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BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY OF THE JUDICIARY COMMITTEE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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United States v. Booker: One Year Later – Chaos or Status Quo?

Mr. Chairman and Distinguished Members of the Committee:

I am honored to have this opportunity to appear before you today to express my views regarding the state of federal sentencing law. I am a practicing criminal defense attorney in Tampa, Florida. Throughout my career I have taken a keen interest in federal sentencing law and in the Federal Sentencing Guidelines in particular. Since 1994 I have helped to organize and moderate the Annual National Seminar on the Federal Sentencing Guidelines, which is a joint project of the Federal Bar Association and the United States Sentencing Commission. From 1998 to 2002 I served as Co-Chair of the Practitioners' Advisory Group to the Sentencing Commission. I am the immediate past Co-Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section and a current member of the ABA's *ad hoc* task force on *Blakely* and *Booker*. I am also a member of the Sentencing Initiative of The Constitution Project, a bi-partisan panel of federal and state judges, scholars, and practitioners chaired by former Attorney General Edwin

Meese and former Deputy Attorney General Philip Heymann. Our group also includes Judge Cassell as well as, until very recently, then circuit judge Samuel Alito. My testimony today is strictly in my personal capacity, and the views I express are not necessarily those of any of the above groups or organizations, although I will reference certain policies adopted by the ABA and the Constitution Project group.

My testimony will cover three areas. First, I will discuss the data on post-*Booker* sentencing patterns. I conclude that there remains a large amount of additional information that would be well worth gathering and analyzing before taking any legislative action. Second, I will address whether the data gathered to date support immediate legislative action. I conclude that it does not and that the additional information we lack is worth waiting for. Another reason to be patient is that most of the legislative alternatives to advisory guidelines pose significant constitutional questions. Those questions may at least in part be addressed by the Supreme Court in a case it agreed to hear just last month, *Cunningham v. California*.¹ Third, while I believe it is premature to take action now, I will offer some thoughts regarding various alternatives over the long term: (1) leaving the existing advisory guidelines in place; (2) new legislation designed to give “presumptive” weight to the guidelines; (3) mandatory minimum guidelines; and (4) simplified guidelines.

¹No. 05-6551, 2006 WL 386377 (cert. granted, Feb. 21, 2006).

I. Post-Booker sentencing data

Thanks to the efforts of the Sentencing Commission, we have a wealth of data regarding both pre- and post-*Booker* sentencing trends.² This data reflects modest increases in both average sentence length and in the rate of sentences outside the now advisory guideline range. It also points to the need for the collection and analysis of additional data to get a complete picture of important aspects of post-*Booker* sentencing.

A. The data we have

1. Average sentence length

The bottom line in sentencing statistics is the overall average sentence length. The average sentence before *Booker* was 56 months. The average sentence after *Booker* is 58 months.³ It would be difficult to make a credible argument in light of that statistic that the post-*Booker* state of affairs is anything other than status quo.

²UNITED STATES SENTENCING COMMISSION, *Report On The Impact of United States v. Booker On Federal Sentencing* (March 2006) (“Booker Report”).

³The status quo regarding average sentence lengths before and after *Booker* is reflected across the board in all four of the most significant categories of cases: drugs, immigration, firearms, and economic offenses.

2. *Percentage of variances*

A somewhat less telling statistic is the rate of sentencing outside the ranges dictated by the guidelines or government-sponsored departures. The post-*Booker* rate of sentencing within the guideline range or outside the range at the request of the government is 85.9%. This compares with a rate of 90.6% prior to the Protect Act and 91.9% after the Protect Act. The percentage of upward variances post-*Booker* has *doubled* from 0.8% to 1.6%. There was a roughly 5% increase in defense-sponsored variances when compared to post-Protect Act rates and a 4% increase when compared to pre-Protect Act rates. This hardly indicates sentencing “chaos.” Because this means 95% of cases are being handled in the same way as before *Booker*, “status quo” more accurately describes the present situation.

3. *Extent of variances*

Undue focus on the percentage of variances obscures an equally important consideration – the extent of such variances. Sentences 10% and 100% below the guidelines range look the same when viewed only from the perspective of whether or not they are variances. To understand the significance of variance rates, they must be considered in conjunction with data regarding their extent. As foreshadowed by the bottom line statistic of slightly increased overall sentence lengths, the average extent of variances based on pre- and post-*Booker* sentencing authority is identical. The

average departure based on pre-*Booker* guidelines authority is 12 months. The average variance based on post-*Booker* Section 3553(a) authority is also 12 months.

Those concerned about overall sentencing severity should note that those averages pale in comparison to the average length of departures granted when sponsored by the government. The average downward departure for substantial assistance is 28 months – more than double the average defense-sponsored variance.

4. *Appellate review of variances*

We do not have data for rates of within-range sentences during the period of relative confusion following the initial enactment of the Guidelines in 1987. Anecdotally, however, I believe there is consensus on the fact that rates of departure dropped dramatically during the initial years of guideline implementation, especially after their constitutionality was upheld in 1989. The major force in pushing departure rates down was the process of appellate review. The circuit courts reversed many more downward departures than they affirmed in those early years, and this led to much higher rates of within-range sentences by the district courts.

A similar phenomenon appears underway now in the immediate post-*Booker* period. The Sentencing Commission’s “Selected Appellate Decisions” data⁴ reflects

⁴See Booker Report, *supra* note 2, at 30, Ex.2.

15 reversals and only 6 affirmances of downward variances.⁵ Only one within-guideline range sentence has been reversed. Just as they did in the late 80's, the district courts will likely respond to this appellate trend. District courts are likely to grant even fewer downward variances throughout the near term.⁶

B. The data we need

While the Sentencing Commission has done a tremendous job compiling a vast array of important post-*Booker* data, there is still a great deal we do not know. For example, we do not yet have any data by offense category on *why* district courts are granting variances under their post-*Booker* authority. I have yet to encounter a federal district judge who does not approach his or her job in general and sentencing in particular with anything other than the utmost solemnity. Frivolous people do not get appointed to the federal bench in this country. Any serious study of post-*Booker* sentencing practices and patterns remains incomplete in the absence of data regarding the reasons why these conscientious men and women are sentencing particular types

⁵Interestingly, this trend does not carry over to appeals of sentences above the guidelines range. The Sentencing Commission cites 14 affirmances and only 2 reversals of above-guideline variances.

⁶Indeed, preliminary data suggest “a possible beginning of an upward trend in the rate of imposition of within-range sentences and a concomitant decrease in the rate of imposition of non-government sponsored, below-range sentences.” Booker Report, *supra* note 2, at 59.

of offenses as they are. We need to know the bases for variances by offense category and their relative rates of frequency. And we also need this data cross-referenced by extent of the variance.

The newly-available array of sentencing considerations in Section 3553(a) presents a valuable learning opportunity that should not be squandered. While the guidelines were always intended to evolve based on further knowledge, they lagged behind in some notable respects. For example, the Commission has identified a number of factors that powerfully predict reduced likelihood of recidivism, including age, first offender status, and a stable employment history,⁷ factors which are not incorporated in the criminal history computation and are deemed “not ordinarily relevant” under the Guidelines. Post-*Booker*, courts have been able to consider factors like these, thus more effectively meeting the purposes of sentencing.⁸ If a large percentage of the variances are for reasons that more effectively assure the

⁷UNITED STATES SENTENCING COMMISSION, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, 11-12, 16 (May 2004) (“Measuring Recidivism”); UNITED STATES SENTENCING COMMISSION, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, 8, 13-15 (Jan. 2005).

⁸*E.g.*, *United States v. Ryder*, 414 F.3d 908 (8th Cir. 2005) (elderly, various medical conditions); *United States v. Lata*, 415 F.3d 107, 113 (1st Cir. 2005) (over 60, suffering from cancer).

purposes of sentencing, this suggests a need to capture these considerations more adequately within the guidelines. This, in turn, would lead to greater rates of within-range sentences. Given the talent of our judiciary, sentencing policy should be a dynamic process of learning. Data on the reasons for variances is essential to this process.

We also need more data regarding appeals of variances. As explained above, this will be an important aspect of the development of post-*Booker* sentencing practices. We do not know how many variances have been appealed. We do not know the rates at which variances are being reversed. And we do not know what the final post-appeal variance rates are. Under our current data, downward variances by district courts are shown as sentences outside the guideline range even if they are later reversed on appeal. And, of course, we do not yet know what the impact of such appellate reversals will be over the near and longer term on future variance rates.

II. There is no need for immediate legislation

The post-*Booker* data reflect slight increases in overall average sentence length and rates of variance and no change at all in average extent of variances. There is, accordingly, no state of emergency in federal sentencing to warrant legislative change at this time. Moreover, as the appellate process continues to play out, variance rates will likely remain low. In the meantime, we can continue to collect the critical

additional data regarding reasons for variances needed to flesh out the full post-*Booker* sentencing picture.

In addition to the fact that the existing data does not demonstrate a pressing need *for* immediate legislation, there is a significant reason *not* to enact immediate legislation. The Supreme Court just a few weeks ago granted certiorari to review a new case in the *Blakely/Booker* line – *Cunningham v. California*.

In *Cunningham*, the Court will consider the constitutionality of California’s presumptive sentencing laws. The case involves a sexual offense against a child. Under California law, the punishment for the specific offense can be either 6, 9, or 12 years’ imprisonment. The middle sentence, however, has presumptive value – the sentencing court must impose a sentence of 9 years unless it finds aggravating or mitigating factors to justify the greater or lesser sentence. These aggravating and mitigating factors are not presented to a jury. In *Cunningham*, the trial court found aggravating factors and imposed a 12-year sentence. The California appellate courts affirmed, relying on an interim decision of the California Supreme Court that its system did not violate *Blakely* because the middle range was merely presumptive and the trial court retained discretion to impose a higher sentence under the advisory aggravating factors.⁹ In its review of *Cunningham*, the newly-comprised Supreme

⁹*People v. Black*, 35 Cal.4th 1238 (Cal. 2005).

Court will directly confront the constitutionality of presumptive guidelines coupled with advisory factors found by judges rather than juries. *Cunningham* may also call into play the issue of raising the low end of the applicable sentencing range based on judicial factfinding – an issue open to question in light of the Court’s 4-1-4 decision in *Harris v. United States*.¹⁰ As discussed below in Part III, several of the potential avenues of legislation raise significant constitutional issues. *Cunningham* appears virtually certain to have a direct impact on these issues.

Over 98% of sentences result from guilty pleas rather than trials. Accordingly, in the overwhelming majority of federal cases, the sentencing hearing is the only trial court proceeding of significance. The law of sentencing is therefore, in my view, the single most important aspect of federal criminal law. Because we do not face a state of emergency, there is valuable data yet to be collected, and the Supreme Court is poised to decide a case of critical significance, I believe the responsible course at this time is one of patience.

III. What are the other alternatives?

I recognize that the law of federal sentencing is a subject of keen interest to this Committee. I also recognize that the post-*Booker* system of advisory guidelines is not exactly the one Congress enacted but resulted from an unanticipated development in

¹⁰536 U.S. 545 (2002).

Sixth Amendment jurisprudence. As we continue to collect important additional data and observe the manner in which the Court will refine the Sixth Amendment lines roughed out in *Blakely* and *Booker*, the Committee will be considering its long-term legislative options. I would like to comment on some of those options.

A. Leave the current system in place

The first and most obvious option is to leave the post-*Booker* system of advisory guidelines in place. This may well be the best option. While the mandatory guidelines reduced disparity to a degree,¹¹ they were not without their faults. There is widespread consensus that the mandatory guidelines were simply too rigid. Indeed, this is one of the central conclusions reached both by our bi-partisan panel at The Constitution Project¹² and by the ABA.¹³ My own experience as a criminal defense

¹¹See UNITED STATES SENTENCING COMMISSION, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 32, 48-52, 82, 87, 91-92, 104, 113-19, 122-27, 131-46 (2004) (goal of eliminating unwarranted disparities was not fully achieved; racial disparity increased under guidelines; unwarranted disparities stem from, *inter alia*, prosecutorial practices, relevant conduct rules, drug guidelines, some criminal history rules) (“Fifteen Year Study”).

¹²CONSTITUTION PROJECT’S SENTENCING INITIATIVE, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005).

¹³The rigidity of the guidelines is accountable in large part to the 25 percent rule codified in 28 U.S.C. §994(b)(2). The ABA, in approving the Justice Kennedy Commission recommendations in August 2004, recommended “that the Congress [r]epeal the 25 percent rule in 28 U.S.C. §994(b)(2) to permit the United States Sentencing Commission to revise, simplify and recalibrate the federal sentencing

attorney matches the consensus viewpoint. As my years of practice go by I am continually reminded of something a senior attorney told me at the outset of my career – “The truth is stranger than fiction.”¹⁴ The mix of information presented by offenses and offenders is frequently so rich that it simply cannot all be predicted, written down, and appropriately weighed in advance with unfailing success. Even the best written guidelines, if mandatory, will yield instances of undue uniformity – treating *unlike* offenses and offenders in a like manner. Making the guidelines advisory while permitting consideration of other relevant factors, coupled with appellate review for overall reasonableness, is a targeted solution to the Guidelines’ undue rigidity. The present advisory guidelines bear no resemblance to the “unbridled discretion” of the pre-Guidelines era.¹⁵ We have an established structure to provide sentences sufficient but not greater than necessary to achieve just punishment, deterrence, protection of

guidelines and consider state guideline systems that have proven successful” Recommendation 121A, Annual 2004, p.9, available at <http://abanet.org/crimjustice/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

¹⁴As the Sentencing Commission has long acknowledged, “it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.” See U.S.S.G. § 1A1.1, editorial note, Part A(4)(b).

¹⁵The current system is consistent with the carefully thought out ABA Standards for Criminal Justice: Sentencing (3d ed. 1994). The Standards recognize the importance of guidelines to control and protect against unfettered judicial discretion, but allow consideration of aggravating and mitigating factors in particular cases.

society, and rehabilitation, in consideration of the advisory guidelines and other sentencing factors present in the case. While it is too soon to be certain, the present system may well be one worth keeping.

B. Potential improvements to the current system

This is not to say that the present system cannot be improved upon. There are important changes that would improve the present system without major structural change or constitutional doubt. I offer the following suggestions:

1. Fix the crack/powder ratio

The 100:1 ratio for crack and powder is wrong.¹⁶ It leads to racially disparate results and is inherently unfair. The ratio should be changed without raising the penalties for powder because drug penalties are more than severe enough as they are.¹⁷

¹⁶See UNITED STATES SENTENCING COMMISSION, *Cocaine and Federal Sentencing Policy*, Executive Summary at v-viii (May 2002). The ABA has called for the elimination of the crack/powder disparity for more than a decade. See Recommendation 129, Annual 1995 (Individual Rights and Responsibilities, Special Committee on the Drug Crisis).

¹⁷The more than doubling of sentences in drug cases is the major cause of prison population growth and a primary cause of racial disparity in sentencing. Yet, over 50% of drug offenders are in Criminal History Category I, and of all federal offenders, drug offenders are the least likely to recidivate. The drug trafficking guideline in combination with the relevant conduct rule increased “prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.” As a result, low-level offenders are punished as harshly as kingpins, and resources may be misdirected from the kingpins and traffickers Congress had in mind in enacting the two-tiered mandatory minimum

2. *Reduce the impact of uncharged and acquitted conduct*

The relevant conduct provisions of the guidelines are also problematic. They allow sentences to be dramatically impacted by conduct for which the defendant is neither charged nor convicted, and even offenses for which the defendant was found not guilty by a jury. The Sentencing Commission has repeatedly looked at ways to correct this problem, but it has not yet acted on the issue.¹⁸ The Constitution Project group has similarly reached consensus that the existing rules governing relevant conduct require change.¹⁹

3. *Procedural reform*

Prior to the guidelines, district courts had discretion to sentence defendants anywhere between any statutory minimum and maximum sentences. Courts were not required to state any reasons for their sentences or make any particular factual findings to support their decisions. Under this discretionary regime, the courts utilized probation officers to conduct presentence investigations regarding the defendant, but

law. *See* Fifteen Year Report, *supra* note 11, at 47-55, 76, 132, 134; Measuring Recidivism, *supra* note 7, at 13 & Exh. 11.

¹⁸UNITED STATES SENTENCING COMMISSION, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996); 62 Fed. Reg. 152, 161 (1997); 61 Fed. Reg. 34,465 (1996); 57 Fed. Reg. 62832, 62848 (1992); 58 Fed. Reg. 67522, 67541 (1993).

¹⁹*See supra* note 12.

these reports were not used to make factual findings regarding disputed matters because no such factual findings were required in the sentencing process.

Under the advisory guidelines, in contrast, narrow sentencing ranges are determined through very specific factual findings regarding the factors enumerated in the guidelines. Given the number and importance of the factual determinations to be made under the guidelines, the rules of procedure should ensure that the process for litigating these factual issues is balanced and designed to produce the most reliable results possible.

The pre-existing practice of presentence investigations conducted by probation officers based on ex parte submissions is inconsistent with the principles underlying an adversarial system of justice and should be revised to account for the new importance of fact finding at sentencing. Indeed, the very concept of a judicial “investigation” of potentially disputed facts is without precedent or analog in American jurisprudence.

There are presently no rules governing the process by which presentence investigations are conducted. In practice in most districts,²⁰ the parties submit factual

²⁰I understand that there is disparity among the districts in these procedures. In some districts there is virtually “open file” discovery. In my district, the Middle District of Florida, all submissions to the Probation Office are ex parte and will not be shared with opposing parties. These wide variations in practice among the districts are a further reason for the enactment of uniform rules of procedure.

information to the probation officer on an ex parte basis. The probation officers do not share the information submitted to them by one party with the other party. Indeed, probation officers are authorized to promise confidentiality to sources of information and to present information without revealing its source. Even in the absence of a probation officer's grant of confidentiality to information sources, presentence investigation reports do not typically cite or reference the sources of information upon which their proposed factual findings are based.

Dueling ex parte submissions, followed by reports without citations, do not approach the level of reliability in the factfinding process that would result from the ordinary adversarial process. There do not appear to be any countervailing considerations to suggest that an adversarial process would be unduly burdensome or unworkable in the litigation of sentencing facts, so long as provision is made for the protection of sensitive information upon good cause shown.

An adversarial process in litigating sentencing facts could be accomplished by amending Rule 32 of the Federal Rules of Criminal Procedure to require that any party wishing to provide information regarding a sentencing proceeding to the probation officer preparing the presentence investigation report must, absent good cause shown, provide that information to the other party.

Specifically, a new subsection (c)(3) should be added:

(3) Limitations on ex parte submissions. Any party wishing to submit information to the probation officer in connection with a presentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer.

This Rule would substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer. A “good cause” exception is made where information, if revealed to other parties, may compromise an ongoing investigation or result in physical or other harm to a confidential source, the defendant, or others. Existing rules limiting ex parte communications should suffice to limit submissions of information directly to the Court without serving opposing parties.

It may also be necessary to repeal or amend subsection (d)(3)(B) of Rule 32, which directs probation officers to exclude from the presentence investigation report “any sources of information obtained upon a promise of confidentiality.” Probation officers should not be empowered to promise confidentiality to sources of information to be used to sentence defendants in the absence of good cause.

4. *Add a defense ex officio to the Sentencing Commission*

Federal sentencing policy is in large measure shaped by the Sentencing Commission. In addition to its seven voting members, the Sentencing Commission

has *two* Department of Justice *ex officio* members – one slot for the Chair of the Parole Commission and a second for the Attorney General or his designee. The defense bar, the other critical player in the sentencing process, has *no* voice or presence on the Sentencing Commission. Parole has been abolished for more than twenty years. There is no longer a need for the Parole Commission to have an *ex officio* seat on the Sentencing Commission. That position should be converted to a defense representative position.²¹

C. Other potential changes to the current system that are not necessary

1. The standard of appellate review

It has been suggested by some that the “reasonableness” standard of appellate review should be changed, perhaps even by a return to the pre-*Booker* standard of de novo review. There are two compelling reasons not to do this. First, it would be unconstitutional. The remedial majority in *Booker* found it necessary to excise de novo review from the statute in order for the guidelines to be sufficiently advisory to pass constitutional muster. *See Booker*, 543 U.S. at 259, 261. Second, it represents poor sentencing policy. A de novo standard of review announces that the opportunity

²¹I would also favor repeal of the limitation on the number of Judges who may serve on the Sentencing Commission. There is no limit on the number of barbers or truck drivers who may be sentencing commissioners. There is no valid reason to limit the number of Judges who may serve. The ABA has also made this recommendation. *See* Recommendation 121A, Annual 2004, *supra*, note 13.

to actually see and hear the individual human being to be sentenced is of absolutely no value to our system of justice. I urge the Congress not to subscribe to this view. Tightening the standard of review to some intermediate point between “reasonableness” and de novo would only push the constitutional envelope, and no case can be made at this point that there is anything wrong with the present standard.²²

2. *Substantial assistance departures without a government motion*

Shortly after *Booker*, some expressed a concern that district courts would grant downward departures for substantial assistance in the absence of a government motion with undue frequency. I do not believe that concern has come to pass. The Sentencing Commission has collected data on 65,766 cases sentenced after *Booker*. The government filed substantial assistance motions in 9,399 of these cases. In 258 cases, district courts considered substantial assistance where the Sentencing Commission could not determine whether or not the government had filed a motion. In only 28 of these 258 cases were departures reportedly granted based solely on unrecognized substantial assistance.

²²The ABA in August 2004, prior to the *Booker* decision, recommended that Congress “[r]einstate the abuse of discretion standard of appellate review of sentencing departures, in deference to the district court’s knowledge of the offender and in the interests of judicial economy.” Whether a “reasonableness” or abuse of discretion standard is used, the unique role played and information possessed by a sentencing judge should be recognized. See Recommendation 121A, Annual 2004, *supra*, note 13.

I have a number of thoughts about this data. The first is how small the numbers are. The 258 cases represents .4% of total cases and 2.7% of the number of cases in which the government filed the motion. These numbers are remarkably small in comparison to the overall number of cases and the number of cases where the government agreed the defendant was entitled to the departure. And evidently the extent of these departures were very modest – an average of only 13 months compared with the average government-sponsored departure of 28 months.

Second, the circumstances of these cases should be examined closely. It seems unlikely that a district court would grant a substantial assistance downward departure to a defendant who did not earn it. There are many other ways under the present system to justify a downward departure or variance. The Sentencing Commission noted that in roughly half of the 258 cases, it could not determine whether the government did in fact move for or agree to the departure. This is not always easy to determine.²³ After careful review of these cases, the number of substantial assistance departures granted without government approval may turn out to be even lower than the minuscule .4% now in question.

²³*Cf.* UNITED STATES SENTENCING COMMISSION, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, 60 (October 2003) (conservative estimate was that 40% of downward departures reported to Congress as judicial departures were initiated or acquiesced in by the government).

Third, the data does not indicate whether the government elected to appeal any of those cases or, if an appeal was taken, its outcome. After a Westlaw search, I found only one case in which the government appealed a sentence below the guidelines range based on cooperation without a government motion. It was reversed.²⁴ I have seen no other appellate decision on this issue.

Finally, just because a judge rewarded a defendant for substantial assistance without a government motion does not mean the defendant did not deserve it. Unfortunately, prosecutors will at times simply refuse to reward defendants with motions to recognize their assistance. In addition to examining why the district courts granted these departures, it may be of equal or greater importance to learn why the government refused to file the motion in these cases. In any event, I hardly think this data suggests a need for corrective legislation.

D. “Presumptive” guidelines

As set forth above, the present system of advisory guidelines may prove to be the best long-term option. Another possibility discussed by some is legislation to give greater or “presumptive” weight to the guidelines. This is not an advisable course of action at this time because the costs of such an approach greatly outweigh its benefits. The benefits to this approach are slim in my view because the guidelines are already

²⁴*United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005).

treated as nearly presumptive by most district courts. Although they may not constitutionally be able to say so, nearly every district judge starts with the assumption that he or she will impose a guidelines sentence unless there is a good reason not to do so.²⁵ This is the functional equivalent of a presumption. A new law labeling the guidelines “presumptive” would not change the results in many cases.

On the other side of the equation, the costs of this approach are considerable. The day after such legislation is enacted, every federal sentence imposed in this country will be in constitutional doubt. Putting additional weight on the guidelines – factors used to increase sentencing ranges in the absence of jury findings – raises a significant constitutional question under *Booker*. We know that “advisory” guidelines are constitutional. We know that “binding” guidelines are not.²⁶ We do not know

²⁵The reason for this is twofold. The first is habit – federal judges have been sentencing under the guidelines for nearly two decades. They are comfortable and familiar with them. The second is practical. The guidelines are specific, whereas the remainder of the 3553(a) factors are general. The comments of the district court quoted in a recent en banc opinion of the First Circuit are likely typical of the vast majority of the district courts: “I need to start someplace, and [the guidelines are] where I’m going to start.” *United States v. Jimenez-Beltre*, ___ F.3d ___, 2006 WL 562154 (1st Cir. Mar. 9, 2006).

²⁶The legislative history of the Sentencing Reform Act describes the original guidelines as “presumptive.” As summarized by the Sentencing Commission, the standard set forth in the now-excised section 3553(b)(1) (requiring a sentence within the range unless a ground for departure existed) was adopted during the legislative process to ensure that the guidelines were “presumptive” rather than “advisory” as they had originally been conceived. See *Fifteen Year Report*, *supra* note 11, at 7. The

whether “presumptive” guidelines are constitutional or not, but we know that virtually every defendant will object on the ground that they are not and appeal until the question is answered by the Supreme Court. If such a law were struck down, many or all of the defendants sentenced during the interim would need to be re-sentenced. We are still in the process of this same work in the wake of *Blakely* and *Booker*. Adding yet another round of this on top of the present process would be truly unfortunate. Moreover, as discussed above, this issue may well shortly be resolved by the Supreme Court in its consideration of *Cunningham*.

It has been suggested by some that “presumptive” guidelines would be constitutional because some,²⁷ but not all,²⁸ circuit courts have held that within-range sentences will be presumed reasonable on appellate review. Putting to one side that an appellate presumption of reasonableness may itself be unconstitutional, this is a

availability of departure in this “presumptive” system did not avoid the constitutional issue. *Booker*, 543 U.S. at 234.

²⁷*See, e.g., United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 707 (6th Cir. 2006); *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

²⁸*See, e.g., United States v. Jimenez-Beltre*, ___ F.3d ___, 2006 WL 562154 (1st Cir. Mar. 9, 2006); *United States v. Cooper*, 437 F.3d 324, 327-28 (3d Cir. 2006); *United States v. Talley*, 431 F.3d 784, 786-87 (11th Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005).

comparison of apples and oranges. A presumption of reasonableness on appellate review presents a wholly different constitutional question from giving the guidelines presumptive weight in the first instance at the district court level.

The term “presumptive” is also vague. Even if a new law making the guidelines “presumptive” were upheld, the Court would surely provide its gloss on what construction of that term led to its passing constitutional muster. Any district court using a more restrictive definition of the term would have to redo its interim sentences.

Accordingly, a cost/benefit analysis weighs decisively against enactment of “presumptive” guidelines at this time. This conclusion is reinforced by the fact that the constitutionality of California’s presumptive guidelines is now before the Court in *Cunningham*. In light of the importance of the issue, the fact that the guidelines enjoy a limited presumption in practice already, and the tremendous potential costs outlined above, there is no compelling reason not to at least await the Court’s ruling in *Cunningham* before taking legislative action to add weight to the advisory guidelines.

E. mandatory minimum guidelines

In addition to “presumptive” guidelines, some have suggested restoring the binding nature of the low ends of guideline ranges as a potential long-term legislative

approach. This “mandatory minimum” approach is an even worse and more constitutionally tenuous idea than “presumptive” guideline legislation.

First, any effort to put binding weight on the low end of ranges determined by judicial factfinding will squarely present the constitutional question of whether the plurality opinion in *Harris v. United States*²⁹ has continuing viability. In *Harris*, Justice Breyer concurred in the Court’s opinion to allow mandatory minimum sentences to be imposed on the basis of judicial factfinding. He did so, however, even though he expressly disagreed that there was any logical difference between using judicial factfinding to raise a sentencing ceiling – clearly unlawful under *Appendi v. New Jersey*³⁰ – and allowing judicial factfinding to raise a sentencing floor – the issue in *Harris*. For Justice Breyer, the same rule must apply to both circumstances. Justice Breyer concurred in allowing judicial factfinding to raise the sentencing floor in *Harris* only because he had dissented in *Appendi* and did not “yet accept its rule.”³¹ In the years since Justice Breyer lost the vote in *Appendi*, he has again lost the same

²⁹536 U.S. 545 (2002).

³⁰530 U.S. 466 (2000).

³¹536 U.S. at 569.

vote in *Ring v. Arizona*,³² *Blakely v. Washington*,³³ and *United States v. Booker*.³⁴ He could well lose the vote again in *Cunningham* by the time legislation enacting mandatory minimum guidelines reaches the Court. Under the circumstances, it hardly seems responsible legislative policy to bet the constitutional ranch on the proposition that Justice Breyer – having lost the same vote at least four times – would continue not to “accept” the rule of *Apprendi*. And, of course, the Congress would not be wagering only its new mandatory minimum guidelines legislation on this constitutional gamble regarding the continuing viability of *Harris*. If the rule of *Harris* falls, every mandatory minimum sentence in the federal criminal code that relies on judicial factfinding would fall along with it.

Second, mandatory minimum guidelines are such poor policy that they have been rejected by every concerned body to have considered them, including the Judicial Conference, the Federal Judges Association, the American Bar Association, as well as our Constitution Project panel, to name only a few.³⁵ Mandatory minimum

³²536 U.S. 584 (2002).

³³542 U.S. 296 (2004).

³⁴543 U.S. 220 (2005).

³⁵*See, e.g.*, Letters to House Judiciary Committee from the Judicial Conference, the Sentencing Commission, Edwin Meese and Phillip Heyman for the Constitution Project, the ABA, the Federal Defenders, Professor Bowman, and others, available at [http://www.nacdl.org/Federal Sentencing](http://www.nacdl.org/Federal_Sentencing).

guidelines would establish as policy that we are essentially unconcerned about unduly severe sentences so long as there are no unduly lenient sentences. Such a policy flies in the face of established sentencing principles, such as the need to avoid unwarranted disparity, the need for sufficient flexibility to avoid unwarranted uniformity, and the “parsimony principle” embodied in Section 3553(a).

F. Simplified guidelines

If the Congress is truly dissatisfied with the post-*Booker* advisory guidelines after all of the necessary data is in, there is one clear alternative approach that would simultaneously serve the purposes of the Sentencing Reform Act and be free from all constitutional doubt. This approach, which I have previously described in some detail,³⁶ has been endorsed by the ABA.³⁷ It is also under careful review by The Constitution Project, which I anticipate will be issuing a report with detailed legislative recommendations within the coming weeks.

I refer to this approach as “simplified” guidelines. It involves selecting a handful of core culpability considerations in each offense type and submitting them

³⁶James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 97 Fed. Sent. R. 97 (Dec. 2004). Professor Bowman has added additional helpful thoughts regarding this potential approach. See Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149 (2005).

³⁷Recommendation 301, Midyear 2005 (Criminal Justice Section).

to the jury or stipulating to them through guilty plea. For example, in drug cases the jury might consider the defendant's role and the weight of the drugs involved in the offense. In fraud cases the jury might consider the loss caused by the offense, just as the jury determines damages in every civil case. The result of these additional jury findings or plea stipulations would be a sentencing range that would ordinarily be binding on the district court. The number of sentencing ranges could be dramatically reduced – from 43 offense levels to as few as, for example, 10 levels:

- | | |
|----|-----------------|
| 1 | 0-1 years |
| 2 | 0-3 years |
| 3 | 1-4 years |
| 4 | 2-5 years |
| 5 | 4-9 years |
| 6 | 8-13 years |
| 7 | 12-17 years |
| 8 | 16-21 years |
| 9 | 20-25 years |
| 10 | 25 years - life |

This proposal is content-neutral on severity. Additional factors such as those in the present guidelines manual and Section 3553(a) could be considered by the sentencing court in imposing sentence within the range established by the jury's verdict or the defendant's stipulation. A court could depart downward from that range only if it found a mitigating circumstance of a kind or to a degree not included in the factors determined by the jury or the within-range advisory considerations.

Obviously there would be room for reasonable differences of opinion in drafting the details of this approach. But if the Congress is dissatisfied with advisory guidelines, the only clearly constitutional way to return to binding guidelines is to put the fact questions that determine the binding guideline range to the jury.

Conclusion

I appreciate this opportunity to assist the Subcommittee on these important issues. I will be pleased to answer any questions the Subcommittee might have at the hearing or, if necessary, in a subsequent written submission.