

**TESTIMONY OF**

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**U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY**

**HEARING ON**

**UNCERTAIN JUSTICE: THE STATUS OF FEDERAL SENTENCING AND THE U.S.  
SENTENCING COMMISSION SIX YEARS AFTER U.S. v. BOOKER**

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**Testimony of Matthew S. Miner, White & Case LLP**  
**Before the Subcommittee on Crime, Terrorism, and Homeland Security**  
**U.S. House of Representatives, Committee on the Judiciary**  
**Hearing on “Uncertain Justice: The Status of Federal Sentencing and the U.S.**  
**Sentencing Commission Six Years after U.S. v. Booker”**  
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Chairman Sensenbrenner, Ranking Member Scott, and Members of this Subcommittee, thank you for holding this important hearing and inviting me to testify on a matter I care deeply about. Criminal sentencing is, in my view, at the very core of our system of ordered liberty. The Framers who crafted our Constitution and Bill of Rights ensured that deprivations of liberty required due process of law – and clearly incarceration is among the greatest restraints on liberty. They also provided a guaranteed mechanism to challenge the basis for governmental detention through the writ of habeas corpus. These basic constitutional controls signal that deprivations of liberty were never meant to be arbitrary. The U.S. Sentencing Guidelines (“the Guidelines”) and the Sentencing Reform Act of 1984 (“SRA”), as amended, provide – or at least provided prior to *United States v. Booker* – a check against arbitrariness, favoritism, racial bias, and other pernicious influences that could taint rulings within our federal sentencing system.

On January 1, 2004, then-Chairman of the House Judiciary Committee, Mr. Sensenbrenner, issued a statement on sentencing matters in response to a related statement by Chief Justice Rehnquist. In his statement, Mr. Sensenbrenner expressed a goal that I believe should be broadly – if not universally – supported by policymakers, judges, prosecutors, and defense counsel alike: “A criminal committing a federal crime should receive a similar punishment regardless of whether the crime was committed in Richmond, Virginia or Richmond, California.”<sup>1</sup>

Sadly, the federal sentencing system has failed to achieve that goal. A review of the district-by-district data from the U.S. Sentencing Commission reveals just how far we’ve strayed from that goal. To cite just one example from the most recent quarterly

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<sup>1</sup> Statement of F. James Sensenbrenner, Jr., on Chief Justice Rehnquist’s Year-End Report on the Federal Judiciary, Jan. 1, 2004, available at <http://judiciary.house.gov/legacy/news010104.htm>

data from the Commission: A defendant is more than twice as likely to receive a below guideline sentence based solely on the judge's discretion if he is arrested in the Southern District of New York (41.9%) rather than the Northern District of New York (18.8%). These two Districts are clearly not on opposite sides of the country or even across state lines. All that separates these two Districts are county lines – and apparently the very different sentencing views of the federal judges who preside there.

By all objective measures, the federal sentencing system is drifting from a guideline-based system to one driven more by luck than by law. To sum up the current state of federal sentencing, let me read a short quote from a congressional report:

[E]very day, Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another – convicted of the very same crime and possessing a comparable criminal history – may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive wildly different prison release dates[.]<sup>2</sup>

Although this description applies very well to current federal sentencing practices under the advisory guidelines system, it comes from the 1984 Conference Report on the SRA and describes the dysfunctional system that existed at that time – a system that Congress, in a very bipartisan effort, sought to and did repair.

The fact that a 1984 description of the pre-guideline system can be applied to current sentencing practice speaks volumes about just how much the federal system falls short of the goals of the SRA. It also speaks to how another strong legislative and policy effort is needed to restore greater order and consistency to this generation of variable discretionary sentencing.

I recognize that there is a wide range of views on the structure and form that our federal sentencing laws should take. I also realize that some who favor sentencing reform disagree that our current system is broken, but rather view it as merely in need of repair. I think disagreements about whether the system is broken or merely damaged are

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<sup>2</sup> H. R. Rep. No. 98-1030 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

not helpful. Much like an unreliable car, an unreliable sentencing system needs to be fixed – and that need for reform needs to be the focus.

After all, I do not believe the current system is capable of a serious defense. Who could defend a system that has had its statutory foundation stripped away from it for over the past half-decade? Who could defend a system without a statutory appellate standard? Who could defend a system with varying approaches to the Guidelines – and the gaps in the law created by *United States v. Booker* – depending on the federal circuit in which the case is heard? Or with wildly varying departure and variance rates depending on the individual district or judge involved? Under our federal system, a defendant’s sentence should not be determined by the circuit, district, or corridor of the courthouse in which the defendant is sentenced. Finally, who could defend a system in which statistics prove that racial and educational disparities are on the rise as judges drift from guideline-based sentences to a discretionary system?

I do not believe there is or should be a question about whether reform is needed. It is needed. The question should, therefore be: What reforms should Congress consider to repair and revise the SRA? That will be the focus of my testimony.

At the outset, let me state that I am in favor of the Guidelines and determinate and semi-determinate sentencing. I believe the Commission and Congress should work toward a system wherein the Guidelines are once again presumptively applicable in all cases. In the aftermath of the line of case law following *Apprendi v. New Jersey*, wherein the U.S. Supreme Court found that a maximum term of imprisonment cannot be increased at sentencing through a judge’s fact-finding – a line of cases that for better or worse culminated in *Booker* and its successors – the only way such presumptive effect can be achieved is through a greater reliance upon charging aggravating factors and having those factors put to a jury via a special verdict form or, in the case of a guilty plea, having the facts admitted by the defendant.

Although some naturally question whether or how well such a system would work, including whether juries could make such complex determinations, I am not sure there is much cause for doubt. As for a jury’s capability to, for example, assess the size and

degree of fraud in a criminal case, it is worth noting that juries make such findings every day in civil fraud cases through both special verdict findings and general verdicts on damages. As for the finding of aggravating factors, juries in capital cases already do so. Accordingly, if we are willing to trust juries to find aggravators that can determine a life or death question, we can surely trust them to find aggravators that would ultimately increase a guideline range by two or three levels.

That is not to say that all aggravators and all offense characteristics would need to be built into a presumptive system with requirements for charging and submitting the factors to a jury. Some factors could very well remain advisory considerations subject to the court's discretion. Indeed, I think some factors, such as acceptance of responsibility, would need to remain advisory because it makes little sense to have such questions put to a jury. Similarly, there is no way a defendant could admit to a legal conclusion akin to acceptance of responsibility.

There is another good reason not to give presumptive effect to every current offense characteristic and aggravator in the Guidelines: simply put, there are a lot of them. For certain crimes where a range of offense characteristics and aggravators could apply, a special verdict form would resemble a lengthy flow chart. In addition to creating jury confusion and highly complicated jury instructions, such a lengthy set of interrogatories to the jury could result in partially hung juries and inconsistent verdicts.

To avoid this risk, the factors given presumptive effect and submitted to a jury should be streamlined, and Congress and the Commission should give careful study to how best to achieve a balance between streamlined presumptive factors and those to be left to advisory guidelines and judicial discretion at sentencing. If such a system were implemented, it would also make sense for the Commission to work with the Judicial Conference to craft pattern special verdict forms for key guideline sections and chapters.

If such a reform were implemented and juries were given a greater role in sentencing to protect the Sixth Amendment rights recognized by the Supreme Court in *Apprendi* and *Booker*, Congress could once again restore a heightened appellate standard akin to what was in effect when *Booker* was decided – that is *de novo* review of the

sentencing judge's findings. In fact, I think such an appellate standard would be required because the key facts at sentencing would have been either found by a jury or admitted to by the defendant. The only questions left for the judge at sentencing would be more-or-less legal ones along with the exercise of discretion allowed by the Guidelines – for example, where within the prescribed range the sentence would fall or whether probation or an alternative to incarceration, if allowed, would be more appropriate.

Although this is the reform I prefer – and to be clear, such a reform would require more components than I just described – I think Congress should consider, and the Commission should recommend, a more modest reform in the near term. Just as the SRA was not achieved within a decade of Judge Marvin Frankel's proposal of a guideline system, it could be a while before comprehensive and meaningful sentencing reform could be studied, assessed, enacted, and implemented. Many thousands of defendants could be sentenced, imprisoned, and released in that period of time under the current flawed system.

Accordingly, there are some things that can and should be done now. When the Supreme Court decided *Booker* and struck down two provisions in the SRA, the Court made clear that the ball was in Congress's court. Those two provisions still stand as nullities on the statute books, and the federal judiciary must function without a statutory appellate standard or congressional guidance on how to apply the Guidelines. This is unacceptable and should be addressed immediately.

Given all that needs fixing, to use a football analogy, Congress may want to look for a first down, rather than a touchdown, here. If nothing else happened this Congress other than the passage of an appellate standard with a presumption of reasonableness for within Guidelines sentences, as allowed by *United States v. Rita*, greater uniformity would find its way into the federal system. If Congress could agree to go farther, consistent with *Gall v. United States*, and require a heightened showing for major departures from the Guidelines – with increased scrutiny on appeal – even greater uniformity would likely follow. At this point, six years after *Booker* struck down

portions of the federal sentencing statute, even modest reforms could go a long way toward restoring order to the system. Such modest reforms could then hold the tide to allow for more meaningful study and debate between the branches and the two houses of Congress. In fact, I would hope that, if only a modest reform could be accomplished, Congress would mandate a Sentencing Commission study of the larger, longer-term solutions that should be considered.

Indeed, I wonder why such a study has not been generated by the Commission to-date. Just three weeks ago, I wrote an op-ed<sup>3</sup> discussing how the Commission faces a threat to its own existence and noted that calls, like that of Professor Otis, had been made to defund the Commission. These calls are understandable. After all, it is difficult in these fiscally challenging times to justify \$17 million to fund a Commission that promulgates optional guidelines that serve only as a rough measuring stick to guide a judge's discretion. Although the Commission performs other laudable tasks in terms of data collection and analysis and training, its chief mission is to promulgate the Guidelines. And the Commission's data collection and training tasks could easily be transitioned to other government agencies, such as the Administrative Office of the U.S. Courts.

It is no wonder then that, since *Booker*, the relevance and impact of the Guidelines and the Commission have naturally decreased as judges have increasingly sentenced defendants outside of the Guidelines. Accordingly, it is puzzling why the Commission has not engaged more meaningfully to propose or even study potential statutory responses to the *Booker* decision. If one looks at the priorities proposed for the Commission since 2008, the Commission has listed the study of *Booker* reforms as a priority each year. Yet nothing has been done, thus calling into question the priority status given to those reforms. It is my hope that the Commission will put forward a concrete proposal or set of proposals along with an analysis of the need and likely impact of each component of proposed reform. After all, if the Commission does not act to justify its role and existence, why should Congress engage to preserve the Commission?

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<sup>3</sup> The op-ed entitled, "It's Time to Fix Our Sentencing Laws: Years after the Supreme Court Put the Ball in Congress' Court, Commission Can Finally Spur Action," appeared in the September 26, 2011 issue of the *National Law Journal*. A copy is attached to this written testimony.

With that said, I do not agree with those who favor elimination of the Commission and its role. I think its role, as originally conceived, remains valuable. Individual district court judges, who have full civil and criminal dockets, including appeals from bankruptcy courts, are far too busy to study sentencing law, policy, and data to the degree necessary to meaningfully evaluate many of the sentencing factors set forth in 18 U.S.C. § 3553. After all, how is an individual judge to work to “avoid unwarranted sentencing disparities among defendants with similar records” in the absence of a Commission that studies sentencing data and prescribes guidelines? In sum, the Guidelines matter, and they are needed to help inform judicial decision-making. They are also helpful to private sector decision-making, as demonstrated by the many corporations and compliance officers who spend millions of dollars to model their programs on the policy statement set forth in chapter 8 of the Guidelines.

But that is not to say that the Commission and the implementation of new guidelines could not be revised or improved. Senator Tom Coburn has proposed significant budget-based reforms to the Commission, including the reduction of the Commission from seven to three members. Given that the Securities and Exchange Commission, with a much broader portfolio and an adjudicatory role, functions with five members, it makes sense to consider reducing the Commission’s size to achieve greater efficiency.

It also makes sense to create a mechanism for published written dissents to Commission rulemakings to inform congressional decision-making on whether to approve or disapprove new amendments. Whereas commissions subject to the Administrative Procedure Act frequently publish written dissents that inform public and congressional debate, the U.S. Sentencing Commission does not do so. Insofar as Congress is called upon to evaluate all Commission amendments before they become final, it makes sense to provide Congress with the opposing arguments to controversial amendments.

Finally, it is worth considering a ratification procedure akin to that proposed in the REINS Act for Commission amendments that significantly impact sentencing levels

or factors. Under such an approach, any amendment that would have a major impact on the sentencing level prescribed for an offense (e.g., by more than 15%) would require affirmative congressional approval, unless the Guidelines amendment was itself prompted by a congressional directive.

### **Conclusion**

Something clearly needs to be done to repair the gaps left by the Supreme Court's remedial holding in *Booker* and to provide greater clarity and consistency to our federal sentencing system. The recent appellate decision and related news stories surrounding convicted terrorist Jose Padilla's sentencing illustrate the flaws and uncertainty in our federal sentencing system. The trial court sentenced Jose Padilla to 17 years in prison – little more than half of the minimum term prescribed by the Guidelines. That sentence would have stood had two of the three judges on appeal not found it to be substantively unreasonable and reversed the lower court's ruling. The third judge sharply dissented, arguing that the majority was intruding on the lower court's broad sentencing discretion post-*Booker*. Although some fault the district court for imposing an overly lenient sentence and others fault the appellate court for second-guessing the district judge's discretion, what happened in Padilla is merely a symptom of the current sentencing system that is only loosely moored to the federal sentencing Guidelines and divorced from any well-defined standard of appellate review. Given that this is how the federal government determines how and whether to incarcerate its citizens, it should be clear that we can and must create a better system. At a minimum, we need to repair the system that was rendered incomplete by the *Booker* decision.

Again, I thank the Chairman and Members of the Subcommittee and I look forward to answering any questions that Subcommittee may have.