

A SECOND CHANCE FOR SENTENCING REFORM: ESTABLISHING A SENTENCING AGENCY IN THE JUDICIAL BRANCH

Kate Stith* and Karen Dunn**

INTRODUCTION.....	217
I. RESPONDING TO <i>BOOKER</i> : WHAT THE SENTENCING COMMISSION CAN DO	218
II. RESPONDING TO <i>BOOKER</i> : WHAT CONGRESS CAN DO	220
A. <i>Structural Deficiencies of the Sentencing Commission</i>	221
B. <i>Establishing a Sentencing Agency in the Judicial Branch</i>	224
III. THE IMPORTANCE OF JUDICIAL REVIEW	229
CONCLUSION	233

INTRODUCTION

By declaring that the Federal Sentencing Guidelines are no longer fully binding “law” and thereby shifting some discretionary authority back to individual judges, *United States v. Booker*¹ creates the opportunity to finally vindicate the holding in *United States v. Mistretta*.² Congress can establish a new sentencing agency that is truly located in the judicial branch and that provides independent and expert sentencing guidance to judges. In urging that a new sentencing agency be structurally and functionally located “in the judicial branch,” we mean that the judicial nature of the agency should be reflected in its composition, method of appointment, and work product. The last of these would be focused not on lawmaking, but on giving guidance—guidance to judges regarding the exercise of sentencing discretion, and guidance to Congress as to which factors relevant to punishment are best treated as elements of the crime and which are best treated as discretionary sentencing

* Lafayette S. Foster Professor of Law, Yale Law School.

** J.D. Candidate, Yale Law School, Class of 2006.

1. 125 S. Ct. 738 (2005).

2. 488 U.S. 361 (1989) (upholding the constitutionality of an “independent [sentencing] commission in the judicial branch of government,” 28 U.S.C. § 991(a) (1989)).

factors. Perhaps most importantly, we urge that the new agency's sentencing guidelines be subject to judicial review equivalent to that provided by the Administrative Procedure Act (APA)³ in order to ensure legitimacy and credibility with Congress, judges, and the public.

Booker, and the line of cases that preceded it, fundamentally reconceptualized sentencing in the United States; in the wake of this transformation, sentencing law and its administration must also change.

I. RESPONDING TO *BOOKER*: WHAT THE SENTENCING COMMISSION CAN DO

From its inception, the United States Sentencing Commission has provided neither guidance nor advice. It has provided only rules. These detailed instructions specifying the factors relevant (and not relevant) to sentencing and the precise weight to be given each factor supplanted, rather than guided, judicial sentencing authority. But post-*Booker*, the present set of Guidelines (we use the term to encompass the Commission's policy statements regarding departures⁴) makes little sense. The effect of *Booker* is to redact from the Sentencing Reform Act of 1984 two central mandates of that charter: that judges must sentence within the Guidelines range in all but extraordinary cases,⁵ and that even when departing from the Guidelines range, judges are bound by the Commission's rules.⁶

Absent these two mandates, the Commission's set of precise, numerical, discretion-free sentencing instructions remains, but it yields at most a proposed sentence for the sentencing judge to consider. Yet post-*Booker*, the judge's task has only begun, for in addition to determining the Guidelines sentence (including, as noted above, Guidelines-approved departures from the calculated Guidelines range), the judge must consider the several broad purposes of punishment set forth in 18 U.S.C. § 3553(a) and impose a sentence that meets the "reasonableness" standard.⁷

The present set of Sentencing Guidelines provides no guidance as to how the courts are to consider or implement these ambitious purposes of sentencing, nor how they are to judge the extent to which the recommended Guidelines sentence achieves some or all of those purposes. Additionally, there are many

3. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

4. See *Stinson v. United States*, 508 U.S. 36, 41-47 (1993) (holding that just as the Guidelines are authoritative, "Commentary" that explains or interprets the Guidelines is authoritative); *Williams v. United States*, 503 U.S. 193, 201 (1992) (holding that "policy statements" are authoritative); see also 18 U.S.C. § 3553(a)(4) (2005) (requiring the sentencing judge to consider Guidelines range); 18 U.S.C. § 3553(a)(5) (2005) (requiring the judge also to consider pertinent policy statements).

5. See *Booker*, 125 S. Ct. at 767 (Breyer, J.) (severing 18 U.S.C. § 3553(b)(1)).

6. See 125 S. Ct. at 765 (Breyer, J.) (severing 18 U.S.C. § 3742(e)).

7. 125 S. Ct. at 766-67 (Breyer, J.).

ambiguities in the *Booker*-redacted Sentencing Reform Act. Among them is the question of how much deference, if any, courts owe the Sentencing Commission's implicit judgment that its Guidelines (including its departure rules) fully reflect the § 3553(a) purposes. The Commission, after all, was directed to consider these same purposes;⁸ yet post-*Booker*, its judgments are no longer given the force of law. Even Justice Breyer, in his remedial opinion in *Booker*,⁹ did not claim that Congress would have enacted the statute that emerged, with its curious combination of detailed and rigid instructions to the Commission, resulting in Guidelines that are only advisory, and accompanied by broadly worded, open-ended instructions to sentencing judges and reviewing courts. The effect is a huge wind-up, only to produce a weak pitch that cannot even make it to home plate, if indeed there remains a home plate after *Booker*.

Still, until and unless Congress amends or replaces the Sentencing Reform Act, as we will argue it should, the Sentencing Commission must try to make sense of the statute as it now exists and to implement its mandates to the extent feasible. With *Booker* having torn the heart out of its statutory charter—the provisions that gave the Commission's rules the force of law—it is incumbent upon the Commission to reconsider where to expend its time, energy, and resources. In our view, just as it is no longer legally sufficient for judges simply to apply preordained sentencing rules, so also it is no longer sufficient for the Commission simply to issue such rules. At the least, *Booker* demands that the Commission devote its resources less to writing specific sentencing rules and more to giving guidance to judges as to how they may best implement the purposes of sentencing set forth in the Sentencing Reform Act. The Commission's statutory mandate relates to all aspects of the sentencing decision, and it makes little sense in the wake of *Booker* to retain its current Guidelines-range instructions and departure rules.

Simply put, if judges are to judge, as *Booker* says they are, the Commission must now attend to this reality. As the Commission considers how to recast its work product to provide greater guidance to sentencing judges in their exercise of discretion, it may be tempted to leave its present discretion-free sentencing rules in place and respond to *Booker* by simply tacking on a series of general statements regarding the application of the other § 3553(a) factors. That would be a band-aid solution to a problem that requires surgery. It would make far more sense to build guidance regarding the exercise of discretion into the consideration of each factor that may be relevant to sentencing (such as quantity, role in the offense, amount and nature of harm, personal

8. See 28 U.S.C. §§ 991(b), 994(a)(2), 994(f) (2005). The Sentencing Reform Act also imposed a series of additional mandates on the Commission, primarily relating to the severity of Guidelines sentences, which are not repeated in the § 3553(a) instructions to sentencing judges. See, e.g., 28 U.S.C. § 994(c), (g), (h), (k), (l), (m), (n), (t) (2005). The lack of parallel instructions, in a statute that, as redacted, no longer gives the force of law to the Commission's judgments, renders the statute difficult to comprehend and implement.

9. See 125 S. Ct. at 756, 765 (Breyer, J.).

characteristics, etc.). There was a good argument even before *Booker* that the Commission was not statutorily bound to write discretion-free sentencing instructions.¹⁰ This argument takes on greater weight now that the Guidelines are no longer binding, and sentencing judges are required to impose a sentence that best meets all the purposes set forth in § 3553(a).¹¹

II. RESPONDING TO *BOOKER*: WHAT CONGRESS CAN DO

In our judgment, however, it is not enough for the Sentencing Commission to reconsider how best to implement the post-*Booker* Sentencing Reform Act; Congress must step up to the plate and enact legislative reform. As noted above, in the wake of *Booker*, the statute as it now stands lacks coherence. Moreover, there are fundamental weaknesses in the structure of the present Sentencing Commission, which have been exacerbated by *Booker*. Finally, the current Commission bears the taint of longstanding and widespread disrespect for its own Guidelines.¹² This lack of respect is especially evident in Congress itself, which increasingly has rejected a role for the Sentencing Commission in formulating federal sentencing policy. Now is the time for Congress to reenvision its relationship both to any independent sentencing agency it establishes and to the sentencing decision itself.

10. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (arguing that the Sentencing Reform Act contemplated far greater exercise of judicial discretion than provided in the Guidelines, including in departures); Joseph Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1212-13 (1999). The Commission apparently determined that 28 U.S.C. § 994(b)(2) (2005), which requires that the ceiling of any sentencing range be no more than twenty-five percent greater than the floor, implicitly prohibited the Commission from providing for the exercise of any discretion in calculation of the range.

11. Even if the Commission concludes that it is statutorily required to retain the kind of inflexible, detailed instructions it has thus far promulgated for determining the Guidelines range, see *supra* note 10, it should replace its current instructions regarding departures with substantive guidance that directly addresses how judges should determine whether a sentence in the calculated range comports with the other § 3553(a) factors. Recasting its departure rules would avoid the present curious situation where some sentences not within the Guidelines range may still be considered "Guidelines sentences," while others are considered "non-Guidelines sentences" or variations or "deviations" from the Guidelines. See *United States v. Crosby*, 397 F.3d 103, 111-12, 118 n.20 (2d Cir. 2005); *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005).

12. A former chief counsel to Senator Kennedy, the original sponsor of the Sentencing Reform Act, has referred to the Sentencing Commission as "the Rodney Dangerfield of federal agencies: . . . [d]espised by judges, sneered at by scholars, ignored by the Justice Department, its guidelines circumvented by practitioners and routinely lambasted in the press." Ronald Weich, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 FED. SENT'G REP. 94, 96-97 (1996).

October 2005] *A SENTENCING AGENCY IN THE JUDICIAL BRANCH* 221

A. Structural Deficiencies of the Sentencing Commission

Congress decided to establish “an independent commission in the judicial branch”¹³ because it understood that sentencing policy should be largely insulated from immediate political pressures and rewards.¹⁴ Yet, as finally enacted in 1984, the Sentencing Reform Act provided for appointment of commissioners by the President and confirmation by the Senate, did not require that a majority of commissioners be judges, and included many specific instructions to the Commission regarding the content of the rules it would issue.¹⁵ While the designation of the Commission as being “in the judicial branch” was critical to the holding in *Mistretta*,¹⁶ in fact the Sentencing Reform Act of 1984 did not simply shift sentencing authority from one group of independent actors (individual judges) to another, equally independent entity within the same branch of government. The reality is that over the past two decades, sentencing authority has been transferred from judges through a politically weak Commission to Congress and, in the end, to prosecutors.¹⁷

Given the Commission’s ambitious and all-encompassing statutory mandates, it is ironic that the Commission itself has been rendered largely insignificant.¹⁸ To the extent that the Commission has made significant policy judgments of its own—such as the determination that personal offender characteristics are generally not relevant to sentencing¹⁹—but failed to offer sufficient justification for its decisions, the Commission has undermined its own legitimacy. At the same time, the Commission’s unexplained decisions to hew just below statutory maximum penalties for many crimes, and generally to treat statutory minimums as Guidelines minimums (rather than independently construct Guidelines sentences which would then be “trumped” by statutory minimums), make the Commission itself complicit in ensuring that it does not play a leading role in setting federal sentencing policy. Finally, the Commission’s peculiar administrative status means that it has no power to implement or enforce its own sentencing regulations, with the result that prosecutors and defense counsel can simply bargain around them.

Most dramatically, Congress has been reluctant to rely on or listen to the

13. See *supra* note 2 and accompanying text.

14. See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

15. See 28 U.S.C. §§ 991(a), 994 (2005).

16. See Kate Stith, *The Story of Mistretta: The Constitution and the Sentencing Guidelines*, in CRIMINAL PROCEDURE STORIES (Carol Steicker ed., forthcoming 2005).

17. See generally KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

18. See Barkow, *supra* note 17, at 769-71.

19. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.1-.12 (2004) (asserting that nearly all personal characteristics of the offender except criminal history are either never relevant or seldom relevant in determining sentence).

Commission. Justice Scalia in his *Mistretta* dissent termed the Commission “a sort of junior-varsity Congress” because its rules had the force and effect of law regulating private behavior.²⁰ In fact, as the years have worn on, Congress has treated the Commission more as the batboy than as the junior varsity.

Rather than entrust the Commission to fulfill the mandates of the Sentencing Reform Act, Congress has increasingly taken on the task itself, both by providing for mandatory sentences and by statutorily instructing the Commission to add or amend Guidelines to include substantive content as specified by Congress. Indeed, a majority of the Commission’s amendments to the Guidelines during the past fifteen years have been in response to such legislative direction,²¹ without further input from the commissioners, the Commission’s staff, its advisory groups, or other expert or interested parties. Consideration of the various purposes of sentencing, including the need to avoid sentencing disparity, has taken place, if at all, in Congress. Moreover, on the few occasions the Commission has proposed a change in statutory sentencing policies, Congress has ignored the Commission’s recommendations. Thus, Congress rejected the Commission’s call in 1991 for elimination of mandatory minimum sentences²² and its repeated calls to reduce the sentence disparity between cocaine base and cocaine powder.²³ In the Feeney Amendment in 2003, Congress went even further, directing the Commission to tighten its already stringent departure rules and statutorily rewriting certain Guidelines rather than simply directing the Commission to do so.²⁴ In sum, Congress has become accustomed to exercising tight control over the nature and severity of sentences. The Commission is simply the medium through which Congress sometimes acts.

As noted in the previous Part, *Booker* exacerbates the insignificance of the

20. *United States v. Mistretta*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

21. *See* U.S. SENTENCING COMM’N, FIFTEEN YEARS OF SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM app. B (2004), http://www.ussc.gov/15_year/15year.htm (last visited Sept. 19, 2005).

22. *See* U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), http://www.ussc.gov/r_congress/manmin.pdf (last visited Sept. 19, 2005).

23. *See* U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (last visited Sept. 19, 2005); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), http://www.ussc.gov/r_congress/new_crack.pdf (last visited Sept. 19, 2005); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995), <http://www.ussc.gov/crack/exec.htm> (last visited Sept. 19, 2005).

24. The Feeney Amendment was a provision in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. Section 401(d)(2) and 401(m)(2)(A) made it more difficult for judges to impose downward departures, while section 103(a)-(b) amended the Sentencing Guidelines directly to provide for higher Guidelines sentences for certain crimes.

Commission by rendering its major work product—the Guidelines—less than fully binding law. Moreover, *Booker* clearly requires sentencing judges to exercise judgment in deciding whether and under what circumstances to impose a Guidelines sentence, a critical change in sentencing law²⁵ about which the Commission thus far has been speechless. This not only weakens the Commission as a power in its own right, but also diminishes its usefulness to Congress. Pre-*Booker*, Congress's statutory directions were duly translated by the Commission into binding law. But post-*Booker*, the Commission's translation function will produce only advisory rules that will not be binding on sentencing judges.

It is not only *Booker II*²⁶ but also *Booker I*²⁷ that renders the Commission a less functional adjunct to Congress. The fundamental message of *Apprendi*,²⁸ *Blakely*,²⁹ and *Booker I* is that while the legislative branch has near-plenary authority to determine what conduct warrants punishment, and how severe that punishment should be, the defendant must be constitutionally convicted of that specified conduct before he can be punished for it.³⁰ Before *Booker*, Congress could evade the constitutional requirements relating to criminal prosecution and conviction by the expedient of directing the Commission to provide for increased sentences for specified acts or circumstances. But now the Guidelines are no longer a complete alternative to statutory criminal prohibitions. Especially if *Harris v. United States*³¹ is overruled, there may be little legislative advantage to instructing the Commission to promulgate sentencing rules (even in the form of “topless” Guidelines ranges³²), rather than Congress doing so directly.

If it is truly Congress's desire to control all federal sentencing, then the Commission and its Guidelines are no longer efficient instruments for doing so. After *Booker*, the only sure way for Congress to constrain judicial sentencing discretion is to enact sentencing rules directly into law—for instance, by

25. *But cf. supra* note 10 and accompanying text.

26. *United States v. Booker*, 125 S. Ct. 738, 764 (2005) (Breyer, J.) (remedial opinion).

27. *Id.* at 747 (Stevens, J.) (substantive opinion).

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

29. *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

30. *See generally* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221 (2005).

31. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to apply the *Apprendi* rule to increases in the lawful minimum, as opposed to lawful maximum, sentence, but the coherence of this distinction was unclear to a majority of the Court. *See id.* at 572 (Thomas, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *id.* at 569 (Breyer, J., concurring in judgment).

32. *See* Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 262-63 (2004) (explaining that raising all sentencing-range ceilings to the statutory maximum for crimes of conviction would transform the ranges into mandatory minimums, which would avoid the rule in *Blakely*, assuming that *Harris* remains good law).

enacting statutory minimum penalties or by specifying exactly which factors judges may and may not take into account when exercising the limited judicial discretion created by *Booker* II. The Commission no longer has the authority to ensure that Congress's will is accomplished; Congress might as well either abolish it and transfer its data-keeping duties to some other office in the government, or make it fully and transparently a congressional agency, providing such analysis as Congress desires.

Even apart from its reduced usefulness to Congress, the present Sentencing Commission has arguably run its course. The disrepute in which its Guidelines are held, justifiably or not, extends to every branch of government, to many federal judges, to state sentencing commissions, and to most academic commentators.³³ Most importantly, and not unrelated we argue, the Commission has never been administratively accountable. All other federal agencies that enact rules with the force and effect of law are subject to judicial review, either through the Administrative Procedure Act³⁴ or under the statutes that created them, thus ensuring that agencies produce reasoned regulations and exercise their authority in a manner authorized by Congress. The Commission, on the other hand, produced rules that had the force of law but were not subject to such judicial review nor related explication and transparency requirements. Indeed, the Commission has arguably been the least accountable agency in the federal administrative arsenal, even as its regulations have had profound impact on the severity of federal criminal law.³⁵

Marvin Frankel wrote that there should be a "highly prestigious commission or none at all."³⁶ Frankel was right. In order to be effective in the glare of the political spotlight in Washington, a criminal justice agency must be respected—coming equipped with expertise, resources, a constructive and coherent work product, and a commitment to the values that Congress has articulated. Today's Commission, burdened by a history that at least in recent years it has had little control over, is none of these things. After *Booker*, there is no good reason for it to continue to exist in its present structure and with its present set of mandates.

B. *Establishing a Sentencing Agency in the Judicial Branch*

We urge that Congress should neither simply abolish the Sentencing Commission nor allow it to limp along trying to make sense of its mandates in the wake of *Booker*. Instead, Congress should seize the opportunity to establish

33. See generally MICHAEL TONRY, SENTENCING MATTERS 72-89 (1995).

34. 5 U.S.C. §§ 701-706 (2005).

35. See Barkow, *supra* note 17, at 761-62; Luby, *supra* note 10, at 1228; Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 5 (1991).

36. Marvin Frankel, *Lawlessless in Sentencing*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 226 (Andrew von Hirsch & Andrew Ashworth eds., 1998).

a new sentencing agency in place of the present Sentencing Commission.

We hope that Congress continues to believe, as it did in 1984, that a truly independent and expert body in the judicial branch of government will produce better sentencing policy. Even if Congress is tempted to exercise sentencing authority itself, it does not have the time, the resources, or the expertise to produce integrated and reasoned policy across all types of offenses and offenders. The spate of new mandatory minimum legislation every election cycle, unanalyzed and unexplained, is powerful evidence that ad hoc legislative action does not lead to the best sentencing policies. Indeed, we doubt that many members of Congress truly believe that such legislation is good for the public or for the criminal justice system; yet, it is politically attractive because it is easy, fast, and popular. Properly structured, an administrative sentencing agency in the judicial branch could provide honest and constructive guidance not only to judges but also to Congress, even serving as a buffer much as the Base Realignment and Closure Commission serves in making complex and politically difficult decisions about the closure of military bases.³⁷

Specifically, we propose that Congress establish a new agency, perhaps to be named the “Judicial Sentencing Agency” (JSA), which is structurally and functionally (not just nominally) located in the judicial branch. While we are not wedded to each of the following specifics, one promising model³⁸ would be charter legislation providing that:

- At least two-thirds of its members are Article III judges, and at least a majority of its members are federal district court judges (that is, judges who actually exercise the sentencing function in federal court);
- Judicial members are appointed by the Chief Justice of the United States (as both judicial and nonjudicial members of the committees of the United States Judicial Conference are appointed);
- Nonjudicial members are appointed by the President with the advice and consent of the Senate (as members of the present Sentencing Commission are appointed);
- Congress delegates to the JSA nonlegislative and nonadjudicative responsibilities relating to sentencing that are best performed by an expert agency rather than by Congress, individual judges, or appellate courts—including promulgation of guidance relating to the exercise of sentencing discretion, collection and public dissemination of sentencing data, and analysis of the efficacy of various approaches and types of sentences in achieving the purposes of sentencing;
- Ex officio members of the JSA include both a representative of the

37. See generally Benjamin L. Ginsberg et al., *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L.J. 169 (1994) (describing how the Base Realignment and Closure Commission functions and how base closure decisions are made).

38. This proposal elaborates on ideas first discussed in STITH & CABRANES, *supra* note 17, at 174-75.

Attorney General (as is now true of the Sentencing Commission) and also a representative of the Federal Public Defenders (presently not entitled even to attend all Commission meetings); and

- The sentencing guidance regulations issued by the JSA are subject to both notice-and-comment rulemaking (as are the present Sentencing Guidelines) and also subject to judicial review and attendant procedural requirements equivalent to those provided by the Administrative Procedure Act and related statutes (unlike the present Sentencing Guidelines). We further discuss the issue of judicial review in the next Part of this Article.

The regulations promulgated by the JSA would give guidance to sentencing judges by explaining the relevance (or irrelevance) to sentencing both of conduct for which the defendant has been convicted and of other factors, including the circumstances of the crime, the defendant's previous crimes, and other aspects of his personal history. Although the JSA, by practical necessity, might begin with the current Sentencing Guidelines as its template, it is not likely, as discussed in the first Part of this Article, that the most constructive and helpful guidance will take the form of rigid rules or numerical weights. Rather, over time, the JSA would, for each factor relevant to sentencing, specify a range of discretion that the judge might exercise, recommending which circumstances call for giving relatively more or less weight to the particular factor.

In addition to providing sentencing guidance to judges, the new agency could be given the responsibility of providing critical interbranch guidance to Congress itself. In particular, an early task could be advising Congress how best to implement the holdings of *Apprendi*, *Blakely*, and *Booker I*. Our present situation, in the immediate wake of *Booker II*, is simply a quick fix to the constitutional error of binding sentencing rules that punish conduct of which the defendant has not been convicted. As we have noted, no one would, as an original matter, devise this Rube Goldberg system, consisting of complex and difficult-to-apply sentencing rules that in the end are not binding and give no guidance as to the exercise of judicial discretion that is now clearly required by law. So why, at this juncture, would we choose to perpetuate such a system?

Fortunately, *Booker*—indeed, the whole *Apprendi* line of cases—allows Congress significant leeway to develop a more rational sentencing system. All these decisions require is that when the presence of particular conduct or circumstances authorizes (or requires) a higher punishment than would otherwise be lawful, that factor must be treated as an element of the crime. Under this narrow holding, the state retains constitutional authority to specify (directly in legislation,³⁹ or through administrative regulations) which

39. We would urge that Congress not seek to specify sentencing factors by statute. Rather, it should allow both the content of these factors and their recommended significance in different circumstances to be developed, and altered over time, by the Judicial Sentencing

October 2005] *A SENTENCING AGENCY IN THE JUDICIAL BRANCH* 227

nonelement factors may or should be considered by sentencing judges, as long as the presence of any such factors does not authorize a greater lawful punishment. That is, *Booker* clearly recognizes the constitutionality of “sentencing factors,” as long as case-by-case application of such factors involves the exercise of judicial discretion—even discretion guided by the recommendations of an administrative agency such as the Judicial Sentencing Agency that we propose.

The JSA would be well positioned to advise Congress as to which factors relevant to punishment are best treated as elements of the crime (requiring enactment by Congress), and which are best treated as discretionary sentencing factors. It might be, for instance, that “causing significant injury or death” is so fundamental to the degree of culpability of some usually nonviolent crimes (such as environmental crimes) that the federal criminal code should recognize a different and separate offense (with a higher maximum penalty) where this factor exists, rather than providing for a high maximum in all cases, even where no injury or death ensues.⁴⁰ Similarly, “role in the offense” may be of universal importance in assessing culpability for certain crimes, such as narcotics offenses, justifying different maximum or minimum statutory penalties depending on the defendant’s role. For other crimes, “role in the offense” may not be of such universal or overriding importance that it should be incorporated as an element. And some factors (such as monetary “loss” in an economic crime) may best be treated as sentencing factors due to their complexity, the disparate configurations in which they arise, or the difficulty of concisely formulating language appropriate for a criminal statute and for jury instructions.

We are suggesting, in effect, that the JSA consider which sentencing factors are best subjected to the “*Blakely*-ization” remedy proposed by Justice Stevens in his dissent in *Booker II*⁴¹ and which are best treated as nonbinding, discretionary factors in accordance with Justice Breyer’s majority holding in *Booker II*.⁴² A salutary consequence of the Breyer resolution is that it allows

Agency. The JSA would have the time, expertise, and duty to make adjustments in response to judicial decisions, changes in public values, and increased knowledge regarding deterrence, rehabilitation, incapacitation, and other purposes of punishment in the context of specific crimes or specific types of offenders.

40. Addressing the propriety of transforming a sentencing factor into a statutory element would likely have the additional benefit of some attention being paid to specification of the requisite mens rea, a critical issue about which the current Guidelines are often silent.

41. See *United States v. Booker*, 125 S. Ct. 738, 771 (Stevens, J., dissenting). The dissent did not use the word “*Blakely*-ization,” which has been widely used by commentators to refer to what Justice Stevens proposed: that every factor resulting in an upward adjustment of the Guidelines sentence be treated for constitutional purposes as an element of the crime. See, e.g., Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes*, 105 COLUM. L. REV. 1082, 1123 & n.102 (2005).

42. See 125 S. Ct. at 756 (Breyer, J.) (holding that guidelines that are “effectively advisory” are constitutional).

Congress to exercise constitutional control over the content and contours of criminal prohibitions, while leaving courts and an expert administrative agency to work out the relevance and application of nonelement sentencing factors.

If the JSA is very enterprising and has sufficient time, resources, and credibility with Congress, the courts, and the public, it might carry this task very far—perhaps even serving as another Brown Commission, proposing after years of analysis wholesale recodification of federal criminal law.⁴³ A major difference between the Brown Commission and the Judicial Sentencing Agency, however, would be the efforts and lessons of the intervening thirty-five years, and especially the effort expended by Congress, the Sentencing Commission, and judges in attempting to make the sentencing process more rational and less disparate.

We believe that there is one especially important lesson to be learned from the dual failures of Congress to enact the Brown Commission's recommendations into law and of the Sentencing Commission to achieve nondisparate sentencing patterns based on culpability. This is the error of too much ambition—especially, as evidenced by the Sentencing Reform Act and the Sentencing Guidelines, when such ambition is suffused with a utopian impulse. Thus, we would urge that the JSA start slowly and proceed incrementally, both in advising judges how to exercise sentencing discretion and in advising Congress which factors addressed in the Sentencing Guidelines should be recodified as statutory elements.⁴⁴

Clearly placing the JSA in the judicial branch will lend it credibility as an expert agency, drawing on the knowledge and authority of judges with respect to the sentencing of defendants. An agency consisting in large part of judges, especially judges who actually engage in sentencing, would help legitimate and depoliticize the agency's work and would go far in convincing other judges (who are the objects of the agency's guidance) that the agency works not in opposition to the judiciary but as its natural ally. At the same time, the presence on the Commission of nonjudges with sentencing experience or knowledge, who are appointed by the President and approved by the Senate, would help ensure a range of political and expert perspectives, which will also be critical to

43. See *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong. 29-514 (1971) (Final Report of the Nat'l Comm'n on Reform of the Fed. Criminal Laws). The Commission, which was established in 1966, was referred to as the "Brown Commission" after its chair, Governor Edmund G. Brown, Sr., of California.

44. The JSA should probably begin by leaving the Sentencing Guidelines largely intact, with the exception of those factors that are least susceptible to numerical, discretion-free rules. The most significant Guidelines factor falling into the latter category is the sprawling, unwieldy, and overinclusive concept of "relevant conduct," especially as it mandatorily encompasses independent crimes of which the defendant has not been convicted and as it operates as an expanded, judicially implemented, and mandatory *Pinkerton* rule. Both the scope of "relevant conduct" and whether the concept should even be applied in certain kinds of cases should be immediately reassessed by the JSA.

October 2005] *A SENTENCING AGENCY IN THE JUDICIAL BRANCH* 229

the agency gaining widespread respect and credibility. A truly expert and independent agency located in the judicial branch would at long last be able to clarify for Congress and the public the different and complementary roles that the legislative and judicial branches play in sentencing.

III. THE IMPORTANCE OF JUDICIAL REVIEW

When Congress expressed its intent to exempt the Sentencing Commission from judicial review under the Administrative Procedures Act (APA), it envisioned a Commission that would adhere to “more extensive procedures than required by Section 553 [notice and comment], at an earlier stage in the process of guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines”⁴⁵ No additional review was “necessary or desirable” because, the Senate Report said, there already was “ample provision for review of the guidelines by the Congress and the public.”⁴⁶ We suggest that the procedures of the existing Commission do not, in fact, justify placing it outside the ambit of judicial review and the APA and that this state of affairs has significantly impaired the legitimacy of the Commission’s rulemaking process and work product.

Under the APA, courts generally evaluate informal rulemaking to assess fidelity to statutory directives, arbitrariness, and compliance with relevant procedures. In the absence of judicial review, it is possible that the Guidelines applied at sentencing proceedings for the past fifteen years are based on dubious interpretations of the Commission’s enabling legislation. Even more importantly, the Commission was freed from the responsibilities of providing a nonconclusory explanation of reasons and of building a detailed factual record in support of the Guidelines it promulgated. That the Commission never had to justify its regulations to a court of law weakened the Commission’s identity as an independent and expert agency, and denied the Commission a shield against pressure—from Congress, the Justice Department, or others—to make decisions based on political factors.

In the pre-*Booker* era, Ron Wright recognized the need for vigorous judicial review and argued that the departure authority in section 3553(b) of the Sentencing Reform Act offered courts the best mechanism to monitor agency action.⁴⁷ The Supreme Court and the Courts of Appeals rejected this avenue of review.⁴⁸ In any event, review based on departure authority is limited to

45. S. REP. NO. 98-225, at 180-81 (1984).

46. *Id.*

47. Wright, *supra* note 35, at 47-69; *see also* Freed, *supra* note 10, at 1734.

48. *See* *Koon v. United States*, 518 U.S. 81, 109-11 (1996) (holding that courts must defer to the Commission’s determination that it has “adequately” considered a sentencing factor); *United States v. Davern*, 970 F.2d 1490 (6th Cir. 1992) (en banc) (similar); U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, § 4(b) (1987) (noting that the Commission has authority to prevent a court from departing on a basis the Commission has already

consideration of what the Guidelines omit—what has not been adequately considered by the Commission—as opposed to what they contain. *Booker*, of course, redacts section 3553(b)(1) from the Sentencing Reform Act, thus making even more problematic the possibility of “departure” analysis as a substitute for APA review. It might be thought that the goal of administrative accountability now may be realized by sentencing judges evaluating the proposed Guidelines sentence in light of *Booker*-reinvigorated section 3553(a) factors. Review conducted by individual judges as they consider the particular cases before them constitutes a sort of de facto judicial review, which could produce, as others have advocated in the past, a “common law” of sentencing.⁴⁹

De facto judicial review is better than none at all. But it has two major deficiencies. First, courts differ widely on how the section 3553(a) factors should be applied, and given the leeway afforded judges in applying such a broadly worded statute, the resulting “common law” may be insufficiently coherent. Second, there is no assurance that the federal courts and the Sentencing Commission are interested in engaging in a continuing dialogue in order to achieve “the evolution of principled and purposeful sentencing [Guidelines] law and policy.”⁵⁰ While some judges have the time and resources to engage in expansive analysis of the structure of the Guidelines and the fidelity of particular Guidelines to the Sentencing Reform Act and the general purposes of sentencing,⁵¹ these are not the primary tasks of sentencing judges. In the myriad sentencings that district courts must conduct each year, their overarching responsibility is to consider the section 3553(a) factors, including determination of a proposed Guidelines sentence. Nor have federal appellate courts undertaken such analysis, even in the wake of *Booker*; they have been content to determine the lawfulness of the sentence. Few courts, trial or appellate, have reached out to assess the adequacy of the Commission’s reasoning or arbitrariness of either specific Guidelines or the Guidelines in general. Moreover, even if federal courts were to embrace the idea of a common law of sentencing, the Sentencing Commission would be under no obligation to reflect these developments by creating new Sentencing Guidelines. It is not realistic to expect an administrative agency to respond to the concerns and inquiries posed by reviewing courts absent some legal

considered).

49. See, e.g., Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN L. & POL’Y REV. 93 (1999); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992). Judge Nancy Gertner has argued that “[t]his approach is not only consistent with the SRA and the Guidelines, but also . . . is now compelled by *Booker*.” *United States v. Jaber*, 362 F. Supp. 2d 365, 373 (D. Mass. 2005).

50. Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 35 (2000).

51. See, e.g., *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (Lynch, J.) (concluding that the Guidelines give undue weight to amount of loss and err in giving virtually no weight at all to the history and characteristics of the defendant).

requirement (such as that imposed by the APA) to do so.

Therefore, we recommend that in creating a new sentencing agency, Congress formalize by statute a process whereby this agency, like others in the federal government, is subject to review under an arbitrary-and-capricious standard. The enabling legislation should permit an individual defendant not only to challenge the lawfulness of the guidance regulations relevant to his sentencing, but also to seek review of the agency's rulemaking and decisionmaking procedures. Indeed, the notice and comment process would be given teeth by the prospect of such later review.⁵² Without the possibility of judicial review, the notice and comment stage may simply be an empty formality, having little or no impact on an agency's decisionmaking. We acknowledge that this would be the first agency "in the judicial branch" subject to APA judicial review or its equivalent.⁵³ We also note, however, that nothing in the Constitution, in *Mistretta* or *Booker*, or in the APA precludes judicial review of a rulemaking agency in the judicial branch.⁵⁴

There is an important question as to what standard of deference would apply in judicial review of the sentencing guidance regulations promulgated by the JSA. Because the pre-*Booker* Guidelines, although having the force of law, were immune from administrative judicial review, they were, in practice, granted more than *Chevron* deference.⁵⁵ In the early 1990s, the Supreme Court even pronounced the Commission's "policy statements" and "commentary" to be binding on sentencing judges.⁵⁶ Yet it is significant, in our view, that in the

52. See *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) (holding that the EPA could not treat a policy statement as binding having failed to comply with notice and comment requirements). See generally E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490 (1992).

53. Cf. Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (2005) (providing a lengthy and complex process for the issuance of, inter alia, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, including approval by the Supreme Court).

54. Indeed, it is curious that the Sentencing Commission has been considered exempt from both judicial review under the APA and the variety of related and complementary procedural limitations in other statutes. While the Senate Report accompanying the Sentencing Reform Act asserted that the APA is inapplicable to the "judicial branch," see S. REP. NO. 98-225, *supra* note 45, the APA says only that its definition of "agency" does not include "the courts of the United States" (which the Sentencing Commission surely is not). It is not clear how the APA, a statute, can be trumped by a conflicting sentence in a report produced by one House of Congress, but the federal courts have been all too willing to give legal effect to Congress's apparent intention even though Congress failed to enact that intention into law. See *United States v. Wimbush*, 103 F.3d 968, 969-70 (11th Cir. 1997); *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991). To avoid any future ambiguity, Congress should include in legislation establishing the JSA a provision specifying which APA provisions apply.

55. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (establishing a two-prong inquiry to be conducted by a court reviewing an agency's construction of a statute: (1) whether Congress "has directly addressed the precise question at issue," and (2) if the statute is "silent or ambiguous" with respect to the specific issue, whether the agency's interpretation is "reasonable").

56. See *supra* note 4 and accompanying text.

last decade the Supreme Court has not shown enthusiasm for using the language of *Chevron* in application to the Commission.⁵⁷ Post-*Booker*, the guidance regulations of the proposed JSA, like the Commission's Guidelines, while of great significance in every case, would not have the force of law, and a standard less deferential than *Chevron* would almost certainly apply.

A recent Supreme Court decision, *United States v. Mead Corp.*,⁵⁸ gives an indication of how APA review might be applied to nonlegislative sentencing regulations. *Mead* held a U.S. Customs ruling letter to command the lesser *Skidmore* deference,⁵⁹ rather than *Chevron* deference, and explicitly noted that *Chevron* is appropriately applied when "it appears Congress delegated authority to the agency generally to make rules carrying the force of law"⁶⁰ *Mead* amplifies the need for APA-style judicial review in the post-*Booker* world: *Booker* makes the Sentencing Guidelines nonlegislative, and *Mead* uses broad language in holding that nonlegislative agency rules are entitled to less deference than regulations that have the force of law. If *Mead* applies to the sentencing guidance regulations issued by an agency such as the JSA, Congress may be confident that the authority it has delegated to a reviewable sentencing agency will be appropriately constrained by the courts.

Most importantly, the JSA should be subject to the explication-of-reasons requirement established by the *State Farm* case in 1983.⁶¹ The specter of judicial review would transform the abbreviated and conclusory explanations that have been a hallmark of the present Sentencing Commission into the kind of thorough statements of reasons produced by other agencies, which are based on factual evidence, rooted in expert evaluations, and responsive to public comment and critique. The benefits of an explication requirement extend well

57. In *Neal v. United States*, 516 U.S. 284 (1995), the Court rejected the defendant's argument for *Chevron* deference to a Guidelines rule regarding how to calculate the weight of LSD, concluding that stare decisis required the Court to adhere to the statutory interpretation it had adopted in an earlier case.

Two years later, in *United States v. La Bonte*, 520 U.S. 751 (1997), the Court found another criminal statute to be unambiguous, thereby avoiding entirely the question of *Chevron* deference to the Commission. *See id.* at 762 n.6. In dissent, Justice Breyer found the statute ambiguous and, after conducting a *Chevron* II analysis, would have deferred to the agency. *See id.* at 762-81 (Breyer, J., dissenting).

58. 533 U.S. 218 (2001). It is interesting to note that in his *Mead* dissent, Justice Scalia cited a case about the Sentencing Guidelines—the clear implication being that the Guidelines are appropriately subject to judicial review. *See id.* at 247 (Scalia, J., dissenting) (citing *Neal*, 516 U.S. at 284).

59. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

60. 533 U.S. at 226-27.

61. *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). *But cf.* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1095-96 (1997) (arguing that the significance of *State Farm* withered in the years after *Chevron*).

October 2005] *A SENTENCING AGENCY IN THE JUDICIAL BRANCH* 233

beyond judicial review, injecting the entire process with the credibility it currently lacks. The establishment of a framework for principled decisionmaking not only improves the quality of judicial review when review is sought but also diminishes the importance of review by enhancing the integrity of the administrative process.⁶²

Finally, increased transparency and disclosure requirements applied to the JSA would boost public confidence in reasoned sentencing. The Federal Register Act,⁶³ the Freedom of Information Act,⁶⁴ and the Government in the Sunshine Act (Open Meetings Act)⁶⁵ all follow the APA in exempting “courts,” and thus the Commission has been understood not to be subject to any of these requirements and limitations. However politicized or one-sided its decisions, whatever pressure was brought to bear by parties with an interest in criminal sentencing, the Commission has always been able to engage in ex parte discussions and hide behind closed doors.⁶⁶ A new sentencing agency would be well positioned to reject these practices of the past, which would help distinguish it from the Sentencing Commission and herald a new era of independence, credibility, and legitimacy.

CONCLUSION

While there is no real need for the Sentencing Commission as it currently exists, there is a need, post-*Booker*, for what this agency could and should have been. The JSA we have described would be empowered, effective, and accountable. It would not be limited to executing the plays as Congress calls them; instead, it could get in the game itself. In addition to assisting judges in their exercise of discretion in a post-*Booker* world, the JSA would be a political player in its own right, able to contribute to the formulation of sentencing policy by asserting its own relevance, holding hearings, broadly disseminating the views of judges and experts, and publicizing areas of substantive disagreement with Congress or the President.

In pursuit of “truth in sentencing,” Congress in the early 1980s knew that an independent, expert agency would produce better sentencing policy. Had the Sentencing Reform Act been faithful to this premise, it is possible that

62. See *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (Bazelon, J., concurring).

63. See 44 U.S.C. § 1501 (2005) (stating that “the legislative or judicial branches of the Government” are not subject to the Federal Register Act requirements).

64. See 5 U.S.C. § 551(1)(b) (2005) (excluding the “the courts of the United States” from the Freedom of Information Act requirements).

65. See 5 U.S.C. § 552b(a)(1) (2005) (utilizing the same definition of “agency” with respect to the Open Meetings Act as used for the Freedom of Information Act, 5 U.S.C. § 551(1)(b) (2005)).

66. Indeed, when it finally issued regulations governing its internal procedures, the Commission expressly provided for “executive” sessions and “briefing” sessions closed to the public and did not limit these meetings with respect to frequency, length, or subject matter. See 62 Fed. Reg. 38599 (July 18, 1997).

Apprendi, *Blakely*, and *Booker* would never have happened. Twenty years, hundreds of Guidelines, and millions of dollars later, Congress should not entirely abandon its goal but should learn from experience. *Booker*'s transformation of the constitutional law of sentencing offers a second chance for sentencing reform. Conduct that Congress wants to criminalize should be subject to proof beyond a reasonable doubt and other protections afforded criminal prosecution, while the exercise of discretion in judging sentencing factors should be guided by an agency that is truly independent and in the judicial branch of government.