
CRIMINAL LAW & PROCEDURE

THE SLOW, SAD SWOON OF THE SENTENCING SUGGESTIONS

By William Otis*

The Guidelines are a lost cause. When they became optional after *Booker*, the Sentencing Commission lost the central purpose for which Congress established it. Yet each year it spends more money making suggestions district courts now follow only little more than half the time. It's time for the Commission to go, and for Congress to re-write the Sentencing Reform Act.

I. How the Guidelines Became Suggestions

The Sentencing Guidelines appeared on the scene a generation ago, in the mid-1980's. The name was misbegotten from the outset; they were not so much guidelines as rules. District courts were required to follow them unless, in a given case, a relevant sentencing factor existed "of a kind, or to a degree" that the Sentencing Commission had not adequately considered.¹ "Relevant factor" was also carefully defined; facts about the offender such as age, family ties and responsibilities, and physical and emotional condition were generally excluded, on the theory that in order to avoid unwarranted differences in treatment, sentencing should be pegged primarily to offense behavior rather than offender characteristics.² The central purpose of the Guidelines was to reduce irrational disparity in sentencing—a feature that Congress correctly found to be rampant.³ The Sentencing Reform Act of 1984 (SRA), which in effect created the Guidelines, also provided for robust appellate enforcement.

In the early years, judges followed the Guidelines in the great majority of cases. On average during those years, roughly three quarters of sentences fell within the guideline range. Despite a slow slide, compliance was still above seventy percent as late as 1995. Still, it continued its decline until the Feeney Amendment⁴ (signed into law April 30, 2003) took root; after that point, compliance, which had slipped to slightly less than two thirds, returned to more than seventy percent. That is where it stood at the end of 2004.

Along came *Booker*.⁵ As readers of this publication will know, *Booker* transformed the Guidelines into "advisory only" measures.⁶ Sentencing courts were still to consult them, at least in theory, but were not bound by them. It would be an oversimplification, though not by much, to sum it up by saying that rules were now out and discretion was back in. Not too surprisingly, Guideline compliance fell sharply. In the year

before *Booker*, it stood at seventy-two percent. In the six and a-half years since, it has fallen to fifty-five percent, the lowest compliance rate ever.

The Sentencing Guidelines have become the Sentencing Suggestions. The evidence is, moreover, that they are not particularly welcome suggestions. The post-*Booker* pace for disregarding them has abated in the last year, but, if viewed overall during the time since *Booker* came down, would mean that, in three years, the majority of sentences will be outside the guideline range.

This outcome is the opposite of what Congress intended, as Justice Stevens explained in his blistering dissent to the remedial portion of *Booker*: "Congress has already considered and overwhelmingly rejected the [advisory] system [the Court] enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentencing."⁷ The *Booker* regimen is, to boot, liable to a certain shell-game quality. As Justice Alito noted in his dissent in *Gall v. United States*:

It is possible to read [*Booker*] to mean that district judges, after giving the Guidelines a polite nod, may then proceed essentially as if the Sentencing Reform Act had never been enacted. This is how two of the dissents interpreted the Court's opinion. Justice Stevens wrote that sentencing judges had "regain[ed] the unconstrained discretion Congress eliminated in 1984" when it enacted the Sentencing Reform Act. Justice Scalia stated that "logic compels the conclusion that the sentencing judge . . . has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range."⁸

Justice Alito appears to have been prescient. The Court recently has been at pains to emphasize that *advisory* means just that. As Professor Berman noted in his explanation of two post-*Booker* cases, *Spears* and *Nelson*:

For the second week in a row, the Supreme Court has issued a . . . *per curiam* opinion to make sure, yet again, that lower courts really, truly understand that the *Booker* remedy means that the guidelines . . . are advisory. Today's opinion, in *Nelson v. US*, (S. Ct. Jan. 26, 2009) includes this key language (cites edited):

Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable. In *Rita* we said as much, in fairly explicit terms: "We repeat that the presumption before us is an *appellate* court presumption. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 551 U.S., at 351. And in *Gall* we reiterated that district judges,

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This article is adapted from a piece Prof. Otis wrote in the *Federal Sentencing Reporter*, Vol. 23, No. 2 (December 2010) at 115-120, published for the Vera Institute of Justice by the University of California Press.

in considering how the various statutory sentencing factors apply to an individual defendant, “may not presume that the Guidelines range is reasonable.” *Id.*

In this case, the Court of Appeals quoted the above language from *Rita* but affirmed the sentence anyway after finding that the District Judge did not treat the Guidelines as mandatory. That is true, but beside the point. The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable. We think it plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson’s Guidelines range. Under our recent precedents, that constitutes error.⁹

Professor Berman continued:

[W]ith *Gall* and *Kimbrough* and now *Spears* and *Nelson*, I sense that the Justices (perhaps save Justices Breyer and Alito) are persistently troubled by how prominent the federal sentencing guidelines remain in both district and circuit sentencing decision-making. Through *Spears* and now *Nelson*, the Justices have made extra efforts to say to lower courts that they need not, *perhaps even should not*, keep gravitating toward the guidelines. Though one would have hoped this message came through loud and clear through the rulings in *Gall* and *Kimbrough*, it is important to see the Justices willingness to keep smacking down the circuits that seem so unwilling to get with the full 3553(a) post-*Booker* program.¹⁰

II. The Current Federal Sentencing System Is a Failure

The present state of federal sentencing is untenable, and not merely because it’s a spliced-together, half-here-and-half-there compromise faithful neither to Congress’s original goal of applying mandatory guidelines—in other words, law—to sentencing, nor the competing goal—and ostensibly the new regime—of allowing largely unchecked discretion. It is also untenable for at least three other reasons.

First, it’s just short of being a fraud. As I noted two years ago,¹¹ the current regimen is less honest than the pre-SRA regime of standardless sentencing. Currently in place is standardless sentencing pretending to have standards. The shrewdly opaque message to the public is that

we still have sentencing guidelines, only that they are more “flexible” than before. Sentencing Commissioners continue to draw hefty salaries to write nominal guidelines (that can be ignored virtually at will). Probation officers continue to calculate ranges (that may count for something or may not). District judges go through the window dressing rehearsed for them in *Gall* and *Kimbrough* (assured by those decisions that if the litany is elaborate enough, it need not be given any weight). A person employing impolite language might call this a charade.¹²

Second, as Professor Jonathan Masur of the University of Chicago Law School has noted, “the Supreme Court’s innovations in *Booker* and its progeny do not even alleviate the problem they were designed to address, namely the sentencing

of offenders based on facts never proven to a jury beyond a reasonable doubt.”¹³ To the contrary, judges, whether they are following the Guidelines or ignoring them, sentence based on the same standard of proof they have always employed; *Apprendi* and *Blakely*—the doctrinal underpinnings of *Booker*—might just as well have never been decided.

Third, disparity has returned to an extent troubling even to those—generally on the defense side—who were willing to sacrifice determinate sentencing as what they viewed as the price necessary for a restoration of robust discretion (a discretion they correctly understood would be exercised almost exclusively to the defendant’s benefit). Indeed, even the *New York Times* has noticed that, in some important areas, the U.S. criminal justice system has returned to the bad old days of luck-of-the-draw sentencing. The *Times*, while continuing to oppose mandatory guidelines, noted in a July 28, 2010, editorial:

Sentencing for white-collar crimes—and for child pornography offenses—“has largely lost its moorings,” according to the Justice Department, which makes a strong case that the matter should be re-examined by the United States Sentencing Commission. . . . As a general principle, sentences for the same federal crimes should be consistent. As the Justice Department notes in its report, a sense of arbitrariness—sentences that depend on the luck of getting a certain judge—will “breed disrespect for the federal courts,” damaging their reputation and the deterrent effect of punishment.¹⁴

Professor Masur has also taken note, explaining that the United States now has

a system that is likely to underperform the prior regime in several important respects. There will certainly be cases in which judges will be better able to tailor sentences to fit offenders and their crimes under the advisory Guidelines. This ability to consider penalties on a case-by-case basis is, of course, the principal advantage of charging judges with the task of sentencing. Yet the cost [extracted] is that racial and ideological disparities are likely to reappear, possibly in even more pernicious form. . . . In many cases the judges who diverge from the advisory Guidelines’ ranges will do so for the wrong reasons. The most ideologically extreme judges will be the most likely to sentence outside of the advised range.¹⁵

III. What Can Be Done

Ideology and idiosyncrasy cannot possibly be acceptable bases for sentencing. That it is impossible to eliminate them altogether is hardly a reason to keep an incoherent system that encourages them. It’s time to start over with a new push for determinate sentencing. Here are some things that can be done.

First, all the actors in the system should understand that determinate sentencing does not necessarily mean harsh sentencing; a rule-of-law *process* for sentencing does not ipso facto imply anything about the *content* or length of the sentences imposed. The guidelines system that preexisted *Booker* did in fact produce what many regarded as stiff sentences, but that was not a function of the process. It was largely a function of substantive

criminal statutes, and thus a matter for Congress. In principle, there is no barrier to a determinate system that produces lenient outcomes. (Whether such outcomes are desirable is, of course, a matter that spurs considerable debate).

Second, the public should be told the truth about what, under the present system, the seductive phrase *judicial discretion* actually means—namely, a one-way street to lower sentences. The most revealing measure of the exercise of so-called discretion is the incidence and direction of departures. As noted previously, a large minority of all sentencing is already outside the range, and the day is soon coming when it will be a majority. But by far the most notable fact about guideline departures—although understandably the one given the least publicity—is their direction. Virtually all of them favor the criminal. In its most recent report, the Commission states that two percent of sentences were above the range, whereas 41.2 percent were below. The criminal is winning the departure game twenty to one.¹⁶

No normal person would recognize that state of affairs as simply the exercise of supposedly neutral *judicial discretion*—a term that a priori implies evenly balanced judgment, with some departures in one direction and, presumably, a vaguely similar number in the other. Instead, it would be recognized for what it is: to wit, a partisan result. When one side—the criminal—is consistently wiping out the other, one might suspect that the umpire is playing favorites. It's true that the government is responsible for a significant share of these departures (in exchange for the defendant's assistance in other prosecutions), but even taking that into account, departures are, for any practical purpose, exclusively the defendant's playground. If the criminal justice system is to have one-sided discretion like that, at least the public should be told what this system actually produces.

Third, if the Sentencing Commission is to remain in operation (see subsequent discussion), it should forthwith require of itself a crime-and-cost impact statement setting forth a line-by-line estimate of the real-world consequences any new guideline or policy statement is likely to produce.

It's too obvious for argument that a government agency, *before* taking action, ought to understand, as well as disclose to the citizens, what effects its proposals are likely to have on them. For years the law has required environmental impact statements for proposed construction projects, and there is no reason the same principle should not be applied to proposed changes in sentencing. The human environment counts, too.

In particular, the Commission will have to refine and expand its present incarceration estimates. If the Commission proposes a change likely to result in higher sentences, it should study how many more years of imprisonment, in the aggregate, this change would produce *and* tell the public what it's going to cost; the day has passed when the taxpayers can foot the bill for every change, even if seemingly desirable. Similarly, if the Commission proposes a change likely to result in lower sentences (e.g., its recent crack/powder equalization proposal, discussed subsequently), it should produce an estimate of the impact of the resulting additional crime. The recidivism rate is not zero, as the Commission full well knows. It should state how many fewer years of imprisonment a downward adjustment

would produce, how much additional crime the reduction would be likely to bring about, and what economic and human costs are likely to result from the crime increase.

Judges, the Justice Department, defense counsel, and interest groups may have come to believe that the system exists to advance their varying agendas; certainly they are the font of the sorts of proposals that tend to get the Commission's attention. But the Commission needs to attend first to the public. The first step in doing so is for it to make a thoughtful and determined effort to assess *in real-world specifics* how the public will be affected by what it proposes to do, then publish that assessment far and wide. Now is not too soon to start.

Fourth, Congress should repeal the SRA and enact a new version. The heart of the statute has already been discarded for most day-to-day purposes. That happened when *Booker* ended mandatory guidelines and stripped the courts of appeals of the power of de novo sentencing review, severely degrading their ability to correct even gross outlier sentences. The appendages of the SRA still twitching in the land of undead law should be put out of their misery. Justice Souter summed it up in his concurrence in *Gall*:

After *Booker's* remedial holding, I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.¹⁷

Fifth, pending repeal and replacement of the SRA, Congress should abolish the Sentencing Commission. By far the most important purpose for which it was created no longer exists—to write binding rules for district courts to use in sentencing. It does have some other functions—for example, to advise Congress about possible statutory improvements, as well as gather and publish statistics about sentencing practices—but when its core function has been demoted to making increasingly ignored nonrules, it's time to turn the page.

The Commission has done an admirable job in its less important missions (indeed, it's the best-informed agency I had the pleasure of working with in about twenty years of government service), but otherwise it has failed. The afternoon *Booker* was handed down, it should have been working to resuscitate determinate sentencing. Specifically, it should have been drafting a proposal to Congress for a remodeled SRA, restoring mandatory guidelines and providing that the government prove such objective sentencing facts as *Booker* required beyond a reasonable doubt and (if the defendant so wished) to a jury. But it has done no such thing. For six and a-half long years and counting, it has acquiesced, to all appearances happily, in a system that cuts the heart out of its *raison d'être*. The Commission's lassitude is all the more surprising in view of the *Booker* Court's explicit invitation for action: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."¹⁸

That the Commission remains in hibernation in the face of the Court's invitation is beyond distressing. An agency that snores through the destruction of its central task—and, of course, no longer performs it—and to boot takes a pass on the opportunity to point Congress toward a new course, is not an agency the taxpayers should keep funding.

This conclusion would hold true even if the Commission had not been occupying itself with other projects, such as expensive cross-country fact finding journeys and, most prominently, its push to give crack cocaine dealers the benefit of lowering their (suggested) sentences to equal those given individuals dealing in a less dangerous drug, powder cocaine. The crack-powder equalization proposal was so radical that the most liberal Congress in decades overwhelmingly rejected it in favor of a Reagan-era proposal to reduce the crack-powder ratio from 100:1 to 18:1.¹⁹ Even the liberal *Washington Post* understood that the Commission's equalization plan blinked reality about the greater dangers of crack:

Some critics of the crack sentences have pushed for complete elimination of the disparities. But this ignores . . . data that crack has a slightly more powerful and immediate addictive effect and more quickly devastates the user physically than does powder cocaine. It also fails to acknowledge the higher levels of violent crime associated with crack.²⁰

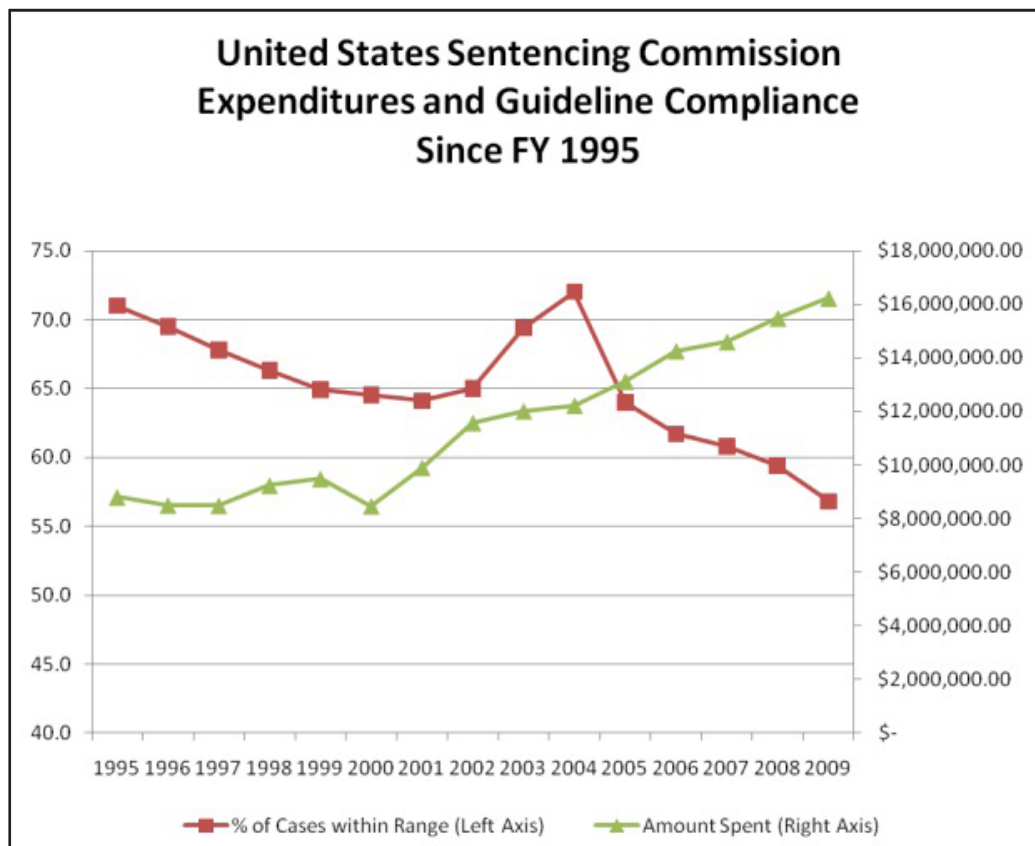
But the Commission has not stopped there. In its May 2010 proposed amendments, it has taken a significant step to *affirmatively undermine*, if not nearly eliminate, what little

remains of determinate sentencing. In order to shift the focus away from potentially (and often in fact) discriminatory and subjective factors that had been part of sentencing in the old regime, the original Sentencing Commission declared that such offender characteristics as age, "mental and emotional condition," and physical status (including drug and alcohol abuse) are "not ordinarily relevant" or simply "not relevant" in determining whether to grant a departure.²¹

The present Commission proposes to reverse field on all of them, saying now that they may be relevant. (In the case of drug or alcohol abuse, it has not gone quite that far—at least not in so many words.²² The existing policy statement declares that drug or alcohol abuse "is not a reason for a downward departure"; the proposed version is that drug or alcohol abuse "ordinarily is not a reason for a downward departure."²³ The change would seem minor to a layman, but those versed in actual sentencing practice will recognize it as a loophole big enough for the proverbial truck. Few and far between are defendants who have not, according to their hired-gun supposed experts, been handicapped by their own chronic drinking and/or recreational drug use.)

The probable long-term desultory impact of the Commission's proposals is difficult to overstate. It is not a coincidence that *no* prior Commission, with either a Democratic or Republican majority, took this disastrous step. The factors green-lighted for departure are a virtual litany of the grievance-mongering, I'm-a-victim theme so often heard in the defense allocation. To invite them in as a basis for district courts to depart is certain to hasten the end of anything now

Figure 1



remaining that provides even a feeble nudge toward consistency. One district judge will see youth as a reason for leniency; the next will see it as the best chance for firmness to cut short a budding criminal career. One judge will see old age as the twilight of a defendant's life and a time for compassion; the next will see it as the time he was jolly well old enough to know better. One judge will see the defendant's belligerence as an emotional condition or syndrome needing therapy instead of punishment; the next will see it as old-fashioned thuggishness needing a good stint in the slammer. One judge will see drug abuse as a factor dimming the defendant's will power and thus culpability; the next will see it as a harbinger of recidivism and public danger. And so forth.

It was one thing, and bad enough, for the Commission to sit in silence while determinate sentencing was dealt a mighty, though reversible, blow. It is quite another for it to strive to add to the damage by giving a breathtaking boost to luck-of-the-draw outcomes.

Finally, the Commission should be abolished because even at its best, it has become a luxury in the age of parsimony. Fifteen years ago, the Commission was the 900-pound gorilla of sentencing law. It wrote binding rules, which courts followed more than seventy percent of the time, at an annual cost of roughly \$8.8 million. Today, the Commission is an overfed lemur. It writes sentencing suggestions, which courts follow fifty-five percent of the time, at roughly twice the annual cost (\$16.2 million) (see Figure 1). If, in private enterprise, a business created a diluted product with a shrinking consumer base and continuously rising production costs, how long would that business survive? How long *should* it survive?

Ronald Reagan once observed, "A government bureau is the nearest thing to eternal life we'll ever see on this earth."²⁴ He was correct, but there is no compelling reason to maintain an eternal, tax-funded life for a watered-down Sentencing Commission. The era of government belt-tightening is already upon us. For example, U.S. Immigration and Customs Enforcement has had to scale back enforcement and deportation drastically because the money isn't there. States are releasing prisoners early because the money isn't there. Recently, the Supreme Court ordered California to release over 30,000 prisoners because deficient funding created what the Court regarded as constitutionally unacceptable conditions of confinement. Indeed, Professor Berman's skepticism about what he calls incarceration nation has never had so much traction—not because the electorate is outraged about the number of prisoners or the length of sentences (it isn't), but because, at least for low-level and nonviolent offenders, more and more people have come to believe that prison, though often useful, costs more than it's worth. The criminal justice system cannot continue to spend as if operating in the relatively plush days of yesteryear. It's time to cut back, and the Sentencing Commission is not immune.

The Commission's data gathering and publication functions are worthwhile, but can be absorbed by other agencies. The various participants in the sentencing business—judges, prosecutors, defense counsel, and crime victims—all have organizations that speak effectively to Congress. The Commission can be a useful voice (and also, as seen, a

perverse one) but is scarcely essential in either event. Most of all, what was by far its preeminent duty—the promulgation of substantive, mandatory sentencing rules—has essentially disappeared. No one has argued, or plausibly could argue, that the Commission would have been created to begin with if its task had been as thoroughly watered down as *Booker* has made it. With apologies to Justice Scalia's *Booker* dissent,²⁵ the Commission has assumed all the value of a cookbook listing advisory-only ingredients, but telling the chef to remember that, in the end, he can use pretty much whatever pops into his head. As the Supreme Court reminded us in *Nelson*, we are now so far down *Booker*'s path that district judges cannot so much as presume a Guidelines sentence is *reasonable*, much less correct, and still less binding.

By its incomprehensibly nonchalant attitude toward restoring the determinate sentencing system it was created to produce, the Commission became an anachronism the day *Booker* was decided. In the era of desperately needed government frugality, taxpayers shouldn't have to continue to shell out millions for sentencing suggestions.

Endnotes

- 1 18 U.S.C. § 3553(b)(1).
- 2 U.S. Sentencing Guidelines Manual ch. 5, pt. H, introductory cmt. (2009); see also *id.* §§ 5H1.1–5H1.12.
- 3 See S. Rep. 98-225 (1983) at 33.
- 4 Title IV of S. 151, Pub. L. No. 108-21.
- 5 *United States v. Booker*, 543 U.S. 220 (2005).
- 6 *Kimbrough v. United States*, 552 U.S. 85 (2007).
- 7 *Booker*, 543 U.S. at 292 (Stevens, J., dissenting from remedial portion of majority opinion).
- 8 *Gall v. United States*, 552 U.S. 38, 62 (2007) (Alito, J., dissenting) (internal citations omitted).
- 9 Sentencing Law and Policy, <http://sentencing.typepad.com> (Jan 26, 2009) (emphasis added).
- 10 *Id.*
- 11 William Otis, *Priority for a New Administration: Restore the Rule of Law in Federal Sentencing*, 20 FED. SENT. REP. 345 (2008).
- 12 *Id.*
- 13 Jonathan Masur, *Booker Reconsidered*, U. CHI. L. REV. (forthcoming 2010).
- 14 Editorial, *Rethinking Criminal Sentences*, N.Y. TIMES, July 28, 2010, at A22.
- 15 See *supra* note 11.
- 16 United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (FY 2009), tbl. N, <http://www.ussc.gov/ANNRPT/2009/TableN.pdf>.
- 17 *Gall v. United States*, 552 U.S. 38, 61 (2007) (Souter J., concurring).
- 18 *Booker*, 542 U.S. at 265.
- 19 The Fair Sentencing Act, S.1789, was introduced in the Senate on October 15, 2009, and amended by the Senate Judiciary Committee on March 15, 2010, to prevent the equalization of penalties for crack cocaine and powder cocaine possession.
- 20 Editorial, *Crack Breakthrough: The Federal Sentencing Act Corrects a Long-Time Wrong in Cocaine Cases*, WASH. POST, August 3, 2010, at A14.

