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Evolving Roles in Federal Sentencing: The Post-*Booker/Fanfan* World

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I. INTRODUCTION

Sentencing is the most important aspect of a criminal proceeding. Over the last twenty years, the process by which sentences are determined in federal prosecutions has undergone radical changes; swinging from a system that vested virtually unreviewable discretion in district court judges; then to a Congressionally-imposed system that divested judges of virtually all discretion while placing it predominantly in the hands of youthful prosecutors; and now, to a sentencing scheme that returns discretion to the judges but under the watchful eyes of appellate courts, prosecutors, defense lawyers, and even Congress. The latest

system—largely a living experiment in jurisprudence—may strike just the right balance.

Prior to the 1984 enactment of the Federal Sentencing Guidelines,[1] or, more importantly, their implementation in 1987, federal sentencing was exclusively the province of district court judges. Aside from a fairly cursory pre-sentence report by the Department of Probation containing a secret sentencing recommendation, the judges were on their own and often were influenced by defense attorneys' advocacy and pleas for leniency on behalf of their clients. Assistant United States Attorneys, who vigorously prosecuted offenders, rarely took an active role in their sentencing and often announced that they were taking no position whatsoever. Moreover, appellate courts had virtually no role in reviewing the sentence.[2] Although this system was advantageous to well-represented defendants, the public perception—or perhaps more importantly, the perception of Congress—was that similarly situated defendants received wildly disparate sentences depending upon the judge involved, the area of the country where the conviction occurred, the type of offense, or the race and social background of the defendant.[3]

As a result, Congress overhauled the sentencing process in the 1980s. In 1984, Congress enacted the Sentencing Reform Act ("SRA"), which established the United States Sentencing Commission and charged it with creating what the Act euphemistically referred to as "guidelines" for federal sentencing. These Sentencing Guidelines, which were implemented in 1987, severely limited district court judges' roles in setting sentences. More specifically, they replaced the traditional system with a mandatory formulaic approach that virtually ignored a defendant's non-criminal background and any positive past

1. U.S. SENTENCING GUIDELINES MANUAL (2004) [hereinafter U.S.S.G.] (promulgated by the U.S. Sentencing Commission pursuant to 28 U.S.C. § 994(a)).

2. *See infra* note 14.

3. *See* Brief for the Honorable Orrin G. Hatch et al. as Amici Curiae in Support of Petitioner, United States v. Booker, 543 U.S. 220 (2005) (Nos. 04-104, 04-105) (characterizing disparity that existed before the Guidelines as "shameful" and "astounding"); Senator Patrick Leahy, Prepared Testimony before the United States Senate Committee on the Judiciary (July 13, 2004), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=2629 (referring to period before Guidelines as "the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence"); Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, SENT'G & CORR. (U.S. Dep't of Justice), Sept. 1999, at 1, 5, *available at* http:www.ncjrs.gov/pdffiles1/nig/175722.pdf. ("Civil rights and prisoners' rights activists claimed that broad discretion produced arbitrary and capricious decisions and that racial and other invidious biases influenced officials.").

behavior or good character and relied almost exclusively on what the prosecutor asserted constituted not only the instant criminal conduct, but related conduct as well. The Sentencing Guidelines also inserted appellate courts into the mix. They were charged with ensuring that district court judges did not deviate from the rigid guidelines

In practice, the system limited sentencing judges' discretion by virtually eliminating their prerogative to evaluate the character of the defendant standing before them. Because the Guidelines required judges to enhance sentences if they found certain factors to exist, such as a conclusion that a defendant played more than a minimal role in the offense conduct, the Guidelines also divested trial juries of their constitutional role of determining for which conduct a person should be held to answer. More troubling, however, was the new arbitrariness the Guidelines inserted into the sentencing process by allowing often youthful prosecutors to dictate Guidelines sentences through plea negotiation, charging decisions, and determining which facts to disclose to the court.

The January 2005 Supreme Court pronouncement in two cases combined for decision, *United States v. Booker* and *United States v. Fanfan* (collectively, *"Booker/Fanfan"*)[4], once again has turned the world of sentencing federal offenders on its ear. In an unusual two part opinion, the Supreme Court rendered the "Guidelines" just that: advisory sentencing guidelines for a judge to consider. Thus, for the first time since the 1987 implementation of the Federal Sentencing Guidelines, district courts find themselves with greater discretion in the imposition of sentences.

The future of federal sentencing law is now uncertain. The United States Sentencing Commission finds itself in a race against time and Congress' patience, attempting to gather data in order to make an informed decision about whether to recommend that legislative changes be made to the federal sentencing system in light of the Supreme Court's decision. While immediately after *Booker/Fanfan* both the government and defense attorneys found themselves testing the limits of *Booker/Fanfan* in a sea of uncertainty, lower federal courts have begun to weigh in. If Congress can resist its anti-judiciary urge, the result actually may be a system that strikes the appropriate balance between advocacy by defense attorneys and a considered role by prosecutors to ensure that relevant facts are brought to the attention of the sentencing court.

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4. 543 U.S. 220 (2005).

A true understanding of where the federal sentencing process is headed requires a review of the traditional, pre-Guidelines method of sentencing, the history and development of the Sentencing Guidelines, and their initial endorsement by the Supreme Court. An integral part of this history now includes the dismantling of the Guidelines system that has been in place for almost two decades. This dismantling process actually had been under way for several years prior to *Booker/Fanfan*, most notably in two significant Supreme Court opinions, *Apprendi v. New Jersey*[5] and *Blakely v. Washington*.[6] Although the result of this process cannot be known immediately, recent decisions by various circuit and district courts in reaction to *Booker/Fanfan* demonstrate the issues facing lower courts in imposing and reviewing sentences. Finally, a review of the options being considered by the Sentencing Commission and Congress provide a glimpse of the future of federal sentencing and why it is unlikely to return to the pre-1987 sentencing world.

II. Sentencing Before the Guidelines

In the early 19th century, America abandoned the torturous methods of corporal punishment inherited from its forefathers in Europe in favor of the development of a penal system that laid the groundwork for the modern criminal justice system.[7] Under this early system, courts imposed flat sentences on offenders based simply on the criminal act committed. As the penal system was modernized and institutionalized, America saw a rapidly increasing number of individuals imprisoned as a result of its expanding population and the increased efficiency of police and courts. In order to ease overcrowding issues, small reform efforts, such as the use of pardons, and releases for good time and probation, were instituted and provided some initial flexibility.[8]

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5. 530 U.S. 466 (2000).

6. 542 U.S. 296 (2004).

7. Until the later years of the eighteenth century, the usual method of dealing with convicted offenders was to impose fines or to mete out to them some more or less brutal form of corporal punishment, such as execution, flogging, mutilation, branding, and public humiliation in the stocks, pillory, and ducking-stool. Those confined in a public institution for any considerable length of time were mainly those imprisoned for debt or accused persons awaiting trial.

United States Bureau of Prisons, Handbook of Correctional Institution Design and Construction 16 (1949).

8. Nat'l Council on Crime and Delinquency, National Assessment of Structured Sentencing 6 (1996), *available at* http://www.ncjrs.gov/pdffiles/strsent.pdf.

These piecemeal reforms alone were insufficient, however, leading to more substantive reform and the transition from the imposition of flat sentences to the use of an indeterminate sentencing system.[9] Characterized by Alan Dershowitz as a shift from the judicial model of sentencing to an administrative model,[10] this system saw discretion distributed among prosecutors, defense counsel, and judges, as well as prison officials and parole boards which played a large role in determining an offender's length of imprisonment.[11]

Under this indeterminate sentencing model, sentencing grew increasingly individualized, resulting in "punishment [that] fit the criminal rather than the crime."[12] Well into the twentieth century, sentencing was left almost exclusively in the hands of judges, whose discretion was virtually unbridled, limited only by legislative action that imposed maximum sentences for certain federal crimes and by the constitutional prohibition against excessive sentences.[13] When a defendant was charged with multiple counts, courts could aggregate the maximum sentences by sentencing defendants to consecutive terms. Appellate court decisions made a demonstration that a district court had imposed an impermissibly harsh sentence, where the sentence was within the statutory range, a virtual impossibility.[14]

Furthermore, although Congress had taken an increasingly active role in criminalizing conduct that it believed implicated national con-

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9. *Id.* (citing S.A. SHANE-DUBOW, A.P. BROWN, & E. OLSEN, SENTENCING REFORM IN THE U.S.: HISTORY, CONTENT AND EFFECT (1985)).

10. *Id.* (citing Alan Dershowitz, *Criminal Sentencing in the United States: A Historical and Conceptual Overview*, 423 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 117-32 (1976)).

11. *Id.*

12. *Id.*

13. U.S. CONST. amend. VIII (preventing the infliction of "cruel and unusual punishments").

14. *E.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972) (accepting government's assertion that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review); United States v. Main, 598 F.2d 1086, 1094 (7th Cir. 1979) ("The general rule on review of sentences in the federal courts is: 'once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end,' unless the sentencing judge relied on improper or unreliable information in exercising his or her discretion, or failed to exercise any discretion at all, in imposing sentence.") (citations omitted)); United States v. Santiago, 582 F.2d 1128, 1137 (7th Cir. 1978) ("[T]rial court is given a broad discretion in considering the sentence to be imposed upon a convicted defendant. [E]xercise of this broad discretion will not be disturbed on review unless there is a plain showing of abuse by the trial court.") (citations omitted); *see also* FED. PUB. & CMTY. DEFENDERS, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING 1 (Lucien B. Campbell & Henry J. Bemporad eds., 5th ed. 2001), *available at* http://www.dcfpd.org/sentencing/fedguideintro.pdf (noting that pre-Guidelines sentences "were largely insulated from appellate review").

cerns, often creating concurrent federal and state jurisdiction over identical conduct, mandatory minimum sentences only infrequently were part of Congress's statutes. Thus, on the low end courts often were free to impose sentences of probation with no jail time. Moreover, prior to the enactment of the Guidelines, no vehicle existed for federal prosecutors to appeal a sentence they believed to be too lenient.[15]

As criminal prosecutions in federal courts increased, judges and practitioners developed a relatively standard method of approaching the indeterminate sentencing process. Judges were aided by the Department of Probation. That department was established by Congress in 1925 to investigate a defendant's background and the circumstances of the crime, as well as to supervise offenders placed on probation.[16] The Department of Probation, considered an arm of the court, was charged with preparing a report that was presented to the court, the defense, and the prosecution. Its sentencing recommendation, however, was made available only to the court.[17] Often, especially in cases where a defendant pled guilty, the presentence report was the primary source of information provided to the judge regarding the defendant.[18]

Prosecutors generally provided the Department of Probation with facts of the offense; however, their role often ended there. In many instances, aside from correcting what the prosecutor perceived as specific misstatements by the defense, prosecutors did not advocate a particular sentence. Rather, any influence allocated by prosecutors was limited to charging decisions and plea negotiations.[19]

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15. *See* 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3919.8 (2d ed. 1992 & Supp. 2005) (detailing grounds on which prosecutors could appeal sentence under old system); *see also* 18 U.S.C. § 3742(b) (2000) (enacted post-Guidelines; circumstances under which government can seek review of sentence include imposition of sentence that: (i) violates the law; (ii) incorrectly applies sentencing guidelines; (iii) is less than the minimum sentence stipulated in the guideline range; or (iv) was imposed for an offense for which there is no sentencing guideline and is "plainly unreasonable").

16. John P. Storm, *What United States Probation Officers Do*, 61 FED. PROBATION 13 (1997).

17. *See id.* (noting differences between probation officer's role pre- and post-Guidelines); *see also* Mark J. Hulkower, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983,* 72 GEO. L.J. 599, 604-05, (1983-1984) (noting that former Federal Rule of Criminal Procedure 32(c)(3)(A) provided that the court need not disclose any sentencing recommendation made in a presentence report if certain exceptions existed).

18. Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HAR. L. REV. 1615, 1623, 1627-28 (1979-1980).

19. *See* Hulkower, *supra* note 17, at 599.

On the other hand, defense attorneys often provided courts with written submissions on behalf of their clients. These submissions varied from simple letters to the court, to elaborate sentencing memoranda including letters from family, friends, and experts, attesting to the defendant's good character and the impact a lengthy sentence would have on others. These submissions were intended to present the defendant to the court as an individual, separate and apart from the wrongdoing for which they had been convicted. Often, these personal presentations played a large role in the ultimate sentence imposed.

Indeed, under this pre-Guidelines system, judges were permitted to weigh a broad range of information in determining an appropriate sentence, such as the possibility of rehabilitation, the societal interest in retribution, and the deterrent effect of a sentence.[20] The only limits placed on a judge in considering information to determine a sentence were constitutionally based, barring a court from considering information obtained in violation of the due process clause, the privilege against self-incrimination, and the sixth amendment right to counsel.[21] In addition to being allowed to consider extensive amounts of information at sentencing, upon the imposition of sentences, judges were not required to explain their rationale and often did not. This unfettered discretion allowed judges to impose varied sentences.

Thus, the hallmark of pre-Guidelines sentencing was vast discretion by sentencing judges within wide-ranging statutory boundaries. Ironically, however, the time actually served by most offenders was determined not by the court, but by parole commissions and boards. These entities were empowered with the ability to review and determine a defendant's eligibility for parole, and further authorized to release a defendant from his sentence any time after one-third of the judicially imposed sentence was served.[22] Although some viewed the role of parole boards as a desirable means of mitigating excessive severity and eliminating disparity in sentencing,[23] the reality was that the parole commissions and boards operated independently and autonomously, creating disparity within the system. Under their watch, on av-

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20. *Id.* at 605-06 & n.2428 (citing numerous cases noting various factors courts permitted to be considered in imposing sentence).

21. *Id.* at 606-08. Despite these constitutional limitations, courts were permitted to consider evidence obtained in violation of the fourth amendment during the sentencing phase. *Id.* at 608.

22. *Id.* at 600.

23. *Id.* at n.2390 (citing United States v. Addonizio, 442 U.S. 178, 188-90 (1979) and United States v. Grayson, 438 U.S. 41, 47 (1978) (which verify power of Parole Commission to release prisoners)).

erage, offenders only served somewhere between one-third and one-half of the imposed sentence.[24]

A growing sense that this sentencing system was unfair and ineffective in controlling crime grew in the 1960s and 1970s. Those years saw a wide disparity in sentences imposed in various geographic regions of the United States. By the mid-1970s, complaints about the indeterminate sentencing system used by the federal and state courts abounded.[25] Civil rights groups argued against the arbitrary and capricious nature of the sentences, based on what they believed were racial and other biases.[26] Conservatives argued that the courts' discretion resulted in undue leniency and undermined the goal of deterrence.[27] Yet others argued that "broad, standardless discretion" denied due process.[28] Finally, researchers complained that statistics revealed the system was ineffective in rehabilitating offenders.[29]

III. The Federal Sentencing Guidelines

A. *Enactment of the Sentencing Reform Act*

These many concerns ultimately led to the creation of the Sentencing Guidelines. In 1984, Congress passed the Sentencing Reform Act ("SRA") which established the United States Sentencing Commission ("Commission") and charged it with creating guidelines for federal sentencing. These guidelines were promulgated in 1987, and given the constitutional blessing of the Supreme Court in 1989.[30] The stated

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24. 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 iv (2004); U.S.S.G. ch.1 pt.A introductory cmt. n.3. Judges took this fact into account, incorporating the one-third to one-half calculation in determining the sentence to be imposed.

25. *See, e.g.*, Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976) (arguing for move from indeterminate sentencing system to more determinate system); Andrew von Hirsch, Doing Justice: The Choice of Punishments (Ne. Univ. Press 1986) (1976) (same); Marvin E. Frankel, Criminal Sentences: Law Without Order 69, 88 (1973) (attacking indeterminate system as cruel and unjust; stating that "the sweeping power of a single judge to determine the sentence, as a matter of largely unreviewable 'discretion' is a—perhaps 'the'—central evil in the system").

26. *See* American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (1971).

27. Tonry, *supra* note 3, at 5 (citing Ernest Van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question 61 (1975); James Q.Wilson, Thinking About Crime (1975)).

28. *Id.*

29. *Id.*

30. Mistretta v. United States, 488 U.S. 361 (1989). Responding to a constitutional challenge to the Sentencing Guidelines, the Supreme Court held that the creation of the

goals of the SRA included the elimination of unwarranted disparity; transparency, certainty, and fairness in the sentencing process; proportionate punishment; and the reduction of crime through deterrence, incapacitation, and the rehabilitation of offenders.[31] To achieve these goals, the Commission engaged in a bi-partisan study of nine years of empirical data to define a list of relevant distinctions to be made among criminal cases that would advance the goals of uniformity, but would be manageable enough to translate into a set of Guidelines for courts to follow.[32]

B. *Application of the Sentencing Guidelines*

The result was the Sentencing Guidelines. The new system required district courts to engage in the mechanistic application of complex rules and to impose sentences within a narrow range. Essentially, the Guidelines assign two mathematical numbers to a defendant—one value based on the individuals' offense level and another based on his or her "criminal history." These two values form the axes of a grid, called the sentencing table. Together, they provide a sentencing range for each defendant, set forth in months. This mathematical calculation fixes the limits of a sentence that may be imposed by the court. Only in extraordinary situations, including those where the court determined that a factor had not adequately been considered by the Commission, were judges permitted to depart from these guideline ranges and to impose a sentence outside the set range.[33]

A Sentencing Guidelines case and calculation would proceed as follows: A defendant was convicted of an offense, either by guilty plea

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Sentencing Commission did not violate the separation of powers doctrine. *Id.* at 390. Rather, Congress was permitted to delegate to the judicial branch nonadjudicatory functions that were not prerogatives of another branch, especially where those functions were appropriate to the central mission of the judiciary. *Id.* at 388.

31. U.S. SENTENCING COMM'N, *supra* note 24, at iv.; *see also* United States v. Booker, 543 U.S. 220, 292 (2005) (Justice Stevens's opinion, dissenting in part, stating that in pursuing sentencing reform, "The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim.").

32. U.S.S.G., *supra* note 24, at ch.1 pt.A introductory cmt. n.3.

33. *Id.* §§ 5K1.1, 5K2.0. This system was endorsed by the Supreme Court in *Koon v. United States*, 518 U.S. 81, 92 (1996), where it emphasized that the Sentencing Reform Act "did not eliminate all of the district court's discretion" but rather, "Acknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances, Congress allows district courts to depart from the applicable Guideline range if 'the court 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.'" (citation omitted) (quoting 18 U.S.C. § 3553(b)).

or by a jury, prompting a Guidelines analysis by the court. Although some plea agreements contained stipulated Guidelines analysis, these calculations, while often relied upon by judges, were not binding. Every Guidelines analysis started with a number known as the base offense level. These levels were set forth in the Guidelines for each particular offense.

After the base offense level was determined, a court would be required to add or subtract points to this number based on the circumstances of the offense such as the defendant's role in the offense (if minimal, points would be subtracted; if defendant was a leader, points would be added), the amount of loss involved, the quantity of drugs in drug offense cases, the number of victims involved, and whether the defendant used a gun during the commission of the offense. A court was required to make these factual determinations, and add or subtract points from the base offense level despite that, often, these facts neither were considered by a jury nor admitted by a defendant in his guilty plea. Although these factors often increased sentences dramatically,[34] they were determined by the court by a "preponderance of the evidence" standard rather than the "beyond a reasonable doubt" standard required to convict and incarcerate a defendant.

Once the defendant's final offense level had been calculated, the court was mandated to further determine the defendant's criminal history category, based on his or her prior criminal record. These two numbers were placed on the sentencing table, which showed a corresponding Guidelines sentencing range. Despite the fact that the Guidelines contained numerous factors for the court to consider in reaching a defendant's sentencing range, such as the defendant's role in the offense and his or her criminal history, the Guidelines did not permit a court to take into account a defendant's personal background, non-criminal activity, and good character.

Courts were permitted to sentence above or below the applicable Guideline range where aggravating or mitigating circumstances existed that were not adequately taken into consideration by the Sentencing

34. For example, the base offense level for basic economic offenses, such as securities fraud, is increased according to the amount of loss or monetary damage involved. U.S.S.G. § 2B1.1(b)(1) (2004). As Congress and the Sentencing Commission increased their attention on white collar crime, the points added for loss increased dramatically, subjecting white collar defendants to a whole new level of sentences, similar to those typically associated with violent crimes. For instance, loss of more than $1 million, increases the offense level by 16 points, U.S.S.G. § 2B1.1(b)(1)(I), which can increase a sentence by more than 120 months, or ten years, in prison. *Id.*

Commission, or where offender characteristics were not otherwise accounted for in the Guidelines.[35] Only in extraordinary cases were judges permitted to depart downwardly from these Guidelines ranges. Some of the more well-known downward departures were for substantial assistance to the prosecution, extraordinary family circumstances, and aberrational conduct.[36] These departures were not granted frequently.[37]

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35. U.S.S.G. § 5K2.0(a)(1)(A)-(B) (2004).

36. U.S.S.G. § 5K2.0(b)(2) provides that, "[u]nder 18 U.S.C. § 3553 (b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that— . . . (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines." While acknowledging that certain cases may be so distinguished as to take them out of the "heartland" of cases, the Commission believed "that such cases will be extremely rare." U.S.S.G. § 5K2.0 cmt. n.3(B)(i).

37. For example, in cases where defendants sought departures based on family circumstances, the Guidelines provided that family ties and responsibilities and community ties were not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. U.S.S.G. § 5H1.6. Accordingly, courts only granted these departures where defendants could show that their family circumstances were so extraordinary as to warrant special consideration. The court's rationale in departing in these circumstances was not that the defendant's family circumstances decreased the defendant's culpability, but that the court was reluctant to inflict extraordinary damage on the dependents who rely solely on the defendant for their support and sustenance. United States v. Johnson, 964 F.2d 124 (2d Cir. 1992); *see also*, United States v. Galante, 111 F.3d 1029 (2d Cir. 1997) (downward departure for extraordinary family circumstances warranted where defendant was married with two young children and wife spoke little English and, therefore, had limited earning capacity; if defendant, who was sole financial source for family, was incarcerated, court found family unit would be destroyed and relegated to public assistance) *reh'g in banc denied*, 128 F.3d 788 (2d Cir. 1997); United States v. Saffer, 118 F. Supp. 2d 546 (E.D. Pa. 2000) (although defendant was primary provider for his family, his children who suffered various health problems would lose defendant's health insurance and wife, who was in poor health, would be required to go back to work as a result of defendant's incarceration, these circumstances were not sufficiently extraordinary to warrant departure). Similarly, courts also were permitted to sentence below the Guidelines range where the defendant's behavior in committing the offense was aberrant. Applying either a "spontaneity" test or "totality of the circumstances" test, circuits examined whether the offense conduct was aberrant within the context of the crime itself or within the context of the defendant's entire life. *See* Zecevic v. U.S. Parole Comm'n., 163 F.3d 731, 734-35 (2d Cir. 1998) (detailing two positions taken by the circuit courts; those applying the spontaneity test define aberrant behavior with reference to the particular crime committed while those using the totality of the circumstances test examine the criminal conduct in the context of the defendant's day-to-day life). Despite the recognition of this test, departures on these grounds were not freely granted. *See, e.g.*, United States v. Murad, 954 F. Supp. 772 (D. Vt. 1997) (denying departure requested by three bankruptcy fraud defendants although each had led an exemplary life before the crimes, had been respected and successful businessmen, actively involved in their religious communities and active and supportive fathers; departure denied based on fact that they had engaged in a comprehensive and lengthy scheme to defraud, which extended over a period of many months and required extensive planning and the creation of false documents); United States v. Petrelli, 306 F. Supp. 2d 449, 452-53 (S.D.N.Y. 2004) (defendant not entitled to aberrant behavior departure secondary to the duration of the conspiracy and defendant's

The most important departure was the one reserved for those who cooperated with the government. Such defendants got significant sentence reductions for providing "substantial assistance" to the government in the investigation or prosecution of other individuals.[38] These downward departures could only be granted upon the motion of prosecutors, who made such requests on behalf of cooperating defendants pursuant to Section 5K1.1 of the Guidelines.[39] Although "[s]ubstantial weight [was to] be given to the government's evaluation of the extent of the defendant's assistance," the significance and usefulness of the assistance ultimately was a determination for the court.[40]

C. Other Changes Resulting from the Guidelines

Along with the institution of a mechanistic, mathematical system pursuant to which courts were to calculate sentences, the Guidelines also resulted in institutional changes. For example, the Guidelines eliminated parole altogether. With this elimination, the only non-incarcerative sentencing options were probation and supervised release. The latter was imposed after a term of imprisonment was completed to facilitate defendant's reintegration into the community and enforce other conditions of a sentence such as fines or restitution orders. A court could impose probation in lieu of imprisonment only in very limited circumstances.[41] Supervised release was imposed in addition to a sentence of imprisonment and was required following any imprisonment sentence longer than one year.[42]

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involvement and furtherance of the illegal enterprise); United States v. Hollier, 321 F. Supp. 2d 601, 603 (S.D.N.Y. 2004) (rejecting defendant's evidence of good character because defendant's actions "were plainly of significant duration and involved significant planning.").

38. U.S.S.G. § 5K1.1 cmt. n.3 (2004). In empowering the Sentencing Commission, Congress directed that the Guidelines should "take into account a defendant's substantial assistance" in the government's prosecution of another individual. 28 U.S.C. § 994(n) (2000).

39. Melendez v. United States, 518 U.S. 120 (1996) (holding section 5K1.1 motion does not authorize a sentence below statutory minimum unless government specifically requests such a sentence).

40. U.S.S.G. § 5K1.1(a)(1) cmt. n.3 (2004).

41. Probation was precluded for: (1) felonies carrying maximum terms of twenty-five years or more, life or death (Class A or B felonies); (2) offenses that expressly preclude probation; and (3) a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a)(1)-(3) (2000). Furthermore, straight probation was barred by the Guidelines unless the bottom of the Guideline range was zero or the court departed below the range. *See* U.S.S.G. §§ 5B1.1(a), 5C1.1.

42. U.S.S.G. § 5D1.1(a). Generally, the term of supervised release increased with the grade of the offense, from one year, to three years, to five years. 18 U.S.C. § 3583(b) (2000).

Appellate review also was changed after the enactment of the Guidelines. Under 18 U.S.C. § 3742, either the defendant or the government was permitted to appeal a sentence on the grounds that it was (1) "imposed in violation of law"; (2) "imposed as a result of an incorrect application of the sentencing guidelines"; or (3) "imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."[43] A defendant could appeal any departure above the Guideline range. The government could appeal any downward departure.[44] Plea agreements, however, often were entered into whereby the defendant agreed not to appeal a sentence within a particular range no matter how the court reached such a range.[45] According to the Sentencing Commission, approximately one out of six sentencing appeals resulted in complete or partial reversal.[46] Appellate courts were very busy.

D. *Perceptions of the Guidelines' Effectiveness*

1. The Sentencing Commission's 2004 Review of the Success of the Guidelines

At the end of 2004, the Sentencing Commission engaged in an extensive assessment of whether the stated goals of sentencing reform had been achieved through the implementation of the Sentencing Guidelines. Its conclusion was that, "In general, the guidelines have fostered progress in achieving the goals of the Sentencing Reform Act."[47] Specifically, sentencing was more transparent with the improved articulation of rationale by sentencing judges; punishment was more certain and predictable; and disparities based on race or ethnicity had been reduced with an overall reduction in disparity for similar offenders committing similar offenses.[48]

The Commission acknowledged, however, that although judicial discretion had been reduced, evidence of disparity still existed in presentencing stages, such as charging and plea negotiation. They lacked

43. 18 U.S.C. § 3742 (a)(1)-(2),(4) (2000).

44. 18 U.S.C. § 3742(a)(3), (b)(3) (2000).

45. *See generally* FED. R. CRIM. P. 11(e)(1)(C). *See also id.* app. 11(e)(i)(c). While prosecutors generally required a defendant to waive the right to appeal the sentence under a plea agreement, the Supreme Court never sanctioned such appeal waivers. Despite the fact that a number of district courts refused to accept plea agreements containing such waivers, they were generally approved by every circuit court that considered them. *See* FED. PUB. & CMTY. DEFENDERS, *supra* note 14, at 15-16.

46. *Id.*

47. U.S. SENTENCING COMM'N, *supra* note 24, at xvi.

48. *Id.*

the transparency of sentencing itself. Further, the Commission noted that "neither appellate review nor guidelines amendments have prevented . . . significant variations in departure rates" and "[n]either Department policy nor judicial review of plea agreements has prevented plea bargaining from sometimes circumventing proper application of the guidelines needed to ensure similar treatment of offenders who commit similar crimes."[49] Despite these concerns, the Commission remained convinced that it was uniquely qualified to continue its research and was "well-positioned to develop fair and effective sentencing policy as long as it continues to receive the resources and support it needs to carry out its vital mission."[50]

2. Other Views of the Guidelines' Impact on Sentencing

The Commission's upbeat sentiments about the changes wrought by the Guidelines were not, however, shared by the legal community as a whole. Indeed, a report issued by the American College of Trial Lawyers in September 2004, concluded that the Guidelines were "AN EXPERIMENT THAT HAS FAILED," summarizing that "[e]fforts to eliminate disparity in sentencing have resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences."[51]

The most significant and problematic result, according to Guideline detractors, was a shift of discretion from judges to prosecutors that occurred for a number of reasons under the Guidelines system: first, prosecutors exercised discretion in choosing the crime to charge; second, by using the Guidelines as a negotiating tool, prosecutors compelled defendants to cooperate in exchange for a "substantial assistance" downward departure—the only exception to a Guidelines sentence that had potentially unlimited effect; and third, prosecutors controlled the facts presented to the court at the time of sentence by forcing defendants to forgo certain legal arguments in order to strike a deal with the government.[52]

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49. *Id.*

50. *Id.* at xvii.

51. AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 1 (2004) (capitalization in original); *see also* Kirby D. Behre and A. Jeff Ifrah, *You be the Judge: The Success of Fifteen Years of Sentencing under the United States Sentencing Guidelines*, 40 AM. CRIM. L. REV. 5 (2003) (detailing unsuccessfulness of the Guidelines).

52. AM. COLL. OF TRIAL LAWYERS, *supra* note 51, at 14-16.

According to the report of the American College of Trial Lawyers,

> The result is a cruel anomaly. Those defendants who are most culpable, and therefore have the most information to offer prosecutors, receive the greatest benefit from their cooperation [under Rule 5K]. Prosecutors are free to charge them with offenses carrying a lesser sentence under the Guidelines to induce cooperation, and to reward them with a substantial assistance motion. Those least culpable and with less to offer end up serving the longer sentences.[53]

The power afforded prosecutors within the mandatory Guidelines system was seen by many as misplaced. In a speech given at the American Bar Association Annual Meeting in August 2003, Supreme Court Justice Kennedy stated,

> Now, part of the federal mandatory minimums have resulted because there's a shift in discretion from the courts to the prosecutors. Sometimes to an assistant U.S. attorney not much older than the defendant. There is a shift from the one actor in the system that is trained in the use of the discretion. That gives reasons for it. That exercises it openly. And that's the judge. But the transfer is to the hidden parts of the prosecutors office. And these are young prosecutors who often, probably in most cases, are conscientious about their duties. But it is simply unwise to take away our discretion from our United States judges. Or, in similar systems in the state system.[54]

Critics also claimed that the Guidelines ineffectiveness could be seen in the increasing number of downward departures over the past ten years, resulting in tremendous disparities in sentencing.[55] The increase in downward departures obviously was a reflection of the increasing frustration of judges with the mandates of the Guidelines and the limits placed on their discretion. Further, due to the complex, abstract and ambiguous nature of the Guidelines, critics argued that establishing uniformity in sentencing was not possible.[56]

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53. *Id.* at 16.

54. Justice Anthony M. Kennedy, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.november.org/stayinfo/breaking/Kennedyspeech.html.

55. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 51, at 17 (arguing that the application of Section 5K1.1 of the Guidelines has generated unwarranted disparities, unpredictability and unfairness in sentencing).

56. *Id.* at 17-20. Indeed, judges themselves complained about the complex nature of the Guidelines. In *United States v. Walker*, 202 F.3d 181, 182 (3d Cir. 2000) United States Court of Appeals Chief Judge Edward Becker called on Congress to amend the Sentencing Guidelines, "to afford federal judges additional sentencing discretion . . . ." A failure to do so would result in "decades more in which the dockets of federal courts will be glutted with such esoteric exercises, the energies of district court and appellate judges sapped, and the Federal Reporters filled with one tome after another on issues as banal as whether a cook supervisor is a corrections officer."

Certainly, the effectiveness and legitimacy of the Guidelines have been a source of on-going debate for the past fifteen years. Little changed, however, until the Supreme Court's recent decisions, marking the beginning of a new chapter in decades of sentencing reform.

IV. The Supreme Court's Reconsideration of Mandatory Determinate Sentencing Systems

A. Apprendi v. New Jersey*: A Foreshadowing of the* Booker/Fanfan *Decision*

In *Apprendi v. New Jersey*,[57] the Supreme Court addressed the question of whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense be made by a jury on the basis of proof beyond a reasonable doubt. The Court answered this question in the affirmative.[58]

In *Apprendi*, the Court analyzed a New Jersey state hate crime statute that provided for an enhanced sentence where a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with a racial purpose to intimidate a person or group. The defendant in *Apprendi* pled guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term of five to ten years, after firing several shots into the home of an African-American family in his neighborhood.[59] After the court accepted the guilty plea, the prosecutor made a motion for an enhanced sentence under the hate crime statute. The court held an evidentiary hearing to determine Apprendi's motivation for the shooting. The judge found that Apprendi committed the crime with the purpose of intimidating the family on the basis of race. Apprendi's sentence was enhanced to twelve years, two years above the statutory ten year maximum for the crime to which he pled.[60]

In its opinion, the Court read the Fifth and Sixth Amendments to require that any fact that increases the maximum penalty for a crime, other than a prior conviction, must be proved to the jury beyond a reasonable doubt. In so holding, the Court expanded an earlier holding in *Jones v. United States*, which determined, as a matter of statutory con-

57. 530 U.S. 466 (2000).
58. *Id.* at 490.
59. *Id.* at 468-69.
60. *Id.* at 470-71.

struction, that the sentencing enhancements in 18 U.S.C. § 2119 were elements of the offense.[61]

B. Blakely v. Washington*: The Court's Analysis of State Sentencing Systems*

Oddly, the first substantial leak in the Sentencing Guidelines dam came in a decision examining a state determinate sentencing scheme—not a sentence imposed under the Federal Sentencing Guidelines. It arose under a fact pattern that suggested that Sentencing Guidelines schemes actually vested judges with *too much* discretion, not *too little* discretion as practitioners and jurists had noted the Guidelines generally did in practice.[62]

In *Blakely v. Washington*, the Supreme Court examined Washington State's determinate sentencing scheme in light of the Sixth Amendment's guarantee of a trial by jury.[63] The petitioner in *Blakely* pled guilty to second-degree kidnapping, a class B felony. Pursuant to Washington's Sentencing Reform Act, the range of permissible sentence for such an offense was forty-nine to fifty-three months. The Act also permitted the court to impose a sentence above the standard range where it found "substantial and compelling reasons justifying an exceptional sentence."[64] In imposing such a sentence, a judge was required to set forth his findings of fact and conclusions of law supporting it.[65]

At Blakely's sentencing, the prosecution recommended a sentence within the standard range of forty-nine to fifty-three months. After an evidentiary hearing, however, the court found that the petitioner had acted with "deliberate cruelty" and sentenced him to ninety months in prison—more than three years above the standard maximum under the statute.[66] Blakely appealed his sentence, arguing that he was deprived of his Sixth Amendment right to have a jury determine beyond a rea-

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61. *Id.* at 488-90; Jones v. United States, 526 U.S. 227 (1999). The *Apprendi* decision addressed only factors that increased the maximum penalty, but did not decide whether constitutional proof and jury requirements applied to factors that increased the statutory minimum. *Apprendi*, 530 U.S. at 486-88 & n.13 (declining to address its decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), which had approved a sentencing factor that imposed a mandatory minimum sentence). *But cf. Apprendi,* 530 U.S. at 521-22 (Thomas, J., concurring) (suggesting that *McMillan* is no longer valid).

62. *See supra* notes 54-57 (emphasis added).

63. 542 U.S. 296 (2004).

64. *Id.* at 299 (quoting WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000)).

65. *Id.* at 298-99 (citing various provisions of the Washington Sentencing Reform Act).

66. *Id.* at 301.

sonable doubt all facts legally essential to his sentence. The Supreme Court agreed.

In its decision, the Court relied on its previously articulated rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[67] Because, in making its "deliberate cruelty" determination, the sentencing court had relied on facts introduced during the evidentiary hearing, but not admitted by the defendant during his guilty plea colloquy, the Supreme Court concluded that Blakely had been denied his constitutional right to have a jury determine all *facts* essential to his sentence beyond a reasonable doubt. Accordingly, the Supreme Court held that Washington State's sentencing procedure did not comply with the Sixth Amendment.[68]

In noting the majority's allegiance to the doctrine set forth in *Apprendi*, Justice Scalia argued that those who would reject that case are resigned only to alternatives that advance extreme judicial subjectivity and discretion in sentencing. Instead, according to Scalia, following *Apprendi* "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended."[69] This is quite peculiar language given the fact that such transfer of control *away* from the judge is precisely what those who enacted the Federal Sentencing Guidelines sought to achieve.

Rejecting the State's argument that the Court's decision effectively rendered determinate sentencing schemes involving judicial factfinding unconstitutional, Justice Scalia wrote that this case was "not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."[70] He further noted that the Sixth Amendment was not a limit on judicial power, but a reservation of jury power.[71]

In her dissent (joined by Justice Breyer and, in part, by Chief Justice Rehnquist and Justice Kennedy), Justice O'Connor expressed deep concern regarding the effect of the majority's opinion, stating that its legacy "whether intended or not, will be the consolidation of sentencing

67. *Id.*
68. *Id.* at 303.
69. *Blakely*, 542 U.S. at 306.
70. *Id.* at 308.
71. *Id.*

power in the State and Federal Judiciaries."[72] This is so, she argues, because legislatures faced with satisfying the burdens imposed by *Apprendi* either will severely limit or completely eliminate their sentencing guideline schemes, which will effectively result in greater judicial discretion and less uniformity in sentencing.[73]

According to the dissent, that result would be contrary to decades of sentencing reform, which resulted in the determinate sentencing schemes of many states and the federal government, referred to by Justice O'Connor as systems of "guided discretion" that well served various constitutional principals.[74]

> The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal government. Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments.[75]

After the Court's decision in *Blakely*, the only question remaining was whether the constitutional analysis in that case would apply to the determinate sentencing scheme set forth in the Federal Sentencing Guidelines. Little doubt existed that it would. As anticipated, the Court soon answered this question in the affirmative.

C. Booker/Fanfan: *Sixth Amendment Considerations and the Federal Sentencing Guidelines*

Six months after its decision in *Blakely*, the Supreme Court issued its widely-awaited opinion in *Booker/Fanfan*.[76] In many ways, *Booker/Fanfan* was the embodiment of the concerns expressed by the dissent in *Blakely*. In *Booker/Fanfan*, the Supreme Court heard argument on two separate cases from the Seventh Circuit and the District Court for the District of Maine,[77] respectively. In both of those cases, the sentencing court rejected the government's recommended application of the Sentencing Guidelines, finding that the Court's decision in *Blakely* prohibited them from imposing a sentence based on additional facts not found by the jury.

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72. *Id.* at 314 (O'Connor, J., dissenting).
73. *Id.*
74. *Id.* at 317.
75. *Blakely*, 542 U.S. at 323 (internal citations omitted).
76. 543 U.S. 220 (2005).
77. The Supreme Court granted certiorari in the *Fanfan* case before judgment to the United States Court of Appeals for the First Circuit. *Id.* at 220, 229.

In *Booker*, the jury found the defendant guilty of possessing at least fifty grams of crack cocaine, based on evidence that he had 92.5 grams. Under those facts, the Guidelines required a possible 210 to 262 month sentence. The government argued that Booker's actual sentence should be almost ten years longer based on the judge's finding by a preponderance of the evidence that Booker possessed an additional 566 grams of crack. The jury never heard or considered this evidence because it was not necessary for a conviction. Relying on *Blakely*, the sentencing judge found that the jury's verdict did not authorize the sentence.[78]

In *Fanfan*, the maximum sentence authorized by the jury verdict was seventy-eight months. At the sentencing hearing, the judge found by a preponderance of the evidence additional facts which, under the Guidelines, increased the sentence to a range of 188 to 235 months, tripling the length of the sentence. Again, in reliance on *Blakely*, the judge determined that he could not impose the higher sentence.[79]

The Supreme Court held that both courts correctly concluded that the *Blakely* decision applies to the Federal Sentencing Guidelines.[80] The unusual opinion was written in two separate parts. The first was written by Justice Stevens and joined by Justices Scalia, Souter, Thomas and Ginsburg, the same Justices who formed the majority in the *Blakely* case. The dissenters in the *Blakely* case, Justices Breyer, O'Connor and Kennedy, and Chief Justice Rehnquist, dissented in the first portion of the *Booker/Fanfan* opinion. This portion of the decision, "Part One," concludes that the Sixth Amendment, as construed in *Blakely*, applies to the Federal Sentencing Guidelines and renders them unconstitutional.[81]

The second part of the opinion, "Part Two," was authored by Justice Breyer, joined by the dissenters to the first opinion and Justice Ginsberg.[82] This second majority decision in *Booker/Fanfan* concludes

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78. *Id.* at 228.
79. *Id.* at 228-29.
80. *Id.* at 226-27.
81. *Id.* at 233-37.
82. Justice Ginsberg, who was a part of the majority in the *Blakely* decision, was the fifth vote in each part of the *Booker/Fanfan* opinion. Critics claim that it is difficult to reconcile the separate majority opinions in the case and that Justice Ginsberg, the only one to join both majorities, should have articulated her position. *See* Alan Dershowitz, *Prima Donnas in Robes*, L.A. TIMES, Jan. 17, 2005, at B11 ("Ginsburg should have written an opinion explaining why the two decisions were reconcilable, if they were, or why she voted inconsistently. Had she written an opinion, it would have been the definitive one. Instead, we have two equally authoritative opinions that seem irreconcilable.").

that those provisions of the SRA that make the Guidelines mandatory are incompatible with the Court's Part One majority opinion and, therefore, must be severed. The result of this severance, according to the majority, is to render the Guidelines advisory, and constitutionally permissible.[83]

1. *Booker/Fanfan* Part One: The Substantive Decision

The majority's analysis in *Blakely* was firmly rooted in two well-settled precepts of common law; first, "that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'"[84]; and second, that the defendant also is guaranteed "the right to demand that a jury find him guilty of all the elements of the crime . . . ."[85] Combined, these guarantees protect a "defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'"[86]

Furthermore, rejecting the government's arguments, the Court determined that no "constitutionally significant distinction" existed between the Federal Guidelines and the Washington State sentencing system that was at issue in *Blakely*. Both systems were mandatory and imposed binding requirements on all sentencing judges. This implicates the Sixth Amendment in a way it would not be implicated if the guidelines were merely advisory.[87] The *Booker/Fanfan* Part One majority observed that the increasing emphasis by determinate sentencing systems on facts that enhanced sentencing ranges effectively "increase[d] the judge's power and diminish[ed] that of the jury."[88] The Court found this trend to be worrisome because the facts relied upon by judges in making such enhancements were not required to be raised before trial or proven by more than a preponderance of the evidence.[89] As in *Blakely* the Supreme Court's concern about *too much* judicial discretion was ironic given that, from a historical perspective, the Federal Guidelines slashed the judicial role.

83. *Booker/Fanfan*, 543 U.S. at 245.
84. *Id.* at 230 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).
85. *Id.* (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)).
86. *Id.* at 232 (quoting Blakely v. Wash., 542 U.S. 296, 301, 303 (2004)).
87. *Id.* at 233.
88. *Id.* at 236.
89. *Booker/Fanfan*, 543 U.S. at 236.

2. *Booker/Fanfan* Part Two: The Remedy

This portion of the opinion addressed the second question presented:

> [W]hether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.[90]

The majority answered this question by finding that those portions of the statute that rendered the Guidelines mandatory were incompatible with the first part of the decision and had to be severed and excised. This modification, "makes the Guidelines effectively advisory . . . [And] requires a sentencing court to consider Guideline ranges, but . . . permits the court to tailor the sentence in light of other statutory concerns as well," such as those set forth in Section 18 U.S.C. 3553(a).[91] These other factors include the imposition of a sentence that reflects the seriousness of the offense, promotes respect for the law, affords adequate deterrence to similar conduct, protects the public from further crimes of the defendant, and provides the defendant with needed training or medical care in the most effective manner.[92]

In reaching its decision, the Court sought to determine what Congress would have intended in light of the Court's holding in Part One. The majority rejected the approach set forth by Justice Stevens in his dissent (and presaged in his authored Part One decision) which would retain the Guidelines in their current state, but impose the Sixth Amendment jury trial requirement on the system of sentencing. Noting a number of Congressional signals, the majority held that to choose the option proposed by Justice Stevens (i.e., to have juries determine all facts necessary for upward *sentencing* adjustments) would "so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand."[93] Indeed, the majority opined that Congress likely would have preferred the total invalidation of the Act to an Act with the constitutional requirement grafted onto it.[94]

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90. *Id.* at 229 n.1.
91. *Id.* at 245-46 (internal citations omitted).
92. 18 U.S.C. § 3553(a)(2) (2000).
93. *Booker/Fanfan,* 543 U.S. at 250.
94. *Id.* at 264-65.

Thus, they chose to sever those unconstitutional provisions, "mak[ing] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."[95] Furthermore, the majority found that "the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent . . . to 'provide certainty and fairness . . . [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted."[96]

Two provisions in particular were severed. First, section 3553(b)(1) of the Guidelines that mandated that sentencing courts impose a sentence within the applicable guidelines range, thereby requiring courts to consider facts not found by a jury, was excised.[97] In addition, the provision that set forth standards of review on appeal, section 3742(e), which contained cross-references to section 3553(b)(1), was excised.[98] The majority opined that the excision of § 3742(e) did not pose problems for the handling of appeals, as the Act still provided for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range) and, as the Court previously had held, "a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*."[99] Specifically, appellate courts would use the familiar and practical standard of review for unreasonableness of the sentence.[100]

With the excision of these two provisions, the Court found that "the remainder of the Act satisfies the Court's constitutional requirements."[101] Although Guidelines sentences were no longer mandated as a result of this severance, the majority reasoned that the Guidelines were not meaningless. With respect to the excision of section 3553(b)(1), the majority explained that judges were still required to consider the Guidelines together with other sentencing goals.

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95. *Id.* at 246.
96. *Id.* at 264 (citing 28 U.S.C. § 991(b)(1)(B)).
97. *Id.* at 259 (referring to 18 U.S.C. § 3553(b)(1)).
98. *Id.* (referring to 18 U.S.C. § 3742(e)).
99. *Booker/Fanfan*, 543 U.S. at 260.
100. *Id.*
101. *Id.* at 259.

V. The Aftermath of *Booker/Fanfan* and the Lower Courts' Reactions

A. *Post-*Booker/Fanfan *Sentencing*

Given the Supreme Court's admonition about Guidelines being "considered," and given Congress' watchful eye, after *Booker/Fanfan*, courts likely will continue to calculate a defendant's Guideline range, as they have for the past seventeen years. These calculations will continue to include the principles established in the Guidelines, "relevant conduct," and other enhancement facts such as the defendant's role in the offense and the amount of loss or drugs involved where relevant.[102] Although the applicable Guideline range must be considered by the sentencing court, a judge no longer is required to impose a sentence within that range. Indeed, the non-mandatory nature of the Guidelines now makes other factors equally as important in a judge's sentencing determination. Such factors include those set forth in section 3553(a), requiring that a sentence reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence and protect the public from further crimes by the defendant.[103]

Whereas the grounds for seeking appellate review will remain the same, the circuit courts' review of criminal sentences also has changed. Now, circuit courts will not be forced to reverse where a sentencing court imposes a sentence that is not within the applicable Guideline range or improperly departs. Rather, appellate courts will review sentences for "reasonableness."[104]

Given the foregoing, no question exists that the *Booker/Fanfan* decision will have a monumental impact on the sentencing process.[105]

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102. *See* Alan Ellis & James H. Feldman, Jr., *All About* Booker 4-5 (2005), http://sentencing.typepad.com/sentencing_law_and_policy/files/ellis_and_feldman_all_about_booker.pdf.

103. *Id.* at 5; *see* 18 U.S.C. § 3553(a) (2000).

104. *All About* Booker, *supra* note 102, at 12.

105. The question of who is entitled to seek resentencing after *Booker/Fanfan* has generated dozens of decisions in the lower courts. Not all criminal defendants will benefit from the new rules. *See* Kris Axtman, *Cases Test New Flexibility of Sentencing Guidelines*, Christian Sci. Monitor (Boston), Feb. 18, 2005, at 2 (citing director of the Cato Institute's Project on Criminal Justice as stating that "[a] lot of people already in prison had high hopes that their sentences would be reduced after the [*Booker*] decision, ... But for the vast majority that is not going to happen.").

First, although the Supreme Court did not deal with the issue of retroactivity, other courts have held that the decision is not retroactive. *See* McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005) (relying on Schriro v. Summerlin, 542 U.S. 348 (2004) for rule of law on retroactivity); Varela v. United States, 400 F.3d 864 (11th Cir. 2005); Quirion v. United

Defense attorneys are now free once again to meaningfully advocate the individual characteristics of defendants by providing the court with information about the defendant that is unrelated to the offense conduct—something that was lost in the mathematical calculations of the Guidelines.

That being said, the current system, requiring "consideration" of the Guidelines and the factors set forth in section 3553(a), as well as the government's declaration of its commitment to the Guidelines and the principles therein,[106] ensures that no danger exists that sentencing judges will return to the unfettered discretion that existed prior to 1987. A January 2005 memorandum sent to all federal prosecutors by the Deputy Attorney General, James Comey (hereinafter referred to as the "Comey Memo"), requires prosecutors to "take all steps necessary to ensure adherence to the Sentencing Guidelines."[107] To ensure this faithful execution, prosecutors must: (1) continue to consult the Guidelines at the charging stage; (2) actively seek sentences within the range established by the Guidelines in all but extraordinary cases; (3) preserve the government's ability to appeal "unreasonable" sentences, which includes any case in which the sentence imposed is below the Guidelines range; and (4) timely report adverse sentencing decisions.[108]

Finally, despite concerns, as detailed *infra*, the limited sentencing data already available suggests that sentencing judges are likely to remain within the Guidelines ranges in most cases. The extension of additional constitutional protection to criminal defendants in criminal cases simply ensures that other pertinent characteristics and facts also

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States, No. Civ. 05-06-B-W, 2005 WL 83832 (D. Me. Jan. 14, 2005); United States v. Larry, No. 3-03-CR-0249-H, 2005 U.S. Dist. LEXIS 853 (N.D. Tex. Jan. 19, 2005).

Second, defendants with cases currently on appeal, so called "pipeline" cases, must still demonstrate that the sentence imposed was erroneous in light of *Booker/Fanfan*. In dealing with these pipeline cases, some circuits have granted automatic remands for reconsideration (not resentencing) by the district court. *See, e.g,* United States v. Hughes, 396 F.3d 374 (4th Cir. 2005); United States v. Crosby, 397 F.3d 103 (2d Cir. 2005); United States v. Ameline, 400 F.3d 646 (9th Cir. 2005) (noting that only "the truly exceptional case" would not require remand). However, other courts have required a showing of plain error at the appellate court level before remanding such cases. *See, e.g.*, United States v. Bruce, 396 F.3d 697 (6th Cir. 2005); United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005) (stating "[w]e ask whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion."); United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005). To date, the Department of Justice has made no announcement that the Department intends to appeal any of these decisions.

106. *See* Memorandum from James B. Comey, Deputy Attorney General, on Department Policies and Procedures Concerning Sentencing to All Federal Prosecutors (Jan. 28, 2005) (on file with author).

107. *Id.*

108. *Id.*

be properly considered.[109] Although some features of the new system hearken back to pre-Guidelines days, we suggest that the current system takes the best of both worlds and finds an ideal middle ground.

With these changes, lower courts currently are busy shaping the contours of the new system. A flurry of cases has been issued from circuit courts and numerous district courts, presenting various applications of *Booker/Fanfan* to sentencing.[110] The Second Circuit in *Crosby* has given one of the most detailed analyses of the post-Guidelines landscape, addressing how district courts should proceed with sentencing in the future and the standard of appellate review of district court sentences.

B. United States v. Crosby

On the heels of *Booker/Fanfan*, the Second Circuit issued its opinion in *United States v. Crosby,*[111] and its companion decisions in *United States v. Fleming* and *Green v. United States*,[112] setting forth the method by which *Booker/Fanfan* would be implemented in that circuit. The court examined the implications for both sentencing and appellate courts. The Second Circuit's opinion engages in an analysis that balances both the concerns of district court judges and the potential concerns of Congress regarding sentencing judges' discretion. In doing so, this case should provide a template for the future of sentencing.[113]

1. District Court Sentencing After *Booker/Fanfan*

In *Crosby*, the Court found that although the Guidelines were no longer mandatory, they have not been discarded and they must con-

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109. "The righteous Supreme Court decision [in *Booker/Fanfan*] to curb the politicization of federal sentencing, moderate prosecutorial immoderation and restore judicial wisdom to the federal bench was recently described by the Boston Globe as 'a defeat for the U.S. Justice Department.' But it was a magnificent victory for justice." Alan Reynolds, *Let Judges Use Judgment*, WASH. TIMES, Jan. 23, 2005.

110. Since the Supreme Court's ruling six months ago, the circuit and lower courts have issued hundreds of opinions discussing or mentioning *Booker/Fanfan*. A comprehensive list of these opinions, current through June 5, 2005, is available at http://www.fd.org/pdf_lib/Post_Booker_Decision_Outline.pdf.

111. 397 F.3d 103 (2d Cir. 2005).

112. United States v. Fleming, 397 F.3d 95 (2d Cir. 2005); Green v. United States, 397 F.3d 101 (2d Cir. 2005).

113. *See also* United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wisc. 2005) (thoughtful application of post-*Booker/Fanfan* law, considering Guidelines and factors set forth in 18 U.S.C. § 3553(a) in imposing sentence of one year and a day where defendant's Guideline range was thirty-seven to forty-six months after upward adjustments for loss, more than minimal planning and abuse of trust).

tinue to be considered. According to the *Crosby* court, sentencing judges remain under a duty to "consider" the Guidelines, along with the other factors listed in Section 3553(a).[114]

In order to fulfill this statutory duty to "consider" the Guidelines, sentencing judges normally will have to determine the applicable Guidelines range in the manner they did before *Booker/Fanfan* and take into account policy statements issued by the Sentencing Commission, including authority regarding departures from the Guideline ranges.[115] Furthermore, although Part One of the opinion in *Booker/Fanfan* held unconstitutional a sentencing court's enhancement to a Guidelines sentence above the recommended range based on facts not found by the jury or admitted by the defendant, Part Two of the opinion noted that once the mandatory nature of the Guidelines is removed,

> [T]he traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection. Thus, the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.[116]

After determining the applicable Guidelines range, sentencing judges will "have the duty, imposed by subsection 3553(a)(4), to 'consider' it, along with all of the factors listed in section 3553(a)."[117] The Second Circuit, however, did not feel obligated to determine the degree of consideration required by the sentencing judge or to create a formulaic approach to sentencing, but felt that it would "evolve" as district court judges carried out their statutory duties. "In other words, we will no more require 'robotic incantations' by district judges than we did when the Guidelines were mandatory."[118]

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114. 397 F.3d at 111.

115. *Id.*

116. *Id.* at 112. Importantly, however, the *Crosby* court observed that a precise calculation of the applicable Guideline range may not be necessary in one circumstance. According to the court, situations may arise where either of two Guidelines ranges, whether or not adjacent, may be applicable, but the sentencing judge, having complied with Section 3553(a) and considered other relevant factors, makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies. Having made such a decision, the court can avoid the need to resolve all of the factual issues necessary to make precise determinations of some complicated matters, such as monetary loss. This "exception" could become significant and could allow judges to justify lower sentences than the Guidelines would suggest. *Id.* The use of this "exception" as articulated by the Second Circuit, as well as others noted by other district and circuit courts, ultimately may have a significant impact on how the Sentencing Commission and Congress respond to the *Booker/Fanfan* decision.

117. *Id.*

118. *Id.* at 113 (citations omitted).

In summary, the court noted that post-*Booker/Fanfan* sentencing would proceed as follows: First, the Guidelines are no longer mandatory, yet must be considered by the sentencing judge. After engaging in the necessary consideration, which normally will require a determination of the applicable Guidelines range, the sentencing judge should decide whether (1) to impose the sentence that would have been imposed under the Guidelines or (2) to impose a non-Guidelines sentence. Second, in making this determination, the sentencing judge is entitled to find all appropriate facts.[119]

The court also issued a final note of caution, stating that

> [I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to 'consider' the Guidelines and all of the other factors listed in section 3553(a) [of the Act].[120]

2. Appellate Review of Sentences After *Booker/Fanfan*

After examining what the application of *Booker/Fanfan* would look like at the district court level, the court focused on the appellate courts and the new standard of review set forth by the Supreme Court. In analyzing the process by which an error would be identified under the new standard of "reasonableness," the court noted that appellate review would not be limited solely to the length of the sentence imposed, but to whether the district judge committed an error of law in the course of exercising his discretion.[121] That being the case, the court anticipated four types of procedural errors that might occur. First, the Sixth Amendment would be violated where a sentencing judge makes factual findings beyond those found by a jury or admitted by a defendant and "mandatorily" enhances a sentence above the range applicable. Second, procedural error would occur where a sentencing judge "mandatorily" applies the applicable Guideline range based solely on facts found by a jury or admitted by the defendant. Although the latter error would not violate the Sixth Amendment, the sentence would constitute procedural error (albeit sometimes harmless) because of the unlawful method by which it was selected.[122]

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119. *Crosby*, 397 F. 3d at 113.
120. *Id.* at 113-14.
121. *Id* at 114.
122. *Id.*

The third type of error anticipated by the court was where the sentencing judge failed to "consider" the applicable Guidelines range as well as other factors listed in section 3553(a), "and instead simply selected what the judge deemed an appropriate sentence without such required consideration."[123] Finally, statutory error in violation of section 3553(a) also would occur if the sentencing judge limited consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable range based on the facts found by the court.[124] The court noted that all of these potential errors would render the sentence unreasonable, regardless of the length of the sentence imposed, because the method of selecting the sentence was unlawful.[125]

With respect to the "reasonableness" standard to be applied by appellate courts when reviewing sentences imposed by a lower court, the court concluded that "reasonableness" is "inherently a concept of flexible meaning, generally lacking precise boundaries," and therefore declined to create per se rules as to the reasonableness of every sentence.[126] Rather, the court encouraged district court judges to "explain" their rationale for imposing either a Guidelines or non-Guidelines sentence as a means of "significantly aid[ing] this Court in performing its duty to review the sentence for reasonableness."[127]

VI. What the Future of Federal Sentencing Looks Like

Reactions to the Supreme Court's decision in *Booker/Fanfan* have been varied and fervent. Former Assistant Attorney General Christopher Wray stated that the government was "disappointed that the decision made the guidelines advisory in nature. . . . To the extent that the guidelines are now advisory . . . the risk increases that sentences across the country will become wildly inconsistent."[128] To be sure, the *Booker/Fanfan* decision takes some of the teeth out of the government's position with respect to seeking "substantial assistance" from

123. *Id.* at 115.

124. *Id.*

125. *Crosby*, 397 F.3d at 115.

126. *Id.* at 115.

127. *Id.* at 116.

128. Prepared Remarks of Christopher A. Wray, Assistant Attorney General, Response to *Booker/Fanfan* (Jan. 12, 2005) (on file with United States Department of Justice) (available at http://www.usdoj.gov/criminal/press_room/press_releases/2005_3131_WraySentencingGuidelinesfinalformatted.pdf).

defendants seeking a departure under the Guidelines.[129] In his testimony before the Subcommittee on Crime, Terrorism and Homeland Security, Wray noted the necessity of cooperation agreements and expressed concern that there would be decreased incentive for cooperating defendants to assume the risks of cooperation if they can seek the benefits regardless. He further stated that "[t]his will have grave effects on the Department's ability to prosecute a wide variety of crimes which are difficult, if not impossible, to investigate without cooperators, such as drug trafficking, gangs, corporate fraud and terrorism offenses."[130]

Although the government's reaction was one of disillusionment, Congressional members were more introspective. Senator Patrick Leahy stated that "Congress should resist the urge to rush in with quick fixes . . . ," and Senator Edward Kennedy noted that "[t]he last thing our criminal justice system needs is a rash action by Congress to impose a comprehensive mandatory sentencing regime on federal judges."[131]

Some district court judges expressed delight with the Court's decision. Senior Judge Jack B. Weinstein from the Eastern District of New York stated, "I'm really elated, and I think most judges will be too. It gives us the discretion to deal with individual cases without being unnecessarily harsh. This is now, if Congress leaves it, a marvelous sys-

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129. Substantial assistance motions are required by statute to permit a sentencing judge to impose a sentence below the statutory mandatory minimum. *See* 18 U.S.C. § 3553(e) (2000); *see also, supra* notes 40-42. As statutory mandatory minimums remain constitutional, the value of substantial assistance motions remains. However, the substantial assistance statute presents an "odd situation where the statutory language refers to the Sentencing Commission." Steven G. Kalar, Jane L. McClellan, & Jon M. Sands, *A* Booker *Advisory: Into the Breyer Patch*, CHAMPION, Mar. 2005, at 8. Furthermore, the statute mandates that sentences reflecting substantial assistance in mandatory minimum cases "*shall* be imposed in accordance with the guidelines . . . ." 18 U.S.C. § 3553(e) (emphasis added). The question arises, therefore, whether "this [is] another statutory 'shall' that should be a 'may,' missed by Justice Breyer's red pen in *Booker*? Because the guidelines are now advisory *in toto*, does this mean that the U.S. Sentencing Commission's interpretation of what is substantial assistance and how a judge should consider it all dicta?" Kalar, *supra* at 19-20. Regardless, like all of the Guidelines, there is now an argument that section 5K1.1 on substantial assistance is advisory and a sentencing court has considerably more discretion when evaluating substantial assistance. *Id.*

130. Christopher Wray, Assistant Attorney General, Prepared Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security (Feb. 10, 2005) (available at http://j-diciary.house.gov/media/pdfs/Wray021005.pdf).

131. *Response to* Booker *Opinion Varies*, 37, No.2 THIRD BRANCH: NEWSL. FED. CTS. 1 (Admin. Office of U.S. Cts., Wash., D.C.), Feb. 2005, *available at* http://www.uscourts.gov/ttb/fed05ttb/opinion/index.html (containing comments of Senator Patrick Leahy, ranking minority member on the Senate Judiciary Committee); Carl Hulse & Adam Liptak, *The Supreme Court: Reactions; New Fight Over Controlling Punishments is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29 (containing quote from Senator Kennedy).

tem."[132] A noted jurist, Judge Nancy Gertner, a district court judge from Massachusetts, stated, "[a] major effect of the Supreme Court's ruling . . . is that judges may now consider individual characteristics of a defendant . . . . 'People are not from cookie cutters; cases aren't made out of the same mold.'"[133]

John S. Martin, Jr., a former District Court Judge, concurred, stating, "This is an ideal sentencing system with guidelines that are advisory, with appropriate review."[134] Similarly, in her testimony before the United States Sentencing Commission, United States District Court Judge Lynn Adelman opined that "*Booker* does two things that will lead to a more just system: (1) it restores federal judges to a meaningful role in the sentencing process; and (2) it makes clear that fairness in sentencing requires consideration of factors other than reducing sentencing disparities."[135]

Finally, Timothy Lynch, from The Cato Institute, said,

> The federal sentencing guidelines shifted power from the judiciary to the prosecutors. The *Booker* ruling will have the effect of shifting power back to the judiciary. The net effect will be in the administration of justice, because we are more likely to find wisdom and prudence from impartial judges than from partial prosecutors.[136]

Barry Scheck, president of the National Association of Criminal Defense Lawyers, said "'[f]or 20 years, federal courts have been forced to impose unjust, irrational sentences based on unproven allegations, speculative calculations and the worst kinds of hearsay . . . Congress should welcome this opportunity to create a fair and just federal sentencing system, not a quick fix.'"[137]

A. *Reaction of the United States Sentencing Commission*

1. Options Considered During Post-*Blakely* Hearings

In November 2004, during hearings conducted post-*Blakely*, in anticipation of the type of decision that was handed down in *Booker/Fan-*

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132. Hulse & Liptak, *supra* note 131.

133. Shelley Murphy, *2 Boston Jurists Hail Return of Discretion*, BOSTON GLOBE, Jan. 13, 2005, at A20.

134. Hulse & Liptak, *supra* note 131.

135. Judge Lynn Adelman, Written Testimony before the United States Sentencing Commission (Feb. 15, 2005), *available at* http://www.ussc.gov/hearings/02_15_05/Adelman_testimony.pdf.

136. Tony Mauro, *Supreme Court: Sentencing Guidelines Advisory, Not Mandatory*, LEGAL TIMES, Jan. 13, 2005.

137. Hulse & Liptak, *supra* note 131.

fan, the United States Sentencing Commission heard from numerous experts in the field of criminal law regarding their assessment of how the Commission should respond to a *Booker/Fanfan*-type decision. During those hearings, with testimony provided by law professors, defense attorneys, and government lawyers, four primary alternative sentencing systems were recommended.[138] Although these discussions occurred before *Booker/Fanfan*, they provide a framework for the types of changes that likely will be considered by the Sentencing Commission and Congress.

The four options are: (i) a topless guidelines plan; (ii) "Blakelyization" or codification of the guidelines; (iii) an advisory scheme; and (iv) an "upside down guidelines plan."[139] Regardless of which plan they favored, the experts were unanimous in their view that the current Guidelines were too complicated.[140]

In proposing alternative systems to the Sentencing Commission, however, the "experts" differed in their assessment of how long Congress should wait for the Commission to create a scheme to replace the current Guidelines before taking matters into its own hands. Some believed Congress should wait for six months, while others suggested two years. In any event, some testified that an "interim fix" would buy the Commission more time to collect data and create an informed plan based on the data, while others hoped that "institutional inertia" would not create a situation where short-term measures would turn into the long-term system.[141]

a. The Topless Guidelines Plan

The "topless guidelines plan" was proposed as an interim fix by Frank O. Bowman, III, an Indiana University School of Law professor. This plan "would leave the minimum terms of the guidelines ranges where they are but would raise the maximum terms of the guidelines ranges to the statutory maximums."[142] In testifying before the Commission, Bowman observed that a topless guideline plan likely would

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138. *See News: Sentencing; Sentencing Commission Braces for Ruling that Jury Trial Right Applies to Guidelines*, 76 CRIM. L. REP. 132, Nov. 2004 [hereinafter *Sentencing Commission Braces for Ruling*].

139. *Id.*

140. *Id.*

141. *Id.* at 132-33.

142. *Id.* at 132. Mark Osler of Baylor Law School proposed a similar plan, suggesting that the size of the sentencing ranges be tripled rather than open them completely to the statutory maximums. *Id.*

not result in greatly increased sentences as most sentences currently are imposed at or near the minimums of the applicable guidelines range because federal district judges think the guidelines ranges are too high. Christopher A. Wray, former Assistant Attorney General, noted that a topless guideline plan "would be relatively easy to legislate, easy in practice, the results would replicate the current guidelines, and it would fulfill the important sentencing policies embodied in the Sentencing Reform Act."[143] Further, Wray believed that the topless guidelines plan preserved the traditional role of judges and juries in a way that a plan that submits sentencing facts to juries does not.

The topless plan does have critics. Indeed, even those who proposed the plan thought it should be considered only as an interim solution. The primary concern of opponents of the plan was that removing the maximum amounts on the range would lead to unwarranted disparities in sentences by "send[ing] the message that we are unconcerned with sentences that are unduly harsh, as long as no one is punished too leniently."[144] Sentencing Commissioner Michael E. Horowitz opined that the meaningfulness of the appellate standard review (at that time, unestablished) was "the key factor . . . in evaluating the potential for disparity under the topless guidelines plan."[145]

b. The "Blakelyization" Plan

The "Blakelyization" Plan is the plan seemingly favored by the Sentencing Commission and most practitioners. As presented at the hearings, the plan would involve converting the bases for the most frequently used guidelines adjustments (such as drug quantities, "loss" amounts, and the defendant's role in the offense) into facts to be found by juries beyond a reasonable doubt.[146] The most serious issue raised with this plan was the need to bifurcate jury trials on guilt issues and sentencing issues. Wray criticized the plan, stating that it was unworkable and would place "significant burdens on every phase of the criminal justice system—burdens that are not constitutionally required and are no more likely to result in fair and consistent sentences."[147]

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143. *Id.* at 133.

144. *Sentencing Commission Braces for Ruling, supra* note 138, at 133 (citing James A. Felman, co-chair of the ABA Criminal Justice Section's Committee on Corrections and Sentencing, appearing at the hearing in his individual capacity).

145. *Id.* at 134.

146. *Id.* at 134-35.

147. *Id.* at 135.

The likely results of a Blakelyization-type Plan were reported in *The Seattle Times* on January 12, 2005. The District Court in Western Washington relied on a similar approach in the conviction of three Israelis accused of defrauding household-moving customers. In a "first-of-its-kind jury verdict," the jury spent seven hours deliberating seventeen specific questions related to factual issues pertaining to the defendants' sentencing. Although this type of system places additional burdens on the jury (increasing deliberation by seven hours in this case), the Blakelyization plan avoids the implication of the Sixth Amendment in any way. Furthermore, Justice Stevens advocates this type of plan in his *Booker/Fanfan* dissent.[148]

c. The Advisory Scheme and the "Upside Down Guidelines Plan"

Although discussed during the Sentencing Commission's hearings, neither of these two plans garnered as much support as the others. An advisory scheme, which is the current state of the system after *Booker/Fanfan*, creates non-binding guidelines which serve only to inform district judges in the exercise of their discretion and to permit them to impose any sentence within the statutory minimums and maximums.[149] The "upside down guidelines plan" was the final plan discussed by the Sentencing Commission and is so named because in imposing sentences, courts start their analysis with the harshest possible sentence and work their way down until a final sentence is reached. This plan involves "an across-the-board conversion of aggravating factors into mitigating factors that would be treated like affirmative defenses to the maximum sentences."[150]

2. Hearings Held Post-*Booker/Fanfan*

Since the passage of *Booker/Fanfan,* the Sentencing Commission held additional hearings on February 15 and 16, 2005. During the two days, experts from the judiciary, the government, the defense bar and academia presented their views as to the implications of *Booker/Fanfan*. Many discouraged legislative action at this time, arguing that the

148. United States v. Booker, 543 U.S. 220, 272 (2005) (Stevens's opinion was joined by Justices Souter and Scalia).

149. *See Sentencing Commission Braces for Ruling*, *supra* note 138, at 132.

150. *Id.*

current system was working and that sentences were being imposed in accordance with the statutory purposes of sentencing.[151]

Among those from the judiciary to testify was Chief United States District Judge Lawrence Piersol, from South Dakota, who appeared in that capacity as well as the President of the Federal Judges Association. Judge Piersol stated, "I believe that *Booker* provides a nearly perfect sentencing system."[152] Accordingly, Judge Piersol discouraged the Commission from adopting the Topless Guideline Plan, or "Bowman fix"[153] as he referred to it, believing it was unconstitutional.[154] United States District Court Judge Richard Kopf urged "Congress and the Commission [to] go slow and see what happens," opining that, "[i]f most district judges exercise the restraint that I predict they will, and circuit judges use Guidelines-sensitive standards for the defiant, *Booker* will turn out to be, in the words of one famous federal prisoner, 'a good thing.'"[155]

Representatives from different advocacy groups also testified, presenting differing views as to what action the Sentencing Commission should take. Mary Price, from Families Against Mandatory Minimums, stated:

> The *Blakely* and *Booker* opinions launched what you recently described as a national conversation about sentencing. Your voice must figure prominently in that discussion. This is not a time to tinker around the edges of reform or rush to adopt measures designed to just meet, or worse, avoid, constitutional requirements. . . . We ask you to think big and reach back to foundation principles of justice.[156]

Collene Campbell, from the organization Memory of Victims Everywhere, urged the Commission to "make certain that fair and reasonable, but realistic and tough, sentencing guidelines are in place and

151. The United States Sentencing Commission has provided links to transcripts from these hearings as well as links to the written prepared testimony of many of the hearings' participants. These are available at http://www.ussc.gov/hearings/.

152. Chief Judge Lawrence Piersol, Prepared Testimony before the United States Sentencing Commission (Feb. 15, 2005), http://www.ussc.gov/hearings/02_15_05/Piersol_testimony.pdf.

153. As an interesting aside, Professor Bowman has since abandoned his position on the Topless Guidelines Plan, although it continues to be championed by former Associate Deputy Attorney General Daniel Collins. *See*, U.S.S.C. Hearings Continue . . . , Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/legislative_reactions_to_booker_and_blakely/index.html (Feb. 16, 2005, 8:59 EST).

154. Piersol, *supra* note 152.

155. Judge Richard G. Kopf, Prepared Testimony before the United States Sentencing Commission (Feb. 15, 2005), http://www.ussc.gov/hearings/02_15_05/Kopf_testimony.pdf.

156. Mary Price, Prepared Testimony to the United States Sentencing Commission (Feb. 15, 2005), http://www.ussc.gov/hearings/02_15_05/price_testimony.pdf.

followed." Ms. Campbell asked that "[the] Commission . . . build into its sentencing policies and procedures a requirement that Judges are obligated to give the victim a right to be heard . . . *prior* to making any sentencing decisions."[157]

Professor Douglas Berman, an avid follower of and commentator on the *Blakely* and *Booker/Fanfan* impact on federal sentencing,[158] also testified, noting that the *Booker* decision and the "remarkable remedy" devised therein, presented the Commission with an opportunity to "focus upon 'first principles,' and yet to do so while still drawing upon the collected wisdom of the last two decades of federal sentencing reform."[159] His comments suggested that the Commission focus on three categories of principles—institutional principles, substantive principles, and procedural principles.[160] All of these comments suggest that the Commission and Congress will act to change the system put in place by *Booker/Fanfan.* Although many of the comments indicate a preference for change consistent with the spirit of *Booker/Fanfan*, they all seem to desire some action by the Commission nonetheless.

Testimony from the defense bar, in contrast, suggested that the current system may strike the perfect balance, advocating only patience, data collection, and analysis by the Commission. Specifically, the Commission heard from Jon Sands, Chair of the Federal Defender Guideline Committee and Federal Public Defender for the District of Arizona. Mr. Sands stated that "[i]t is important not to forget that *Booker* is the latest in a series of Supreme Court decisions that have given greater protection to the constitutional rights of criminal defendants in sentencing. With that in mind, *Booker* presents an opportunity for the Commission to make sentencing more fair and rational."[161] Accordingly, Mr. Sands and the Federal Defender Guideline Committee joined others

> in urging the Commission to study and analyze sentencing information over the next year to see if any change is required, and if so, what kind. Meanwhile, no legislative change is warranted. The system is apparently

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157. Honorable Collene (Thompson) Campbell, Prepared Testimony to the United States Sentencing Commission (Feb. 15, 2005), http://www.ussc.gov/hearings/02_15_05/campbell-testim.pdf.

158. Sentencing Law & Policy Blog, *supra* note 153.

159. Professor Douglas A. Berman, Prepared Testimony before the United States Sentencing Commission (Feb. 15, 2005), http://www.ussc.gov/hearings/02_15_05/Berman_testimony%20(2-15).pdf.

160. *Id.*

161. Jon Sands, Prepared Testimony before the United States Sentencing Commission (Feb. 16, 2005), http://www.ussc.gov/hearings/02_15_05/Sands_testimony.pdf.

working, sentences are being imposed in accordance with the statutory purposes of sentencing, and the broader goals of the Sentencing Reform Act are being met.[162]

The path taken by the Sentencing Commission in response to this feedback remains to be seen. Because the Supreme Court appears to have fashioned a workable remedy, the Sentencing Commission has a window of opportunity to decline immediate action, collect and analyze information about actual sentences and consider its many options and the various proposals presented by the experts. Furthermore, if Congress will abide the interim solution, the Sentencing Commission is in a unique position to further consider many of the findings of its Fifteen Year Study as well as criticisms of the system, as detailed *supra*, in order to substantially correct problems within the federal sentencing system. Perhaps exhibiting signs of patience, recently, the Sentencing Commission posted its proposed priorities for the coming year, which included the "continuation of its work . . . on appropriate responses to *United States v. Booker*, including any appropriate guideline changes."[163] In accordance with its statutory authority, the Sentencing Commission is seeking public comment on these policy issues.[164]

B. Congressional Reaction

The real question is whether Congress will be patient in giving the Sentencing Commission enough time to gather the necessary data and possibly suggest or implement necessary changes. Recent legislative actions continue a long trend of Congressional limitations on judicial discretion, indicating strong feelings among Congressional members regarding the path of federal sentencing. In 2003, Congress passed a new sentencing law that further limited a judge's ability to deviate from the Guidelines in imposing sentences. This law, known as the "PROTECT Act," sends the signal that "judges who exercise sentencing leniency do so at their peril," requiring that judges' sentencing decisions be reported individually to Congress and be afforded little to no deference on appeal.[165] To add insult to injury, the law also curtailed judicial representation on the federal Sentencing Commission, limiting the number

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162. *Id.*

163. *See* United States Sentencing Commission, Federal Register Notice of Proposed Priorities and Request for Public Comment, http://www.ussc.gov/FEDREG/fedr0605.htm.

164. *Id.*

165. *See* Gerald Walpin & Alan Vinegrad, *Letting Judges Judge*, N.Y. SUN, Oct. 27, 2003, at 9; Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21.

of jurists who can serve to three.[166] Although the Department of Justice was a strong proponent of the PROTECT Act, the Department of Justice has met with vociferous opposition from other quarters of the legal community. In any event, Congress' passage of the PROTECT Act provides tremendous insight into the frame of mind with which it approaches issues regarding the federal sentencing system.

On February 10, 2005, the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security held hearings on the implications of *Booker/Fanfan* decisions for the Federal Sentencing Guidelines. During the hearings, much of the testimony recommended that Congress proceed slowly with respect to federal sentencing policy, in order to allow the Sentencing Commission to gather sufficient data and determine how effectively the new system is working.[167] Judge Ricardo Hinosjosa, Chairman on the US Sentencing Commission, testified about the impact of *Booker/Fanfan.* He reported that as of February 4, 2005, the Sentencing Commission had received and analyzed sentencing documents in 733 cases since *Booker/Fanfan*, and found that judges had followed the guidelines 90.9% of the time. Only 7.8% of the cases were sentenced below the guidelines and 1.3% were sentenced above.[168]

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166. *Id.*

167. *See, e.g.*, Frank O. Bowman, III, Prepared Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), http://judiciary.house.gov/media/pdfs/Bowman 021005.pdf ("In short, we don't yet know what the post-*Booker* sentencing regime will look like. At a minimum, Congress should abstain from legislative intervention long enough for the courts to clarify what *Booker* means in practice. If Congress is to legislate, it should have a clear understanding of the situation it is setting out to correct." Source is stating that the post-*Booker* system may be preferable to the uncertainties of legislating a new sentencing system.); *see also*, American Bar Association, Criminal Justice Section, Report to the House of Delegates, http://www.abanet.org/crimjust/policy/my05301.pdf (urging Congress to allow the new advisory system to remain in place for at least one year; "This Report emphasizes that (1) there is no reason to anticipate wide divergence from the guidelines due to the Feeney Amendment's reporting requirements, appellate review of sentences outside guideline ranges, and the high rate of compliance in other jurisdictions with advisory guidelines; (2) the Feeney Amendment will ensure ready access to the critical data needed to evaluate compliance with the guidelines; and (3) there are no obviously better solutions in the near term, and cases sentenced in the near term will likely be governed by advisory guidelines in any event due to the Ex Post Facto Clause."); Letter to Judiciary Committee of United States Senate and Judiciary Committee of United States House of Representatives (Jan. 12, 2005), http://www.sentencingproject.org/pdfs/sent-reform-letter.pdf (letter signed by fifty diverse organizations urging Congress to proceed slowly with respect to legislative changes to federal sentencing policy).

168. Judge Ricardo H. Hinojosa, Prepared Testimony before the Subcomm. on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), http://www.ussc.gov/Blakely/bookertestimony.pdf.

Kirby Behre, a former federal prosecutor and coauthor of the book *Federal Sentencing for Business Crimes*, stated that, although the data collected is from a relatively brief period of time, "'it seems that while judges have been given the discretion to deviate from the sentencing guidelines, they are not doing so in the vast majority of cases.'"[169] The reasons for this are unknown, although Behre believes it could indicate that judges believe the Guidelines sentences to be fair or that many judges know no other system for computing sentences and "have been under constant, sometimes blatant, pressure by Congress to strictly follow the guidelines" causing them to act slowly with their newfound discretion.[170] Finally, Behre opines that "'[i]t might be a paper victory to have your case remanded, but it's going to be a huge uphill battle to get your sentence changed.'"[171]

Despite the overwhelming call for caution from Congress, there are those who believe Congress should act promptly with respect to the reinstatement of a formal sentencing system.[172] Indeed, in the April 2005 version of a drug sentencing bill introduced in the House, entitled "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005," an unrelated "*Booker* fix" was added.[173] The substance of this fix forbids consideration by sentencing judges of dozens of potentially mitigating factors as a basis for sentencing below the applicable guideline range and imposes procedural restrictions on any possible remaining grounds for downward departure.[174]

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169. Kris Axtman, *Cases Test New Flexibility of Sentencing Guidelines*, CHRISTIAN SCI. MONITOR (Boston), Feb. 18, 2005, at 3 (setting forth Behre's comments).

170. *Id.*

171. *Id.*

172. *See* Daniel P. Collins, Prepared Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), http://judiciary.house.gov/media/p000dfs/Collins021005.pdf ("[I]t is my strong recommendation that the Congress act—and act promptly—to rebuild the federal sentencing system so that it can function most nearly as it did before *Booker.* If federal sentencing policy wasn't broke before *Booker*, don't fix it into something entirely different. The invalidation of the Guidelines in *Booker* does not call into question any of the ultimate values or objectives of federal sentencing policy; it simply found fault with the *mechanisms* by which those values were achieved in certain cases."); Testimony of Christopher A. Wray, *supra* note 130 (speaking on behalf of Department of Justice, "We are confident that Congress will act in the near term to ensure that federal sentencing policy continues to play its vital role in bringing justice to the communities of this country.").

173. H.R. 1528, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.1528:.

174. *See* Details Concerning the Brewing Booker Fix, Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/details_concern.html (Apr. 12, 2005 00:54 EST).

Support for such a system has been voiced by Attorney General, Alberto Gonzalez, who, until recently, had been silent on the issue of *Booker/Fanfan*'s impact on federal sentencing.[175] Stepping into the *Booker* fray in a June 21, 2005 speech, Gonzalez advocated a system much like the one proposed by the House in HR 1528. He opposed the current system, stating that the "advisory guidelines system we currently have can and must be improved." Stating his preference for "the construction of a minimum guideline system," Gonzalez explained that under this system a sentencing court would be bound by the guidelines minimum while guidelines maximums would remain advisory.[176]

Notwithstanding support from the Department of Justice for the *Booker* fix contained in the House bill, there are indications that the Senate is not in agreement with the need for quick legislative action.[177] Furthermore, the proposed fix has received opposition from the Sentencing Commission, the judiciary and former prosecutors.[178] In its letter to the House Subcommittee, the Chair of the Criminal Law

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175. *See* Eric Lichtblau, *Gonzalez Lays Out His Priorities at Justice Department*, N.Y. TIMES, Mar. 1, 2005, at A14; Attorney General Alberto Gonzalez, Prepared Remarks to Hoover Institution Board of Overseers Conference (Feb. 28, 2005), http://www.usdoj.gov/ag/speeches/2005/02282005-agremarkshov.htm (full text of speech). Gonzalez's initial silence was contrary to the position taken by former Attorney General John Ashcroft, who criticized the *Booker/Fanfan* ruling and said Congress, in response, "should reinstitute tough sentences and certain justice for criminals." *See* Dan Eggen, *Ashcroft Defends Tough Politics*, WASH. POST, Feb. 2, 2005, at A02 (calling *Booker/Fanfan* "a retreat from justice that may put the public's safety in jeopardy").

176. *See* Eric Lichtblau, *Gonzalez is Seeking to Stem Light Sentences*, N.Y. TIMES, June 22, 2005, at A15; download of Gonzalez's speech available at http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm.

177. *See* Gary Fields, *Proposed Bill Aims to Tighten Sentencing Rules*, WALL ST. J., Apr. 12, 2005, at A2 (stating that "[a] Senate Republican Judiciary Committee staff member said the staff members weren't consulted about the House bill and had no companion proposal in the works.").

178. *See* Letter from Professor Frank Bowman to House Subcomm. on Crime, Terrorism, and Homeland Sec. (Apr. 11, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/files/bowman_judiciary_letter_41105_on_booker_fix.doc ("It had been my understanding that many, perhaps most, members of this Subcommittee were of the view that a legislative response to *Booker* should await data on the operation of the advisory system and should be the product of careful development and wide consultation. Section 12 of the present Bill does not meet these criteria. It is premature, poorly conceptualized, and imprecisely drafted."); Letter from United States Sentencing Comm'n to House Subcomm. on Crime, Terrorism, and Homeland Sec., (Apr. 19, 2005), http://www.ussc.gov/HR1528.pdf; Still More Voices Speaking Out Against the Brewing *Booker* Fix, Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/still_more_voic.html (Apr. 22, 2005 13:57 EST) (containing downloads of letters from Chamber of Commerce and other industry groups, as well as former prosecutors); The Judges Speak Out Against HR 1528, Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/the_judges_spea.html (Apr. 26, 2005 13:51 EST) (containing downloads of letter from judiciary members).

Committee of the US Judicial Conference noted that the Committee, in conjunction with the Federal Judicial Center and the Sentencing Commission, is sponsoring a National Sentencing Policy Institute in Washington, D.C. on July 11-13, 2005, the purpose of which is to bring together judges, congressional staff, officials from the Department of Justice, Committee members and the Sentencing Commission to discuss potential policy and practical issues arising from the *Booker* decision and provide feedback on these issues. The letter expressed its hope that the House and Senate Judiciary Committees would attend and actively participate in the institute, thereby avoiding immediate and uninformed action.[179]

Indeed, the lack of deviation by sentencing judges thus far ultimately may serve to calm any fears Congress may have about the fallout from *Booker/Fanfan*, giving the Sentencing Commission additional time to gather data and the courts additional time to resolve outstanding issues. Certainly, Congress is aware of the fact that any legislation requiring that the Guidelines be given a certain amount of weight by sentencing judges may be perceived as a return to per se mandatory sentencing systems and run the risk of being found in contravention of *Booker/Fanfan*.

C. *A Real World Application*

In Houston, Texas last year, Jamie Olis was sentenced to twenty-four years, the longest sentence in the history of federal securities fraud cases, for his role in a natural-gas trading scheme. Despite the fact that he was eligible for a relatively light sentence of six months in prison, the district judge was required by the Guidelines to take into account the amount of shareholder losses, valued at approximately $100 million. Mr. Olis was not the chief executive officer of Dynegy, Inc., the natural-gas company for which he worked. Rather, he was a midlevel executive, who declined a plea agreement to take his chances at trial.[180]

Unlike other defendants in high-profile securities fraud cases, such as Enron,[181] Mr. Olis never rose above the position of vice president for finance and did not amass a fortune from his scheme. Furthermore,

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179. *See* The Judges Speak Out Against HR 1528, Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/Files/judicial_conf_letter_on_hr_1528.pdf (Apr. 26, 2005 13:51 EST).

180. Simon Romero, *Stiff Sentence is Possibility for a Name Not So Known*, N.Y. TIMES, Mar. 24, 2004, at C1.

181. By comparison, Jeffrey Skilling, former CEO of Enron, paid his lawyers $23 million before a federal judge froze approximately $55 million of his assets in early-2004. *See*

Mr. Olis's ex-boss, Gene Foster, struck a deal with the government requiring his cooperation against Mr. Olis in return for a maximum sentence of five years.[182] As a result of the Supreme Court's decision in *Booker/Fanfan*, the Fifth Circuit currently is considering whether Mr. Olis's case should be remanded for resentencing. This case symbolizes what many in the legal community see as "one of the worst examples of the restrictions placed on federal judges by the now-defunct sentencing guidelines."[183] Moreover, this case seems a perfect opportunity for a sentencing court to sentence below the recommended, advisory Guideline range. Such a sentence would recognize Olis's minimal role in the company and lack of criminal history, as well as the fact that Olis should not be held accountable for the entire shareholder loss, especially given the precarious state of the energy industry at the time and the difficulty in measuring shareholder loss. The question remains, however, whether the sentencing judge will take this opportunity. Indeed, this uncertainty hearkens back to the days when the discretion of individual judges determined criminal sentences, something abhorred by Congress.

VII. Conclusion

In many ways, the post-*Booker/Fanfan* world of sentencing is the best of both worlds—a more perfect system. While sentencing courts have regained some of the discretion lost to the Guidelines, this discretion is not unfettered or without checks. While many of the positive aspects of pre-Guideline sentencing will return, the wild disparities, inconsistencies, and other problems of that era will be avoided because the Guidelines and the principles therein continue to play a pivotal role in sentencing, guiding judicial action. Although recent data suggests that sentences might not change dramatically, the dynamics of the system have changed in significant and meaningful ways.

First, judges, who for seventeen years have been focused on the offense and other relevant conduct, will now have the opportunity to focus on the individual defendant, an opportunity many district court judges will relish. Unlike the regime in place before 1987, however, Congress and the Sentencing Commission will be carefully monitoring district courts and collecting sentencing data. This careful scrutiny, in

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Posting of Tom Kirkendall, to Houston's Clear Thinkers, The Sad Case of Jamie Olis, http://blog.kir.com/archives/000364.asp (Mar. 24, 2004 04:36 CST).

182. *Id.*

183. *See* Kris Axtman, *supra* note 169, at 3.

combination with the Supreme Court's requirement that the Guidelines be thoughtfully and meaningfully "considered," likely will prevent the disparities of indeterminate sentencing. This likelihood could prevent Congress or the Sentencing Commission from instituting new changes to the system.

Second, defense attorneys, who have been hemmed in by the Guidelines, will be able to expand their arguments on behalf of their clients to address the defendant as an individual beyond the offense conduct. However, they too will be required to address Guideline considerations and the factors set forth therein. Third, while prosecutors have been stripped of some of the discretion afforded them under the Guidelines, they still have a significant role to play in sentencing, unlike the passive role taken in the pre-Guidelines days. Indeed, the government has embraced this role and, pursuant to the Comey Memo, will continue to advocate for the policies and sentencing ranges they believe appropriate under the Guidelines.

Finally, unlike the days of indeterminate sentencing when appellate courts virtually were without power to overturn a sentencing court's ruling, the post-*Booker/Fanfan* world of sentencing provides for substantive appellate review of sentences. Moreover, the "reasonableness" standard may be tested by either the defendant or the government.

There is no doubt, that the Supreme Court's decision in *Booker/Fanfan* caused quite a stir in the federal criminal justice system. Almost two decades of practice under the federal Sentencing Guidelines has been questioned. Lessons learned from the mistakes of both the indeterminate sentencing system and the determinate sentencing system finally seem to have led to a happy medium. Let's hope that Congress gives this new system sufficient time so that new lessons might be learned.