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DOJ'S ATTACK ON FEDERAL JUDICIAL "LENIENCY," THE SUPREME COURT'S RESPONSE, AND THE FUTURE OF CRIMINAL SENTENCING

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The last few years have brought some equilibrium to the power struggle in the federal system between prosecutors, judges, and Congress¹ over criminal sentencing. It has been a turbulent ride, and, while we're still moving, we seem to be slowing down. In this piece, we detail the Department of Justice's ("DOJ") attempt to stamp out every vestige of judicial leniency at federal sentencing and the Supreme Court's subsequent strike back.² It is primarily, though not exclusively, a federal story as of course the Court's response, handed down in the form of constitutional rulings, binds the states as well as the federal government. Though pieces of the story have been shared and various Supreme Court sentencing cases analyzed, our unique contribution is to explain how and why a true sentencing reform movement that began in the mid-1980's was co-opted by conservative politics at the federal level at the turn of this century, thereby eliminating one avenue of change entirely for all federal and state actors.

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1. We purposefully do not mention juries here, as juries by and large hold no authority in sentencing matters. Except in those few states that practice jury sentencing (like our home state of Texas), the vast majority of jurisdictions practice judicial sentencing, both before and after the *Blakely/Booker* revolution. Even in those jurisdictions that responded to the Court's Sixth Amendment cases by sending facts that trigger higher statutory maximum sentences to the jury, the jury's power is limited to finding facts, not determining sentences.

2. Elsewhere, one of us has given the historical account of the evolution of criminal sentencing from the colonial English practice of fixed judicial sentencing for felonies depending upon the indictment listing the "essential elements" of the crime, to the American practice of indeterminate judicial sentencing within very wide statutory ranges based upon pure judicial discretion, to the more recent federal practice of determinate sentencing based upon judicial findings of those particular facts thought relevant by Congress. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Val. U. L. Rev. 693, 696-719 (2005). One of us has also addressed the impact on federal sentencing of the Supreme Court's landmark decision in *Booker v. United States*. Sandra Guerra Thompson, *The Booker Project: The Future of Federal Sentencing*, 43 Hous. L. Rev. 269 (2006). We have also described the doctrine surrounding the Supreme Court's seemingly sudden determination that over two decades of federal sentencing practice, designed to cabin judicial discretion and foster judicial transparency in decision-making, in fact violates a defendant's Sixth Amendment right to a jury trial and can only be cured by additional judicial discretion. Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 Cardozo L. Rev. 775 (2008).

Part I belongs to “Main Justice.”³ It was during the early days of George W. Bush’s administration that the Department of Justice began its all-out assault on the federal judiciary’s sentencing powers as part of a campaign to consolidate central authority and to require the harshest possible sentences for all federal convictions. While it had become commonplace for members of Congress to campaign on a platform advocating harsh punishment for criminals, this time it was the Department of Justice under Attorney General Ashcroft seeking harsher penalties, and not just harsher—the harshest.⁴ DOJ’s campaign was played out in numerous arenas at the same time: (1) in Congress, where DOJ urged the adoption of laws addressing the “problem of leniency” of district court judges; (2) before the U.S. Sentencing Commission (“Commission”), which DOJ chided for not doing enough about the leniency problem; and (3) even among its own field offices by attempting to virtually eliminate the traditional charging discretion exercised by prosecutors and instead mandating that all federal prosecutors bring the most serious charges provable. Eventually, as the straw that broke the Court’s back, the Department succeeded in prompting Congress to enact the Feeney Amendment, a piece of legislation that was viewed as a frontal assault on the discretion of federal judges in sentencing.

Though the show is far from over, the Supreme Court regained the upper hand over both DOJ and Congress. As we explain in Part II, the judiciary regained much of its sentencing authority by trumping Congress’s legislation (and DOJ’s political agenda) on constitutional grounds. The Court upheld the overall constitutionality of the federal sentencing system but only on the condition that the Federal Sentencing Guidelines (“Guidelines”) be applied in a purely advisory manner, subject to extremely weak appellate review for “reasonableness.”⁵ The case was decided on constitutional grounds that were actually unrelated to whether or not district court judges should have the power to reduce sentences, but the reason was neither here nor there. The outcome of the ruling was the same: the Supreme Court gave the power over sentencing that Congress had transferred to DOJ back to sentencing judges. The Court reaffirmed that position in a series of additional Sixth Amendment cases decided in the October 2007 and 2008 Terms: *Gall v. United States*,⁶ *Kimbrough v. United States*,⁷ (both heard in the October 2007 Term) and *Spears v. United States*,⁸ (heard in the October 2008 Term) firmed federal district judge discretion through rigid limits on appellate reversals.

The Court appeared, sensibly in our view, far less concerned with the effects of its opinions on state criminal justice systems. Probably because most states don’t have

3. This is the not always respectful designation of the Attorney General, other political appointees, and trial attorneys working on Pennsylvania Ave. and other downtown D.C. locations as distinguished from the 94 U.S. Attorney’s Offices located throughout the United States.

4. Ironically, for over a decade, numerous scholars and federal judges had decried the *harshness* of punishments that were required under federal law. Especially as compared to most state laws, federal sentences were considered by many to be draconian, inconsistent with rational sentencing policy, and a wasteful use of correctional resources.

5. Close to half of the states had followed the federal model post-1984 and enacted some form of guidelines. States were likewise given the choice, by the Court, of advisory guidelines that permitted judicial discretion or mandatory guidelines that require jury findings on all facts that increase sentences.

6. 128 S. Ct. 586 (2007).

7. 128 S. Ct. 558 (2007).

8. 129 S. Ct. 840 (2009).

mandatory sentencing guideline systems or presumptive sentencing systems, those states that do build more judicial flexibility in their systems, and state legislators are not at war with their judiciary, so the Court's new constitutional rulings in fact had significantly less effect on state than on federal sentencing. This is not to say, as we note in Part III, that the Court entirely ignored the states; two recalcitrant states were pointedly reminded of the *Blakely/Booker* rule,⁹ and the Court in its most recent sentencing decision, *Oregon v. Ice*,¹⁰ (heard in the October 2008 Term) granted state trial judges even more discretion through the practice of imposing concurrent or consecutive sentences for multiple offenses.

As a result of the last few terms, many of the recent victories that the Department enjoyed in the political arena it lost in the courts. Under the administration of Attorney General Alberto R. Gonzales, the Department continued its push for more stringent punishments, but changes in circumstances required a new approach. Congress considered and rejected new legislation that might constitutionally replicate DOJ's earlier coup. When DOJ's Republican allies in Congress lost their majority position after the 2006 elections, the push for harsher punishments slowed considerably. We expect Attorney General Eric Holder to back away from harsh sentencing laws and tight control over Assistant United States Attorneys ("AUSA") in the field. We have recently seen federal district judges sentence below the range provided in the Guidelines with rising frequency, yet not ignore the Guidelines. Though states judges never suffered in the same manner, we expect state legislators to react to the new constitutional requirement by increasing state judicial discretion in sentencing through advisory, rather than mandatory guidelines, and expanding judicial authority to "stack" sentences.

I. FEDERAL SENTENCING REFORM: 1984 TO 2003

The story began in 1984 when the Sentencing Reform Act transformed federal sentencing from a purely discretionary process into a structured, mandatory one. The move to structured sentencing also created the United States Sentencing Commission, the administrative body that wrote the 1987 Guidelines. It now has the job of updating them and conducting empirical research into how they are working.¹¹

The movement toward structured sentencing happened to coincide with a "get tough" approach in Congress. Congress moved in two directions at once. On the one hand, Congress asked the Commission to devise mandatory guidelines for sentencing to promote fairness goals like "uniformity" (similar punishment for similar crimes). Experience revealed that the broad judicial discretion in indeterminate sentencing regimes on both the state and federal levels resulted in unwarranted disparities in sentencing similarly situated defendants, with such factors as geography, race, gender, socioeconomic status, and judicial philosophy accounting for much of the difference. "This welter of empirical data by researchers led to a rallying cry of conservative and liberal judges and policymakers behind

9. California and Michigan in *Cunningham v. California*, 549 U.S. 270 (2007) and *McCuller v. Michigan*, 549 U.S. 1197 (2007); *infra* nn. 147–51.

10. 129 S. Ct. 711 (2009).

11. The Federal Sentencing Guidelines became effective on November 1, 1987. See U.S. Senten. Commn., *2007 Federal Sentencing Guidelines Manual* (2007) (available at <http://www.ussc.gov/2007guid/GL2007.pdf>).

Judge Marvin Frankel, the father of the modern sentencing movement.”¹² This led in turn to published Guidelines with transparent sentences and mandatory appellate review for conformity with the Guidelines.¹³

On the other hand, a few years earlier, Congress enacted stiff mandatory minimum and sometimes consecutive punishments for crimes like drugs, immigration, and firearms offenses, and began implementing “three strikes” laws against repeat offenders.¹⁴ Of necessity, the Commission then incorporated the mandatory minimums in setting the sentencing ranges within the Guidelines. One effect was to tie the Commission’s hands in setting appropriate punishments for entire categories of offenses for which Congress had created mandatory minimum sentences. The more serious effect was to create a new mandatory sentencing system that provided for extremely harsh punishments, especially compared with similar offenses at the state level.

The harshness of the new sentencing regime meant that, as a practical matter, rehabilitation was no longer a serious goal of federal sentencing.¹⁵ Parole was eliminated.¹⁶ It was now possible to calculate to the day when a federal inmate would be released (assuming he or she behaved well). Rehabilitative efforts in prison would count for nothing—new sentencing laws aimed instead simply to incapacitate offenders. Since the guidelines went into effect in 1987, judges who oversee jury trials or who accept guilty pleas must apply them—“guidelines” are actually “mandatory rules.” Judges must make a series of factual findings and perform a series of mathematical calculations to determine an offender’s punishment.

The defendant’s sentence is determined by his place on a 258-box sentencing grid. The defendant’s place along the vertical axis, which consists of forty-three offense level categories, is controlled primarily by the particular offense(s) the prosecutor charged in the indictment—each federal criminal offense is assigned an offense level by the Sentencing Guideline Manual. The judge can then adjust this offense level upward or downward by making factual findings on those aggravating and mitigating circumstances deemed relevant by the Sentencing Commission and listed in the Manual.¹⁷ These factors almost exclusively concern the manner in which the defendant committed the

12. Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 S. Ct. Rev. 223, 229–30.

13. The Sentencing Guidelines were passed as part of the Bail Reform Act of 1984. Curiously, this was co-sponsored by Senator Thurmond (who wanted harsher penalties) and Sen. Edward Kennedy, who bemoaned sentencing disparity.

14. See U.S. Senten. Commn., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, 17 Fed. Senten. Rep. 269, 270–72 (2005).

15. The Sentencing Reform Act “rejects imprisonment as a means of promoting rehabilitation, and it states that punishment should serve retributive, educational, deterrent, and incapacitation goals.” *Mistretta v. U.S.*, 488 U.S. 361, 367 (1989) (citations omitted). The Senate Report accompanying the Sentencing Reform Act castigated the “‘outmoded rehabilitation model’ for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.” *Id.* at 366 (citing Sen. Rep. 98-225 at 38 (Aug. 4, 1983)).

16. Federal prisoners were required to serve all of their time with the possibility of only a 15 percent reduction for good behavior in prison.

17. U.S. Senten. Commn., *2008 Federal Sentencing Guidelines Manual* (2008) (available at <http://www.ussc.gov/2008guid/GL2008.pdf>) (The Amendments to the Sentencing Guidelines were submitted to Congress May 1, 2009 and will be effective Nov. 1, 2009. The Amendments are available at <http://www.ussc.gov/2009guid/finalamend09.pdf>).

crime and conducted himself during the trial, and the characteristics of the victim. The judge makes these factual findings at an informal sentencing hearing employing a lax preponderance-of-evidence standard of proof. The defendant's place along the horizontal axis is determined solely by his criminal history. "Under this rather mechanical process, the judge's discretion is limited to selecting the sentence within the very narrow range offered by the defendant's place in the grid."¹⁸ The only way for a judge to show mercy was by something called a "downward departure," a mechanism which was frowned upon and often reversed on appeal.

Traditionally, courts had given weight to other factors relating to an offender's background such as employment history, family circumstances, education, age, mental and physical condition, and the like. The Guidelines, however, give little, if any, weight to an offender's personal characteristics and history (other than criminal history). Not surprisingly, federal judges balked at the new system. At the time that the Guidelines went into effect, federal judges felt the sting of losing the wide discretion they once exercised in deciding what sentence to impose.¹⁹

Judges also balked at the harshness of the new system. Some resigned in protest when the Guidelines went into effect or simply refused to handle sentencing in drug cases that carry mandatory minimum sentences. Others were outspoken in speeches and in writing about the perceived failings of the new system of punishments. Most judges simply applied the Guidelines faithfully, as they were required by law to do. The new mandatory system resulted in the imposition of long prison sentences under a system that offered federal judges little wiggle room when an offender's background seemed to call for leniency. Predictably, the combination of the Guidelines, mandatory minimum and consecutive penalties, the drug war, demographics, three strikes laws, and the federalization of crime brought about a population explosion in the federal prison system—an increase of over 600 percent since the 1980s—as more people were sent to prison for longer periods of time.²⁰

Perhaps less predictably, the Federal Sentencing Guidelines shifted almost all discretion in federal criminal sentencing from district court judges to federal prosecutors. Conceptually, a guidelines regime might reduce unwarranted disparity and promote transparency in sentencing decisions.²¹ Much scholarly criticism of the Federal Sentencing Guidelines concerned particular aspects of that system and its implementation. For example, the mandatory nature of these Guidelines shifted the possibility of obtaining leniency from either the prosecutor (in determining what to

18. Klein & Steiker, *supra* n. 12, at 232 (footnote omitted).

19. See Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 5 (U. Chi. Press 1998); Michael Tonry, *Sentencing Matters* 72 (Oxford U. Press 1998) (calling the federal system "the most controversial and disliked sentencing reform initiative in U.S. history").

20. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1328–29 (2005). See John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, Fordham L. Leg. Stud. Research Paper No. 1338365 (forthcoming 2009) (available at SSRN) (noting the U.S. prison growth over the last three decades from 300,000 to 1.6 million prisoners); The Pew Ctr. on the Sts., *One in 100: Behind Bars in America 2008* (Feb. 2008) (available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (noting 1 in 100 adult Americans are incarcerated).

21. As the U.S. Sentencing Commission's data confirms, it will reduce disparity in sentencing outcomes per charged offense. It cannot account for disparity in charging and pleas or disparity in investigation.

charge) or the judge (in determining the individualized sentence) to begging the prosecutor. The draconian sentence lengths and possibility of charging offenses with mandatory minimum penalties or mandatory consecutive penalties allow prosecutors to coerce plea bargains from risk-averse defendants, and from defendants who know they are guilty of at least some basic offense. The necessity of pleading guilty to receive an “acceptance of responsibility” deduction, and the requirement of a government motion before a judge can reduce a sentence below a mandatory minimum based on substantial assistance to the government, also place inordinate power solely in the hands of the prosecutor.²²

Toward the end of the Clinton Administration, there were political stirrings in Congress that presaged a change of direction in sentencing policy. Ironically, although federal judges had protested the Guidelines when they were adopted in 1987, the outcries had died down by the late 1990’s, possibly because judges had become inured to the unavoidable reality of sentencing guidelines and mandatory minimums. But some members in Congress saw things differently. According to their view, many federal judges were instead *not* applying the Guidelines faithfully. Some legislators believed that judges had found a way to circumvent the Guidelines by applying “downward departures” to reduce sentences. They also took the view that the Clinton Administration’s Justice Department was complicit in this effort in not protesting and appealing such departures. Thus, began the drive for sentencing harshness in the fall of 2000 that would gain speed with the election of President George W. Bush and would become a principal goal of the DOJ under Attorneys General Ashcroft and Gonzales.

Concerns about judicial leniency were first aired at a Senate subcommittee hearing held during the height of the Presidential election campaign of 2000. Criticisms centered on the threat to the consistent operation of the Guidelines that some saw in the steady increase in “downward departures” by federal district court judges and the fact that “[t]he Clinton Justice Department apparently has shown little concern about this trend toward reduced and more inconsistent punishment.”²³

District courts can grant downward departures under a number of different circumstances. Some of the departures can be characterized as demonstrating judicial leniency. Others are granted only upon request of the prosecutor. The term “downward departures” refers to reductions below the sentencing range specified by the Guidelines. Once she determines the Guidelines range for a particular offender, the Guidelines permit the judge to “depart” from the range under certain circumstances. Departures can be made “upward” (yielding a more severe sentence) or “downward” (yielding a more lenient sentence). Not all downward departures represent judicial leniency, however, as two of the three types of departures are granted by request of the prosecution for purely

22. Klein & Steiker, *supra* n. 12, at 235; Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 Geo. Mason L. Rev. 303 (2009); Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87 (2003); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010 (2005).

23. Sen. Subcomm. on Crim. Just. Oversight of the Comm. of Jud., *Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?* 106th Cong. (Oct. 13, 2000), in 15 Fed. Senten. Rep. 317, 317 (2003) (statement of Senator Thurmond).

pragmatic reasons.

The largest category of downward departures, a reward for the defendant's cooperation with the government, applies only upon request of the prosecutor. A recent example of a "substantial assistance" departure is the government's use of Andrew Fastow's testimony to convict Jeff Skilling and Ken Lay—the two top executives of the Enron Corporation during the company's scandalous slide into bankruptcy.²⁴ A second large category of downward departures—those in immigration-related cases—emerged during the 1990's in border districts that implemented special procedures to accommodate the growing volume of cases.²⁵ Fast-track programs were instituted of sheer necessity, and downward departures made as part of this program do not indicate judicial or prosecutorial leniency but are again considered an unfortunate necessity.

The Guidelines create a third category of downward departures for cases in which there exists "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."²⁶ The assumption underlying the Guidelines is that most cases involving a certain offense and a certain criminal history will deserve the same range of punishment. This group of typical cases within a certain offense and criminal history combination is known as the "heartland" of cases, and all offenders falling within that heartland should be sentenced within the same narrow guideline range. Consideration of other factors like potential for rehabilitation or community service can normally be taken into account only within the very narrow range dictated by the Guidelines. However, the provision allowing judges to depart either upward or downward from the Guidelines range for circumstances not adequately considered by the Commission recognizes that some extraordinary cases will fall outside the heartland of ordinary cases. It is this third category that provides some opportunity for judicial leniency.

In the early days of the Guidelines, district court judges tried to find some flexibility in the Guidelines by exercising this departure power. The adoption of the appellate review provisions of the Guidelines meant that prosecutors could challenge a judge's application of the Guidelines by filing an appeal. Judges who granted downward departures often found their decisions reversed by appellate courts that did not agree that the facts or the law justified the departure. To give one example, district court judges applying the Guidelines in the early days of their existence sought to find grounds for reducing sentences for mothers who were solely responsible for young children at home.²⁷ Prosecutors often challenged these sentence reductions and, by and large, the

24. U.S. Senten. Commn., *supra* n. 17, at § 5K1.1. Law enforcement considers these a necessary evil to induce "snitches" to help the government in investigating and prosecuting other criminals. A reduced sentence for a government informant is not generally evidence of leniency—it is the cost of doing business for the government. However, once the prosecutor makes such a request, she cannot control the extent of the departure the judge chooses to grant.

25. The 1990s saw a rapid rise in the rate of prosecution for offenses relating to immigration, as well as drug offenses, along the southwest border. DOJ responded by implementing measures called "fast track" programs to expedite the processing of cases in districts with large immigration caseloads. These programs offer reduced sentences in exchange for prompt guilty pleas, waiver of appeals, and immediate deportation of the individual.

26. U.S. Senten. Commn., *supra* n. 17, at Ch. 1, Pt. A(4)(b) (quoting 18 U.S.C. § 3553(b)).

27. See Judge Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 Yale J.L. & Feminism 291, 291–300 (2002).

Circuit Courts agreed with the prosecutors. The Circuit Courts found that this basis for departure had been taken into account by the Commission which found family circumstances to be “not ordinarily relevant” as a ground for departure. A departure was therefore only justified if the family circumstances were “extraordinary.” The Circuit Courts typically decided that the hardships faced by young children whose parent was incarcerated were not sufficiently “extraordinary” to justify a downward departure.²⁸

It did not take long to recognize that the critical issue in downward departure cases was how much deference the Circuit Courts should show to District Court judges in their sentencing decisions. In cases in which prosecutors appealed sentences that included downward departures, defense lawyers often argued that the appellate courts should take a hands-off approach in reviewing the propriety of downward departures. DOJ took the opposite position. Eventually, the issue percolated up to the Court in *Koon v. United States*,²⁹ a case that gained notoriety for different reasons, but which within the world of federal sentencing would be widely known for its impact on the district court judges’ power to grant sentence departures. The Court told the Circuit Courts of Appeal to back off in stringently reviewing the appropriateness of departure decisions (whether upward or downward) made by sentencing judges.³⁰

On March 3, 1991, a group of mostly white Los Angeles police officers beat the intoxicated Mr. King repeatedly with police batons when he refused to lie on the ground after a high-speed automobile chase and arrest.³¹ A bystander captured most of this incident on videotape, and it was aired repeatedly nationwide. When the state prosecution yielded acquittals of the four officers, sparking widespread rioting,³² federal prosecutors stepped in with civil rights charges, and this time two of the officers were convicted.

Federal District Court Judge John Davies sentenced Koon and Powell to 30 months imprisonment, rather than the 70 to 87 months recommended by the Federal Sentencing Guidelines, granting a five-level downward departure because “the victim’s wrongful conduct contributed significantly to provoking the offense behavior.” He granted another three-level departure based on a combination of factors: (1) the “widespread publicity,” (2) that the officers would “likely be targets of abuse’ in prison,” (3) that they would now face a police inquiry that would result in their never again working as police officers and had been subjected to multiple prosecutions, and (4) that they were not “violent, dangerous, or likely to engage in future criminal conduct.”³³

The government appealed the officers’ sentences, challenging the validity of the grounds for the downward departure. The DOJ (under the Clinton Administration) also argued (as would the Bush DOJ in testimony before Congress years later) that decisions

28. U.S. Senten. Commn., *supra* n. 17, at § 5H1.6; Douglas A. Berman, *Addressing Why: Developing Principled Rationales for Family-Based Departures*, 13 Fed. Senten. Rep. 274 (2001) (collecting cases).

29. 518 U.S. 81 (1996).

30. *Id.*

31. *Id.* at 85–87; Lou Cannon, *Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD* xix (Westview Press 1999).

32. Madison Gray, *The L.A. Riot: Fifteen Years after Rodney King*, http://www.time.com/time/specials/2007/la_riot/article/0,28804,1614117_1614084_1614512,00.html (last accessed May 18, 2009).

33. *Koon*, 518 U.S. at 89 (quoting *U.S. v. Koon*, 833 F. Supp. 769, 788–90 (C.D. Cal. 1993)).

to depart should be reviewed on appeal on a “de novo” basis. The Supreme Court agreed to hear the case in order to settle the important issue about how much latitude sentencing judges should have in granting departures. In the end, the case before the Supreme Court was less about whether the grounds for departure in the officers’ cases were justified and more about which court—the district court or court of appeals—should decide.

It is interesting to note that the DOJ at this time was headed by Janet Reno, the Attorney General appointed by President Clinton. In later Congressional hearings, the Clinton DOJ would be accused of failing to challenge downward departures by regularly filing appeals. Yet in the *Koon* case, it was the Clinton Administration’s DOJ that was challenging the downward departures and argued for a de novo standard of appellate review.

The preference shown by federal prosecutors of all political affiliations for a de novo standard of appellate review does not necessarily reflect a uniform preference for harshness. Rather, experts would see it as a preference for prosecutorial control over sentencing. A de novo standard of appellate review gave prosecutors a second chance to enforce the plea deal and sentencing arrangement they had negotiated with the defendant.³⁴ If a District Court judge granted a downward departure despite a prosecutor’s objections, the prosecutor could appeal the case and try again with a Circuit Court that would have broad powers to reverse the decision. Because appellate judges are far removed from individual cases and have a stronger interest in intra-Circuit uniformity not possessed by district judges, a prosecutor had a pretty good shot at having a departure overturned by an appellate court. In fact, appellate courts were reversing about three-quarters of all downward departures appealed by the government at that time.³⁵

In the *Koon* case, defense lawyers argued that a district judge’s decision to depart should be reviewed on appeal under the more deferential “abuse of discretion” standard, overturning a sentence only if the judge clearly erred in applying the law, and not simply because the appeals court decides the sentence departure was not justified by the facts. The defense emphasized the fact that appellate courts would have to weigh the merits of factual issues based only on the “cold record” and not on any personal contact with the defendant or other witnesses.

In a unanimous decision, the Supreme Court ruled that district courts should have sufficient leeway to make departure decisions for unusual cases and adopted an “abuse of discretion” standard of appellate review.³⁶ The Court declared that departure decisions

34. 95 percent of federal criminal felony cases in 1995 resulted in guilty plea. In 2008, that figure rose to 97 percent. U.S. Dept. of Justice, *Criminal Case Processing Statistics*, <http://www.ojp.usdoj.gov/bjs/cases.htm> (last updated Apr. 25, 2008). Because of this, appellate review is primarily of sentences imposed after a defendant has plead guilty and entered into a deal—there are few appellate reviews of sentences imposed after a trial. Aside from government sponsored downward departures for substantial assistance or the fast-track program, plea deals very rarely include a downward departure for the defendant—that is something a district judge may do on her own or after a request by defense counsel. A de novo standard makes it easier for the appellate court to reverse any non-government sponsored downward departure and impose a sentence pursuant to the Federal Sentencing Guidelines.

35. U.S. Senten. Commn., *Guideline Involved in Issues Appealed by the Government: Table 58*, (2001) (available at <http://www.uscc.gov/ANNRPT/2001/table58.pdf>).

36. When Congress enacted the Sentencing Reform Act (SRA), which created the Commission and set out its charge to draft the guidelines, it did not specify the standard for appellate review (beyond review “for conformity with the Guidelines”) and neither did the Commission’s guidelines. The Supreme Court was left with the task of

should in most cases be given “substantial deference” because they embody “the traditional exercise of discretion by a sentencing court.”³⁷ In so deciding, the Supreme Court rejected the government’s argument that departure decisions are not fact-intensive. The Court found that sentencing courts decide whether a case falls outside of the heartland of typical cases by making a “refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”³⁸ Not only did the Court decide that departure determinations were fact-intensive decisions, but it also found that sentencing courts have a “special competence” to decide whether a particular case is ordinary or unusual.³⁹

While the Supreme Court’s decision put an end to these officers’ legal battles, it was the beginning of a new battle over the powers of federal judges to depart downwards. This battle would again be resolved ultimately by the Court, though tussles on this issue between the DOJ, Congress, and the federal judiciary continue to this day.

The United States Sentencing Commission had envisioned that departures, both upward and downward, would be “rare” occurrences. Yet following the *Koon* decision in 1996, the district courts had more latitude to exercise their discretion to depart downwards, and some judges clearly took advantage of that new freedom. Senator Strom Thurmond took the position that too many district court judges were finding “more and more creative reasons” for reducing sentences.⁴⁰ Somewhat melodramatically, William G. Otis, a former Assistant U. S. Attorney in the Eastern District of Virginia, chided the Clinton Administration’s Justice Department and the Sentencing Commission for showing a “lack of leadership” in failing to address the “epidemic of downward departures.”⁴¹ (Of course, this was the same Administration that had challenged the downward departures in the *Koon* case and had argued for a de novo standard of appellate review.) Unfortunately, neither Senator Thurmond nor Mr. Otis provided statistics that broke down the total number of downward departures over time and distinguished sentence reductions based on judicial leniency from those given to government informants or to expedite immigration cases.⁴²

The Justice Department representative at the hearing was Laird Kirkpatrick, Counsel to the Assistant Attorney General, who *agreed* with the assessment that “fewer and fewer cases are being sentenced within the sentencing range dictated by the guidelines.”⁴³ He called for the Commission to seriously examine the issue, but did not make any statement in defense of the Justice Department’s role in the increase in

deciding the standard based on Congress’s apparent vision of the departure power.

37. *Koon*, 518 U.S. at 98.

38. *Id.*

39. *Id.* at 99 (quoting *U.S. v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993)).

40. Sen. Subcomm. on Crim. Just. Oversight of the Comm. of Jud., *supra* n. 23, at 317.

41. *Id.* at 321 (statement of William G. Otis).

42. The United States Sentencing Commission now divides departures into “government-sponsored” and “non-government sponsored” departures and further divides those two categories into additional subcategories (within the government-sponsored category, the statistics are further broken down into substantial assistance departures, early disposition program departures, and other below range; within the non-government sponsored category, the statistics are additionally broken down into downward departures from the guidelines range and downward departures with *Booker*). This new coding system did not occur until fiscal year 2003 and post-2005, respectively. U.S. Senten. Comm., *2008 Annual Report* 35–36 (2008) (available at http://www.ussc.gov/ANNRPT/2008/Chap5_08.pdf).

43. *Id.* (statement of Laird Kirkpatrick).

downward departures. In the end, the hearing served to signal to observers an emerging discontent with sentencing judges among Republicans in Congress.

Within months, George W. Bush became President, and his appointee, John Ashcroft, took the helm at the Justice Department. Attorney General Ashcroft answered the clarion call sent out by Senator Thurmond and took up the fight against judicial “leniency.” The Department, at least Main Justice, went from being a *target* of the criticism to being the principal *critic*, with the target now placed squarely on the federal district courts.⁴⁴ High-ranking DOJ officials at Main Justice began a concerted effort to shed light on what they perceived to be the growing leniency in the way that federal district court judges were applying the Guidelines. They urged members of Congress to curb the power of the District Court judges by “overruling” the *Koon* case and adopting a *de novo* standard of review, giving the Circuit Courts more power to reverse sentencing decisions.

Representatives of the Department promoted the campaign against downward departures by raising the subject at Congressional hearings and hearings before the Commission, even when the hearings were not called to address issues in sentencing. In what was clearly a coordinated effort, each DOJ representative would begin by addressing the topic of the hearing and then change the subject to the question of downward departures by the federal district courts.⁴⁵

DOJ also attacked the problem by proposing that the Commission severely limit downward departures, ostensibly as a means of deterring corporate criminals. Eric Jaso, Counselor to the Assistant Attorney General, wrote a letter to the Commission dated October 1, 2002, reaffirming the President’s commitment to holding corporate criminals accountable for their misdeeds by enforcing tough penalties.⁴⁶ As a means of toughening penalties for corporate criminals, DOJ proposed placing severe limits on downward departures of many types—and not just in white-collar cases. The proposed provisions would have limited a judge’s ability to take many factors into account in departing downwards: (1) physical condition, including drug or alcohol dependence or abuse, (2) family ties and responsibilities, and community ties, (3) military, civic, charitable, or public service; (4) employment-related contributions; (5) record of prior good works, (6) acceptance of responsibility and payment of restitution; (7) diminished capacity, and (8) aberrant behavior.

The overall campaign for tougher penalties also involved efforts to increase the punishments required by the Guidelines (in addition to the effort to force judges to

44. Many of the 94 U.S. Attorney’s Offices continued to concur with local judges in granting downward departures.

45. For example, U.S. Attorney James B. Comey testified before the Senate Judiciary Subcommittee on Crime and Drugs on June 19, 2002 in a hearing called to discuss the penalties for white-collar crime. Mr. Comey complained that federal judges were using their departure powers “to sentence white-collar defendants to probation rather than jail.” He then launched into a general complaint about how the standard of appellate review announced in the *Koon* case was “[f]urther exacerbating the problem” because it has “impaired the government’s ability successfully to challenge district court departures.” He concluded that the “impact of these departures in white-collar cases cannot be overstated.” He then went on to provide several anecdotes, and statistics for downward departures not including substantial assistance departures. *Statement of U.S. Attorney James B. Comey before the Senate Judiciary Subcommittee on Crime and Drugs* (June 19, 2002), 15 Fed. Senten. Rep. 323, 324 (2003).

46. Ltr. from Eric H. Jaso to J. Diana E. Murphy (Oct. 1, 2002), in 15 Fed. Senten. Rep. 326 (2003).

impose sentences without departing from the Guidelines). Spurred by public outrage over the harm caused by the defendants in the Enron fiasco, Congress passed the Sarbanes-Oxley Act, which, in addition to creating new criminal offenses, included directives to the Commission to increase penalties for corporate crimes.⁴⁷ The Commission held a public meeting on January 8, 2003, to consider certain proposals designed to comply with the Sarbanes-Oxley Act.⁴⁸ Mr. Jaso gave voice to the Department's views that the Commission's proposal "did not go far enough in increasing penalties."⁴⁹

By the spring of 2003, DOJ's efforts against downward departures had picked up political steam with the support of hard statistical data. Associate Deputy Attorney General Daniel P. Collins used the occasion of a Congressional hearing on crimes affecting children and pornography to tout the Department's position on downward departures. Unlike earlier hearings at which individuals testified without having statistical support for their contentions, by 2003 the Department had compiled statistics on non-substantial assistance, non-immigration downward departures. Mr. Collins testified that the "rate of such departures [non-substantial assistance] in non-immigration cases has climbed from 9.6% in [fiscal year] 1996 to 14.7% in [fiscal year] 2001—an increase of over 50% in just five years."⁵⁰ These figures would be repeated by other DOJ officials testifying in other hearings during this period. He also specifically addressed the statistics on downward departures in sexual abuse and pornography cases. Finally, he reiterated the Department's position that "much of the damage is traceable to the Supreme Court's decision in *Koon v. United States*."

The Department's campaign against downward departures had reached the receptive ears of some members of Congress, including freshman Congressman Tom Feeney, who sponsored an amendment to H.R. 1161 (later dubbed the PROTECT Act). The bill was aimed at child abduction and sexual offenses. In what would become known as the "Feeney Amendment," the provision advanced DOJ's agenda on downward departures.

The bill included a highly controversial reporting requirement. It required the Chief Judge of each district and the Commission to report to Congress and, upon request, to the Attorney General on downward departures, including "the identity of the sentencing judge." The requirement to provide a list of names of judges was viewed as an attempt to intimidate federal judges by "blacklisting" those who granted downward departures. As a final slap at the federal judiciary, the amendment reduced the number of federal judges that were required to serve as members of the Commission from a minimum of three to a maximum of three, meaning that under the new provision it would be permissible to exclude judges completely!

It is no exaggeration to say the representatives of nearly every prestigious legal and

47. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

48. *Excerpts from Minutes of the U.S. Sentencing Commission Public Meeting* (Jan. 8, 2003), 15 Fed. Senten. Rep. 329 (2003).

49. *Id.* at 330.

50. *Statement of Associate Deputy Attorney General Daniel P. Collins before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security* (Mar. 11, 2003), 15 Fed. Senten. Rep. 331, 331 (2003).

civil rights organization with any interest in federal criminal law—other than the Justice Department—spoke out against the Feeney Amendment. On March 26, 2003, a joint letter was sent to every Congressman from the Leadership Conference on Civil Rights, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, Families against Mandatory Minimums, and the American Civil Liberties Union.⁵¹ The letter opposed the Feeney Amendment, warning that it would “eviscerate a federal judge’s power to depart from the Sentencing Guidelines” and “to make the punishment fit the crime.”⁵²

In a separate letter, the NAACP Director, Hilary O. Shelton, wrote generally about the “potential impact of this provision on the African American community and on ethnic minority American communities throughout the nation is almost incomprehensible.”⁵³ The American Bar Association President Alfred P. Carlton, Jr. wrote to Senator Orrin Hatch, Chairman of the Committee on the Judiciary, on April 1, 2003 that adoption of the amendment would send “an unmistakable message that Congress does not trust the judgment of the judges it has confirmed to office,” and it “threatens the legitimacy of the Commission . . . [which] was created by Congress to ensure that important decisions about federal sentencing were made intelligently, dispassionately, and, so far as possible, uninfluenced by transient political considerations.”⁵⁴

Academics chimed in too. A group of 70 criminal law professors, many with extensive experience in sentencing law, submitted a letter to Congress.⁵⁵ They questioned the necessity of the Feeney Amendment, noting that in fiscal year (“FY”) 2001, the Circuit Courts had reversed granted departures in more than three-quarters of those cases in which the government decided to challenge them.

Needless to say, the federal judiciary—from the Chief Justice of the Supreme Court to the district court judges across the country—vehemently opposed the Feeney Amendment. The Judicial Conference of the United States issued a letter to the Senate Judiciary Committee Chairman Orrin Hatch on April 3, 2003.⁵⁶ This group, comprised of federal judges, scholars, and practitioners who annually amend the Federal Rules of Criminal Procedure “strongly oppose[d] several of [the Feeney Amendment] sentencing provisions because they undermine the basic structure of the sentencing system and impair the ability of courts to impose just and responsible sentences.” The judiciary voiced the same concern, as did other groups, regarding the “lack of careful review” and the fear that the amendment would undercut the traditional role of the Commission. The Judicial Conference urged Congress to await the studies of departures that were currently

51. Ltr. from Leadership Conf. on Civ. Rights, Natl. Assn. of Crim. Def. Laws., Natl. Leg. Aid and Defender Assn. Families against Mandatory Minimums & Am. Civ. Liberties Union to H.R. (Mar. 26, 2003), in 15 Fed. Senten. Rep. 346 (2003).

52. *Id.* at 346.

53. Ltr. from Hilary O. Shelton to U.S. Sen. (Apr. 10, 2003), in 15 Fed. Senten. Rep. 346, 350 (2003).

54. Ltr. from Alfred P. Carlton, Jr. to Orrin G. Hatch (Apr. 1, 2003), in 15 Fed. Senten. Rep. 346, 348 (2003).

55. Ltr. from L. Profs. to Senators Hatch and Leahy (April 2, 2003), in 15 Fed. Senten. Rep. 346, 351 (2003).

56. Ltr. from Jud. Conf. of the U.S. to Sens. Hatch and Leahy (April 3, 2003), in 15 Fed. Senten. Rep. 343 (2003).

being undertaken by the Commission before making any changes to the law. In a separate letter, Chief Justice William Rehnquist added that the Judicial Conference further opposed the legislation because it would alter the standard of appellate review.

The DOJ responded promptly. Through its representative Jamie Brown, Acting Assistant Attorney General, the Department issued a letter in support of the Feeney Amendment on April 4, 2003. This letter argued that even using the measure suggested by the American Bar Association, downward departures increased from 5.5 percent in FY 1991 to 13.2 percent in FY 2001, more than doubling in over ten years.⁵⁷ Mr. Brown's letter made an emotional appeal against downward departures by highlighting a single child pornography case in which the district court granted a departure.

In the end, the widespread criticism of the Amendment spurred Congress to scale back some of the proposed terms. The original bill had included language that would have prohibited departures on any ground that the Commission has not affirmatively specified as a permissible ground for a downward departure. This provision was restricted to departures in cases involving crimes against children. As for departures in all other cases, the amendment provided only that the Commission would review downward departures and make appropriate amendments to "substantially reduce" the incidence of downward departures. The amendment also required the Attorney General to report to Congress on all downward departures, a record-keeping task the Department preferred not to undertake. Interestingly, the amendment also required the Attorney General to report to Congress on the policies and procedures the Department had undertaken to ensure that DOJ attorneys adequately challenged inappropriate downward departures and to ensure that DOJ attorneys in the field promptly notify Main Justice of any adverse sentencing decision. In the end, the scaled-down version of the Feeney Amendment overwhelmingly prevailed in Congress and was signed into law by President Bush on April 30, 2003.

Numerous federal judges vocalized strong opposition to the Feeney Amendment once enacted. One judge, John Martin, a former United States Attorney, resigned in public protest. As part of an apparent passive-aggressive protest against the reporting requirements placed on federal judges, Judge Sterling Johnson, Jr., imposed a "blanket seal" on all documents originating in his Eastern District of New York court and forbade Congress from examining them without his approval.⁵⁸ Judge Johnson's colleague in the Eastern District of New York, Senior District Judge Jack B. Weinstein, decided that the *de novo* standard of appellate review necessitated that all sentencing hearings be memorialized by video recordings to assist the appellate courts in "their new onerous task of more closely supervising trial judges in minimizing departures from the Guidelines."⁵⁹

At the appellate level, Judge Guido Calabresi of the Second Circuit Court of Appeals noted the overt politicization of sentencing embedded in the new provisions. His "fundamental objection" to the new system is that "it takes discretion from

57. Ltr. from Jamie E. Brown to Orrin G. Hatch (Apr. 4, 2003), in 15 Fed. Senten. Rep. 355, 356 (2003).

58. Benson B. Weintraub & Benedict P. Kuehne, *The Feeney Frenzy: A Case Study in Actions and Reactions in the Politics of Sentencing*, 16 Fed. Senten. Rep. 114, 115 (2003).

59. Memo. from J. Jack B. Weinstein (Jan. 30, 2004), in 16 Fed. Senten. Rep. 282, 282 (2004).

independent courts and gives it to dependent prosecutors, who then have to answer to the attorney general and other political figures.”⁶⁰

Attorney General Ashcroft swung into action following the passage of the Feeney Amendment. His first response was to get into compliance with the mandates of the new law, but he would soon go much farther than that. He issued internal memoranda listing new directives to be followed by DOJ attorneys at Main Justice and all Assistant U.S. Attorneys nationwide.

The Feeney Amendment required DOJ to adopt procedures to ensure that DOJ attorneys (1) oppose unsupported downward departures, (2) notify the Washington component of the DOJ about any such “adverse sentencing decisions,” and (3) “ensure the vigorous pursuit of appropriate and meritorious appeals.”⁶¹ In a memorandum of July 28, 2003, he required DOJ attorneys to oppose and appeal unsupported downward departure decisions and to report adverse sentencing decisions to Main Justice.⁶² These requirements simply put into effect the requirements set forth in the Feeney Amendment. In addition, Attorney General Ashcroft also required that federal prosecutors must disclose to the judge all “readily provable facts” that are relevant to sentencing and that prosecutors refrain from “fact bargains.” Fact bargaining is a phenomenon that arose with the adoption of tough, mandatory minimum penalties and mandatory sentencing guidelines. In order to obtain guilty pleas, prosecutors had been known to neglect to mention certain incriminating facts to the judge and the Probation Officer (who calculates the Guidelines for the court) so as to keep the Guidelines calculations lower than they otherwise would be. The Guidelines prohibited such suppression of relevant facts as part of a plea bargain, but the practice apparently existed nonetheless. This memorandum was therefore an attempt to enforce compliance with the Guidelines.

A few months later, the Attorney General issued new directives that, again, went much farther than what Congress had required in the Feeney Amendment. In a memorandum that would be known as the “Ashcroft Memorandum,” dated September 22, 2003, the Attorney General mandated that federal prosecutors treat all cases as harshly as possible.⁶³ The memorandum attempted to remove the vast majority of the discretion that federal prosecutors may have once exercised in making charging and plea bargaining decisions. The new directives from Main Justice to line attorneys in the U.S. Attorneys offices caused great consternation both within and beyond DOJ walls. The lion’s share of federal criminal prosecutions are brought by the 94 U.S. Attorney’s Offices, not Main Justice, and this memorandum could cabin prosecutorial discretion only to the extent that it could be enforced.

The memorandum set forth a “[g]eneral [d]uty to [c]harge and [p]ursue the [m]ost

60. Alan Vinegrad, *The New Federal Sentencing Guidelines: The Sentencing Commission’s Response to the Feeney Amendment*, 16 Fed. Senten. Rep. 98, 98 (2003) (quoting Judge Calabresi).

61. Prosecutorial Remedies and Tools against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 674 (2003).

62. Memo. from Atty. Gen. John Ashcroft Setting Forth Justice Department’s Sentencing Policies (July 28, 2003), in 15 Fed. Senten. Rep. 375, 376 (2003).

63. Memo. from Atty. Gen. John Ashcroft Setting Forth Justice Department’s Charging and Plea Policies (Sept. 22, 2003), in 16 Fed. Senten. Rep. 129 (2003). This memorandum, which formally superseded the Reno Memorandum, repeated that prosecutors must charge and pursue the most serious readily provable offense, and limited the circumstances under which local USAOs could deviate from this rule without Main Justice approval.

[s]erious, [r]eadily [p]rovable [o]ffense in [a]ll [f]ederal [p]rosecutions.”⁶⁴ The new policy defined “serious offense” as that which would generate the most substantial sentence under the Guidelines, so the policy was clearly part of the effort to maximize sentencing harshness for all offenses. Of course, there is some wiggle room as to which offenses are “readily provable” as this is a judgment call based upon the prosecutor’s view of the facts. The Ashcroft Memorandum also addressed another way in which prosecutors could participate in reducing sentences below that which the Guidelines require for the type of offense committed: charge bargaining. Unlike “fact bargaining,” which involves overlooking aggravating facts so as to keep the Guidelines sentence lower, “charge bargaining” refers to the negotiation surrounding declining or dismissing more serious charges as part of a plea bargain. The Ashcroft Memorandum prohibited charge bargaining if it lowered the overall sentence. It did include a small list of exceptions to the duty to charge the most serious offense—fast-track programs, substantial assistance, caseload issues, and other exceptional circumstances. Overall, however, the policy was clear: Federal prosecutors were now ostensibly bound by Main Justice policy to charge and pursue the most serious offenses that they could “readily” prove. U.S. Attorney’s Offices followed this policy to varying degrees, depending upon the political clout of particular U.S. Attorneys and the backbone and experience of individual Assistants.

The abrupt abolition, at least on paper, of prosecutorial charging discretion left nearly everyone stunned, including many federal prosecutors. Former Attorney General Janet Reno disagreed with the new policy, saying, ““To see that justice is done, there has got to be the ability to focus on what’s the right thing to do in a particular case, and the right thing to do may not be the ultimate charge.””⁶⁵ The view that prosecutors should exercise fairly broad discretion in charging so as to “do justice” had been firmly established in the traditions of our legal system. It was so central to the essence of what it means to be a prosecutor that the Ashcroft Memorandum arguably represented nothing less than a fundamental shift of the federal prosecutorial role in general and the relationship between Main Justice and the 94 branch offices in particular.

At the same time, the Commission had begun to fulfill its new obligations under the Feeney Amendment. It eliminated certain grounds for downward departures altogether and limited certain others. Departures that had sought to provide additional reductions of sentence based on things such as “extraordinary” acceptance of responsibility or a “super-minimal” role in the offense were abolished. The possibility of departing downward based on an offender’s extraordinary community ties was eliminated, among other abolished grounds. Other common departure grounds such as diminished capacity, aberrant behavior, and family ties and responsibilities, were scaled back.

By the end of 2003, DOJ—with Congress’s help—had managed to transfer a great deal of sentencing authority from the district court judges to prosecutors (or at least to

64. *Id.* at 130.

65. See Amie N. Ely, Student Author, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum’s Curtailment of the Prosecutor’s Duty to “Seek Justice”*, 90 *Cornell L. Rev.* 237, 240 (2004) (footnote omitted).

Main Justice) by virtue of the Feeney Amendment. Since the judges could no longer exercise their downward departure powers as freely, the Justice Department would be in a position to determine the sentence to be imposed by means of the charges selected. This preference for prosecutorial control of the disposition of criminal cases is not unique to the Bush Administration's Justice Department. The Clinton Administration's decision to challenge the downward departures in the *Koon* case and argue in favor of de novo review of departures underscores this fact. Attorneys General appointed by both Democratic and Republican Presidents wanted their prosecutors to have the greatest ability possible in challenging downward departures with which they disagreed. What sets the Bush Administration's DOJ apart, however, was the Ashcroft Memorandum's policy of eliminating the line-prosecutor's powers to reduce sentences, when appropriate, without Main Justice prior approval. It was this policy that demonstrates that the Department's aim was not simply prosecutorial control over sentencing but enhancing headquarters' control over the 94 U.S. Attorney's Offices and maximizing harshness of punishment across the board.

This desire for punitive sanctions in all cases, controlled by prosecutorial charging decisions, is further demonstrated by the Department's reaction to the U.S. Sentencing Commission's proposed changes to the Federal Guidelines between 1987 and 2008. To date, over 700 amendments to the Guidelines have been promulgated. By our count, 262 of these were substantive amendments, while the others were technical, correcting, and conforming. The overwhelming majority of these substantive amendments increased an offense level, changed a definition in the Guidelines Manual to one more favorable to the government, added a new enhancement, resolved a circuit split in favor of the Department's interpretation of the Guidelines, or added a base offense level to a new crime.⁶⁶ We could find only one instance where the Department suggested a substantive change that favored a defendant—when Attorney General Janet Reno, with the support of President Clinton, unsuccessfully advocated reducing the crack:powder disparity in sentencing for cocaine trafficking down from 100:1 to 5:1.⁶⁷

II. THE SUPREME COURT STRIKES BACK

At the same time that the institutional struggle over sentencing power was being fought, the Supreme Court was creating additional havoc in the sentencing world in a series of constitutional decisions relating to the intersection between the Sixth Amendment right to a jury trial and criminal penalties. While the first case in this series, *Apprendi v. New Jersey*,⁶⁸ concerned a state hate-crime statute, those involved knew that a holding in favor of the defendant might be viewed as a mandate on the constitutionality of the Federal Sentencing Guidelines. This initial decision announced a new constitutional limit on the power of a legislature—whether federal or state—to require *judges*, rather than *juries*, to find facts triggering an increase in sentences beyond what is

66. Susan R. Klein & Sandra Guerra Thompson, *Sentencing Commission and Department Response Study, 1987–2008* (unpublished ms.) (copy on file with authors).

67. Ltr. from U.S. Atty. Gen. Janet Reno and Dir. of the Off. of Natl. Drug Control Policy Barry R. McCaffrey to Pres. William Jefferson Clinton (July 3, 1997), in 10 Fed. Senten. Rep. 192 (1998).

68. 530 U.S. 466 (2000).

otherwise specified for the crime. Just a few years later, the Court announced that guidelines sentencing as it was practiced in the federal system denied individuals this same jury right, and that the remedy was a return to having *judges* decide sentence lengths under the now advisory guidelines.⁶⁹

The fact that the Court framed these cases in the context of jury findings—when in fact there was to be no additional jury findings in the future of federal courts—was confusing. What was *really* going on “behind the scenes” during the Supreme Court’s secret deliberations, or for that matter in the minds of the individual justices, remains confidential. In our view, however, the individual justices most likely agreed to overhaul federal sentencing at least in part because of the power struggles with Congress we described above. This new sentencing jurisprudence came crashing down on the DOJ and Congress’s campaign to force federal judges to impose the harshest sentences mandated by the Guidelines. Ultimately, the Court would undo much of the “handcuffing” of the federal judiciary accomplished by the Sentencing Reform Act and the Feeney Amendment.

These decisions during the 2000–2004 Terms were particularly surprising in light of the Court’s earlier rulings on the Federal Guidelines. In every case directly challenging their constitutionality (though none specifically concerned the Sixth Amendment’s right to a jury trial), the Court upheld the Federal Sentencing Guidelines from attack. In *Mistretta v. United States*,⁷⁰ the Court upheld the Sentencing Reform Act against a claim that it violated separation of powers via the nondelegation doctrine. In *United States v. Dunnigan*,⁷¹ the Court upheld the guideline perjury enhancement against a challenge that it violated a defendant’s Sixth Amendment right to testify in her own behalf. In *Witte v. United States*⁷² and *United States v. Watts*,⁷³ the Court upheld the Guidelines against claims that double jeopardy prohibited judicial findings that increase a sentence based upon uncharged and acquitted conduct, and in *Edwards v. United States*,⁷⁴ the Court upheld the practice of judicial findings regarding the type and quantity of drugs required to enhance a sentence against a Due Process challenge.

The Supreme Court’s decision in *Apprendi v. New Jersey*⁷⁵ would be the first in a series of decisions that would rock the sentencing world. The case did not involve a guidelines system or mandatory sentencing, though that issue was front and center at oral argument and in the majority and dissenting opinions. The case concerned the constitutionality of one of the laws that had become known as “sentence enhancements.” Under these types of provisions, the judge determined at sentencing, using a preponderance of the evidence standard of proof, whether the defendant had committed the crime in the manner that triggered the enhancement. In *Apprendi*, the enhancement concerned whether the defendant committed his weapon offense with “racial animus” against an African-American victim. Such a finding doubled the maximum penalty for

69. *U.S. v. Booker*, 543 U.S. 220 (2005).

70. 488 U.S. 361 (1989).

71. 507 U.S. 87 (1993).

72. 515 U.S. 389 (1995).

73. 519 U.S. 148 (1997).

74. 523 U.S. 511 (1998).

75. 530 U.S. 466.

the crime of conviction (from 10 to 20 years imprisonment), and Mr. Apprendi was sentenced to 12 years.

The Court held that the sentence enhancement in *Apprendi* violated the defendant's constitutional rights in that it increased the penalty for the crime of conviction beyond the prescribed statutory maximum for that offense without giving the defendant the right to have the decision made by a jury and proved beyond a reasonable doubt.⁷⁶ The effects of *Apprendi* were immediate and far-reaching. In one fell swoop, *Apprendi* had the effect of invalidating numerous sentencing enhancements and other similar sentencing provisions, causing a flood of petitions to be filed by inmates seeking to overturn their sentences.⁷⁷ Though speculation was rampant as to whether Justice O'Connor was correct in her prediction that this opinion would also sound the "death knell" for the Federal Sentencing Guidelines,⁷⁸ most experts concluded that the Court was unlikely to invalidate guidelines systems like that in the federal system and similar ones in about a dozen states.⁷⁹

Justice Steven Breyer, who served as one of the original members of the United States Sentencing Commission that devised the Guidelines, dissented. He shared Justice O'Connor's fear that the *Apprendi* decision would create "serious concerns about the constitutionality" of guidelines systems and could threaten the continued existence of systems designed to promote uniformity. His preference for preserving as much of the guidelines system as possible would become even more apparent in future cases.

The distinction between the *Apprendi* case and federal guidelines sentencing is that in *Apprendi* the statutory maximum punishment was increased by the enhancement, whereas an increase above a calculated Federal Sentencing Guidelines range does not explicitly affect the statutory maximum for the offense. The Federal Guidelines range requires a judge to sentence all similar bank robbers to a sentence within a narrow range, say 10–12 years, even though the maximum punishment allowed by the statute criminalizing bank robbery provides for a much higher possible ceiling, say 20 years. Going above the presumptive guidelines range to take into account certain aggravating facts does not technically increase the statutory maximum provided in the substantive criminal statute. Thus, despite the fears expressed by Justices O'Connor and Breyer that the *Apprendi* rule would invalidate guidelines systems, most experts believed the Court would draw a distinction between the maximum statutory punishment, and the maximum limit of a guideline range. As it turns out, the dissenting justices were right, and the experts were wrong.

The battle over the constitutionality of the Federal Sentencing Reform Act began in earnest in *Blakely v. Washington*,⁸⁰ a case in which the Court sent shock waves

76. *Id.* at 496–97.

77. Nancy J. King & Susan R. Klein, *Après Apprendi*, 12 Fed. Senten. Rep. 331 (2000) [hereinafter King & Klein, *Après Apprendi*]; Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, apps. B–C (2001) [hereinafter King & Klein, *Essential Elements*] (providing appendices of state and federal statutes containing enhancements that must go to the jury after *Apprendi*, such as drug quantity, serious bodily injury, and amount of fraud/theft loss).

78. *Apprendi*, 530 U.S. 466 (O'Connor, J., dissenting).

79. See King & Klein, *Essential Elements*, *supra* n. 77, at 1485.

80. 542 U.S. 296 (2004).

through the federal criminal justice system (and through those state criminal justice systems with similar mandatory sentencing guidelines). The issue in *Blakely* was whether the state trial judge's act of imposing a 90-month sentence—37 months above the 53-month sentence dictated by the Washington's Sentencing Reform Act—violated Blakely's constitutional right to a jury trial on facts leading to the increase in the sentence.

The petitioner, Ralph Howard Blakely, Jr., kidnapped his estranged wife, Yolanda, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. All the while, he begged her to dismiss the divorce suit and related trust proceedings. When the couple's 13-year-old son, Ralphy, returned home from school, Blakely ordered him to follow in another car, threatening Yolanda with a shotgun if he did not obey. Ralphy managed escape and sought help when they stopped at a gas station, but Blakely continued on with Yolanda to a friend's house in Montana. He was arrested after the friend called the police.

Blakely pled guilty to the charges of second-degree kidnapping involving domestic violence and use of a firearm. The guidelines established in the Washington Sentencing Reform Act made him eligible for a presumptive sentence of anywhere from 49 to 53 months for the crimes of conviction, and the State prosecutor had recommended a sentence within the range. After hearing Yolanda's description of the kidnapping, the judge disregarded the prosecutor's recommendation and imposed an "exceptional sentence" of 90 months on the ground that Blakely had acted with "deliberate cruelty." Like the Federal Guidelines, upon a finding of certain aggravating facts, the sentencing guidelines statute allowed the judge to increase the sentence above the presumptive sentencing range. The operative question was whether the Supreme Court would find that Blakely was entitled to have a jury decide those aggravating facts beyond a reasonable doubt.

The Justice Department had kept a keen eye on *Blakely*, even though it was not a federal case. The constitutional principles announced there would likely apply equally to the Federal Sentencing Guidelines as to all those state criminal systems around the country with mandatory sentencing guidelines. DOJ filed an amicus brief echoing the same arguments already made by the State of Washington.⁸¹ Both briefs argued that the holding of *Apprendi* did not apply, and that if such a rule were applied to a guideline sentencing decision it would render unworkable valuable sentencing reform efforts. Both Washington State and the DOJ were clearly convinced that the Court could potentially abolish guidelines sentencing altogether by declaring much of the framework unconstitutional.

The *Blakely* case provided the Supreme Court the opportunity to limit the *Apprendi* ruling to cases in which judges increased sentence beyond the *statutory* maximum stated in the substantive criminal statute. In this case, the kidnapping statute of which Blakely was convicted allowed for a statutory maximum of 10 years. The judge imposed a sentence of 90 months, or 7½ years, well within the statutory maximum. But on June 24, 2004, Justice Scalia, writing for the same five justice majority that comprised the

81. Br. for the U.S. as Amicus Curiae Supporting Resp., *Blakely*, 542 U.S. 296.

Apprendi majority, dropped a bomb on the state and federal sentencing landscape by choosing not to define “statutory maximum” in this way. “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”⁸² The additional facts here showing “deliberate cruelty” were presented through Yolanda’s testimony at the sentencing hearing—and not by a jury trial or through the defendant’s admissions in pleading guilty. Thus, the Court declared that Blakely was deprived of his Sixth Amendment right to a jury trial by a beyond a reasonable doubt standard of proof on these important facts.

Perhaps as alarming as the actual Sixth Amendment holding was the absence of any discussion regarding the remedy. *Blakely* simply struck down the guidelines system but did not indicate whether any modifications to the system could save those guidelines from total demise. Lawyers and judges in Washington State and the dozen or so other states with similar laws—not to mention the federal system—were left to scramble to figure out how to respond. The Court did not give even a hint as to whether the Federal Guidelines would meet the same fate as the ones in Washington State.

Justice Sandra Day O’Connor, along with three of her brethren, protested the decision, calling it a “number 10 earthquake.”⁸³ It is hard to overstate the level of chaos that broke out in the federal criminal system in the wake of *Blakely*. Judges were called upon to decide whether the constitutional rule announced in *Blakely* even applied to the Federal Guidelines, and if so, what that meant for how individuals should be tried and sentenced. Defense attorneys struggled to figure out how best to protect the interests of their clients whose cases were pending, and they scrambled to file briefs seeking to overturn the sentences of clients whose cases had already resulted in sentences imposed by judges. Federal prosecutors scratched their heads trying to figure out whether they should include aggravating circumstances set out in the Guidelines in their indictments, and what sort of procedure they should propose for sentencing.

By July 2, 2004, only a week after *Blakely* had been decided, DOJ had issued a memorandum to their prosecutors first announcing the Department’s position that the holding does not apply to the Federal Sentencing Guidelines but then offering a complicated set of instructions in the event that it does. Prosecutors were instructed to charge aggravating factors from the Federal Sentencing Guidelines in their indictments, to obtain superseding indictments for all cases that had not yet resulted in a guilty plea or a trial, to file briefs with the district judge suggesting that the court need not submit these new aggravating facts to the jury but rather continue to find facts at sentencing hearings, to “immediately seek to obtain plea agreements that contain waivers of all rights under *Blakely*,” to direct probation officers to continue to prepare presentence reports that calculate Guidelines sentences, to request that district judges state alternative *Blakely* and non-*Blakely* sentences on the record, and, finally, to collect data on all sentences altered as a result of *Blakely*. Courts were wildly split on what approach they should take in

82. *Blakely*, 542 U.S. at 303–04.

83. See Thompson, *supra* n. 2, at 269 (citing Charles Lane, *Supreme Court to Consider Federal Sentencing Guidelines*, Wash. Post A10 (Oct. 3, 2004) (quoting Justice Sandra Day O’Connor’s comment on the *Blakely* case made at the Ninth Circuit’s annual conference in July 2004).

sentencing. The utter confusion brought the entire federal criminal system to a screeching halt when most defense attorneys decided the best course was to request delays in their cases until the whole mess was resolved.

As the volume of pending cases quickly mounted, the federal courts frantically sought answers. So desperate was the need for resolution that on July 14, 2004, the Second Circuit Court of Appeals issued a unanimous plea to the Supreme Court strongly urging the Supreme Court to decide immediately whether the Federal Guidelines were unconstitutional.⁸⁴ All thirteen of the active judges within the Circuit added their names to this odd public demand for answers. “We are convinced that a prompt and authoritative answer to our inquiry is needed to avoid a major disruption in the administration of criminal justice in the federal courts—a disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements.”⁸⁵ For the Circuit to take the highly unusual approach of “certifying” questions for the Supreme Court and making an impassioned plea for a quick decision shows just how dysfunctional the federal courts had become following *Blakely*’s blockbuster ruling. It was the judicial equivalent of having a group of judges jump up and down yelling “Help!” at the Supreme Court! The Supreme Court, for the moment, ignored the jumping judges.

The State of Washington asked the Supreme Court to reconsider *Blakely*. It argued that *Blakely* had “produced greater disruption, and more adverse consequences for defendants, than the majority had anticipated.” In addition to the disruption in the federal system, Washington State noted that these issues were also of great importance to “over a third of the States” that had adopted guideline systems.⁸⁶ The Supreme Court ignored the request.

For the next six months, the Supreme Court allowed federal district courts to linger in their paralysis and the Circuits to maintain their splits. Proposing “fixes” for the system, speculation about what the Supreme would do, and the close reading of tea leaves became common pastimes. Most observers agreed that there were no principled reasons to distinguish the Washington State and federal systems.⁸⁷ They were much more alike than they were different. Many also wondered whether the judiciary’s ire toward Congress over the Feeney Amendment might motivate the Supreme Court to declare the Federal Guidelines unconstitutional without suggesting a “fix,” like they did the Washington State guidelines. By striking the system down without offering possible solutions to remedy the problems, the Court would further wreak havoc nationwide, leaving it to Congress to clean up the mess. Such a move might have ended the 20-year social experiment that the adoption of mandatory federal guidelines represented and

84. Chief Judge John M. Walker wrote the opinion “certifying” three questions on the application of *Blakely* to the federal guidelines that the judges wanted the Supreme Court to decide. *U.S. v. Penaranda*, 375 F.3d 238, 239–40, 247–48 (2d Cir. 2004) (certifying questions and seeking expedited review pertaining to the constitutionality of the Guidelines in order to minimize the impending crisis in federal courts’ administration in light of thousands of cases to be decided in coming months).

85. *Id.* at 246.

86. Pet. for Rehearing on Behalf of the St. of Wash. at 10, *Blakely*, 542 U.S. 296.

87. Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Senten. Rep. 316, 317 (2004) (arguing that the DOJ’s distinction between the Federal Sentencing Guidelines and the Washington state system was untenable, and predicting that the Court would be unlikely to accept it).

caused us to revert back to completely discretionary sentencing.

Instead, in *United States v. Booker*, the Supreme Court essentially split the baby. In the first part of the decision, one group of five justices concluded that the Guidelines were unconstitutional for the same reasons that it gave in the *Blakely* case. However, unlike the *Blakely* case, this time the Court also included a critical second half. In this section of the decision, a different group of five justices (with the exception of Justice Ginsburg who was in the majority in the first part as well) found a way to save the Guidelines from demise.

DOJ initially filed a brief in the *Booker* case arguing that the differences between the Washington State guidelines and the Federal Guidelines justified applying a different rule.⁸⁸ However, the Department's lawyers recognized that this argument was not likely to win the day, and oral argument in the case was half-hearted.⁸⁹ Interestingly, DOJ seemed to think it was likely that the Court would graft jury trial rights on the existing system, requiring that juries decide all the facts contained in the federal sentencing manual that triggered a higher sentence. This is how the state of Kansas and the federal government had responded to the elements rule after *Apprendi*. Judges in Kansas asked juries to decide whether defendants had committed a particular crime out of racial animus, for example.⁹⁰ Juries in federal trials were asked to make factual findings regarding type and quantity of drugs when such facts triggered an enhanced penalty under the drug trafficking statutes.⁹¹

However, DOJ further argued (quite rightly) that to incorporate jury trial rights into the Federal Guidelines system would be inconsistent with the legislative design of the Guidelines, so the Court should avoid such an outcome. Congress very clearly relegated sentencing fact-finding decisions to the court alone. The Commission filed a brief as amicus curiae that did little more than to agree with the government and encourage the Court to preserve the role of the Commission by preserving the Guidelines.

Booker's defense attorneys argued that there was no principled distinction between the Washington State guidelines and the Federal Guidelines. One might have thought that they would argue that the Court should strike down the Guidelines as a whole, which might then lead to the return to totally discretionary sentencing as it existed prior to the adoption of the Guidelines in 1987. One can imagine that the defense might have preferred such an outcome to one that maintained the structured Guidelines mostly intact. Yet, the defense in fact argued that the Court could "sever" the parts of the statute that authorized the Guidelines but improperly failed to include a jury trial right. The defense attorneys favored a decision requiring that sentencing issues be added to jury trials but that otherwise kept the Guidelines intact.

Some members of Congress had their say as well. Submitting their own amicus briefs, the original sponsors of the legislation that led to the adoption of the Guidelines,

88. Reply Br. for the U.S., *Booker*, 543 U.S. 220.

89. Michael Dreeben, a talented attorney now Deputy Solicitor General, appeared uncomfortable.

90. See *State v. Gould*, 23 P.3d 801 (Kan. 2001) (state judicial response to *Apprendi* was to send aggravating facts to the jury; this was then confirmed by the legislature in 2004).

91. See King & Klein, *Après Apprendi*, *supra* n. 77.

Senators Hatch and Kennedy, along with other Senators, asked the Court to keep in mind all the bipartisan work and compromise that went into creating the Guidelines. Clearly, there was great anxiety among the members of the Senate Judiciary Committee that their handiwork would be abolished.

The group that may have exerted the most influence, perhaps not surprisingly, seems to have been “an ad hoc group of former federal judges in support of neither party.” The lead author of the brief submitted on behalf of a total of 19 judges was none other than John Martin, Jr., the same judge who resigned in protest over the Feeney Amendment. The judges wanted a return to the good old days before the dreaded Feeney Amendment. They liked the idea of the Guidelines as true “guidelines,” rather than as mandatory rules such as they were originally designed. They also longed for the days when they could go above or below the Guidelines sentencing range without much fear of reversal by the appellate courts. In other words, they sought a return to the standard of appellate review that the Court had adopted in the *Koon* case, and which the Feeney Amendment had replaced with a standard that showed the sentencing judge virtually no deference. Along the same lines, the public interest group called “Families against Mandatory Minimums” also weighed in with an amicus brief favoring “non-binding” guidelines.

DOJ recognized that the winds might be turning in the direction of advisory guidelines, although there was still a profound fear that the entire sentencing guidelines structure would be jettisoned. In its reply brief, submitted in response to the plethora of views expressed in the other briefs submitted, DOJ asked the Court not to incorporate juries into any part of the guidelines system and not to do away with the system as a whole.⁹² Instead, the DOJ preferred to make the Guidelines advisory, but for only a limited class of cases—those in which an enhancement would raise the sentence beyond the otherwise presumptive guidelines range. DOJ saw no need for making all guidelines sentencing advisory. Since there is only a jury trial right in those cases in which a judge chooses to go above the Guidelines range, the remedy of making the Guidelines purely advisory need only apply to those cases.

On January 12, 2005, the DOJ lost a major battle in its campaign to reign in the “lenient” federal judiciary. The Supreme Court’s decision in *United States v. Booker* brought to a halt the drive to shift the power to punish away from the judiciary and put it in the hands of federal prosecutors at Main Justice. One scholar described the opinion as a “two-headed monster and a conceptual monstrosity.”⁹³ It is as if the Court decided to play softball and divided itself into two teams of four, reserving Justice Ginsburg as a utility player for both teams. Each team then got to decide one-half of the case. Team A, led by Justice Stevens, authored the first “merits” part of the “opinion of the Court” concluding that the Guidelines were unconstitutional as written. Juries, not judges, should decide aggravating factors. Team B, with Justice Breyer serving as captain, authored the second “remedial” part in which the other “majority” saved the Guidelines from demise by severing the problematic parts and by making the *whole system*

92. See Br. for the U.S., *supra* n. 81.

93. Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L.J. 387, 387 (2006).

“advisory.” Judges, not juries, decide aggravating facts. The members of each team then also filed dissenting opinions to the other team’s part of the “opinion of the Court.”⁹⁴

The *Booker* remedial opinion was a coalition formed to strike down the Feeney Amendment to the PROTECT Act rather than to provide a coherent Sixth Amendment theory. Since Justice Breyer was one of the original members of the Commission during the time when the Commission was first charged with drafting the Guidelines, it makes sense that he would be keenly concerned with preserving them. His dissenting opinion in the *Blakely* case from the previous Term certainly gave every indication he would not agree to discard the Guidelines. In fact, *Booker* was Justice Breyer’s fifth attempt to make the Guidelines advisory (other attempts included his proposal for advisory guidelines in the initial draft of the Guidelines that he wrote as chief counsel to the Senate Judiciary Committee in the late 1970s, his recommendation when, as a First Circuit judge, he sat on the Sentencing Commission, and his signing on to the *Koon* decision in 1996).⁹⁵

Justices O’Connor and Kennedy joined the remedial opinion. Justice O’Connor had teamed up with Justice Breyer in *Blakely* for many of the same reasons. Her position was probably informed by her prior experience as a state legislator and her concern that legislatures, both state and federal, should be shown deference by the Supreme Court. Justice Kennedy was certainly influenced by his intense disapproval of the shift from judicial to prosecutorial discretion at sentencing. He had taken the unusual approach of delivering a public address in which he was very candid about his disapproval of mandatory minimum sentences.⁹⁶ Much of the criticism he makes about mandatory minimums applies with equal force to the issue of whether the Guidelines should be maintained in their mandatory form, especially in the post-Feeney Amendment world in which judges no longer had much discretion in sentencing.

Chief Justice Rehnquist also joined the team that transformed the Guidelines into an advisory system. He approached the issues in *Booker* from a different perspective than those of the other justices. As Chief Justice, he was outspoken in support of federal judges. He frequently gave public addresses on issues such as providing adequate security for federal judges and increasing their salaries, and he also often gave lectures

94. *Booker*, 543 U.S. 220. The majority merits opinion was written by Justice Stevens, joined by Justices Ginsburg, Thomas, Scalia, and Souter. The majority remedial opinion was written by Justice Breyer and joined by Justices Ginsburg, O’Connor, Kennedy, and Chief Justice Rehnquist.

95. Klein, *supra* n. 2, at 695, 717–19 (providing details of the five times Justice Breyer attempted to ensure that the Federal Sentencing Guidelines were advisory).

96.

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. *Most of the sentencing discretion should be with the judge, not the prosecutors.*

Anthony M. Kennedy, Speech, *The American Bar Association Annual Meeting* (Aug. 9, 2003), in 16 Fed. Senten. Rep. 126, 127 (2003) (emphasis added).

on the role that former justices had played in America's history. On May 5, 2003, Chief Justice Rehnquist gave a speech at the Board of Directors Meeting of the Federal Judges Association, where he addressed the Feeney Amendment. Interestingly, he believed that it was part of Congress's legitimate function to reduce the frequency of downward departures. He also had no problem with Congress's desire to collect sentencing information. What troubled the Chief Justice about the new law was the collection of sentencing information on an individualized judge-by-judge basis, what some had called the "black-listing" of federal judges who departed downward. These developments threatened judicial independence by putting judges in fear of possible removal, or at least embarrassment, if Congress disapproved of their sentencing decisions. He saw this aspect of the Feeney Amendment as posing a threat of "an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."⁹⁷ Given his steadfast protectiveness of the role of federal judges for whom he felt responsible as Chief Justice, it is not surprising that he would vote with the team that transformed the Guidelines into an advisory system. In so doing, he ensured that federal judges would regain their power to punish offenders as they see fit without fear of being targeted by Congress for their decisions.

Main Justice was rattled. It first attempted to recreate the pre-*Booker* system through charging and pleading rules. In a memorandum distributed the same day that *Booker* was rendered, the DOJ instructed prosecutors to argue in all cases that the district judge should impose a sentence consistent with the Guidelines, as it "reflects the distilled wisdom of the Sentencing Commission" and thus yields a reasonable sentence.⁹⁸ Another Main Justice DOJ memorandum from Main Justice to all federal prosecutors attempted to reign in perceived leniency by Assistants in some districts. The memorandum reminded federal prosecutors to continue to charge and demand a plea to the most serious readily provable offenses, as defined by the Ashcroft Memorandum. It demanded that federal prosecutors "actively seek sentences within the range established by the Sentencing Guidelines," obtain supervisory authorization before stipulating to a sentence outside the Guidelines or refraining from objecting to such a sentence, and make a record in the district court of the government's opposition to all sentences below the Guidelines range.⁹⁹

When that did not produce satisfactory results, and compliance with the Guidelines overall appeared to be decreasing and stories of widely variant sentences, especially between districts, started growing, the Department turned to a statutory remedy. Less than a month after the *Booker* decision, Alberto Gonzales assumed the role of Attorney General. He soon got up-to-speed on the whole sentencing controversy and gave a

97. William H. Rehnquist, Speech, *Remarks of the Chief Justice* (Fed. JJ. Assn. Bd. of Dirs. Meeting, May 5, 2003), at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html (last updated Feb. 8, 2005).

98. Memo. from Mary Beth Buchanan, Dir., Exec. Off. U.S. Attys., to all United States Attorneys, all First Assistant and United States Attorneys, all Criminal Chiefs, all Civil Chiefs, all Appellate Chiefs, *Initial Guidance in U.S. v. Booker and U.S. v. Fanfan* (Jan. 12, 2005) (copy on file with authors) (quoting Memo. from Patty Merkamp Stemler, Chief App. Sec., U.S. Dept. of Just., to all Federal Prosecutors, *Supreme Court Decision in United States v. Booker and United States v. Fanfan 2* (Jan. 12, 2005) (copy on file with authors).

99. Memo. from Dep. Atty. Gen. James B. Comey to all Federal Prosecutors (Jan. 28, 2005), in 17 Fed. Senten. Rep. 282, 283 (2005).

speech in June of 2005 with the DOJ's new proposal for a *Booker* "fix."¹⁰⁰ Attorney General Gonzales espoused a proposal that was the brainchild of a law professor and former DOJ lawyer, Frank O. Bowman III. Bowman had pointed out that "topless guidelines" would not violate the jury trial right that the Supreme Court had declared in *Apprendi*, *Blakely* and *Booker*.¹⁰¹ The Supreme Court said that a defendant had a right to a jury trial on facts that *increased* the sentence, but it did not say that the same applied to facts that *decreased* the sentence, or imposed a *mandatory minimum* sentence. Thus, Bowman noticed that a system that was mandatory as to the minimum sentences and then advisory as to the maximums would pass the constitutional test. DOJ officials had an "aha!" moment, and the Attorney General and his top deputies began promoting the idea of a topless guidelines system.

Such a fix would not be airtight, as the Court's position on whether the *Apprendi* rule applied to mandatory minimums was quite a close one. In a 1986 case, the Court, in a sharply divided decision, held that a five-year mandatory minimum sentence for the visible possession of a firearm during an aggravated assault could be imposed based solely on the trial judge's factual finding regarding the weapon at a sentencing hearing—the jury need only find the aggravated assault.¹⁰² However, in *Harris v. United States*,¹⁰³ a case decided shortly after *Apprendi* but before *Blakely* and *Booker*, that same reasoning persuaded only four Justices. They held in a plurality opinion that historical practice supported a rule that a fact that increased the mandatory minimum (here the penalty was increased from five to seven years based upon fact that defendant "brandished" rather than "carried" a firearm during his drug trafficking offense), but not the statutory maximum (here life imprisonment), need not be found by a jury using the beyond a reasonable doubt standard.

The four *Harris* dissenters, on the other hand, reasoned that mandatory minimum statutes limit the jury's role in exactly the same fashion as did the increased statutory maximum in *Apprendi*, by imposing mandatory higher penalties based upon facts not even submitted for their consideration. It was Justice Breyer, the architect of the Guidelines, who granted the winning fifth vote to the plurality opinion. Though it is clear from his concurring opinion that he agreed with the reasoning of the *Harris* dissent, he nevertheless voted against extending *Apprendi* to mandatory minimums because he was worried about the "adverse . . . consequences"¹⁰⁴ this would have on the Federal Sentencing Guidelines.

A deliberate Congressional circumvention of the jury's role through a device like topless guidelines just might be enough to result in a future 5-4 opinion in the other direction. However, before the Department's new agenda could gain any momentum in

100. Alberto Gonzalez, Speech, *Federal Sentencing Guidelines* (Nat'l. Ctr. for Victims of Crime, June 21, 2005), in 17 Fed. Senten. Rep. 324 (2005).

101. Memo. from Frank Bowman to the U.S. Senten. Commn. (June 27, 2004), in 16 Fed. Senten. Rep. 364, 367–68 (2004) (noting that Congress could amend the guidelines by raising the ceiling in each of its 258 boxes of the grid to life imprisonment, thus the new statutory maximum would be the maximum penalty provided in the substantive criminal statute, not the much lower maximum provided by each box of the Federal Sentencing Guideline grid).

102. *McMillan v. Pa.*, 477 U.S. 79 (1986) (5-4 decision).

103. 536 U.S. 545 (2002) (4-1-4 decision).

104. *Id.* at 569 (Breyer, J., concurring).

Congress, the 2006 elections swept out a large number of Republicans and installed Democrats who had little interest in promoting mandatory minimums or curbing federal judicial discretion.¹⁰⁵ Indeed, the sentencing momentum seemed to shift in the opposite direction, and the federal courts settled into the advisory guidelines system ushered in by *Booker*. The next highly contested issue was whether the Department could move the Guidelines back toward a semi-mandatory regime by stricter appellate review of the “reasonableness” of particular sentences.

Most of the press accounts of *Booker* focused on the remedial majority’s holding that the Federal Sentencing Guidelines were now advisory. But it was the second part of that opinion, excising the Sentencing Reform Act’s provision requiring appellate review for conformity with the Guidelines in favor of a review of federal criminal sentences for “reasonableness,” that generated an immediate circuit split among the federal Courts of Appeals. The Department attempted to recreate mandatory guidelines, to the extent possible, by obtaining appellate reversals of sentences below the guideline range.¹⁰⁶ The Department was remarkably successful in the year following *Booker*—it convinced seven of the 11 circuits that had addressed the issue to presume that within-Guidelines sentences were reasonable,¹⁰⁷ persuaded nine of the 11 circuits that had addressed the issue to require district judges to provide “extraordinary” justifications for outside-Guidelines sentences,¹⁰⁸ and convinced seven of the nine circuits that had addressed the issue to automatically reverse deviations based on district judges’ policy disagreements with the Guidelines.¹⁰⁹ Fifteen of the 21 below-guideline sentences imposed shortly after *Booker* were reversed as unreasonable and remanded for resentencing while only two of the 16 above-guideline cases were successfully reversed. Moreover, of the scores of within-guideline sentences imposed during that time-period, only one sentence was reversed as unreasonable.¹¹⁰

However, the Department’s win with the appellate courts was not replicated before the Supreme Court. In *Rita v. United States*,¹¹¹ the first post-*Booker* case from the October 2006 Term, the Court affirmed an *appellate* presumption that within-Guideline sentences are reasonable, though it noted that appellate courts need not apply such a presumption, and trial courts may not apply it. More importantly, the Court noted that neither trial nor appellate courts may presume that outside-Guideline sentences are *unreasonable*. The trial judge had sentenced Mr. Rita, a former military man, to 33

105. Congress rejected a bill implementing Attorney General Gonzales’ proposed transformation of the Federal Sentencing Guidelines into a complex series of mandatory minimum penalties. Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. § 12 (Apr. 6, 2005) (adding new or increased mandatory minimum sentences, eliminating most possible grounds for departures or non-guideline sentences under the factors listed in 18 U.S.C. § 3553(a), and imposing heightened procedural requirements only where the court is considering a sentence below the applicable guideline range).

106. Another method of recreating the Guidelines is through negotiated pleas, which now account for 97 percent of federal felony cases. See *supra* n. 34. While DOJ attempted this following *Blakely*, see the text on pages 121–22, Main Justice was ultimately unsuccessful in imposing its will on the filed offices and the defense bar.

107. See *Rita v. U.S.*, 127 S. Ct. 2456 (2007).

108. See Br. for U.S. at 13 n. 3, *Gall*, 128 S. Ct. 586 (collecting cases).

109. *Kimbrough*, 128 S. Ct. 558, 566 n. 4 (collecting cases).

110. U.S. Senten. Commn., *Report on Impact of United States v. Booker on Federal Sentencing* 30 ex. 2 (Mar. 2006) (available at http://www.ussc.gov/booker_report/Booker_Report.pdf).

111. 551 U.S. 338 (2007).

months in prison (the lowest term in the 33–41 guideline range) for lying to the grand jury about his purchase of a kit to assemble a machine-gun.¹¹² Though it is acceptable for the appellate court to defer to this sentence as presumptively reasonable, the appellate court should be deferential, in the future, where such a judge sentences outside (below or above) the Guidelines range. Below-Guideline sentences cannot be presumed unreasonable on appeal or the Guidelines transform back to mandatory ones that violate the Sixth Amendment.

The Department lost the next two Court battles, and the Court continued to protect federal district court discretion by overturning both appellate reversals and reinstating each district judge's original below-guideline sentence. A substantial majority of the Court held in *Gall v. United States* that appellate courts may not require extraordinary justifications from trial judges for sentences that vary from the Guidelines but must review each sentence (whether within or outside the Guidelines), individually and deferentially for abuse of discretion.¹¹³ The more searching de novo review mandated by Congress in the Feeney Amendment is unconstitutional because it gives the Guidelines too much binding authority. Thus, the Court reinstated the trial court's original sentence of probation rather than the guideline's recommended range of 30–37 months, based upon the trial judge's determination that the defendant's youth, willingness to withdraw from and confess to the drug conspiracy, and post-offense rehabilitation warranted leniency. The message from the Supreme Court to the Courts of Appeal and the Department is clear—that the appellate court might reasonably reach a higher within-guideline sentence does not justify a reversal, and the fact that the sentence is significantly below the Guideline range does not mean that the Department will prevail on appeal.

What if the trial judge imposes a low sentence simply because she believes that the penalties contained in the Guidelines are too harsh? In *Kimbrough v. United States*, the trial judge sentenced the defendant to 180 months (the statutory mandatory minimum for the crack and weapons offenses), rather than the suggested guideline range of 228 to 270 months, because of the “disproportionate and unjust effect that crack cocaine guidelines have in sentencing,”¹¹⁴ particularly in regards to African-American defendants. Pursuant to the Anti-Drug Abuse Act of 1986,¹¹⁵ a drug trafficker dealing in crack cocaine (a form that is smoked) is subject to the same sentence as one dealing in 100 times more powder cocaine (which is snorted). Though crack and powder cocaine have the same physiological and psychotropic effects, the statutes and Guideline's employment of the 100-to-1 ratio yields sentences for crack offenses, committed overwhelmingly by black defendants, three to six times longer than those for offenses involving equal amounts of powder cocaine (an offense committed overwhelmingly by white defendants). Had Mr. Kimbrough possessed powder rather than crack cocaine, his guideline range would have been only 97 to 106 months. The Fourth Circuit vacated his sentence, holding that any sentence outside the Guidelines range is *per se* unreasonable

112. *Id.* at 341–45.

113. 128 S. Ct. at 594–97 (7-2 decision).

114. *Id.* at 565 (quoting Jt. App. at 72, *Kimrough*, 128 S. Ct. 558).

115. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

when based upon a disagreement with the policies inherent in the Guidelines.¹¹⁶

Again, by a wide margin, the Court disagreed with the government and the appellate court and reinstated the original sentence. The Court noted that the Commission had, in a series of reports from 1994–2002, tried to lower the ratio (to 1:1, 5:1, and 20:1) and that Congress had expressly rejected each recommendation or refused to act.¹¹⁷ The Department opposed each attempt by the Commission to ameliorate a ratio that both “overstated the relative harmfulness of crack cocaine and generated unwarranted disparity in sentencing based upon race.”¹¹⁸ The Court, despite this history, reaffirmed that all Guidelines are advisory, and that it is not an abuse of discretion for a trial judge to find that the Guideline sentence for crack cocaine was too high. The Court rejected the Solicitor General’s argument that the 100-to-1 ratio is an exception to the general freedom that sentencing courts have to “vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”¹¹⁹

The Department continued, at least up until the appointment of Attorney General Michael B. Mulkasey, to fight federal judicial discretion at sentencing even after *Gall* and *Kimbrough*. The Department argued in briefs filed in a case from the October 2008 Term that the First, Third, and Eighth Circuits were correct in holding that district judges could not simply replace the Commission’s 100:1 ratio in powder versus crack cocaine sentencing with their own lower ratios but rather could depart below the Guidelines only based upon “an individualized determination that they yield an excessive sentence in a particular case.” On January 21, 2009, the Court in *Spears v. United States*¹²⁰ reinstated the trial judge’s decision to replace the 100-to-1 ratio in all cases with a 20-to-1 ratio, even though the particular defendant presented no special mitigating circumstances. The whole point of *Kimbrough*, the Court scolded the Department in its per curiam opinion, was to recognize district courts’ authority “to reject and vary categorically from the crack-cocaine Guidelines based on a *policy* disagreement with those Guidelines.”¹²¹

III. WHAT ABOUT THE STATES?

While the Supreme Court’s ire with the DOJ and Congress over federal judicial

116. *U.S. v. Kimbrough*, 174 Fed. Appx. 798 (4th Cir. 2006), *cert. granted and rev’d*, *Kimbrough*, 128 S. Ct. 558 (Oct. 2007 Term).

117. The history of these amendments can be found in *Kimbrough*, 128 S. Ct. at 569. In May of 2007, the Commission amended the guidelines by reducing the base offense level for crack cocaine by two levels. See Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558, 28571–72 (May 21, 2007) (base offense level reduction leads to ratio between 25:1 and 80:1). Congress allowed this change to take effect on Nov. 1, 2007. In November and December of 2007, the U.S. Department of Justice testified before the Senate Judiciary Committee in opposition to making that change retroactive.

118. The DOJ’s written and oral opposition to each proposal to equalize the ratio can be found in the U.S. Senten. Commn., *Public Hearing on Retroactivity* (Nov. 13, 2007) (available at http://www.uscc.gov/hearings/11_13_07/Transcript111307.pdf); U.S. Senten. Commn., *Report to the Congress: Cocaine and Federal Sentencing Policy* apps. B, B-2–B-4 (2007); U.S. Senten. Commn., *2002 Public Hearings* (Mar. 19, 2002) (available at <http://www.uscc.gov/hearings/031902.htm>); U.S. Senten. Commn., *Report to the Congress: Cocaine and Federal Sentencing Policy* apps. E, E-2 (2002); U.S. Senten. Commn., *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997); 60 Fed. Reg. 25075–77 (May 10, 1995); U.S. Senten. Commn., *Special Report to the Congress: Cocaine and Federal Sentencing Policy* app. B (Feb. 1995).

119. *Br. for U.S.* at 16, *Kimbrough*, 128 S. Ct. 558.

120. 129 S. Ct. 840. Chief Justice Roberts and Justice Alito dissented from the summary reversal.

121. *Id.* at 844 (emphasis added).

discretion at sentencing was not directed at the states, obviously the Court realized the import of its holding on state criminal justice systems. After all, *Blakely*, the case that set the stage for the Court's application of *Apprendi* to the Federal Sentencing Guidelines in *Booker*, was a state sentencing case. Though there are certainly fascinating and important state stories to tell, the Supreme Court didn't appear nearly as interested in the impact of its two revolutionary sentencing rulings on the states. While we do not here attempt to tell these state stories,¹²² we believe that the Court's lack of express concern in its written opinions in *Blakely* and *Booker* regarding the effect of these holdings on state sentencing systems can be sensibly explained in a number of ways.

First, we note that the majority of states (from a low of 29 up to a high of 31, depending upon how one counts, plus the District of Columbia) were unaffected by the Sixth Amendment decisions in *Blakely* and *Booker* at the time they were rendered because of the construction of their sentencing regimes.¹²³ Seventeen states had no guidelines but rather relied upon essentially unfettered judicial discretion,¹²⁴ as the federal system had prior to the Sentencing Reform Act of 1984. This method of sentencing was overtly blessed by the Court. Seven states and the District of Columbia already had voluntary rather than mandatory sentencing guidelines, which were likewise unaffected by the Court's rulings.¹²⁵ Two states had predicted the outcome of *Blakely* after *Apprendi* and had already started sending sentencing aggravators to the jury.¹²⁶ Finally, five states have jury, rather than judicial, sentencing,¹²⁷ and these jurisdictions were thus unaffected by the new constitutional jury rights requirement.

That left 20 or so states with sentencing systems—either presumptive sentencing or mandatory guidelines—that utilized arguably mandatory judicial factfinding and were therefore plausibly at risk by the *Blakely/Booker* pair.¹²⁸ Why, then, was the Court unmoved by the State of Washington's motion to reconsider *Blakely* in light of the state's correction of the *Blakely* Court's count of "nine States" whose sentencing structures will be effected to the more accurate figure that "is at least *double* that number"?¹²⁹ And why did the Court, after denying rehearing, refuse to grant Washington's request to at least stay the petition and allow it to argue on behalf of itself and as representative of the 17 other states at oral argument *Booker*? We believe it is

122. One place to look is the National Center for State Courts report on all 50 states' sentencing systems. Natl. Ctr. for St. Cts., *State Sentencing Guidelines: Profiles and Continuum* (July 2008) (available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/NCSC%20Sentencing%20Guidelines%20profiles%20July%202008.pdf).

123. Bibas & Klein, *supra* n. 2, at 785, at app. B. Illinois and Kansas should probably be added to this list as both states reacted to *Apprendi* (prior to *Blakely* or *Booker*) by sending facts, which aggravated the penalty at sentencing, to the jury. See *infra* n. 124 and accompanying text. See also Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Implications for State Sentencing Systems*, Vera Inst. of Just. Policy & Prac. Rev. 3-4 (Aug. 2004) (available at http://www.vera.org/publication_pdf/242_456.pdf).

124. Florida, Georgia, Idaho, Iowa, Louisiana, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Carolina, South Dakota, West Virginia, and Wyoming. See Bibas & Klein, *supra* n. 2, at app. B.

125. Alabama, Delaware, Maryland, Pennsylvania, Utah, Virginia, and Wisconsin. See *id.*

126. See *Kan. v. Gould*, 23 P.3d 801; *State v. Swift*, 781 N.E.2d 292 (Ill. 2002).

127. Arkansas, Kentucky, Missouri, Oklahoma, and Texas. See Bibas & Klein, *supra* n. 2, at app. B.

128. *Id.* at app. A, 797-99.

129. Pet. for Rehearing on Behalf of the St. of Wash. at 3, *Blakely*, 542 U.S. 296 (footnote omitted).

because this categorization of states into those states with systems similar to the Federal Sentencing Guidelines and those states dissimilar fails to paint a complete or accurate picture. There were and are no states with criminal justice or sentencing systems quite like the federal one. Even those state with mandatory sentencing guidelines crafted by a commission were as unlike their federal counterpart as night and day.

State criminal justice systems in general (even those states with mandatory guidelines) never suffered from the federal problems of legislatively-mandated draconian sentences¹³⁰ and reforms that shifted discretion from judge to prosecutor.¹³¹ There are many reasons for this. There remains a significant number of jury trials in most state systems (unlike the latest federal statistic of 97 percent of criminal defendants pleading guilty), so the plausible threat of a trial and an acquittal equalize bargaining power a bit between prosecutors and the defense bar. There are few jurisdictions with sentences as harsh as those in the federal system. Most non-federal jurisdiction still have parole boards, which comprise a check on prosecutorial power and the harshness of sentences at the back end.¹³² Most states allow judges to sentence to probation and other non-incarceration alternatives, a practice that was forbidden by the federal Sentencing Commission prior to *Booker* for most offenses.¹³³ In states that have presumptive sentencing or guidelines, the players in the system were initially in favor of the proposals and, after living with the changes, most attorneys supported the reforms as an improvement over the earlier law.¹³⁴ This was quite a different reaction than most federal judges and the federal Public Defenders Offices had after the Sentencing Reform Act and Feeney Amendment were enacted.

130. The Bureau of Justice Statistics for 2004 indicate that the mean sentence length (in months) for felons for all offenses was 37 months in the states and 61 months in the federal justice system. Broken into categories, the mean maximum sentence for sexual assault was 93 months in the states and 112 months in the federal system. For robbery, it was 86 months in the states and 105 months in the federal system. And for drug offenses, it was 31 months in the states versus 84 months in the federal system. Dept. of Just., Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons 2004—Statistical Tables: Table 1.10 Comparison of Felony Convictions in State and Federal Courts, 2004*, available at <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04110tab.htm> (last updated July 25, 2007). We also note that “[b]etween 1982 and 1993, overall federal justice system expenditures increased at twice the rate of comparable state and local expenditures, increasing 317% as compared to 163%. . . . Over a twelve year period, the number of federal prison inmates rose by 177%, as compared to a lower increase in state prison inmates, 134%.” Am. B. Assn. Crim. Just. Sec., Task Force Federalization Crim. L., *The Federalization of Criminal Law* 13–14 (1998) (available at [http://www.criminaljustice.org/public.nsf/legislation/overcriminalization/\\$FILE/fedcrimlaw2.pdf](http://www.criminaljustice.org/public.nsf/legislation/overcriminalization/$FILE/fedcrimlaw2.pdf) (footnotes omitted)).

131. “The steady complaints of inflated prosecutorial power heard in the federal system are nowhere echoed in the commission-guideline states.” Model Penal Code: Sentencing 117 (ALI 2003).

132. 16 states have abolished the release discretion of parole boards. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 66 tbl. 3.1 (Oxford U. Press 2003). There were 708,764 adults on parole in the states as of December 31, 2006. Dept. of Just., *Probation and Parole in the United States, 2006* 5 tbl. 3 (Dec. 2007) (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf>). The Sentencing Reform Act terminated federal parole, so federal offenders serve their full sentence, minus a potential 15 percent good time credit.

133. There were 4,212,532 adults on probation in the states in 2006, compared with 24,491 probationers in the federal system. *Id.* at 3 tbl. 1. This data excludes county probations, for which data was not available. “Only a small proportion of federal offenders are sentenced in Zones A (7.9 percent) and B (6.8 percent) and are eligible for non-prison sentences. U.S. Senten. Commn., *Alternative Sentencing in the Federal Criminal Justice System* 3 (Jan. 2009) (available at http://www.ussc.gov/general/20090206_Alternatives.pdf). Increases in the rates of federal offenders sentenced to prison from fiscal year 1997 to fiscal year 2007 corresponds “to declines in each of the other sentence categories, probation (13.1 percent to 7.7 percent), probation with alternatives (7.1 percent to 3.9 percent), and prison with alternatives (4.4 percent to 3.1 percent).” *Id.* at 5–6 fig. 1.

134. Model Penal Code: Sentencing 115 (ALI prelim. dft. 2003).

Equally important is the difference between the federal government and the states in terms of resource restraints. The federal government has such a tiny percentage of the total number of prisoners (and criminal justice expenditures comprises such a tiny percent of the annual federal budget) that the federal government can afford to keep felons locked up, and to keep them locked up for a long time.¹³⁵ In state and local systems, where 90 percent of the nation's criminal felony cases are charged, state and local governments spend a large percentage of their annual budgets on incarceration¹³⁶ and still cannot build prisons fast enough to keep up with harsh sentences. When jails overcrowd, prisoners are released.¹³⁷ This provides an incentive to keep prison sentences low (or create alternative sanctions), to discourage ceding too much overall authority to the prosecutors.

Local prosecutors' offices don't assume a conviction and move on immediately to pleading and sentencing, as do their federal counterparts. Assistant District Attorneys cannot respond to resource issues in their investigations or to increases in incarceration costs by ignoring or cherry picking cases, as federal prosecutors are wont to do, as the buck stops with them.¹³⁸ If a rape, murder, burglary, or theft occurs in a particular venue, the police and the District Attorney's Office must attempt to find the perpetrator and charge her, even if the case barks as fiercely as the eyewitness in the O.J. Simpson case. A local prosecutor must react to the incident reports brought to her by local police, and must pursue these cases or heads will roll.¹³⁹ Federal prosecutors, on the other hand, can simply ignore most cases (by dismissing them, never investigating them, or handing them off to state prosecutors), except for the minority of the federal criminal docket that concerns exclusively federal matters like immigration and terrorism.¹⁴⁰ Federal prosecutors and their investigative agencies are more frequently proactive, and can select whom and what to charge, and have the luxury to pursue only the winning cases.

135. Spending has stayed relatively constant over time except for terrorism funding, which "increased from approximately \$737 million in Fiscal Year (FY) 2001 to approximately \$3.6 billion in FY 2006, an increase of almost 400 percent." Off. of the Inspector Gen., *The Department of Justice's Internal Controls over Terrorism Reporting*, <http://usdoj.gov/oig/reports/plus/a0720/index.htm> (Feb. 2007). In 2008, law enforcement activity accounted for 1.5 percent of the annual budget. Public Budget Database, White House Office of Management and Budget, 2008 Federal Budget; Law Enforcement Administration of Justice (FY 2008 budget was \$2,931,222 in millions, and the total subfunctions of federal law enforcement activities, federal litigative and judicial activities, federal correctional activities, and criminal justice assistance equaled 46,202 in millions).

136. In 2007, the states spent more than \$44 billion on incarceration costs. The PEW Ctr. on the Sts., *supra* n. 20, at 30 tbl. A-2.

137. Over half the states were under court order to reduce prison crowding in the mid 1980s. Gail A. Caputo, *Intermediate Sanctions in Corrections* vi (U. of N. Tex. Press 2004).

138. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583 (2005) (making this point in the context of explaining why pretextual prosecutions are primarily a federal not a state phenomenon).

139. *Id.* at 603 (noting that DA "must defend their performance before the voters every few years. The upshot is that both police departments and DAs' offices are held responsible for increases in serious crime." (footnotes omitted)).

140. About 17 percent of the federal offenders sentenced between FY 1991 through 2007 were for immigration offenses. U.S. Senten. Commn., *The Changing Face of Federal Criminal Sentencing* 7 tbl. 2 (2009) (available at http://www.uscc.gov/general/20090127_Changing_Face_Fed_Sent.pdf). The other categories, fraud, larceny, drugs, firearms, pornography, arson, and robbery, involve crimes where state and local jurisdictions generally have concurrent jurisdiction. *See id.*; U.S. Senten. Commn., *Sourcebook of Federal Sentencing Statistics* (2008).

Thus, the Court could pretty safely bet that their sentencing opinions would not wreak the same havoc on states as on the targeted federal sentencing system.¹⁴¹ Even in states with mandatory presumptive sentences or guidelines loosely modeled on the federal reform, the systems were designed to be less complicated, and offer higher levels of judicial discretion (in the sentencing ranges and the power to depart), than the federal system.¹⁴² For example, the Federal Guidelines have 43 offense levels, in contrast to 10 levels in most state systems with guidelines.¹⁴³ The Federal Sentencing Guidelines Manual grid contains 258 sentences boxes, as opposed to the 60 in Minnesota.¹⁴⁴ State Sentencing Commissions tend to grant state judges substantial power to depart from the guidelines when they are so inclined.¹⁴⁵

It should thus be no surprise that 13 of the 20 or so states affected by *Blakely* responded, at least initially, the same way that most had responded to *Apprendi*—they sent these aggravating facts to the jury for a beyond a reasonable doubt finding.¹⁴⁶ This is in fact how Washington State eventually reacted to the *Blakely* decision.¹⁴⁷ This did not create the chaos Justice Breyer predicted for a similar move with the Federal Sentencing Guidelines, as in most jurisdictions there were perhaps a dozen rather than several hundred potential aggravators to resolve by such jury fact-finding. Moreover, no state had the complicating federal pre-*Booker* requirement that judges must sentence for “relevant conduct” (conduct not charged or acquitted at trial), and for conduct occurring during the trial (such as perjury and obstruction enhancements). Those sorts of findings cannot necessarily be discovered and charged in the indictment, as a “Blakelyized” system would require.

This is not to say that the states were entirely ignored by the Supreme Court post-*Booker*. There were a few tussles with recalcitrant states—California and Michigan prosecutors claimed that systems that appeared mandatory were actually advisory. The Court in *Cunningham v. California* was quick to point out that California’s sentencing system, which presumed that the judge should impose the middle of three sentencing ranges in the ordinary case absent certain judicial findings of fact, was in fact mandatory and violated the Sixth Amendment.¹⁴⁸ The California legislature responded by removing the presumption that a defendant would be sentenced in the middle range and

141. We do not mean to suggest here that the state sentencing and criminal justice systems are perfect—far from it! They suffer grossly from underfunding, especially on the criminal defense side, racism, and many of the other problems that plague the federal system. Our much narrower claim here is only that the Supreme Court’s sentencing decisions over the last few terms were directed toward and would have a much greater impact on the feds.

142. See generally Model Penal Code: Sentencing 115–25.

143. Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U. Cal. Davis L. Rev. 587, 588–90 (1992).

144. *Id.* at 611, 615.

145. For a description of the Pennsylvania’s Sentencing Commission’s response to judicial departures, see John Kramer and Cynthia Kempinen, *The Reassessment and Remaking of Pennsylvania’s Sentencing Guidelines*, 8 Fed. Senten. Rep. 74 (1995).

146. Bibas & Klein, *supra* n. 2, at 786 n. 51. See also Norman Abrams and Sara Sun Beale, *Federal Criminal Law and Its Enforcement* 899 (2006) (“In the wake of *Booker*, some of the states with simpler guidelines have adopted jury fact finding with no apparent difficulties.”).

147. Shortly after *Blakely* was rendered but before *Booker*, the Washington legislature amended its statute, sending aggravating factors to the jury. Wash. Rev. Code §§ 9.94A.535, 9.94A.537 (2008).

148. 549 U.S. at 293–94.

instead gave the trial judge discretion to choose between the three ranges.¹⁴⁹ The Court was less assertive in its response to the Michigan Supreme Court's holding in *Michigan v. McCuller*¹⁵⁰ that its system, similar to California's, likewise was consistent with *Blakely/Booker*. The Court vacated that opinion in light of *Cunningham*.¹⁵¹ However, the Michigan Court responded to the remand with another opinion declaring its system truly advisory, and hence constitutional.¹⁵²

The *Blakely* and *Booker* opinions led to what we see as a relatively sharp increase in states interpreting their present guidelines systems to be voluntary rather than mandatory, avoiding the jury issue altogether. Since *Blakely*, three state Supreme Courts, in New Jersey, Ohio, and Michigan, interpreted the guidelines systems they had in place prior to *Blakely* to be voluntary ones not subject to the rule. Three additional state legislatures, in California, Indiana, and Tennessee, amended their formerly mandatory guidelines regimes into advisory ones, and thus again not subject to a Sixth Amendment challenge.¹⁵³ This brings the number of jurisdictions with advisory guidelines up to 14. Even the American Law Institute's new Model Sentencing Project, which had originally (post-*Apprendi* but pre-*Booker*) proposed that the small number of mandatory aggravators selected by its Sentencing Commission and contained in its sentencing guidelines be sent to the jury for a beyond a reasonable doubt finding, now includes a "second-preference alternative to the presumptive guideline system" that transforms the mandatory scheme into an advisory one, bypassing Sixth Amendment concerns and the jury's role.¹⁵⁴

Finally, we note that most states have maintained a relatively high level of judicial discretion even after *Blakely* by utilizing the common law rule permitting judges to decide whether to run a defendant's sentences concurrently or consecutively when that defendant is convicted of multiple offenses (as is often the case). However, 18 states had systems in place prior to *Blakely* that permitted stacking of sentences in this manner only after judicial fact-finding.¹⁵⁵ The *Blakely/Booker* cases generated a state split over whether this practice violated the Sixth Amendment, and the Court chose judicial discretion over jury findings. In its latest sentencing opinion from the October 2008 Term, *Oregon v. Ice*, a five member majority upheld a state statute that permitted a trial judge to stack sentences only after a finding that the offenses did not arise from the same course of conduct, indicated the defendant's willingness to commit more than one criminal act, or caused a risk of greater harm to the victims.¹⁵⁶ The majority ignored the

149. Cal. Penal Code Ann. § 1170(b) (West Supp. 2009).

150. 715 N.W.2d 798 (Mich. 2006) (judicial fact-finding regarding defendant's use of a weapon and injury to a victim, for the purpose of determining whether to impose an intermediate sanction or a prison term, did not violate *Blakely* under Michigan's indeterminate sentencing scheme).

151. *McCuller*, 569 U.S. 1197.

152. *Mich. v. McCuller*, 739 N.W.2d 563, 565 (Mich. 2007) (reaffirming original decision, after case remanded in light of *Blakely*).

153. Bibas & Klein, *supra* n. 2, at app. A, 797–99.

154. Model Penal Code: Sentencing (ALI prelim. dft. no. 4, 2005), Prof. Kevin R. Reitz, Univ. of Minn., Reporter). See also Christopher Slobogin, *Symposium on the Model Penal Code's Sentencing Provisions*, 61 Fla. L. Rev. ___ (forthcoming 2009) (available at SSRN) (providing an excellent history of the MPC Sentencing Project from 1998 to the present, and a nice description of its current provisions).

155. Bibas & Klein, *supra* n. 2, at app. C, tbls. I, II, IV.

156. 129 S. Ct. at 719.

pesky fact that Oregon's sentencing scheme allows judges rather than juries to find the facts necessary to the punishment imposed. Instead, it held that "historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule."¹⁵⁷ In an opinion that Justice Scalia correctly notes is "a virtual copy of the dissents" in *Apprendi*,¹⁵⁸ the majority explained that States could easily avoid the alternative rule by giving judges unfettered discretion in deciding whether sentences should run consecutively or concurrently, or by presuming sentences for multiple offenses run consecutively but allowing sentencing judges to order concurrent sentences upon a finding of cause (after all, the Sixth Amendment does not mandate that mitigating facts be sent to the jury).

The decision makes sense, however, in light of the Court's transformation of the Sixth Amendment from a right to a jury trial in *Apprendi* into a due process-like right to sentencing judge discretion subject only to extremely deferential appellate review in *Booker/Kimbrough/Gall*. The majority disfavors using that rule to limit the ability of judges to "find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence, required attendance at drug rehabilitation programs or terms of community service, and the imposition of statutorily prescribed fines and orders of restitution." Though the Court's interpretation of *Apprendi* to sentencing matters may not be entirely logical or principled, it stays the course.

IV. CONCLUSION

Four years after the *Booker* decision, the United States Sentencing Commission reported that despite it all—the years of political warfare on sentencing, the adoption of the Feeney Amendment, the chaos in federal court caused by the *Blakely* decision, the Supreme Court's "last" word in the *Booker* and then *the Kimbrough* and *Gall* cases—not as much has changed in federal sentencing as we might have expected. With all the pre-Feeney hype about downward departures and the leniency of the judiciary, one might have anticipated a federal judiciary run amok handing out light sentences to hardened criminals under a purely advisory system. That nightmare never materialized. There is an increase in sentencing outside the Federal Sentencing Guidelines, and this increase has continued to rise as the Court cements its ruling and district judges receive the message. Moreover, there has been even more of an increase in disparity between judicial districts. Federal judges have heard but not overreacted to the Court's grant of discretion, and AUSAs in the field offices have realized that Main Justice cannot control their plea negotiations and sentencing hearings.

While there is a greater and greater tendency over the last few years to sentence below the federal sentencing guideline range, the majority of federal cases continue to be sentenced within the Guidelines. As far as non-government sponsored (not for substantial assistance, fast-track program, or any other government requested reason) downward departures, the U.S. Sentencing Commission reported in 2006 that the rate increased from 8.6 percent pre-Feeney Amendment to 12.5 percent post-*Booker*. The increase for below-Guidelines sentences not requested by the government is slightly higher if we limit our post-*Booker*

158. *Id.* at 720 (Scalia, Souter, Thomas, JJ. & Roberts, C.J., dissenting).

comparison to sentencing decisions after the Feeney Amendment constrained federal district judges even further—the percentage increased from 6.3 to 12.5 percent.¹⁵⁹ The Commission's latest report, which includes cases sentenced post-*Kimbrough* and *Gall* (2007-08), indicates yet another increase in non-government sponsored downward departures, this time to 13.1 percent.¹⁶⁰ We believe that these figures may also not tell the whole story, as the percentage of government sponsored below range sentences for substantial assistance and early disposition is also increasing, as is a category called “other government sponsored below range” sentences.¹⁶¹

In addition to its obvious description of enhanced judicial discretion, these figures also tell us that Main Justice is losing its grip on line prosecutors in the field and that these line-prosecutors are more apt to agree to below guideline sentences suggested by their local district judge or defense bar. This conclusion is further buttressed by the fact that most of the variation among Circuits and from district to district is caused by government-sponsored departures, not downward departures suggested by the defense bar or the judge and opposed by the government.¹⁶² This tells us that line-prosecutors in different U.S. Attorney's Offices are not toeing the party line that Main Justice is attempting to impose.

Why didn't *Booker* unleash the judiciary to impose reduced sentences more often? Although the Supreme Court made the Guidelines advisory, they did not make them irrelevant. Judges are still required to calculate and consider the Guidelines sentencing range and explain in writing any decision not to impose the guideline range. So the guideline range is necessarily the starting point in every judge's decision making—it serves as a mental anchor, it creates a shared vocabulary that structures all sentencing decisions. The appellate courts have insulated sentences within the Guidelines range from reversal, and the Supreme Court has blessed this in *Rita* by allowing an appellate “presumption of reasonableness” for within-guideline sentences only. Although a departure decision up or down is much less likely to be reversed post-*Booker*, even where the departure is motivated by the judge's own policy disagreement with the Commission, any departure decision still leaves the judge vulnerable to the possibility of reversal, which every judge avoids. Finally, many federal judges on the bench today were appointed after 1984, which means they have known no system but the Guidelines. We are all infected by the normative power of the actual.¹⁶³ In short, after *Booker*, *Kimbrough*, *Gall*, and *Spears*, the Guidelines still carry the day in the majority of federal sentences, and, while departures from guideline sentences will probably continue to increase, the rate of these departures is unlikely to change radically under current law.

159. U.S. Senten. Commn., *supra* n. 111, at 73, 77.

160. U.S. Senten. Commn., *Latest Post-Booker Sentencing Data*, 21 Fed. Senten. Rep. 39, 40 (2008) (Table 1, including about 40,000 cases sentenced from Dec. 10, 2007 to June 30, 2008). The Commission also reported in 2006 that the rate of above-range sentences doubled from the pre-Feeney period, although even that figure was only 1.6 percent. That figure has not increased at all in the 2008 data, confirming that federal judges did not believe that sentences were too low.

161. Other Government-sponsored below range sentences increased from 3.2 percent after *Booker* to 4.0 percent after *Kimbrough/Gall*. *Id.* at 30.

162. See U.S. Senten. Commn., *U.S. Sentencing Commission Post-Kimbrough/Gall Data Report* (2008).

163. *But see* Model Penal Code: Sentencing 115 n. 161 (citing Stith & Cabranes, *supra* n. 19) (documenting the “spectacular unpopularity” of the federal guidelines among most U.S. District Court judges during the decade after enactment).

What's more, the DOJ's characterization of the judiciary as too lenient and in need of constraining has been proved to be untrue.¹⁶⁴ The trend, pre and post-*Booker*, continues to be higher and higher sentences. Why, one might ask, are sentences inching *upward* in our new discretionary regime, from 56 months prior to the Feeney Amendment to 58 months post-*Booker*? The Commission's explanation is that this slight rise is attributable to the rise in presumptive sentences under the Guidelines, an increase in prosecutions for more serious offenses, and a stiffening of penalties in pre-existing and new federal statutes, such as the Sarbanes-Oxley Act and various terrorism legislation.¹⁶⁵ Perhaps judges took Congress's criticism of their leniency to heart. Who knows? Sometimes the world of federal sentencing is just a mystery.

164. The United States has 2.3 million criminals behind bars, with China, which has four times more population, a distant second with 1.6 million prisoners. We hold 751 people in prison per 100,000 of our population, Germany's rate is 88, and Japan's is 63. Most scholars attribute this gap at least in part to harsher U.S. sentencing laws. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. Times A1 (Apr. 23, 2008).

165. U.S. Senten. Commn., *supra* n. 111, at 73.