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United States v. Booker: The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing

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UNITED STATES V. BOOKER: THE DEMISE OF MANDATORY FEDERAL SENTENCING GUIDELINES AND THE RETURN OF INDETERMINATE SENTENCING

I. INTRODUCTION

Each year, federal judges sentence thousands of criminal defendants in federal district courts across the country.[1] The United States Sentencing Commission (the "Sentencing Commission" or "Commission") promulgates the Federal Sentencing Guidelines ("Guidelines"), which had required judges to sentence convicted offenders according to factors set out by Congress and the Commission.[2] Recently, cases have attacked the constitutionality of the Guidelines' sentence enhancement provisions. These controversies threaten over twenty years of sentencing reform and highlight the issues Congress confronted when it created the Sentencing Commission in 1984.[3] Congress's primary intent in forming the Commission was to create and implement a set of sentencing guidelines that would greatly reduce judicial discretion.[4] Without a system of mandatory Guidelines, there is a genuine possibility that sentencing will return to the indeterminate process Congress sought to eliminate.

In *Apprendi v. New Jersey*,[5] the Supreme Court of the United States provided the impetus for constitutional challenges to the Guidelines in holding that facts increasing a criminal sentence

1. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 3 tbl.1 [hereinafter 2002 STATISTICS SOURCEBOOK], *available at* http://www.ussc.gov/ANNRPT/2002/table1.pdf (last visited Apr. 2, 2005).

2. 18 U.S.C.S. § 3553(b)(1) (Law. Co-op. 2004) (held unconstitutional by United States v. Booker, 125 S. Ct. 738 (2005)). Because this comment cites to amendments not yet appearing in the print form of the *United States Code*, some citations reference the *United States Code Service*.

3. *See infra* notes 26–41 and accompanying text.

4. *See infra* notes 33–41 and accompanying text.

5. 530 U.S. 466 (2000).

beyond the statutory maximum had to be pleaded to a jury and proved beyond a reasonable doubt to satisfy the Sixth Amendment.[6] The Supreme Court failed to consider, however, the constitutionality of the Guidelines in *Apprendi*, effectively limiting the scope of the Court's ruling. Nevertheless, in *Blakely v. Washington*,[7] the Court made the prospect of a constitutional challenge to the Guidelines imminent when it invalidated Washington's sentencing procedure[8]—a system that seemed indistinguishable from the Guidelines.[9] Finally, in *United States v. Booker*,[10] the Supreme Court held that the Sixth Amendment invalidated these sentence enhancement provisions and remedied the situation by making the Guidelines advisory.[11]

Part II of this note traces the historical development of the Guidelines, including Congress's reasoning in creating the Sentencing Commission and an explanation of how the Guidelines function. Part III explains the Court's decisions in cases challenging the constitutionality of the Guidelines before *Booker*. Part IV discusses the background of *Booker* and examines the Court's majority and dissenting opinions. Finally, Part V analyzes the impact of *Booker*, including possible changes Congress will make to the Guidelines and a proposal for congressional action from the author.

II. THE DEVELOPMENT AND IMPLEMENTATION OF THE FEDERAL SENTENCING GUIDELINES

A. *The Rise of the Rehabilitation Ideal*

The Guidelines resulted from a series of contemporary criminal reforms. The story of twentieth-century criminal reform in the United States focuses on the rehabilitation viewpoint of punishment.[12] This rehabilitation ideal derived from two beliefs: "first,

6. *Id.* at 490.
7. 124 S. Ct. 2531 (2004).
8. *Id.* at 2538.
9. *Id.* at 2548–49 (O'Connor, J., dissenting).
10. 125 S. Ct. 738 (2005).
11. *Id.* at 755–56, 767.
12. *E.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 18 (1998).

that inmates should be provided an incentive for betterment, and, second, that experts—not judges—should determine when sufficient improvement had taken place."[13] In practice, this rehabilitation ideal required that after conviction of a crime, punishment was the result of both a system of indeterminate sentencing by judges and a system of parole in which properly informed experts—rather than judges—ultimately decided when to release an inmate.[14] On a federal level, rehabilitation became reality in 1910 when Congress created the possibility of parole for federal prisoners.[15]

The rehabilitation ideal was the dominant theory of criminal punishment through the 1960s.[16] One of the distinguishing features of this concept was bifurcated trial proceedings,[17] which the Court seemed to support.[18] In *Williams v. New York*,[19] the Court upheld the distinction between adjudication and sentencing, and the different constitutional requirements of each proceeding.[20] In *Williams*, Justice Black wrote,

> [T]he due process clause does provide these salutary and time-tested protections where the question for consideration is the guilt of a defendant . . . [a] sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.[21]

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13. *Id.* at 17.

14. *See id.* at 17–18.

15. PETER B. HOFFMAN, U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003), *available at* http://www.usdoj.gov/uspc/history.pdf (last visited Apr. 2, 2005). The federal parole system failed to limit federal judicial control of sentencing, unlike similar enactments in the states. STITH & CABRANES, *supra* note 12, at 18–19. Instead, the status quo for federal sentencing remained, in which Congress prescribed maximum penalties and fines and required federal judges to impose determinate sentences for each crime. *Id.* Although parole officials technically determined the actual length of imprisonment for a convict, federal criminal law required defendants to serve at least one-third of their sentence—in effect, judges retained much discretion over how much time a particular inmate spent in prison. *Id.*

16. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895 (1990).

17. *See* STITH & CABRANES, *supra* note 12, at 28.

18. *Id.* at 28. Traditionally, the trial phase of a criminal proceeding was separate from the sentencing phase. This intentional split divided a prosecution into a jury trial to determine whether the defendant committed the crime, and a later sentencing proceeding to analyze the relevant factors in calculating a "just punishment." *Id.* at 22.

19. 337 U.S. 241 (1949).

20. *Id.* at 251–52.

21. *Id.* at 245, 247.

In practice, this decision affirmed the notion that judges were not limited procedurally at the sentencing stage by the same constitutional requirements imposed at trial.[22] The Court later affirmed this distinction in *United States v. Grayson*.[23] In *Grayson*, the defendant claimed that the trial court infringed on his constitutional right to due process when the sentencing judge increased the sentence for escape from prison upon a finding, independent of the jury, that the defendant perjured himself.[24] Writing for the majority, Chief Justice Warren E. Burger declared that "'[b]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'"[25]

B. *The Fall of the Rehabilitation Ideal*

The rehabilitation ideal relied upon indeterminate sentencing—judges had wide discretion to sentence defendants based on character and other factors.[26] In theory, the use of parole in this system served as a check and balance on these judges, allowing parole officials to correct excessive sentences.[27] By the 1970s, however, empirical research began to cast doubt on the efficacy of the indeterminate sentencing regime.[28] These studies claimed that unfounded disparities existed on both federal and state levels in the sentencing and parole systems.[29] The most influential critic of indeterminate sentencing was Judge Marvin E. Frankel.[30] In 1973, Judge Frankel published *Criminal Sentences:*

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22. STITH & CABRANES, *supra* note 12, at 28. Similarly, the Court has held that parole officers have wide discretion in obtaining and using information to determine whether to release an inmate. *Id.* at 29.

23. 438 U.S. 41 (1978).

24. *Id.* at 42–45.

25. *Id.* at 50 (quoting United States v. Tucker, 404 U.S. 443, 446 (1972) (alterations in original)).

26. STITH & CABRANES, *supra* note 12, at 29–30.

27. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3–49 (1973).

28. *See* Nagel, *supra* note 16, at 895–96.

29. STITH & CABRANES, *supra* note 12, at 31.

30. *See* Nagel, *supra* note 16, at 896; Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942 (1988). Judge Frankel served as a district court judge in United States District Court for the Southern District of New York. *Id.*

Law Without Order, a book containing severe criticism of indeterminate sentencing and the wide discretion it conferred on judges.[31] Judge Frankel proposed the creation of a sentencing commission, which would establish sentencing guidelines to replace the use of judicial and parole official discretion in deciding the length and type of punishment for a crime.[32]

C. *The Sentencing Reform Act of 1984*

The studies challenging the usefulness of indeterminate sentencing eventually caught the attention of Senator Edward Kennedy. In 1975, Senator Kennedy introduced the first bill proposing the creation of a United States Sentencing Commission.[33] The political climate in the 1970s and the 1980s—namely, the persisting affinity for the rehabilitation ideal—prevented the bill's immediate passage.[34] As the national crime rate increased during the 1980s, however, so did the fear that discretionary judicial sentencing and the use of parole would result in sentences that were either too short, or even worse, prisoners serving less time than appropriate because of good fortune in the parole process.[35] Proponents of sentencing reform capitalized on these fears and introduced comprehensive anticrime legislation that included major changes to sentencing.[36] President Reagan signed the Comprehensive Crime Control Act into law on October 12, 1984.[37] A component of this anticrime law, termed the Sentencing Reform

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31. *See* FRANKEL, *supra* note 27, at 3–49.

> The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes "shall be any term the judge sees fit to impose." . . . But the fact is that we have accepted unthinkingly a criminal code creating in effect precisely that degree of unbridled power.

Id. at 8.

32. *Id.* at 118–24.

33. PAUL J. HOFER ET AL., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 4 (2004) [hereinafter FIFTEEN-YEAR REPORT], *available at* http://www.ussc.gov/15_year/15year.htm (last visited Apr. 2, 2005).

34. *See* STITH & CABRANES, *supra* note 12, at 39–48.

35. *See id.* at 43–48.

36. FIFTEEN-YEAR REPORT, *supra* note 33, at 5.

37. Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended at 18 U.S.C. § 1 (1984) (repealed 1987)).

Act, created the United States Sentencing Commission as an independent agency within the judicial branch.[38]

Congress had three distinct goals in mind when it enacted the Sentencing Reform Act: (1) reducing unwarranted disparity; (2) assuring certainty and severity of punishment; and (3) increasing rationality and transparency of punishment.[39] These goals reflected a response to the criticism of indeterminate sentencing that arose in the 1970s.[40] The Sentencing Reform Act's purposes for establishing a sentencing commission also suggest a similar response. These purposes, listed in 18 U.S.C. § 3553, essentially direct the Commission to create sentencing guidelines that are proportional to the seriousness of the crime committed, increase public safety via crime control, and provide for rehabilitation.[41]

Working with these goals and purposes in mind, the Sentencing Commission deliberated for eighteen months before deciding how best to fashion a comprehensive set of sentencing guidelines.[42] The Commission hoped to design a sentencing procedure addressing the concerns that indeterminate sentencing produced gross disparities and unjust sentences.[43] First, the Commission simplified the sentencing process by grouping similar crimes into general classes of offenses.[44] By doing so, the Commission hoped to develop a system ensuring that defendants committing similar

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38. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 28 U.S.C. § 991 (2000)).

39. FIFTEEN-YEAR REPORT, *supra* note 33, at 11–12.

40. *See supra* notes 26–32 and accompanying text.

41. 18 U.S.C. § 3553(a)(2)(A)–(D) (2000). Section 3553(a)(2) lists the purposes of sentencing as:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Id.

42. FIFTEEN-YEAR REPORT, *supra* note 33, at 14.

43. *See id.* at 15. For a discussion of the concerns regarding indeterminate sentencing, see *supra* notes 26–32 and accompanying text. One important way in which the Sentencing Reform Act restricts variation in sentences among like crimes is by requiring that the Commission create sentencing ranges in which the maximum sentence for a crime exceeds the minimum by no more than twenty-five percent, provided the range between the minimum and maximum is at least six months. 28 U.S.C. § 994(b)(2) (2000).

44. Ilene Nagel, *Writing the Federal Sentencing Guidelines*, *in* PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 25 (1997).

crimes would receive similar sentences.[45] Next, the Sentencing Commission analyzed over 10,000 sentencing reports and 100,000 federal convictions.[46] From these data, the Commission calculated the average time served for each class of crime.[47] These figures set the offense level for each crime—the possible baseline sentencing range.[48] The Commission also identified factors associated with each crime, which would either increase or decrease a given sentence.[49] The Sentencing Commission integrated a defendant's criminal history into the sentencing calculus.[50] Finally, the Commission devised the Sentencing Table, which included forty-three offense levels and six classes of criminal history.[51] After congressional review, the Commission introduced the first set of Federal Sentencing Guidelines on November 1, 1987.[52]

D. *Understanding How the Federal Sentencing Guidelines Work*

Before discussing the Supreme Court's decisions regarding the Guidelines, it is important to examine how the Guidelines function. For the purposes of this discussion, assume that a jury has convicted a criminal defendant, with no prior criminal history, of planning a complex burglary and successfully stealing $500,000 from a home while in the possession of a firearm. Remember that the sentencing stage arrives only after the jury has completed all fact-finding and returned a conviction for the criminal defendant.[53] By this time, the judge has usually received the presentence report—a document containing facts gathered by a United

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45. *Id.*

46. FIFTEEN-YEAR REPORT, *supra* note 33, at 14.

47. *Id.*

48. *Id.*

49. *Id.* These mitigating and aggravating factors are known as "specific offense characteristics." *Id.*

50. *Id.* at 15.

51. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2004) [hereinafter GUIDELINES]. The Sentencing Table functioned as a matrix, with corresponding offense levels, specific offense characteristics, and criminal history leading the judge to one specific sentence for each crime. *See infra* notes 53–67 and accompanying text.

52. GUIDELINES, *supra* note 51, § 1A1.1, cmt. background (2004). The Sentencing Commission must submit the Guidelines and any amendments to Congress for approval. 28 U.S.C. § 994(p) (2000).

53. *See* GUIDELINES, *supra* note 51, § 1A1.1, cmt. background (2004).

States probation officer.[54] The presentence report contains a wide variety of facts, which may or may not have been pleaded and proved to a jury.[55] Moreover, the judge may accept "any undisputed portion of the presentence report as a finding of fact."[56]

First, the judge determines the base offense level by identifying the relevant crime in chapter two of the Guidelines. Here, our defendant is guilty of burglary of a residence, which carries an offense level of seventeen.[57] Next, the judge looks at the specific offense characteristics associated with each crime to determine whether any of the circumstances of the commission of a crime justify increasing the offense level. The court may consider "all relevant conduct" to determine the base offense level and specific offense characteristics.[58] In our hypothetical, the judge increases the offense level by a value of eight because the burglary required more than "minimal planning" (plus two),[59] the defendant stole more than $250,000 (plus four),[60] and the defendant carried a firearm (plus two).[61] Thus, the offense level for our defendant is twenty-five. The judge then considers whether any adjustments would apply. These adjustments, located in chapter three of the Guidelines, apply broadly to many crimes and include: (1) increases and decreases in a sentence for factors such as the state of the victim; (2) the defendant's role in the offense; (3) whether the defendant obstructed law enforcement; (4) whether the defendant is convicted of multiple charges; and (5) whether the defendant accepted responsibility for the crime.[62] None of these adjustments apply to our hypothetical defendant.

Next, the judge examines the criminal history of the offender. The Guidelines assign points representing the criminal history of a convicted offender.[63] This value translates into a Criminal History Category between I and VI. Because our defendant has no prior convictions, he receives a criminal history score of zero,

54. 18 U.S.C. § 3552(a) (2000); FED. R. CRIM. P. 32(d), (g).
55. FED. R. CRIM. P. 32(d)(1)(A)–(3)(C).
56. FED. R. CRIM. P. 32(i)(3)(A).
57. GUIDELINES, *supra* note 51, § 2B2.1(a)(1) (2004).
58. FIFTEEN-YEAR REPORT, *supra* note 33, at 16 (internal quotation marks omitted).
59. GUIDELINES, *supra* note 51, § 2B2.1(b)(1) (2004).
60. *Id.* § 2B2.1(b)(2)(E).
61. *Id.* § 2B2.1(b)(4).
62. *Id.* §§ 3A1.1–3E1.1.
63. *Id.* §§ 4A1.1–4B1.5.

placing him in Criminal History Category I.[64] After determining the proper offense level and Criminal History Category, a judge looks to the Sentencing Table to identify the applicable sentencing range. The Sentencing Table is divided into four zones labeled alphabetically A through D, with Zone A representing the mildest sentences and Zone D representing the harshest.[65] With an offense level of twenty-five and a Criminal History Category I, our defendant falls into Zone D on the Sentencing Table.[66] The judge must sentence him to a term of imprisonment between fifty-seven and seventy-one months.[67]

III. CONSTITUTIONAL CHALLENGES TO THE FEDERAL SENTENCING GUIDELINES

A. *Providing the Guidelines with Constitutional Armor:* Mistretta v. United States

Soon after the Sentencing Commission introduced the Guidelines, numerous federal district courts invalidated them as unconstitutional.[68] It is possible that factors other than defense of the Constitution motivated federal judges to invalidate the Guidelines, because a key development leading to the creation of the Sentencing Commission was a growing distrust of judicial discretion.[69] Ultimately, the Supreme Court of the United States upheld the constitutionality of the Sentencing Commission and the Guidelines in *Mistretta v. United States*.[70] In doing so, the Court rejected arguments that Congress violated the nondelega-

64. *Id.* at ch. 5, pt. A.

65. *Id.* It is particularly important for the criminal defendant to avoid Zone D, if possible. While a judge may give an offender falling into Zones A–C an alternative sentence to imprisonment within an applicable sentencing range, those convicted and sentenced in Zone D *must* serve at least the minimum sentence in a given sentencing range. *See id.* §§ 5B1.1–5D1.3.

66. *See id.* at ch. 5, pt. A.

67. *Id.* Thus, our hypothetical defendant will serve a prison term of no less than fifty-seven months.

68. MICHAEL H. TONRY, SENTENCING MATTERS 73 (1996).

69. *See supra* notes 26–32 and accompanying text; *see also* STITH & CABRANES, *supra* note 12, at 39 ("Liberals and conservatives alike evinced a deep suspicion of discretionary judgment by federal judges; Congress was determined to limit it by delegating sentencing authority to an administrative agency that promised to be more responsive to Congress itself.").

70. 488 U.S. 361, 412 (1989).

tion doctrine by granting the Sentencing Commission excessive legislative authority[71] and the separation of powers doctrine by placing the Sentencing Commission in the judicial branch.[72]

Since *Mistretta*, federal judges have sentenced more than 650,000 criminal defendants using the Guidelines.[73] Despite the acquiescence by federal judges to the Guidelines, there is evidence that federal judges administered the Guidelines out of judicial duty rather than any belief in their usefulness.[74] In 1990, the Judicial Conference of the United States published a report indicating "'pervasive concern [among federal judges] that the Commission's guidelines [were] producing fundamental and deleterious changes in the way federal courts process criminal cases.'"[75] The principal worry of these judges and other commentators was that the Guidelines did not allow sufficient judicial discretion.[76] Despite the concern over judicial discretion, *Mistretta* provided the Guidelines with the constitutional armor necessary to function. In 2000, however, the Court decided the first in a new line of cases that would again challenge the constitutionality of the Guidelines.[77]

B. *The First Chink in the Guidelines' Constitutional Armor:* Apprendi v. New Jersey

1. The Facts of *Apprendi*

In the early morning hours of December 22, 1994, someone shot several bullets into the home of the first African-American family to reside in a previously all-white neighborhood in Vineland, New Jersey.[78] Shortly after the shooting, police arrested Charles C. Apprendi, Jr., who confessed to the shooting about an hour

71. *Id.* at 371–79.

72. *Id.* at 380–411.

73. U.S. SENTENCING COMM'N, 2002 ANNUAL REPORT 2, *available at* http://www.ussc.gov/ANNRPT/2002/ch1-2002.pdf (last visited Apr. 2, 2005).

74. *See* TONRY, *supra* note 68, at 74–76.

75. *Id.* at 75 (quoting JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE FEDERAL COURTS STUDY COMMITTEE 135 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE]).

76. FEDERAL COURTS STUDY COMMITTEE, *supra* note 75, at 135.

77. Apprendi v. New Jersey, 530 U.S. 466 (2000).

78. *Id.* at 469.

later.[79] About three hours after his admission, Apprendi responded to further questioning by stating that he did not want people in the neighborhood who were "'black in color.'"[80]

Two New Jersey statutes were relevant in *Apprendi*. The first defined possession of a firearm for an unlawful purpose as a second-degree offense, which imposed a sentencing range between five and ten years.[81] The second, known as New Jersey's hate crime law, allowed an extended term of imprisonment between ten and twenty years for second-degree offenses when committed with a biased purpose such as race.[82] In finding a biased purpose, the trial judge is required to use a standard of preponderance of the evidence.[83]

Apprendi entered into a plea agreement and pled guilty to two second-degree counts of possession of a firearm for an unlawful purpose.[84] After holding an evidentiary hearing, the trial judge concluded that the preponderance of the evidence indicated that Apprendi's purpose was racial intimidation, and as such, justified the enhanced sentencing provided for by New Jersey's hate crime law.[85] The trial judge sentenced Apprendi to twelve years imprisonment on the count relating to the December 22 shooting and a shorter concurrent term on the other second-degree offense.[86] Apprendi appealed the enhanced sentence, arguing that the "Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt."[87] Both the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey affirmed.[88] Following the Supreme Court of New Jersey's decision, Apprendi appealed to the Supreme Court of the United States.

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79. *Id.*

80. *Id.* (quoting New Jersey v. Apprendi, 731 A.2d 485, 486 (1999)).

81. *Id.* at 468.

82. *Id.* at 469.

83. *Id.* at 468–69.

84. *Id.* at 469–70. As part of Apprendi's plea agreement, he also pleaded guilty to a lesser third-degree count. The sentence for this count, however, is immaterial to the holding in *Apprendi*, because it did not affect the maximum sentencing range that the trial court could impose. *See id.* at 470. Thus, the maximum sentence before any enhancement the trial judge could impose on Apprendi was twenty years, ten for each second-degree offense. *Id.*

85. *Id.* at 470–71.

86. *Id.* at 471.

87. *Id.*

88. *Id.* at 471–72.

2. The Holding of *Apprendi*

In a five-to-four decision,[89] the Court agreed with Apprendi's claim that New Jersey's hate crime law violated the Due Process Clause of the Fourteenth Amendment, because the statute authorized an increase beyond the maximum sentence for a crime based on a factual determination made by a judge rather than a jury.[90] To support this holding, Justice John Paul Stevens examined the Court's Fifth and Sixth Amendment jurisprudence and the development of the rights granted therein, concluding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[91] Recognizing the long-standing tradition of judicial discretion at sentencing in the United States,[92] Justice Stevens noted that the Court's decision did not invalidate a judge's right to consider various facts in determining a sentence if "that discretion was bound by the range of sentencing options prescribed by the legislature."[93]

3. The Effect of *Apprendi*

The dissenters in *Apprendi* feared that the majority's holding would undo the Guidelines and "unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part."[94] This was a reasonable concern because *Apprendi*'s holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submit-

89. Justice Stevens wrote the majority opinion and was joined by Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 468.

90. *Id.* at 476.

91. *Id.* at 490.

92. *Id.* at 481; *see* Williams v. New York, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."); *see also supra* notes 16–25 and accompanying text (discussing the traditional division between trial and sentencing).

93. *Apprendi*, 530 U.S. at 481.

94. *Id.* at 551 (O'Connor, J., dissenting); *see id.* at 543–52 (O'Connor, J., dissenting) (discussing the likely deleterious effect of *Apprendi* on federal and state sentencing guidelines).

ted to a jury, and proved beyond a reasonable doubt"[95] seemed to apply broadly to all sentencing regimes.[96] Moreover, the Court failed to give lower federal courts any guidance on the issue, preferring to answer that question another day.[97]

The aftermath of *Apprendi* was not invalidation of the Guidelines as the dissenters predicted. On June 24, 2002, the Supreme Court applied *Apprendi* to two separate cases, *Ring v. Arizona*[98] and *Harris v. United States*,[99] without ruling on the constitutionality of the Guidelines or invoking the concerns of the *Apprendi* dissenters. Following suit, lower federal courts applied *Apprendi* without any determination as to the constitutionality of the Guidelines.[100] In fact, no federal court ever ruled that the Guidelines were unconstitutional based solely on *Apprendi*.[101] Although this outcome should have allayed their fears, the Court's application of *Apprendi* in *Blakely v. Washington* worried the dissenters every bit as much, if not more, over the future of the Guidelines.[102]

C. *The Chink Becomes a Gaping Hole:* Blakely v. Washington

1. The Facts of *Blakely*

In 1998, Ralph Howard Blakely, Jr. used a knife to kidnap his ex-wife from her home, bind her with tape, and force her into a

95. *Id.* at 490.

96. *Id.* at 549 (O'Connor, J., dissenting).

97. *Id.* at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.").

98. 536 U.S. 584, 609 (2002) (holding that *Apprendi* applies when a judge, without a jury, finds aggravating facts required to impose the death penalty).

99. 536 U.S. 545, 568–69 (2002) (holding that *Apprendi* does not apply when considering increases in mandatory minimums).

100. *See, e.g.*, Akosa v. United States, 219 F. Supp. 2d 311, 317–18 (E.D.N.Y. 2002) (holding, without invalidating the Guidelines, that *Apprendi* did not apply to an inmate's sentence for drug-related offenses); United States v. Walls, 215 F. Supp. 2d 159, 163 (D. D.C. 2002) (holding, without invalidating the Guidelines, that *Apprendi* does not apply retroactively to an initial motion to vacate); United States v. Enigwe, 212 F. Supp. 2d 420, 430–31 (E.D. Pa. 2002) (holding, without invalidating the Guidelines, that *Apprendi* does not apply to cases on collateral review).

101. *See* Blakely v. Washington, 124 S. Ct. 2531, 2547 n.1 (2004) (O'Connor, J., dissenting) (noting that as recently as June 24, 2004, the only court to ever invalidate a system of sentencing guidelines using *Apprendi* was the Kansas Supreme Court in 2001).

102. *See id.* at 2543–50 (O'Connor, J., dissenting); *id.* at 2551–62 (Breyer, J., dissenting).

box in the bed of his truck.[103] Forcing their thirteen-year-old son to follow in another car, Blakely drove from Washington state to Montana.[104] The son escaped when both vehicles stopped for gas, and police eventually arrested Blakely in Montana.[105]

The state of Washington utilized sentencing guidelines to determine the possible term of imprisonment for convicted offenders.[106] Three provisions of Washington's sentencing guidelines were relevant in *Blakely*. First, Washington's guidelines provided a ten-year maximum for class B felonies such as second-degree kidnapping.[107] Second, the sentencing guidelines required a span of forty-nine to fifty-three months as the standard range for second-degree kidnapping with a firearm.[108] Third, the guidelines allowed a judge to impose an exceptional sentence if he concluded there were "'substantial and compelling reasons justifying an exceptional sentence.'"[109] Such a conclusion must "take[ ] into account factors other than those which are used in computing the standard range sentence for the offense."[110] Imposition of an exceptional sentence required the judge to set forth findings of fact and conclusions of law in support.[111]

Blakely entered into a plea agreement and pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm.[112] Although the State recommended a sentence within the standard range, the judge instead imposed an exceptional sentence of ninety months.[113] The judge defended his decision on a finding that Blakely acted with deliberate cruelty, a recognized basis for departure from the standard range in domestic violence cases.[114] Blakely appealed his sentence, arguing that Washing-

103. *Id.* at 2534.

104. *Id.*

105. *Id.*

106. *See id.* at 2535.

107. *Id.*

108. *Id.*

109. *Id.* (quoting WASH. REV. CODE § 9.94A.120(2) (2000) (recodified at § 9.94A.505 (2001)).

110. *Id.* (quoting State v. Gore, 21 P.3d 262, 277 (Wash. 2001)).

111. *Id.*

112. *Id.*

113. *Id.* Note that the exceptional sentence of ninety months was still less than the ten-year maximum allowed for class B felonies.

114. *Id.* After an initial determination of deliberate cruelty, Blakely objected. The judge then conducted a bench hearing over three days from which he issued thirty-two findings of fact. These findings led to the same conclusion of deliberate cruelty. *Id.* at 2535–36.

ton's sentencing guidelines violated his constitutional right "to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence."[115] The State Court of Appeals affirmed and the Supreme Court of the State of Washington denied Blakely's petition for review.[116] Blakely appealed to the Supreme Court of the United States.

2. The Holding of *Blakely*

Writing for the majority in a five-to-four decision, Justice Antonin Scalia invalidated the Washington statute allowing a judge to impose an exceptional sentence if the court found additional compelling facts not considered by a jury.[117] Applying *Apprendi*, the Court found it immaterial that Blakely's exceptional sentence of ninety months still fell within the statutory maximum of ten years set for class B felonies.[118] Justice Scalia explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[119] The Court concluded that the Washington statute violated the Sixth Amendment by requiring a judge to rely on judicial fact-finding to justify an exceptional sentence.[120]

3. The Effect of *Blakely*

Immediately after the Court's ruling in *Blakely*, the doomsday scenario for the Guidelines that the *Apprendi* dissenters predicted seemed once again possible.[121] Although the Court again

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115. *Id.* at 2536.

116. *Id.*

117. *Id.* at 2538. The Supreme Court of the State of Washington only allowed an exceptional sentence beyond the standard range if a judge considered "'factors other than those which are used in computing the standard range sentence for the offense.'" *Id.* at 2537 (quoting State v. Gore, 21 P.3d 262, 277 (Wash. 2001)). Justice Scalia was joined by Justices Stevens, Souter, Thomas, and Ginsburg. *Id.* at 2533.

118. *See id.* at 2537.

119. *Id.* at 2537 ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

120. *Id.* at 2538.

121. *Id.* at 2549 (O'Connor, J., dissenting) ("Today's decision casts constitutional doubt over [the sentencing guidelines of states and the federal government] and, in so doing, threatens an untold number of criminal judgments.").

refused to comment in *Blakely* as to the constitutionality of the Guidelines,[122] the dissenters noted that the sentencing regime in Washington was indistinguishable in practice from the Federal Sentencing Guidelines.[123] Moreover, the fact that an administrative agency promulgated the Guidelines instead of a legislative body, as was the case in *Blakely*, was immaterial to the dissent because "[t]he Guidelines have the force of law . . . and Congress has unfettered control to reject or accept any particular guideline."[124] The dissenters claimed that *Blakely* would have a disastrous effect on past, pending, and future criminal judgments.[125]

The immediate aftermath of *Blakely* was not quite the disaster the dissenters forecasted. While many federal courts did invalidate the Guidelines,[126] the principal consequence of *Blakely* was great anxiety and confusion as courts,[127] the Department of Justice,[128] and Congress[129] attempted to grapple with the majority's

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122. *Id.* at 2538 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."); *id.* at 2540 ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.").

123. *Id.* at 2549–50 (O'Connor, J., dissenting). In fact, the dissenters opined that the structure of the Guidelines made them more susceptible to invalidation under *Blakely*—upon the finding of additional facts by the judge, the Washington statute merely allows upward departures while the Federal Guidelines require them. *Id.* at 2550.

124. *Id.* at 2549 (citations omitted).

125. *Id.* (O'Connor, J., dissenting).

126. *See* United States v. Agett, 327 F. Supp. 2d 899, 906–07 (E.D. Tenn. 2004); United States v. Mueffelman, 327 F. Supp. 2d 79, 96 (D. Mass. 2004); United States v. Sisson, 326 F. Supp. 2d 203, 205 (D. Mass. 2004); United States v. Marrero, 325 F. Supp. 2d 453, 457 (S.D.N.Y. 2004); United States v. Einstman, 325 F. Supp. 2d 373, 380–82 (S.D.N.Y. 2004).

127. The federal courts responded with various approaches to *Blakely* including declaring the Guidelines unconstitutional, using them in an advisory fashion, only applying some sentence enhancements, and holding the Guidelines unaffected. *See* OFFICE OF GENERAL COUNSEL, FREQUENCY REPORT 1–5 (2004) [hereinafter FREQUENCY REPORT], *available at* http://www.ussc.gov/Blakely/11_30_04.pdf (last visited Apr. 2, 2005).

128. On July 2, 2004, Deputy Attorney General James Comey issued a memorandum to all federal prosecutors stating that the official position of the federal government was that *Blakely* did not apply to the Guidelines. The memorandum outlined the government's argument and detailed charging, plea, and trial procedures to follow until the Supreme Court decided whether *Blakely* invalidated the Guidelines. *See* Memorandum from James Comey, Deputy Attorney General, to All Federal Prosecutors (July 2, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf (last visited Apr. 2, 2005).

129. On July 13, 2004, the Senate Judiciary Committee conducted hearings regarding the impact of *Blakely* on the Guidelines and the steps Congress should take in response. *See* Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Blakely Hearings*] (testimony of Sen. Hatch, Chairman, Senate Comm. on the Judiciary), *at* http://judiciary.senate.gov/member_statement.cfm?id=1260&wit_id=51 (last visited Apr. 2,

rule. Why did *Blakely* fail to destroy the Guidelines? One possible reason is that so long as the Supreme Court expressed no opinion on the matter, there was no requirement that the lower federal courts deviate from the Guidelines.[130] Everything changed, however, when the Court reached its decision in *United States v. Booker*, which left the Guidelines defenseless against Sixth Amendment challenges.

IV. ANALYSIS OF *UNITED STATES V. BOOKER*

A. *The Facts of* Booker

In *Booker*, the Supreme Court consolidated two cases to address whether *Blakely* applied to the Guidelines.[131] In the case of Freddie Booker, the United States Court of Appeals for the Seventh Circuit invalidated the lower court's decision to impose an enhanced sentence, because the district court judge determined that Booker possessed 566 grams of crack cocaine subsequent to a jury determination that Booker had only possessed 92.5 grams.[132] Holding that *Blakely* applied, the Seventh Circuit observed that "[t]he vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact [instead of the jury when sentencing]."[133] Similarly, the United States District Court for the District of Maine also refused to apply an enhanced sentence to Duncan Fanfan, despite the trial judge's belief that Fanfan was "the ring leader of a significant drug conspiracy,"[134] because doing so would require judicial fact-finding.[135] In reaching this conclu-

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2005).

130. In fact, one might make the argument that the lower federal courts could not invalidate the Guidelines based on *Blakely*. United States v. Booker, 375 F.3d 508, 516 (7th Cir. 2004), (Easterbrook, J., dissenting) (noting that the Supreme Court is the only court that may ultimately say whether the Guidelines are unconstitutional), *aff'd*, 125 S. Ct. 738 (2005).

131. 125 S. Ct. 738, 746 (2005).

132. *Booker*, 375 F.3d at 509.

133. *Id.* at 511.

134. Transcript of Sentencing Hearing at 106, United States v. Fanfan, 2004 WL 1723114 (D. Me. June 28, 2004) (No. 03–47–P–H), *available at* http://www.med.uscourts.gov/Opinions/Hornby/2004/DBH_06282004_2-03cr47_U_S_V_FANFAN.pdf (last visited Apr. 2, 2005).

135. *Id.* at 104–05.

sion, the district court ruled that the Guidelines were indistinguishable from those at issue in *Blakely*.[136]

In its petitions for writs of certiorari regarding *Booker* and *Fanfan*, the federal government asked the Supreme Court to determine whether its decisions in *Apprendi* and *Blakely* applied to the Guidelines.[137] The Court considered two questions:

> 1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 2. If . . . "yes" . . . . [W]hether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.[138]

The Court's resolution of these issues resulted in the uncommon result of a split majority opinion. In a five-to-four decision,[139] Justice Stevens concluded that the enhancement factors required by the Guidelines violated the Sixth Amendment.[140] In a separate five-to-four ruling,[141] Justice Stephen G. Breyer held that, although the sentence-enhancing aspects of the Guidelines violated the Sixth Amendment, the statutory provisions making the enhancements mandatory could be excised and severed—resulting in a system of Guidelines that are merely advisory.[142]

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136. *See id.* at 104 ("[P]erhaps the Supreme Court can find a way to explain away *Blakely* in its language and its reasoning, but as a trial Judge and a sentencing Judge, I cannot. I must take it as it is written. I will leave it to higher courts to tell me it does not mean exactly what it says.").

137. United States v. Booker, 125 S. Ct. 738, 746 (2005).

138. *Id.* at 747 n.1.

139. *Id.* at 746.

140. *Id.* at 756.

141. *Id.*

142. *Id.* at 756–57.

B. *The Sentence-Enhancing Provisions of the Guidelines Violate the Sixth Amendment*

1. Justice Stevens: Majority Opinion Part I

a. Blakely *Applies to the Guidelines*

Considering its earlier rulings regarding sentencing and the Sixth Amendment,[143] it was inevitable that the Court would extend *Blakely* to the Guidelines. In fact, Justice Stevens employed the same argument in *Booker* that the Court employed earlier in *Apprendi* and *Blakely*—namely, that the Constitution has long required that a jury find all facts necessary to charge a criminal defendant with a crime.[144] As such, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[145] Justice Stevens acknowledged that the current Guidelines, if overlaid with this jury trial requirement, would be constitutional because the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."[146] The Guidelines, however, are mandatory,[147] and the use of sentence-enhancing facts shift the power to determine the upper bounds of sentencing from the jury to the judge, without the same standard of reasonable doubt afforded at trial.[148] After determining that

143. *See* Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'") (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 55 (2d ed. 1872)); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *supra* notes 89–93, 117–20 and accompanying text.

144. *See Booker*, 125 S. Ct. at 749; *Blakely*, 124 S. Ct. at 2536–37; *Apprendi*, 530 U.S. at 476–85.

145. *Booker*, 125 S. Ct. at 756.

146. *Id.* at 750.

147. *Id.*

148. *See id.* at 751–52. Moreover, as sentence-enhancing facts began to carry higher penalties, the jury's determination of the underlying crime became secondary. *Id.* (citing instances where sentence enhancements significantly increase the possible sentence for a

Blakely applied to the Guidelines, Justice Stevens examined and dismissed three arguments that the federal government offered in support of its contention that *Blakely* did not apply to the Guidelines.

b. *The Federal Government's Arguments Are Unpersuasive*

First, the government maintained that *Blakely* did not apply to the Guidelines because they were promulgated by the Sentencing Commission rather than by Congress.[149] The government argued that the Court's holding in *Apprendi* only considered "'any fact that increases the penalty for a crime *beyond the prescribed statutory maximum*.'"[150] Although the holding in *Apprendi* suggested applicability only to statutory maximums and not sentencing guidelines, Justice Stevens dismissed this notion because the Court was only considering a New Jersey statute and not the Guidelines at the time.[151] Effectively, the constitutional right to a jury trial could not be limited, "[r]egardless of whether the legal basis of the accusation is in a statute or in [the G]uidelines."[152]

Second, the government cited four cases that prevented the Court from applying *Blakely* to the Guidelines.[153] The Court examined these decisions and decided that all four were inconsistent with *Blakely*.[154] Justice Stevens found no need to overrule *United States v. Dunnigan*[155] because circumstances exist where federal judges might apply sentence enhancements for perjury without exceeding the maximum sentence for an offense.[156] The Court held that *Witte v. United States*[157] and *United States v.*

convicted offender).

149. Brief for United States at 19, United States v. Booker, 125 S. Ct. 738 (2005) (Nos. 04–104 & 04–105) [hereinafter U.S. Brief].

150. *Id.* at 15 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added)).

151. *Booker*, 125 S. Ct. at 752–53.

152. *Id.* at 753.

153. U.S. Brief, *supra* note 149, at 32–38.

154. *Booker*, 125 S. Ct. at 753–54.

155. 507 U.S. 87 (1993). In *Dunnigan*, the Court held that the Guidelines' requirement that judges apply a sentence enhancement, upon a judicial finding that the accused committed perjury at trial, does not violate the privilege to testify on one's own behalf. *Id.* at 98.

156. *Booker*, 125 S. Ct. at 753.

157. 515 U.S. 389 (1995).

Watts,[158] cases examining the interaction of the Double Jeopardy Clause with the Guidelines,[159] did not apply because the Court in those cases did not consider the Sixth Amendment issue.[160] Finally, Justice Stevens found no precedent in *Edwards v. United States*[161] that would limit the Court's holding in *Blakely*.[162]

Third, the government claimed that the requirement that sentencing factors be proved to a jury beyond a reasonable doubt would violate the doctrine of separation of powers, because such a requirement vests in the Sentencing Commission the legislative power to define elements of crimes—a province usually reserved for Congress.[163] Justice Stevens rejected this premise, stating that nothing in the Court's decision conflicted with its earlier holding in *Mistretta v. United States*[164] that upheld Congress's delegation of authority to the Sentencing Commission.[165] Rather, the Court has always "recognized the fact that the Commission is an independent agency that exercises policy-making authority delegated to it by Congress."[166]

2. Justice Breyer's Dissent

a. *Sixth Amendment Rights Are Not Implicated at Sentencing*

The dissenters from *Apprendi* and *Blakely* banded together one more time to rebut the contention that the Sixth Amendment prohibits judges from enhancing criminal sentences via judicial fact-finding.[167] First, Justice Breyer analyzed the history of sentencing practices and rejected any notion that sentencing traditionally afforded criminal defendants the right to a jury trial.[168] Instead, the law recognized a difference between "facts [as] elements of crimes

158. 519 U.S. 148 (1997).
159. *Watts*, 519 U.S. at 157; *Witte*, 515 U.S. at 406.
160. *Booker*, 125 S. Ct. at 753–54.
161. 523 U.S. 511 (1998).
162. *Booker*, 125 S. Ct. at 754.
163. U.S. Brief, *supra* note 149, at 63–66.
164. 488 U.S. 361, 371 (1989).
165. *Booker*, 125 S. Ct. at 754–55.
166. *Id.* at 755.
167. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Breyer's dissenting opinion in response to Majority Opinion Part I. *Id.* at 802 (Breyer, J., dissenting).
168. *Id.* at 803–04 (Breyer, J., dissenting).

and facts that are relevant only to sentencing."[169] The Guidelines only concern sentencing facts, and as such, judges use them "not to convict a person of a crime as a statute defines it, but to help determine an appropriate punishment."[170] Moreover, Justice Breyer explained that federal law has upheld judicial fact-finding during sentencing so long as the convicted defendant had both an opportunity to contest those facts before the judge and the sentence fell within a range specified by Congress.[171]

Next, Justice Breyer examined the constitutional implications of applying *Blakely* to the Guidelines. Justice Breyer criticized the Majority Opinion Part I Justices for removing from Congress the power to specify criminal sentences.[172] In the federal government, Congress alone has the right to decide the sentencing range of offenses and to differentiate facts as either elements of crimes or sentencing factors.[173] Thus, Justice Breyer opined that the imposition of the Sixth Amendment on the Guidelines unduly limits Congress's powers.[174]

b. *The Guidelines Are Distinguishable from Those at Issue in* Apprendi *and* Blakely

Justice Breyer also argued that even if the Sixth Amendment jury trial right applied to the sentencing schemes at issue in *Apprendi* and *Blakely*, the Court should not extend its holdings in those cases to the Federal Sentencing Guidelines.[175] First, Justice Breyer emphasized that *Apprendi* and *Blakely* applied to statutory mandates while the Guidelines are merely administrative rules.[176] As such, the dissent noted that any fear of the Sentencing Commission taking the place of Congress in legislating particular elements for crimes was unfounded, "because it cannot write substantive criminal statutes at all."[177]

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169. *Id.* at 803 (Breyer, J., dissenting).

170. *Id.* at 804 (Breyer, J., dissenting).

171. *Id.* (Breyer, J., dissenting).

172. *See id.* (Breyer, J., dissenting) ("The upshot is that the Court's Sixth Amendment decisions—*Apprendi*, *Blakely*, and today's—deprive Congress and state legislatures of authority that is constitutionally theirs.").

173. *Id.* at 805 (Breyer, J., dissenting).

174. *See id.* (Breyer, J., dissenting).

175. *Id.* (Breyer, J., dissenting).

176. *Id.* (Breyer, J., dissenting).

177. *Id.* at 806 (Breyer, J., dissenting).

Next, the dissent distinguished the sentencing statutes in *Blakely* from the Guidelines by examining their control of judges. The Washington statutes in *Blakely* allowed an enhanced sentence only if the judge determined the existence of a fact separate from those elements comprising a crime.[178] The Guidelines' provision for departures, however, provides no similar limitation on federal judges.[179] Justice Breyer noted that the practical effect of this difference is that federal judges may sentence a criminal defendant "anywhere within the range provided by *statute*—regardless of the applicable Guidelines range."[180] Thus, Justice Breyer argued that *Blakely* does not apply because the statutory maximum for a particular offense is actually the maximum set by Congress—a ceiling federal judges cannot exceed—and not the upper bound of the sentencing range established by the Sentencing Commission.[181]

C. *Excision and Severability of the Sentence-Enhancing Provisions of the Guidelines*

1. Justice Breyer: Majority Opinion Part II

a. *The Guidelines Are Incompatible with the Constitutional Jury Trial Requirement*

After Justice Stevens held that *Blakely* applied to the Guidelines, the question remained whether the sentence-enhancing provisions of the Guidelines invalidated the entire Guidelines system.[182] To answer this question, Justice Breyer considered whether the Guidelines could incorporate the jury trial requirement imposed by the Majority Opinion Part I Justices.[183] The Court concluded that the jury trial requirement was not compatible with congressional intent in creating the Guidelines for five reasons: (1) Congress intended that judges and not juries decide

178. *Id.* at 807 (Breyer, J., dissenting).
179. *Id.* (Breyer, J., dissenting).
180. *Id.* (Breyer, J., dissenting).
181. *See id.* (Breyer, J., dissenting).
182. *Id.* at 756.
183. *See id.* at 757.

what sentence to impose;[184] (2) the jury trial requirement prevents sentencing uniformity, the basic goal of Congress in passing the Sentencing Reform Act;[185] (3) the requirement creates a sentencing system considerably more complex than Congress intended;[186] (4) plea bargaining under the Sixth Amendment requirement would diminish Congress's purpose of uniform sentencing;[187] and (5) Congress would not allow a sentencing regime that makes upward departures harder to impose than downward ones.[188] In light of these findings, Justice Breyer claimed that Congress would have preferred invalidation of the Guidelines to a system integrating the jury trial requirement.[189]

b. *Sections 3553(b)(1) and 3742(e) of the Sentencing Reform Act Must Be Excised*

After concluding that Congress would not have incorporated the jury trial requirement into the current Guidelines, the Court still needed to fashion a remedy to fix the current sentencing regime.[190] The Court examined the feasibility of severing and excising the unconstitutional portions of the Sentencing Reform Act

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184. *Id.* at 759. The Court noted that the Guidelines leave no room for the jury at sentencing. *Id.* ("[T]he words 'the court' mean 'the judge without the jury,' not 'the judge working together with the jury.'").

185. *Id.* at 760–62. This result would happen because the jury trial requirement eliminates the use of presentence reports by judges. *Id.* at 760. Historically, judges could use presentence reports to get a sense of the real conduct of a defendant in his commission of a crime, such as infliction of bodily harm or possession of a firearm. *Id.* at 760–62. The rationale was that since a single crime could be perpetrated in a multitude of ways, the presentence report helps achieve uniformity of sentencing because judges would sentence convicted defendants based on the crime and circumstances of its commission. *Id.* at 760. Because the presentence report is given to the sentencing judge after trial and often includes information not proved to a jury beyond a reasonable doubt, Justice Stevens's ruling would prohibit its use. *See id.*

186. *Id.* at 761. Justice Breyer suggested that imposing the jury trial requirement on the current Guidelines would render them unworkable for courts, juries, prosecutors, defense attorneys, and defendants alike. *See id.* at 761–62.

187. *Id.* at 763 ("[A]ny factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely. Prosecutors would thus exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.").

188. *Id.* The Court found it unlikely that Congress envisioned a system allowing judges to consider any fact in adjusting a sentence down, while limiting the facts permitting an upward departure. *Id.*

189. *Id.* at 764.

190. *See id.*

without invalidating either the Act or the Guidelines.[191] Justice Breyer identified two provisions requiring removal (along with any cross-references to them): 18 U.S.C. § 3553(b)(1)[192] and 18 U.S.C. § 3742(e).[193] The Court excised section 3553(b)(1) because it contains the mandate that judges must apply sentences in accordance with the Guidelines.[194] Without this requirement, the Sixth Amendment is satisfied, and the Sentencing Reform Act and the Guidelines remain functional, albeit in an advisory role.[195] Justice Breyer assured readers of his opinion that the Sentencing Reform Act still requires judges to *consider* sentencing ranges set in the Guidelines when sentencing convicted offenders, as well as the goals and purposes of Congress in creating the Sentencing Commission.[196]

The Court removed section 3742(e) because it contained extensive references to section 3553(b)(1).[197] Although the excision of section 3742(e) leaves the Sentencing Reform Act without a standard of review for appealed sentences, Justice Breyer found this fact unimportant because "a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*."[198] The Court found this implicit standard by looking to previous versions of section 3742(e), which imposed an unreasonableness standard of review.[199] While acknowledging that advisory sen-

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191. This type of severability analysis requires the Court to consider whether Congress would intend for part of a statute to remain effective when a constitutional conflict requires amendment of that law. *Id.* at 757. This examination requires that the Court "retain those portions of the [Sentencing Reform] Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' . . . and (3) consistent with Congress' basic objectives in enacting the statute." *Id.* at 764 (citations omitted) (quoting Am. Airlines v. Brock, 480 U.S. 678, 684 (1987)).

192. 18 U.S.C.S. § 3553(b)(1) (Law. Co-op. 2004) (stating that judges "shall impose a sentence of the kind, and within the range" provided for by the Guidelines).

193. *Id.* § 3742(e) (setting out standards of review on appeal of a sentence).

194. *See Booker,* 125 S. Ct. at 764.

195. *See id.*

196. *See id.* at 764–65 ("The Act nonetheless requires judges to consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' . . . the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims . . . . And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.") (citations omitted) (quoting 18 U.S.C. § 3553(a)(4) (2000)).

197. *Id.* at 765.

198. *Id.*

199. *Id.* at 765. By reverting to the requirement of reasonable sentencing in previous

tencing guidelines and an unreasonableness standard of review for sentencing decisions are not the regime envisioned by Congress, Justice Breyer believed that this application of the jury trial requirement would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."[200] Notably, Justice Breyer recognized that Congress now has the task of reforming the Guidelines to function in accordance with *Booker*.[201]

2. Justice Stevens's Dissent

a. *The Guidelines Are Neither Facially Invalid nor Subject to Severability Analysis*

Justice Stevens began his analysis by citing the "fundamental premise of judicial review that all Acts of Congress are presumptively valid."[202] As such, the Court may invalidate a duly enacted statute "'only upon a plain showing that Congress has exceeded its constitutional bounds.'"[203] Otherwise, the Court must rely upon the two exceptions to this presumptive validity: (1) facial invalidity, if the law is unconstitutional in all or almost all of its functions, and (2) total invalidation of the law, if the unconstitutional provisions cannot be severed from the rest of the statute.[204]

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versions of section 3742(e), the Court has essentially invalidated part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108–21, § 401(d)(1), 117 Stat. 670 (2003) (codified as amended at 18 U.S.C.S. § 3742(e) (Law. Co-op. 2004)), in addition to sections 3553(b)(1) and 3742(e). *See Booker*, 125 S. Ct. at 765.

200. *Booker*, 125 S. Ct. at 767 ("We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives. Under these circumstances, why would Congress not have preferred excision of the 'mandatory' provision to a system that engrafts today's constitutional requirement onto the unchanged pre-existing statute—a system that, in terms of Congress' basic objectives, is counterproductive?").

201. *Id.* at 768 ("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.").

202. *Id.* at 772 (Stevens, J., dissenting).

203. *Id.* at 773 (Stevens, J., dissenting) (quoting United States v. Morrison, 529 U.S. 598, 607 (2000)).

204. *Id.* (Stevens, J., dissenting).

The dissent argued that the numerous constitutional applications of the Guidelines, even with the jury trial requirement, prevented a finding of facial invalidity.[205] Justice Stevens noted that over ninety-five percent of all federal criminal cases end via plea bargaining, and of the cases proceeding to trial, only half actually resulted in the imposition of sentence enhancements.[206] In the few remaining cases where federal judges applied sentence enhancements, Justice Stevens provided three reasons why it is unlikely that the Sixth Amendment will be implicated. First, the jury trial requirement would not come into play if the accused waived his Sixth Amendment right to a jury trial.[207] Second, judges would be able to protect the Sixth Amendment rights of criminal defendants at sentencing with the current mandatory Guidelines.[208] Third, *Blakely* prohibits judicial fact-finding only when it increases the sentence of an accused beyond that which could have been imposed solely from facts found by the jury or admitted by the defendant.[209] Thus, according to Justice Stevens, judicial fact-finding is not "unconstitutional per se."[210]

Turning to the issue of severability, Justice Stevens simply concluded that severability does not apply, because all of the Sentencing Reform Act's provisions are constitutional and fell within Congress's power to enact legislation.[211] In light of this finding, Justice Stevens criticized the Majority Opinion Part II Justices for creating a new kind of severability analysis in its holding.[212] Moreover, he claimed that the Court exceeded its authority by invalidating constitutionally valid legislation—a right generally reserved for Congress.[213]

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205. *See id.* at 772–76 (Stevens, J., dissenting).

206. *Id.* at 772–73 (Stevens, J., dissenting).

207. *Id.* (Stevens, J., dissenting); Blakely v. Washington, 124 S. Ct. 2531, 2541 (2004) ("When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.").

208. *Booker*, 125 S. Ct. at 774 (Stevens, J., dissenting).

209. *Id.* at 775 (Stevens, J., dissenting).

210. *Id.* (Stevens, J., dissenting).

211. *Id.* at 777 (Stevens, J., dissenting).

212. *See id.* at 779–83 (Stevens, J., dissenting).

213. *Id.* at 787–89 (Stevens, J., dissenting).

b. *The Guidelines Can Satisfy the Sixth Amendment Without Becoming Advisory*

Rather than make the Guidelines advisory, Justice Stevens recommended that the sentencing system remain in place with the requirement that "any fact . . . *required* to increase a defendant's sentence under the Guidelines [be proved] to a jury beyond a reasonable doubt."[214] In support of his remedy, Justice Stevens noted that the Department of Justice implemented procedures post-*Blakely* that included alleging facts relevant to sentence enhancements.[215] In citing these procedures, however, the dissent assumed that the Department of Justice's approach to criminal prosecutions in the wake of *Blakely* would be successful—an unfounded claim at best.[216]

c. *Congress Has Already Rejected an Advisory System of Federal Sentencing Guidelines*

Considering Congress's intent in providing for the establishment of the Guidelines, Justice Stevens criticized the Majority Opinion Part II Justices for adopting a system of sentencing that Congress previously considered and rejected.[217] The dissent noted that a key influence on Congress's decision to create the Sentencing Commission was the sentencing disparities caused by judicial discretion.[218] As Congress worked through different proposals for a commission on sentencing from 1977 to 1984, each successive bill contained sentencing regimes that were less advisory and included greater restrictions on judicial discretion.[219] Justice Stevens also disagreed with Justice Breyer's analysis of congressional intent regarding the Sentencing Reform Act. Whereas Justice Breyer found that Congress intended judges to play a role in sentencing reform,[220] Justice Stevens believed that a distrust of judges provided the impetus for the creation of the Sentencing

214. *Id.* at 779 (Stevens, J., dissenting).

215. *Id.* (Stevens, J., dissenting).

216. *See* Blakely v. Washington, 124 S. Ct. 2531, 2552, 2554–56 (Breyer, J., dissenting) (describing the limitations of a sentencing system requiring that the prosecution plead and prove every fact relevant to sentence enhancement).

217. *Booker*, 125 S. Ct. at 782 (Stevens, J., dissenting).

218. *Id.* at 783 (Stevens, J., dissenting).

219. *Id.* at 784 (Stevens, J., dissenting).

220. *See id.* at 759 (Breyer, J., dissenting).

Commission.[221] Thus, Justice Stevens maintained that it was not at all clear, despite Justice Breyer's assertion to the contrary,[222] that Congress would have preferred advisory Guidelines to a sentencing scheme incorporating the jury trial requirement.[223]

3. Justice Scalia's Dissent

Justice Scalia wrote separately from Justice Stevens to discuss the implications of the reasonableness standard of review for sentencing established by Justice Breyer.[224] First, Justice Scalia noted the irony of the remedial majority's decision to "rescue from nullification a statutory scheme designed to eliminate discretionary sentencing [by] discard[ing] the provisions that eliminate discretionary sentencing."[225] Justice Scalia opined that the practical effect of advisory Guidelines was to allow federal judges full discretion at sentencing[226]—a prospect Congress sought to prevent when it created the Sentencing Commission.[227]

Next, Justice Scalia criticized Justice Breyer for ignoring the principle that "appellate review of sentencing discretion [is] limited to instances prescribed by statute."[228] Justice Scalia observed that in the case of sentencing decisions under the Guidelines, section 3742 only allows a court of appeals to review a sentence for unreasonableness "when the sentencing court has departed from 'the applicable guideline range.'"[229] Moreover, Justice Scalia found

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221. *Id.* at 783 (Stevens, J., dissenting). The Court pointed to the recent PROTECT Act as indicative of Congress's continued fear of judicial discretion. *Id.* at 786 (Stevens, J., dissenting).

222. *See supra* note 189 and accompanying text.

223. *See Booker*, 125 S. Ct. at 784–87 (Stevens, J., dissenting).

224. *See id.* at 745 (Scalia, J., dissenting). Justice Scalia filed a separate opinion disagreeing with Justice Stevens's reliance on committee reports and individual statements of members of Congress as indicative of congressional intent. *Id.* at 789 n.1 (Scalia, J., dissenting). Justice Scalia also rejected Justice Stevens's assertion that "even if the change to an indeterminate system were necessary, the Court could have minimized the consequences to the system by limiting the application of its holding to those defendants on direct review who actually suffered a Sixth Amendment violation." *Id.* at 788 n.17 (Stevens, J., dissenting); *id.* at 789 (Scalia, J., dissenting).

225. *Id.* at 790 (Scalia, J., dissenting).

226. *Id.* at 791 (Scalia, J., dissenting).

227. *See supra* notes 33–41 and accompanying text.

228. *Booker*, 125 S. Ct. at 791 (Scalia, J., dissenting).

229. *Id.* at 792 (Scalia, J., dissenting) (quoting 18 U.S.C. § 3742(f)(2) (Law. Co-op 2004)). The four types of appeal allowed by section 3742 arise when the sentence was: (1) "imposed in violation of law;" (2) "imposed as a result of an incorrect application of the

that this standard only applied to seventeen percent of all federal sentencing appeals in 2002.[230] Thus, Justice Scalia believed that a unitary standard of unreasonableness for all sentencing review was inappropriate.[231]

Finally, Justice Scalia argued that Justice Breyer's reasonableness standard of review for sentencing decisions would create conflicting holdings for similar cases among the federal appellate courts.[232] Justice Scalia claimed that because a reasonableness standard of review requires individual evaluation of each sentence rather than application of the Guidelines' standards, different appellate judges would likely reach dissimilar conclusions when faced with similar cases.[233] The result, according to Justice Scalia, would be a "discordant symphony of different standards, varying from court to court and judge to judge."[234]

4. Justice Thomas's Dissent

Justice Clarence Thomas wrote separately to apply a severability analysis, which Justice Stevens claimed was inapplicable, to the Sentencing Reform Act.[235] First, Justice Thomas reiterated the requirement that the Court "invalidate a statute only if the plaintiff establishes that the statute is invalid in all of its applications."[236] Justice Thomas noted that numerous provisions of the Guidelines and Federal Rule of Criminal Procedure 32(c)(1), acting in concert with section 3553(b)(1), resulted in an unconstitutional sentence for defendant Booker.[237] Thus, Justice Thomas opined that the Court should have considered the constitutionality of all of these provisions.[238] Citing numerous constitutional

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sentencing guidelines;" (3) "either above or below the applicable guideline range;" or (4) "plainly unreasonable" and no guideline is applicable. *See* 18 U.S.C. § 3742(a)(1)–(b)(4), (e)(1)–(4), (f)(1)–(2) (Law. Co-op. 2004).

230. *Booker*, 125 S. Ct. at 794 (Scalia, J., dissenting).

231. *Id.* (Scalia, J., dissenting).

232. *Id.* at 794–95 (Scalia, J., dissenting).

233. *Id.* (Scalia, J., dissenting).

234. *Id.* at 794 (Scalia, J., dissenting).

235. *Id.* at 795 (Thomas, J., dissenting). Justice Stevens failed to apply a severability analysis to the Sentencing Reform Act because he claimed that "severability analysis simply does not apply." *Id.* at 777 (Stevens, J., dissenting).

236. *Id.* at 795 (Thomas, J., dissenting).

237. *Id.* at 796–97 (Thomas, J., dissenting).

238. *Id.* at 797 (Thomas, J., dissenting).

applications of these provisions, even with the jury trial requirement, Justice Thomas reasoned that none were subject to facial invalidation.[239]

Turning to severability, Justice Thomas disagreed with Justice Stevens's conclusion that severability analysis did not apply.[240] The result of Justice Thomas's examination of the Sentencing Reform Act, however, differed from that of Justice Breyer.[241] Justice Thomas began his analysis from the same starting point that Justice Breyer began his[242]—"[u]nless the Legislature clearly would not have enacted the constitutional applications independently of the unconstitutional application, the Court leaves the constitutional applications standing."[243] Justice Thomas, however, reached a different conclusion. Pointing to Congress's intent to bind judges under a system of mandatory Guidelines and the many constitutional applications of the Guidelines with a jury trial requirement, Justice Thomas argued that "it is far from clear that Congress would not have passed the [Sentencing Reform Act] or allowed Rule 32 to take effect, or that the Commission would not have promulgated the Guidelines at issue, had either body known that the application of the scheme to Booker was unconstitutional."[244] Rather, Justice Thomas claimed that Justice Stevens's remedy of imposing a jury trial requirement without altering the Guidelines "does the least violence to the statutory and regulatory scheme."[245]

V. THE IMPACT OF *BOOKER*: A COUNTRY WITHOUT THE FEDERAL SENTENCING GUIDELINES?

A. *The Remnants of the Federal Sentencing Guidelines*

As noted earlier, Justice Stevens's response to the question of whether the Sixth Amendment's jury trial right applies to the

239. *Id.* at 797–99 (Thomas, J., dissenting).

240. *Id.* at 800 (Thomas, J., dissenting).

241. *Id.* at 800 n.10 (Thomas, J., dissenting) ("Justice Breyer grossly distorts severability analysis by using severability principles to determine which provisions the Court should strike as unconstitutional.").

242. *See id.* at 758–59.

243. *Id.* at 801 (Thomas, J., dissenting).

244. *Id.* at 801 (Thomas, J., dissenting).

245. *Id.* at 802 (Thomas, J., dissenting).

Guidelines was hardly a surprise in light of the Court's decisions in *Apprendi* and *Blakely*.[246] However, the remedy fashioned by Justice Breyer's majority opinion dropped a bomb on the federal courts and Congress. Justice Breyer's ruling that the current Guidelines are merely advisory represents a tremendous shift from the current sentencing scheme.[247] The Court essentially rewrote portions of the Sentencing Reform Act and changed a congressional mandate that judges sentence according to rules prescribed by the Sentencing Commission.[248] This result raises several noteworthy issues.[249]

1. Coming Full Circle: The Return of Indeterminate Sentencing?

The main academic question in the aftermath of *Booker* is whether the Court may rule that the Guidelines are advisory. It is worth noting that of all the Justices sitting on the Supreme Court, Justice Breyer, more than anyone else, understands the Guidelines and the forces that drove Congress to create the Sentencing Commission—he helped create both.[250] For this reason, his conclusion that Congress would have preferred an advisory sentencing system to a mandatory one incorporating the jury trial requirement is surprising. By making the Guidelines advisory, Justice Breyer dismissed Congress's goal to severely limit judicial discretion.[251]

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246. *See supra* notes 143–45 and accompanying text.

247. *See Booker*, 125 S. Ct. at 787–89 (Stevens, J., dissenting).

248. *See supra* notes 191–201 and accompanying text.

249. Note that the split majority happened when Justice Ginsburg inexplicably joined Justice Breyer's majority opinion after joining in Justice Stevens's ruling that *Blakely* implicated the Guidelines. Without any concurring or dissenting opinion, lawyers, judges, and commentators are left to speculate on her rationale for doing so. *See* Linda Greenhouse, *Supreme Court Transforms Use of Sentencing Guidelines*, N.Y. TIMES, Jan. 13, 2005, at A4.

250. Justice Breyer was Chief Counsel of the Senate Judiciary Committee from 1979–1980, a time when legislators were attempting to pass the Sentencing Reform Act. He also served as a member of the Sentencing Commission from 1985–1989. *See* SUPREME COURT OF THE U.S., THE JUSTICES OF THE SUPREME COURT, *available at* http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Apr. 2, 2005); Greenhouse, *supra* note 249, at A4. For an interesting discussion of the Guidelines by Justice Breyer, see generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

251. *See supra* notes 39–43 and accompanying text.

While it is true, as Justice Breyer claimed,[252] that reducing unwarranted disparity in sentencing was a goal of Congress in promulgating the Sentencing Reform Act, this was not the only goal.[253] The basic purpose of the Sentencing Reform Act was to end indeterminate sentencing because it created unfounded disparities in sentencing.[254] As such, Congress was most concerned with eliminating the system of indeterminate sentencing that had developed along with the rehabilitation ideal.[255] Thus, the holding in Majority Opinion Part II creating an advisory Guidelines system is ironic, because it returns sentencing to its pre-Sentencing Reform Act status. Now, although federal courts must *consider* the Guidelines when sentencing criminal defendants, judges may impose any sentence they deem reasonable.[256] In contrast, Justice Stevens suggests maintaining the Guidelines as they are and imposing the jury fact-finding requirement before judges can go beyond the standard sentencing range for a crime.[257] The return to indeterminate sentencing that Justice Breyer made possible will likely produce the same problems that existed before the implementation of the Guidelines.[258]

Compounding the problems created by a return to indeterminate sentencing, the Court also invalidated the standard of review for sentencing decisions under the PROTECT Act of 2003[259] when it excised section 3742(e).[260] In doing so, Justice Breyer failed to make the same determination as he did in removing section 3553(b)(1)—namely, whether Congress would intend to keep

252. *See Booker*, 125 S. Ct. at 759–62.

253. *See id.* at 785–86 (Stevens, J., dissenting).

254. *See id.* at 786 (Stevens, J., dissenting) ("The House version of the bill preferred the Guidelines to be written by the Judicial Conference of the United States—the House Report accompanying that bill argued that judges had vast experience in sentencing and would best be able to craft a system capable of providing sentences based on real conduct without excessive disparity. . . . Those in the Senate majority, however, favored an independent commission. They did so, whether rightly or wrongly, based on a belief that federal judges could not be trusted to impose fair and uniform sentences. . . . And, at the end of the debate, the few remaining Members in the minority recognized that the battle to empower judges with more discretion had been lost."); *see also supra* notes 26–32 and accompanying text.

255. *See Booker*, 125 S. Ct. at 783–85 (Stevens, J., dissenting).

256. *See id.* at 766.

257. *See id.* at 772 (Stevens, J., dissenting). This jury trial requirement has its own deficiencies as explained *infra* notes 282–87 and accompanying text.

258. *See supra* notes 26–32 and accompanying text.

259. *See supra* note 199.

260. *See Booker*, 125 S. Ct. at 765.

the de novo standard if the Guidelines were made advisory or implement a standard of reasonableness.[261] The Court disregarded the fact that Congress explicitly changed the standard of review from reasonableness to de novo review because it felt judges were exercising too much discretion in implementing downward departures.[262] Justice Breyer merely stated that by making the Guidelines advisory, "the reasons for these revisions . . . have ceased to be relevant."[263] This could not be farther from the truth. Congress's purpose in changing the standard of review for sentencing decisions was to further reduce judicial discretion—or to put it another way, Congress wanted to establish a stricter adherence to the Guidelines.[264] Imposing a standard of review of mere reasonableness only adds to judicial discretion because appellate review of sentencing decisions will depend on whether a judge sufficiently justified his sentence rather than whether there were sufficient factors to support that sentence.[265]

In sum, considering the intent of Congress in promulgating the Sentencing Reform Act, it is not at all clear that Congress, as Justice Breyer claimed, "would likely have preferred the total invalidation of the Act to an Act with the [Court's Sixth Amendment] requirement engrafted onto it, but would likely have preferred the excision of the Act's mandatory language to the invalidation of the entire Act."[266] If anything, the Court's remedy seems "an exercise of legislative, rather than judicial, power."[267]

2. The Impact of *Booker* on the Lower Federal Courts

Despite Justice Breyer's questionable reasoning in ruling that the Guidelines are now advisory, the truth is that no appellate

261. *See id.* at 764–66.

262. *See id.* at 787 n.16 (Stevens, J., dissenting).

263. *See id.* at 765.

264. *See* 149 CONG. REC. S5122–23 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) ("[T]he game is over for judges: You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here. . . . We say in this bill: We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission.").

265. *See Booker*, 125 S. Ct. at 794 (Scalia, J., dissenting).

266. *Id.* at 743.

267. *Id.* at 772 (Stevens, J., dissenting).

court may now review his decision.[268] While it is possible that the federal government may challenge the validity of Justice Breyer's holding in a lower federal court as an unconstitutional exercise of legislative power in violation of the doctrine of separation of powers, it is more likely that Congress and the Sentencing Commission will analyze the implications of *Booker* and focus on amending the Guidelines in the future.[269]

In the meantime, it is worth considering the practical question of what the federal courts will do. Lower federal courts will likely apply the Guidelines in an advisory manner as instructed by *Booker*.[270] The reason is simple when one considers the history of the Guidelines. When Congress created the Sentencing Commission, it did so because of a growing distrust of judicial discretion in sentencing.[271] This animosity was so severe that the Senate refused to allow the Sentencing Commission to be filled entirely by judges, despite their obvious qualifications.[272] As noted earlier, federal judges reacted negatively to the Guidelines upon their enactment,[273] and there is already anecdotal evidence that current and former federal judges approve of an advisory system with greater sentencing discretion.[274] It remains to be seen, however, whether Congress will allow this new system of advisory Guidelines to continue.

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268. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

269. *See* Press Release, Ricardo H. Hinojosa, U.S. Sentencing Comm'n Chair, U.S. Sentencing Commission Chair Comments on High Court Ruling, (Jan. 13, 2005) ("Now that a decision has been issued, the Commission will work with Congress, members of the federal judiciary's Committee on Criminal Law, the Department of Justice, the defense bar, members of the criminal justice community, and other interested individuals to ensure that we have a fair and just sentencing system within the bounds of our Constitution."), *available at* http://www.ussc.gov/PRESS/rel011305.htm (last visited Apr. 2, 2005).

270. Contrast this with the lower federal courts' response post-*Blakely*, where many upheld the constitutionality of the Guidelines. *See supra* notes 126–29 and accompanying text.

271. *See supra* notes 26–32 and accompanying text.

272. *See* 130 CONG. REC. 976 (1984) (statement of Sen. Laxalt) ("The present problem with disparity in sentencing . . . stems precisely from the failure of Federal judges—individually and collectively—to sentence similarly situated defendants in a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past.").

273. *See supra* notes 68–69 and accompanying text.

274. *See* Carl Hulse & Adam Liptak, *New Fight Over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29.

B. *The Legislative Response*

1. Sentencing Reform: Examining the Possibilities

a. *Justice Breyer's Advisory Guidelines*

The current Guidelines are merely advisory after Justice Breyer's holding in *Booker*.[275] Advisory Guidelines require that federal judges consider but not necessarily follow the Guidelines when making their sentencing decisions.[276] This option has received some support, albeit only as a temporary solution.[277] The main advantages of this solution are that it complies with *Booker* and is simple to apply.[278] It should only be a temporary fix, however, with Congress legislating a new sentencing scheme after completing a sufficient analysis of how best to implement determinate sentencing without invoking *Booker*.[279] Advisory Guidelines essentially reinstate indeterminate sentencing—a regime Congress explicitly rejected when it enacted the Sentencing Reform Act.[280] Moreover, Congress still seems to believe it must limit judicial discretion at sentencing. [281] Thus, Justice Breyer's plan, although constitutional, is contrary to congressional intent.

b. *Justice Stevens's Jury Trial Requirement*

Justice Stevens proposed a plan where prosecutors must plead and prove every fact necessary to support a conviction and sentence.[282] Prosecutors did attempt to adopt this solution following the Court's decision in *Blakely*.[283] Requiring prosecutors to plead and prove every fact, however, shifts a tremendous burden onto

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275. *Booker*, 125 S. Ct. at 767–68.

276. *See supra* notes 196–97 and accompanying text.

277. *See Blakely Hearings*, *supra* note 129 (testimony of Frank Bowman, Professor of Law, Indiana University School of Law), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647 (last visited Apr. 2, 2005); *Blakely Hearings*, *supra* note 129 (testimony of Ronald Weich, Partner, Zuckerman Spaeder LLP), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3685 (last visited Apr. 2, 2005).

278. *See Blakely Hearings*, *supra* note 129 (testimony of Frank Bowman).

279. *See id.* (testimony of Ronald Weich).

280. *See supra* notes 217–23 and accompanying text.

281. *See supra* notes 257–62 and accompanying text.

282. *See supra* notes 214–16 and accompanying text.

283. *Booker*, 125 S. Ct. at 779 (Stevens, J., dissenting). *But see supra* note 128.

both the government and the defendant. Prosecutors would need to invest additional resources to ascertain all facts relevant to sentencing—despite the fact that these facts are generally unavailable until after trial.[284] Defendants would be subject to prosecutorial rather than judicial discretion at sentencing, because prosecutors decide which charges and facts to present to the jury.[285] Justice Stevens's solution would also place defendants in the difficult position of defending against aggravating facts during trial rather than at sentencing.[286] For example, an accused might have to argue simultaneously that he did not commit robbery, but if he did, he did not use a gun. The result is a fundamentally unfair system that satisfies the Sixth Amendment while possibly violating the defendant's right to due process.[287]

c. *The Kansas Plan*

In the wake of *Apprendi*, Kansas adopted a bifurcated trial proceeding for criminal prosecutions where sentencing factors needed to be pleaded and proven to a jury.[288] This process seems to be a sure way to integrate the Sixth Amendment requirements of *Booker* into the Guidelines. There are, however, significant challenges to doing so. The first is the increased cost of bifurcated criminal proceedings for courts, defendants, lawyers, and jurors.[289] To a degree, this extra cost is alleviated by the fact that the overwhelming majority of criminal cases end in guilty pleas.[290] This proposal, however, would substantially raise the costs of preparing for trial—whether the case is resolved at the

284. *See, e.g.*, Blakely v. Washington, 124 S. Ct. 2531, 2555 (Breyer, J., dissenting) (noting that "prosecutors [would have to] charge all relevant facts . . . before many of the facts relevant to punishment are known").

285. *See id.* (Breyer, J., dissenting).

286. *Id.* (Breyer, J., dissenting).

287. *See id.* (Breyer, J., dissenting).

288. *See* KAN. STAT. ANN. § 21–4718 (Cum. Supp. 2003); *Blakely Hearings*, *supra* note 129 (testimony of Frank Bowman). Bifurcated jury proceedings already take place in capital cases. *See Blakely*, 124 S. Ct. at 2556 (Breyer, J., dissenting). The formalities of capital sentencing require a separate analysis and are not addressed in this Comment. For an interesting discussion of Sixth Amendment rights at capital sentencing, see John G. Douglass, Confronting Death: Sixth Amendment Rights at Capital Sentencing (2005) (unpublished manuscript, on file with the author).

289. *Blakely*, 124 S. Ct. at 2556 (Breyer, J., dissenting).

290. Because less than ten percent of all criminal defendants go to trial, bifurcated proceedings would be meaningless or even detrimental for most criminal defendants. *Id.* at 2256–57 (Breyer, J., dissenting).

plea bargaining phase or proceeds to trial. This is so because in preparing for trial, both prosecutors and defense counsel would prepare simultaneously for sentencing.[291] This burden may prove especially difficult for defense counsel, whose resources are usually limited.[292] In addition, prosecutors would wield great power over criminal defendants by threatening more or fewer charges during the plea bargaining process.[293]

d. *Pure Charge System*

Another solution to the issue presented by *Booker* would be the implementation of a pure charge system. Under this scheme, Congress would create a system of statutory crimes under which every offender received the same sentence.[294] In other words, these sentencing guidelines would be perfectly determinate because every person convicted for the same crime would receive the same sentence.[295] Admittedly, this regime produces uniformity, but it would sacrifice many other goals of the Sentencing Reform Act.[296] Most importantly, a pure charge system fails to consider the particular circumstances of an offense, removing the possibility of ensuring that the punishment fits the crime.[297] This result contradicts Congress's intent in establishing the Sentencing Reform Act.[298]

e. *Raising Guideline Maximums to Statutory Maximums*

Congress can also raise the upper limit of current sentencing ranges for all crimes to the highest possible sentence under the

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291. *Cf.* Roy Brasfield Herron, *Defending Life in Tennessee Death Penalty Cases*, 51 TENN. L. REV. 681, 684 (1983) (noting that in bifurcated proceedings such as capital cases, defense counsel must prepare for the trial and sentencing from the beginning of the case); S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—A Report on Reforms in Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371, 380 (2002).

292. *See* Shank, *supra* note 291, at 379–81.

293. *Blakely*, 124 S. Ct. at 2557 (Breyer, J., dissenting).

294. *Id.* at 2552–53 (Breyer, J., dissenting).

295. *Id.* (Breyer, J., dissenting).

296. *Id.* at 2553 (Breyer, J. dissenting).

297. *See id.* (Breyer, J. dissenting).

298. *See supra* notes 39–41 and accompanying text.

Guidelines—the statutory maximum.[299] After a jury convicts an offender of a crime, the judge would have the discretion to apply all facts in determining the defendant's sentence up to the statutory maximum, subject to an abuse of discretion standard of review.[300] In practice, this system would function just like the previous Guidelines, without changing the way judges apply them to determine a sentence.[301] The key difference is that *Booker* is not invoked, because a judge can never impose a sentence exceeding the statutory maximum for a crime.[302] One problem with this plan is that it subjects sentences above the guideline minimum to merely an abuse of discretion standard of review—Congress would likely prefer that the Guidelines afford greater control of judicial discretion.[303]

2. A Proposal for Congressional Action

It is clear from the legislative history of the Sentencing Reform Act that Congress desired a mandatory guideline system as a means of reducing judicial discretion and limiting sentencing disparity.[304] Justice Breyer's remedy fails to satisfy that congressional purpose.[305] Congress, however, can once again achieve that goal in large measure and still comply with the Sixth Amendment. As this section will explain, it is possible to retain most of

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299. This proposal was introduced first by Professor Frank Bowman. *See, e.g.*, *Blakely Hearings*, *supra* note 129 (testimony of Frank Bowman) (advocating the Bowman Plan of raising statutory maximums in response to *Blakely*); Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with* Blakely v. Washington, 16 FED. SENTENCING REP. 364 (2004) (proposing the Bowman Plan in a memorandum to the Sentencing Commission addressing the implications of *Blakely*). *But see A Counsel of Caution: Hearing on the Implications of the* Booker/Fanfan *Decision for the Federal Sentencing Guidelines Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Frank W. Bowman) (acknowledging that "topless guidelines" may be unconstitutional and asking Congress to cautiously proceed in the wake of *Booker*), *available at* http://judiciary.house.gov/media/pdfs/Bowman021005.pdf (last visited Apr. 2, 2005).

300. *See Blakely Hearings*, *supra* note 129 (testimony of Frank Bowman). Remember that *Apprendi* and *Blakely* do not stand for the notion that judges may not exercise discretion, they merely cannot find facts independent of a jury determination to increase the sentence for a criminal defendant beyond the standard range for an offense. *See Blakely*, 124 S. Ct. at 2537; *Apprendi*, 530 U.S. at 481.

301. *See Blakely Hearings*, *supra* note 129 (testimony of Frank Bowman).

302. 18 U.S.C. §§ 3551(b)(3), 3581 (Law. Co-op. 2004).

303. *See supra* notes 259–65 and accompanying text.

304. *See supra* notes 26–32 and accompanying text.

305. *See supra* notes 33–41, 250–67 and accompanying text.

the current Guidelines without making them wholly advisory and without violating the constitutional principles mandated in *Booker*.

Congress can maintain effective limits on sentencing disparity and comply with the Sixth Amendment merely by making the upper limit of each sentencing range advisory, while leaving each lower limit as a mandatory guideline.[306] This amendment to the Guidelines would retain the mandatory lower bound of sentencing ranges currently in effect. The authorized range for conviction of a crime under the Guidelines with no additional judicial fact-finding would vary between the current minimum and the statutory maximum punishment allowed. The advisory maximum would remain at the upper limit of the existing guideline, and judges would be required to consider this boundary pursuant to 18 U.S.C. § 3553(a).[307] To limit disparity at the upper end, Congress should provide for an abuse of discretion standard of review for sentences that depart upward from the Guidelines.[308] For sentences within the ranges currently specified by the Guidelines, Congress should retain the clearly erroneous standard of review now in use.[309] More importantly, Congress should continue requiring appellate courts to review sentencing decisions that depart downward under a de novo standard of review.[310] Using this approach, Congress can simultaneously satisfy the Sixth Amendment and control judicial discretion.

a. *Mandatory Minimum Guidelines and Advisory Maximum Guidelines Satisfy the Sixth Amendment*

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a

306. The author thanks Professor John G. Douglass for his insightful comments and suggestions in developing the proposal set forth here. The author also acknowledges that this proposal is very similar to and builds from Professor Frank Bowman's proposal for "topless guidelines." *See supra* notes 299–303 and accompanying text.

307. 18 U.S.C. § 3553(a) (2000) (requiring that judges consider the Guidelines when imposing sentences).

308. Because an upward departure from an advisory guideline would represent an exercise of discretion by the district court, the appropriate standard for review would be abuse of discretion. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 558 (1988) (noting that the standard of review for "matters of discretion" is abuse of discretion).

309. *See* 18 U.S.C.S. § 3742(e) (Law. Co-op. 2004).

310. *See id.*

crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[311] The *Blakely* and *Booker* courts extended *Apprendi* to hold that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[312] By directing the Sentencing Commission to make the upper limit of Guidelines merely advisory, Congress would allow a judge—after a jury verdict convicting the defendant and without further fact-finding—to impose any sentence up to the statutory maximum for that offense. Congress thus avoids implicating the *Apprendi* line of cases.

While this adjustment to the Guidelines may seem to circumvent the jury trial requirement because it allows judges broad discretion in applying upward departures,[313] the Court's jurisprudence clearly supports the exercise of judicial discretion to select a sentence within the range justified by a jury verdict.[314] In *Booker*, Justices Stevens and Breyer recognized the right of a judge to select an appropriate sentence within the range allowed by a jury's verdict.[315] If Congress makes the Guidelines' upper limit merely advisory, then a jury verdict would authorize the judge to impose a sentence anywhere between the Guidelines minimum and the statutory maximum. Although the Guidelines would function as mandatory minimums with advisory maxi-

311. *Apprendi*, 530 U.S. at 490 (2000).

312. *Booker*, 125 S. Ct. at 746–47; *Blakely*, 124 S. Ct. at 2537.

313. *See, e.g.*, *Blakely Hearings*, *supra* note 129 (testimony of Rachael Barkow) (noting that the similar Bowman plan allows judges "to increase a defendant's sentence even above the prior Guidelines ceiling"), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id= 3684 (last visited Apr. 2, 2005).

314. *See Booker*, 125 S. Ct. at 750 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *Apprendi*, 530 U.S. at 481 ("We should be clear that nothing . . . suggests that it is impermissible for judges to exercise discretion . . . in imposing a judgment *within the range* prescribed by statute"); Williams v. New York, 337 U.S. 241, 246 (1949) ("But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

315. *Booker*, 125 S. Ct. at 750 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *id.* at 804 (Breyer, J., dissenting) ("[D]espite the absence of jury determinations . . . [judicial sentencing] procedures [are] fair as long as the convicted offender has the opportunity to contest a claimed fact before the judge, and as long as the sentence falls within the maximum of the range that a congressional statute specifically sets forth.").

mums, the Court has already upheld the constitutionality of mandatory minimums in *Harris*.[316]

b. *Mandatory Minimum Guidelines and Advisory Maximum Guidelines Further Congress's Goal of Controlling Judicial Discretion*

This revision to the Guidelines would also advance Congress's goal of limited judicial discretion at sentencing.[317] Admittedly, judges would have greater discretion if Congress made the upper Guidelines merely advisory.[318] Upward discretion, however, was not Congress's main concern in enacting mandatory Guidelines.[319] In passing the Sentencing Reform Act, Congress hoped to limit instances of downward rather than upward departures.[320] As noted earlier, Congress did not enact the Sentencing Reform Act until there was a growing fear of the escalating national crime rate.[321] Thus, one of the goals of the Act was to ensure that criminal defendants received their just desserts.[322] Under a system that retains the mandatory minimums from the previous version of the Guidelines, Congress should not fear that disparate sentences would return.

Furthermore, in practice, upward departures are seldom an issue at the sentencing stage. Whereas thirty-five percent of all criminal sentences usually include a downward departure,[323] federal judges typically justify an upward departure in less than one percent of all federal criminal cases.[324] The requirement of de novo review for departures below the mandatory minimum set by the Guidelines simply retains the standard set forth in the current statute as a means for controlling disparities brought about through downward departures.[325]

316. *Harris*, 536 U.S. at 568–69.

317. *See supra* notes 33–41, 250–67 and accompanying text.

318. *See supra* note 313 and accompanying text.

319. 28 U.S.C. § 991(b)(1) (2000); *see* FIFTEEN-YEAR REPORT, *supra* note 33, at 11–13.

320. *See, e.g.*, Nagel, *supra* note 44, at 24 ("The inference that Congress thought that past sentences were often unduly lenient, in the community's view, was inescapable.").

321. *See supra* notes 35–38 and accompanying text.

322. 28 U.S.C. § 991(b)(1) (2000); *see* FIFTEEN-YEAR REPORT, *supra* note 33, at 11–13.

323. *See* 2002 STATISTICS SOURCEBOOK, *supra* note 1, at fig.G, 53–55 tbl.26.

324. *Id.*

325. *See* 18 U.S.C. § 3742(e) (2000).

In sum, a Guidelines system with mandatory guidelines at the lower end and advisory guidelines at the upper end would satisfy the congressional purpose of controlling disparities in over ninety-nine percent of cases, without violating the Sixth Amendment. Congress would maintain control of judicial discretion where it really matters (at the low end of the sentencing ranges) and still comply with the Sixth Amendment jury requirement where it applies (at the top of the sentencing ranges).

VI. CONCLUSION

The Court's two-part holding in *Booker* has turned the Guidelines on their head. The main question now is how to fix the Guidelines in a manner that does not violate the Sixth Amendment but still advances Congress's goal of determinate sentencing. Justice Breyer's transformation of the Guidelines into an advisory tool will prove to be the first step in what will surely be a new period of sentencing reform. The answer to this question should be the result of collaboration among members of Congress, judges, prosecutors, criminal defense attorneys, and other commentators instead of the bitterness between Congress and the judiciary that pervaded the enactment of the Sentencing Reform Act. Among the myriad of options available to Congress, the best choice would be to render the current Guidelines' maximums advisory. This is the least costly way to preserve Congress's original intent of creating mandatory Guidelines that limited judicial discretion and unwarranted disparities in sentencing. In the meantime, "[t]he ball now lies in Congress' court"[326] as federal courts and the nation anxiously wait to see what will ultimately happen to the Guidelines.

Jonathan Chiu

326. *Booker*, 125 S. Ct. at 768.

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