Written Statement of the American Civil Liberties Union

Submitted to the House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism and Homeland Security

Hearing on "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker"

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Martin Luther King noted that "law and order exist for the purpose of establishing justice and . . . when they fail in this purpose they become the dangerously structured dams that block the flow of social progress."[1] His words ring true in the ears of those who have tried to balance the sometimes contradictory notions of punishment and progress in this country. We all believe that law and order must be consistent and, indeed, just. The question of equality of punishment has long plagued the country and thus, it is not surprising that the question comes up in the context of the criminal justice system. The Sentencing Reform Act of 1984 (SRA)[2] tried to respond to this issue with an answer of its own.

This House Judiciary's Subcommittee on Crime, Terrorism and Homeland Security hearing entitled "Uncertain Justice: The status of the Sentencing Commission and Federal Sentencing Six Years after U.S. v. *Booker*" will presumably examine whether the objectives of the SRA such as to reduce unwarranted disparities and increase certainty and fairness in sentencing are being achieved with this current federal Guideline system. Specifically, the hearing will explore whether the current federal advisory sentencing Guidelines are consistent with the intent of Congress when it enacted the SRA? After over a decade of federal sentencing under mandatory Guidelines that created an unnecessarily ridged sentencing scheme, the current advisory Guidelines system has resulted in judges having a limited amount of discretion to sentence people to fairer sentences which is completely consistent with the goals of the SRA.

Also, the hearing will focus on whether the U.S. Sentencing Commission has overstepped its authority by proposing that certain offender characteristics are relevant to a determination of a person's sentence and by its decision to apply the Fair Sentencing Act of 2010 Guidelines retroactively. Again, both the proposal to consider specific offender characteristics and the Commission's decision on retroactivity are consistent with the SRA's objective to create more fairness in sentencing, thus it is appropriate role for the Sentencing Commission to make these type of determinations.

I. The Sentencing Reform Act of 1984

In the 1970s, observers of the American judicial system were increasingly concerned with the widespread disparity in sentencing for crimes of a similar nature and severity. With broad discretion, judges imposed widely varying sentences for similar offenses. As a result, many pushed for more determinate sentencing, which established sentences by statute for a fixed or

[1] Martin Luther King Jr., *The Negro Is Your Brother; Letter from a Birmingham Jail,* THE ATLANTIC MONTHLY, August 1963, at 78-88.

[2] Sentencing Reform Act of 1984, Pub. L. No. 98-473 §211, 98 Stat. 1837.

minimum period and limited the range of discretion exercised by judges and parole authorities.[3] The SRA was thought to be a necessary means to two different ends for those on both sides of the political spectrum. The liberal criticism of the pre-SRA world focused on the unwarranted disparities, including alleged bias against minorities. Those on the political right condemned the perceived leniency of the sentencing structure and rehabilitation system.[4] After some haggling in the Senate and House over competing versions of the bill, which included proposed integration into a criminal code reform bill, eventually compromise legislation, the Sentencing Reform Act passed in 1984.[5]

As enacted, the SRA codified a framework for a determinate sentencing scheme under federal law.[6] Supporters of the SRA wanted to reduce unwarranted disparity among defendants having similar records or guilty of similar conduct. They also wanted to increase certainty and fairness of sentencing. The drafter of the SRA, Kenneth Feinberg, said himself that the primary motivating factor was the concern over sentencing disparities.[7] The legislation created the United States Sentencing Commission, an independent expert panel in the judiciary tasked with producing federal sentencing Guidelines and monitoring the application of the Guidelines. Parole in the federal system was abolished entirely and to provide the certainty and fairness that SRA proponents sought, the sentencing and outcome were to be based upon "articulate grounds."[8] Courts were directed to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing."[9] The statute enumerated four purposes of sentencing: (1) punishment; (2) deterrence; (3) incapacitation; (4) rehabilitation.[10] However, the statutory text of the Act provides no clear statement as to how these four purposes were to be reconciled with each other. Essentially, the SRA aimed to produce consistency in punishment enabled by the fairness emblematic of social progress.

II. United States v. Booker

In 2005, the Supreme Court in *United States v. Booker*[11] held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum or even the ordinary range must be submitted to a jury and proved beyond a reasonable doubt. As a result, the Court held

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[3] Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1006 (2001).
[4] Erik S. Seibert, *The Process is the Problem: Lessons Learned From United States Drug Sentencing Reform*, 44 U. Rich. L. Rev. 867, 888 (2010).
[5] Parker *supra* note 2.
[6] *Id.* at 1007.
[7] William K. Sessions III, *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, 314 n.45 (2011)
[8] Parker *supra* note 2 at 1007.
[9] *Id.*
[10] *Id.*
[11] 543 U.S. 220 (2005)

that the federal sentencing Guidelines violated the Sixth Amendment's right to trial by jury and declared that the sentencing Guidelines could not be mandatory.

Prior to *Booker*, the statute compelled sentencing courts to impose sentences within the Guidelines range barring exceptional circumstances specific to the individual offender.[12] Trial judges could not account for instances when the guideline sentence for a specific offense failed to effectuate the broad sentencing goals articulated by Congress.[13] *Booker* fundamentally altered the landscape of sentencing. The opinion in Booker struck from the federal sentencing statute the provision that mandated the imposition of sentences within Guidelines sentences.[14]

While allowing sentencing courts to continue to make factual findings, the *Booker* opinion cured the statute of constitutional infirmity by declaring the Guidelines to be merely advisory. In 2007, the Court in *Rita v. United States*[15] reiterated that sentencing courts could no longer "presume[e] that the Guidelines sentence should apply." *Rita* emphasized that district courts must take the Guidelines into account when sentencing, even if they are no longer bound by them.

The *Booker* decision was a reaction to a number of problems in the pre-*Booker* system. As a report by the Constitution Project highlights[16], the sentencing Guidelines had several deficiencies:

1. *The Guidelines were overly complex. They subdivided offense conduct into too many categories and required too many detailed factual findings.*
2. *The Guidelines were overly rigid*
3. *The Guidelines placed excessive emphasis on quantifiable factors such as monetary loss and drug quantity and not enough emphasis on other considerations, such as the defendant's role in the criminal conduct.*
4. *The basic design of the Guidelines contributed to a growing imbalance among the institutions that create and enforce federal sentencing law and has inhibited the development of more just, effective and efficient federal sentencing system.* [17]

Noticeably, the pre-*Booker* world still encompassed many of the same problems the SRA set out to remedy – imbalance, consistency and unfairness. While attempting to resolve

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[12] *Id*. at 223-24.
[13] 18 U.S.C. Sec. 3553(a)
[14] *Id*. at 259-260.
[15] 551 U.S. 338 (2007)
[16] The Constitution Project, *Principles for the design and Reform of Sentencing Systems: A Background Report*. at 13, available at http://www.constitutionproject.org/pdf/34.pdf

[17] *Id.*

inconsistency in sentencing, the SRA became too rigid. With respect to offender characteristics, the Guidelines significantly restricted judges' ability to consider many aspects, such as a defendant's age and family circumstances, and instead focused on a defendant's criminal record as the most important offender characteristic.[18] As former Chair of the U.S. Sentencing Commission Judge William K. Sessions argued, the Guidelines turned judges into computers, thereby taking away their humanity and reason.[19]

III. A Post-*Booker* Advisory Guideline World

With the *Booker* decision, federal courts now apply advisory sentencing Guidelines to reduce some of the rigidity about which some judges complained. In the wake of *Booker*, the Sentencing Commission continues to fulfill its role in developing Guidelines, but judges no longer are required to follow the Guidelines. However, judges are only able to sentence offenders below statutory mandatory minimum sentences, in limited circumstances.[20] Under the advisory Guidelines system, sentencing courts are still tasked with consulting the Guidelines, but are not bound by them. The Guidelines still provide federal judges with fair and consistent sentencing ranges to consult at sentencing. The advisory Guidelines take into account, both the seriousness of the criminal conduct and the defendant's criminal record. Certain characteristics (including age and mental condition) now "may be relevant" in granting a departure from the Guidelines range if "present to an unusual degree."[21] The Commission has also taken steps to encourage judges to consider human characteristics in sentencing.[22]

In testimony before the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, James Felman of Kynes, Markman & Felman, P.A, one expert suggested that the post-*Booker advisory Guidelines* may, indeed, be the best option. "The mix of information presented by offenses and offenders is frequently so rich that it simply cannot all be predicted, written down, and appropriately weighed in advance with unfailing success."[23] He notes that the mandatory Guidelines actually contradict the very purposes under which they were commissioned – yielding undue uniformity, treating unlike offenses and offenders in a like manner. Felman argues that an advisory system that permits consideration of other relevant factors is a good solution to the Guidelines undue rigidity.

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[18] Sessions *supra* note 6 at 315.
[19] *Id.*
[20] i.e. if an offender qualifies for the "safety valve" or is granted a government sponsored downward departure.
[21] Sessions *supra note* 6 at 337.
[22] *Id.*
[23] *United States v. Booker: One Year Later- Chaos or Status Quo?: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 155 (2006)* (statement of James E. Felman, Partner, Kynes, Markman, and Felman, P.A.).

The post-*Booker* system still accomplishes the task of giving trial judges flexibility, yet not allowing them unbridled discretion. As a result of what Judge Sessions terms a "Guidelines culture," judges actually are supportive of this system that allows for limited discretion. Seventy-five percent of judges surveyed preferred the *Booker* "advisory" system to the "mandatory" system.[24] Seventy-eight percent opined that the advisory Guidelines reduced disparity, and 67% felt the advisory Guidelines increased fairness.[25]

Despite the optimism surrounding the advisory system, the ultimate test of its effectiveness will be in the overall fairness in sentencing those results from its use. In March 2010, the Commission issued a report concluding that after the enactment of the PROTECT Act of 2003, federal legislation that created a *de novo* standard of appellate review for federal sentences,[26] black male offenders received longer sentences than white male offenders. More notably, the report also found that these differences in sentences between black and white male offenders increased after *Booker* and again after the *Gall v. U.S.*[27] In spite of this finding, the Commissions' report conceded that under a more expansive analysis spanning between 1999 through 2009 the greatest difference in the length of sentences between black and white offenders occurred in 1999, when the Guidelines were mandatory.[28] The Commission's study also found that black females received shorter sentences than males of any race and other females except Native American, Asian, Alaskan Native, and Pacific Islander women.[29]

Some are using this analysis to suggest [30]that there is growing racial bias among federal judges, even though the study does not include many legally relevant factors that legitimately affect sentencing decisions. These factors include an offenders' employment background, history of violence, family responsibilities, mental illness, substance abuse or abstinence among other factors.

After the Commission released its report, researchers at Pennsylvania State University using the Commission's data sets to release a study, but reached a different conclusion. The Penn State study found "[p]ut simply, racial and gender sentence length disparities are less today, under advisory Guidelines, than they were when the Guidelines were arguably their most rigid

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[24] Sessions *supra* note 6 at 328.
[25] *Id.*
[26] The Protect Act's appellate standard of review was later stricken from the statute by *Booker*
[27] USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the* Booker Report's *Multivariate Regression Analysis* 2, 22-23 (2010).See also 552 U.S. 38 (2007), the United States Supreme Court held that the federal appeals courts may not presume that a sentence falling outside the range recommended by the Federal Sentencing Guidelines is unreasonable.
[28] Id. at 14.
[29] *Id*. at 4, 22, 23. "Other" includes Native American, Asian, Alaskan Native, and Pacific Islander.
[30] Otis, William, The Slow, Sad Swoon of the Sentencing Suggestions, Criminal Law and Procedure, Volume 12, Issue 1, pgs. 28-33.

and constraining."[31] The Commission and Penn State studies reach different results because they use different methodologies.[32]

The Penn State study also looked at government sponsored departures or departures that result from prosecutors agreeing to a sentence below the Guidelines because a defendant has cooperated in the case versus a judge initiated downward departure which results from a judge sentencing below the advisory Guidelines. As a result, the research concluded that government sponsored below guideline sentences create more racial disparity than judge initiated deviations.[33] The analysis also suggests that Hispanic males do not benefit as much from prosecutorial sponsored substantial assistance departures since the *Gall* decision[34]

Unfortunately, multivariate analyses that attempt to examine whether there are unwarranted disparities at sentencing, such as the Commission's research and the Penn State study, cannot measure the effects of the *sentencing and other law enforcement policies* on racial unfairness. For example, these studies do not assess the demonstrated adverse effect of criminal justice policies that result in unnecessarily harsh sentences that disproportionately punish people of color, such as the crack/powder cocaine disparity or the impact of selective law enforcement scrutiny, arrests, and charging and plea bargaining decisions.[35] Often these criminal justice policies contribute as much or more to unwarranted disparities as the sentence hand down by a judge.

IV. Post-*Booker* Advisory Guidelines Reflect the Congressional Intent of the SRA

1. Efficiency is Flexible

In the SRA, Congress adopted a "just punishment" framework, placing importance on minimizing the social harms associated with both crime and punishment.[36] The "just

[31] Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity In the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y __ (forthcoming) ["Penn State Study – Alternative Analysis"] (manuscript at 31-32), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675117 (updated manuscript on file with authors).

[32] These kinds of considerations led the Penn State team to prefer the second approach.[32] The Commission chose the first approach, studying all types of sentences together and treating probationary sentences as zero months of imprisonment. The Penn State researchers found that what appeared to be lengthier prison sentences for black male offenders under the advisory Guidelines was, in fact, an increased difference in the portion of black and white male offenders who received probation after *Gall.*

[33] Penn State Study – Alternative Analysis (manuscript at 2, 34-35, 39).

[34] *Id.* at 34.

[35] *Fifteen Year Review* at 89-92, 133-35.

[36] *Id*. at 302-3.

punishment" in the context of the Guidelines should reflect the seriousness of the offense, promotion of respect for the law, and providing just punishment for the offense. [37]

Society is harmed by rigid sentencing, which puts 2.3 million people behind bars, [38] 591,000 of those in prison are African American.[39] We cannot continue to disproportionately incarcerate certain ethnic groups and profile target groups and simultaneously promote a system that "respects the law" and "reflects the seriousness of the offense." Criminal justice policies such as racial profiling and law enforcement targeting particular communities (often communities of color) for arrest and prosecution actually contradict the above defined congressional intent. The advisory role currently instituted gives judges a *guideline range* in which to consider sentencing, allowing for both flexibility that both respects a judge's competence and respects the law as Congress intended.

2. Best Available Knowledge

Certainty and fairness *in accordance with the best available knowledge* are two of the major purposes of the Sentencing Commission.[40] Further, the Sentencing Reform Act directed the Commission to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in the Act.[41] This function of the Commission seems to elevate the weight and credibility of the Commission in sustaining Congressional intent. The SRA requires the Commission to develop the expertise needed to measure the effectiveness of criminal sentences.[42] The Commission has assumed the responsibility of educating judges and practitioners on social science research that pertains to the relevance of particular offender characteristics in sentencing.[43] It is vital that the Commission maintain this expert role in the criminal justice community. Performing this role as an advisor does not render them incapable of maintaining expert status.

3. ***Determinate Sentencing***

Legislative history of the SRA is replete with references to "determinate sentencing" and the concept is still held up by some as an example of a flaw in the current system. But, determinate sentencing is not wholly without benefit. It is entirely appropriate for the Guidelines to seek to reduce the amount of unwarranted variation in federal sentencing outcomes and advisory

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[37] *Id.* at 303.
[38] Pew Center on the States, *One in 100: Behind Bars in America 2008,* (Washington, DC: The Pew Charitable Trusts, April 2011).
[39] *Prisoners in 2009*, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Dept. of Justice, Office of Justice Programs), Dec. 2010, at 27 *available at http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf.*
[40] Parker *supra* note 2 at 1011.
[41] *Id.*
[42] *Id.*
[43] *Id.*

Guidelines can achieve this objective. Judicial discretion still fits within in a range of options based on principled reasoning, due in part, to the expert role of the Commission. The Sentencing Guidelines Manual, which is a publication of the Sentencing Commission that includes the Federal Sentencing Guidelines, serves as a resource for Congress' special interest in an articulated and determinate Guideline.

The introductory commentary of the Guidelines Manual notes that "in determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics." The manual quotes *Booker*, which emphasizes that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."[44] This is exactly what the advisory Guidelines have accomplished by providing a framework for judges to sentence offender while also allowing the flexibility to consider that specific facts of that person case.

The Guideline Manual affirms the Congressional intent behind the SRA is not inconsistent with the advisory Guidelines, but noting "the Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates."[45] The intent behind "providing information" does not contradict the reasoning in *Booker* behind a purely "advisory" role.

4. Guided Discretion

The reasoning behind SRA, as alluded to above, was to provide certainty in sentencing and to reduce disparities in sentencing by judges. The advisory Guidelines simply do not threaten this fundamental mission. In fact, they give judges greater license to implement equitable discretion and fairer sentencing overall. Because the Commission is tasked with the research component and in educating judges on issues of sentencing conduct that they otherwise might not have, it does not depart from either the overall efficiency responsibility with which it was tasked nor the advisory responsibility for which it is currently tasked. Further, the Court still requires sentencing judges to consider the Guidelines as a benchmark for appropriate sentencing.[46] In Fiscal Year 2009, 56.8% of federal sentences were imposed with the applicable Guidelines range; another 25.3% were the result of a government-sponsored downward departure.[47] Any notion of departure from the Guidelines and judges running rampant with unfettered opinions is exaggerated.

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[44] UNITED STATES SENTENCING COMMISSION, 2010 FEDERAL SENTENCING GUIDELINES MANUAL & SUPPLEMENT 448 (2010).
[45] Id. at 51.
[46] Sessions *supra* note 6 at 316.
[47] Id. at 316 n.59.

5. Consistent, but Fair

One of the goals of the SRA was to provide consistency in sentencing, but in so doing it did not make other goals inaccessible, including the primary goal of "fairness." To be too consistent is to be unfair as mandatory Guidelines might disregard the peculiar circumstances of a case or a person or the circumstances therein or the judges own knowledge beyond that of a simple algorithm. The nature, extent, and significance of specific offender characteristics can involve a range of considerations.[48] The Commission is still responsible for providing a foundation for that range of considerations in a reasoned, well-articulated, researched way, which is exactly the process with which it was tasked.

The fact is that determinate sentencing and mandatory Guidelines ultimately contradict Congressional intent of SRA in a way that the post-*Booker* understanding seeks to remedy. Determinate sentencing provides consistency, but to a fault. It renders judges ultimately useless and as a result the respect for law and order, the respect for justice and the respect for equity is diminished.

V. Post *Booker* Appellate Standard of Review for "Unreasonableness"?

In addition to declaring the Sentencing Guidelines advisory in *Booker*, the Supreme Court also considered the appropriate standard of appellate review in light of the now advisory nature of the Guidelines, noting that excision of 18 U.S.C. § 3553(b)(1), which rendered the Guidelines mandatory, also required the excision of 18 U.S.C. § 3742(e), the corresponding section of the Act addressing appeals.[49]

Ultimately, the Court determined that, going forward, federal appeals [50]courts must apply the familiar abuse-of-discretion standard to determine the reasonableness of a given sentence. In its decision in *Gall v. United States* two years later, the Court stated explicitly that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences whether inside, just outside, or significantly outside the Guidelines range under a deferential abuse-of-discretion standard."[51] The Court went on to provide precise guidance to appellate courts, adding:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as

[48] 2010 FEDERAL SENTENCING GUIDELINES MANUAL & SUPPLEMENT *supra* note 21.
[49] 543 U.S. at 260.
[50] *Id.* at 260-261.
[51] 552 U.S. 38, 41 (2007).

> failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound; the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness.[52]

The Court based its decision regarding the appropriateness of the abuse-of-discretion standard, quite logically, on "related statutory language, the structure of the statute, and the 'sound administration of justice,'" as well as "the past two decades of appellate practice in cases involving departures."[53]

While critics have complained that the review standard announced by the Court in *Booker* and *Gall* has "severely degrade[d] [courts of appeals'] ability to correct even gross outlier sentences,"[54] a careful review of the Court's rationale in reaching its decision, as well as the historical context in which the decision was made, reveals the appropriateness and ultimate workability of the abuse-of-discretion standard. Despite some commentators' lamentations that *Booker* "stripped the courts of appeals of the power of de novo sentencing review," the fact is that the de novo standard was not inserted into 18 U.S.C. § 3742(e) until 2003, just two years before *Booker* was decided. In the two decades prior to that, under the mandatory regime, appellate courts were directed to determine whether a sentence was "unreasonable" in light of the factors articulated in 18 U.S.C. § 3553(a)—an inquiry entirely consistent with the abuse-of-discretion standard the Court found implicit in the Act, even after the removal of § 3553(b)(1).

"Two basic principles underlie the application of the abuse-of-discretion standard."[55] The first is that, where a court's ruling is based, in large part, on the judge's unique perspective

[52] *Gall*, 552 U.S. at 597.
[53] *Booker*, 543 U.S. at 260-261.
[54] Otis, p. 30
[55] *United States v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009).

as the finder of fact, due deference should be given to the court's decision on appeal.[56] Hence, the Supreme Court has recognized that "deference was owed to the 'judicial actor…better positioned than another to decide the issue in question.'"[57]In the sentencing context, the abuse-of-discretion standard and the attendant level of deference to the district court are particularly appropriate. In addition to being more intimately familiar with the facts of the case simply by virtue of presiding over the proceedings, the sentencing judge has the opportunity to assess the credibility of witnesses, both at trial and during the sentencing phase, and to observe and interact directly with the defendant. As such, it makes perfect sense for appellate courts to extend significant deference to the district court's decision.

The second justification for the use of the abuse-of-discretion standard is "the sheer impracticability of formulating a rule of decision for the matter in issue."[58] That is, because of the fact-specific nature of any given case, the district court is better positioned to come to a reasoned decision, including in the sentencing context, than is the appellate court.[59] It is no surprise then that the Supreme Court has found, even prior to *Booker*, that "[a] district court's decision to depart from the [mandatory] Guidelines…will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court."[60] The Court in *Koon* went on to add that deference to the district court stems from that court's "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing."[61] Moreover, "a district court's departure decision involves the consideration of unique factors that are little susceptible…of useful generalization, and as a consequence, *de novo* review is unlikely to establish clear Guidelines for lower courts."[62]

For these same reasons, the Court, in light of *Booker*, has determined that the abuse-of-discretion standard continues to be the most appropriate in the sentencing context, notwithstanding the fact that the Guidelines are no longer mandatory. The Court has made clear that "[t]he sentencing judge is in a superior position to find facts and judge their import under 18 U.S.C§3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record."[63]

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[56] See *Id. (noting that "deferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter.") (internal citation omitted).*

[57] *Koon v. United States*, 518 U.S. 81, 98, 99 (1996) (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-560 (1988).

[58] *Pierce*, 487 U.S. at 561-562.

[59] *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("'Fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise.'") (quoting *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

[60] *Koon*, 518 U.S. at 98.

[61] *Id.*

[62] *Id.* at 99 (internal citations omitted).

[63] *Gall*, 552 U.S. at 51

In addition, "district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do."[64] The fact that appellate courts relied on a reasonableness inquiry prior to *Booker*, with the exception of the short timeframe between passage of the Feeney Amendment in 2003 (establishing a *de novo* review standard) and the Court's decision in 2005, is particularly important given that, even according to some observers, "compliance [with the mandatory Guidelines] was still above seventy percent as late as 1995."[65] Indeed, the Sentencing Reform Act, introduced in 1984, both created the Guidelines and "provided for robust appellate enforcement."[66] While rates of compliance with the Guidelines may have decreased in recent years, there is nothing to suggest that the decrease was driven by the standard of review employed by appellate courts.

It also should be noted here that the abuse-of-discretion standard applies with equal force whether the court sentences a defendant above, below, or within the guideline range. As such, to the extent that this standard of review renders the court's sentencing decision difficult to overturn on appeal, all parties are on equal ground. In addition, despite complaints that increased judicial discretion post-*Booker* favors defendants by encouraging downward departures, the fact is that the overwhelming majority of sentences—nearly sixty percent—still fall within or above the now-advisory guideline range.[67]

Some may argue, and the Court acknowledges, that the "reasonableness" standard will not necessarily lead to the kind of uniformity in sentencing that Congress sought in enacting the SRA. However, "Congress wrote the language of the appellate provisions to correspond with the mandatory system it intended to create."[68] As such, and given that the Guidelines have been deemed advisory, the question becomes "which alternative adheres more closely to Congress' original objective: (1) retention of sentencing appeals, or (2) invalidation of the entire Act, including its appellate provisions?"[69] Although the former will not guarantee absolute uniformity in sentencing, appellate courts' reasonableness determination, based on an abuse-of-discretion standard, "would tend to iron out sentencing differences," while the latter would leave parties with no opportunity to appeal at all. Additionally, appellate review under the current standard works in tandem with the continued efforts of the Sentencing Commission to collect sentencing information from around the country, research salient legal issues, and revise the Guidelines as

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[64] *Id.* at 52. *See also Rita v. United States*, 551 U.S. 338, 357-358 (2007).
[65] (Otis, p. 28).
[66] *Id.*
[67] As Otis acknowledges, a significant portion of the below-Guideline sentences that are doled out result, not from the whims of bleeding-heart liberal judges who refuse to crack down on offenders, but rather from substantial assistance provided by defendants to the government, pursuant to § 5K1.1 of the Sentencing Guidelines. See Otis at 30.
[68] *Booker*, 543 U.S. at 263.
[69] *Id.*

necessary, thus encouraging uniformity in sentencing while also allowing district courts to consider the specific circumstances and characteristics surrounding individual defendants.

At the very least, the majority of defendants wishing to challenge their above- or within-Guidelines sentences continue to face very long odds on appeal given the current standard of review. Nevertheless, in light of the fact that the abuse-of-discretion standard gives significant weight to the sentencing court's decisions, encourages adherence to the Guidelines by permitting appellate courts to maintain the presumption of reasonableness with regard to within Guideline sentences, and thereby discourages frivolous appeals. It is difficult to quarrel with the Court's conclusion that the current standard is the most appropriate in this context.

Although prosecutors and others may now, post-*Booker*, find the abuse-of-discretion standard to be a frustrating impediment to successful appeals—a frustration long held by defendants—the suggestion that the standard is therefore unworkable or unfair is ironic. Indeed, the better question seems to be how a *de novo* standard of review, as proposed by some critics, could be squared with the Court's consistent and well-reasoned conclusion, as highlighted above, that sentencing courts maintain a unique and significant advantage over appellate courts in determining the appropriate sentence for criminal defendants. At best, such a standard would encourage duplicative efforts by district and appellate courts. At worst, it would allow appellate judges, far removed from the original proceedings and relying solely on a paper record, to substitute their judgment for that of the sentencing judge who had first-hand access to the proceedings, a phenomenon long frowned upon in our system of justice.

VI. The Role of the U.S. Sentencing Commission

One of the stated goals of the Sentencing Reform Act of 1984 was to assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all federal criminal cases. Another stated goal was to provide a full range of sentencing options from which to choose the most appropriate sentence in a particular case in order to reduce the use of imprisonment.[70] Specifically, the SRA aimed to produce sentences that were sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C.A. § 3553(a)(2)(A). Indeed, this "parsimony principle" remains the driving force behind federal sentencing. To achieve fair sentences that were neither excessive nor the result of robotic reliance on incarceration, the SRA called for sentencing policies and practices that account for the history and characteristics of the defendant,[71] provide fairness in meeting the purposes of sentencing, and permit individualized sentences when warranted by mitigating or aggravating factors.[72]

[70] S. Rep. No. 98-225, at 39 (1983)
[71] See 18 U.S.C.A. § 3553(a)(1),
[72] 28 U.S.C. § 991(b)(1)(B).

As is well documented, for a number of reasons the mandatory Guidelines scheme that persisted for two decades frustrated Congress's goals in enacting the SRA. While the SRA was designed to eliminate *unwarranted* disparity, it was not promulgated either to dispense with *warranted* disparity or to create *unwarranted uniformity*. Yet this is exactly what the mandatory Guidelines system did, primarily by mandating excessive uniformity among defendants regardless of differences in culpability, dangerousness, risk of recidivism, or need for rehabilitation. This cookie-cutter approach, in turn, resulted in many punishments that did not fit the offender and were thus not justified by the purposes of sentencing. The quest for uniformity within the harsh mandatory scheme led to an overall increase in lengthy prison sentences, made it impossible for judges to craft reasonable sentences sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C.A. § 3553(a)(2)(A.

In addition, although not obligated to do so, the Sentencing Commission tied the drug Guidelines to mandatory minimums, and, despite Congress's authorization for judges to impose probation for any offense with a statutory maximum below 25 years unless expressly precluded for the offense, 18 U.S.C. § 3561(a), § 3559(a), the Commission made probation unavailable to many offenders.[73] Despite the fact that § 994(d) directed the Commission to consider a non-exhaustive list of eleven mitigating and aggravating factors in establishing an appropriate sentence (age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood), and that of these factors Congress directed the Commission *not* to rely on the defendant's lack of education, vocational skills, employment, or stabilizing ties to recommend imprisonment over probation or a longer prison, the Commission, nonetheless, inserted numerous aggravating factors to be weighted heavily by judges while minimizing both the number and significance of mitigating factors.[74]

Factors such as age, mental or emotional conditions, physical condition, employment record, educational and vocational skills, family ties and responsibilities, and community ties were deemed "not ordinarily relevant" as grounds for downward departure (a list which had been expanded to include additional factors in the years following the passage of the SRA), while drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were prohibited completely. Simply put, although the Congress that enacted the SRA thought there was "too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty

[73](The percentage of prisoners receiving probation has dropped from almost 35% in 1984 to less than 10% in 2010). 1984-1990 FPSSIS Data files, Administrative Office of U.S. Courts; USSC, *Sourcebook of Federal Sentencing Statistics*, tbl.12 (1991-2009); USSC, *Preliminary Quarterly Data Report, Fourth Quarter FY 2010*, tbl.18.

[74] (Though they could be considered for non-incarceratory sentences), S. Rep. No. 98-225, at 174 (1983),

that results from imprisonment,"[75] the mandatory sentencing scheme struck down by *Booker* relied heavily on not only on incarceration, but lengthy incarceration.

The good news is that in recent years the Commission has learned from its mistakes, as well as from two decades of sentencing under the Guidelines regime, and sought to set federal sentencing back on the path it was originally intended for by the SRA. This path was made much more tolerable by *Booker* ending the mandatory guideline system. Through close analysis of its significant data set, the Commission has regained its footing and embraced its original purpose: serving in a vital role to improve our federal sentencing scheme in a way that makes individual sentences fairer and more rational while at the same time ensuring that sentencing practices remain within a permissible and predictable range of possibilities. In tandem with the Commission's recent work and decision, the now-advisory Guidelines system reduces both the unwarranted disparities and unwarranted uniformity created in large part by the mandatory system. In this way, the corrections that the Commission and courts have been making post-*Booker* are in no way radical; rather, they are merely bringing federal sentencing back in line with the original intent of Congress in enacting the SRA: fairer sentences, fewer unwarranted disparities, more warranted disparities based on individualized factors under § 3553(a), and less uniformity solely for uniformity's sake. The Commission also continues to perform the numerous valuable functions it was designed for as summarized by Justice Blackman in *Mistretta v. U.S.*[76]

> In addition to the duty the Commission has to promulgate determinative sentence Guidelines, it is under an obligation periodically to "review and revise" the Guidelines. § 994(o). It is to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress "any amendments of the Guidelines." § 994(p). It is to make recommendations to Congress whether the grades or maximum penalties should be modified. § 994 (r). It must submit to Congress at least annually an analysis of the operation of the Guidelines. § 994(w). It is to issue "general policy statements" regarding their application. § 994(a)(2). And it has the power to "establish general policies ... as are necessary to carry out the purposes" of the legislation, § 995(a)(1); to "monitor the performance of probation officers" with respect to the Guidelines, § 995(a)(9); to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel" and others, § 995(a)(18); and to "perform such other functions as are required to permit Federal courts to meet their responsibilities" as to sentencing, § 995(a)(22).

[75] S. Rep. No. 98-225, at 59 (1983).
[76] 488 U.S. 361, 370 (1989)

Moreover, as the Court stated in *Kimbrough v. United States*,[77] "[c]arrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"

The critical role played by the Commission, as well as the courts, as well as the important give-and-take relationship between them that allows the improvement of sentencing practices by examining data and practice and ensuring that sentencing remains fair and rational, is by design. As the Supreme Court stated in *Rita*:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly. … The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.

The symbiotic relationship between the Commission and the courts is critical to Congress's original intent in enacting the SRA, and to improving sentencing practice generally across the federal courts. Indeed, the current dynamic between the Commission and the courts is exactly what the Court called for in *Rita*. Two recent examples of how the Commission continues to fulfill its critical duty to promote fairness in sentencing and rid the system of unwarranted disparities are its decisions on courts' consideration of specific offender characteristics in devising sentences consistent with the objectives of § 3553(a) and on the retroactive effect of the Fair Sentencing Act .

Specific Offender Characteristics

Section 18 U.S.C.§ 3553(a)(1) requires courts to consider "the history and characteristics of the defendant," while 18 U.S.C.§ 3661 mandates that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate

[77] 552 U.S. 85, 108-109 (2007) (citation omitted),

sentence."[78] After all, "[t]he sentencing judge … has 'greater familiarity with ... the individual case and the individual defendant before him than the Commission or the appeals court.' He is therefore 'in a superior position to find facts and judge their import under § 3353(a)' in each particular case." [79]

For years, however, the Guidelines' restrictions on courts' consideration of offender characteristics as mitigating factors has been one of its central failings. Thus, greater consideration of such factors is warranted to reduce unnecessarily harsh sentences often recommended by the Guidelines. Therefore, in light of the purpose behind 18 U.S.C. § 3553(a), it is very much in line with Congress's goals underpinning the SRA, not to mention necessary, though not sufficient, to address widespread unfairness wrought by mandatory sentencing pre-*Booker*, that the Commission has recognized that (1) departures from the Guidelines may be warranted in situations where an offender's criminal activity is related to a treatment issue such as drug or alcohol abuse or significant mental illness; (2) where sentencing options such as home or community confinement or intermittent confinement would serve a specific treatment purpose; and (3) that courts take into consideration the effectiveness of residential treatment programs as part of their decision to impose community confinement. In other words, it is essential to the determination of fair and effective sentences that courts be given significant latitude to consider offender characteristics.

This is not to suggest that courts cannot use certain offender characteristics to depart upwards; indeed they can, and sometimes they do. Fairness in sentencing can move in either direction: more severe or more lenient.[80] Departures do not fall on either side of the political spectrum; as a number of cases demonstrate, courts can exercise discretion in ways that increase or decrease sentences, whether they are eliminating unwarranted disparities and allowing warranted disparities. The fact that most departures post-*Booker* are in the downward direction is simply a reflection of the undue severity of much sentencing pre-*Booker*, as the system now seeks to self-correct and courts are now able to focus not only on the offense at hand, but on the individual offender before them, in addition to varying from the Guidelines on the basis of policy disagreements.

Retroactivity of the Fair Sentencing Act

[78] *See also U.S. v. Booker*, 543 U.S. 220, 250 (2005) (discussing that the history of the SRA makes clear that judges "must conduct 'a comprehensive examination of the characteristics of the particular offense and the particular offender'")(citations omitted)

[79] *Kimbrough v. U.S.*, 552 U.S. 85, 109 (2007)(citation omitted).

[80] *See, e.g., U.S. v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (upward departure sentence imposed was substantively reasonable and sufficiently justified by district court's stated ground that New York City's strict gun laws created large black market that required more severe penalties to deter selling of illegal firearms).

On June 30, 2011, the Commission voted to apply the Fair Sentencing Act retroactively to people currently serving sentences for crack-cocaine charges. In doing so, the Commission was simply carrying out one of its critical roles in federal sentencing: to ensure "fairness in meeting the purposes of sentencing, [and to] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[81] Particularly here, where the underlying concerns with racial equality and proportionality that drove Congress's enactment of fairer crack sentences going forward apply with equal force to sentences calculated under the earlier, flawed Guidelines. It would have not only been illogical and unjust, but also an abrogation of its mission, for the Commission to have merely acknowledged past unfairness and avoided future inequity while simultaneously leaving defendants whose sentences were already tainted by such unfairness without a remedy.

To question the continued viability of the Commission because it carried out one of its critical functions by ensuring that defendants who were sentenced under the earlier, flawed Guidelines have the opportunity to petition courts for sentence modifications in light of FSA's equitable changes in crack-cocaine sentencing reveals either a fundamental misunderstanding about or an unprincipled position on the central purpose of the Commission. The Commission recognized that it would fundamentally undermine Congress's goal of promoting fairness and reducing penalties to continue enforcing an unfair scheme on offenders simply because they happened to be sentenced prior to the passage of the FSA. The Commission was merely heeding Congress's recent pronouncement in favor of lower sentences for crack-cocaine while also fulfilling Congress's directive a quarter century ago to promote sentences that were sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C.A. § 3553(a)(2)(A).

[81] 18 U.S.C.A. § 3553(a)(6).