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It's Alive! The Federal *Booker*-Fix Debate Stirs

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Seven years have passed since Justice Ginsburg do-si-doed from the merits majority to the remedial majority in *Booker* and transformed the Federal Sentencing Guidelines into an advisory system.¹ And despite the logical absurdity of the Scalia Sixth Amendment doctrine that produced this outcome,² and despite the expectation of folks like me that this marriage of fish and fowl could not long survive, it survives. What is more, a great many people whose opinion matters now claim to love it—or at least to like it well enough to want to keep it for the foreseeable future. Thus, the outburst of legislative concern that followed the *Blakely-Booker* duo in 2004–2005 died away. Among the primary stakeholders in the day-to-day operation of the federal sentencing system—prosecutors, defense lawyers, and judges—the debate ceased to be dominated by the question of whether a sweeping “*Booker* fix” was called for and turned to the mechanics of making the system work to their particular advantage.

Last fall, the possibility of legislative intervention rather suddenly reemerged. The Republican leadership of the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security called a hearing on October 12, 2011, revealingly titled, “Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After *U.S. v. Booker*.” Subcommittee Chair James Sensenbrenner (R-Wis.) opened the proceedings with a statement expressing concern about increasing judicial deviation from the Guidelines and what he viewed as evidence of rising regional sentencing disparity.³ Judge Patti Saris, Chair of the Sentencing Commission, testified, described the Commission's activities, offered some modest proposals for statutory responses to *Booker* (primarily measures that would clarify points left uncertain by the Court's judicial surgery on the Sentencing Reform Act), and was grilled at length.⁴ Two witnesses selected by the majority, William Otis and Matthew Miner,⁵ called for reinstatement of more binding sentencing rules, while James Felman, selected by the minority Democrats and representing the American Bar Association, argued for retention of the advisory system. Curiously absent from the witness table was the Department of Justice, which was apparently not invited.

The hearing served primarily to highlight a sharp political divide on the House Judiciary Committee. Republican congressmen generally expressed considerable skepticism about the post-*Booker* advisory regime and about the adequacy of the Sentencing Commission's response to *Booker*. Democrats largely followed the lead of Ranking Member Robert C. “Bobby” Scott (D-Va.), whose view, expressed at greater length in this issue,⁶ is that “*Booker* is the fix” for what previously ailed federal sentencing. Republicans being in the majority, their skepticism prevailed and Sentencing Commission was directed to study the question further and provide more complete responses to the majority's concerns.

In response to the Subcommittee's requests, the Sentencing Commission held its own hearing on February 16, 2012, titled “Federal Sentencing Options After *Booker*.”⁷ This all-day affair assembled an impressive set of representatives of the federal bench, defense bar, Justice Department, and academy. This issue of *FSR* is in large measure an effort to capture the spectrum of views expressed in the Judiciary Committee and Sentencing Commission hearing rooms, in hallways between sessions, and in later conversations. We have done this in some cases by reproducing witness testimony and in others by securing later-written reflections by witnesses.

For the most part, the authors' contributions speak for themselves, but it may be worth summarizing what appear to be the dominant positions at present.



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On the one hand, there is a body of thought, expressed most vocally by House Republicans and their allies, that advisory guidelines are bad because they have markedly relaxed control over judicial discretion, thus producing increased sentencing disparity and less-than-optimally-severe sentences for many defendants. The remedial prescriptions of those in this camp vary, but the trend is toward mechanisms that would reproduce the restrictions on judicial discretion which characterized the pre-*Booker* guidelines.⁸

A second group, among whom I count myself and which notably includes Judge William Sessions, former Chair of the Sentencing Commission,⁹ believes that the post-*Booker* advisory system is badly flawed because it retains too many of the defects of the pre-*Booker* system while reintroducing an undesirable degree of unaccountable judicial discretion. In this issue, I set out the case against the advisory system and join Judge Sessions in advocating a significantly redesigned presumptive guidelines system using wider ranges and a variety of other features.¹⁰

The third, and plainly the largest, group contains the defense community, a good many (probably most) judges, many congressional Democrats, and a large chunk of the interested legal academy. Here, the sentiment ranges from gushing enthusiasm for the advisory system to more restrained acceptance of a post-*Booker* world which is preferred to any other outcome thought likely to emerge if political actors sought to fundamentally reorder the federal sentencing system. This contingent is represented here by Congressman Scott, James Felman, testifying on behalf of the ABA,¹¹ Raymond Moore, appearing for the Federal and Community Defenders,¹² and Professors Sarah Sun Beale¹³ and Michael Tonry,¹⁴ speaking as longtime academic observers of the federal sentencing scene.

The final category is occupied by the Justice Department, which seemingly sits alone atop its own fence. As indicated by the testimony of Associate Deputy Attorney General Matthew Axelrod in this issue,¹⁵ the Department is not altogether happy with the current state of affairs, but it is not unhappy enough to formulate its own reform proposal or to put its weight behind any other option now on the table.

The Sentencing Commission seems, for the moment, paralyzed. The Commission's modest proposals for statutory changes that clarify the operation of the post-*Booker* advisory regime have been treated as small beer by congressmen who want big reform, and derided as unnecessary and even unconstitutional by defenders of the status quo. Beyond that, the Commission appears divided both on the wisdom of making any material alteration in the advisory system and on the question of what sort of alteration would be desirable.

My own assessment of the politics is this: There is presently insufficient interest among the key political actors to produce anything other than cosmetic alterations of the post-*Booker* status quo. However, judges are slowly, but steadily, slipping away from the habit of guidelines adherence and various sorts of sentencing disparity are slowly, but inexorably, growing.¹⁶ If the presidency, and with it the Justice Department, passes into Republican control in January 2013, then the game changes. If Republicans also hold the House and gain the Senate, then the arguments laid out in this issue may suddenly assume a fierce urgency.

Notes

¹ United States v. Booker, 543 U.S. 220 (2005).

² See Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. Chi. L. Rev. 367, 469 (2010).

³ F. James Sensenbrenner Jr., Chairman's Statement to the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, October 12, 2011, 24 Fed. Sent'g Rep. 338 (2012).

⁴ Judge Patti B. Saris, Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, October 12, 2011, 24 Fed. Sent'g Rep. 344 (2012).

⁵ Matthew S. Miner, Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, October 12, 2011, 24 Fed. Sent'g Rep. 352 (2012).

⁶ Robert C. "Bobby" Scott, *Booker Is the Fix*, 24 Fed. Sent'g Rep. 340 (2012).

⁷ For a full list of the participants and links to their oral and written testimony, see http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Agenda_16.htm.

⁸ See Testimony of Matthew S. Miner, *supra* note 5.

⁹ See Written Statement of Judge William K. Sessions III before U.S. Sentencing Commission, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Sessions.pdf.

¹⁰ Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 Fed. Sent'g Rep. 356 (2012).

¹¹ James E. Felman, Testimony on Behalf of the American Bar Association before the U.S. Sentencing Commission, February 16, 2012, 24 Fed. Sent'g Rep. 369 (2012).

- ¹² Raymond Moore, Testimony on Behalf of Federal Public and Community Defenders before the U.S. Sentencing Commission, February 16, 2012, 24 Fed. Sent'g Rep. 376 (2012).
- ¹³ Sara Sun Beale, *Is Now the Time for Major Sentencing Reform?*, 24 Fed. Sent'g Rep. 382 (2012).
- ¹⁴ Michael Tonry, *The U.S. Sentencing Commission's Best Response to Booker Is to Do Nothing*, 24 Fed. Sent'g Rep. 387 (2012).
- ¹⁵ Matthew Axelrod, Testimony on Behalf of the U.S. Department of Justice before the U.S. Sentencing Commission, February 16, 2012, 24 Fed. Sent'g Rep. 348 (2012).
- ¹⁶ See Bowman, *supra* note 10, at 361–62.