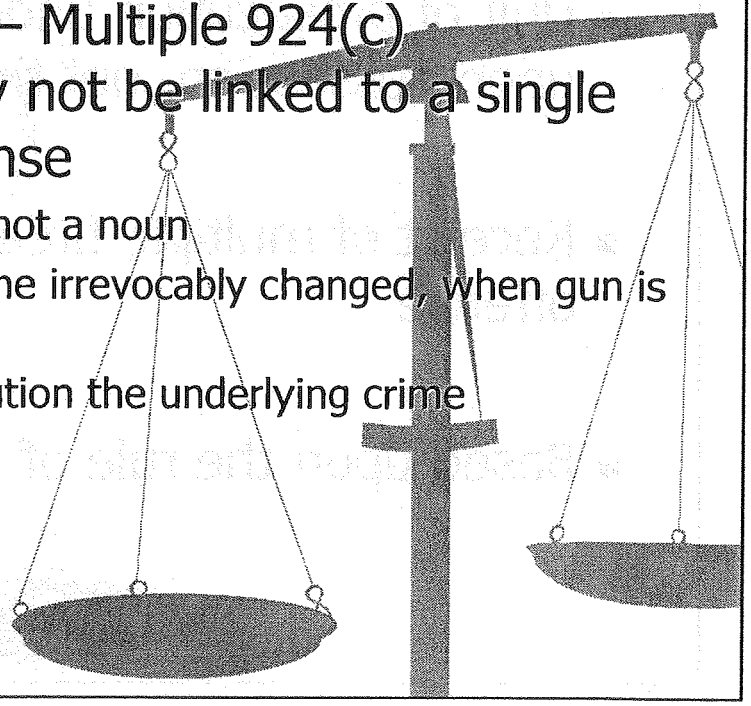
- Overturned *United States v. Peterson*
- The allowable unit of prosecution is "an incident of possession regardless of whether a defendant satisfied more than one § 922(g) classification, possessed more than one firearm, or possessed a firearm and ammunition."

Kinsley

- Unit of prosecution under 922(g) is based upon possession, not the firearm
- Receipt of multiple firearms is but a single offense
- Based upon the rule of lenity

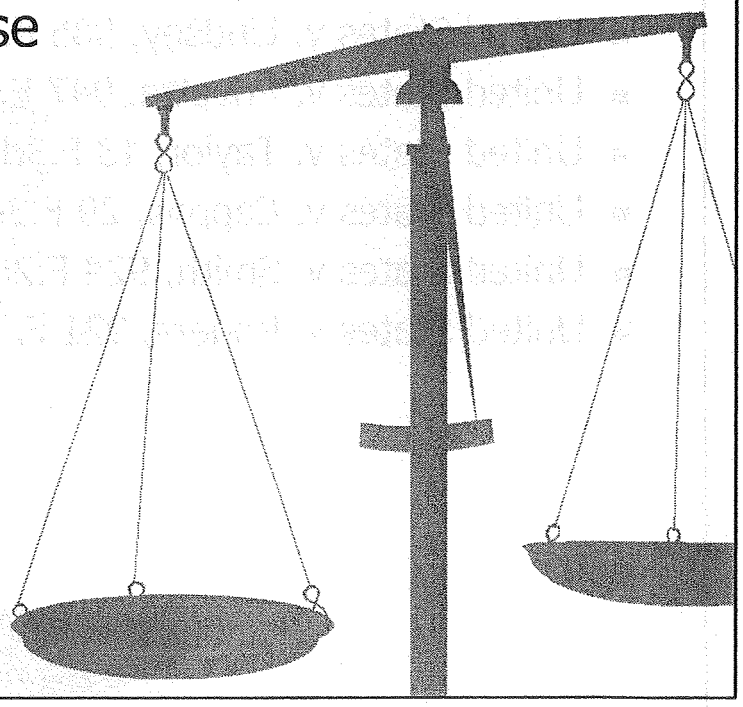
United States v. Anderson, 59 F.3d 1323 (D.C. Cir. 1995)

- Majority Rule – Multiple 924(c) convictions may not be linked to a single underlying offense
  - Use is a verb, not a noun
  - Underlying crime irrevocably changed, when gun is used.
  - Unit of prosecution the underlying crime



Rationales

- Predicate offense
- Rule of lenity



Contrary Authority

- United States v. Lindsey, 985 F.2d 666 (2d Cir. 1993)
- United States v. Privette, 947 F.2d 1259 (5th Cir. 1991)
- United States v. Taylor, 13 F.3d 986 (6th Cir. 1994)
- United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994)
- United States v. Smith, 924 F.2d 889 (9th Cir. 1991)
- United States v. Rogers, 921 F.2d 1089 (10th Cir. 1990)

DISCOVERY PROCEDURES / PLEA AGREEMENTS

PRESENTED BY

STEVE O'MEARA
FIRST ASSISTANT
U.S. ATTORNEY
SOUTHERN DISTRICT OF IOWA

The Practice of Federal Criminal Law in an Institutional Environment
Plea Bargaining and Discovery From The Perspective of the United States Attorney

Plea Bargaining

- The authority of Assistant U. S. Attorneys to conclude a plea agreement is derivative of and subject to the authority of the Attorney General of the United States and the United States Attorney of the respective District.
    - Title 28, United States Code, Sections 541 and 542
    - *Nadler v. Mann*, 951 F.2d 301 (11th Cir. 1992): the U.S. Attorney is the chief federal law enforcement official for the judicial district which the U.S. Attorney serves and is responsible for the prosecution of all offenses against the United States within the district. Assistant U. S. Attorneys are appointed by the Attorney General to aid U. S. Attorneys in carrying out their duties.
        - (Note: *United States v. Smith*, 104 F. Supp. 283, (D.C.Cal. 1952)
    - **There is no formal plea agreement offer from the United States Attorney's Office unless and until there is such an offer in writing and approved by the appropriate Supervisory Assistant U. S. Attorney.**
        - Des Moines: Criminal Division Chief or his designee
        - Davenport: Branch Chief or his designee
- *United States Attorney's Manual*
    - The United States Attorney is subject to direction from the Department of Justice regarding plea bargaining.
    - General standard: "most serious readily provable offense"

Discovery

- Reports, Statements of Interview, Grand Jury Testimony
    - F.R.Cr.P. 16
    - Jencks Act: 18 U.S.C., Section 3500
- Discovery Agreements and Protective Orders of Court
    - Balancing the need to disclose with the need to protect

ETHICS

PRESENTED BY

STEVE WANDRO
ATTORNEY AT LAW

ETHICAL CONSIDERATIONS IN MULTI-CLIENT REPRESENTATIONS

Steven P. Wandro
Wandro, Baer & Appel, P.C.
Des Moines, Iowa

I. INTRODUCTION.

Litigants choose to use the same attorney for several reasons. The most basic is cost. Hiring a single lawyer can save the expense of retaining separate attorneys and allow for a pooling of resources. There is also the benefit of a unified strategy for parties that are seeking the same goal. But there are drawbacks to multiple representation. There is no attorney-client privilege within the confines of joint representation and one client cannot keep anything secret from the other. Also, if the clients' relationship deteriorates for any reason or their interests begin to diverge, their attorney will have to withdraw, probably from representing all of them, and they will have to hire separate counsel at increased expense who will not be as familiar with the case. *See* Model Rule of Professional Conduct 1.7 cmt. 29 ("[A] lawyer should be mindful that if the common representation fails . . . , the result can be additional cost, embarassment, and recrimination.").

The conflict-of-interest provisions of the Model Rules of Professional Conduct seek to balance these competing interests and concerns. Disciplinary action is obviously a major issue for attorneys who may represent multiple clients. *See, e.g., In re Beckner*, 778 N.E.2d 806 (Ind. 2002). But that should not be attorneys' only concern when faced with a potential conflict of interest. Conflicts can cause fee payment issues, such as when a lawyer has to withdraw during the course of representation or fails to properly handle an aggregate settlement. Moreover, malpractice claims have arisen because of a lawyer's

conduct during simultaneous representation. *See, e.g., RTC Mortgage Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co.*, 58 F. Supp. 2d 503 (D.N.J. 1999).

II. COMPARISON OF MODEL RULES AND MODEL CODE.

On July 1, 2005, Iowa joined the vast majority of states that have adopted most or all of the Model Rules of Professional Conduct to replace the Model Code of Professional Responsibility. Regardless, it is useful to review the former conflict rules under the previous Iowa Code of Professional Responsibility. The conflict-of-interests approaches under the two bodies of rules are different, and comparison of the two furthers an understanding of the conflict analysis under the Model Rules. Moreover, current ethical, malpractice, or fee dispute matters may concern conduct that occurred before July 1, 2005, which will consequently be judged under the former Model Code.

The Model Code's conflict-of-interest rules for multiple representation are found in DR 5-105. Under DR 5-105(C), "[a] lawyer shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the representation of another client, except to the extent permitted under DR 5-105(D)." Section DR 5-105(D) permits a lawyer to "represent multiple clients if it is obvious that the lawyer can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each." The Ethical Considerations that apply to multiple-client conflicts are EC 5-1, 5-14, 5-15, 5-16, 5-17, 5-18, and 5-19.

The Iowa Supreme Court gave an extended analysis to the Model Code's conflict-

of-interests provisions in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Wagner*, 599 N.W.2d 721 (Iowa 1999). It defined "differing interest," the phrase used in EC 5-15, as every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. *Id.* at 726. The differing interests need not be antagonistic. *Id.* The mere possibility of a conflict precludes the dual representation. *Id.*

Conflicts of interests among multiple current clients are now analyzed under the rubric of Model Rule 1.7, which encompasses concurrent conflicts of interest. Model Rule 1.7(a)(2) prohibits multiple representation if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." Even if there is such a conflict, Model Rule 1.7(b) permits multiple representation if (1) "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"; (2) "the representation is not prohibited by law"; (3) "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal"; and (4) "each affected client gives informed consent, confirmed in writing."

In *Bottoms v. Stapleton*, 706 N.W.2d 411 (Iowa 2005), the Iowa Supreme Court compared Iowa Rule 32:1.7 to DR 5-105(C). It noted that although related to the former "appearance of impropriety" approach under the Model Code, the modern analysis focuses on the degree of risk that a lawyer will be unable to fulfill duties to more than one client. *Id.* at 416. The court also observed that potential conflicts are foreign to the new

rule; only an actual conflict of interest, as defined by Rule 32:1.7(a), will justify disqualification because of a conflict. *Id.* at 417. Thus, there must be a likelihood, not a potential, of differing interests. *Id.* at 418.

III. RESOLVING CONFLICTS OF INTERESTS UNDER THE MODEL RULES.

Comment 2 to Model Rule 1.7 sets forth the framework for resolving conflicts of interests. "Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent confirmed in writing."

A. Is There A Conflict?

Because in most instances the identity of the potentially affected clients will be clear, conflict analysis for multiple representation usually starts with determining whether the simultaneous representation could present a conflict. Such potential conflicts are within the scope of Model Rule 1.7(a)(2). *See* Model Rule of Professional Conduct 1.7 cmt. 23. It is here that the lawyer must apply Rule 1.7(a)(2)'s definition of a conflict, which "is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Comment 8 to Rule 1.7 elaborates on the rule's definition of a conflict: "The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will

materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

Comment 23 to Rule 1.7 provides examples of the types of conflicts that might arise among multiple clients. "A conflict may exist by reason of substantial discrepancy in the parties testimony, incompatibility of positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liability in question." Comment 5 to Rule 1.7 also observes that "the addition or realignment of parties in litigation might create conflicts in the midst of representation." Inadequate money to pay all of the clients' claims can also cause a conflict. *See* Restatement of the Law Governing Lawyers 128 cmt. d(i) (2000).

There can also be personal conflicts between the clients. *See* Model Rule of Professional Conduct 1.7 cmt. 29 ("[A] lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated."). A common situation in which personal conflicts preclude simultaneous representation involves former spouses or spouses who are in the process of divorcing. *See, e.g., Unnamed Attorney v. Kentucky Bar Ass'n*, 1 S.W.3d 474 (Ky. 1999). An attorney, however, does not have to assume conflict among clients when none is reasonably apparent or foreseeable. Restatement of the Law Governing Lawyers 130 cmt. c (2000). But some inquiry into the respective positions, interests, and attitudes of each client should still be made to determine whether there is a possible conflict. *See Felix v. Balkin*, 49 F. Supp. 2d 260 (S.D.N.Y. 1999).

The analysis ends if there is no conflict. But because of the possible ethical,

malpractice, and fee collection consequences of misjudging whether there is a conflict, the safest course is to err on the side of a conflict and move to the determination of whether the conflict is consentable.

B. Is The Conflict Consentable?

Consentability is determined by Model Rule 1.7(b). Multiple representation conflicts in litigation are not the type that are automatically nonconsentable. *See* Model Rule of Professional Conduct 1.7 cmt. 23 ("[C]ommon representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met."); Restatement of the Law Governing Lawyers 128 cmt. d(i) (2000) ("No conflict of interest is ordinarily presented when two or more of a lawyer's clients assert claims against a defendant."); ABA/BNA Lawyer's Manual on Professional Conduct 51:308 ("[M]ost conflicts in multiple representation can be cured with informed client consent."). Parties on the same side of litigation generally will have similar interests, but that does not mean that attorneys can ignore Model Rule 1.7(b)(1)'s mandate that they must evaluate whether they "will be able to provide competent and diligent representation to each affected client."

C. Obtaining Informed Consent.

If there is a concern with a possible conflict-of-interest and the conflict is consentable, the lawyer must obtain all of the potential clients' informed consent to the simultaneous representation. Failure to obtain informed consent if there is a possible conflict violates the attorney's ethical obligations and could lead to malpractice and disciplinary actions. *See Mosier v. S. California Physicians Ins. Exch.*, 74 Cal. Rptr. 2d 550 (Ct. App. 1998); *In re Beckner*, 778 N.E.2d 806 (Ind. 2002).

" 'Informed consent' " denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about

the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e); *see also* Model Rule 1.0(e) cmt. 7 (expanding upon definition of informed consent). Comment 18 to Model Rule 1.7 gives further guidance as to the requirements of clients' informed consent to a conflict of interest: "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. . . . When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved." Clients should be told, as noted in Comments 30 and 31 to Rule 1.7, that information provided by one client will not be kept confidential from the other, that the lawyer may have to withdraw if one client insists on withholding information from another, and that the attorney-client privilege will be inapplicable in subsequent disputes between the two clients. Possible conflicts at the settlement stage should also be discussed. *See* Model Rule of Professional Conduct 1.8 cmt. 13.

The Iowa Supreme Court considered the requirements for informed consent (albeit under the former Iowa Code of Professional Responsibility) in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Wagner*, 599 N.W.2d 721 (Iowa 1999). In a multiple representation situation, it is not enough for the attorney to merely tell the clients that more than one is being simultaneously represented, that there may be a potential conflict, and that if the conflict arises the attorney will withdraw. *Id.* at 728-29. The attorney must explain the nature of the conflict in detail so that the clients understand

the reasons why it may be desirable for each to have independent counsel. *Id.* at 728. There must be a detailed explanation of all possible areas where the interests of one client may differ from that of the other. *Id.* at 729. For foreign state examples of the requirements for obtaining informed consent in common representation cases, see *Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *In re Houston*, 985 P.2d 752 (N.M. 1999); and *In re Cohen*, 853 P.2d 286 (Or. 1993).

Model Rule 1.7(b)(4) requires that each client give informed consent to the conflict and that the consent be confirmed in writing. The writing may be a document signed by the client or one that the lawyer prepares and sends to the client following verbal consent. *See* Model Rule of Professional Conduct 1.7 cmt. 20. Comment 20 also cautions that the documentation of consent does not take the place of a conversation with the client about the possible conflict and its effects on the client, as discussed above, with the opportunity for the client to raise questions and concerns.

IV. SUBSEQUENT CONFLICTS ARISING AFTER MUTLIPLE REPRESENTATION IS UNDERTAKEN.

Attorneys must continue to be vigilant for potential conflicts even after informed consent is obtained and simultaneous representation begun. *See* Model Rule of Professional Conduct 1.7 cmts. 4 & 5. New developments may arise after informed consent is initially received that create a potential conflict and require the attorney to again obtain informed consent in the same manner as that received at the outset of the simultaneous representation. *See Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *Office of Disciplinary Counsel v. Mazer*, 712 N.E.2d 1246 (Ohio 1999); *Thomas v. State*, 551 S.E.2d 254 (S.C. 2001). For example, newly discovered facts may disclose a conflict

between the clients, *see Straubinger v. Schmitt*, 792 A.2d 481 (N.J. Super. Ct. App. Div. 2002), or a conflict may arise at the settlement stage of a case, *see In re Jaeger*, 213 B.R. 578 (C.D. Cal. 1997). If a subsequent conflict, either nonconsentable or for which informed consent is not received, does arise, the attorney will probably have to withdraw from representing all of the common clients. *See* Model Rule of Professional Conduct 1.7 cmt. 29 ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."); *see also Picker Int'l v. Varian Assocs.*, 869 F.2d 578 (Fed. Cir. 1989); *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984); *Harte Biltmore Ltd. v. First Pennsylvania Bank*, 655 F. Supp. 419 (S.D. Fla. 1987); *Carroll v. Superior Court*, 124 Cal. Rptr. 2d 891 (Ct. App. 2002); *Unnamed Attorney v. Kentucky Bar Ass'n*, 1 S.W.2d 474 (Ky. 1999).

V. RESPONSIBILITIES OF LOYALTY AND CONFIDENTIALITY TO COMMON CLIENTS.

An attorney who undertakes simultaneous representation owes each client an equal degree of loyalty and may not favor the interests of one client over another. Model Rule of Professional Conduct 1.7 cmt. 31; *see also Felix v. Balkin*, 49 F. Supp. 2d 260 (S.D.N.Y. 1999); *Swift v. Choe*, 674 N.Y.S.2d 17 (App. Div. 1998). That has a major impact on confidentiality and the attorney-client privilege in common representation matters. Comment 30 to Model Rule 1.7 states that "[w]ith regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach." *See also FDIC v. Ogden Corp.*, 202 F.3d 454 (1st Cir. 2000); *Felix v. Balkin*, 49 F. Supp. 2d 260 (S.D.N.Y. 1999); *Sec. Investor Protection Corp. v. Stratton Oakmont Inc.*, 213 B.R. 433 (S.D.N.Y. 1997).

A difficult situation can arise if one client gives the attorney information but insists that it not be shared with the other co-clients. An attorney cannot withhold such information without violating Model Rule 1.4's instruction that every client has a right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to the client's benefit. *See* Model Rule of Professional Conduct 1.7 cmt. 31. If the client insists with the demand that the information not be shared, the attorney likely needs to withdraw under Model Rule 1.16(a)(1), which requires a lawyer to withdraw if continued representation will result in an ethical violation. The lawyer should also consult with the appropriate state attorney regulatory body to determine whether to share the information with the other common clients notwithstanding the instructions to withhold the information. *See* ABA/BNA Lawyer's Manual on Professional Conduct 51:312 (comparing various state authorities concerning whether such information must be disclosed).

VI. AGGREGATE SETTLEMENTS AMONG COMMON CLIENTS.

Model Rule 1.8(g) and DR 5-106(A) contain the rules for aggregate settlements among joint clients. Under Model Rule 1.8(g), an attorney representing multiple parties cannot agree to an aggregate settlement "unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all of the claims. . . involved and of the participation of each person in the settlement." Comment 13 to Rule 1.8 gives additional guidance as to the disclosure required for informed consent and states that each client must be informed about the

material terms of the settlement, including what the other clients will receive or pay under the settlement agreement.

Unanimous informed consent is required. *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892 (10th Cir. 1975); *Knisley v.* Jacksonville, 497 N.E.2d 883 (Ill. Ct. App. 1986); *Estate of Vafiades v. Sheppard Bus Serv.*, 469 A.2d 971 (N.J. Super. Ct. Law Div. 1983); *State ex rel. Oklahoma Bar Ass'n v.* Watson, 897 P.2d 246 (Ok. 1994). If the clients disagree about accepting an aggregate settlement offer, the lawyer will likely have to withdraw from representing all of them under the general principle that a lawyer cannot eliminate a conflict by withdrawing from representing some but not all of the clients. *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984). For further cases concerning aggregate settlements, see *Kelly v. Johns-Manville Corp.*, 590 F. Supp. 1088 (E.D. Pa. 1984); *In re Sonnier*, 157 B.R. 976 (E.D. La. 1993); *Butler County Bar Ass'n v. Barr*, 591 N.E.2d 1200 (Ohio 1992); *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225 (Tex. Ct. App. 1985).

VII. APPLICATION OF CONFLICT RULES TO CLASS ACTIONS.

Class actions pose a special problem for conflicts analysis in the multiple client context. Nothing in the Model Rules makes their conflict-of-interest provisions inapplicable to class actions, other than Comment 25 to Rule 1.7, which clarifies that unnamed class members are ordinarily not considered to be clients of the lawyer. But there are myriad other situations in which conflict can arise in class actions.

A frequent conflict problem unique to class actions is the negotiation of a common fund recovery for a class and a fixed fee amount for class counsel out of that

common fund. The money paid to class counsel out of the common fund obviously serves to reduce the class's recovery. Thus, "[g]iven the antagonistic interests of counsel and their clients, an uncontested [common fund fee] petition calls for heightened scrutiny by the trial judge." *Trist v. First Fed. Sav. & Loan Ass'n*, 89 F.R.D. 8, 10 (E.D. Pa. 1980). Yet, in *Evans v. Jeff D.*, 475 U.S. 717 (1986), the United States Supreme Court approved of simultaneous negotiations for the class recovery and attorney fees. But while *Evans* may ensure the validity of the class settlement, it does not necessarily preclude an ethical violation because of the simultaneous negotiation since most federal courts will defer to state disciplinary authorities on such matters. The better practice is to agree with the defendant that it will pay the reasonable fees that are awarded by the court and will not object to a fee award up to a certain sum. *See Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982).

Another situation that may arise in the class action context is that of opt-out plaintiffs who want to retain class counsel in their individual actions. Assuming that such a conflict is consentable and informed consent is obtained, there is no reason why class counsel cannot simultaneously represent the class and opt-out plaintiffs. Difficulties may arise, however, if there is limited money for settlement and the settlement interests of some clients may be harmed by that of other dual clients. For example, in *Sullivan v. Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246 (N.D. Cal. 1978), the court determined that an attorney could not represent a class of investors without withdrawing from representation of a plaintiff in a parallel securities fraud suit because there was a possibility of insufficient insurance and assets.

What about Rule 1.8(g)'s mandates for proper aggregate settlements? Does Rule

1.8(g) apply to class actions to the point that every member of the class must give informed consent to a settlement? There is no exclusion in Rule 1.8 for class actions, although some states, like North Dakota, specifically remove class actions from Rule 1.8's scope. Arguably, since Comment 25 to Rule 1.7 confirms that unnamed class members are not considered clients, and Rule 1.8 applies to only aggregate settlements made on behalf of clients, Rule 1.8 has no application to unnamed class members. *See* Model Rule of Professional Conduct 1.8 cmt. 13. Further, class action procedural rules have numerous safeguards built in to ensure fairness to the class, such as notice of the proposed settlement to the class and the necessity of court approval. *See id.* But class procedure eliminates the need for informed consent in writing by each member of the class, which is a requirement for an aggregate settlement under Rule 1.8(g).

The Third Circuit faced a difficult decision in *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999). It held that class counsel may continue to represent one group of class plaintiffs who supported a settlement while simultaneously representing another group that objected to the settlement, unless the prejudice to the opponents of the settlement substantially outweighed the benefits of continued representation. The balancing approach was more appropriate than automatic disqualification because of the differences between class actions and other types of litigation.

VIII. APPLICATION OF CONFLICTS RULES TO CRIMINAL CODEFENDANTS.

The best approach to evaluating conflicts among multiple codefendants in a criminal case is to simply not represent criminal codefendants. Comment 23 to Rule

32:1.7 states that the "potential for conflict in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." *See also Cuyler v. Sullivan*, 446 U.S. 335 (1980) (possible conflict inheres in almost every instance of multiple representation in criminal case). Notwithstanding Comment 23, Model Rule 1.7 does not foreclose dual representation of criminal defendants as long as they provide informed consent and the attorney's obligations to each client will not interfere with the ability to consider, recommend, or carry out a course of action for each defendant. *In re Egbert*, 184 F.R.D. (D.R.I. 1999). Like any other instance involving a possible conflict of interest, some conflicts between criminal codefendants are not consentable and an attorney may not undertake simultaneous representation regardless of the clients' desires. *Wheat v. United* States, 486 U.S. 153 (1988). Conflicts between criminal defendants may arise at any stage of the proceeding, and a lawyer who undertakes multiple representation in a criminal case must be continuously watchful for changed circumstances that turn a consentable conflict into and unconsentable situation.

The Sixth Amendment's right to effective assistance of counsel is an additional concern for conflicts analysis in criminal cases that is not found in civil matters. *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982). The United States Supreme Court has rendered several decisions on the constitutional dimensions of multiple client conflicts in criminal cases. *See Mickens v. Taylor*, 535 U.S. 162 (2002); *Wheat v. United States*, 486 U.S. 153 (1988); *Strickland v. Washington*, 466 U.S. 668 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60 (1942).

A further consideration for simultaneous codefendant representation in criminal cases is aggregate plea agreements, which are governed by Model Rule 1.8(g) and Comment 13 to Rule 1.8. Read together, those provisions prohibit aggregate plea agreements unless the clients consent after consultation, including disclosure of the existence and nature of all the pleas involved and each client's proposed deal.