

## **RETURNING TO MARVIN FRANKEL'S FIRST PRINCIPLES IN FEDERAL SENTENCING**

Thirty years ago last month, the newly-formed United States Sentencing Commission circulated the first “discussion draft” of proposed federal sentencing guidelines. That draft had been prepared under the direction of one of the original commissioners, Professor Paul Robinson.<sup>1</sup> It was mathematical and complex – with “harm values,” “multipliers,” and “sanction units.” It sought to account for a wide array of aggravating and mitigating factors.<sup>2</sup> It attempted to achieve something approaching “perfect justice.”<sup>3</sup>

The reaction to that draft was resoundingly negative. Circuit Judge Jon Newman, an early proponent of the need for sentencing guidelines, wrote, “My first point challenges a basic assumption that underlies the entire proposal – the idea that every increment of harm that can possibly be measured should be reflected in an increment of additional punishment. I seriously doubt that there is moral validity to this idea.” Judge Newman predicted, “The complexity of the proposed system will create enormous grounds for error in application of the guidelines and appeals to challenge the sentence. This is the inevitable consequence of a system that tries for ultimate precision. If everything matters, then every statement of definition must be interpreted, with inevitable mistake and subsequent legal challenge.”<sup>4</sup>

Although later discussion drafts were less complex, the final product, which became effective in 1987, was obviously influenced by the original draft.<sup>5</sup> The 1987 *Guidelines Manual* was complex and mathematical and sought to account for myriad aggravating and mitigating factors other than the offense of conviction.<sup>6</sup> Most stakeholders reacted negatively to the new guidelines.<sup>7</sup>

Over 200 federal judges ruled that the new guidelines were unconstitutional.<sup>8</sup> But in 1989, in *Mistretta v. United States*, the Supreme Court, over Justice Antonin Scalia's lone dissent, upheld the constitutionality of the Commission and its new guidelines.<sup>9</sup> Sixteen years later, in *United States v. Booker*, the Supreme Court – with Justice Scalia now in the majority – invalidated the mandatory guidelines as violating the right to a jury trial under the Sixth Amendment.<sup>10</sup> As a temporary fix, a different majority of that Court, in a remedial opinion written by Justice Stephen Breyer, one of the original commissioners, held that the guidelines could continue to operate as advisory, but the remedial opinion told Congress that “the ball lies in [its] court” to come up with a workable and constitutional guidelines system.<sup>11</sup>

Congress has not picked up the ball. Over 11 years later, the advisory guideline system created by the Court as a short-term remedy in *Booker* remains in place. Well over a half of a million federal offenders have been sentenced under the post-*Booker* guidelines.<sup>12</sup> The *Guidelines Manual* has grown in complexity. And empirical evidence

proves that sentencing disparities – the primary concern that led to the creation of the guidelines – have increased since the guidelines became advisory.

During the last three decades, the guidelines have created more controversy than any other aspect of the federal criminal justice system. The vast majority of the academic commentary has been negative, and countless judges have expressed frustration in applying the guidelines.<sup>13</sup>

Today, I want to propose a solution both to the original problems created by the mandatory guidelines and to the new problems created by *Booker*. My proposal adheres to the first principles of sentencing reform initially articulated by Judge Marvin Frankel in the early 1970s and later embodied in the Sentencing Reform Act of 1984. But my proposal differs from both the original guidelines and the post-*Booker* guidelines. I propose that Congress and the Commission create a system of presumptive guidelines, a radically simpler system with wider sentencing ranges and fewer enhancements. Those enhancements would be found by juries, not judges, unless a defendant admitted to the enhancements in pleading guilty. This system would better resemble the architecture proposed by the American Law Institute in our revision of the Model Penal Code.<sup>14</sup>

Three different experiences influence my perspective. First, since 2004, as a federal judge, I have decided more than a thousand sentencing appeals. Second, from 1997 to 2004, as Attorney General of Alabama, I worked closely with other state

leaders to create the Alabama Sentencing Commission, which promulgated simpler sentencing guidelines.<sup>15</sup> And, third, since 2013, I have served as a member of the U.S. Sentencing Commission.

Since 2013, the Commission has made significant strides towards reforming federal sentencing. For instance, in 2014, we unanimously reduced the guideline penalties for the majority of drug-trafficking offenders – including those already serving their prison sentences – by approximately 25 percent.<sup>16</sup> That reform complied with our statutory obligation to consider and address prison overcrowding.<sup>17</sup> Earlier this year, we promulgated a reform of the career offender guideline and other provisions for recidivists by simplifying the definition of a prior “crime of violence.”<sup>18</sup> And last month, we promulgated an overhaul of the immigration guideline for illegal reentry cases.<sup>19</sup> That amendment simplifies the guideline and will result in fairer and more cost-effective sentencing of illegal reentry offenders.<sup>20</sup> These reforms affect the great majority of federal offenders and represent most of what we can hope to achieve working with the current *Manual*.

Instead of continuing to tinker with the advisory guidelines, we now need to tackle a more fundamental reform. We need to address why the guidelines have failed to achieve the first principles of sentencing and consider how, with structural reforms, they could do so in the future. I will begin by discussing the first principles of sentencing and offer observations about the utopian ideal of “perfect justice.” I then

will discuss how the original guidelines went wrong, how *Booker* failed to fix those problems and made some things worse, and why we need a second generation of guidelines to implement the first principles of sentencing and to avoid the elusive quest for perfect justice.

My comments do not reflect the official position of the Sentencing Commission. They are solely my opinions, at least for now.

The first principles of modern sentencing were initially articulated by Judge Frankel over 40 years ago.<sup>21</sup> Those principles, embraced by Senators Edward Kennedy and Strom Thurmond and others in the passage of the Sentencing Reform Act,<sup>22</sup> are as follows:

1. Sentences should meaningfully reflect the primary **purposes of punishment** (retribution, deterrence, incapacitation, and rehabilitation), as appropriate;<sup>23</sup>
2. A sentencing system should result in **proportional punishments** – both among offenders convicted of different offense types and among different offenders convicted of the same offense type;<sup>24</sup>
3. A sentencing system should, as much as reasonably possible, avoid **unwarranted disparities** among similarly situated offenders;<sup>25</sup>
4. A sentencing system should achieve reasonable **certainty** in sentencing (meaning defendants should be able reasonably to predict the sentences that they will serve);<sup>26</sup>
5. There should be **honesty** in sentencing (meaning no “indeterminate” sentences so that offenders serve the vast majority of the sentence imposed);<sup>27</sup> and

6. There must be **transparency** in the sentencing process.<sup>28</sup>

Judge Frankel envisioned a “codified [system of] weights and measures”<sup>29</sup> with “binding” rules<sup>30</sup> – his description of what later would be called “sentencing guidelines.” He proposed an expert “commission on sentencing” to create the guidelines.<sup>31</sup> And he stressed that appellate review was necessary to enforce the guidelines uniformly throughout the country.<sup>32</sup> Judge Frankel also believed both before and after the Sentencing Reform Act that federal sentences were often more severe than needed to achieve the purposes of punishment.<sup>33</sup>

Judge Frankel was under no illusion that his proposal would lead to “perfect justice.” As he explained, he was not operating under “delusions of precision” about the level of detail needed in the guidelines.<sup>34</sup> Although his ideas were still nascent in 1973, he proposed simple guidelines that “could be graded along a scale from, perhaps, 1 to 5.”<sup>35</sup>

In *The Price of Perfect Justice*, the late Judge Macklin Fleming of the California Court of Appeals observed,

The fuel that powers the modern theoretical legal engine is the ideal of perfectibility – the concept that with the expenditure of sufficient time, patience, energy, and money it is possible eventually to achieve perfect justice in all legal process. . . . Yet . . . that . . . noble ideal has consistently spawned results that can only be described as pandemoniac . . . . Why, we ask ourselves, have such diligent attempts to create a perfect legal order fared so poorly in practice? . . . The answer, perhaps, may be found in the reason given by Macaulay for the failure of ambitious

governments: the government that attempts more than it ought ends up doing less than it should.<sup>36</sup>

Richard Epstein has explained that our entire modern regulatory state has been built on the premise that, “[i]f the law can identify enough factors [and] can indicate the ways in which they should be taken into account . . . , then maybe, just maybe the legal system will reach the heady level of perfection to which it aspires.”<sup>37</sup> Like Judge Fleming, Professor Epstein warned that “the gains from seeking perfection are an illusion.” He added, “[t]he relevant comparison between simple and complex rules should be conducted not in the language of aspiration, but in the language of realizable achievement. . . . Simple rules are adopted by people who acknowledge the possibility of error up front, and then seek to minimize it in practice. Complex rules are for those who have an unattainable vision of perfection.”<sup>38</sup>

The history of the federal guidelines offers a case study of the follies of pursuing perfect justice instead of recognizing the need for simple rules.

In 1992, when Judge Frankel gave the keynote address at the *Yale Law Journal* conference on the federal guidelines,<sup>39</sup> the new guidelines had been implemented for only three years following *Mistretta*.<sup>40</sup> Judge Frankel recounted the criticisms that the guidelines were complex, “rigid,” “harsh,” too “mechanical,” and unduly constrained judicial discretion concerning mitigating factors.<sup>41</sup> He intimated his agreement with those criticisms, which his friend, Judge Newman, later confirmed after he died.<sup>42</sup>

Judge Frankel was mostly right in 1992, and his criticisms became more cogent in the ensuing decades.

Let's begin with complexity. The 1987 *Manual* was 268 pages (without appendices).<sup>43</sup> By 1992, when Judge Frankel gave his speech at Yale, the *Manual* was 393 pages.<sup>44</sup> By 2005, when the Court decided *Booker*, the *Manual* had grown to 514 pages.<sup>45</sup> It's currently 542 pages<sup>46</sup> -- twice as long as in 1987.

Many of the most commonly applied guidelines – such as those for fraud and theft and for drug-trafficking<sup>47</sup> – have expanded in a disproportionate manner. For instance, in 1987, the original drug-trafficking guideline was 115 words long (without the quantity table and commentary). That same guideline today has 1,397 words.<sup>48</sup>

The expanding girth of the *Manual* has been a function of nearly 800 amendments since 1987.<sup>49</sup> Many of those amendments were the result of “directives” from Congress, which required or strongly suggested that the Commission amend the guidelines,<sup>50</sup> typically by increasing penalties.<sup>51</sup> Often those amendments concerned minor or arcane sentencing issues, such as the enhancement for a theft or destruction of “property from a national cemetery or veteran’s memorial.”<sup>52</sup>

The original guidelines were rigid. They required the sentencing judge to be as much of an accountant as an arbiter of justice. They required and still require numerous mathematical calculations: a “base offense level” plus or minus myriad “specific offense characteristics,” plus or minus several “adjustments,” followed by a



criminal history calculus. The calculation then yields a narrow sentencing range – for instance, 46 to 57 months or 70 to 87 months of imprisonment.

Before *Booker*, the guidelines constrained judicial discretion to sentence outside those narrow ranges. So long as the Commission had considered a particular issue about offense conduct in the guidelines, a “departure from the guideline [was] warranted only if the factor [was] present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction.”<sup>53</sup> The *Manual* also restricted the consideration of offender characteristics—such as an offender’s age, mental illness, drug addiction, or family responsibilities—as a basis to depart from the sentencing range.<sup>54</sup>

Much of the rigidity was dictated by the Sentencing Reform Act. Congress directed the Commission to narrow sentencing discretion in three ways:

- (1) create a “detailed set of sentencing guidelines” that “reflect every important factor relevant to sentencing”;<sup>55</sup>
- (2) prohibit or limit consideration of several personal characteristics of defendants;<sup>56</sup> and
- (3) limit the breadth of the individual sentencing ranges within the guidelines’ Sentencing Table such that “the maximum of the range . . . shall not exceed the minimum of the range by more than the greater of 25 percent or six months” – what is known as the “25 percent rule.”<sup>57</sup>

For the most part, Congress, not the Commission, made the guidelines rigid, although the Commission exacerbated the problem by making the guidelines complex and mathematical.

The guidelines were and are severe. In 1992, when Judge Frankel gave his speech at Yale, the average federal prison sentence was 66.7 months.<sup>58</sup> Before the guidelines, the average federal prison sentence was 65.2 months,<sup>59</sup> yet the amount of prison time actually served was much lower because of the availability of parole, which was abolished with the advent of the guidelines.<sup>60</sup> Today, the average federal prison sentence is 53 months, over a year lower than the average in 1992, but still longer than the average time served by federal prisoners before the guidelines.<sup>61</sup> And it is over one year longer than the average sentence for a felony conviction in state court where the offense—such as murder or rape—may be far more serious than most federal felonies and where parole may shorten the sentence actually served.<sup>62</sup>

A lot of credit (or blame) goes to Congress. In the Sentencing Reform Act, Congress not only abolished parole but also envisioned more severe sentences – particularly for white-collar offenders and drug-traffickers – and the original Commission faithfully followed Congress’s directives.<sup>63</sup> Congress’s enactment of mandatory minimum penalties for drug-trafficking, firearm, and child pornography offenses since the mid-1980s has also contributed to the increase in the federal prison population.<sup>64</sup> And during the last three decades, Congress has issued many “directives” requiring or strongly suggesting that the Commission increase guideline ranges for a variety of offenses.

Perhaps the Commission, in its first decades, failed to assert sufficient independence in establishing sentences for many offense types. In recent years, the Commission has reduced penalties modestly for some offense types – most notably, for drug-trafficking.<sup>65</sup> These reductions haven't caused the sky to fall.<sup>66</sup>

In addition to their complexity and severity, the original guidelines suffered from another problem – one that led the Supreme Court to invalidate the mandatory guidelines in *Booker*. Because the Act required judges, not juries, to find sentencing enhancements by a preponderance of the evidence, it was unconstitutional.<sup>67</sup> In its remedy, the Supreme Court excised the provisions that made the guidelines mandatory and made them advisory. That remedy meant that juries would not be required to find sentencing facts. Federal district judges still find those facts, by a preponderance of the evidence, but judges now enjoy the discretion to vary from the advisory guideline ranges.<sup>68</sup>

The *Booker* remedy, now in its eleventh year, has not advanced Judge Frankel's first principles. On the contrary, the advisory system has made things even worse in some respects. Judges are now freer to consider offender characteristics.<sup>69</sup> That freedom has led to growing disparities. Data analyses by the Commission establish that the disparities are not only a matter of judicial assignment or the district or circuit in which sentencing occurs; differences in sentence length are also associated with

race and gender.<sup>70</sup> Black males receive higher sentences than white males, and women receive lower sentences than men, even after controlling for other factors.<sup>71</sup>

I do not suggest that federal judges are biased. But when a sentencing system gives judges free reign to consider virtually all aspects of an individual offender’s “history and characteristics,”<sup>72</sup> those associated with offenders’ demographics – such as employment, education, and family support – inevitably will result in sentencing disparities correlated with race, class, and gender. That fact explains why the original Commission restricted departures from the guideline range based on individual characteristics.<sup>73</sup> Perhaps the original Commission went too far, but *Booker* effectively removed all limitations. We went from one extreme to the other.

The advisory guidelines are the worst of both worlds. On the one hand, they have increased sentencing disparities. On the other hand, they are as complex as the mandatory guidelines. Indeed, they are even more complex today than they were in 2005. The *Booker* three-step process requires a sentencing court to (1) calculate the guideline range, (2) decide whether to depart from the range for reasons consistent with the *Guidelines Manual*, and (3) decide whether to vary from the range for virtually any reason.<sup>74</sup> A court has to jump through all of the same hoops that existed before *Booker* and then engage in an additional inquiry.

Because the Court in *Booker* kept the guidelines as a central part of its three-step process, the Commission has continued to amend the guidelines on a regular

basis, and Congress has continued to seek to influence the Commission. In addition to legislation directing the Commission to make the *Manual* more complicated, members of Congress frequently urge the Commission to amend the guidelines when those members have been unable to enact legislation to raise statutory penalties. For instance, last year, two Senators (one from each party) requested that the Commission amend the guidelines to increase penalties for “candy flavored drugs” – even though we were unable to find any evidence that candy-flavored drugs had become a national problem requiring yet another sentencing enhancement.<sup>75</sup>

One might expect that a sentencing regime with advisory guidelines – that, by their very nature, have less influence on sentencing judges than mandatory guidelines – would engender fewer, not more, attempts to add minutiae to the *Manual*. From my experience on the Commission, I have not seen any evidence of a reduction in attempts to add minutiae.

Despite his misgivings about the original guidelines, Judge Frankel remained a proponent of some type of *mandatory* guidelines to achieve the principles of sentencing that he articulated in the early 1970s. He believed that the guidelines needed to be retooled.<sup>76</sup> Like other critics, Judge Frankel recognized that the Commission had followed congressional directives in promulgating the original guidelines.<sup>77</sup> Thus, the retooling that he proposed had to involve Congress.

I agree with Judge Frankel’s perspective. We need a system of enforceable guidelines in which judges adhere to sentencing ranges absent substantial and compelling reasons to depart from them. And we need to cabin the unrestrained consideration of offender characteristics. Otherwise, we will continue to see unwarranted sentencing disparities and a lack of certainty in sentencing. But we also need some consideration of offender characteristics. And we need to reduce the severity of some guidelines, at least for non-violent offenders.

I prefer the term “presumptive” instead of “mandatory” because even the pre-*Booker* guidelines were never truly mandatory (in the same sense as a statutory mandatory minimum). Presumptive guidelines would bind judges in most cases, subject to meaningful appellate review, but they would have some flexibility. They also would be less objectionable to judges than the pre-*Booker* guidelines if they had wider ranges and less severity.

I do not propose making the current guidelines presumptive. I propose a radically simpler system that would incorporate only the most important and common aggravating and mitigating factors. For instance, the drug-trafficking guideline would look more like it did in 1987. Many of those factors in the current guidelines – called “specific offense characteristics” in Chapter Two and “adjustments” in Chapter Three of the *Manual* – would be deleted. Perhaps it would have aggravating factors for possession of a firearm or one or two other common aggravating factors. But it

would not have the laundry list of aggravating factors in the current guideline. Many factors could be moved to the commentary – as reasons for sentencing courts to consider in deciding where *within* the broader ranges to impose a specific sentence.

A presumptive guideline system would have broader ranges. Congress would need to amend the Sentencing Reform Act by repealing the “25 percent rule.” That rule in large part explains why the current Sentencing Table is so complex, with 258 different cells, and ranges that are so narrow. If the 25-percent rule were repealed, the Commission could create broader ranges and a simpler sentencing grid.

To comply with the right to a jury trial under the Sixth Amendment, a presumptive guidelines system would use juries to find aggravating facts that would raise a guideline range. The preponderance standard used by judges in the advisory system would be replaced by the reasonable doubt standard. And related constitutional rules would apply too, such as the requirement that sentencing facts that would raise the guideline range be pleaded in an indictment<sup>78</sup> and the requirement that the defendant be able to confront witnesses against him about facts that would raise the guideline range.<sup>79</sup> In other words, sentencing under a presumptive system in many ways would resemble a criminal trial. The days of uncharged “relevant conduct”<sup>80</sup> found by a sentencing judge by a preponderance of the evidence – often based on hearsay in a presentence report – would be over.

Based on the experience of several states that have enacted presumptive guidelines in the last decade, it is unlikely that a presumptive federal system would lead to a significant number of lengthy, contested sentencing trials.<sup>81</sup> The vast majority of defendants likely would continue to plead guilty both to the charge and the relevant sentencing facts that would raise guideline ranges. But, if we ended up having more sentencing juries, that development would not be a bad thing. The jury is the primary feature of the American criminal justice system that promotes democratic accountability under the Constitution.<sup>82</sup>

A word about severity: I do not suggest dramatic, across-the-board reductions in federal sentences. Many offenders – particularly violent offenders, sex offenders, and large-scale drug-traffickers and fraudsters – should go to prison for a long time. But penalties could be reduced for first-time and low-level non-violent offenders. Criminologists tell us that *certainty* and *swiftness* in punishment are more important than *severity* in punishment.<sup>83</sup>

In a system with less severe penalties and broader ranges, most cases would not present a reason for departure from the guideline range. Downward departures would be appropriate in those cases outside the heartland where the guidelines fail to account for some compelling offender or offense characteristic. Because of the constitutional requirement that aggravating facts that would raise ranges be pleaded in



an indictment and proved to a jury beyond a reasonable doubt, upward departures would no longer exist in a presumptive system.

For criminal history calculations in a presumptive system, the current Chapter Four of the *Manual* should be retained with minor simplifications. The criminal history rules, though complex, work well and have received relatively little criticism. The Commission's recent recidivism report shows how well those criminal history rules work: each incremental criminal history point generally corresponds to a higher recidivism risk. The report's graph showing the recidivism rates associated with criminal history points resembles stair steps as offenders' points increase.<sup>84</sup> There is a strong empirical basis for retaining those rules.

There must be meaningful appellate review in a presumptive guideline system. Let me explain what I mean by contrasting what I envision with what existed before *Booker* and what exists now.

Before *Booker*, appellate courts had to deal with the same guidelines minutiae that district courts did: Should an offender have received a 2 or 3-level reduction for a "minor role"? Should an offender have received a 2-level enhancement for his cohort's possession of a firearm during a drug deal where the offender was not even present? Did the district court err by departing below the guideline range based on an offender's underprivileged childhood?

After *Booker*, appellate courts continue to check the district court’s math about guidelines minutiae – what is called review for “procedural reasonableness.”<sup>85</sup> Last month, in *Molina-Martinez*, the Supreme Court held that, even when a defendant didn’t object to an erroneous guideline calculation at sentencing and raised the issue first on appeal, an appellate court ordinarily must find plain error and remand for resentencing if the advisory guideline range applied by the district court was higher than what it should have been.<sup>86</sup> Notably, the Court observed that “the guidelines are complex” and recognized that calculation errors often will result from that complexity.<sup>87</sup>

In addition to review for “procedural reasonableness,” appellate courts also review whether sentences are “substantively reasonable.”<sup>88</sup> I and other appellate judges liken this form of review to deciding whether a sentence “shocks the conscience.”<sup>89</sup> This highly deferential review rarely leads to reversals.<sup>90</sup>

Reasonableness review, which occurs in thousands of appeals annually,<sup>91</sup> does almost nothing to promote the first principles of sentencing. If an appellate court reverses a district court for miscalculating the guideline range and remands for sentencing, the district court can apply the correct guideline range and then vary from that range to impose the exact same sentence as before. Under the shocks-the-conscience standard, appellate review almost never leads to a reversal of a sentence as

substantively unreasonable. So what is the point of this two-tiered system of reasonableness review?

For presumptive guidelines, meaningful appellate review would do two things: first, appellate courts would review for clear error whether sufficient evidence supports an enhancement;<sup>92</sup> and, second, they would decide whether a district court erred in departing below a guideline range. They would review *de novo* questions of lawful authority to depart and review for abuse of discretion exercises of that authority. Departures would be governed by the statutory purposes of sentencing and would be accompanied by written reasons. Appellate review would deter excessive departures and reduce the types of sentencing disparity that we see in the current advisory system. Kevin Reitz has explained that the federal system could learn a lot from state systems of appellate review.<sup>93</sup>

This proposal for guidelines reform is not mine alone. Similar proposals have been made by others, including former Commission Chair Judge William Sessions<sup>94</sup> and the nonpartisan Constitution Project.<sup>95</sup> But my proposal differs in one important respect: I propose that Congress enact into law the portions of the new guidelines that would increase guideline ranges instead of allowing them to go into effect 180 days after the Commission promulgates them, as ordinarily happens under current law.<sup>96</sup> Any later amendment to the guidelines that increases penalty ranges also should be enacted into law by Congress.

Requiring Congress to enact the enhancements for presumptive guidelines would serve two purposes. First, it would remove any constitutional doubt about the guidelines in a post-*Booker* world. An argument could be made that, without legislation, the new guidelines would be the product of an unconstitutional delegation to the Commission.<sup>97</sup> Although the same argument was rejected by the Supreme Court in *Mistretta* in 1989,<sup>98</sup> the Court described the then-mandatory guidelines as not “regulat[ing] the primary conduct of the public or vest[ing] in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime.”<sup>99</sup> But after *Booker*, presumptive guidelines arguably would regulate primary conduct because aggravating facts that increase guideline ranges are tantamount to elements of the offense that, if proved, raise the range of punishment.<sup>100</sup> If Congress enacts guideline enhancements proposed by the Commission into law, any constitutional doubt about a presumptive guideline system would disappear.

The only portions of the new guidelines that would require an enactment by Congress would be the aggravating factors. The provisions that would increase offenders’ guideline ranges based on prior convictions would not need congressional approval because the Sixth Amendment does not apply to a sentencing enhancement based on a prior conviction.<sup>101</sup> Nor, of course, would mitigating factors for presumptive guidelines require congressional approval because the Sixth Amendment does not apply to facts that *lower* an offender’s sentence.

A second reason for requiring Congress to enact aggravating factors into law is that it would likely deter increases in severity and complexity. Of course, Congress could change minutiae in the guidelines – especially by adding aggravating factors – but the cumbersome, bicameral legislative process would make change more difficult than when the authority is delegated to a seven-member commission. And Congress would have to account for the fact that prosecutors would have to prove any new aggravators to a jury beyond a reasonable doubt.

The Commission could amend the presumptive guidelines (without action by Congress) in three ways. First, the Commission could amend the commentary recommending higher or lower sentences *within* the wider ranges. Second, the Commission could amend the provisions for departures. And, third, the Commission could amend the provisions about an offender’s prior convictions. The Commission also would continue to recommend statutory changes to Congress and to collect and analyze its data. That data analysis has been instrumental in amending the guidelines for the better in recent years.<sup>102</sup>

Before I conclude, let me say a brief word about mandatory minimum penalties enacted by Congress. Since the beginning of the guidelines era, the Commission<sup>103</sup> and many others, including Justices Breyer and Kennedy,<sup>104</sup> have noted the disconnection between the blunt instrument of mandatory minimums and a finely-tuned guideline system. Congress enacts mandatory minimums because it wants to

make sure federal judges don't impose unduly lenient sentences for certain types of aggravated offenses or for offenders with serious criminal records. The presumptive guidelines system that I propose – which Congress would, in part, enact into law and in which downward departures would require substantial and compelling reasons – arguably would render mandatory minimums unnecessary, except perhaps for egregious offenses.

There is no such thing as “perfect justice” in sentencing. The Sentencing Reform Act of 1984 and the original guidelines both were good-faith efforts to achieve something close to perfect justice. As the past three decades have proved, Congress and the Commission were wrong to pursue that elusive goal.<sup>105</sup> They should have adhered more to Judge Frankel's vision.

The perfect should not be the enemy of the good. The Commission should work with Congress for a bipartisan reform of federal sentencing that leads to a simpler, presumptive guidelines system. What I propose today would not be a perfect system, but it would be better than both the pre-*Booker* system and the status quo. It would better implement the principles of sentencing that Judge Frankel articulated over four decades ago – reducing unwarranted disparities, while promoting proportionality, certainty, honesty, and transparency. I hope Congress and the Commission will work together to strengthen and simplify the federal guidelines.

Thank you.

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<sup>1</sup> See Irene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 916, 918, 921 & n.21 (1990).

<sup>2</sup> See “Proposed Sentencing Guidelines Manual” (April 17, 1986) (on file with the author).

<sup>3</sup> The concept of “perfect justice” is discussed in the text accompanying endnotes 36 to 38.

<sup>4</sup> Nagel, *supra* note 1, at 919 n.202 (quoting from Judge Newman’s letter to the Commission).

<sup>5</sup> Shortly after the original guidelines went into effect in 1987, Professor Robinson – who was the sole dissenting Commissioner from the Commission’s decision to promulgate the guidelines – stated that he believed they should be more complex and should account for many more aggravating and mitigating factors. See Paul Robinson, *A Sentencing System for the 21<sup>st</sup> Century?*, 66 TEX. L. REV. 1 (1987).

<sup>6</sup> See U. S. SENT. COMM’N, GUIDELINE MANUAL (Nov. 1, 1987).

<sup>7</sup> See, e.g., *United States v. Davern*, 970 F.2d 1490, 1505 & n.11 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting) (“[T]he New York Bar Association’s Committee on the Federal Courts and practically every other commentator have urged Congress to overrule the Sentencing Commission and transform the Guidelines from compulsory prescriptions to general standards[.]”) (citing numerous critics of the guidelines).

<sup>8</sup> See Nagel, *supra* note 1, at 906 (noting over 200 courts held that the guidelines were unconstitutional, while 120 courts upheld their constitutionality, before the Supreme Court decided the issue in *Mistretta*).

<sup>9</sup> *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

<sup>10</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>11</sup> *Id.* at 265 (“Ours, of course, is not the last word: The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.”) (opinion of Breyer, J.).

<sup>12</sup> See U.S. Sent. Comm’n, 2005-2015 Datafiles (USSCFY2005 – USSC FY2015).

<sup>13</sup> See, e.g., *United States v. O’Meara*, 895 F.2d 1216, 1221 (8th Cir. 1990) (Bright, J., concurring in part & dissenting in part) (“This case opens the window on the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines.”); Jose Cabranes & Kate Stith, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

<sup>14</sup> American Law Institute, TENTATIVE DRAFT NO. 1 MODEL PENAL CODE §§ 6A.04 & 6B.02 (2007).

<sup>15</sup> See William H. Pryor, Jr., *Lessons of a Sentencing Reformer from the Deep South*, 105 COLUM. L. REV. 943 (2005).

<sup>16</sup> See U.S. Sent. Comm., USSG, App. C, Amends. 782 & 788 (2014). The amendment reduced the Drug Quantity Table in the guidelines for the vast majority of drug-trafficking cases by 2 offense levels. See *id.* A 2-level reduction in the applicable range typically reduces the guideline sentencing range by 20 to 30 percent. U.S. Sent. Comm., REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 124 (2012) (discussing how offense levels relate to sentencing ranges).

<sup>17</sup> 28 U.S.C. § 994(G) (“The Commission, in promulgating guidelines . . . shall take into account the nature and capacity of the penal, correctional, and other facilities and services available . . . . The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.”).

<sup>18</sup> See U.S. Sent. Comm., Amendment to the Sentencing Guidelines (Preliminary) (Jan. 2016) [http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108\\_RF.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108_RF.pdf).

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- <sup>19</sup> See USSG §2L1.2; see also U.S. Sent. Comm., *Illegal Reentry Offenses* (2015).
- <sup>20</sup> Press Release: U.S. Sentencing Commission Approves Significant Changes to the Federal Sentencing Guidelines, <http://www.ussc.gov/news/press-releases-and-news-advisories/april-15-2016> (Apr. 15, 2016) (discussing amendment to USSG §2L1.2).
- <sup>21</sup> CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).
- <sup>22</sup> See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 234-35, 258-59, 271-72 (1993).
- <sup>23</sup> CRIMINAL SENTENCES, at 105-08; see also 28 U.S.C. § 991(b)(1)(A); see also 18 U.S.C. § 3553(a)(2).
- <sup>24</sup> CRIMINAL SENTENCES, at 113-14; see also 28 U.S.C. § 994(c) & (d).
- <sup>25</sup> CRIMINAL SENTENCES, at 7-8, 11, 17-25, 43; see also 28 U.S.C. § 991(b)(1)(B).
- <sup>26</sup> CRIMINAL SENTENCES, at 3-6; see also 28 U.S.C. § 991(b)(1)(B).
- <sup>27</sup> CRIMINAL SENTENCES, at 86-102; see also 18 U.S.C. § 3624.
- <sup>28</sup> CRIMINAL SENTENCES, at 31, 38-43; see also 18 U.S.C. § 3553(c).
- <sup>29</sup> CRIMINAL SENTENCES, at 111-15.
- <sup>30</sup> *Id.* at 122-23.
- <sup>31</sup> *Id.* at 118-24.
- <sup>32</sup> *Id.* at 75-85.
- <sup>33</sup> *Id.* at 58-59; see also Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L. J. 2043, 2047 (1992).
- <sup>34</sup> CRIMINAL SENTENCES, at 114.
- <sup>35</sup> *Id.*; see also James R. Thompson, *Book Review: Criminal Sentences: Law Without Order*, 74 COLUM. L. REV. 152, 158 (1973) (“While Judge Frankel recognizes that many sentencing factors are largely non-quantifiable and that a ‘perfect’ sentence cannot be reached by plugging one independent variable into a set formula, a substantial degree of agreement on concrete factors would promote rationality in the sentencing process.”).
- <sup>36</sup> Macklin Fleming, THE PRICE OF PERFECT JUSTICE 3 (1974).
- <sup>37</sup> Richard A. Epstein, SIMPLE RULES FOR A COMPLEX WORLD 38 (1995).
- <sup>38</sup> *Id.* at 38-39.
- <sup>39</sup> His address was later published at 101 YALE L. J. 2043 (1992).
- <sup>40</sup> It was not until January 1989 that the Supreme Court upheld the constitutionality of both the Commission and the guidelines. See *Mistretta v. United States*, 488 U.S. 361, 361 (1989); see also U.S. Sent. Comm’n, ANNUAL REPORT 11–12 (1989) (“The Supreme Court’s *Mistretta* decision cleared the way for nationwide application of the sentencing guidelines.”).
- <sup>41</sup> Frankel, *Sentencing Guidelines*, 101 YALE L. J. at 2046-50.



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- <sup>42</sup> See Jon O. Newman, *Remembering Judge Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT'G RPTR. 319 (2002).
- <sup>43</sup> U.S. SENT. COMM'N, GUIDELINES MANUAL (1987).
- <sup>44</sup> U.S. SENT. COMM'N, GUIDELINES MANUAL (1992).
- <sup>45</sup> U.S. SENT. COMM'N, GUIDELINES MANUAL (2005).
- <sup>46</sup> U.S. SENT. COMM'N, GUIDELINES MANUAL (2015).
- <sup>47</sup> See USSG §§2B1.1 & 2D1.1 (2015). In FY2015, those two offenses types accounted for 43.6 of all federal cases. See U.S. SENT. COMM., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. A (2015).
- <sup>48</sup> Compare USSG §2D1.1 (1987), with §2D1.1 (2015).
- <sup>49</sup> See USSC, App. C (797 amendments as of November 1, 2015).
- <sup>50</sup> See, e.g., Senator Orin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196 (1993) (noting that Congress made increased use of “specific statutory directives to the Commission to set forth desired guidelines amendments” sometimes in lieu of enacting mandatory minimum statutory penalties).
- <sup>51</sup> See Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1340 (2005) (referring to the Commission’s amendments as being “a one-way upward ratchet”).
- <sup>52</sup> USSG, App. B, at 83 (2015) (setting forth Pub. L. 110-384).
- <sup>53</sup> USSG §5K2.0 (1987).
- <sup>54</sup> See USSG §§5H1.1, 5H1.3, 5H1.4 and 5H1.6 (1987).
- <sup>55</sup> REPORT OF THE COMMITTEE OF THE JUDICIARY, UNITED STATES SENATE, on S. 1872, No. 98-225, at 168-69 (Sept. 14, 1983).
- <sup>56</sup> See 28 U.S.C. § 994(d) (“The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”) & (e) (“The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”).
- <sup>57</sup> 28 U.S.C. § 994(b)(2).
- <sup>58</sup> See U.S. SENT. COMM'N, ANNUAL REPORT 63 (1992) (Tab. 21).
- <sup>59</sup> ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 282 (1987) (Tab. D-5).
- <sup>60</sup> See Christopher Stokes, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-86 (IV. Sentencing, Probation, and Parole)*, 75 GEO. L.J. 1195, 1198 (1987) (discussing the federal parole laws in effect before the guidelines went into effect and noting that federal prisoners typically were eligible for release on parole after serving one-third of their prison sentences and sometimes even less).
- <sup>61</sup> U.S. SENT. COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2015) (Tab. 14).

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<sup>62</sup> See Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006-6* (2009) (Table 1.3) (38-month average sentence of incarceration), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>; see also Stefan J. Bing, *Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions*, 100 KY. L.J. 871, 872 (2011) (noting that 34 of the 50 states still have parole boards that release prison inmates early on parole).

<sup>63</sup> See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 268 (1993) (“In addition to the general provisions inviting the commission to set guidelines that would result in more persons being imprisoned for longer prison terms, several other provisions of the Sentencing Reform Act of 1984 encourage imprisonment of particular categories of offenders.”); see also *id.* at 284 (“[O]ur examination of the statute and its legislative history demonstrates, we believe, that, by and large, the Commission has implemented the Sentencing Reform Act in a manner consistent with legislative intent.”); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 296 (1992) (“Many of the decisions of the U.S. Sentencing Commission that determined the current contours of federal sentencing hearings were preordained by Congress. Under the Sentencing Reform Act of 1984, the Commission was instructed to effect a dramatic change in sentencing philosophy. Congress had already decided to abandon rehabilitation as a major goal of sentencing, to abolish parole, and to minimize the use of probation.”).

<sup>64</sup> U.S. Sent. Comm’n, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 81 (2011) (“Combined Commission and BOP data demonstrate that an increasing number of inmates in the federal prison population were convicted of violating statutes carrying mandatory minimum penalties. As of September 30, 1995, combined Commission and BOP data identify 40,104 offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum penalty. . . . As of September 30, 2010, combined Commission and BOP data identify 111,545 offenders in BOP custody who were convicted of an offense carrying a mandatory minimum penalty, a 178.1 percent increase.”).

<sup>65</sup> See, e.g., U.S. Sent. Comm., USSG, App. C, Amends. 706, 713 (2008) (reducing guideline penalties for crack cocaine offenders).

<sup>66</sup> See, e.g., U.S. Sent. Comm., *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, at 1-2 (2014) (“[T]here is no evidence that offenders whose sentence lengths were reduced pursuant to retroactive application of the 2007 Crack Cocaine Amendment had higher recidivism rates than a comparison group of crack cocaine offenders who were released before the effective date of the 2007 Crack Cocaine Amendment and who served their full prison terms less earned credits.”).

<sup>67</sup> *Booker*, 543 U.S. at 243-44 (majority opinion of Stevens, J.).

<sup>68</sup> *Id.* at 258-68 (separate majority opinion of Breyer, J.).

<sup>69</sup> See *Gall v. United States*, (2007); see generally 18 U.S.C. § 3553(a)(1).

<sup>70</sup> U.S. Sent. Comm., REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, PART E (*Demographic Differences in Sentencing*) (2012), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_E.pdf#page=1](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf#page=1); see also William Rhodes et al., *Federal Sentencing Disparity: 2005–2012*, at 40-41 (Bureau of Justice Statistics 2015) (“[E]xamining the estimated changes over the 8-year period [from *Booker* to 2012], it appears that white males and females received sentences that decreased in severity.”), <http://www.bjs.gov/content/pub/pdf/fsd0512.pdf>.

<sup>71</sup> U.S. Sent. Comm., *Demographic Differences in Sentencing*, *supra* note 70, at 9 (Fig. E-3) (multiple regression analysis of FY2011 federal sentencing data showed black males received sentences that, on average, were 19.5% higher than white males; white females received sentences that were 31.1% lower than white males).

<sup>72</sup> 18 U.S.C. § 3553(a)(1).

<sup>73</sup> See *United States v. Wilson*, 355 F.Supp.2d 1269, 1276-77 (D. Utah 2005) (Cassell, J.).

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<sup>74</sup> See 18 U.S.C. § 3553(a)(1) (judges ultimately sentence based on “the nature and circumstances of the offense and the history and characteristics of the defendant”).

<sup>75</sup> Letter from Senators Charles E. Grassley and Diane Feinstein to Judge Patti B. Saris (Mar. 23, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/Senate.pdf>.

<sup>76</sup> Frankel, *Sentencing Guidelines*, 101 YALE L. J. at 2049 (“I am prepared to accept the position [of those critics who contended] that the guidelines do indeed produce some outlandish results. . . . Nevertheless, I think [these critics] are mistaken in their proposal that the . . . guidelines should be scrapped and that we should return to the older days.”); see also *id.* at 2050 (“[I]f we are to have meaningful rules of law to measure sentences, . . . they ought to be *rules*, not merely advice.”).

<sup>77</sup> *Id.* at 2047-48; see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 284 (1993) (“[O]ur examination of the statute and its legislative history demonstrates, we believe, that, by and large, the Commission has implemented the Sentencing Reform Act in a manner consistent with legislative intent.”).

<sup>78</sup> The Court in *Apprendi v. New Jersey* stated any fact that raises the statutory maximum is an “element” that must be pleaded in an indictment, at least in federal cases. See *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”). In *Blakely v. Washington*, 542 U.S. 296 (2004), and later in *Booker*, the Court applied the *Apprendi* principle to mandatory guidelines. See *Booker*, 543 U.S. at 230-33.

<sup>79</sup> See Michael Vitiello, *Introduction: Symposium Sentencing Guideline Law and Practice in a Post-Booker World* 37 MCGEORGE L. REV. 487, 502 (2006) (“*Cranford [v. Washington]*, 541 U.S. 36 (2004),] rejected longstanding precedent regarding the Confrontation Clause and *Booker* held that the mandatory application of the Guidelines violated the Sixth Amendment of the Constitution. Read together, they suggest that the Court should reconsider the traditional view that the Confrontation Clause does not apply at sentencing [in mandatory guidelines systems].”).

<sup>80</sup> See USSG §1B1.3.

<sup>81</sup> See Frank O. Bowman, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 461-62 (“Among the nine [states] that altered their sentencing regimes, the real world effects on jury participation seem to be de minimis. Where statistics are available, they show no observable effect on jury-trial rate in these states from the enactment of measures making sentencing *Blakely*-compliant.”).

<sup>82</sup> See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“[T]he institution of the jury raises the people itself. . . to the bench of judicial authority [and] invests the people . . . with the direction of society.’ . . . Jury service preserves the democratic element of the law.”) (quoting Alexis de Tocqueville, 1 DEMOCRACY IN AMERICA 334-337 (Schocken 1st ed. 1961)).

<sup>83</sup> See, e.g., Daniel Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001); Anthony Doob & Cheryl Webster, *Sentence Severity and Crime: Accepting the Null Hypotheses*, 30 CRIME & JUSTICE 143 (2003); see generally Cesare Beccaria, *On Crimes and Punishments* (1764), in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 346, 349 (Morris R. Cohen & Felix S. Cohen eds., 1951).

<sup>84</sup> See U.S. Sent. Comm’n, *Recidivism Among Federal Offenders: A Comprehensive Overview*, at 18 (2016) (Fig 6), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf).

<sup>85</sup> *Rita v. United States*, 551 U.S. 338, 370 (Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.).

<sup>86</sup> *Molina-Martinez v. United States*, \_\_\_ U.S. \_\_\_, 2016 WL 1574581 (Apr. 20, 2016).

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<sup>87</sup> *Id.* at \*4.

<sup>88</sup> *Gall v. United States*, 552 U.S. 38, 51 (2007).

<sup>89</sup> *See, e.g., United States v. Feemster*, 572 F.3d 455, 467 (8<sup>th</sup> Cir. 2009) (en banc) (Colloton, J., concurring).

<sup>90</sup> *See, e.g., United States v. Rigas*, 583 F.3d 108, 122-23 (2d Cir. 2009) (“The manifest-injustice, shocks-the-conscience, and substantive unreasonableness standards in appellate review share several common factors. . . . [T]hey are deferential to district courts and provide relief only in the proverbial ‘rare case’”).

<sup>91</sup> *See* U.S. Sent. Comm., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2015) (Tab. 55) (noting that there were 4,902 appeals challenging federal sentences in FY2015). There were an additional 1,498 *Anders* briefs – many of which involved frivolous sentencing appeals.

<sup>92</sup> *Cf. Jackson v. Virginia*, 443 U.S. 307 (1979).

<sup>93</sup> Kevin Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 N.W. U. L. Rev. 1441 (1997).

<sup>94</sup> William K. Sessions, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305 (2010).

<sup>95</sup> Edwin Meese III et. al., *The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post Booker World* (2006), in 18 FED. SENT’G REP. 310, 314-15 (2006).

<sup>96</sup> *See* 28 U.S.C. § 994(p).

<sup>97</sup> *Cf. Amy Baron-Evans & Kate Stith, Booker Rules*, 160 U. PA L. REV. 1631, 1726-27 (2012).

<sup>98</sup> *Mistretta*, 488 U.S. at 396.

<sup>99</sup> *Id.*

<sup>100</sup> *See Blakely*, 542 U.S. at 307-08. Although five members of the Court in *Booker* stated that “[o]ur decision in *Mistretta* . . . upholding the validity of the delegation of [mandatory guideline promulgation] authority [to the Sentencing Commission] . . . is unaffected” by *Apprendi* and *Blakely*, *Booker*, 543 U.S. at 241, that statement was arguably dicta because it was unnecessary to the holding of that five-member majority. That five-Justice bloc simply invalidated the mandatory nature of the federal guidelines in view of *Blakely* but did not rule on the constitutionality of a new, post-*Blakely* mandatory or presumptive guidelines system that used juries and the reasonable-doubt standard. I believe that the unconstitutional delegation issue is an open one – and a serious constitutional question – and can be avoided by requiring Congress to affirmatively enact the aggravating factors in presumptive guidelines into law.

<sup>101</sup> *See United States v. O’Brien*, 560 U.S. 218, 224 (2010) (noting the “one exception” to *Apprendi* is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

<sup>102</sup> *See, e.g.,* Amendment to the Sentencing Guidelines, “Reason for Amendment [to USSG §2B1.1]” (Apr. 30, 2015) (“This amendment is a result of the Commission’s multi-year study of §2B1.1 and related guidelines, and follows extensive data collection and analysis relating to economic offenses and offenders. Using this Commission data, combined with legal analysis and public comment, the Commission identified a number of specific areas where changes were appropriate.”), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430\\_RF\\_Amendments.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430_RF_Amendments.pdf).

<sup>103</sup> *See* U.S. Sent. Comm’n, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) & REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011).

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<sup>104</sup> *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment); Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting, San Francisco (Aug. 9, 2003), available at [www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html).

<sup>105</sup> *See United States v. Kuhl*, 816 F. Supp. 623, 626 n.4 (S.D. Cal. 1993) (“After sentencing several hundred defendants under the sentencing guidelines and after diligent, repeated, and thoughtful study of the [*Guidelines*] *Manual*, I am afraid that the government, in the hope that disparity would be eliminated, has attempted more than it ought and has ended up doing less than it should.”) (citing Fleming, *supra* note 36, at 3).