

Republican Appointees and Judicial Discretion: Cases Studies From the Federal Sentencing Guidelines Era

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Nothing sits more uncomfortably with judges than the sense that they have all the responsibility for sentencing but little of the power to administer it justly.¹

Outline of the Report

This Report explores Republican-appointed district court judge dissatisfaction with the sentencing regime in place during the Sentencing Guideline era.² The body of the Report discusses my findings. Appendix A presents forty case studies which are the product of my research.³ Each case study profiles a Republican appointee and one or two sentencings by that judge that illustrates the concerns of this cohort of judges.

The body of the Report is broken down as follows: Part I addresses four foundational issues that explain the purposes and relevance of the project. Parts II and III summarizes the broad arc of judicial reaction to

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¹Former Judge John Martin, a Reagan appointee and former United States Attorney resigned in June 2003 in protest over Congressional restrictions on judicial discretion. Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, December 8, 2003, at B1.

²In *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court invalidated the U.S. Sentencing Guidelines as a mandatory regime. Although the Court preserved a significant “advisory” role for the Guidelines, sentencing is now governed by §3553(a) of the Sentencing Reform Act. Thus, it is fair to say that the “Sentencing Guidelines era” ended with *Booker*.

³This Report and the profiles can be found at <http://faculty.rwu.edu/dzlotnick>. Additional Appendices on the website contain the research methodology and additional statements by judges who are the subject of complete profiles. Additional profiles of sentencings by Democrat-appointees will also be added in the future.

changes in the sentencing environment during the Guidelines era. Part IV discusses my findings with regard to the Republican-appointed district court judges in this period. Part V is forward looking and discusses how Republican appointee opinion could be harnessed for reform in the post-*Booker* era. The Conclusion explains how this Report explodes the conservative myth of the liberal judiciary and urges policymakers to more carefully consider the experience of the federal judiciary in determining the appropriate balance between mandatory sentencing rules and judicial discretion.

I. Introduction: Four Questions

Before presenting the substance of the report and the profiles, this Introduction discusses four foundation issues intended to explain the purposes of this study and why it is relevant to the *post-Booker* sentencing policy debate. The questions are as follows:

- A. Why should judicial voice matter? More bluntly, why should policymakers or the public care if unelected, life tenured judges disagree with legislatively enacted sentencing policies?
- B. Why focus on Republican appointees and their cases? What about these judges and their cases is particularly revealing or relevant to the future of sentencing policy?
- C. Why case studies? What can be learned from in-depth portraits of individual cases and judges that cannot be culled from the wealth of sentencing data collected by the Sentencing Commission, other governmental bodies, and public interest groups?
- D. Why are the cases in this study relevant now that the U.S. Supreme Court has ruled that the Sentencing Guidelines are “advisory” and no longer binding rules which judges must follow?

A. Judicial Voice Matters.

Over the past twenty-five years, conservative politicians have unleashed a torrent of criticism against the federal judiciary.⁴ They have assailed judicial decisions in individual cases⁵ and proposed legislation to

⁴For example, in the aftermath the refusal of several federal courts to interfere with the Florida judicial system’s decisions in Terry Schiavo case, House Majority Leader Tom DeLay went so far as to say “the time will come for the men responsible for this to answer for their behavior.” Mike Allen, *Delay Wants Panel to Review Role of Courts Democrats Criticize His Attack on Judges*, Washington Post, April 2, 2005, at A9.

⁵ In 1996, Judge Harold Baer Jr. (S.D.N.Y) initially granted a motion to suppress evidence and a confession in a large drug case. Picked up by the media, his ruling caused an uproar in Congress. In a letter to President Clinton, Republican members of Congress Fred Upton, Michael Forbes, and Bill McCollum wrote, “[w]e respectfully request that you join us in calling for his resignation from the federal bench. He has turned his back on the millions of residents of communities like the one in this case who are prisoners in their own homes because of violent drug traffickers.” cited at http://www.ajs.org/cji/cji_political_threats.asp. See

restrict the jurisdiction of the federal courts.⁶ Judicial sentencing discretion has received particular and consistent attention. With the dual goals of getting tough on crime and promoting sentencing uniformity, conservative critics have sought to increase criminal penalties and to restrict judicial discretion.

Both of these goals were significantly advanced at the start of the Sentencing Guidelines era. In 1984, the Sentencing Reform Act (“SRA”) mandated the creation of the United States Sentencing Guidelines and abolished federal parole. Soon thereafter, in 1986, the Federal Anti-Drug Abuse Act (“1986 Act”) created quantity based mandatory minimums for most drug felonies that started at five and ten years and escalate to twenty years and life without parole for recidivists.⁷

In the beginning of the Sentencing Guidelines era, there was significant and sharp judicial resistance. However, since the early years, much of the judiciary, and certainly its official organs, have generally taken moderate positions and sought to engage the elected branches in a reasoned debate. For example, the Judicial Conference, and its Criminal Law Committee, have typically argued that a degree of judicial discretion is necessary component of a just sentencing regime, but without advocating a return to the pre-Guideline system of unfettered judicial sentencing power.⁸ Similarly, the judiciary has argued that mandatory minimums were both unwise in principle and unnecessary given the existence of Sentencing Guidelines.⁹

also Jon. O. Newman, *The Judge Baer Controversy: Correspondence from the White House, Senator Dole, Congressmen, and Judges*, *Judicature*, Vol. 80, Number 4, January-February (1997). Judge Baer later reversed his own ruling, only adding fuel to the fire that the judiciary could be intimidated.

⁶ See e.g., Constitution Restoration Act, H.R. 1070, 109th Cong. (2005); Marriage Protection Act, H.R. 1100, 109th Cong. (2005).

⁷ See P.L. 99-570, codified at 21 U.S.C. § 841(b)(1)(A).

⁸ The federal judiciary speaks first through the Judicial Conference. The Chief Justice presides over the Conference whose membership includes the chief judge of each circuit court, the chief judge of the court of international trade and an elected district judge from each regional judicial circuit. Much of the Conference’s work is done through a network of committees. The membership of these committees is controlled by the Chief Justice. See www.uscourts.gov/judconf.html See Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference, to Honorable Orrin Hatch, Chairman, Committee on Judiciary (April 3, 2005) available at www.uscourts.gov/judiciary2003/feeneyamendment.pdf; Letter from Sim Lake, Judicial Conference to Honorable F. James Sensenbrenner, Jr, Chairman, Committee on the Judiciary, (April 25, 2005) (on file with author).

⁹ See 79-Oct A.B.A. J. 78, 78 (October 1993) (90% of federal and state judges surveyed thought mandatory minimums for drug violations were a bad idea). In 1996, the Federal Judicial Center Survey on sentencing reports that 73% of district and 69% circuit court judges felt that mandatory guidelines were not necessary to direct the sentencing process, rather most judges favored an advisory guidelines system. In addition, 79% of federal district judges asked, favored the idea of “delinking” the guideline levels from the mandatory minimums. Molly Treadway Johnson and Scott A Gilbert *The U.S. Sentencing Guidelines:*

Despite the efforts of the federal judiciary for a meaningful dialogue with Congress about the Guidelines and need for mandatory minimums, the right has largely rejected their entreaties and suggestions, maintaining that Congress need not consider the judiciary's views because criminal justice policy is the sole purview of the elected branches. The role of appointed, life tenured judges, in their view, is simply to enforce the laws as passed by the legislature. Thus, any effort to modify the Congressionally designated result in a particular case, or to even to advocate for greater discretion, is nothing more than an undemocratic grab for power by unelected and elitist judges. As a result of this view, when judiciary has spoken out, the Congressional faction waging its war against the federal judiciary has not just disagreed, but has tried to stifle and intimate them. In some cases, they have done so by personal attacks on judges who publically disagree with their positions on sentencing policy.¹⁰ They have also passed legislation to track individual judge's sentencing decisions and proposed other legislation to facilitate investigation and impeachment of "activist" judges.¹¹

In contrast to the right's attempt to silence the judiciary, the philosophical premise of this Report is that judicial voice in sentencing policy should matter. My reasoning, however, is not driven by party politics or particular sentencing policy goals, but rather based on common sense and history. First, common sense suggests that district court judges have valuable information to add to the sentencing policy debate because it is these judges, not members of Congress, who face the human beings who are being sentenced to prison. Legislators, on the other hand, deal only in paradigmatic, hypothetical offenders. Thus, sentencing judges are in an ideal position to help evaluate whether the sentencing laws are generally serving to find a good fit between offenders and offenses and the legislatively prescribed punishment.¹² Moreover, unlike the prosecutor or defense attorney, the judge is a non-partisan in the courtroom and thus able to remain an impartial observer.

Results of the Federal Judicial Center's 1996 Survey Report to the Committee on Criminal Law of the Judicial Conference of the United States, Federal Judicial Center (1997).

¹⁰ One disturbing example was the harsh treatment of Judge Rosenbaum (D.Minn.) by the House Judiciary Committee, after he testified in favor of retaining a Guideline amendment that lowered some drug sentences in 2002. *See infra* at ___. More recently, Congressman Sensenbrenner sent an *ex parte* letter to the Seventh Circuit demanding that an alleged "illegal" sentence be corrected by the *en banc* court, even though the government itself failed to appeal the issue. *See* *United States v. Rivera*, 411 F.3d 864 (7th Cir. 2005) *See* Letter from Nan Aron, President, Alliance for Justice to The Honorable Doc Hastings, Chairman, Committee on Standards of Official Conduct and The Honorable Allan B. Mollohan, Ranking Member, Committee on Standards of Official Conduct *available at* www.afj.org/sensenbrennerletter.pdf.

¹¹ *See* Feeney Amendment reporting provisions, *infra* at ___ and notes ___; H.R. 5219, Judicial Transparency and Ethics Enhancement Act of 2006 (Seeking to establish an office of the inspector general for the judicial branch).

¹² *See generally*, Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 873 n.500 (2002).

Nor should we ignore that judicial appointments have a significant political component and therefore reflect not just sentencing expertise but prevailing political values as well. For many years, Presidents have relied on the recommendations of the senior Senator from their party for potential nominees for judicial vacancies in their states.¹³ To have come to the attention of these Senators, nominees often had political careers of their own, serving in elected or appointed positions in both the state and federal system. Many more participated in party politics, as party officials or as fund raisers, and their resumes usually reflect substantial involvement with community, civic, and religious organizations. Thus, it is critical to recognize that federal judges do not hatch fully robed on the bench, but rather that they are a product of the very political system from which some now seek to exclude their input.

Yet federal judges are more than just another breed of politician. In addition to their political connections, most federal judges are drawn from the cream of each state's bar and only confirmed by the Senate after an extensive vetting process. By the time of their nomination, federal judges generally have had decades of experience as prosecutors, defense attorneys, corporate litigators, in house counsel, federal magistrates, state judges, or other government positions, and thus collectively, are a storehouse of practiced judgment. Thus, by virtue of their position and experience, federal judges constitute a unique and valuable elite of both the national polity and the legal community.

Finally, it is important to remember that as conceived by the Framers, life tenure was granted to federal judges precisely to insulate them from the political winds that pull at elected officials. What the current day critics seem to ignore is that precisely because the judiciary is constitutionally obligated to protect individual liberties and minority interests, federal judges are likely to sometimes make decisions that run counter to the current majority will, in criminal law, as well as other areas.

For all these reasons, historians and legal scholars have argued that when the elected branches are unable to muster the will to repeal outmoded and oppressive laws, judicial voice can serve as a warning bell that action is necessary to bring the law back to the moral and political center. In modern history, the civil rights movement and school desegregation are frequently given as examples. However, the tradition of judicial voice as a moral warning bell goes much further back in American history, with judicial opposition to the criminal laws that regulated slavery standing as the starkest example.

As one judge of this era wrote in 1833 in his charge to a jury in a Pennsylvania case which ultimately sent an African-American slave back to his owner under the hated Fugitive Slave Act, a judge wrote

It is not permitted to . . . us to indulge our feelings of abstract right on these subjects; the law . . . recognises [that] right . . . although its existence is abhorrent to all our ideas of natural right and

¹³Sheldon Goldman, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 10 (Yale University 1997) (“Recommendations of a Senator of the President’s Party from the state where a vacancy exists are very important.”).

justice.¹⁴

Compare that judge's language the following quote from Judge Robert Matsch (D. Co.), a Nixon appointee, who in 1996 responded to a plea for mercy from a first-time offender he was about to sentence to thirty years in prison for a crack cocaine conspiracy by saying

[H]ow can I respond to you when you are saying what you seek is fairness and justice? To be brutally frank, I don't know that fairness and justice have much to do with it. . . . I have to punish you with great severity because that's what the law requires me to do.¹⁵

While separated by one hundred and fifty years, these two judges shared the same predicament; each felt bound by oath and office to take away a man's freedom under a Congressional act that they viewed as morally bankrupt. While slavery and sentencing are different issues,¹⁶ in voicing their objections even as they followed the law, both judges were following a long tradition of using the bench as bully pulpit – judicial voice as a moral counterweight against majority tyranny and political gridlock. The fact that the prison population in the United States has reached historic levels, such that we now lead the world in incarceration rates (including grossly disproportionate numbers of African-Americans), suggests that we had reached such a similar point of moral bankruptcy in federal sentencing policy.

In 2005, however, the march towards virtually discretion-less sentencing was slowed by the Supreme Court's decision in *Booker v. United States*. By holding that the Sentencing Guidelines were unconstitutional as mandatory rules, *Booker* returned a modicum of sentencing discretion to the courts.¹⁷ *Booker* outraged conservatives, who viewed the opinion as a judicial coup d'état and they have repeatedly

¹⁴*Johnson v. Tompkins*, 13 F. Cas. 840, 843 (C.C.E.D.Pa. 1833) (No. 7,416) (per Baldwin, Cir. J.).

¹⁵Sentencing Transcript at 41, *United States v. Williams*, No.94cr254 (D. Colo. Feb. 16, 1996) (on file with author).

¹⁶Obviously, slaves were imprisoned for no offense other than the color of their skin whereas federal inmates have been duly convicted of a crime. Nevertheless, given the disproportionate impact of sentencing policies on racial minorities, the legacy of racialized justice in American should not be overlooked. See, e.g., Richard Dorvak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & LAW 611 (2000).

¹⁷While *Booker* made the Guidelines advisory rather than mandatory, the Guidelines have remained a central feature of sentencing outcomes, with the majority of sentences, approximately 60%, still falling within the Guideline range. Of the 40% outside the Guideline ranges, the majority are still the result of government requested substantial assistance or fast-track departures. See Table 26, U.S. Sentencing Commission, 2005 Data File, USSCFY05, Post-*Booker* Only Cases (January 12, 2005, Through September 30, 2005).

introduced proposals to circumvent its holding.¹⁸ Given the conservative dominance of sentencing policy over the past twenty-years, some commentators believe it is only a matter of time before Congress acts.¹⁹ Therefore, this Report contends that now more than ever, the public and Congress need to listen to federal judges on this issue before allowing judge-hating conservatives to control the post-Booker sentencing era.

B. Why Republican Appointees?

This Report includes only cases from Republican-appointed federal district court judges for several reasons.²⁰ First, most studies examine the judiciary in the aggregate. By focusing on sentencings by only Republican judges, I hoped to determine if this subgroup of judges had distinct concerns. While this information would be interesting in its own right, given the political risks in advocating for reductions in criminal sentences, identifying the sentencing issues that most trouble Republican appointed judges might help sentencing reform advocates prioritize their agenda and formulate proposals on which they might find credible allies and political cover.

Second, this focus was intended, without apology, to bolster the persuasive impact of the study. By completely excluding Democratic appointees, the Report is immunized from the accusation that its findings are tainted by the views of “liberal, activist” judges. As one can see in the first section of each profile in Appendix A, the conservative credentials of the judges in this Report are beyond reproach.

Lastly, showing that Republican appointees are deeply dissatisfied with certain aspects of the sentencing

¹⁸ *Booker* created a quandary for conservatives. By eliminating mandatory guidelines as a means for controlling judicial discretion, Congress had no immediately obvious alternative other than more mandatory minimums, which engender strong opposition from moderates. Ultimately, the Attorney General has endorsed what has come to be known as “topless Guidelines” as a way to circumvent *Booker*, discussed in more detail later in this Report. See *infra* at _____. Other proposals have sought to strategically add mandatory minimums for gang related offenses and other hot-button crimes. See H.R. 4472 the Children's Safety and Violent Crime Reduction Act of 2005 (seeking to apply mandatory minimums to participants in gang violence) H.R. 3889 (seeking to apply mandatory minimums to methamphetamine users).

¹⁹See Pamela A. MacLean, *Cracking the Code: After "Booker" Judges Reduce Crack Cocaine Sentences*, Nat'l L.J. Oct. 3, 2005, at 1; see also Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform* 58 Stan. L. Rev. 235 (2005); Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone*, 83 Wash. U. L. Q. 151, n255 (2005).

²⁰My initial research included judges appointed by all Presidents. A discussion of additional insights from those interviews and case studies can be found in David Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. REV. 211, 227-28 (2004); David Zlotnick, *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV 645 (2004).

regime serves to highlight a powerful disconnect in the right wing’s rhetoric about the federal judiciary. When it is time to confirm Republican nominees to the bench, these appointees are routinely lauded as “strict constructionists” who will be “tough on crime” by conservative politicians. Yet, when it comes to making sentencing policy, these same members of Congress sounds the alarm that the federal bench is populated by “soft on crime” liberals and judicial activists whose discretion must be strictly limited.²¹

Thus, identifying a significant cohort of Republican judges who disagree with congressional conservatives on sentencing policy undermines the myth that it is only liberal judges who think that sentences are too long and discretion too limited. In fact, if one truly listens to Republican-appointed judges, it becomes clear that it is really the Congressional conservatives who are out of step with mainstream values on crime. As embodied in on-the-record statements of these judges, true conservative sentencing policy can be tough on criminals without being draconian. Moreover, judicial conservatives also believe that some measure of judicial discretion is necessary; not to impose their personal preferences but to counter the real dangers of prosecutorial overreaching. Lastly, contrary to conservative claims, rehabilitation and consideration of the defendant’s eventual reentry into society are not code words for liberal leniency, but rather factors, that in the right case, need to be considered along with punishment and incapacitation to arrive at a just sentence.

C. Why Case Studies?

The Sentencing Commission, the Justice Department, and groups such as The Sentencing Project²² publish and analyze a myriad of data about sentencing decisions and there is much to learn in these numbers. This study, in contrast, employed the case study method, using sentencings from district court judges around the nation. Thus, the product of my research is not tables of statistics, but individual portraits of inmates and judges. As a result of this methodological choice, I can make no claims of statistically significant results. Nevertheless, this section of the Introduction advances several reasons why the conclusions in this Report are trustworthy and why the case study method of these judges and their cases has much to offer sentencing policy makers.

Initially, the claims in this report about the views of Republican appointees are well-supported by the studies

²¹As a factual matter, by the time Booker was decided, this accusation was simply wrong; by October 2005, 57% of the federal bench was appointed by Republican presidents. Of the 1,270 active and senior status judges, 758 or 59.6% were appointed by Republican presidents, 512 or 40.31% were appointed by Democrat presidents. Of all 815 active District Court judges, 456 or 55.9% were appointed by Republican presidents, 359 or 44.0% were appointed by Democrat presidents. Source FJC database. <http://www.fjc.gov/history/home.nsf>.

²² See www.sentencingproject.org.

and surveys conducted by Sentencing Commission²³ and the Federal Judicial Center²⁴ of the federal judiciary, as well as well as a plethora of other sources, such news reports and published judicial opinions from Republican-appointed judges who were not profiled for this Report (only because full documentation of their cases could not be obtained).

Second, the case study is also particularly well-suited for exploring sentencing policy because of the Anglo-American tradition that the each punishment should fit the crime. Indeed, the march of the modern criminal law and sentencing policy can be seen as an effort to match culpability and social harm with the appropriate punishment.²⁵ Thus, just knowing the percentage of judicial downward departures or other aggregate statistics about the application of the Guidelines reveals very little about the qualitative nature of the cases and whether the sentence in an individual case was in accord with current notions of just punishment. Only by looking a select number of cases in-depth, can policymakers obtain the richer context necessary to evaluate whether a particular judge's desire to impose a less harsh sentence is consistent with mainstream values or represents a dangerous leniency that needs to be policed and cabined by more legislative restrictions on discretion.

Third, the case studies in this Report offer material and insights that can be missed by only looking at the raw data. For example, in all the cases profiled in this report, the judges stated at sentencing that the law required them to impose a longer sentence than each felt was necessary to accomplish the purposes of sentencing. Rather than bend the Guidelines calculations or the rules for downward departures, as the congressional critics believe judges routinely do, these judges simply registered their disapproval in open court. As a result, these cases never showed up in departure statistics or anywhere else that would have registered these judges' concerns. Only by gathering the sentencing transcripts and pre-sentence reports was I able to capture this hidden cross-section of cases and the underlying policy issues they represent.

²³ See *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, United States Sentencing Commission, November 2004.

²⁴ See *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, Barbara S. Vincent and Paul J. Hofer; Federal Judicial Center, 1994.

²⁵ Tailoring punishment to fit the crime had long been a shared process between the branches of government. Modern legislatures divided crimes in degrees and graded punishments according to culpability and harm, prosecutors selected charges, and until recently, within these statutory parameters, judges had unfettered discretion to sentence the defendant. From this vantage point, the Sentencing Guidelines were not a refutation of individualized sentencing, but a perhaps naive attempt to systematize sentencing this process. See Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines* 52 EMORY L.J. 557, 595-96 (2003) (“ . . . mainstream just desert theory considers two factors to be critically important in assessing culpability – the mental culpability of the defendant and the actual harm caused by his or her conduct.”). See also Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on which our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1988).

Fourth, giving attention to the kinds of cases in this Report is critical because whether criminologists, law professors, and the hard-working statisticians at Sentencing Commission like it or not, sentencing policy is often driven by stories about individual cases. New criminal offenses are created in response to a particularly heinous crime and judicial discretion vilified in response to poorly explained examples of supposed lenient sentences.²⁶ This Report attempts to balance out these examples by providing counter-stories of cases in which the defendants are clearly guilty of criminal conduct, but arguably less culpable or less dangerous than envisioned by Congress and the Commission when it predetermined the punishments that applied. In addition, these are cases in which the judges followed the law despite their desire for a different result, negating the Congressional claims that the federal judiciary is out-of-control. In other words, this Report provides a storehouse “dog-did-not-bite-man” sentencing stories, in the hope of adding balance and realism to the often distorted debate over sentencing policy and judicial discretion.

Lastly, despite the technical jargon of the Guidelines, pronouncement of the sentence is still an intensely personal event for both the judge and the defendant. Stripped to its essence, at a sentencing hearing, one person - the judge - has to tell another human being - the defendant - how many years of their life they will serve in a prison. For many judges, the defects of the Sentencing Guidelines and mandatory minimums statutes made this moment one of frustration and even despair. Moreover, as reflected in the many of the transcripts of this study, these emotions also created an odd moment of connection between the judge and defendant, two people whose lives until that point usually could not have been more different. As each realizes their powerlessness to change the outcome of the hearing, there is sometimes a few pages of genuinely moving dialogue as each tries to reconcile what the law requires, despite the shared belief that the punishment in excess of what is fair or rational.

In general, in these transcripts, the judges tend to explain their lack of discretion, express their outrage at Congress, and sometimes apologize to the defendant; yet at the same time not condone or excuse the defendant’s criminal conduct. While a few of the defendants are defiant and angry, most tend to apologize to the judge, family, and community for the harm they have caused, even as they complain about unfairness of the sentence or the trial. Many can be seen trying to come to terms with their fate. A select few are able to show surprising insight into the judge’s dilemma, even at the moment when their freedom for much, or all of their life, is about to be taken away. As one defendant who received a mandatory life sentence put it to the judge

... I think about it sometimes, your Honor, and I would hate to be in your shoes ... because it must be hard for a man to pass judgment on someone, and may be he does want to give him that

²⁶See also Alberto Gonzales, United States Attorney General, Prepared Remarks to a Victims’ Rights Advocates in Washington, D.C. (June 21, 2005) (criticizing disparate post-Booker sentences in two child pornography cases). *But see* Press Release, National Association of Criminal Defense Lawyers, Truth in Sentencing? The Gonzales Cases (July 7, 2005) available at <http://www.nacdl.org/public.nsf/newsreleases/2005mn010> (defending these sentences as justified by differences in the offenders and the offense.).

time, and maybe he doesn't. But I pretty much know its out of your hands, and that must be an awful feeling.²⁷

By reproducing these portions of the transcripts in the profiles, this Report hopes to re-capture the human element of sentencing and undo the all too frequent dehumanization of offenders and their lives. Nothing, and certainly not statistics, can match the power of these moments.

D. Why Pre-Booker Cases?

As a result of *Booker*, district court judges are no longer bound by the Sentencing Guidelines. Instead, while judges must still calculate and consider the Guideline range, they can also can rely on a broader array of traditional sentencing considerations in imposing sentence as long as the Court of Appeals can conclude that the final sentence is "reasonable" under all the provisions of the Sentencing Reform Act.²⁸ The research for this study, however, was conducted before *Booker* and thus all the cases come from the Guidelines era when judges had significantly less discretion to adjust sentences outside a narrow range of departures. The issue that naturally arises is whether this Report's pre-*Booker* cases are still relevant. To this question, I have three primary answers.

First, while *Booker* invalidated the Guidelines, the decision left untouched the statutory mandatory minimum

²⁷Sentencing Transcript at 52-53, *United States v. Rudy Martinez*, No. 91-Cr-53 (N.D. Ill. April 23, 1992) (remarks made by defendant Rudy Martinez to Judge Milton I. Shadur).

²⁸18 U.S.C. § 3353(a) directs judges to consider "the nature and the circumstances of offense and the history and characteristics of the defendant," which now seems to allow judges to consider factors, such as age or addiction, which could not be considered under the Guidelines. See e.g. *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir.) (remanding defendant for sentencing noting the district court's hesitation to consider age and health); *United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005) (allowing court to consider age and medical condition after *Booker*). In contrast, several Courts of Appeals have held that *Booker* does not permit judges to revisit sentencing factors upon which Congressional policy is clear. Thus, efforts by judges to sentence crack defendants below the Guidelines have been overturned. *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006). The overarching debate, however, is how much weight should be given to the Guidelines calculation and if a presumption the Guideline range is reasonable violates the spirit of *Booker*. See *United States v. Wilson*, 2005 WL 78552 (D.Utah January 13, 2005) (arguing for a virtual presumption of reasonableness for the Guidelines, urging that judges should continue to follow the guidelines "in all but the most exceptional circumstances"); but see *United States v. Ranum*, No. 04-CR-31, slip op. at 2 (E.D.Wisc. January 19, 2005). (contending that *Booker* commands that judges "must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual" and not give greater weight to the Guidelines above any other factor in the statute). The United States Supreme Court has recently heard argument in *Rita v U.S.*, 2006 WL 1144508; cert granted No. 06-5754 and *Claiborne v. U.S.*, cert granted No. 06-5618, to consider the weight to be given to the Guidelines after *Booker*.

penalties for many drug and gun offenses. Beginning with the passage of the 1986 Act, Congress created mandatory minimum sentences for most drug offenses as well as for firearms offenses²⁹ that operate independently, and indeed trumped the Guidelines, when there was conflict. Mandatory minimums were not affected by *Booker* because unlike Guidelines which required a series of fact finding decisions, mandatory minimums generally have a one-fact trigger which can easily be submitted to a jury. In fact, since at least 2000, federal prosecutors have been charging and proving the factual predicate required to trigger mandatory minimums in most criminal cases.³⁰ Thus, the many cases in this Report that deal with mandatory minimums are as relevant after *Booker* as before, and especially important to consider in light of several post-*Booker* bills to dramatically increase the use of mandatory minimums.

Second, in many circuits the Guidelines calculations have been held to be presumptively reasonable and placed a heavy burden on sentences below these ranges. Thus, despite *Booker*, many judges still feel bound to impose Guidelines sentences that they believe are too severe. Third, the experience of these judges under the Guidelines is relevant to assessing proposals to circumvent *Booker* by mimicking the Guidelines' limitations on judicial discretion to lower sentences. The best known of these proposals, known colloquially as "topless guidelines," which has been endorsed by the Justice Department and is reportedly favored by at least one prominent conservative legislator.³¹ Under this proposal, the lower end of each defendant's Guideline range would be established by the facts found by the jury. However, instead of the current ranges, where the top and bottom of each range have to be within 25% of each other, the upper end of each defendant's range would be the statutory maximum for each crime.

²⁹ See 18 U.S.C.A. §924(e) (2000) (fifteen year mandatory minimum for felon-in-possession of a firearm who has three previous convictions for certain felonies or drug offenses; 18 U.S.C.A. §924(c) (2000) (which currently provides, for example, five and seven year minimums for a first offense of possessing or carrying a handgun during the commission of a crime of violence or drug trafficking crime).

³⁰ This trend was the result of prosecutors attempts to not run afoul of the Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the first in the line of Sixth Amendment cases that ultimately led to *Booker*. See Memorandum from Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to All Federal Prosecutor's, re: Guidance Regarding the Application of *Blakely v. Washington*, to Pending Cases, at 8, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf.

³¹ See Remarks prepared by Attorney General Alberto Gonzalez given at the National Center for Victims of Crime First National Conference, 21 June 2005, Washington D.C. http://www.usdoj.gov/ag/speeches/2005/06212005_victimsofcrime.htm; Gina Holland, the Associated Press November 18, 2004, *More Judges Deviate from Mandatory Sentences*, available at <http://www.law.com/jsp/article.jsp?id=1100535357414> (stating that a Justice Department official unofficially endorsed topless guidelines); In addition, Rep. Sensenbrenner has sponsored a bill to introduce topless guidelines in the House. See HR 6254, *Sentencing Fairness and Equity Restoration Act of 2006* (109th Congress).

The proponents of “topless” guidelines believe that this system would technically comply with *Booker* because sentences above the minimum would be at the discretion of the judge, not dependent on judicial fact finding.³² But, by instating a mandatory sentence floor based on the jury verdict, judges would be prevented from lowering sentences based on non-Guideline factors such as age, addition, rehabilitation, etc.

Thus, “topless guidelines” would automatically permit sentences above the current Guideline ranges but prevent lower sentences that fail to qualify on Guidelines departures grounds in the much the same way that the mandatory Guidelines did. To the extent that judges across the political spectrum felt that the Guideline minimums were excessive in a significant cross-section of cases, “topless guidelines” would recreate the same concerns. Thus, these pre-*Booker* cases are still relevant to assessing the judicial response to efforts designed to undo or “fix” *Booker*.

II. A Brief History of Modern Sentencing Reform.

To place my observations about the views of Republican appointees in context, this Part provides a detailed overview of federal sentencing reform since 1984 along with the judicial reaction to these changes through the *Booker* decision in 2005.

A. The Modern Sentencing Reform Movement and the Birth of the Sentencing Guidelines.

In early American history, criminal penalties followed the English model with a specific term for each crime. The nineteenth and twentieth centuries saw this system give way to statutory ranges and indeterminate sentencing as the dominant sentencing model. Under this power sharing scheme, legislatures still defined crimes but now prescribed a broad range of years within which judges generally had unfettered discretion to impose any term up to the statutory maximum. The executive branch, through the prosecutor, chose the charges, and then, through the parole board had the power to release the inmate before the expiration of their term based upon a prisoner's rehabilitative efforts.

On the federal level during the 1960s and '70s, a bipartisan consensus began to form that unfettered judicial and parole board discretion resulted in too much sentencing disparity. The prevailing account of the reform movement is that it was liberals, such as Judge Marvin Frankel, who initially pushed for sentencing reform, arguing that racial minorities and the socio-economically disadvantaged received harsher sentences. Later, conservatives, interested in a more punitive and determinate system joined and eventually came to dominate

³²It is worth pointing out that the law professor and former prosecutor who conceived of “topless” guidelines now believes that they are a bad idea and may run afoul of the Supreme Court’s understanding of the Sixth Amendment.. See *A Counsel of Caution: Hearing on the Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary*, 109th Cong. (2005) (testimony of Frank W. Bowman) available at <http://judiciary.house.gov/media/pdfs/Bowman021005.pdf>.

the coalition.³³

The modern federal sentencing reform movement resulted in the passage of the Sentencing Reform Act of 1984 ("SRA"). The SRA abolished parole and required prisoners to serve at least 85% of their sentences, solving the problem of post-sentencing disparity. At the front end, the SRA created the United States Sentencing Commission ("Sentencing Commission") and mandated the creation of a sentencing guideline system for all federal crimes. After three years of hard work and significant controversy and discord, the Sentencing Commission released the first version of the Sentencing Guidelines in 1987.³⁴

The Sentencing Guidelines are based upon a two-axis grid. The vertical axis is the Offense Level which starts at 1 and goes up to 43. Every crime is assigned an initial base offense level. Additional factors can then raise or lower the offense level, for example, the defendant's role in the offense, the use of a gun, or the defendant's acceptance of responsibility (usually shown by pleading guilty). For offenses involving narcotics and crimes involving financial loss, the Sentencing Commission chose to determine offense levels largely on the quantifiable component of the crime, the amount of drugs or the financial loss. The Commission then amplified the impact of quantity by adopting "real offense" sentencing. "Real offense" sentencing requires the sentencing judge to look at all related "relevant conduct" to determine the offense level. For example, assume a defendant is found guilty of one count of possession with intent to distribute cocaine based upon evidence obtained in a single seizure. Nevertheless, the Guidelines require that the base offense level include any other drug transactions or contemplated transactions that involved the same course of conduct.

The horizontal axis of the Guidelines quantifies the defendant's criminal history. Points are assigned for prior convictions that vary depending on factors such as seriousness, remoteness, and whether the current offense was committed while on parole or probation. Based on the total criminal history points, a defendant is placed in Criminal History category I-VI, with the applicable sentencing range escalating the more extensive the criminal history. Using the adjusted offense level and defendant's criminal history category, the Guidelines direct the sentencing judge to a sentencing range found in one of the 138 boxes on the Sentencing Guidelines grid. By congressional mandate, each grid box prescribes a range with a high end generally not

³³Kate Stith & Jose A. Cabranes, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 35-37 (University of Chicago, 1998).

³⁴The commission faced a number of early challenges of both a substantive and procedural nature. See e.g. Janet Alberghini, Comment, "Structuring Determinate Sentencing Guidelines: Difficult choices for the new federal Sentencing Commission" 35 *CATH. U. L. REV.* 181 (1985); Paul H. Robinson, Commentary: Dissent From the United States Sentencing commission's proposed Guidelines, 77 *J. CRIM L. & CRIMINOLOGY* 1112 (1986). After having undergone a lengthy approval and ratification process the guidelines still had to clear a number of legal challenges and therefore the Sentencing Guidelines didn't fully take effect until after the Supreme Court upheld their constitutionality in *Mistretta v. United States*, 488 U.S. 361 (1989).

more than twenty-five percent longer than the low end.³⁵

The Guidelines also made provisions for exceptions called "departures." Judges could go above or below the applicable guidelines range if the judge found that the case fell outside "the heartland" of circumstances and factors considered by the Sentencing Commission. Some departure grounds were affirmatively recognized by the Guidelines, while others, such as age, socio-economic background, gender, and substance abuse are specifically forbidden or discouraged.³⁶ Judges also retained discretion to depart if they considered a combination of factors unique to a particular case. All departures, however, and in fact all Guidelines calculations, were made subject to judicial review.

B. Mandatory Minimums for Narcotics and Firearms Offenses.

During the Guidelines era, Congress added to the criminal code by federalizing a variety of offenses in response to highly publicized incidents such as carjacking and child pornography. More recently, the wave of corporate scandals resulted legislative directives to increase the Guideline penalties for white collar criminals in the Sarbanes-Oxley bill.³⁷ Certainly, the increases in the statutory and Guideline penalties for some of these offenses troubled federal judges in specific cases.³⁸ Nevertheless, it is fair to say that story of judicial dissatisfaction with the Sentencing Guideline regime was largely driven significant increases in the penalties, both statutory and under the Guideline for drug and gun cases. Hence, the majority of this Report concerns these two kinds of offenses.

1. Drug Penalties in the Guidelines Era.

In 1986, before the Sentencing Commission released the first edition of the Guidelines, college basketball

³⁵For example, a defendant with an offense level of 26 and a criminal history category of I is subject to a sentence that falls between 63-78 months. *See* 2005 Federal Sentencing Guidelines §5A Sentencing Table.

³⁶*See e.g.* U.S. SENTENCING GUIDELINES §§5H1.10, 5H1.4, 5K1.12, and 5K2.12.

³⁷The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 805, 905, 1104, directed the Sentencing Commission to increase the Guidelines imposing higher penalties for white collar offenders based on a variety of factors (although Congress did not add mandatory minimums to this area of the federal criminal code). The influence of these changes are now being seen in the sentences for defendants in the WorldCom and Enron prosecutions such as WorldCom Founder Bernard Ebbers, who received a twenty five year sentence). "Ex-WorldCom CFO Gets 5 Years" NEW YORK, August 11, 2005, CBS/Associated Press.

³⁸*See* Benjamin Weiser, *A Judge's Struggle to Avoid Imposing a Penalty He Hated*, The New York Times, (January 13, 2004).

star and Boston Celtic draft pick Len Bias died from a cocaine overdose.³⁹ This event spiked a national hysteria over illegal drug use, and crack cocaine in particular. Congress responded with the Anti-Drug Abuse Act of 1986. Passed without hearings and with no input from the judiciary, this bill instituted weight-based mandatory minimums for a wide range of illegal narcotics with penalties far harsher than existing federal law.⁴⁰

According to contemporaneous Congressional statements, the bill's mandatory minimums were supposed to be targeted at the drug kingpins and wholesalers who were responsible for importing and distributing narcotics on a national or regional scale.⁴¹ However, the triggering quantities were lowered as politicians tried to out-tough each other.⁴² As a result, the 1986 Act requires five and ten year mandatory minimum for quantities generally transacted by the lowest level street dealers. Moreover, with its recidivist provision, mandatory sentences under the 1986 Act quickly escalate to twenty years, and even mandatory life without parole, for defendants who were often no more than mid-level street dealers, whose reach rarely extended beyond a city block or two. This was especially true for crack cocaine. Based upon the view at the time that crack was a much more dangerous and addictive drug, the Act established a 100:1 ratio for powder to crack; thus a wholesaler of powder cocaine must possess or sell 500 grams to trigger the five year penalty, whereas it takes only five grams (the weight of two sugar packets) to trigger the same mandatory term.⁴³

³⁹ See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 410 (1995) (discussing the expedited course pursued by then house speaker Tip O'Neil in seeking passage of the Anti-Drug Abuse Act in order to placate constituent outrage over the cocaine overdose death of Boston Celtics basketball star Len Bias.)

⁴⁰Congress had experimented with mandatory minimums for drug crimes in the 1970s but this experiment was declared a failure and these penalties were repealed. United States Sentencing Commission: Mandatory Minimum Penalties in the Federal Criminal Justice System, 5 (1991), *available at* http://www.ussc.gov/r_congress/MANMIN.PDF.

⁴¹For instance, Congress intended that “that federal government’s most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . . .” H.R. Rep. No 99-845 at 11, 99th Cong. (1986). Accordingly, Congress adopted quantities to trigger mandatory minimums “based on the minimum quantity that might be controlled or distributed by a trafficker in a high place in the processing and distribution chain.” *Id.* at 12.

⁴²See Eric Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, *Supra* at n. 40; Seth Stern, *Meth vs. Crack; Different Legislative Approaches*, CQ Weekly, June 5, 2006 at 1548 (claiming that “President Ronald Reagan and Democrats in Congress competed to come up with the most aggressive solutions.”).

⁴³Prior to the 1986 Act, cocaine offenses did not distinguish between powder and forms of cocaine. See Anti Drug Abuse Act, Pub. L. No. 99-570, §1002(2),(1986)(codified at 21 U.S.C. §841(b) (2000).

The 1986 Act also increased drug sentences in more subtle ways. For example, quantity was now determined by the weight of the entire “mixture or substance,” not just the amount of actual narcotics present. This provision was intended to punish dealers who increased their sales using cutting agents, but the result was that drugs that are generally heavily diluted or which require a “carrier medium,” were now virtually certain to trigger a mandatory minimum penalty. The best example of the “carrier medium” effect was found in LSD cases. Because the weight of an actual dose of LSD is negligible, too small to be put into a pill or vial, it is generally impregnated onto sheets of paper, with individual doses identified by stickers or decals (the user licks the paper to ingest the drug). Since a ten-year mandatory requires only ten grams of LSD, many LSD dealers who used paper of a regular weight easily exceeded the ten gram requirement and were subject to at least a ten year mandatory sentence.⁴⁴

In 1988, Congress extended the reach of the drug mandatory minimums by making them applicable to conspiracy charges to possess or distribute narcotics.⁴⁵ Before this amendment, drug distribution conspiracies were covered by the general federal conspiracy statute, which carries a maximum five-year sentence. With the 1988 bill, not only were more cases eligible for the mandatory penalties, but these defendants were now subject to punishment for the entire quantity of drugs in the conspiracy of which they were aware or should reasonably have been aware, even if they never personally possessed or distributed any drugs. Moreover, because modern conspiracy law requires little active involvement before one is deemed to have joined a conspiracy; even taking a phone message or giving a ride to a friend is enough, so long as a jury believes the defendant agreed to assist the primary actor.⁴⁶

2. Firearms Legislation in the Guidelines Era.

In the early Guidelines period, mandatory minimum penalties were also added to offenses involving firearms. For example, in 1984, the penalty for using or carrying a firearm during a violent crime was made a consecutive, five year mandatory term.⁴⁷ In 1986, Congress extended this penalty to drug-trafficking crimes,

⁴⁴ For example, from October 1995-September 1996, 39.8% of LSD defendants received at least ten year mandatory minimum sentence. An additional 39.% received a five year mandatory minimum. United States Sentencing Commission, Annual Report 1996, *available at* <http://www.usc.gov/annrpt/1996/tab-38.pdf>.

⁴⁵See P.L. 99-570; 21 U.S.C. 846.

⁴⁶ See, e.g., *United States v. Esparsen*, 930 F.2d 1461,1471-72 (10th Cir. 1991) (recognizing that to be found guilty of conspiracy, “the defendant need not know all the details of the operation and may play only a minor role or have only a slight connection to the conspiracy . . . [and that while mere] presence at the scene of the crime does not, by itself, prove involvement . . . is a material factor.”).

⁴⁷Pub. L. No. 98-473, § 1005(a), 98 Stat. 2028, 2138 (1984).

and increased the mandatory minimum to ten years for certain types of firearms.⁴⁸ In later amendments to this statute, 18 U.S.C. § 924(c), Congress increased the penalty for a "second or subsequent conviction" to a mandatory minimum of twenty years.⁴⁹ In 1986, Congress also passed the Armed Career Criminal Act, which made possession of a firearm or ammunition by a convicted felon⁵⁰ with three convictions for a wide range of state or federal felonies subject to a fifteen year term mandatory minimum.⁵¹ This new fifteen year mandatory minimum applied even to an ex-felon's simple possession of a firearm (or even a bullet), without any requirement of related criminal conduct.

C. The Sentencing Commission and the 1986 Act Mandatory Minimums.

The mandatory minimums for narcotics offenses in the 1986 Act were created after the passage of the SRA but before the first Guidelines were released. The statutory penalty structure of the 1986 Act was problematic for the original Sentencing Commission, which had largely been relying on past sentencing data to establish the penalties for the draft Guidelines. Ultimately, the Commission decided to disregard the past data for drug crimes and use the mandatory minimums to set the floor for most Guideline sentences for drug offenses. Quantities above the mandatory minimum trigger were set incrementally even higher. With these two decisions, the Commission guaranteed that most Guideline drug sentences would be even more severe than the new mandatory minimums. In fact, as discussed in this Report, until amended by the Sentencing Commission in 1994, the Guidelines sometimes required life sentences without parole solely based upon drug quantity, even where no statutory life sentence applied.⁵² In addition, the first Commission chose to make no downward adjustments for the consecutive firearm mandatorys in now part of 924(c), ensuring that a gun plus the requisite quantity of drugs virtually guaranteed a sentences of at least ten years.

Because the drug and gun mandatory minimums are statutory penalties, they also trumped a lower Guideline

⁴⁸18 Pub. L. No. 99-308, § 104(a)(2)(A)-(F).

⁴⁹Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

⁵⁰Possession of a firearm by a convicted felon (regardless of whether the felony was a state or federal conviction) was already a federal offense. Section 922(g) initially criminalized possession by a person convicted of a crime which carries a punishment of imprisonment for a period of greater than one year as part of the Gun Control Act of 1968 Pub. L. No. 90-618. The law was later expanded to include possession by an unlawful drug user, 922(g)(3), and by an illegal alien, 922(g)(5), as part of a larger number of additions to the section contained in the 1986 Firearms Owners Protection Act. *See* Pub. L. No. 99-308.

⁵¹Armed Career Criminal Act ("ACCA") (18 U.S.C. § 924(e)) 98 P.L. 473; 98 Stat. 1837 (1986).

⁵²UNITED STATES SENTENCING GUIDELINES MANUAL App. C, Amend. 505 (1998) (amending the drug quantity table, U.S.S.G. §2D1.1(c) to eliminate the top two levels, precluding the imposition of a life sentence for a first time offender based purely on drug quantity); *See also* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1076 (2001).

range. For example, if the Guidelines called for a sentence of 70-87 months, but the statutory mandatory minimum called for ten years (120 months), the Guideline sentence had to be adjusted to 120 months. In other words, the Sentencing Guidelines were like a quilt that covered every sentence. Mandatory minimums were overlaid in some sections, like patchwork, which influenced and sometimes trumped the Guidelines, where they applied.

Moreover, unlike a Guidelines sentence, judges could not on their own depart below a mandatory minimum. The only exception initially provided by Congress was for a defendant who cooperated with the government in the investigation and prosecution of another offender. However, the sole authority to move for a departure for “substantial assistance” was given to the government. Thus, without a motion by the U.S. Attorney's Office, judges were powerless to sentence below the mandatory minimum, even when the defendant made a good faith effort to cooperate but was unable to do enough to satisfy the government.⁵³

D. Sentencing Law and Prosecutorial Discretion.

While Congressional action created the Guidelines and new mandatory minimums, it is critical to recognize the role prosecutorial policy and charging decisions by the Justice Department and the local United States Attorneys during the Sentencing Guidelines era. Legislative changes mean nothing if the laws are under-enforced or shunted to the state criminal justice systems. At the start of the Sentencing Guideline era, the Reagan Administration declared a federal “war on drugs.” This administration increased the budgets of the Justice Department and federal law enforcement agencies, FBI, DEA, and ATF, and it stressed the importance of increasing drug and gun prosecutions. In response, local federal prosecutors brought many more of these cases, either from federal law enforcement or by accepting cases begun by arrests by city and state law police agencies, acting alone or in concert with federal agencies.⁵⁴ As a result, federal prosecutions

⁵³See *United States v. Wade*, 504 U.S. 181,183-4 (1992)(holding that judges have “no power to go beneath the minimum” without a “substantial assistance” motion from the prosecution.) Only in the extremely rare case where the defendant can prove that the government refuses in bad faith to make the motion are judges authorized to take action. *Id.*

⁵⁴Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, Cato Policy Analysis No. 180 (October 2, 1992); "President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime," (October 14, 1982), Weekly Compilation of Presidential Documents, vol. 18, pp. 1311, 1313-14. The President called for (and got): (1) more personnel--1,020 law enforcement agents for the Drug Enforcement Agency, Federal Bureau of Investigation, and other agencies, 200 Assistant U.S. Attorneys, and 340 clerical staff; (2) more aggressive law enforcement--creating 12 regional prosecutorial task forces across the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises;" (3) more money--\$127.5 million in additional funding and a substantial reallocation of the existing \$702.8 million budget from prevention, treatment, and research programs to law enforcement programs; (4) more prison bed space--the addition of 1,260 beds at 11 federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws--a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture, and the exclusionary rule; (6) better interagency

rose from 59,682 in 1986 to 116,582 in 2004, with narcotics enforcement by far leading the increase.⁵⁵ In addition, beginning in 1991 with Attorney General Thornburgh's "Operation Triggerlock," federal firearms offenses also experienced a dramatic increase as successive administrations encouraged local federal prosecutors to pursue felon-in-possession and other federal firearm violations.⁵⁶

It is not hyperbole to say that the impact of the increase in penalties and more aggressive prosecution policies on the federal criminal justice system was staggering. In 1984, the federal prison population was 32,317.⁵⁷ In 2006, it stood at 191,116.⁵⁸ These changes also dramatically altered the makeup of the federal criminal docket. In 1983, drug case accounted for only 16% of the federal district court criminal docket.⁵⁹ With the shift of more drug cases to the federal system, the numbers skyrocketed. In 2003 drug cases accounted for over 27% of criminal cases filed.⁶⁰ As a result, over 53% of current federal inmates are serving sentences for drug offenses. The average federal drug sentence before 1984 was 65.7 months.⁶¹ By 1991, this average increased to 95.7 months. While there has been a slight decrease in drug sentences over the past ten years, the increase in the federal prison population has continued as the total number of prosecutions has

coordination--bringing together all federal law enforcement agencies in "a comprehensive attack on drug trafficking and organized crime" under a cabinet-level committee chaired by the attorney general; and (7) improved federal/state coordination, including federal assistance to state agencies by training their agents." *Id.*

⁵⁵http://trac.syr.edu/tracreports/crim/136/include/table_3.html; <http://www.ojp.usdoj.gov/bjs/abstract/fccp02.htm>.

⁵⁶For the government's explanation of Operation Triggerlock, see <http://www.ojp.usdoj.gov/bjs/pub/pdf/ffo98.pdf> at 4 of 19. Operation Triggerlock continued under the George H. Bush Administration. The Clinton administration followed suit with its "Weed and Seed" program which attempted to allow each jurisdiction to create a firearm's prosecution policy suited to local needs and tried to provide funding for social services as well as prosecution. Richmond's highly touted "Project Exile" rekindled interest in federal prosecutions for felons-in-possession and President George W. Bush followed with his Project Safe Neighborhoods which provided for additional funding and designated prosecutors and agents for these cases. See *infra* for more details and criticism of these prosecutions at ____.

⁵⁷Federal Bureau of Prisons Quick Facts at www.bop.gov/fact0509.html.

⁵⁸Federal Bureau of Prisons Population Report at www.bop.gov/locatins/weekly_Reports.jsp. Accessed on July 24, 2006.

⁵⁹www.ojp.usdoj.gov/bjs/pub/pdf/fccp93.pdf

⁶⁰www.usdoj.gov/usao/reading_room/Reports/asr2003/03_STAT_Report.pdf.

⁶¹Admin. Office of the U.S. Courts, National Profile and Enforcement Trends Over Time, at <http://trac.syr.edu/tracdea/findings/national/druppri8199.htm> (last visited Nov. 28, 2001)(on file with the Iowa Law Review) [hereinafter TRAC study].

continued to increase.⁶² This dramatic shift did not go unnoticed by the judges and it is to their reaction that the next Part turns.

III. The Judiciary's Response to Federal Sentencing Policy

A. Preliminary Issues: Guidelines vs. Mandatory Minimums, Discretion vs. Severity, and Persistent Regionalism.

In framing the judicial reaction to the changes in sentencing laws since 1984, it is important to distinguish between two sets of issues. First is the relationship between judicial discretion and sentencing severity. Without question, there was a strong judicial consensus in the Guidelines era that Congress has taken too much sentencing discretion from judges (although with real disagreement over how much discretion that judges actually need). Many federal judges also believe that many post-1986 sentences have been more severe than necessary, with again, wide differences on the scope of this problem. What unites most judges, however, is that the combination of less discretion coupled with higher penalties has created too great a potential for unjust sentencing outcomes that they are powerless to affect.⁶³ However, judges didn't always express their disagreement with a sentencing outcome in these terms. Rather, many referred either to the discretion issue or the severity problem, without noting that it is really a combination of both that has hamstrung their sense of fairness.

A similar confusion can be found in judicial statements about the Guidelines and mandatory minimums. Because the Guidelines and the drug and gun mandatory minimum penalties became effective in the same general time frame (and because the drug Guidelines were for all practical purposes pegged to the mandatories), many judges complained about these distinct issues interchangeably, when in fact, the issue in the case was really either a mandatory minimum or a Guidelines issue.

Lastly, regional factors seemed to play a significant role in level of judicial dissatisfaction with the sentencing regime, especially the prosecution policies and priorities of the local United States Attorneys in each federal judicial district. While ostensibly controlled by the Justice Department, in reality, local U.S. Attorney's

⁶²Federal prosecutions rose from 71,437 in 1995 to 116,582 in 2004 http://trac.syr.edu/tracReports/crim/136/include/table_3.html; See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data From the District Level*, 87 IOWA L. REV. 477 (2002) (arguing that the players in the federal criminal justice system, including many prosecutors, colluded in recent years to try to bring drug sentences down slightly).

⁶³There were also areas where some judges believed federal penalties were too light. The most common complaint, pre-Sarbanes-Oxley, was that white collar penalties were too lenient. In addition, in areas, such as Indian Country, where federal prosecutors also handle crimes usually prosecuted in the state courts, some judges complained that the Guideline penalties for sexual abuse crimes were too low, particularly when compared to drug offense penalties. Western Judge 1, Anonymous Interview, Sept. 30, 2002.

Offices had enough independence during the Sentencing Guidelines era to shape very different sentencing environments within which judges had to operate.⁶⁴ For example, there were wide variations in the willingness of U.S. Attorney's Offices to accept cases for federal prosecution, with some taking very small drug cases and others having higher weight cut-offs. Similarly, inter-district variations in their willingness to make substantial assistance motions directly impacts the number of defendants who must face mandatory minimum sentences. Other regional differences flowed from differences in crime patterns and jurisdictional anomalies. Examples include the flood of drug and immigration cases in the border states⁶⁵ and the higher percentage of violent crime on the criminal docket in the federal districts that have jurisdiction over traditional crimes of violence such as in Indian Country.⁶⁶

B. Three Periods: A Historical Approach to Judicial Reaction to Sentencing Policy in the Guidelines Era.

While disentangling the severity vs. discretion and mandatory minimum vs. Guidelines distinctions and regionalism threads is helpful, judicial reaction to sentencing policy is best understood as a historical evolution. My research suggests that there were three discernable periods. The first period, from 1986 - to early the 1990s, covers the initial judicial reaction to the Sentencing Guidelines and the new mandatory minimums. In the second period, largely encompassing the Clinton presidency, there was an overall

⁶⁴The persistence of regionalism in the federal criminal justice system should not be surprising. Most federal prosecutors and judges had their start in the local system and do not discard local values and practices overnight. For example, gun cases are often dealt with more seriously in urban areas in comparison to rural and Western states that have a tradition of gun ownership. While several administrations have attempted to rein in these offices, local federal prosecutors still have a large degree of autonomy and have shown varying degrees of fealty to new Justice Department policies. See Ian Weinstein, *SYMPOSIUM: The Historical Roots of Regional Sentencing Variation*, 11 Roger Williams U. L. Rev. 495 (2006).

⁶⁵Even the same statutory offense can look very different depending on the location. For example, drug cases in border states tend to consist of courier cases involving large amounts of drugs possessed by low level operatives. In the inner cities, drug cases tend to involve more retail and intermediate wholesale. Thus, while possession with intent to distribute a kilo of cocaine carries a single penalty under federal law, that crime can be committed under very different circumstances and by different kinds of offenders across the nation. For example, prosecutors and judges in Arizona might look at a poor Mexican defendant paid \$100 to carry a kilo of cocaine across the desert into Arizona quite differently than the defendant who possessed the same quantity of cocaine with the intent to distribute it in \$500 bags to a bunch of Wall Street investment bankers. Yet, for purposes of the mandatory minimum, the quantity is the sole determinant.

⁶⁶Technically speaking, criminal jurisdiction over Indian Country is shared between the federal government and tribal governments. See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 405 (2004). However, Congress has conferred jurisdiction to the federal courts over many violent crimes, such as rape and murder, that ordinarily would not fall to federal jurisdiction, in Indian Country. See *id.* See also, MAJOR CRIMES ACT, 18 U.S.C. §1153 (2000); INDIAN CRIMES ACT, 18 U.S.C. §1151 (2000).

softening of judicial opposition for a variety reasons including moderation of Justice Department policies and a greater judicial familiarity with the Guidelines system. However, the second period abruptly ended midway through George W. Bush's first term around 2002 when hostility between the judiciary and Congress and the Justice Department re-emerged with significant intensity. The critical events of the third period included the attack on Judge James Rosenbaum by the majority of House Judiciary Committee and the passage of the Feeney Amendment as well as broader conservative attacks on the judiciary that flowed from conflict over other issues such as the Terry Schiavo case. The third period ended with the *Booker* decision which made the Guidelines advisory and otherwise threw sentencing policy into its current period, characterized by a sense of temporariness and uncertainty.

Of course, these three periods are constructs designed to illuminate an overall pattern and in reality, one can find substantial overlap as judges vocal in one period continued the same vein, even as the majority of the judiciary trended in another direction. For example, some pre-Guidelines judges continued to advocate for unfettered discretion long after the majority of the judiciary had come to accept some degree of guided discretion as a fairer and less arbitrary regime. Moreover, no study can claim to completely categorize the wide range of opinions among the almost nine hundred federal judges; as one would expect given their diverse political and experiential backgrounds. For all these reasons it is foolish to assert that the federal judiciary had monolithic or consistent views during the Sentencing Guidelines era, even within discrete periods of time. Thus, the positions sketched out in this section are designed to capture the dominant trends reflected in the official positions of the judiciary and individual judicial statements at sentencing hearings and surveys, interviews, and speeches. With this caveat, I turn to Period I -- the initial judicial reaction to the Guidelines.

1. **Period I - The Birth of the Sentencing Guidelines Era (1986 to the early 1990s).**

- a. **The Judicial Rebellion and Defeat in *Mistretta*.**

The initial judicial reaction to the Sentencing Guidelines was overwhelmingly negative.⁶⁷ Prior to the Guidelines, judges experienced sentencing as an introspective and very personal decision. While aided by the presentence report and the arguments of the parties, judges were largely left to ponder the combination of rehabilitation, “just desserts,” deterrence, and incapacitation that they believed best fit the case and their own philosophical preferences. Now, the Guidelines operated to severely restrict their discretion, and for

⁶⁷ See, e.g., Tracey Thompson, *Applying a Formula to Justice; Sentencing Rules Limit Judicial Discretion*, WASH. POST, June 12, 1989, at A1, available at 1989 WL 2050174 (reporting sentencing reform “drew immediate opposition from judges, who saw it as an intrusion by the executive branch into the judicial domain”); Robert Moran, *War on Drugs Is a Lost Battle, Judges Say*, PHILA. INQUIRER, Apr. 9, 2002, available at 2002 WL 14968432 (reporting on a panel discussion at Temple University where two U.S. District Court judges, Judge John T. Curtin of New York and Judge John Kane of Colorado, openly criticized the federal sentencing guidelines).

the first time, they had to justify their sentencing decisions to the appellate courts.⁶⁸

The Guidelines also required frequent post-trial hearings and sometimes a complex calculus, as well as an entirely new body law which was constantly changing due to appellate interpretation and yearly Commission amendments.⁶⁹ Many judges were unhappy with this combination of more work, less authority, and appellate oversight. A few of the most dissatisfied took senior status early which allowed them to decline to take criminal cases and a few outright retired in protest.⁷⁰ Many others struck back by holding that the Sentencing Guidelines were unconstitutional as a violation of the separation of powers doctrine.⁷¹ However, in 1989, the Supreme Court reversed these lower courts and upheld the constitutionality of the Guidelines in *Mistretta v. United States*.⁷²

In the immediate aftermath of *Mistretta*, while not necessarily any happier about the Guidelines, the judiciary largely realized that it would have to live with this system and largely set about to understand how it worked, and to some extent, to test the limits of their discretion with this framework. Judicial downward departures, which had been relatively few in the first years, then rose to 8.4% by 1995.⁷³ Some judges also chose to participate in the Sentencing Commission's process individually, or through the Judicial Conference and the

⁶⁸See Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 Am. Crim. L. Rev. 1, 3 (1997); See also Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN'S L. REV. 757, 763 (1993) (claiming the Federal Sentencing Guidelines have greatly complicated the sentencing process and consumed more judicial resources).

⁶⁹Over the past twenty years, the Sentencing Commission continued to tinker with the Guidelines every year, such that there are now 680 amendments that alone runs 1127 pages of the Guidelines Manual.

⁷⁰ See also Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. Leg. Studies 231, 243-51 (2004) (statistical study finding that the Sentencing Guidelines led to a slightly higher percentage taking senior status but that overall early retirement rate was still low).

⁷¹ See, e.g., *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988) (overruled by *Mistretta v. United States*, 488 U.S. 361 (1989)). Prior to *Mistretta*, "200 judges declared the guidelines unconstitutional."

⁷²488 U.S. 361 (1989) (holding the sentencing guidelines did not violate non-delegation principle of the separation of powers doctrine).

⁷³United States Sentencing Commission, *1995 Annual Report*, 88. However, these departures were not uniformly distributed, as some circuits were particularly restrictive in their interpretation of the sentencing judge's departure power. See, e.g., *United States v. Rybicki*, 96 F.3d 754, (4th Cir. 1996) (remanding a defendant for resentencing finding a defendant's alcohol problem, responsibilities to his ailing wife and child, years of unblemished service to as a police officer, and the fact no one was hurt by his crime were not sufficient to support a district court's downward departure.)

separate District Court Judges Association, in the hope of influencing the Guidelines through the yearly amendment cycle. In some percentage of cases as well, the scope of which is subject to significant disagreement, there were judges who obtained outcomes more to their liking by manipulating Guidelines calculations, or by browbeating prosecutors into more lenient plea offers, or by making rulings adverse to the government.⁷⁴

b. Sentencing Outcomes and the Judiciary: Specific Complaints and Issues.

After some early optimism about working with the Sentencing Commission and Congress to address their concerns, it quickly became clear to many judges that the new regime produced a significant number of sentencing outcomes that they did not like and could not change.⁷⁵

Judicial complaints about the new mandatory minimums were particularly were numerous. Weight-based mandatory minimums create arbitrary sentencing cliffs; one tenth of one gram could put the defendant into a higher statutory mandatory minimum. This seemed irrational to many judges who were used to making nuanced sentencing decisions. Other judges voiced concerns about a range of other issues, including the increase in “dry conspiracy” cases (where no drugs are seized). In these cases, the triggering quantities were

⁷⁴Bowman and Heise make a persuasive argument that given the ability of prosecutors to appeal, most cases of “manipulation” of the Guidelines were an exercise in which judges, prosecutors, and defense lawyers were complicit, based on their joint assessment that a lesser sentence was appropriate. See Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 528-29 (2002). I have argued that in some cases, judges, probation officers, and defense attorneys took the time and initiative to conduct a more thorough investigation of the case and the defendant’s background which produced defensible grounds for a departure. See David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS L. REV. 645, 668-69 (2004).

⁷⁵For example, Federal District Court Judge Stanley Marshall publicly stated “I’ve always been considered a fairly harsh sentencer, but it is killing me that I am sending so many low-level offenders away for all this time.” Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 458 n.84 (1999) (two of the three authors of this article are themselves judges). When asked how he felt about a mandatory ten year sentence he imposed on two men in their twenties for growing marijuana, Judge Thelton Henderson of the federal district court in San Francisco told PBS Frontline: “I felt awful. I still remember vividly, here are two young men who look like the kids next door. Not that gets [sic] you off going to jail, but I felt awful because they’re in the prime of life. I thought the sentence was much too harsh.” PBS Frontline, Interview with Judge Thelton Henderson from *Busted: America’s War on Marijuana* (Winter 1997-98).

established solely by the testimony of questionable cooperating witnesses.⁷⁶

However, the mandatory minimum cases that disturbed judges the most, were the ones that resulted in lengthy sentences for low level players in drug conspiracies, especially for poorly paid couriers and romantic partners (usually women) of traffickers who assisted in some minor way. These defendants rarely shared in the profits of the operation or exerted any managerial function and they often knew too little to be of any use as cooperating witnesses for the government.⁷⁷ A few of these cases received national attention in newspapers and television magazine shows, particularly when the sentencing judges were willing to be interviewed.⁷⁸

In addition to the low-level offenders, there was another class of cases that deeply troubled judges in this first period, which in contrast to the “girlfriend” cases, received virtually no media attention. These cases involved very lengthy sentences, sometimes life without parole, meted out to more serious, but still non-violent, drug offenders. These cases resulted from the operation and/or the interaction of the Guidelines and the 1986 statute.

For example, the 1986 Act provided for significant, escalating mandatory minimums for recidivist drug offenders. Thus, a second time offender with just five grams of crack or one gram of LSD faced a mandatory ten years. A second offense with fifty grams of crack or just ten grams of LSD required twenty years, and two prior drug felonies for these defendants resulted in a mandatory sentence of life without parole.⁷⁹ While judges generally supported higher sentences for recidivists, the 1986 statute, in many judges’ opinions, were both over-inclusive and over-the-top.

⁷⁶See Sam Hodges, *Crack Rocks and A Hard Place*, Mobile Register, Section A, June 23 1997. (Recounting the tale of a conspiracy drug conviction where no drugs were ever recovered during police investigations)

⁷⁷Provisions for downward departures for substantial assistance included in the SRA and then modified to include sentences under mandatory minimums after the 1986 Act was passed. See 28 U.S.C. §994(n); 18 U.S.C. §3553(e). In this first period, the only way to avoid a weight-based mandatory minimum was to provide substantial assistance to the government. As noted by many judges and commentators, this system particularly disadvantaged low-level offenders, such as couriers or romantic companions, because they often had no one to “rat out,” or they simply waited too long to come forward out of ignorance, loyalty, or fear. In these cases, judges had to impose mandatory minimum terms, even when higher-ups in the same drug network are able to cooperate in exchange for lesser sentences.

⁷⁸See e.g. *U.S. v. Nunn*, 940 F.2d 1128 (8th Cir. 1991) (upholding the conviction of a drug dealer’s girl friend when it was reasonable for the jury to infer that she had dropped him off twice in order to consummate a drug deal).

⁷⁹ 21 U.S.C. §841(b)(1) (2002).

For example, the recidivist provisions simply required that the prior convictions be for drug felonies but did not distinguish between one rock sales by a cocaine addict (for which they received probation in a state court), and defendants who had been convicted of more high level distribution. Even more troubling, the 1896 Act failed to recognize that some states punish mere possession of hard drugs as a felony,⁸⁰ ensuring that some drug users would be treated as unrecalcitrant recidivists, rather than drug addicts selling to support their habit. Moreover, because these were mandatory minimums, once the prosecutor filed the requisite statutory enhancement document, the judge had no choice but to impose these elevated penalties.

In addition, under the Guidelines a mandatory life sentence was also possible, even for a first-time, non-violent offenders because of the Sentencing Commission's decision to use the mandatory minimums as the floor for the base offense levels for drug crimes and then incrementally escalate sentencing levels for larger amounts. Thus, for drugs such as crack cocaine and LSD, which need only small quantities to trigger a ten year mandatory, the Guidelines ranges quickly escalated if the defendants who were part of a large or longstanding conspiracy. In this period, a defendant could reach the top of offense level at 43 solely based upon drug quantity. At Level 43, a life sentence was required across the board, regardless of a prior record.

Lastly, the racial impact of the 1986 Act penalties, especially the crack/powder disparity, troubled many judges in this period, especially when they were required to send many young African-Americans to prison for lengthy terms while the White and Hispanic importers of powder cocaine received lesser sentences, cooperated, or simply were not caught at all. The long sentences for minorities in drug cases also caused some judges to complain that middle and upperclass (and usual white) defendants in fraud and other white collar cases that involved thousands (or millions) of dollars in losses were getting slaps on the wrist in comparison.⁸¹

c. The Impact Prosecutorial and Law Enforcement Policy Changes.

Changes in prosecutorial policies in this period also impacted the judiciary's satisfaction with sentencing outcomes. The "War on Drugs" begun by the Reagan Administration, and continued under President George H.W. Bush led federal prosecutors to bring more drug cases in federal court to take advantage of the new penalties.⁸² Attorney General Dick Thornburgh also tried to force local U.S. Attorneys to institute uniform and tougher plea bargaining policies. Under the "Thornburgh Memo," federal prosecutors across

⁸⁰See e.g. R.I.G.L. § 21-28-4.01(C); N.C.G.S. 90-9(d)(1).

⁸¹*Supra* note ____.

⁸²Many of these cases originated with local police departments who brought their cases to federal authorities as an end around the congested and more lenient state courts. Law enforcement also preferred the federal system because cooperation was the only escape mechanism from a lengthy sentence. See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 812, 814-19 (2004).

the country were told to charge and obtain a conviction and sentence on the most serious conduct in an indictment that could be readily proven.⁸³ “Most serious” was defined as the conduct and count that brought the longest prison term. Although not fully implemented by every office, the Thornburgh memo did generally result in harsher and less flexible plea policies in most jurisdictions. Moreover, in some districts, the local U.S. Attorneys decided to prosecute virtually every qualifying case in federal court, ignoring judicial considerations about federalism and court resources.⁸⁴ Particularly in urban districts, the increase in federal drug prosecutions led a more burdensome federal docket,⁸⁵ making it more difficult for civil litigants to get court hearings and trials scheduled in a timely fashion. Particularly for judges who felt federal court should be reserved for weighty matters of national concern, the increase in minor drug cases was deeply resented.⁸⁶

Another byproduct of quantity-based mandatory minimums was their distorting impact on police practices during the investigation stage. After the 1986 Act’s mandatory minimums became understood by law enforcement, some state and federal agents began to refrain from arresting small-time dealers until their undercover officers or informants made enough buys to cross a mandatory minimum threshold.⁸⁷ While law

⁸³ The Thornburgh Memo required prosecutors to “charge the most serious, readily provable offense.” Memorandum from Attorney General Richard Thornburgh, to United States Federal Prosecutors, entitled *Plea Bargaining Under the Sentencing Reform Act* (March 13, 1989) (commonly known as “the Thornburgh Memo”), reprinted in Thomas Hutichison & David Yellen, FEDERAL SENTENCING LAW AND PRACTICE 622, supp. app. 12 (1989).

⁸⁴For example, in the District of Columbia from 1988 to 1993, the United States Attorney required his prosecutors to bring virtually every drug case which met the minimum weight requirement for a mandatory minimum to be charged in federal court. See “Stop Complaining Stephens tells Judges,” Wash. Post, June 8, 1991 at B1.

⁸⁵See e.g., Amy Dockser Marcus & Arthur S. Hayes, *State Courts in ‘89 Got 100 Million New Cases as Tort Suits Rose 7.6%*, WALL ST. J., May 7, 1991, at B4, available at 1991 WL-WSJ 609342 (Reporting drug related prosecutions were “overwhelming the federal court system”); Sara Sun Beale, *Get Drug Cases Out of the Federal Courts*, WALL ST. J., Feb. 8, 1990, at A16, available at 1990 WL-WSJ 589385 (Reporting drug cases constitute approximately forty percent of the federal docket and accounting “for 44% of criminal trials and roughly 50% of criminal appeals” and noting that prosecutions in the federal courts have risen by 229% and were accelerating) . . .

⁸⁶ These complaints came from every level of the judiciary, not just district court judges. See, e.g., William H. Rehnquist, *Congress is Crippling Federal Courts*, ST. LOUIS POST - DISPATCH, Feb. 19, 1992, at 3B, available at 1992 WL 3514530 (claiming the 33% rise in criminal appeals in the first year of the sentencing guidelines is symptomatic of an overburdened federal court system). See also Robert M. Parker, *Foreword*, 26 Tex. Tech L. Rev. 265, 268 (1995) (“The continuing creation of federal crimes . . . has caused the role of the federal courts to become largely duplicative of the role traditionally played by state courts). Robert M. Parker is a judge on the United States Circuit Court of Appeals for the Fifth Circuit.

⁸⁷One Republican appointee talked about cases in which it was “the agent who tried to get the defendant to convert powder to crack or how they can keep going on with the buys.” Atlantic Judge 2

enforcement officials justified such these practices on the grounds that a harsh mandatory sentence created more pressure on low-level dealer to turn against their supervisors and suppliers, once charged, judges were deprived of any discretion to lower to sentence if these defendant were unable or unwilling to cooperate.⁸⁸

In addition, because not all law enforcement agencies engaged in this practice, significant disparity was reintroduced into the system which judges could not alter or take into consideration into sentencing under the Guidelines and mandatory minimum regime.⁸⁹

d. The Makeup of the Judiciary in Period I.

At the outset of the first period, it is fair to say that a majority of sitting judges were unhappy, at least to some degree, with the dramatic changes in the sentencing practice wrought by the mandatory minimums and the Guidelines. Without question, the 1986 Act and the Guidelines had upset the traditional model of sentencing that federal judges had experienced as lawyers and came to the bench expecting to wield. However, in sifting through judicial reactions in this period, it is also worth looking at the composition of the bench at this time to tease out any distinctions that may have based on judicial background.

In 1986, the federal bench was a mix of appointees of Presidents Johnson, Nixon, Ford, Carter, and Reagan. When the SRA was passed in 1984, judges appointed by Nixon, Ford, and Carter predominated. However, eighty-five new federal judgeships were added in 1984, which immediately gave President Reagan the opportunity to make a significant impact on composition the federal bench at the time the Guidelines and 1986 penalties took effect.⁹⁰

Anonymous Interview (Oct. 15, 2002). Some defendants assert that informants or undercover cops ask for much larger amounts than the defendants normally dealt in order to meet a mandatory minimum threshold. See e.g. *United States v. Watkins*, 179 F.3d 489, 503 (6th Cir. 1999). Others assert that they were specifically asked for crack rather than powder so that the 100:1 ratio would apply. See *United States v. Shepherd*, 102 F.3d 558, 565-67 (D.C. Cir. 1996).

⁸⁸There were a few decisions that endorsed the concept of sentencing entrapment when it was clear that law enforcement agents had induced a defendant to traffic in a larger quantity or a substance in which they usually did not engage. *United States v. Staufer*, 38 F.3d 1103, 1106 (9th Cir. 1994). However, this narrow doctrine was of no avail in the typical aggregation, undercover case where the defendant was regularly transacting in small quantities, which when aggregated triggered a higher sentencing. To date, only the Ninth circuit has approved it usage with any regularity. Jess D. Mekeel, *Misnamed, Misapplied and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conceptions of the Doctrine*, 14 Wm. & Mary Bill Rts. J. 1583, 1593-1602 (2006).

⁸⁹See generally Ian Weinstein, *SYMPOSIUM: The Historical Roots of Regional Sentencing Variation* 11 Roger Williams U. L. Rev. 495 (2006).

⁹⁰See History of Federal Judgeships, Authorized Judgeships 7 at http://www.uscourts.gov/history/all_authorized_judgeships.pdf.

To the extent that some distinctions can be made by the appointing President, many of the Johnson, Nixon, and Carter appointees seemed to focus more on the shift of judicial power to the Justice Department and the Sentencing Commission. Many of these judges had cut their teeth as private and public lawyers in the civil rights era and during the Warren Court revolution in criminal procedure.⁹¹ These judges were invested in the concept of the federal judiciary as an independent and empowered branch of government, and as participants in the tumultuous legal battles of the '60s and '70s, they were also less reticent about taking public stands or in ruling against the government. Moreover, more of these judges came from decidedly more liberal political backgrounds than the new Reagan appointees. These older judges felt betrayed by the sentencing reform movement, which had promised to ameliorate racial disparities, not aggravate them. Finally, these judges also came of age during the height of the rehabilitative approach to criminal justice. Because the Guidelines were birthed just as the nation turned to a much more punitive approach to crime, the Guidelines became a target for these judges who were now required to impose sentences far more severe than they had ever chosen on their own.⁹²

Many of the new Reagan judges joined the opposition to the new sentencing regime. Given the conservative background of these judges, their dissatisfaction with the Guidelines and mandatory minimums cannot be attributed to a liberal or rehabilitative mind set. Some of the Reagan judges might have been reacting to the dramatic changes in their work environment and loss of power. However, another set of more substantive and interesting features of their backgrounds were probably more responsible for their views on the new sentencing regime.

First, some Reagan judges took the loss of sentencing discretion as an expression of a lack of faith in them and their judgment. Many Reagan appointees came from powerful corporate law firms and a few had served as the United States Attorneys for their district. Powerful and well-respected in their legal communities, they were used to having their judgment trusted. Moreover, many of them gave up highly remunerative careers for the prestige and perceived independence and power of a federal judgeship. Now, they were being instructed how to sentence in minute detail by Congress and the Sentencing Commission. The fact that these instructions were coming from far away Washington also irked those who had bought into the Reagan Revolution's anti-Washington rhetoric and federalism themes that had brought their President to power.

Lastly, while many of the Reagan era judges might describe themselves as tough on crime, many if not most

⁹¹For example, Judge Robert Lee Carter (S.D.N.Y.), a Nixon appointee, had previously served in a number of leadership roles within the NAACP including a stint as General Council from 1956-1968. Similarly judge Constance Baker Motley, a Carter appointee, had a twenty year career as an attorney in the NAACP legal defense and education fund before being elevated to the bench.

⁹²See e.g. Judge Harry T. Edwards noting that the guidelines "often produce harsh results that are patently unfair because they fail to take account of individual circumstances that might mitigate in favor of a properly "tailored" sentence" *United States v. Harrington*, 947 F.2d 963 (DC Cir. 1991).

were not longtime criminal practitioners or deeply ideological about crime and punishment before ascending the bench. Particularly for those who had been corporate lawyers, their self-concept focused on their ability to be problem-solvers, honed by years of brokering deals and resolving business disputes. Their pragmatic sensibilities were offended when the Guidelines purposefully ignored the offender's underlying problem. The best examples come from narcotics cases in which the defendant had been an otherwise functioning citizen, but who for a time had turned to drug dealing to support an underlying addiction. Under the Guidelines, even when these defendants had been able to address and overcome their addiction while on bond, they still had to receive the same sentence as for the dealer motivated by greed. To these judges, who lacked the drug warrior mentality that dominated at Main Justice, these outcomes were a foolish waste of both financial and human resources.

2. Period II: Clinton, Koon, & the "Safety-Valve"- 1992 - 2002.

a. The Judiciary Adjusts.

The second period, which largely consisted of the Clinton years, saw a significant muting of judicial dissatisfaction with the Guidelines. This shift was affected by factors both within and without the judiciary and included changes in the composition of the bench, more flexible prosecution policies, as well as Guidelines amendments and legislation that partially ameliorated several of the most egregious sentencing issues for judges.

Changes in the composition of bench clearly lessened the severity of judicial dissatisfaction with sentencing law. In the early 1990s, many of the staunchest Johnson and Carter liberals retired or took senior status, and with new appointments, Reagan and Bush I judges came to constitute a majority of the bench.⁹³ These judges tended to be more crime control in orientation. Thus, while not necessarily always happy with the limits on their discretion and still distressed by particular sentences, a smaller percentage of cases tended to deeply conflict with their personal sense of justice.

Interestingly, President Clinton's appointees largely continued the trend towards grudging acceptance of the Guidelines regime. While a few of Clinton's first term nominees had liberal backgrounds and were perceived by prosecutors to be pro-defense and lenient sentencers,⁹⁴ even in his first term, his nominees tended to be

⁹³By 1993, 67% of Johnson's appointees, and 29% of Carter's had retired, leaving over 70% of the bench in Republican control. Federal Judges Biographical Database, Federal Judicial Center, <http://www.fjc.gov/public/home.nsf/hisj>; See DEBORAH J. BARROW, GARY ZUK & GERALD S. GRYSKI, THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE 16, FIG 2.2 (University of Michigan Press 1996).

⁹⁴ Judge Nancy Gertner (D. Mass.) is a good example. A prolific writer and critic of the Guidelines, she has noted that: "While other criminal justice systems – other states, and other countries – ask the eminently reasonable question, what sentences work to effect rehabilitation or deterrence, much less what

more centrist than those of Carter and Johnson. This trend accelerated after the Republican Party retook the Senate majority in 1994 and the judicial confirmation process became a battleground for the parties. Ever the pragmatist, President Clinton chose nominees who hewed close to the center (while the Senate found ways to stall some of those they suspected of harboring “liberal” bias).⁹⁵ In addition, because many of the Clinton appointees who made it past the Republican gauntlet had served as Assistant U.S. Attorneys,⁹⁶ they were already largely comfortable working with concept, if not the execution of mandatory Guidelines. Finally, because more and more of the new judges did not know a federal sentencing world before the Guidelines, they had less reason to question the Guidelines system or its outcomes.⁹⁷

As the Guideline regime took shape, some judges also came to appreciate its attributes. Given that many judges tend to focus most sharply on events in their district, the success of the Guidelines in reducing intra-district disparity was a clear improvement.⁹⁸ Some judges also admitted (mostly privately) that the Guidelines made their jobs easier. In the past, some judges experienced sentencing as the most difficult part of their job. By reducing sentencing decisions to largely a numerical calculus, sentencings became less of an emotional burden on judges. The routinized process could be used to depersonalize the interaction between sentencer and the defendant, and the Guidelines explicitly dispersed responsibility for the sentence

sentences have an impact on the crime rate, the federal system simply stacked the penalties.” Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, Human Rights Magazine (Spring 2002), available at <http://www.abanet.org/irr/hr/spring02/gertner.html>.

⁹⁵For example, between 1996 and 2000, Republicans denied Senate Judiciary Committee hearings to twenty appeals-court nominees and forty-five district court nominees. Other tactics employed included anonymous holds (used in 1999 to block nominee Richard Paez from the 9th Circuit Court of Appeals who was not confirmed until four years after his nomination), and the “blue slip system.” Other nominees that who were not confirmed included now Dean of Harvard Law School, Elena Kagan, and a former Rehnquist clerk, Allen R. Snyder. Herman Schwartz, *Nuclear Whiner*, The American Prospect Online, March 24, 2005. <http://www.prospect.org/web/printfriendly-view.www?id=9384>

⁹⁶Judges such as Patty Saris, Shira Schleidlin, Harold Baer, George Daniels, Nancy Friedman Atlas, Deborah Batts, and Tena Campbell are all examples of Clinton appointees with prosecutorial experience. Federal Judges Biographical Database, Federal Judicial Center, available at <http://www.fjc.gov/public/home.nsf/hisj>

⁹⁷ As of July 2003, 704 federal judges have been commissioned since the end of 1987. *History of the Federal Judiciary*, Website for the Federal Judiciary, Washington D.C., available at <http://www.fjc.gov/newweb/jnetweb.nsf/hisj> (last visited July 18, 2003) (search for federal judges commissioned after January 1, 1988).

⁹⁸Prior to the Guidelines the expected difference in sentences between judges was 16-18%. This improved following the Guidelines to 8-13% between 1988-1993. James M. Anderson, Jeffery R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303 (1999).

away from the judge and onto the Commission, Congress, and the probation officer who prepared the Presentence Investigation Report (“PSI” or “PSR”). Particularly in the charged atmosphere in the courtroom when many friends and family members are present, some judges welcomed the option to fasten the onus for the sentence on other institutions.

b. Realism at Justice and the “Reno Bluesheet.”

Important changes also occurred outside the judiciary. In the streets, the crack epidemic began to somewhat subside, reducing the number of extremely long sentences for African-American inner-city defendants whose reach rarely extended beyond their immediate neighborhood.⁹⁹ The reduction in the inner city crime rate also made the workload more manageable in some districts (although the border states continued to experience a crushing criminal docket).¹⁰⁰ While there were new drug scares, such as ecstasy and methamphetamine, these drugs did not immediately overwhelm communities the way that crack had, although meth did become a larger problem in certain part of the Midwest towards the end of this period.¹⁰¹ However, because those involved in these drugs tended to be whites, these prosecutions as well as moderate increases in penalties for meth, did not further aggravate the racial politics of the drug war.¹⁰²

⁹⁹See Cheryl Wetzstein, *Crack Cocaine Epidemic Subsides*, Washington Times, June 26, 1998 at A6; Tony Allen-Mills, *New York Crime Plunge Wins Over Skeptics*, Sunday Times, April 6, 1997 at 19; Gordon Hickey, *Crack Fever is Broken as Cocaine Use Wanes, Heroin Abuse Increases*, Richmond Times Dispatch, October 12, 1999 at A1.

¹⁰⁰Indictments in the courts on the southwest border increased 125% between 1994 and 1999. Press Release, Senators Feinstein and Hutchison Introduce Bill to Increase Federal Judges on U.S./Mexico Border: Five New and Three Temporary Federal Judges to Handle California’s Growing Border Caseload (Jan. 23, 2001).

¹⁰¹According to government statistics, use of the highly addictive substance known as methamphetamine – or meth – has doubled since the 1990s. National Public Radio, *Talk of the Nation* (May 4, 2005).

¹⁰²In 2003, 92.4% of those convicted for offenses involving meth were white. Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 2003, (October 2005) at www.whitehousedrugpolicy.gov/drugfact/methamphetamine/ Pursuant to Congressional directives, the Commission amended the Guidelines in several ways to increase sentences for methamphetamine by halving the quantities required to trigger each base offense level in the drug quantity table. See Amendment 555 (1997). The Commission also eliminated the lower Guideline drug equivalencies for a less potent form of the drug (l-methamphetamine), see Amendment 517 (1995), and added a two-level enhancement for importation of methamphetamine or its precursor chemicals and another two-level enhancement if the offense involved the discharge, unlawful transportation, storage, or disposal of hazardous or toxic chemicals. See Amendment 555 (1997). Lastly, the Commission raised the quantity table for certain precursor chemicals needed to manufacture meth. See Amendment 541 (1997), U.S. Sentencing Guidelines Manual, app. C (2003).

Most importantly, the appointment of Janet Reno as Attorney General led to a roll back the strict charging and plea policies of the previous administrations. Reno repealed the “Thornburgh Memo,” and instead of a presumption to pursue the most serious charge, the “Reno Bluesheet” stated that plea agreements should be based on “an individualized assessment of the extent to which particular charges fit the specific circumstances of the cases.”¹⁰³ President Clinton also replaced many of the Bush I and Reagan “drug warrior” U.S. Attorneys with career prosecutors who valued prosecutorial discretion and had little use for “zero tolerance” prosecution policies.¹⁰⁴ These federal prosecutors were more selective in the criminal cases they brought into federal court, and now sanctioned by the Reno Bluesheet, they could cooperate with, or at least acquiesce to, the efforts of judges and defense attorneys to lessen the most extreme sentencing outcomes.¹⁰⁵

¹⁰³Memorandum from Attorney General Janet Reno, to United States Attorney’s and Litigating Divisions, entitled *Principles of Federal Prosecution* (Oct. 12, 1993) (copy on file with author) (more commonly known as the “Reno Blue Sheet”).

¹⁰⁴ See Thomas Mengler, *The Sad Refrain of Tough on Crime; Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 Kan. L. Rev. 503, 533 (1995) (noting that the Clinton Administration’s prosecution policies “have been very different from those of the Reagan and Bush Administrations,” and “by all accounts, less local street crimes have been prosecuted . . . and the U.S. Attorneys’ Offices are currently focusing on fewer, more complex cases.”). The United States Attorney’s Office in Washington D.C. presented a good example of this phenomenon. Under President H.W. Bush, the office was run by Jay Stephens, who came from the Reagan White House Counsel’s Office and was perceived as a “drug warrior.” See http://www.findarticles.com/p/articles/mi_m1077/is_n11_v49/ai_1583729 (noting the “widespread perception among the predominately Black citizenry that the U.S. Attorney’s Office [in Washington D.C.] “used its judicial powers not only to prosecute Blacks but persecute them..”) Stephens was succeeded by Eric Holder, at the time, a well respected African-American Superior Court judge, who steered the office in a more moderate direction. See <http://www.answers.com/topic/eric-h-holder-jr> (Noting that Holder's sentiments as a judge--both sympathetic and pragmatic--helped endear him to the District of Columbia's political leaders). Another example is Zachary Carter, who as a Clinton appointed United States Attorney wrote that he believed the disparity between crack and powder sentencing was too high, in contrast to the positions taken on this issue by the Reagan and Bush Justice Departments. See Zachary Carter, *Status, Progress, and Integration of Lawyers of Color in the Legal Profession*, 19 W. New. Eng. L. Rev. 114, 115 (1997); see also Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 Stan. L. Rev. 137 (143 (2005) (stating that different U.S. Attorneys have different approaches to charging and some are more heavily influenced by Main Justice policies while others have resisted oversight); see also Maha Blog, <http://mahablog.com/> (discussing how Janet Reno asked all 93 United States Attorneys to resign soon after her appointment in what was described as a “routine” transition to a new administration).

¹⁰⁵See Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1076 (2001) (attributing leveling and slight decline in drug sentences to efforts by all players in the federal criminal justice system to ameliorate harsh sentences generated by strict application of Guidelines and mandatory minimums). Prosecutors could accede to fact and charge bargaining, whereby the parties and the judge allow the defendant to plead and be sentenced for lesser conduct, often by understating the drug quantities at issue. Sometimes substantial

c. Changes on the Margin by Congress and the Commission.

Congress and the Sentencing Commission also tried to be responsive to some the sentencing issues that the judges had raised. The single most important piece of legislation was the 1994 bill that included a provision called the “safety-valve.”¹⁰⁶ The safety-valve allows judges to sentence below an otherwise applicable mandatory minimum statute if the offender meets certain conditions intended to establish that they were a low-level, non-violent offender.¹⁰⁷ While commentators and judges have criticized the safety-valve for being too narrowly drafted and thereby excluding some worthy defendants,¹⁰⁸ it still was the first piece of legislation since 1986 in which Congress authorized reduced sentences for a significant cohort of cases and that allowed judges to circumvent a mandatory minimum without the government’s assent.¹⁰⁹ The

assistance motions were filed by prosecutors based upon minimal cooperation that would not have past muster in other districts. Some believe this was a rampant practice in the Eastern District of Pennsylvania which at times had a substantial assistance departures of 38.8%. United States Sentencing Commission, Office of Policy Analysis, 2003 Datafile, Table 8, *available at* <http://www.ussc.gov/JUDPACK/JP2003.htm>. A few judges expressed anger over the subversion of the law, with one anonymous judge being quoted as saying, “‘The Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result. All under the banner of truth in sentencing!’” Stith & Cabranes, at 90 (quoting an anonymous federal judge).

¹⁰⁶See The Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322 §80001, 108 Stat. 1796, 1985(1994); codified at 18 U.S.C. §3553(f) (1994 & Supp. II 1996) and U.S.S.G. §5C1.2.

¹⁰⁷18 U.S.C. §3553(f) requires that: “(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act, 21 U.S.C. §848; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.”

¹⁰⁸See Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and The Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-99 (2000).

¹⁰⁹Mary Price, *Mandatory Minimums in the Federal System: Turning a Blind Eye to Justice*, Human Rights (Winter 2004). The original bill would have made the “safety-valve” retroactive, but political fears about the potential for a wholesale release of inmates was apparently deemed too politically dangerous. History of Mandatory Minimums, FAMM, *available at* http://www.famm.org/si_history_of_mandatory.htm. Later attempts to make the provision retroactive such as the Safety Valve Fairness Acts of 2001 (H.R. 765)

Commission also took steps to ensure that the safety-valve actually benefitted the defendants who qualified by providing for a two point Guideline reduction for safety-valve defendants.¹¹⁰ For these reasons, the safety-valve was welcomed by the judiciary, and despite its limitations, eventually came to be used in almost 22% of drug cases by 2001.¹¹¹

The Sentencing Commission also amended the Guidelines in a variety of ways to allow lower sentences in sympathetic situations. An example of the latter was an amendment that provided for an award for “super acceptance of responsibility.” The original Guidelines had provided for a two-level reduction for acceptance of responsibility, which generally applied to defendants who pled guilty.¹¹² In 1992, the Commission amended this provisions to allow judges to award an additional third point reduction to certain defendants who pled early and fully admitted their own conduct.¹¹³ While perhaps not so intended, this additional point

and 2003 (S. 390) were never brought to a vote.

¹¹⁰See U.S.S.G. §5C.1 (providing two point offense level reduction to safety-valve eligible with an offense level of 26 or higher. At Criminal History Category I, Level 26 has a range of 61-78 months, essentially where the five year mandatory minimums kicked in for these offenders). As explained earlier, because the Guidelines offense levels for drug crimes increased with the quantity of drugs, even a low-level drug offender’s Guideline range could run significantly above the otherwise applicable mandatory minimum. In such cases, even if eligible, the safety valve would have no actual effect on the sentence because even if the mandatory didn’t apply, the Guideline range still did. The two point reduction to the Guideline range ensured that at least some of these safety-valve defendants would actually be sentenced below the five and ten year statutory mandatory minimums.

¹¹¹Drug Offenders Receiving Safety Valve and Mandatory Minimums For Each Drug Type” Table 44 2001 U.S. Sentencing Commission, 2001 Data File, USSCFY01 (Access at <http://www.ussc.gov/ANNRPT/2001/table44.pdf>)

¹¹²Defendants who proceeded to trial were not automatically precluded from obtaining this reduction but it was rarely granted in those circumstances, and never to defendants whose testimony was implicitly rejected by the jury’s verdict. See e.g. *United States v. Gonzalez*, 897 F.2d 1018 (9th Cir. 1990) (provision extended reduction for defendant’s who went to trial); *United States v. White*, 869 F.2d 822 (5th Cir. 1989) cert denied 490 U.S. 1112. (provision does not violate Sixth Amendment right to jury trial even if sole purpose of provision is to encourage guilty pleas); *United States v. Block*, 205 F.3d 1348 (8th Cir. 2000) (court’s denial of a acceptance of responsibility departure was not punishment for defendant’s exercise of his constitutional right to trial).

¹¹³Third point eligibility was restricted to defendants with a base offense level of 16 or greater and who "clearly demonstrat[ed] acceptance of responsibility for his offense," and timely: (a) provides "complete information to the government concerning his own involvement in the offense," and (b) notifies "authorities of his intention to enter a plea of guilty. . . ." U.S.S.G. app. C, amend. 459 (2000) (amended November 1, 1992).

quickly came to be awarded to the majority of eligible defendants who pled guilty.¹¹⁴

Another responsive amendment involved the calculations of drug offense levels in conspiracy cases, which in some cases had resulted in clearly disproportionate sentences for minor conspirators. Initially, following traditional conspiracy doctrine, some courts had held defendants who were aware of the full scope of a conspiracy when they joined, were responsible under the Guidelines for all its activities beforehand and hence had would be sentenced on quantities far in excess what the deals they had personally participated in.¹¹⁵ To address this discrete issue, the Commission limited “relevant conduct,” to only those amounts transacted after the defendant joined the operation.¹¹⁶

For specific drugs, the 1990s also saw the Sentencing Commission depart from its lock step use of the statutory minimums as the Guideline floor for drug quantity offense levels. For example, the Commission changed the offense level calculation for live marijuana plants. Prior to the amendment, each live plant was equated to a kilogram of marijuana. Not only did this valuation have no basis in science,¹¹⁷ but small-time growers with just a few hundred plants were receiving sentences far above the mandatory minimum.¹¹⁸ A similar change was made for LSD defendants in 1993. A Guideline amendment required that the offense

¹¹⁴“Super acceptance of responsibility,” as it came to be called, was awarded to just 50.8% of drug offenders in 1993, U.S. Sentencing Commission, 1993 Annual Report 90 tbl.29 (1994), but grew to 80.2% by 1999. U.S. Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics 76 tbl.41 (2001).

¹¹⁵ See e.g., *United States v. Phillips*, 37 F.3d 1210, 1214-15 (7th Cir. 1994) (holding defendant responsible for amounts distributed by the conspiracy two months before he joined it because of his role in collecting debts for cocaine sold before he joined, and his “extensive dealings with two individuals” who joined the conspiracy before him); *United States v. Mojica*, 984 F.2d 1426, 1446 (7th Cir. 1993) (attributing earlier quantities to defendant who joined in the middle of conspiracy, but who was an experienced dealer who had associated with the conspirators for some time before joining conspiracy).

¹¹⁶UNITED STATES SENTENCING GUIDELINES MANUAL App. C, Amend. 503 (1998) (Effective Nov. 1, 1994).

¹¹⁷The average weight of a mature female domestically grown cannabis plant is just under 450 grams. Drug Policy Alliance at www.drugpolicy.org/marijuana.

¹¹⁸The 1986 Act requires a five year mandatory for 100 live plants and ten years for 1000 plants. 2002 U.S.S.G. § 2D1.1(c) amend. 516 (1995) (amending the manner in which marijuana plants are counted). See *United States v. Evans*, 12 F.3d 215 (6th Cir. 1993) (upholding conviction and 78 month sentence of a small time marijuana grower who grew 149 plants in his basement and 179 plants in a side building near his residence); see also *United States v. Sizemore*, 991 F.2d 797 (6th Cir. 1993) (78 months for an estimated three hundred plants).

level be calculated by counting doses instead of weight of the paper impregnated with the drugs.¹¹⁹

These two amendments brought many marijuana farmers and small time LSD dealers' Guideline ranges down and because many of these defendants were also safety-valve eligible, they actually could be sentenced below the mandatory minimum.¹²⁰ These changes pleased many judges because marijuana farmers and LSD dealers tended to be non-violent and often seemingly more amendable to rehabilitation and deterrence than other stereotyped crack dealers of the inner city.¹²¹

Another Guideline amendment in this period addressed an issue at the opposite end of the spectrum; virtual or actual life sentences based on drug quantity alone. As discussed in the previous section, under the Guideline's original drug table, a defendant's base offense level could reach Level 40 and 42, almost the top rung of the Guideline offense level axis based just on drug quantity. At Level 42, the minimum sentence was thirty years. With just a one point enhancement (to Level 43), the top of the table would be reached, where every defendant including a first-time offender is subject to a life sentence without parole. This meant that some participants in very large and/or longstanding drug conspiracies received life sentences without any attendant violence or a significant leadership role.¹²²

In 1994, the Commission amended the drug quantity table and eliminated the top two levels.¹²³ This change precluded imposition of a life sentence (or a sentence in the 292-365 month range) for a first-time offender based solely on drug quantity. Thereafter, without additional enhancements, a first time drug offender's sentence could not exceed the 235-293 month range. While the statistical impact of this amendment on the

¹¹⁹2002 U.S.S.G. § 2D1.1(c), amend. 488 (1993) (amending the manner in which LSD is weighed for sentencing purposes) (Effective November 1, 1993).

¹²⁰See e.g. *United States v. Coffee*, 124 F.3d 200 (Table); 1997 WL 468335 (6th Cir.) (allowing a reduction from an initial sentence of 60 months (the statutory minimum) to 42 months under retroactive amendment and safety valve.).

¹²¹See generally Stern, *supra* at ___ (discussing whether penalties for drugs used by whites from higher income and less urban areas are treated less harshly than other narcotics).

¹²²One or two points could be added, for example for obstruction of justice if a defendant testified at trial or if a gun or ammunition was found near the drugs, regardless of whether the weapon was ever carried, used, or displayed. If other adjustments raise a defendant's offense level higher than 43, the Guidelines mandate that the defendant be treated as if his offense level were 43. U.S.S.G. §2D1.1(a)(1) (2003).

¹²³UNITED STATES SENTENCING GUIDELINES MANUAL App. C, Amend. 505 (1998) (Effective Nov. 1, 1994) (amending U.S.S.G. § 2D.1.1 Table).

average sentence was apparently negligible,¹²⁴ many judges felt this amendment made a lot of sense and were relieved to not have to contemplate imposing such a sentence on a first time offender. Others still felt that such lengthy sentences for first-time offenders were still too high. Nevertheless, the amendments discussed in this section conveyed to judges that the Sentencing Commission was somewhat willing and able to address some of their concerns.¹²⁵

d. Some Help on Downward Departures from the Supreme Court.

While between *Mistretta* and *Booker*, the Supreme Court rejected numerous attacks on the Guidelines and mandatory minimum regime,¹²⁶ the second period did produce two decisions that heartened judges. The

¹²⁴Bowman and Heise contend that the number of cases affected by the amendment was unlikely to have exceeded a few hundred of the nearly 17,000 drug defendants sentenced in 1994. See Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1076 (2001). As support, they note that in 1995, the same year that the statutory safety valve went into effect, “the average imposed narcotics sentences either increased (according to the AO) or decreased by an average of only one month (according to the Sentencing Commission).” *Id.*

¹²⁵Another limited example was Amendment 484 which removed the “non-consumable” portion of a “mixture or substance” from the drug quantity calculation. Prior to this amendment, the waste product from the manufacture of certain drugs, particularly methamphetamine “waste water” which contained traces of the drug, were counted as part of the “mixture or substance” and assessed as additional drug quantity. Because the meth manufacturing process is difficult and messy, some meth defendants were assessed huge sentence increases based upon these byproducts, not the actual quantity of the drug produced. See *United States v. Sprague*, 135 F.3d 1301, 1306 n.4 (9th Cir. 1998) (stating “we held that a defendant should be given the mandatory minimum sentence under Section 841 based on the entire weight of a liquid solution containing methamphetamine and by-products of the production process”); *United States v. Richards*, 87 F.3d 1152, 1158 (10th Cir. 1996) (en banc) (holding that unusable and unmarketable portion of a methamphetamine mixture seized in the midst of manufacturing should be included for sentencing purposes under section 841(b)); *United States v. Innis*, 7 F.3d 840, 845, 847 (9th Cir. 1993) (holding that entire weight of unfinished methamphetamine mixture should be included even though it was poisonous if ingested). *But see United States v. Stewart*, 361 F.3d 373, 382 (7th Cir. 2004) (holding that only the amount of pure drug contained in an 825-gram solution generated during a thwarted attempt to produce methamphetamine or the amount of usable drug likely to be produced after the solution was fully processed could be used in sentencing under the statute).

¹²⁶The Supreme Court insulated the federal mandatory minimums from an Eighth Amendment challenge with its decision in *Harmelin v. Michigan*, 501 U.S. 957(1991) (holding that a state sentence of life imprisonment without parole for a first-time offender who possessed one-and-one-half pounds of cocaine was not cruel and unusual punishment); see also *Neal v. United States*, 516 U.S. 284 (1996) (upholding the “mixture or substance” language to apply to carrier medium in LSD cases). With regard to decisions concerning challenges to the Guidelines; *Stinson v. United States*, 508 U.S. 36, 47 (1992) (holding that Sentencing Commission’s commentary to the Guidelines is binding on the courts); *Edwards v. United States*, 523 U.S. 511, 513-14 (1998) (upholding a sentence based on the offense level for crack, even though the jury

more important symbolic decision came in *Koon v. United States*, a 1996 opinion that helped to maintain a modicum of discretion for judges in the hard fought arena of judicial downward departures. As noted earlier, the Guideline drafters contemplated that would be permitted to sentence below the range, if they could identify factors or a combination of unusual factors that were either encouraged or not specifically forbidden from consideration. In fact, the original Commission anticipated judicial departure in the area of 20% of sentencings.¹²⁷

Although judicial downward departures crept up only to 13.6% of all federal sentences in 1998,¹²⁸ prosecutors appealed some of these, especially where it appeared that district judges were trying to create general loopholes for more lenient sentences.¹²⁹ While much of this litigation involved substantive departure issues, the Ninth Circuit accepted the government's procedural claim that judicial departures should be subject to de novo review by the appellate courts.¹³⁰ Under this standard, conservative courts of appeals had reversed virtually all judicial downward departures.

In *Koon*, however, the Supreme Court held that the standard of appellate review for departures should be the more lenient "abuse of discretion" standard. While the *Koon* opinion was criticized on a variety of

found a conspiracy to sell powder cocaine or crack, thereby endorsing the relevant conduct provisions of the Guidelines); *Wade v. United States*, 504 U.S. 181, 185 (1992) (stating that the Government has "a power, not a duty, to file a motion when a defendant has substantially assisted"); *Melendez v. United States*, 518 U.S. 120, 129 (1996) (holding that a government motion under U.S.S.G. § 5K1.1 is not sufficient to make a defendant eligible for a departure below a statutory minimum mandatory sentence absent a separate government motion under 18 U.S.C. § 3553(e) (1994)). Lower court cases of note included the closely watched Tenth Circuit panel decision that held the testimony of a co-conspirator must be suppressed when the witness obtained a benefit, usually a promise of leniency, in exchange for that testimony. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). *en banc*, but the full circuit vacated that decision and upheld the conviction. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (*en banc*). See, e.g., David W. Gleicher, 'Singleton' Goes Down for the Count, CHI. DAILY L. BULL., Jan. 20, 1999, at 5 (comparing a promise of leniency in exchange for testimony against a co-defendant, to a promise to "get your mother a job so she can pay her mortgage"); see also *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991) (holding that § 1B1.3 is not an unconstitutional bill of attainder); *United States v. Ebbole*, 917 F.2d 1495 (7th Cir. 1990) (holding that the relevant conduct section does not offend due process).

¹²⁷See S. Rep. No. 98-223, at 49 n.71 (1983).

¹²⁸U.S. Sentencing Commission, FY1998 Data File, MONFY98.

¹²⁹ See generally Karen R. Smith, *United States v. Johnson: The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 Brooklyn L. Rev. 573 (1993).

¹³⁰*United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991).

grounds by commentators,¹³¹ the decision created an analytic roadmap for downward departures and allowed room for sentencing judges to insulate their departures from reversal by making extensive factual findings.¹³² District court judges were heartened by the high court's clear vote of confidence in the departure mechanism as an integral part of the Guidelines regime and judges responded to *Koon* by increasing their departure rates, but only slightly. For example, in the year after the decision, non-substantial assistance departures increased by only 1.8%. The rate continued to rise in the next two years, but only by a little over 2%. However, these increases were not uniform. Despite the intention of the Court to liberalize departure review, some Courts of Appeals continued to take a restrictive approach, even under *Koon*.¹³³ However, in circuits more amendable to the departure power, *Koon*'s more permissive departure scheme did lessen the absolute number of cases in which district judges felt powerless to alter a Guideline sentence they perceived as unfair.¹³⁴

The second 1996 decision that heartened judges was *Bailey v. United States*.¹³⁵ Here, the Court held that a conviction under 18 U.S.C. § 924(c) for "use" of a firearm during and in relation to a drug or violent crime required that the defendant "actively employed" the weapon in relation to the offense. Prior to *Bailey*, defendants who had legally registered firearms in their home were receiving a mandatory and consecutive five year sentence if illegal drugs were seized from the premises, even where no weapon had been used or even carried during the underlying drug offense. Based on the Court's plain reading of the statute, *Bailey* allowed a number of defendants to return to court and have these sentences vacated.¹³⁶

¹³¹See Douglas Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 Notre Dame L. Rev. 21 (2000); Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of *Loon v. United States**, 58 Ohio St. L.J. 1697 (1998).

¹³² *Supra Koon* at note __.

¹³³See *United States v. Hairston*, 96 F.3d 102 (4th Cir. 1996) cert. denied, (No. 96-944)(reversing a downward departure based on "extraordinary" restitution); *United States v. Weinberger*, 91 F.3d 642 (4th Cir. 1996)(reversing a downward departure based on the defendants exposure to civil forfeiture).

¹³⁴*United States v. Galante*, 111 F.3d 1029, 1036 (2d Cir. 1997) (upholding a departure based only on family circumstances).

¹³⁵517 U.S. 1234 (1996).

¹³⁶*Bailey* allowed some 924(c) defendant to have their five year mandatory statutory sentence vacated. However, in some cases, the government was able to convince the courts to to have any underlying Guideline sentence for a drug or violent crime increased by two points, moderating the final relief (to prevent double counting, the Guidelines forbade an increase for gun possession where the defendant receives a separate sentence under 924(c). *Bowman & Heise, supra* note __ at 1085.

This decision proved popular with judges in districts where gun ownership was common and with those who had experienced abusive charging decisions under this statute. While Congressionally later enacted a "Bailey-fix" and broadened the language of § 924(c) to cover anyone who "in furtherance of any [drug trafficking] crime, possesses a firearm,"¹³⁷ the willingness of the Supreme Court to finally act as a check on the longstanding partnership of Congress and the Justice Department to both the expansion of penalties and the reach of criminal statutes suggested to judges that perhaps there was hope that some balance might be restored in the federal criminal justice system.

Although the individual impact of each of these judicial, legislative, and Guidelines changes is debatable and difficult to isolate, their net impact was clear – federal sentences, after peaking in 1991 or 1992, slowly declined from 1991 to 1999. Drug sentences, which comprised about 50% of the federal criminal docket decreased by about ten percent in this period. Specifically, between 1991 and 1999, "the average federal prison sentence for a drug offender decreased from 95.7 months to 74.6 months, a drop of 22%, or nearly two years, per defendant."¹³⁸

Commentators attribute most of the decrease in drug sentences to the safety-valve and more moderate exercise of prosecutorial discretion, while other changes, such as the capping of the drug tables at Level 38 probably only affected a few hundred inmates. However, for judges, some of developments had a larger psychological impact, for it could take just one deeply troubling case, such as a life sentence for a first-time offender or the reversal of a downward departure in a sympathetic case, to sour them on the system. Thus, while lower aggregate sentences were perceived as a benefit to some subset of judges, for a large percentage, it was the partial responsiveness of the system to particular concerns that likely accounted for the increasing judicial acceptance of the Guidelines.

¹³⁷See PL 105-386 (1998). Thus, while *Bailey* still protected the gun owner whose guns were completely divorced from the crime, defendants who guns were stored near their drugs were once again liable for a five year mandatory and longer mandatory terms of seven and ten years if the firearms were brandished or discharged. See 18 U.S.C. §924(c)(1)(a). Thus, while *Bailey* may had some impact on decreasing sentences in the short term, the long term impact of the case was probably quite small except to the extent it caused prosecutors to rethink their charging policies for guns. In 1996, the percentage of drug cases involving a weapon (i.e., the defendant was either convicted of a § 924(c) count or received a Guidelines weapon enhancement declined from 17.1% to 14.5%. 1995 U.S. Comm'n Ann. Rep. 43 tbl. 10 (1996) available at <http://www.ussc.gov/ANNRPT/1995/ANNTB95.PDF>; U.S. Sentencing Comm'n Sourcebook of Federal Sentencing Statistics 54 tbl. 39 (1997) available at <http://www.ussc.gov/ANNRPT/1996>. Between 1997 -1999, the rate dropped again to 12.1% and 12.3%. 1988 Sourcebook at 74 tbl. 39; 1999 Sourcebook at 74 tbl. 39.

¹³⁸Bowman & Heise, *supra* at note ___ at 1047. (Statistics from the Administrative Office of the United State Courts, Transactional Access Clearing House (TRAC), Syracuse University at <http://trac.syr.edu/tracdea/findings/national/drugpri8199.html>.)The Sentencing Commission statistics Report a "seven-year decline in the average drug sentence from 88.2 months in 1992 to 75.2 months in 1999, a drop of 14.7%." *Id.* at 1047.

e. The Continuing Judicial Frustration with the Sentencing Regime.

Nevertheless, the grudging acceptance of Guideline sentencing by the federal judiciary in the second period tells only one half of the story. First, Congress continued to increase statutory penalties for some offenses such as methamphetamine and directed the Commission to increase sentences for a variety of offenses and offenders.¹³⁹

Second, concerted efforts by the federal judiciary and the Sentencing Commission to focus Congressional attention on major structural problems, such as mandatory minimums, failed despite the investment of substantial investment of institutional and political capital. For example, between 1991 and 1994, the GAO, the Sentencing Commission, and the Federal Judicial Center (“FJC”) released reports criticizing the impact of mandatory minimums.¹⁴⁰ The FJC report illustrated how mandatory minimums were being applied to low level offenders at great cost to the treasury, and noted that these laws were having adverse racial impacts.¹⁴¹ This report also attacked mandatory minimums for shifting too much authority from “neutral judges to adversarial prosecutors.” Moreover, in keeping with this period of greater harmony with the executive branch, a 1993 Department of Justice study even largely echoed the FJC’s conclusions about the impact of sentencing laws on low level offenders (while remaining silent on its conclusions about prosecutorial power).¹⁴²

¹³⁹For example, pursuant to Congressional directives, the Commission amended the Guidelines in several ways to increase sentences for methamphetamine by halving the quantities required to trigger each base offense level in the drug quantity table. *See* Amendment 555 (1997). The Commission also eliminated the lower Guideline drug equivalencies for a less potent form of the drug (l-methamphetamine), *see* Amendment 517 (1995), and added a two-level enhancement for importation of methamphetamine or its precursor chemicals and another two-level enhancement if the offense involved the discharge, unlawful transportation, storage, or disposal of hazardous or toxic chemicals. *See* Amendment 555 (1997). Lastly, the Commission raised the quantity table for certain precursor chemicals needed to manufacture meth. *See* Amendment 541 (1997). U.S. SENTENCING GUIDELINES MANUAL, app. C (2003). *See* Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-310, Div. B, Title XXXVI, Oct. 17, 2000, 114 Stat. 1227); Ecstasy Anti-Proliferation Act of 2000 (Pub. L. 106-310, Div. B, Title XXXVI, Subtitle C (§§ 3661 to 3665), Oct. 17, 2000, 114 Stat. 1241).

¹⁴⁰U.S. General Accounting Office, *Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them?* (November 1993); U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); Barbara S. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms* (FJC 1992).

¹⁴¹*See also* Tonya Weathersbee, *Drug Trade 101: Isolation Breeds Illegal Businesses*, *The Times-Union*, Oct. 30, 2006 (noting that most inner city drug dealers do not become kingpins, citing a study that found the average mid-level dealer made around \$12,000 a year and street dealers as little as \$2,500.).

¹⁴²U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, 3 (December 1993) Executive Summary available at

In 1995, the Sentencing Commission tackled the crack/powder disparity head on. Its 1995 Special Report to Congress: Cocaine and Federal Sentencing Policy made the case that the crack/powder disparity had no firm basis in science or policy¹⁴³ and disproportionately impacted African-Americans.¹⁴⁴ The Commission boldly recommended that Congress amend the drug statute to provide for a 1:1 ratio and allow the Commission to similarly equalize the cocaine Guidelines.¹⁴⁵ However, the Justice Department opposed these moves and Congress ultimately rejected the Commission's cocaine amendment and declined to amend the statute. Although Congress mandated further study, no change was ever made to the 100:1 ratio. In fact, other than the safety-valve, Congress rejected every other attempt to reduce or modify application of any mandatory minimums during this period, and in fact added a few new ones.¹⁴⁶

The failure of the crack amendment also marked a loss in the perceived prestige of the Sentencing Commission. In the aftermath of this defeat, some commentators believe the Commission became more cautious and therefore less willing to take up Guidelines amendments that its experts believed made sense, but which would likely meet with resistance from Congress. Because the Sentencing Commission was technically housed in the judicial branch and a majority of the Commissioners were judges, the decline of the Commission was also a perceived loss for the judiciary. This was a loss for judicial voice because many judges felt more comfortable participating in Commission policy making than in the rough and tumble of Congress. Thus, it is not surprising that in a survey conducted after the crack amendment failure, less than two thirds of judges felt the Sentencing Commission was able to adequately respond to their sentencing concerns.¹⁴⁷

<http://www.november.org/razorwire/rzold/20/20021.html> (findings in this study included; low-level offenders constituted 36.1 of all drug law offenders in prison system and were serving an average of 69 months before being released; two thirds of the low level offenders in prison in 1994 had received a mandatory minimum sentence, and that federal sentences had increased 150% after the passage of mandatory minimums for drugs and guns in the 1980s).

¹⁴³See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at G-145, 5(D)(3) (1995) available at <http://www.uscc.gov/crack/chap1-4.pdf>. (reporting that in 1993, approximately eighty-eight percent of defendants facing the heightened crack-cocaine penalties were black).

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 54.

¹⁴⁶Carjacking Correction Act of 1996, Pub. L. 104-217 §a2 (H.R. 3676, Oct. 1, 1996). In 2001, Rep. Maxine Waters proposed the Major Drug Trafficking Act of 2001 which would have eliminated mandatory minimums for all drug crimes. Press Release, Rep. Maxine Waters Unveils Legislation that Repeals Extreme Mandatory Minimum Drug Sentences, (May 23, 2001). This bill went nowhere in Congress.

¹⁴⁷Barbara S. Meierhoefer, The General Effect of Mandatory Minimum Prison Terms, at 25 (FJC 1992).

Therefore, a balanced view of the second period suggests that despite real progress on discrete issues, fundamental questions about sentencing policy and outcomes still troubled a significant percentage of the bench. Without question, the opposition to mandatory minimums remained strong and consistent. An October 1993 Gallup survey of 350 state and 49 federal judges who belonged to the American Bar Association found 8% in favor of and 90% opposed to federal mandatory minimums for drug offenses.¹⁴⁸ In addition, every federal circuit in the country passed resolutions condemning mandatory minimums and calling for their repeal. Even Chief Justice Rehnquist, a reliable conservative voice, threw his weight behind these arguments, using a State of Judiciary address to criticize mandatory minimums as unnecessary and unwise.¹⁴⁹

The judiciary's grudging acceptance of the Guidelines with reservations was also reflected in comprehensive surveys of the federal judiciary conducted by the Federal Judicial Center in 1996¹⁵⁰ and by the Sentencing Commission in 2002.¹⁵¹ For example, in the 1996 FJC survey, 73% of district court judges did not believe that mandatory guidelines were necessary to direct the sentencing process and 68% preferred an advisory guidelines regime to either mandatory guidelines or unguided discretion.¹⁵² In addition, 79% of district judges wanted the Guidelines offenses levels de-linked from the mandatory minimum penalties and about

¹⁴⁸ See <http://www.famm.org/ExploreSentencing/TheIssue/HistoryoftheIssue/HistoryTimeline/1990sthenextphase.aspx> (discussing results of the poll).

¹⁴⁹ Michael Brennan, *A Case for Discretion; Are Mandatory Minimums Destroying Our Sense of Justice and Compassion*, NEWSWEEK, Nov. 13, 1995, at 18, available at 1995 WL 14647063; see also William H. Rehnquist, "Luncheon Address," in U.S. Sentencing Commission, *Drugs and Violence*, pp. 286-87 ("These mandatory minimum sentences are perhaps a good example of the law of unintended consequences. . . . the mandatory minimums have [] led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space. . . . Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.") (copy on file with author).

¹⁵⁰ One of the questions from the 1996 survey conducted by the Federal Judicial Center asked judges to rank what they would most like changed about the Guidelines and the departure procedure ranked highest. Molly Treadway Johnson & Scott A. Gilbert, *THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY, REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 3 tbl.2 (1997) [hereinafter "FJC Survey Report"].

¹⁵¹ Linda Drazga Maxfield, *Survey of Article III Judges on the Federal Sentencing Guidelines*, United States Sentencing Commission (2003) (hereinafter "Fifteen Year Survey Report").

¹⁵² FJC Survey Report at 4.

half did said that drug quantity should play a lesser role in drug sentences.¹⁵³ With regard to harshness of penalties, on a scale of 1 to 5, with 5 being too harsh, all twelve categories of offenses were ranked over the midpoint of 2.5, although some such as fraud and tax evasion, were only marginally above that number. Not surprisingly, drug offenses were ranked as the harshest, along with the offense of unlawfully remaining in the country.¹⁵⁴

Ranked third on district judges' list of needed changes was relevant conduct. A clear majority thought that the current relevant conduct guideline placed too much weight on conduct beyond the offense of conviction and that offenders' sentences were being increased too much for the behavior of their accomplices. This same rough percentage also agreed that there should be a limit on the impact of uncharged conduct on the final sentence.¹⁵⁵

The number one area where judges wanted change, assuming the Sentencing Guidelines remained in place, was more authority to depart downward, particularly in cases "involving youthful offenders, first-time offenders, or offenders who played only a minor role in the charged criminal activity."¹⁵⁶ This finding clearly reflected the judicial view that the safety-valve did not adequately cover some sympathetic offenders and did not provide enough sentencing relief for some who fell within its ambit.¹⁵⁷ Almost two-thirds of district court judges also believed that more offenders should be eligible for

¹⁵³FJC Survey Report at 11-12. Because this was a Guidelines survey, the Report notes that many judges did not comment about mandatory minimums because they thought these laws were outside the scope of the survey.

¹⁵⁴FJC Survey Report at 19.

¹⁵⁵ Over 25% thought relevant conduct should be abandoned in favor of Guidelines based on the offense of conviction. Over 80% thought acquitted conduct had no place in a Guidelines sentence. FJC Survey Report at 13-14.

¹⁵⁶FJC Survey Report at 5.

¹⁵⁷For example, by restricting defendants to zero or one criminal history point, a non-violent offender who was convicted of more than one petty misdemeanor at any point in their life was disqualified from the safety-valve. This restriction ensured that defendants were drug addicts and had engaged in petty thievery or prostitution at some point in their lives were excluded. In addition, some courts held that if any firearm was present in the conspiracy, even if the defendant him or herself did not possess the gun, any knowledge of a firearm's presence rendered them safety-valve ineligible. See e.g. *United States v. McLean*, 409 F.3d 492, 504 (1st Cir. 2005) (defendant ineligible for safety valve based on his knowledge of the gun and power to exert dominion over it given its close proximity); *United States v. Hager*, 66 Fed.Appx. 499, 500-501 (4th Cir. 2003) (defendant constructively possessed the gun in furtherance of the drug conspiracy given his admission he knew his co-conspirator would possess a gun and therefore was properly denied application of the safety valve.) Lastly, the requirement for truthful proffer created substantial litigation which defendants often lost. Some prosecutors tried to use this requirement to force defendants who refused to cooperate to name their

alternatives to incarceration, especially first-time, non-violent offenders, and defendants with extenuating circumstances (such as illness, handicaps, or multiple dependents).¹⁵⁸

In addition, more than 40% of judges who responded to the survey believed that they should be allowed to take a number of factors into the consideration that the Guidelines prohibited such as “youth, advanced age, mental and emotional conditions, physical disability or vulnerability, or factors that were generally discouraged, such as “the fact that an offender’s criminal act was personally aberrant behavior.”¹⁵⁹ The survey also showed that judges believed that the sentencing regime gave too much discretion to prosecutors; with 86% of judges agreeing with that statement and another 75% stating that prosecutors had the greatest influence on the Guideline sentence.¹⁶⁰ The comments to the survey also reflected some bitterness over prosecutorial power. One anonymous judge wrote: “The excessive power granted to prosecutors by the guidelines scheme has resulted in a situation where the Court is viewed as a rubber stamp of the prosecutor’s determination.”¹⁶¹ Other judges indicated that they believed that prosecutors were abusing their exclusive power over substantial assistance agreements with 59% of district court judges stating that they believed that prosecutors had withheld cooperation agreements from deserving defendants.¹⁶²

The survey conducted by the Sentencing Commission in 2002 as part of its fifteen year anniversary study of the Guidelines yielded similar results. For example, only 22.9% of district court judges gave the Guidelines a low degree of overall effectiveness.¹⁶³ Yet at the same time, a plurality of judges thought the

suppliers or supervisors. *See e.g. United States v. Rodriguez*, 60 F.3d 193, 195 (5th Cir. 1995) (defendant described his involvement to the probation officer but refused to meet with the case agent and was therefore ineligible for the safety valve); *United States v. Acosta-Olivas*, 71 F.3d 375 (10th Cir. 1995) (defendant is required to provide everything he knew about his own actions and those of his conspirators to qualify for safety valve); *United States v. Adu*, 82 F.3d 119, 124 (6th Cir. 1996) (defendant providing the government with “all they asked” was insufficient to qualify for the safety valve which required affirmative action by the defendant to “truthfully disclose[] all the information he possesses that concerns his offense and related offenses”).

¹⁵⁸FJC Survey Report at 15.

¹⁵⁹FJC Survey Report at 5. Judges also showed their support for more discretion by concurring with a question about whether there sentencing ranges on the Guidelines sentencing table should be expanded. FJC Survey Report at 6.

¹⁶⁰FJC Survey Report at 6-7.

¹⁶¹FJC Survey Report at 7.

¹⁶² Not surprisingly, 69% believed that judges should be given the power to depart below a mandatory minimum for substantial assistance without a government motion. FJC Survey Report at 8.

¹⁶³Fifteen Year Survey Report at ES-7.

Guidelines were less effective in providing rehabilitation where appropriate and in “maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors.”¹⁶⁴ Again, drug sentences were singled out as an area where greater flexibility was needed and that “mandatory minimums statutes highly affect their ability to impose a sentence reflect the statutory purposes of sentencing.”¹⁶⁵ Specifically, 73.7% of district court judges stated that drug sentences were greater than appropriate in drug trafficking cases.¹⁶⁶

These surveys suggests a fairly steady trend for judicial opinions about the sentencing regime during the Clinton presidency. While judges appreciated more reasonable prosecution policies and tinkering by Congress and the Commission around the edges, many still believed that mandatory minimums and the Guidelines did not strike the right balance on either discretion or severity. Moreover, given these trends, few inside the judiciary anticipated the antipathy that followed the 2000 election. It is to this third period, between the 2000 elections and *Booker* that the next section addresses.

3. Period III: The Renewed Assault on Sentencing Discretion to the Booker Decision - 2002 to 2005.

*While America was focused on the opening weeks of the war in Iraq, the US. Justice Department had another target in its sights – a sneak attack on the independence of the 665 federal district judges to determine fair and responsible sentences for people convicted of federal crimes.*¹⁶⁷

The third period began in earnest about midway through George W. Bush first term. While sentencing issues were important to President Bush’s new Attorney General John Ashcroft and congressional conservatives, the September 11th terrorist attacks and the subsequent “War on Terror” pushed domestic crime policy

¹⁶⁴*Id.* at ES-3.

¹⁶⁵*Id.* at App. B- 2. *Id.* at B-3.

¹⁶⁶42% felt that firearm sentences were too high and 56% felt the same about unlawful entry penalties. *Id.* at App. B-1. In addition, more than half of judges again wanted more emphasis on the personal characteristics of offenders including mental condition, and over 40% wanted offender age, employment record, public service, substance abuse, and role in the offense to count for more in the sentencing calculus. Finally, like in the 1996 survey, the 2002 responders wanted more alternatives to straight prison sentences for a small but significant class of defendants. *Id.* at ES - 5-6.

¹⁶⁷ James K. Jenkins, *Give Federal Judges Sentencing Discretion Back*, ATLANTA J. -CONST., June 9, 2003, at A9, available at 2003 WL 56079739.

to the back burner while the nation was in crisis mode.¹⁶⁸ But after the passage of the Patriot Act and the initial phase of the war in Afghanistan, conservative in Congress and the Justice Department renewed their attacks on the sentencing discretion, and more generally on the federal judiciary. As a result, relations between the judiciary and the other two branches in this period sunk to a new low and judicial opposition to the sentencing laws spiked upwards once again. This period ended abruptly, however, when the Supreme Court's decided *Booker*, marking the end of mandatory guidelines as a means of controlling judicial discretion.

The primary events in this period were the passage of the Feeney Amendment and the Justice Department's return to less discretionary and more aggressive prosecution policies.¹⁶⁹ In hindsight, however, the desire of conservatives to rein in, and some would say, to intimidate the federal judiciary in this period really began in May 2002, when conservatives on the House Judiciary Committee went to great lengths to attack a federal judge who had testified in defense of yet another Guideline amendment that sought to ameliorate the harshness treatment of low-level offenders in large conspiracies.

a. The Judge Rosenbaum Debacle.

In 2001, the Commission proposed Amendment 640, which capped the offense level for drug defendants who had a "minimal role" at Level 30, ensuring that these defendants with no record (and no other enhancements) would not face a sentencing range higher than 97-121 months. Prior to this amendment, if the scope of the conspiracy was foreseeable to a "girlfriend" or a drug courier, she or he was liable for

¹⁶⁸The Administration saw its immediate priority to expand its powers to detect and defend against another terrorist attack. Thus, passage and implementation of the Patriot Act and the legal issues concerning the Guantanamo detainees and other terrorism suspects were among the major concerns of the Justice Department. USA PATRIOT Act, Pub. L. 109-41, 115 Stat. 272 (October 26, 2001) See m on civil liberties in a time of terror, Winn S. Colins and Jennifer R. Racine, SYMPOSIUM, Introduction, 2003 Wis. L. Rev. 253.

¹⁶⁹While the major action in this period was on restricting judicial discretion, the Bush Administration was also vigilant in ensuring that the statutory and Guideline penalties structure remained as is. For example, in March 2002, the Sentencing Commission held more hearings on the crack/powder disparity. In the Bush Administration's first statement on this issue, Deputy Attorney General Larry D. Thompson stated that the penalty structure for crack and powder should remain unchanged, but that if anything were done, "the sentences for powdered-cocaine should be increased." Neil A. Lewis, *Justice Department Opposes Lower Jail Terms for Crack*, NEW YORK TIMES, March 20, 2002, at A24. Interesting, in that session of Congress, Senators Hatch and Sessions had introduced a bill to reduce the ratio of crack to powder from 100:1 to 20:1, by increasing the quantity of crack needed to trigger a mandatory minimum and by reducing the amount of powder necessary to do the same. Senator Leahy therefore noted that the Bush Administration came to "this debate to the right of some of the most conservative members for the Judiciary Committee." *Id.*

the entire quantity of drugs in the network up to the highest offense level possible under the Guidelines.¹⁷⁰ Like previous efforts by the Commission during Period II to address low level offenders' sentences, this amendment was also welcomed by many judges who believed that relative culpability was too often disregarded by the Guidelines quantity-driven sentences.

House conservatives viewed this Amendment as a part of the dangerous retreat from the all out war on drugs wrought by "liberal" and "activist" judges (and aided and abetted by the Sentencing Commission and the Clinton Justice Department).¹⁷¹ Thus, in 2002, conservatives introduced a bill to repeal the amendment. This bill failed, in part, due to the testimony of Chief Judge of the Minnesota District Court, James M. Rosenbaum, who voluntarily appeared and offered testimony in opposition at a hearing on the bill before the House Judiciary Subcommittee Crime, Terrorism, and Homeland Security.¹⁷²

As a former U.S. Attorney for Minnesota and a Reagan appointee, Judge Rosenbaum began his testimony by explaining that he was "no bleeding heart," an assertion supported by comparative sentencing data and his unimpeachable conservative credentials.¹⁷³ Nevertheless, he opposed the bill because he believed that capping drug guidelines for minimal participants properly shifted the focus of sentencing back to the culpability of the perpetrator and away from the scope of the conspiracy. He argued this shift made sense for low-level offenders because these individuals rarely made much money and they exerted no real control over the operation.¹⁷⁴ As part of his testimony, Judge Rosenbaum provided fourteen short profiles of defendants (without their real names) from federal cases in Minnesota whom he felt illustrated the need this

¹⁷⁰As noted earlier, prior to 1994, the drug offense quantity table went up to level 42. After 1994, the table was amended to go no higher than level 38.

¹⁷¹ See H.R. 4689. See also Tony Mauro, *Judiciary Committee to Debate Disparity in Drug Sentences*, Legal Intelligencer, May 21, 2002, at 4.

¹⁷²Originally, Senior Judge Paul Magnuson (D. Minn.) was asked to testify but at the last minute, he developed a scheduling conflict and Judge Rosenbaum agreed to substitute for him. Douglas A. Kelley, *Minnesota Federal Judge Caught in a Constitutional Crossfire*, 27 HAMLIN L. REV. 427, 430 (2004).

¹⁷³Testimony by Hon. James M. Rosenbaum, before the United States House Committee on the Judiciary, 3 (May 14, 2002) (hereafter Rosenbaum Testimony)(copy on file with author). Judge Rosenbaum was recommended to the President by Senator Rudy Boschwitz (R.-Minn). A study by the Washington Post during the controversy found that this judge's "sentences for drug offenders exceeded the national median each year between 1998 and 2002,," a finding consistent with his reputation as a tough sentencer. Kelley, *supra* note __ at 430; Emily Bazelon, *With No Sentencing Leeway, What's Left to Judge?*, Wash. Post, May 4, 2003 at B4 available at 2002 WLNR 3526539.

¹⁷⁴Rosenbaum compared low-level drug offenders to "minnows," and contended the sentencing guidelines should impose the harsh penalties on the "sharks" or the "major players" in the drug trade. Rosenbaum Testimony at 3.

change.¹⁷⁵ He concluded his remarks by saying

Please consider giving the Judiciary the chance to do the job for which it was chosen, as designated by the Constitution to perform. We work with this system, and those who operate in it everyday of our lives. Please give us the tools to make it more fair and just.¹⁷⁶

Judge Rosenbaum's role in defeating the bill did not sit well with the conservatives members and staffers on the Subcommittee.¹⁷⁷ In the aftermath of the hearing, the Chair of the Subcommittee demanded that Judge Rosenbaum turn over documentation to support his case examples and certain assertions in his testimony.¹⁷⁸ Throughout the summer of 2002, the Subcommittee and the judge exchanged a series of tense letters relating to the production of these documents.¹⁷⁹ At various points, Judge Rosenbaum cited confidentiality concerns

¹⁷⁵ The profiles were of cases from both Judge Rosenbaum's docket and from other Minnesota judges. He explained why each defendant played a minimal role and how their Guideline sentencing range would have been lowered by the amendment. Kelley, *supra* note __, at 431. Susan Schmidt, *Judge Accused of Misleading House Panel: Republicans on Sub-Committee Say Testimony on Drug Sentencing Was Inaccurate*, WASH POST., Nov. 6, 2002, at A2, available at 2002 WL 102569652.

¹⁷⁶ *Fairness in Sentencing Act of 2002: Hearing on H.R. 4689 Before the House Subcomm. on Crime, Terrorism, and Homeland Security*, 107th Cong. 53 (2002) (statement of Hon. James M. Rosenbaum, Chief Judge, U.S. District Court for the District of Minnesota), available at http://commdocs.house.gov/committees/judiciary/hju79613.000/hju79613_of.htm.

¹⁷⁷ As Rep. Scott put it, "the Republicans were intent on punishment Rosenbaum because they did not like his views on the Guidelines." Susan Schmidt, *Judge Accused of Misleading House Panel: Republicans on Subcommittee say Testimony on Drug Sentencing was Inaccurate*, THE WASHINGTON POST at A2 (Nov. 6, 2002). The article quotes Rep. Scott as saying, "If you went over everybody's testimony like they went over this judge's testimony, nobody would ever want to testify." *Id.* Greg Gordon, *Judge Sits in the Middle of Capitol Struggle; Congress and the Federal Bench are at Odds over James Rosenbaum's Drug Sentences*, STAR TRIB., Mar. 15, 2003, at 1B, available at 2003 WL 5530871. Greg Gordon, *Judge Sits in the Middle of Capitol Struggle; Congress and the Federal Bench are at Odds over James Rosenbaum's Drug Sentences*, STAR TRIB., Mar. 15, 2003, at 1B, available at 2003 WL 5530871.

¹⁷⁸ Letter from Lamar Smith, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, United States House of Representatives, to James M. Rosenbaum, Chief Judge, United States District Court, District of Minnesota (May 22, 2002); Jason Hoppin, *Drug Sentencing Probe Worries Bench*, Legal Intelligencer, Mar. 24, 2003, at 4. The Subcommittee also requested that the judge identify cases in which he had not granted a motion for judgment of acquittal in cases where the defendants had not known they were carrying illegal narcotics (an assertion that Judge Rosenbaum had corrected (and abandoned) during the hearing. Kelley, *supra* note __, at 432.

¹⁷⁹ Some sources Report that the Subcommittee tried to get the GAO to gather the transcripts but that the Administrative Office of the Courts ("the AO") resisted these efforts. See Kelley, *supra* note __, at 434.

as a reason for withholding production and the Subcommittee's counsel accused him of being uncooperative and trying to cover up misconduct. Frustrated, the Subcommittee threatened him with a subpoena and refused to "rule out seeking disciplinary action, including impeachment" for his actions.¹⁸⁰

This fight officially ended in October 2002,¹⁸¹ when the House Judiciary Committee released a scathing report which accused Judge Rosenbaum of a litany of misconduct.¹⁸² Despite the relentlessness of the Subcommittee's inquiry and their harsh public rhetoric, throughout the controversy, Judge Rosenbaum and his attorneys largely sought to handle the situation quietly rather than make him a cause celebre.¹⁸³ Nevertheless, the controversy received enough press coverage than many in the legal world were aware of, and outraged by his treatment, and perhaps also a little intimidated.¹⁸⁴ If a respected Reagan appointee

¹⁸⁰The subpoena would have forced Rosenbaum to produce "records from his cases since Jan. 1, 1999, identifying drug-related cases in which he departed from sentencing guidelines . . . [and] sentencing transcripts, the status of appeals, copies of all decisions and the names of any court personnel who helped in his testimony before Congress." Rob Hotakainen & Pam Louwagie, *State's Chief U.S. Judge Might Face Subpoena; House Panel Investigating Sentencings in Drug Case*, STAR TRIB., Mar. 13, 2003, at 1A, available at 2003 WL 5530675. See also Jess Bravin & Gary Fields, *House Panel to Probe U.S. Judge; Minnesota Jurist's Records Expected to be Subpoenaed In an Unusual Showdown*, WALL ST. J., Mar. 12, 2003, at A2. Eventually, a compromise was reached and most of the documents were provided or otherwise obtained by the Subcommittee.

¹⁸¹The Subcommittee eventually asked the Eighth Circuit to discipline Judge Rosenbaum but that request was denied Gordon, at 1B.

¹⁸² H.R. Rep. No. 107- 4689, at 9-10 (2002). The Report alleged that his testimony had been false and misleading and that he had illegally departed in at least two cases. For example, the Report argued that in his case examples, Judge Rosenbaum had suggested that the Guideline ranges he gave had actually had actually been imposed on each of these defendants, when in fact, he (or another Minnesota judge), had departed below that presumptive Guideline sentence based upon another legal grounds in many of the cases, thereby inferring that Rosenbaum had tried to mislead listeners into believing these individuals (and others like them) would languish in jail without this amendment when there were already provisions to provide sentencing relief (albeit the primary one being cooperation agreements with the government). Four members of the subcommittee issued a dissent. See John Conyers, Jr., Barney Frank, Robert C. Scott, and Melvin L. Watt. Dissenting Views, HOUSE REPORT ON THE FAIRNESS IN SENTENCING ACT OF 2002 307-09 (2002); See also David Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 228 (2004); Douglas A. Kelley, *Minnesota Federal Judge Caught in a Constitutional Crossfire*, 27 HAMLIN L. REV. 427, 430 (2004).

¹⁸³Judge Rosenbaum was represented by Victoria Toensig, a well-known and politically connected Republican litigator. Perhaps her litigation team thought that a Republican Committee would not treat one their own so harshly.

¹⁸⁴Many members of the bench and bar, as well as some Minnesota politicians publically stood up for the judge. For example, Rep. Jim Ramstad (R.-Minn) stated "would be absolutely floored" by any illegal

who had been a U.S. Attorney could be make a target, perhaps no judge was safe to speak out against the inequities in the sentencing laws.¹⁸⁵ Even Chief Rehnquist felt the incident significant enough to comment upon. While Rehnquist conceded that Congress has a right to obtain “information that will assist in the legislative process . . . these efforts . . . may not threaten judicial independence or the established principle that a judge’s judicial acts cannot serve as a basis for his removal from office.”¹⁸⁶

b. The Feeney Amendment.

While ideas for further restricting judicial discretion had been kicking around in Congress and the Ashcroft Justice Department since 2000, in the session after the Judge Rosenbaum debacle, the demand by conservatives to assert control over “independent judges” gained momentum, in some part as a result of their frustration and anger over the Rosenbaum incident.¹⁸⁷ One thread of their argument was that judicial downward departures were undermining the uniformity goal of the Guidelines. As evidence, they pointed to the increasing rate of downward departures since the inception of the Guidelines and that the rate of increase seemed to be accelerating.¹⁸⁸ Moreover, they argued that it was some number of judges, like Judge

action by Rosenbaum. Gordon, *supra* at note ___, at 1B. In his letter on behalf of the 410,000 members of the ABA, President Alfred P. Carlton labeled the subpoenas to Rosenbaum “unprecedented.” Letter from Alfred Carlton Jr., President, American Bar Association to Honorable James Sensenbrenner, Chairman, Committee on the Judiciary, (March 24, 2003) (copy on file with author).

¹⁸⁵ Hotakainen & Louwagie, *supra* note ___ at 1A (Reporting University of Minnesota law Prof. Barry Feld considered the subpoena an act of “intimidation”). Judge Rosenbaum’s colleague in Minnesota, Judge Magnuson stated that he could not think of “a greater invasion on the independence of the judiciary.” Kelley, *supra* note ___.

¹⁸⁶See William H. Rehnquist, Remarks at the Federal Judges Board of Directors Meeting (May 5, 2003), at http://www.supremecourtsus.gov/publicinfo/speeches/sp_05-05-03.html.

¹⁸⁷ABA President Alfred Carlton, Jr., for example, saw a direct link between the Feeney Amendment and the Judge Rosenbaum controversy: “I think it was a result of the powers-that-be recognizing that the subpoena route wasn’t going to be very fruitful. . . . Better to go ahead and just legislate – and that’s what they did.” Rob Hotakainen, *Sentencing Leeway - or Leniency?*, STAR TRIB., May 8, 2003, at 16A, available at 2003 WL 5535030. A contemporaneous New York Times editorial also looked beyond the immediate controversy, stating, “The attack on Judge Rosenbaum is not only a sign of the right’s continuing attempt to hijack the federal judiciary but also trespass on the constitutional separation of powers.”

¹⁸⁸See United States Sentencing Commission, *Federal Sentencing Statistics by State, District and Circuit*, Table 9 (1998-2001) (indicating that the national rate of federal departures, other than substantial assistance departures, has risen steadily each of the last four fiscal years, from 13.6% in 1998 to 18.3% in 2001). The links to the statistics for each fiscal year are available at <http://www.ussc.gov/LINKTOJP.HTM> (last visited July 16, 2003). Certainly, some of the increase in the rate of judicial downward departures was partly attributable to the decision in *Koon*. See Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 717-18 (2005).

Rosenbaum, whose hostility to tough Guideline sentences was responsible for this increase. Therefore, they argued for both greater restrictions on discretion, and for a new kind of “oversight,” judge-specific reporting requirements that would enable Congress to review the sentencing practices of individual judges without the difficulties they encountered in the Rosenbaum case.¹⁸⁹

In late March 2003, prodded by Rep. Sensenbrenner and the Justice Department, a freshman representative from Florida, Tom Feeney, introduced a sentencing reform bill designed to accomplish these goals as a last minute rider to the popular Amber Alert legislation.¹⁹⁰ Thus, there were no committee hearings in either chamber and no formal input from the Sentencing Commission or the judiciary.¹⁹¹ With minimal floor debate, the amendment and the bill cleared the House, with some members later complaining that attaching unrelated sentencing provisions to a bill on child sex crimes made it difficult for them to vote against it.¹⁹²

¹⁸⁹See Laurie Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Judges’ Soft Sentences*, Wall Street Journal, August 6, 2003 (noting that the House Judiciary Committee has tangled with several judges who have imposed sentences below mandatory minimums); John R. Steer, *Sentencing Commission Review*, Cong. Testimony, Oct. 13, 2000, available at 2000 WL 23833583 (testifying before the Congressional Subcommittee on Judicial Oversight on the increase in departure rates in the post-*Koon* era, and ultimately finding “some reason for concern, particularly if the trends continue unabated, while also seeing a guideline sentencing scheme that remains fundamentally sound.”).

¹⁹⁰Representative Feeney later stated that he “was simply the ‘messenger’ of the amendment bearing his name, which was drafted by two Justice Department officials, Associate Deputy Attorney General Daniel Collins and Jay Apperson, counsel to the House Judiciary Committee.” Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Judge’s Soft Sentences*, Wall Street Journal, August 6, 2003. An admitted “bomb thrower” in the Florida legislature, Feeney was once labeled by the governor as “the David Duke of Florida politics.” Tamara Lytle, *Feeney Makes an Impression as Freshman on Capitol Hill*, Orlando Sentinel, Apr. 38, 2003, at A1, available at 2003 WL 18420211 (Reporting on the personal notoriety garnered by Feeney in response to his sponsorship of the sentencing amendment). Feeney himself justified the bill on the grounds that federal judges were giving sex offenders no more than a “slap on the wrist” and with “increasing frequency.” Mark H. Allenbaugh, *Who’s Afraid of the Federal Judiciary*, THE CHAMPION, June 2003, at 8.

¹⁹¹See H.R. Rep. No. 48 (limiting debate on the Amendment to a total of twenty minutes including statements from proponents); 150 Cong. Rec. S8572-01, S8573 (daily ed. July 21, 2004) (remarks of Sen. Leahy) (the Feeney Amendment “was forced through the Congress with virtually no debate and without meaningful input”); 149 Cong. Rec. S5133 (daily ed. April 10, 2003) (remarks of Sen. Kennedy) (“This legislation overturns a unanimous Supreme Court decision, without a single day, hour, or minute of hearings.”). Nor were traditional lobbying groups like the ABA and the Judicial Conference consulted before passage of the amendment. See Kelley, *supra* note __, at 436.

¹⁹²For example, the senior Democrat on the Judiciary Committee, Sen. Edward M. Kennedy, “expressed ‘deep concern’” about the Feeney Amendment, but ultimately voted for the Amber Alert Bill. Dan Christensen, *Stealth Bomber*, MIAMI DAILY BUS. REV., Apr. 15, 2003, at 1.

In the form passed by the House,¹⁹³ the Feeney Amendment would have dramatically limited judicial departures by eliminating whole categories of existing departures,¹⁹⁴ and by prohibiting judges to downward departures to only those specifically identified by the Commission.¹⁹⁵ The last provision in particular would have gutted the heart of the departure concept because allowing judges to depart in unusual circumstances was a recognition by the original Commission that it could not anticipate every circumstance that might warrant adjustments to the ordinary results of the offense and criminal history guidelines.

To address the “Rosenbaum issue,” the Feeney Amendment also contained a “depart and tell” provision that required that detailed information about every criminal case, by judge and including any departure grounds, be sent to the Commission and made available to the Justice Department and Congress for study, “including the identity of the sentencing judge.”¹⁹⁶

In the two week period before the conference committee meetings, however, a concerted lobbying effort was initiated by public interest groups and the judiciary to stop or at least modify the bill.¹⁹⁷ The Judicial Conference expressed its concerns in a formal letter and Chief Justice Rehnquist added his own, stating that the Amendment “would do serious harm to the basic structure of the sentencing guideline system and would

¹⁹³ This bill was passed by the House on March 27, 2003. Ralph Grunewald, *NACDL's Fight to Save Judicial Discretion*, THE CHAMPION, June 2003, at 7. The formal name of the bill that passed is the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003” or the “PROTECT Act.” Mike Martindale, *Amber Alert Will Now Protect All Children*, DETROIT NEWS, May 1, 2003, at 2, available at 2003 WL 17888237.

¹⁹⁴The bill attempted to eliminate departures grounds such as aberrant behavior, family ties, and military service (which were a popular grounds judges have used to lower sentences where the otherwise required punishment seems disproportionate) See, Allenbaugh, *supra* note __, at 8.

¹⁹⁵ See *Id.* at 9.

¹⁹⁶See PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 672 (2003).

¹⁹⁷Letters of opposition were sent by the Chief Justice, the secretary of the Judicial Conference, the Sentencing Commission, the ABA, the Cato Institute, the Washington Legal Foundation, and over 70 law professors. Grunewald, *supra* note __. The New York Times, Washington Post and other papers also wrote editorials opposing the bill. See, e.g., John S. Martin Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31; Editorial, *House Without Mercy*, WASH. POST, Apr. 4, 2003, at A20, available at 2003 WL 17425634. Academics also contributed. See Steven L. Chanenson, *The Return of Hammurabi*, 26 PLW 390 (April 7, 2003). See also Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 CATO INST. POL'Y ANAL. 1, 5 (2002). See also *Materials from Interested Groups Opposing Original Feeney Amendment*, 15 FED. SENT R. 346 (June, 2003) (including include the letters from the NACDL, FAMM, ACLU, ABA, National Petroleum Refiners Association, and Business Civil Liberties, Inc.).

seriously impair the ability of courts to impose just and responsible sentences.”¹⁹⁸

This joint lobbying effort was partly successful. The most severe restrictions on downward departures were limited to just sex offenses. However, the bill that passed both Houses still contained the reporting requirement and additional provisions that rolled back some of the gains achieved during Period II. For example, the Feeney Amendment instituted *de novo* appellate review of all departures (overruling *Koon*) and instituted a government motion requirement for the extra one level reduction for extraordinary acceptance of responsibility.¹⁹⁹ Prospectively, the Feeney Amendment forbade the Commission from adding any new departure grounds for two years and instructed the Commission to amend the guidelines and policy statements to substantially reduce the incidence of downward departures.²⁰⁰

Lastly, the bill reduced the number of federal judges on the Sentencing Commission from at least three of the seven to no more than three.²⁰¹ Reportedly, Rep. Sensenbrenner said this change was necessary because “We don’t want to have the Commission packed with Federal judges that have a genetic

¹⁹⁸Letter from William H. Rehnquist, Chief Justice, Supreme Court of the United States, to Patrick Leahy, Ranking Member, Committee on the Judiciary, United States Senate (undated), in 149 CONG. REC. S5,120 (daily ed. Apr. 10, 2003). See Letter from Leonidas Ralph Meacham, Secretary, Judicial Conference of the United States, to Orrin Hatch, Chairman, Committee on the Judiciary, United States Senate (April 3, 2003) available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/\\$FILE/judconf_feeney.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/judconf_feeney.pdf). All five Sentencing Commissioners also wrote to oppose the Feeney Amendment. Letter from United States Sentencing Commission, Members, to Honorable Orrin Hatch, Chairman, Senate Committee on the Judiciary (April 2, 2003) (copy on file with author). See also individual letters from former Sentencing Commissioners and the head of the Federal Judges Association. Letter from Judge Diana E. Murphy, U.S. Court of Appeals for the Eighth Circuit, Judge Richard P. Conaboy, U.S. District Court for the Middle District of Pennsylvania & Chief Judge William W. Wilkins, U.S. Court of Appeals for the Fourth Circuit to Honorable Orrin Hatch, Chairman, Senate Committee on the Judiciary & Honorable Patrick Leahy, Ranking Member, Senate Committee on the Judiciary (April 2, 2003) (copy on file with author). Letter from Jerome B. Simandle, U.S. District Court Judge for the District of New Jersey & E. Grady Jolly, Fifth Circuit Court of Appeals Judge, to Honorable Orrin Hatch, Chairman, Committee on the Judiciary (April 3, 2003) (copy on file with author). It is worth noting that Judges Wilkins, Simandle, and Jolly were all appointed by Republican presidents, as of course were the former Chief Justice and some of the Sentencing Commissioners.

¹⁹⁹ PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 670-71 (2003). The Feeney Amendment also prohibited downward departures based on new grounds on remand to prevent judges from getting the same result a different way.

²⁰⁰The Department of Justice was also directed to assist the Commission in this endeavor PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 673 (2003).

²⁰¹ PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 676 (2003).

predisposition to hate any kind of sentencing guidelines.”²⁰²

As modified, the Feeney Amendment emerged from conference committee and was passed as part of the PROTECT Act (the formal name for the “Amber Alert” bill). The judicial reaction to the bill’s passage can without hyperbole be described as outrage and disgust. Chief Judge Young (D.Mass.) called the passage of the Feeney Amendment “the saddest and most counterproductive episode in the evolution of federal sentencing doctrine.”²⁰³ For one judge, the Feeney Amendment was the last straw. Judge John Martin, a Reagan appointee in New York, and long an outspoken critic of sentencing policy announced his resignation from bench and intention to return to private practice in a widely disseminated op ed piece soon after the bill was passed.²⁰⁴ Judicial dissent also cut across all political lines. Judge John Kennan stated, “I’m a Republican, but I don’t think this is good legislation. . . . I don’t know of any federal judge who thinks it’s a good idea.”²⁰⁵ Judge Shira Scheindlin, a Clinton appointee and former federal prosecutor, stated that “in her nearly ten years on the federal bench, this was the first time she had ever seen judges of all political stripes so willing to go public over such a highly political matter.”²⁰⁶

Judges were most vocal about the “depart and tell” provisions. Although most judges understood that sentencing data is public information to which policymakers, the press, and academics should have access, even in a judge-by-judge format, the judiciary viewed this provision in light of what had happened to Judge Rosenbaum in the House Subcommittee. Thus, federal judges were alarmed that this provision was not a

²⁰²*United States v. Detwiler*, 338 F. Supp. 2d 1166, 1173 (D. Or. 2004) (Justice Panner, in attributing this quote to Rep. Sensenbrenner, relied upon the account of Sen. Leahy because he could not get a transcript of the committee discussions).

²⁰³*United States v. Green*, 346 F.Supp.2d 259, 283 (D. Mass. 2004).

²⁰⁴Describing the “most recent assault on judicial independence”, Judge Martin characterized the amendment as “an effort to intimidate judges to follow sentencing guidelines.” John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.; See also Edward A. Adams, *Federal Judges Scores Mandatory Sentences for Dealing in Drugs*, N.Y. L.J., Aug. 26, 1993, at A1.

²⁰⁵Adam Liptak, *Opposition Rises to Crime Bill’s Curb on Judicial Power in Sentencing*, N.Y. TIMES, Apr. 18, 2003, at A10. Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, December 8, 2003, at B1 (Judge Kennan added, “Even I recognize that this administration has taken a step too far). See also Thanassis Cambanis, *Sentencing Law Targets US Judges in Massachusetts*, BOSTON GLOBE, May 30, 2003, at A1 (“It turns me into a bureaucrat, and I do not believe for a moment that the public wants that. . . .”) (statement of Judge Nancy Gertner)). See also <http://www.november.org/dissentingopinions/NYJudges.html>; <http://www.talkleft.com/story/2003/12/08/884/84941>; (citing letter by John M. Walker, Jr., Chief Judge of the Second Circuit who along with “26 colleagues from around the country signed a statement calling for repeal of the law.”).

²⁰⁶Urbina, *supra* at note __ at B1.

harmless data collection device but rather potential blacklist to intimidate and persecute individual judges.²⁰⁷

Chief Justice Rehnquist noted these concerns in a speech to the Federal Judges Association, stating that “target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.”²⁰⁸

In the post-Feeney period, several district court judges also claimed that the Feeney Amendment’s reporting provision had deterred them from departing in cases they felt were otherwise appropriate for a lower sentence. For example, Minnesota’s Judge Paul Magnuson decided not depart in a white collar case that led to a four year sentence. He wrote in his decision, “This reporting system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.”²⁰⁹ In another case from Montana, Judge Donald Molloy felt he could not depart in the case of a Chinese immigrant who was convicted of harboring illegal aliens. The defendant himself had been homeless upon his arrival in this country many years ago and the judge believed he had acted as a good Samaritan and nothing more.²¹⁰

²⁰⁷In opposing the bill, Senator Kennedy, argued that this provision would result in a “judicial blacklist.” See 2003 WL 2436701, *Influential Judges' Group Urges Repeal of Tough Sentencing Guidelines*, Los Angeles Times, Wednesday, September 24, 2003. Judge Robert Patterson (S.D.N.Y) agreed that “Its also certainly looks like a blacklist.” Some judges argued that they were not intimidated; Chief Judge Michael Mukasy (S.D.N.Y.) said, “They can have their blacklist. . . But we have life tenure.” Alan Vinegrad, *The Judiciary's Response to the PROTECT Act*, N.Y.L.J., Jan. 8, 2004, at 4. See also Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. Times (Dec. 17, 2003) available at <http://209.157.64.200/focus/f-news/1035963/posts>. An appellate court removed Judge Thomas C. Platt (E.D. NY) from a routine drug case saying that his decisions were ‘improperly affected’ by his ‘annoyance’ with the sentencing guidelines and with the United States Attorney’s office.” *Id.* At the appellate level, judges were as displeased with the Feeney Amendment but being one step removed from sentencing some were able to joke about it. At an oral argument, Judge Roger J. Miner quipped to the government attorney that if the panel did not rule for the prosecution in a sentencing appeal, “you’ll probably take our names and report them to the attorney general.” Another member of the panel, Judge Straub, then jumped in telling the prosecutor “Be sure you spell them correctly,” which prompted the third, Judge Guido Calebresi, to spell Straub’s name. *Id.*

²⁰⁸ Chief Justice William H. Rehnquist, Remarks of the Chief Justice at the Federal Judges Association Board of Directors Meeting at 7 (May 5, 2003) available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html (last visited October 18, 2005).

²⁰⁹ Steve Karnowski, *Federal Judge Claims Sentencing Pressure*, AP Wire (Oct. 22, 2003).

²¹⁰Judge Molloy stated at a sentencing, “I believe that this case is one that the Feeney amendment, in seeking to strip federal judges of their judgment, will lead to more unjust sentences and that what we will end up with is a third branch of administrators heeding the beck and call of those who have a sense of justice reflected in the old testament. Sent. Tr. at 26, *United States v. Chang Gou You*, Cr. 02-15-H-DWM (D. Mon., Sept. 11, 2003) (copy on file with author). Other judges continued to depart but feared reversal under Feeney. See Mark Hamlett, *Judge Takes Aim at Congress in Sentencing U.N. Shooter*, N.Y. L.J., Oct. 22, 2003, available at <http://www.law.com/jsp/article.jspid=1066605411059> (last visited Dec. 20, 2003)

Judges were also deeply troubled by the provision that reduced the number of judges on the Commission from at least three to no more than three (of seven), thus ensuring that the judges could never constitute a majority of the commissioners (even though the Commission was ostensibly a part of the judicial branch) and otherwise undercutting the Sentencing Commission's role in sentencing policy. Judges and commentators recognized that the Feeney Amendment constituted the first time Congress entirely bypassed the Sentencing Commission and directly changed the Guidelines itself.²¹¹ While only a small number of cases were affected by the sex offense guidelines, this change in the process signaled how much Congress has abandoned its original conception of the Commission as an independent body entrusted to implement broad congressional directives away from the heat of politics.

Finally, many judges also voiced concerns about how the Feeney Amendment was sprung upon them without a meaningful opportunity to vet the need for any changes to the departure system.²¹² In the first

(discussing Judge Robert Patterson's (S.D.N.Y) decision to depart downward in case where a man harmlessly shot a gun at the United Nations as a political statement). The judge called the Feeney Amendment Congress's "latest attack on the third branch of government" and claimed that "Congress sought to deter any departures by the implicit threat to trial judges that, if they are considered for appellate positions, they will be subjected to the type of demeaning and unseemly treatment which nominees to the courts of appeals have undergone at the hands of Congress in recent years." Pamela Manson, *Judge Asserts His Right to Stray from Guidelines*, Salt Lake City Trib., July 28, 2003 (Reporting on an opinion and decision to depart by recent Bush appointee Judge Paul Cassell (D. Utah) that the judge released to dispel the "'hyperbolic claims' that judges have no authority in any case to reduce sentences"). Feeney's de novo standard, however, clearly was responsible for reversing some downward departures. *See also United States v. Thurston*, 286 F. Supp. 2d 70, 72 (D.Mass. 2003) (opinion by Judge Edward Harrington recusing himself from imposing a sentence on remand which the judge felt "is clearly contrary to the objective of the sentencing guidelines . . ."); *United States v. Dyck*, 287 F. Supp.2d 1016, 1022-23 (D.N.D. 2003)(Judge Webb, a Reagan appointee, noted upon remand that "the pendulum for sentencing within the criminal justice system has moved to far to the right in favor of harsh sentences. . . . Judges and others involved in the criminal justice system must speak out against unjust and unwise mechanisms of justice such as strict guidelines and mandatory minimum sentences.").

²¹¹*See Detwiler*, 338 F.Supp. 2d at 1171 n.3. Prior to the Feeney Amendment, Congress had only directed the Commission to implement policy goals but stayed away from mandating offense levels and writing specific language for the Commission to incorporate. For example, the Commission increased the offense level for property damage in national cemeteries in response to the Veterans' Cemeteries Protection Act of 1997, Pub. L. 105-101, a 2, 111 Stat. 2202, 2202 (1997).

²¹² Judge Sim Lake expressed his concern "about the lack of meaningful consultation with the Judiciary before" the Feeney Amendment was enacted. Interview by The Third Branch with Judge Sim Lake, U.S. District Court for the Southern District of Texas, (March 2004), *available at* <http://www.uscourts.gov/ttb/mar04ttb/interview>. Judge Owen Panner described the amendment's enactment as taking a "stealth route [which] clearly was intended to prevent close scrutiny . . . or a fair opportunity to oppose the measure." *United States v. Detwiler*, 338 F.Supp. 2d 1166, 1172 (D. Or. 2004). Similarly, Chief

place, the argument that judges were mostly to blame for the increase in the departure rates did not sit well with them, and there was substantial statistical support to refute this claim that was not presented until after the bill was past. According to subsequent studies by the GAO and the Sentencing Commission, the largest percentage of departures had always been government substantial assistance motions, not judicial departures.²¹³ Moreover, the primary source for increase in the downward departure rate in this period was the increase in prosecutor sanctioned departures initiated to ease court congestion, called the “fast-track” departures, for the border states that were experiencing a wave of illegal immigration and drug cases that threatened to overwhelm their court systems.²¹⁴ Thus, as Republican appointee Judge Ancer Haggerty put it, “Congress enacted the measure, in part, using misleading statistics about how often federal judges departed from sentencing guidelines.”²¹⁵ Or as Judge Gerald Bruce Lee (E.D. Va.), “the Feeney Amendment [was] an over-reaction to a non-existent problem and an unwarranted restriction on sound judicial decision-making.”²¹⁶

Moreover, even with regard to judicial departure themselves, some commentators have argued that

Justice Rehnquist expressed his concern stating the amendment was “enacted without any consideration for the views of the Judiciary”. *2003 Year-End Report on the Federal Judiciary* (January 1, 2004) available at www.supremecourtus.gov/publicinfo/year-end/year-endreports.html.

²¹³In 1995, 19.7% of sentences received downward departures for substantial assistance, while only 8.4% received judicial departures. U. S. SENTENCING COMMISSION, 1995 ANNUAL REPORT 84 (1996). In 1998, those numbers were 19.3 and 13.6 respectively. U.S. SENTENCING COMMISSION, 1998 ANNUAL REPORT 38 (1999).

²¹⁴Under the fast-track system, defendants who pled early to immigration and minor drug charges in these districts were offered substantially reductions in their Guidelines sentences by the government. However, before the Feeney Amendment, the fast-track system had expanded in an ad hoc fashion. Thus, the Sentencing Commission did not initially separately track these downward departures. As a result, many fast-track departures got lumped into other “judicial departures.” Thus, not surprisingly, by 2002, the judicial departure rate crept up to 16.8%. Thus, while certainty is impossible, most commentators and analysis suggest that the fast-track was largely responsible for the accelerating downward departure statistics. U.S. Sentencing Commission, 2002 Report, tbl.8 (2003). GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 12, tbl.1 (Oct. 2003); *See also*. Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 346-47 (2000) (discussing the Southern District of California’s “fast track” departure plan for illegal immigrants).

²¹⁵“If you look at the overall number of times a judge supposedly departed, it was done at the request of the government in most cases,” Paul Chavez, *Western Federal Judges Rip New Law Limiting Sentencing Discretion*, AP Wire (January 27, 2004) available at <http://www.november.org/dissentingopinions/9thCircuit.html>. The fifteen chief district court judges of the Ninth Circuit held a two day meeting in early 2004 at which they reached a “‘virtual unanimity’ in disdain for the Feeney Amendment.” *Id.*

²¹⁶Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary*, *Champion*, June 2003, at 10.

prosecutor participation or at least quiet acquiescence was also a critical factor in the increase in judicial departures in Period II and into the beginning of Period III. One study found evidence that in a few districts, sympathetic prosecutors seemed to make cooperation agreements based upon minimal cooperation to alleviate what would be otherwise harsh mandatories for low level offenders.²¹⁷ Other have argued that local federal prosecutors were declining to oppose questionable defense motions for downward departures because they were satisfied with the resulting, slightly lower sentence,²¹⁸ and as evidence, point to the low percentage of sentencing appeals by the local U.S. Attorney's Offices.²¹⁹ Thus, while it would be foolish to contend that there were not some judges who granted more than the national average of downward departures based upon their view that the proscribed Guideline sentences were too harsh,²²⁰ it is fair to say that the percentage of downward departures granted by judges over the objection of the government was dwarfed by the departures initiated by the government via by substantial assistance and fast track and those the government chose not to contest.

Most importantly, both the manner of passage and the substance of the Feeney Amendment conveyed to judges the not so subtle message that Congress viewed them as the enemy rather than a partner in making

²¹⁷ For example, in the Eastern District of Pennsylvania during 2001, substantial assistance motions are made in 40.3% of drug cases whereas the rate for the entire Ninth Circuit is 10.7% and the national average was 17.1%. United States Sentencing Commission, *Federal Sentencing Statistics by State, District and Circuit 2001*, Table 8, 11-13, available at <http://www.ussc.gov/JUDPACK/2001/pa01.pdf> (last visited July 19, 2003).

²¹⁸Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Judge's Soft Sentences*, Wall Street Journal, August 6, 2003 (quoting Judge John Martin saying that 'so few departures are appealed because 'most assistant U.S. attorneys recognize they're appropriate,' though they may argue otherwise.').

²¹⁹"Of the more than 230,000 sentences handed down from 1999 through 2002, prosecutors appealed only 282 of them." Jess Bravin & Gary Fields, *House Panel to Probe U.S. Judge*, WALL ST. J., Mar. 12, 2003, at A2, available at 2003 WL-WSJ 3961643. The defendants also pursued cross appeals 138 of those 282. *Id.* See also Mark T. Bailey, *Feeney's Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 Iowa L. Rev. 269, 296-97, 301 (2004) (citing statistics that the government won an overwhelming percentage of it pre-*Koon* sentencing appeals and that prosecutors appealed only 25% of all downward departures, suggesting that United States Attorneys showed "apparent complacency with downward departures.").

²²⁰For example, one judge who consistently clashed with the appellate courts over the Guidelines was John T. Elfvin (N.D.N.Y.). After being cited by the Second Circuit Court of Appeals for failing to state his reasons for departing from the Guidelines, he quipped, "I thought guidelines were guidelines, not mandates. Now I'm told they're mandates, and I have to proceed on that basis," but then went ahead and again sentenced outside the Guideline range. See Dan Herbeck, *Elfvin Cited Twice More for Defying Sentencing Rules*, BUFFALO NEWS at B1 (March 9, 2004).

criminal justice policy.²²¹ Thus, even though the original version of the Amendment was modified in conference, many judges focused on the original bill and the harsh anti-judicial rhetoric that accompanied it in the House.²²² For all these reasons, the Feeney Amendment became a symbol to judges of what was wrong with the sentencing regime and Congress and rekindled judicial opposition to limits on their sentencing discretion in a way not seen since the Guidelines and mandatory minimums were first passed.

Thus, it is not surprising that the judiciary's opposition to the Feeney Amendment was deep and sustained. In February 2004, another judge, Robert Cindrich, (W.D. Pa.) resigned in protest, stating that the sentencing guidelines are "'morally wrong' and have disproportionately affected minorities and poor people." He added that "federal judges have become little more than functionaries in the legal system."²²³ A few judges tried legal maneuvers to combat the Feeney Amendment's provisions. For example, Judge Jack Weinstein, (S.D.N.Y.), announced his plans to tape all sentencing hearings, arguing that since the Feeney Amendment essentially allows the Courts of Appeal to re-sentence, those judges should see and hear the defendant for themselves.²²⁴ Another Southern District Judge, Sterling Johnson, decided to place a blanket seal on all documents required by the Feeney Amendment that would forbid Congress from reviewing these materials without his approval.²²⁵ Two judges, including one Republican appointee, Judge Dick Tevrizian (C.D. Cal.), held that the reporting requirements of the Feeney Amendment were unconstitutional, but a full scale appellate battle over the constitutionality of the Feeney amendment was never fully realized.²²⁶

²²¹"I think some judges feel they are under attack from Washington" Judge Jack Weinstein (S.D.N.Y), Urbina, *supra* note __ at B1.

²²²See *Detwiler*, 338 F.Supp. 2d at 1172.

²²³Associated Press, *Federal Judge Rips Sentencing Guidelines as He Steps Down*, (February 2, 2004).

²²⁴Tom Hays, Associated Press, Jan. 29, 2004, at <http://www.newsday.com/news/local/crime/nyc-sex0130,0,2231592.story?coll=nyc-manheadlines-crime> (last visited Feb. 4, 2004).

²²⁵Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. Times, Dec. 7, 2003, at B1, available at <http://www.november.org/dissentingopinions/NYJudges.html> (also quoting anti-Feeney Amendment remarks by Judges Thomas C. Platt, Robert P. Patterson, Jr., and Guido Calabresi, and Roger J. Miner). A former New York City police officer, Judge Johnson served as New York City's special narcotics prosecutor from 1975 until 1991 and spent a year as the Executive liaison officer to the U.S. Drug Enforcement Administration. <http://www.fjc.gov/public/home.nsf/hisj>

²²⁶Judge Tevrizian held that the statute's requirement for reports on individual judges who grant downward departures from the Sentencing Guidelines violated the separation of powers doctrine because the provision "chills and stifles judicial independence to the extent that it is constitutionally prohibited." The judge's memorandum order notes that while the law does not on its face give the Executive or Legislative branch and power over the Judiciary, the "threat, real or apparent, is blatantly present." Order Declaring Title IV of the Section 401(h)(1)(2) & (3) Report of the Attorney General of the Protect Act and Feeney Amendment Unconstitutional, *United States v. Mendoza*, Case No. 03-730, at 12 (C.D. Cal. Jan. 12, 2004) (copy on file

The organized judiciary also continued its protest. At the Judicial Conference's annual meeting in January 2004, the full conference called for a repeal of the legislation, more than a year after passage.²²⁷ The Conference resolution stated that the "new law severely limits the ability of trial judges to depart from the Sentencing Guidelines and requires reports to Congress on any federal judge who does so."²²⁸ The fallout from the Feeney Amendment also seemed to have inspired Justice Anthony Kennedy's August 2003 keynote address at the American Bar Association ("ABA") Annual Meeting which was essentially an indictment of twenty-five years of conservative sentencing initiatives. His oft repeated conclusions were that, "our resources are misspent, our punishments too severe, our sentences too long."²²⁹

c. The Sentencing Commission, the Justice Department and the Feeney Amendment.

*"Congress and the Executive Branch carved up the Sentencing Commission as if it were a Thanksgiving turkey."*²³⁰

with author). Similarly, Judge Owen Panner (D. Or.) found the statute unconstitutional on separation of powers principles, finding problems with both allocation of power to Executive Branch and the reduction of judicial representation on the Commission, as well as the reporting requirements. *See Detwiler*, 338 F.Supp. 2d at 1172. *But see United States v. Schnepfer*, 302 F.Supp. 2d 1170 (D. Haw. 2004) (upheld all the Reporting provisions of the Feeney Amendment as constitutional because most of them existed to some extent previously under the Sentencing Reform Act of 1984); *United States v. Bordon*, 300 F. Supp. 2d 1288 (S.D. Fla. 2004) (finding that the Feeney Amendment did not violate the Ex Post Facto Clause both because the defendant was not subject to any additional punishment and because the Amendment was procedural); *United States v. VanLeer*, 270 F.Supp. 2d 1318 (D. Utah 2003) (finding that the Feeney Amendment did not substantially alter the ability of judges to depart downward from the Guidelines).

²²⁷*See supra* at note ____.

²²⁸ Judge Carolyn Dineen King of the Fifth Circuit Court of Appeals added that the judiciary's problems with the Feeney Amendment went beyond "matters of process and ceremony . . ." Mark Hamblett, *Federal Judges Attack Sentencing Restrictions; Judicial Conference Calls for Feeney Amendment Repeal*, N.Y.L.J. 1 (col. 4) (Sept. 24, 2003).

²²⁹Justice Anthony M. Kennedy, Associate Justice, Supreme Court of United States, Speech at the American Bar Association Annual Meeting at 4 (August 9, 2003). He singled out mandatory minimums statutes as "unwise and unjust" and criticized the continuing transfer of sentencing discretion from judges to federal prosecutors misguided. Justice Kennedy concluded with a request that the ABA study the matter and then ask Congress to repeal mandatory minimums and the President to reinvigorate the pardon process so that some already serving these sentences might be released. The ABA established the Commission which held hearings in Washington, D.C. in November 2003 and released a report. *See* ABA Justice Kennedy Commission, June 23, 2004 available at <http://www.abanet.org/media/jkcrecs.html>.

²³⁰*Detwiler*, 338 F.Supp. 2d at 1179.

The Feeney Amendment also directed the Sentencing Commission to amend the Guidelines in several ways. In an emergency report in October 2003, the Commission complied with these directives by imposing serious hurdles for aberrant behavior departures²³¹ and departures based on the over-representation of the defendant's criminal history.²³² In addition, the Sentencing Commission added new restrictions for departures based upon multiple circumstances (previously referred to as a combination of factors),²³³ the defendant's family ties,²³⁴ victim's conduct,²³⁵ coercion and duress, and diminished capacity.²³⁶ To further implement the Feeney's Amendment's goals, the Sentencing Commission also restructured the departure guideline and added policy language that requires greater specificity and additional documentation from judges when they depart.²³⁷

The general consensus in the judiciary and academic community was that the Sentencing Commission staff appeared to have attempted to faithfully execute the dictates of the Feeney Amendment while preserving

²³¹See United States Sentencing Commission, Report to Congress: Downward Departures From the Federal Sentencing Guidelines 76-77 (October 2003) [hereinafter Departure Report]. Aberrant behavior departures are no longer permitted if the defendant has any significant prior criminal behavior, even if the prior conduct did not result in a federal or state felony conviction and when the defendant is subject to a mandatory term of imprisonment of five years or more for a drug-trafficking offense, regardless of whether the defendant meets the criteria for the safety-valve. *Id.* at 77.

²³²Departures based on over-representation of criminal history were no longer permitted if the defendant is an armed career criminal or if the defendant is a repeat or dangerous sex offender against minors. *Id.* at 77-79.

²³³*Id.* at 74-75.

²³⁴The Commission limited factors including, inter alia, whether the offense presented any danger to family members to distinguish these cases from those that involved "hardship or suffering that is ordinarily incident to incarceration." *Id.* at 75-76.

²³⁵"In addition to five previously existing factors, the court now should consider the proportionality and reasonableness of the defendant's response to the victim's provocation." *Id.* at 76.

²³⁶The new guideline requires that the diminished capacity "now must have substantially contributed to the commission of the offense" and that the departure should "reflect the extent to which the reduced mental capacity contributed to the commission of the offense." *Id.*

²³⁷The Commission restated that departures in general should be rare and added language that departures are only permitted if, in addition to the court finding "that there exists an aggravating or mitigating factor of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," and the court finds that the departure will advance the objectives set forth in the Sentencing Reform Act. *Id.* at 73-74.

the basic structure of the departure guidelines and leaving most existing grounds for departure intact.²³⁸ Nevertheless, the new requirements and conditions on these frequently used grounds, such as over-representation of criminal history and aberrant behavior, disqualified some defendants who might have received a lower sentence before Feeney. In addition, the new standard of appellate review made government appeals and appellate reversals more likely. In this way too, the Feeney Amendment increased judicial frustration with the inflexibility and arbitrariness of some Guideline results.

In contrast to the Sentencing Commission measured response, President Bush's Justice Department used the Feeney Amendment's directives to take more aggressive steps to restrict judicial discretion and slow the downward trend in sentences.²³⁹ With regard to departures, Attorney General Ashcroft created a new internal reporting and appeal process which required local federal prosecutors to report to Main Justice specific categories of departures²⁴⁰ including any departures that had "become prevalent in the district or with a particular judge."²⁴¹ In addition, local prosecutors were now required to file a notice of appeal in all

²³⁸In its report, the Commission reaffirmed the basic principle that [d]epartures . . . perform an integral function in the sentencing guideline system." Analysis by NACDL's Federal Sentencing Guidelines Committee, at www.nacdl.org/downwarddepartures (last visited Jan. 21, 2004). *But see* Stuart Taylor, Jr, *Ashcroft and Congress are Pandering to Punitive Instincts*, Atlantic Monthly, at <http://www.theatlantic.com/politics/nj/taylor2004-01-28.htm> (noting that an Ashcroft subordinate complained that the Sentencing Commission "had not gone far enough and threatened to go back to Congress.").

²³⁹The Feeney Amendment directed that the Department of Justice adopt policies and procedures to: a) ensure that the Department of Justice Attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law; and b) delineate objective criteria, specified by the Attorney General, as to which cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge. PROTECT ACT, Pub. L. No. 108-21 §401(1), 117 Stat. 650 (2003). The DOJ's post-Feeney response was contained in two memoranda from Attorney General Ashcroft. The first, dated July 28, 2003 ("Ashcroft Appeals Memo") dealt primarily with the appeals process for downward departures. Memorandum from John Ashcroft, Attorney General, United States Department of Justice, to All Federal Prosecutors, App. (July 28, 2003). The second, dated September 22, 2003, ("Ashcroft Charging Memo") also considered departure policy but its most significant changes involved charging policies. Memorandum from John Ashcroft, Attorney General, United States Department of Justice, to All Federal Prosecutors (Sept. 22, 2003).

²⁴⁰Other departures which local AUSAs were required to report within fourteen days included, inter alia: departures that reduce a sentencing zone that required no term of imprisonment; departures of two or more criminal history categories based upon an over-representation of the seriousness of the defendant's record; departures of three or more offense levels based upon a "discouraged" factor, or an "unmentioned" factor, or a combination of factors where no single factor justifies departure, or an impermissible factor (as defined by 18 U.S.C. §3742(j)(2)) for an offense which, prior to the departure, resulted in an offense level of level 16.

²⁴¹ Ashcroft Appeals Memo, app. at 1-2. The Ashcroft Appeals Memo could have but did not require prosecutors to report and appeal every downward departure. While one might posit that the

downward departures to preserve the government's right to appeal, and in all cases where an appeal was authorized to "vigorously and professionally pursue the appeal."²⁴² With regard to non-substantial assistance departures, the prosecutors were instructed that "the circumstances in which federal prosecutors will request or accede to downward departures in the future will be 'properly circumscribed' and 'rare' and directs prosecutors to 'affirmatively oppose downward adjustments that are not supported by the facts and the law,' and not 'stand silent' with respect to such departures."²⁴³

Without specifically saying so, these policy changes acknowledged that some local federal prosecutors had contributed to the increase in departure rates by acquiescing to judicial departures and then failing to appeal those decisions. By attempting to eliminate local prosecutorial discretion in this area, the Bush Administration made clear that downward departure policy was to be centralized in Washington and that local variations and tacit agreements between judges and local U.S. Attorneys would not be tolerated.²⁴⁴

The most significant post-Feeny shift by the Justice Department was Ashcroft's decision to also return to a more aggressive and less flexible plea policy; a change not specifically required by the Feeny Amendment. The new charging and plea policy required prosecutors to charge and pursue "the most serious, readily provable offense or offenses that are supported by the facts."²⁴⁵ The "most serious offense or offenses are those that generate the most substantial sentence under the sentencing guidelines or

Department of Justice did not fully agree with the anti-downward departure spirit of the Feeny Amendment, all the evidence indicates that rather, this was a strategy choice to preserve precious appellate resources; in other words, the Department of Justice decided to pick its downward departure appeal battles.

²⁴²*Id.* at 4.

²⁴³Downward Departure Report, *supra* note __, at 12-13 (quoting Aschcroft Charging Memo, *supra* note 270, at 7). The Charging Memo also reiterates the existing policy that prosecutors must identify to the court instances where they have agreed to depart so there can be both a record and judicial review. Ashcroft Charging Memo, *supra* note __ at 7.

²⁴⁴The DOJ acted quickly in order to avoid more onerous reporting provision in the bill that would take effect if the Department had not instituted policies within ninety days. That provision would have required the Attorney General, within fifteen days after a district court's grant of a non-substantial assistance departure in any case, to submit a report to the House and Senate Judiciary Committees identifying the case, the facts involved, the identity of the district court judge, the district court's stated reasons, whether the district court provided the government with advance notice of its intent to depart, the position of the parties with respect to the downward departure, and whether the government filed or intended to file a motion for reconsideration. PROTECT Act § 401(l)(2). The Attorney General then had another five days to file a Report on the Solicitor General's decision regarding authorization of an appeal.

²⁴⁵Ashcroft Charging Memo, *supra* note __ at 2.

mandatory minimums."²⁴⁶The only time a lesser charge was permissible was when a higher charge was not "readily provable" because the prosecutor had a good faith doubt, for legal or evidentiary reasons, as to the government's ability to prove a charge at trial.²⁴⁷

In other words, Ashcroft also sought to end the long standing practice of what has been called "charge bargaining" or "fact bargaining," wherein the prosecutor and defense agree to a factual proffer that minimized the criminal conduct so that a lesser Guideline or mandatory minimum statute would apply.²⁴⁸ In some respects, Ashcroft's "new" charging policy was simply a return to the Thornburgh Memorandum policy from the Bush I Administration, which had been substantially loosened by the Reno Bluesheet.²⁴⁹ However, the Thornburgh Memo policies were often honored more often in the breach in many districts, given the historic autonomy of local U.S. Attorney's offices. The Feeney Reporting requirements and the seriousness of the rhetoric suggested that this time the Department of Justice had both the tools and the will to bring the local offices in line. To Congressional critics, these moves suggested that, "John Ashcroft seems to think Washington, D.C. can better determine a fair sentence than a judge who heard the case or the prosecutor who tried it."²⁵⁰

The Bush II Administration also increased federal prosecutions by 31% from 2000-2004. In the last year of the Clinton Presidency, there were 88,755 federal criminal cases brought. The Bush numbers were 94,132 in 2002 which then surged to over 100,000 for the first time in 2004 to 116,582. While federal prosecutions had steadily increased since 1986,²⁵¹ the 2002 -2003 jump of over 15,000 new cases was the

²⁴⁶Downward Departure Report, *supra* note __, at 13-14 (summarizing Ashcroft Charging Memo, *supra* note 270).

²⁴⁷Ashcroft Charging Memo, *supra* note __, at 5.

²⁴⁸Attorney General Ashcroft wrote in his Charging Memo that "The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case. Ashcroft Charging Memo at 2.

²⁴⁹*See supra* note __.

²⁵⁰Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Judge's Soft Sentences*, WALL ST. J., (August 6, 2003) (quoting Rep. John Conyers (D. - Michigan)).

²⁵¹In 1986, there were 59,682 federal prosecutions. Prosecutions rose from 74,547 in Clinton's first year to 88,755 in 2000. However, during the Clinton presidency, there were year to year dips as well as increases. Transactional Records Access Clearinghouse (TRAC) Report, *available at* <http://trac.syr.edu/tracreports/crim>.

largest absolute increase, with the greatest increases for immigration and weapons offenses.²⁵²

This combination of more prosecutions, more aggressive and less flexible prosecution policy and new restrictions on departures again increased the number situations in which judges were faced with cases that called for sentences they found untenable, even for a judiciary which grew more conservative each year. The reaction of the longest serving judges was predictably the most bitter and outspoken. Chief Judge Marilyn Patel (N.D. Cal.) wrote:

Under this new regime not only will the government determine the charges to be filed, whether the indictments will undercharge or overcharge the criminal conduct, or whether it will engage in pre-indictment or post-indictment maneuvering to bring about the government's desired result, but it also will be the only voice heard when adopting statutory sentence and Sentencing Guidelines with less and less discretion afforded to the courts and the Sentencing Commission. To put it more bluntly, the wisdom and years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches.²⁵³

d. The Judicial Reaction to Booker.

The post-*Feeney* and pre-*Booker* period was a difficult and stressful time for federal judges. Thus, it is little wonder that the *Blakely* and *Booker* decisions were welcomed by the overwhelming majority of judges. Judge Catherine Blake (D. Md.), a former prosecutor, noted that "It appears, however, that the Supreme Court has left in place a system that will truly guide a judge's discretion at sentencing without mandating what might in an individual case be an unjust result." Judge U.W. Clemon (N.D. Al.) said that the decision would have a "tremendous impact . . . because it allow judges to hand down justice they think is appropriate in each case." Judge Lasnik (W.D. Wash.) described the decision as "good news." Other judges were more colorful in their language. After praising the return of decision-making to the judge, Judge John Kane (D. Co.) noted that "on their face, 'mandatory guidelines' are an oxymoron that 'only somebody in Washington could dream up.'"

While the *Booker* majority rested its holding upon its interpretation of the Sixth Amendment, many in Congress, academia, and even the judiciary, saw *Booker* in the context of the power struggle between the branches and a delayed reaction to the Feeney Amendments and the longstanding war on judicial discretion. From this real politick view, in *Booker*, the Supreme Court finally stepped in to show Congress that there

²⁵²Interestingly, the number of terrorism prosecutions, already a low number, peaked in 2002 and thereafter dropped. In addition, the number of drug prosecutions by the Bush Administration, now the second largest category after immigration, leveled off and then dropped in 2004 and into 2005. *Id.*

²⁵³*United States v. Mellert*, 2003 WL 22025007 (N.D. Cal. July 30, 2003).

were limits to its willingness to tolerate Congressional meddling with the independence and prestige of the federal courts. Anticipating this decision, Judge Panner wrote before *Booker*:

For too long, the Judicial Branch has remained silent in the face of repeated encroachments by the other two Branches. Like frogs in a simmering pot, we adjust to the new temperature, and complain among ourselves that it seems a tad warm, but then accept the new order of things, to repeat that process anew after the next encroachment. Unless a line be drawn somewhere, and soon, the independent federal judiciary that is the bulwark of our liberties. . . will be relegated to just another historical footnote.²⁵⁴

After *Booker*, most judges seemed satisfied with the concept of advisory Guidelines system if not all of its outcomes. Sentences remained largely the same, even rising slightly, and in the overwhelming majority of cases, judicial variances from the Guidelines did not appear excessive either in frequency or degree. However, the post-*Booker* environment was also characterized by tentativeness and uncertainty as everyone recognized that sentencing policy is ultimately Congress' prerogative, and that sooner or later, Congress was eventually going to revisit sentencing policy.²⁵⁵ Moreover, while the Guidelines are now advisory, the overlapping system of drug and gun mandatory minimums remain intact, leaving a significant number of cases in which judges are still powerless to alter sentences that flow from the independent and inflexible charging decisions of prosecutors. Thus, as noted in the Introduction, it is still worthwhile to continue to mine the pre-*Booker* data, particularly for the experiences of Republican appointees whose voices in the aggregate might matter to Congress as it revisits sentencing policy in the post-*Booker* era. Therefore, the next Part explores the distinct experiences of Republican appointees and the sentencing issues that most troubled them in this period.

IV. Republican Appointees in the Sentencing Guidelines Era.

Congress should not be distracted by off-the-mark suggestions that [mandatory minimum sentencing] is a soft vs. tough on crime issue. I am a former prosecutor and I chair an agency that views crime control as the most important goal of sentencing So the real issue is how to most effectively, efficiently, and fairly achieve this important goal.

²⁵⁴*Detwiler*, 338 F.Supp. 2d at 1179.

²⁵⁵ *Booker*, *supra* note __, at 768 (“The ball now lies in Congress’ court”); “I think it’s a very positive thing because it puts the decision making responsibility on the person who is supposed to be making the decision, and that is the judge.” Alicia Caldwell, *Justices: “Mandatory guidelines” Unconstitutional*, DENVER POST, (Jan. 13, 2005) (quoting U.S. District Judge John Kane). “I think that Congress should give it a chance. If it doesn’t work, if they find that judges are going off the map, then they can always revisit it.” Gina Holland, *Judges Deal With Sentencing Rules Fallout*, THE STATE, (Jan. 13, 2005)(quoting U.S. District Judge Charles Kornmann of South Dakota).

This Part focuses on judges appointed by Republican presidents and begins with some impressions about the influence of party affiliation, the appointing President, and a judge's prior legal background. It then explores this cohort's dissatisfaction with two principal features of federal criminal law that impact sentencing, mandatory minimums and the federalization of crime. The remainder of this Part examines in detail four specific issues that appear to have provoked the most serious disagreement from Republican judges during the pre-Booker sentencing regime; sentences for crack cocaine, low-level offender with limited culpability, surprisingly, a group of more culpable defendant, whose sentences were so excessive as to offend the judge's notion of proportionality, and finally, perceived misuse of prosecutorial charging discretion in gun cases carrying mandatory prison terms. In this last section, I make substantial use of examples from the profiles in Appendix A, as well as providing quotations from my interviews. Part III concludes by discussing some specific policy changes that these judges have either identified as favorable or that might naturally address their primary concerns.

A. Introduction: Some Impressions about the Influence of Party Affiliation, Appointing President, and Legal Background.

As it turns out, in many respects, the sentencing concerns of Republican appointed judges were not significantly different from their Democratic counterparts. Certainly, by 2005, judges from both parties tended to support the concept of guided judicial discretion and some form of appellate review of sentences, at least to control outliers. Correspondingly, only a small minority from either party were still advocating for a return to the pre-Guidelines regime of unfettered discretion.²⁵⁷ However, like most Democratic appointees, a majority of Republican judges on the bench during the Sentencing Guidelines era would have preferred presumptive guidelines to mandatory minimums/mandatory guidelines regime.²⁵⁸ Moreover, in cases in which Republican judges were dissatisfied with what the pre-Booker regime required them to do, for sheer vehemence, some of their rhetoric is easily on par with statements by the most liberal Democratic appointees. For example, in explaining his inability to depart to a defendant at sentencing, Judge Lyle E. Strom (D. Utah),

²⁵⁶*U.S.S.C. on Mandatory Minimums: Testimony of Judge William W. Wilkins, Jr., Chairman of the U.S.S.C.*, 6 Fed. Sent. Rep. 67, *2 (1993). Judge Wilkins, appointed in 1986 by President Reagan, served as the Chair of the U.S. Sentencing Commission from 1985-1994.

²⁵⁷ These judges, mostly appointed before the Guidelines, tended to be quite vehement in their opinions. One judge argued that if someone is appointed to the federal bench, "we ought to trust their judgment." Atlantic Judge 1, Anonymous Interview (Aug. 10, 2002). Another Republican appointee stated, "sentencing guidelines are horrid in theory and worse in practice." Atlantic Judge 3, Anonymous Judge Interview (Sept. 6, 2002).

²⁵⁸ Again, there was some variation. One Bush II appointee interviewed stated that his preference was somewhere between presumptive and mandatory guidelines. Western Judge 2, Anonymous Interview (Oct. 2, 2002).

appointed by President Reagan, stated: “I know its no justification or solace to you, but I am serious when I say this is an outrageous sentence, and I apologize to you on behalf of the United States Government.”²⁵⁹

Nevertheless, there are distinctions worth drawing in both speech and deed. In interviews, these judges often stated their unequivocal support for the SRA’s “truth in sentencing” provisions, including the abolition of independent parole board discretion.²⁶⁰ Republican judges generally also made a point to articulate their high regard for sentencing uniformity;²⁶¹ and correspondingly, also expressed discomfort with sentencing disparities, regardless of their cause.²⁶²

With regard to sentencing severity, these judges tended to make generalized claims about the importance of law and order and the need for stiff punishment for crime. In contrast, Democratic appointees interviewed, particularly Clinton judges, focused on violent offenses and organized crime when asked about when punishment should be the primary factor in a sentencing decision and where there was the greatest need for tough sentences.²⁶³ Republican appointees were more likely to identify areas in which Guideline sentences

²⁵⁹See Profile of Judge Lyle E. Strom (D. Neb), Appendix A. Similarly, Judge Garnett Thomas Eisele (E.D.Ark.) labeled one guideline sentence “truly tragic.” See Profile of Garnett Thomas Eisele, Appendix A. A Reagan appointee stated “I feel like an apparichik in a totalitarian regime” and that mandatory guidelines are “horrid in theory, worse in practice.” Atlantic Judge 3, Anonymous Judge Interview (Sept. 6, 2002).

²⁶⁰“The major contribution of the Sentencing Reform Act is truth in sentencing. Parole board actions were hidden from the public and every confusing.” Atlantic Judge 1, Anonymous Interview (Oct. 15, 2002). Similarly, a Western Republican appointee agreed with the “principle of honesty and uniformity of the SRA.” Western Judge 3, Anonymous Interview (Sept. 30, 2002). A Southern judge expressed his preference to “give less time but have defendant serve it.” Southern Judge 3, Anonymous Interview (Nov. 2, 2002).

²⁶¹One southern judge stated that he found the Guidelines helpful because “its hard to reach into the air and pick a number.” Southern Judge 1, Anonymous Interview (Sept. 4, 2002).

²⁶²“The concept of the Guidelines is to promote a consistent approach . . . it is wrong to be in the same courthouse or different part of the country and get probation or jail.” Western Judge 2, Anonymous Interview (Oct. 2, 2002). Another expressed concern that the “typical person questions the credibility of the criminal justice system when sentences vary by judge or region, a crime is crime wherever it is.” Southern Judge 3, Anonymous Interview (Nov. 2, 2002). Interestingly, while many judges said they would be troubled by inter-district disparity, at the time of these interviews, a fair number were unaware of the emerging research that suggested the persistence of regional disparity on issues such as substantial assistance and other both government sponsored and judicial downward departures. See Weinstein *supra* note ____.

²⁶³Northeastern Clinton Appointee 1, Anonymous Interview (December 11, 2002); Midwestern Clinton Appointee 2, Anonymous Interview (Nov. 2002); Northeastern Clinton Appointee 2, Anonymous Interview (August 27, 2002); Northeastern Clinton Appointee 3, Anonymous Interview (October 7, 2002).

were not high enough.²⁶⁴ Lastly, Republican appointees, as a group, were probably dissatisfied with a smaller percentage of the Guidelines sentences on their dockets, although it is hard to quantify this difference,²⁶⁵ although there is some statistical evidence that Republican appointees imposed slightly longer Guideline sentences for drug and gun crimes than their Democratic counterparts.²⁶⁶

There are also moderate generalizations that seem to flow from when the judge was appointed. For example, press reports and my research suggest that a significant contingent of Nixon and Reagan judges, who were appointed before the Guidelines took effect, became some of the Guidelines regime's strongest critics (and include probably almost all the Republican appointees willing to say that they favor a system closer to unfettered discretion). Judges appointed by President Bush I, having come into the system with the Guidelines already in place, tended to focus their objections more on specific cases and substantive issues than at system generally. Lastly, because judges appointed by President G. W. Bush had less than five years on the bench before the Booker decision was handed down, their sample size (in numbers of judges and total criminal cases) was smaller when my database was collected. Nevertheless, both in interviews and in published decisions, some of the Bush II judges raise similar concerns as their longer serving brethren, such as the severity of crack penalties and the disproportionality of drug crimes to crimes of violence.²⁶⁷ To the

²⁶⁴Some of these areas tended to be localized issues. For example, in jurisdictions in which federal judges had authority over traditional crimes of violence such as in Indian country, some judges felt that sentences for sex crimes, especially child molestation were not long enough. Western Judge 1, Anonymous Interview (Sept. 30, 2002). While collar and other crimes of violence were also sometimes mentioned, though often, like Democratic appointees, as a comparison point rather than as definitive desire for an increase in all cases.

²⁶⁵ One Midwestern Reagan appointee did; saying that 80-90% of sentences he didn't "feel that bad about, but that he had concerns about the remaining ones." Midwest Judge 2, Anonymous Judge Interview (Oct. 28, 2002).

²⁶⁶Max Schanzenbach and Emerson H. Tiller, *Strategic Judging Under the United States Sentencing Guidelines: Instrument Choice Theory and Evidence*, at 6, available at www.law.uchicago.edu/Lawecon/workshop-papers/Schanzenbach.doc. Schanzenbach and Tiller believe their results show that prior political affiliation correlates to particularly well with decision to use offense-level adjustments and making departures.

²⁶⁷ See Western Judge 2, Anonymous Judge Interview (October 2, 2002) (stating the Guidelines were "out of whack" when a routine drug transport case gets twenty years but a drunk driver with multiple deaths receives much less). A Southern George W. Bush appointee stated there are a few cases where he would give significantly less than required by the Guidelines. Southern Judge 3, Anonymous Interview (Nov. 2, 2002). Post-*Booker*, other George W. Bush appointees have also criticized both Guideline and mandatory minimums. See *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D. RI. 2005) (Judge Smith criticizing the 100:1 crack to powder ratio and citing "the growing sentiment in the district courts is clear: the advisory Guideline range for crack cocaine based on the 100:1 ratio cannot withstand the scrutiny imposed by the sentencing courts when the §3553 factors are applied); *United States v. Angelos*, 345 F. Supp. 2d 1227,

extent any generalizations can be made, the Bush II judges in the 2000-2005 period tended to be both younger and slightly more conservative in political outlook, especially in their views on “judicial activism.” Given their view of judicial power, and perhaps their own recognition of their relative inexperience both on and off the bench, these judges seem to be more reticent to speak out publically against sentencing policy decisions made by the two other branches, and when they did so, their statements and opinions tend to show greater deference to Congress and the President.

Not surprisingly, a judge’s prior legal career also seems to shape their outlook on sentencing policy. For example, Republican judges who had experience as state judges (or other positions in a state criminal justice system) with unfettered discretion tended to bridle more under the Guidelines. Even more profoundly, judges with substantial state criminal justice system experience tended to disagree with very lengthy sentences for non-violent and first-time offenders, especially life sentences without parole for drug crimes. From their experience, the ultimate sentence of life without parole should be reserved for the most serious violent crimes such as murder and rape, or rarely, for inveterate recidivists deemed beyond any hope of rehabilitation. In contrast, Republican federal judges who were primarily federal prosecutors or political operatives, generally were familiar and comfortable with the operation and results of the Sentencing Guidelines.

Lastly, Republican judges who came to the federal bench without criminal justice experience tended to come from successful corporate careers. These judges tended to see themselves, in part, as problem solvers. Thus, when the rigidity of the Guidelines and mandatory minimums prevented this kind of judge from adjusting a sentence when the underlying problem had been addressed, they tended to express frustration with the rules. The most typical scenario for this kind of case, discussed later in this section, were drug addicts who has successfully completed drug treatment before sentencing and had no criminal record before their addiction.

B. Mandatory Minimums and the Federalization of Crime.

1. Mandatory Minimums.

As noted throughout this Report, judicial opposition to mandatory minimum sentencing has been virtually unanimous since 1986, and has long been the official position of the federal judiciary.²⁶⁸ Without question, Republican judges are part of the overwhelming majority of the federal judiciary that see mandatory minimums

1241-1243 (D. Utah 2004) (Judge Cassell noting the unfairness and disproportionality of “stacking” 924(c) counts).

²⁶⁸Both the Judicial Conference and its Criminal Law Committee have been resolute in their opposition to mandatory minimum statutes. *See* 5 Fed Sent Rep. 202, *1 (1993) (The Criminal Law Committee declaring “the prime requisite for a workable [sentencing] system is to eliminate the deleterious effects of minimum sentencing mandated by statute.”).

as unnecessary and sometimes resulted in unjustifiably harsh sentences.²⁶⁹ In fact, during the research for this study, only one Republican judge contacted defended mandatory minimums, but even that judge acknowledged that this was a recognition of Congress' power to set punishment rather than an assessment of their efficacy.²⁷⁰ In contrast, every other Republican judge interviewed or profiled for this study was willing to say that they had to personally impose at least one mandatory minimum sentence (and sometimes many) that was unnecessary and unjust.²⁷¹ Most Republican judges also stated that they saw no need for mandatory penalties because the Guidelines were sufficient to guard against excesses in judicial discretion and many also noted that mandatory minimum statutes distorted the proper functioning of the Guidelines.²⁷²

When pressed in interviews about whether any mandatory minimums made sense, for example, for first degree premeditated murder, the general response was that because every judge would punish first degree murderers, at or near the maximum allowed anyway, mandatory minimums for serious violent crimes were unnecessary. Thus, while many of these judges philosophically disagreed with mandatory penalties in general, the real grist for their complaints seems to have been the application of the existing drug and gun mandator

²⁶⁹ See Gallop Survey *supra* note ___; See also FJC 2002 Survey, *supra* note ___.

²⁷⁰ See Letter to David M. Zlotnick, Professor of Law Roger Williams University of Law, from Judge Paul R. Matia, Northern District of Ohio (July 23, 1998) (on file with author). Judge Matia indicated that the "right to determine what . . . the penalty for [criminal] acts should be, belongs to the people, acting through their duly elected representatives in our republican form of government." He "never had a case in which a mandatory minimum sentence troubled [him]." *Id.* One Democratic appointee interviewed initially made a statement that he had no problem with mandatory minimums. Later in the interview, however, he confided that the real reason that he had no problem with the statutory scheme was that in the rare case where he was uncomfortable with the prospective sentence, he was usually able to convince the prosecutor to dismiss the indictment and allow the defendant to plead to an information charging a lesser offense that carried a non-mandatory penalty. He elaborated that his district was still a small community and his family and those of most of the lawyers deep roots there. Thus, he felt he had substantial personal leverage with the U.S. Attorney's Office. Southern Judge 2, Anonymous Interview (Nov. 5, 2002).

²⁷¹ Few of these judges were willing to back up these statements by providing the name of a case either because they claimed failure of memory, or more honestly, stated their preference to remain anonymous.

²⁷² Comments included: "Why do we need mandatory minimums if we have guidelines?" Southern Judge 1, Anonymous Interview (Sept. 4, 2002). "Most judges find mandatory minimums really difficult. There is no need for statutory mandatory minimums." Western Judge 3, Anonymous Interview (Sept. 30, 2002). "I could live with the Guidelines if Congress did away with mandatory minimums." Midwest Judge 2, Anonymous Interview (Oct. 28, 2002). See also Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 Fed. Sent. Rep. 33, *1 (1994) ("mandatory minimums have influenced, and some would say distorted, the guidelines and thus the entire federal sentencing structure"); See Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 30 Fed. B. News & J. 158 (1993) ("th[e] calibration of 'minimum' sentences . . . has corrupted the entire federal sentencing system.").

to specific cases.

This is not to say that Republican judges were always happy with the actual sentences produced by the Guidelines. In fact, many agreed with their Democratic counterparts that the Sentencing Guidelines as written, had grown too complex and inflexible and had their own significant problems, both structurally and with regard to specific offenses.²⁷³

B. Federalism and the War on Crime.

In contrast to the unanimity and clarity on mandatory minimums, Republican judicial views on the federalization of crime and the war on drugs tend to be nuanced and sometimes self-conflicting. As life-long Republicans, most were quick to champion federalism and states' rights. Thus, federal prosecutions of small time drug and gun crimes were often seen by them as an unwarranted intrusion on the state criminal justice system. One Republican judge argued that the combination of overlapping jurisdiction and tougher, federal penalties "distorted the market" for prosecution, driving too many cases into federal court because law enforcement quite naturally sought 'a higher return.'²⁷⁴

At the same time, Republican appointees' law and order ideology, as well as a dose of realism, pushed them to recognize the need for a federal role in drug enforcement. Obviously, drug trafficking is an inter-state, and indeed an international problem, beyond the ability of local and state governments to handle. Despite these conflicting perspectives, my research suggests that overall, these judges believe that too much drug and gun crime was being prosecuted in the federal courts in the 1987-2005 period. One Western Republican judge went so far as to state that all the drug cases he had seen so far belonged in state court and fifty percent of the felon-in-possession gun cases.²⁷⁵

This Republican judicial federalist ire was likely fueled by the dramatic increase in both absolute numbers and the percentage of the federal docket taken up by drug and gun cases in the Guidelines era.²⁷⁶ The result has

²⁷³For example, on the Guidelines, one Republican judge noted that "The present regime requires micro findings and is unduly cumbersome." Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002).

²⁷⁴Atlantic Judge 3, Anonymous Interview (Oct. 11, 2002).

²⁷⁵Western Judge 1, Anonymous Interview (Sept. 30, 2002).

²⁷⁶ Drug case filings increased 65% from 1994 to 2001, surging to more than 80,000 cases per year. Similarly, firearms cases increased exponentially with an 83% increase from 1997 to 2001. Office of Human Resources and Statistics, Administrative Office of the United States Courts, *Federal Judicial Caseload: Recent Trends*, at 8 (2001). In comparison, from 1989 to 1998, the number criminal filings increased, but only by 25% in all categories combined. See Patrick Walker & Pragati Patrick, Administrative Office of the United States Courts, *Trends in Firearms Cases From Fiscal Year 1989 and the Workload Implications for the U.S. District Courts* (Apr. 4, 2000) <<http://www.uscourts.gov/firearms/firearms00.html>>. See also Frank

been that in certain districts, federal district court practice came to look like a busy urban superior court, grinding out dispositions with little individualized attention. One judge in a busy border state noted that on some days, he might take sixty guilty pleas in minor drug and immigration cases, forcing a “gang plea” situation with multiple defendants pleading at once.²⁷⁷

These judges were also critical of the process of federalization, recognizing that Congressional action was often motivated by a highly publicized crime or crimes, rather than from deliberate study and consideration. In this vein, one judge noted that he thought the carjacking statute was an absurdity.²⁷⁸ Another claimed more broadly that because of federalization, the federal criminal justice system was so overwhelmed that it “is sliding down the edge of a razor.”²⁷⁹ On the other side of the coin, judicial critics have asserted that judicial opposition to the growth of the federal criminal docket is rooted not in federalism, but in resentment against an increased workload and an elitist attitude about the business of the federal courts.²⁸⁰ At least one judge interviewed for this study made comments that sounded in this theme, stating that “federal court was a special place,” and therefore, “there should be a very good reason for a drug case to be in federal court.”²⁸¹

Further muddying the waters, was judicial ambivalence about the competence of state courts to address the drug and gun epidemic. These judges frequently noted that state courts were underfunded and ill-equipped to deal with war on crime by themselves, and hence needed federal assistance.²⁸² But, at the same time, judges were frequently resentful that state courts were not tough enough on drug offenders, with one judge arguing that “inefficiency of state courts” was not a good reason to bring a drug case to federal court.²⁸³

O. Bowman, *The Year of Jubilee...or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, 43 HOUSTON L. REV. 279 (2006).

²⁷⁷Western Judge 5, Anonymous Interview (Oct. 2, 2002).

²⁷⁸Western Judge 1, Anonymous Interview (Sept. 30, 2002). Carjacking was federalized pursuant to 18 U.S.C. 2119 (2000). The statute was passed following public outcry when a Maryland woman was killed in the course of a carjacking. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L. Rev. 505, 532 (2001) (noting that carjackings are rare but that the bill was a “politically valuable symbolic statement to voters.”).

²⁷⁹Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002).

²⁸⁰At least one judge interviewed for this study made comments that sounded in this theme, stating that “federal court is a special place,” and therefore there should be a very good reason for a drug case to be in federal court.” Southern Judge 2, Anonymous Interview (Nov. 2, 2002).

²⁸¹Southern Judge 3, Anonymous Interview (Nov. 2, 2002).

²⁸²“State courts are in a state of collapse, are underfunded and staffed. They cannot deal with the fallout of the drug culture.” Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002).

²⁸³Southern Judge 3, Anonymous Interview (Nov. 2, 2002).

Some judges were also concerned about disparity issues, noting that defendants prosecuted in state court for essentially the same offenses received very different sentences.²⁸⁴

Lastly, on the issues of federalism and the war on drugs, surprising, drug warrior fatigue also showed up in some of the interviews. While most Republican judges still voiced their commitment to tough narcotics enforcement (though not to the severity of sentencing laws), there was a recognition that federal intervention seemed to be having no impact on the drug culture and willingness of young men, especially minorities, to engage in drug trafficking. For example, Judge Matsch (D. Co.), after being required to impose a thirty year sentence on a first-time crack dealer stated, “And the purpose of [the sentence], as I’ve already indicated, is to try to warn other people away from it, principally, and I’ve sentenced a lot of people and more keep coming. So I don’t know. But that’s what I must do here.”²⁸⁵

A few Republican judges, however, have gravitated to a more radical stance, especially with regard to “soft drugs” such as marijuana. One southern Republican judge, in an area that saw a fair amount of cultivation cases said, “Marijuana is a fact of life and we should recognize it. Its no more serious than a martini and one can’t say anymore that it’s a stepping stone [to more expensive drugs] because crack is so cheap in [city omitted].”²⁸⁶ Sounding much like a liberal drug reformer, this judge also contended that the war on drugs should be more about avoiding drug use than fighting drug sales.

C. Specific Areas of Concern for Republican Appointees.

1. The Special Case of Crack Cocaine.

As noted in Part II, there is ample evidence that a majority has of the judiciary has long believed that sentences for crack cocaine are too long. Twice the Sentencing Commission has recommended that Congress lower the mandatory minimums for crack and in September 2006, the Judicial Conference affirmed a recommendation from its Criminal Law Committee, chaired by Judge Paul Cassell (D. Ut), a well known conservative academic and now judge, that the disparity between crack and powder be remedied.

Many individual judges have spoken out publically on the excessiveness of the statutory penalties and its racial

²⁸⁴Southern Judge 2, Anonymous Interview (Nov. 15, 2002); Southern Judge 3, Anonymous Interview (Nov. 2, 2002); *See also* Profiles of Judge Lyle E. Strom (D. Neb.); Judge James C. Fox (E.D. N.C.), Appendix A (giving examples of such cases).

²⁸⁵*See* Profile of Judge Richard P. Matsch, Appendix A.

²⁸⁶Southern Judge 1, Anonymous Interview (Sept. 4, 2002). Another argued that all marijuana cases should be handled in state court as well as the “out the back door” cases. Western Judge 1, Anonymous Interview (Sept. 30, 2002).

impact.²⁸⁷ In September 1997, twenty-eight former United States Attorneys, now federal circuit and district court judges signed a joint letter addressed to the Chairmen of the House and Senate Judiciary Committees asserting their belief that “the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society’s interest.”²⁸⁸ The letter went on to add that the solution was not to raise penalties for powder for these judges wrote, are already “severe and should not be increased.”²⁸⁹ These judges were appointed by every President between Nixon and Clinton and included fourteen Republican appointees.²⁹⁰

My research suggests the Republican signatories of the 1997 letter fairly represent the majority views of Republican appointees. In the anonymous interviews for this study, Republican appointees have said that the crack penalties constitute a “grave injustice”²⁹¹ and that the crack/powder disparity is “completely unacceptable,”²⁹² and a “discrepancy that has no basis in fact.”²⁹³ However, this does not mean that all Republican appointees also felt that crack and powder penalties should be equal. Rather, at least some contingent felt that crack penalties should still be higher than for powder cocaine, just not as high as currently set by statute and the Guidelines.²⁹⁴

²⁸⁷Reggie B. Walton recently criticized the sentencing disparity as “unconscionable.” See Matt Apuzzo, *Judge: Cocaine Sentencing Disparity “Unconscionable,”* November 15 2006, Associated Press.

²⁸⁸1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees, reprinted in 10 Fed. Sent. Rptr. 14-95 (1998).

²⁸⁹The same letter was resubmitted to the Sentencing Commission for its 2002 hearings on the issue with twenty-eight judges signing on. See Statement to the United States Sentencing Commission Concerning the Penalties for Powder and Crack Cocaine Violations Submitted by Certain United States Circuit Court of Appeals and District Court Judges Who Previously Served as United States Attorneys, Apr. 15, 2002 at 1, referenced at http://www.ussc.gov/r_congress/02crack/ch1.pdf. at 2, n.6.

²⁹⁰ The judges who signed the 1997 letter are as follows: Michael Daly Hawkins, Boyce F. Martin, Jr. Gilbert S. Merritt, Jon. O. Newman, Raymond L. Acosta, Sarah Evans Barker, Walter E. Black, Jr., Catherine C. Blake, Clarence A. Brimmer, Robert J. Cindrich, John T. Curtin, Glen H. Davidson, Raymond J. Dearie, Gustave Diamond, Peter C. Dorsey, John Hannah, Jr. William W. Justice, William C. Lee, William T. Moore, Frederick J. Motz, Alan H. Nevas, Manuel L. Real, James M. Rosenbaum, Barefoot Sanders, Fred J. Scullin, Jr., Donald E. Walter, Rodney S. Webb, George E. Woods.

²⁹¹Midwest Judge 1, Anonymous Interview (Nov. 26, 2002).

²⁹²Western Judge 4, Anonymous Interview (Oct. 17, 2002).

²⁹³ Midwest Judge 2, Anonymous Interview (Oct. 28, 2002).

²⁹⁴It is not clear to what extent the support for a higher crack to powder penalty is based on their view that crack is a more dangerous drug, or that 1:1 is politically unfeasible, or that it feels safer and less partisan to endorse the most recent suggestion of the Sentencing Commission. Likely, for this group of judges,

A good example of a Republican appointee's views on crack sentencing is the case of William Gaines, sentenced by Judge Robin Cauthron (W.D. OK).²⁹⁵ Even according to the government's version of the offense, William was not a central figure in the Oklahoma City cocaine ring that resulted in a twenty-nine count indictment against twelve individuals in 1994. William was charged in only two counts; a broad conspiracy count and a distribution count. The government contended that William had two roles in the conspiracy, that of a cook/cook trainer and as a distributor of small quantities of crack.²⁹⁶

William admitted that he sold marijuana off and on to support his family, but he denied being part of this organization and denied that it was his voice on the audiotape of the two buys the government had recorded. However, based on the testimony of several co-conspirators, William was found guilty. He was sentenced to 292 months despite being a first offender because the conspiracy was alleged to have trafficked approximately 10.6 kilograms of crack (which was assessed as relevant conduct for William).

It seems fairly certain that William obtained very little profit from the operation as demonstrated by the fact that at the time of his arrest, he was holding down a job as a janitor which paid \$6.25 per hour. William's sentence seems even more unfair when compared to his more culpable co-defendants who cooperated and testified against William and others. For example, Ramon Cartznes, the Mexican wholesaler who provided

all three factors may play a role. See U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy at 91 (May 2002) (recommending 20:1 ratio as reasonable, incremental step to the penalty structure); See also *United States v. Perry*, 389 F. Supp. 2d 278 (D. R.I. 2005) (Judge Smith, a George W. Bush appointee endorsing the 20:1 ratio as reasonable in a post Booker context); *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006) (reversing similar unpublished decision from the same district by Judge Ernest Torres, a Ronald Reagan appointee, who also found the disparity irrational).

²⁹⁵See Profile of Judge Robin J. Cauthron (W.D. Okla.), Appendix A; see also Profiles of Judge William M. Nickerson (D. Md.); Judge Philip Reinhard (N.D. Ill.); Judge Alex Kozinski (9th Cir.); Judge Clyde Roger Vinson (N.D. Fla.); Judge Joseph F. Anderson, Jr. (D. S.C.); Judge Sharon Lovelace Blackburn (N.D. Ala.); Judge Charles R. Butler, Jr. (S.D. Ala.); Judge Ira DeMent (M.D. Ala.); Judge Marilyn L. Huff (S.D. Cal.); Judge James M. Rosenbaum (D. Minn.); Judge Sam Sparks (W.D. Tx.); Judge Lyle E. Strom (D. Neb.); Judge Richard W. Vollmer, Jr. (S.D. Ala.); Judge Samuel G. Wilson (W.D. Va.), Appendix A.

²⁹⁶The government audio-recorded two crack transactions with William that involved 13.8 grams and 27.6 grams. The government also presented testimony that a leader of the group asked William to show someone how to cook powder cocaine into crack. While the process of "cooking" crack cocaine requires nothing more than correctly heating powder cocaine with baking soda and water, mistakes can be costly, thus dealers prefer to have an experienced person perform the operation. The process of making crack cocaine can be easily found on the Internet. See <http://www.a1b2c3.com/drugs/coc05.htm> (mix 2 parts cocaine hydrochloride (regular powder cocaine) to 1 part baking soda in 20 ml water. Heat solution gently until white precipitate forms, and stop heating when precipitation stops. Filter and keep precipitate. Wash precipitate once with water (this procedure may be omitted in street product). Dry twenty-four hours under heat lamp. Profile of Judge Robin J. Cauthron (W.D. Okla.), Appendix A.

virtually all the crack and powder for a period of time received only a 72 month sentence.²⁹⁷

At the sentencing hearing, Judge Cauthron recognized that the sentence seemed disproportionate to the offense and the offender, but she asserted that there was nothing that she could do about it. She told William's defense attorney

. . . many of your arguments are valid ones in specific given cases. There are times when the [G]uidelines do not result in fairness or equity. It is of concern to me any time someone with no criminal history can face exposure as high as Mr. Gaines does based on a first conviction. But, in any event, the guidelines are the law and they have been found to be constitutional and the way to change them is through the political process. . . . I am committed by an oath of office to follow the law and the guidelines are the law.²⁹⁸

While commentators have largely focused on the racial impact of crack sentences,²⁹⁹ Republican appointees like Judge Cauthron, seem to be at as concerned with proportionality. Particularly for small time figures like William Gaines, meting out crack sentences that far exceeded the penalties imposed for importers (as well as for armed robbers, rapists, and even some murderers) troubled these judges. This was particularly true for first time offenders and lower level retail dealers. Judges recognized that although Congress had stated that the severe mandatory minimums were to apply to kingpins and importers, the fact that cocaine is imported into the United States as powder and is only converted to crack at the end of the retail chain ended up inverting the penalty structure in many cases. In reality, importers were subjected to much less severe penalties for powder than the inner city dealers and addicts who dealt in small quantities of crack. For the judges who had to impose these penalties, there was something perverse about punishing the smallest fish in the distribution chain the most severely.³⁰⁰

²⁹⁷Morris Johnson, who for a time was the number three person in the organization, was sentenced to 120 month. Floyd Bush and Charles Watson, who testified against William each received 120 months despite their acknowledged roles as steady distributors for the organization in Oklahoma City. Three of those convicted along with Mr. William were given more severe sentences: Timothy Johnson, 410 months; Kevin Johnson, 292 months; and Nick Owens, 360 months (remanded for resentencing). See Profile Robin J. Cauthron, Appendix A.

²⁹⁸*Id.*

²⁹⁹See U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* at 21 (May 2002) (arguing that early studies which indicated that crack was more addictive and had a more severe impact on fetuses appeared to have been at least overstated and probably wrong); see also U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, Chapter 7(D)(4) (Feb. 1995) (noting that “the 100-to-1 [crack/powder disparity] is a primary cause of the growing disparity between sentences for Black and White federal defendants.”).

³⁰⁰One judge observed that he had yet to see a kingpin in his court. Rather he was being asked to sentence crack dealers who controlled only a few blocks yet ended up being sentenced to 300-400 months.

C. Low-Level Offenders - Girlfriends, Junkies & Couriers.

In talking about low level drug offenders, Republican judges faced the central problem with the 1986 statute and the Guidelines approach to drug sentencing; as one Reagan appointee put it: “Quantity shouldn’t mandate result.”³⁰¹ Another Republican appointee looked at the problem more philosophically, arguing that the Guidelines failed to sufficiently individualize punishment. This Republican appointee was very direct about her desire to “look at the whole person and not hold ghetto dealer to same standard as a bank president.” But she noted, “Congress worried about empathy so tied [it] judges hands.”³⁰²

In drug cases, the areas in quantity and culpability collided most often for Republican judges involved three types of low-level offenders; those who became involved because of a romantic relationship, or from substance abuse, or as drug couriers (or some combination of all three).³⁰³ Because of the prevalence of these three kinds of cases, each is discussed in more detail in this section. However, there were several other categories of low level offenders that Republican appointees mentioned enough to be worth mentioning in summary.

Some Republican judges were concerned about older defendants who had been convicted of crimes specific to their age group, such as social security recipients who keep checks of deceased partners. A judge noted that older defendants, regardless of their offense, tended to have health problems that were turning the Bureau of Prisons into “one giant nursing home.”³⁰⁴ Many of these older defendants appeared to have lived otherwise productive lives until they gave in to temptation or impulse, particularly white collar defendants facing financial hardship.³⁰⁵

Another subcategory of low level and first time offenders were involve law enforcement or prison guards convicted of assaulting inmates. One Republican appointee who presided over such a case stated that he felt

Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002).

³⁰¹Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002).

³⁰²Midwest Judge 1, Anonymous Interview (Nov. 26, 2002).

³⁰³ One Western Republican judge stated that “generally speaking,” the Guidelines were “too severe for non-violent offenders and “not severe enough for violent offenders. He noted that some sex crimes carried less time than for drug couriers. Western Judge 3, Anonymous Interview (Sept. 30, 2002).

³⁰⁴Midwestern Judge 1, Anonymous Interview (November 26, 2002).

³⁰⁵See Profiles of Judge Marilyn L. Huff (S.D. Cal.); Judge Stephen M. Reasoner (E.D. Ark.), Appendix A. Some judges were also concerned when the defendant’s crime seemed motivated in party by mental illness. See Profile of John C. Coughenour (W.D. Wash.); Judge William M. Nickerson (D. Md.), Appendix A.

the inmate had created a risk of harm, but that the guard didn't stop beating him so he was guilty. Still, he felt the guard's behavior "was aberrant and deserved less time,"³⁰⁶ even if the Guidelines rules did not allow a departure under the circumstances.

Lastly, some Republican appointees in my sample expressed concern with the length of sentences for immigration offenses. They argued that these defendants were going to be deported anyway and therefore the government should shorten their sentences to save money.³⁰⁷

1. The "Girlfriend" Cases.

The so-called "girlfriend" cases seemed to bother Republican judges the most. Generally female, these defendants tended to have a minor role in the offense. They may have taken messages, stored drugs, assisted in transport, and sometimes engaged in low level sales activity. However, they rarely made substantial profit and their primary motivation for criminal conduct was the relationship. Moreover, even if the quantity of drugs in the conspiracy was reasonably foreseeable to them, they rarely had any influence over the scope of the operation. One judge commented that the Guideline's focus on drug quantity made no sense in these cases because the woman was "only there because she followed a man around."³⁰⁸ In the most troubling examples, the male defendant was able to negotiate a cooperation agreement and lesser sentence, precisely because his larger role made him valuable to the government, while his partner, out of fear, loyalty, or ignorance could not make a similar deal.³⁰⁹

³⁰⁶Southern Judge 4, Anonymous Interview (Nov. 7, 2002).

³⁰⁷ One Western Republican judge noted that prison sentences seemed to do little to deter illegal immigration and at great cost to the government. Western Judge 1, Anonymous Interview (Sept. 30, 2002).

³⁰⁸ Southern Republican Judge 1, Anonymous Interview (Sept. 4, 2002). Another stated that its hard to disregard things the Guidelines tell judges to ignore like the fact that these are "mothers with children." Western Republican Judge 1, Anonymous Interview (Sept. 30, 2002). One more was even more forthright, stating that he felt bad for female defendants, citing his Texas upbringing but also his views about who is running the show. Western Republican Judge 3, Anonymous Interview (Sept. 30, 2002).

³⁰⁹ The issue of cooperation disparity in these cases reflects the distorting effect of cooperation agreements in general, an issue which has received substantial criticism throughout the Guidelines era. Several judges interviewed for this study noted their general concerns with cooperation created disparity, with statements such as "cooperation skews cases," Western Judge 4, Anonymous Interview (Oct. 17, 2002); "There is a lack of accountability . . . [such that] prosecutor's have unilateral discretion." Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002). However, this issue was not noted as a concern by every Republican appointee interview. In some districts, this might have been local federal prosecutors took pains to avoid this result. One Republican judge stated with mixed emotions that there was less of this problem in her district because she believed that the local U.S. Attorney sometimes gave cooperation agreement when not warranted to be fair in sentencing. Midwest Judge 1, Anonymous Interview (Nov. 26, 2002). Other judges indicated that they took steps to prevent cooperation disparity, for example, by not sentencing the cooperators

Without question, the 1994 "safety valve" law helped to reduce the sentences for many of the girlfriend defendants. However, my research revealed that there were "girlfriend" cases that continued to trouble judges because of limitations written into the safety-valve that either excluded some defendants whom judges believed were still deserving or did not provide enough sentencing relief.³¹⁰

A poignant illustration of a post-safety valve "girlfriend" case comes from Reagan appointee, Judge James D. Todd (W.D. Tenn.).³¹¹ In 2002, Lakisha Murphy, had been with her boyfriend, Cedric Robertson, since she was fifteen.³¹² Cedric was a member of the "Crips" and a drug dealer. He was also a paraplegic and Lakisha was his primary caretaker, feeding and bathing him. Because Lakisha spent most of her time caring for Cedric at his house, she clearly was aware of Cedric's illegal activities, who was a still a principal of the group despite his handicap. In the course of the investigation, Lakisha admitted that she sometimes helped him with his drug business, and even made a few retail sales when none of Cedric's gangmates were around.³¹³ However, when she wasn't helping Cedric with his health needs, she usually had a job as a cashier to support herself and was not considered by the government to be a full-time employee of the conspiracy.

However, because more than fifty grams of crack was involved in the offense, she faced a ten-year mandatory minimum sentence. Lakisha also had two prior petty offenses which placed her in Criminal History Category II, thus she was ineligible for the safety valve. Perhaps on principle, or out of love or fear, Lakisha also refused to cooperate with the police. Thus, although Cedric received a longer sentence than her, four of her male co-defendants, who were far more culpable, received less time than Lakisha because they received substantial assistance motions from the government. Judge Todd noted this disparity, stating that "it seems unfortunate in this case that you're doing more time than some of these guys did . . . and there's

until all the other defendants were sentenced. Western Judge 1, Anonymous Interview (Sept. 30, 2002). While not explicit, others, because of a pro-government orientation, seemed willing to tolerate some cooperation disparity because of the government's need for this kind of evidence in drug conspiracies. For cases in this study in which more culpable cooperators received lesser sentences or in which judges discussed this issue, *see* Profiles of Judge William M. Nickerson (D. Md.); Judge Shelby Highsmith (S.D. Fla.); Judge James C. Fox (E.D. N.C.); Judge J. Phil Gilbert (S.D. Ill.); Judge Malcolm J. Howard (E.D. N.C.); Judge Ronald Longstaff (S.D. Iowa); Judge James D. Todd (W.D. Tenn.); Judge Clyde Roger Vinson (N.D. Fla.); Judge Samuel G. Wilson (W.D. Va.), Appendix A.

³¹⁰Another Republican judge noted that "some pretty minor conduct can disqualify a defendant" from the safety valve. Midwest Judge 2, Anonymous Interview (Oct. 28, 2002).

³¹¹*See* Profile of Judge James A. Parker (D. N.M.); *see also* Profiles of Judge James M. Rosenbaum (D. Minn.); Judge Sam Sparks (W.D. Tx.); Judge Clyde Roger Vinson (N.D. Fla.), Appendix A.

³¹² *See* Profile of Judge James D. Todd, Appendix A.

³¹³ *Id.*

nothing I can do about it.³¹⁴ Judge Todd also spoke directly to Lakisha at the sentencing hearing, saying

The tragedy of this case, Ms. Murphy, is that you made a very poor choice of boyfriends I have no doubt that this was Cedric Robertson's drug operation. . . . [But] a woman can stand by her man without becoming a criminal herself. . . . But you had the misfortune in this case of having a boyfriend who couldn't use his arms and his legs and couldn't care for himself, so you became his arms and his legs. And in doing so, you did, in fact, become a criminal. . . . [But] part of the problem in this case, Ms. Murphy, is that the sentencing guidelines passed by Congress have tied my hands as to what discretion I have. They have also passed mandatory minimums which also tie my hands.³¹⁵

As a result, Judge Todd was required to sentence Lakisha to a ten year sentence.

2. Drug Addicted Defendants.

A significant number of defendants charged with low-level drug crimes become involved in distribution activities to support their own substance abuse problems.³¹⁶ The Sentencing Guidelines, however, specifically forbid judges to consider drug addiction at sentencing. A good number of Republican appointees in the Guidelines era disagreed with this policy choice. For example, a Midwestern judge stated that he although he supported the concept of drug enforcement and harsh penalties for the top rungs, he mostly sees people from the lower levels, many who are only involved because they are addicts. This is where he “really struggles with the Guidelines.”³¹⁷ Another stated that while he is “not sympathetic to those who victimize others,” he was “sympathetic to those with substance abuse problems.”³¹⁸

During the Guidelines era, methamphetamine cases seemed to typify this kind of case in federal court. Another Midwestern judge who saw a lot of these cases noted that in her district, most of the methamphetamine dealers were also users. She called them “22-year old babies,” who were often “kids who couldn’t go to college and don’t have good judgement.”³¹⁹ However, as a result of lengthy Guideline

³¹⁴*Id.*

³¹⁵ *Id.*

³¹⁶Addicts rarely make it very far in the drug world because suppliers cannot trust them not to use too much of the product, and in any event, addicts are not very reliable employees. See Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 719-20 (2005) (discussing how many drug “steerers” who get arrested are drug addicts working for others).

³¹⁷ Midwest Judge 2, Anonymous Interview (Oct. 28, 2002).

³¹⁸ In an effort to burnish his crime fighting bona fides, this judge further added that he had has close relative who is a DEA agent. Western Judge 2, Anonymous Interview (Oct. 2, 2002).

³¹⁹Midwest Judge 1, Anonymous Interview (Nov. 26, 2002).

sentences, prison was turning them into hardened criminals by the time they got out. Thus, she would prefer that these defendants get intensive drug treatment and sentences in the three year range.³²⁰

The type of addict case that seemed to most infuriate Republican judges, however, were the ones in which the defendant was able to successfully complete drug treatment before the sentencing date. Sometimes, these defendants went into an in-patient program, in lieu of pretrial detention, and were then released into the community for a considerable period of time without relapse or re-offending. Moreover, in some cases, prior to their drug addiction, these individuals had worked, raised children, and otherwise been upstanding members of the community. Thus, it was fairly clear that if their drug addiction remained “in remission,” these defendants presented a low risk of recidivism.

An excellent example of this kind of case comes from Reagan appointee, Judge James Parker (D. N.M.).³²¹ Amanda James left home at fifteen and became involved with her co-defendant, Michael Santisteven. At the time of the offense conduct, she was living with him and taking care of his children while he dealt methamphetamine. She was also an addict most of her adult life. Complicating matters further, Amanda became pregnant before her arrest. However, Amanda entered treatment while on bond and made substantial progress combating her addiction and she even did drug counseling for other addicts. Lastly, she reunited with her mother who had her own earlier history of substance abuse.

At sentencing, her attorney moved for a downward departure based upon a combination of factors including extraordinary post-conviction rehabilitation and extraordinary family circumstances. The government opposed the motion. Judge Parker stated that while her efforts had been admirable, her case did not rise to the level required for a downward departure on these grounds. Nevertheless, during the sentencing hearing, Judge Parker asked the government if it would consider a role adjustment that might lower her sentence. The prosecutor refused, and bound by the law, Judge Parker gave her the low end of the Guideline range of 57 months (after application of the safety-valve).

At her sentencing, Amanda apologized for the harm she caused and the trouble that would flow from her incarceration to her family. She had trouble speaking but was able to tell the judge, “I want you to consider that this is the first time I have even been in a prison. I go to school, I am a mom, I’m just really scared.”³²² Judge Parker responded by saying

³²⁰*Id.*

³²¹*See* Profile of Judge James Parker, Appendix A; *see also* Profiles of Judge Garnett Thomas Eisele (E.D. Ark.); Judge Michael R. Hogan (D. Or.); Judge Thomas Gray Hull (E.D. Tenn.); Judge Robert E. Jones (D. Or.); Judge Stephen M. Reasoner (E.D. Ark.); Judge Frederic N. Smalkin (D. Md.); Judge Sam Sparks (W.D. Tx.), Appendix A.

³²²*Id.*

. . . I think the guideline sentences in [regard to] some of these drug offenses are extreme and draconian and I think this is a sentence that's longer than what is necessary, but it's a sentence that under the law I am required to impose. . . . Ms. James, I think you have definitely changed your life and now you're going to go to prison at a time after having done that. It's not something that's easy for a judge to do.³²³

Judge Parker's view of this "successful treatment" case reflect a theme seen in other Republican appointees with a background in private legal practice. While these appointees tend to express strong conservative views across a range of issues, a primary feature of their professional identity was as problem solvers. Thus, while they could be hard-nosed litigators when necessary, as good business lawyers, they also recognize when there is a win-win situation for all parties. Thus, while they might generally see themselves as tough on crime, the successful treatment cases tended to invoke their problem solving identities. If the cause of the criminal conduct has been controlled, they couldn't see why an expensive and probably counter-productive prison term was necessary.

Moreover, many of these judges were genuinely moved by the effort of these defendants and the hurdles they overcame to address their addictions, particularly in a system that sees few successes at the front end. For judges who had little contact with the criminal justice system before their appointment, these defendants seem to stand apart and deserving of special consideration because they did not look like criminals.

3. Drug Courier Cases.

The final category of low level offenders that most concerned Republican judges were drug courier cases. While all districts had some of these cases, they were most prevalent along the southwestern border and in districts with airports or bus and rail terminals that served source countries or as source cities. These defendants were generally poor, often non-citizens, who were paid small sums of money to transport drugs on their person, or sometimes, by orally ingesting them. Couriers arrested in transit were rarely useful to investigators because once the drop was not made at the right time and location, the courier became suspect and higher level operatives would not deal with them. In addition, many couriers were minimally connected to the conspiracy, sometimes recruited abroad or allowed contact with only one person, by cell phone or pager. Even when couriers had more information about the conspiracy, many expressed fear for themselves

³²³ *Id.* Amanda's case could also be categorized as a "girlfriend case." Her attorney argued for a downward departure because she had been under the domination of her boyfriend (he conceded the case did not meet the legal standard of coercion and duress). The government contended that they played equal roles, but the judge agreed with defense counsel, stating that "The sad part of all of this is, and I've seen this before, I think it is quite apparent that the real problem in all of this [is] with Mr. Santisteven. I think Ms. James, being much younger, was really acting under his influence to a large extent, probably not to the point that she could seek a downward departure . . . for coercion or duress. . . . I've read the entire transcript of all the telephone conversation, I understand what's going on, but I'm still left with the distinct impression that its really Mr. Santisteven who put Ms. James in this position." *Id.*

or loved ones back home if they cooperated.³²⁴

Because the primary sentencing factor under the 1986 statute and the Guidelines is the weight of the drugs over which the courier has no control, courier sentences were often quite high in comparison to their culpability. This did not sit well with many Republican judges. One Bush I appointee said that one year in prison would probably be enough for most drug couriers.³²⁵ Another from the same district felt that drug couriers required some punishment, several months, but asserted that “more than one half wouldn’t do it again, once caught and with a good set of supervised release conditions and proper supervision.”³²⁶ A third Republican judge in this district stated that while he did “not condone drugs, I think the guidelines are out of whack.” He noted a recent case in which a defendant was convicted of DUI resulting in four deaths who ended up with a lesser Guideline range than the routine drug courier who might receive a twenty year sentence.³²⁷

A good example of a courier case is Gerard Greenfield from Judge David Sam (D. Utah), although this defendant’s sentence was later commuted by President Clinton.³²⁸ At age twenty-eight, Gerard Greenfield still had a promising, if somewhat undefined future ahead of him. In 1983, he had enlisted in the Marine Corp Reserve where he served for four years before receiving an honorable discharge, and then maintained a steady employment history with a series of jobs that included sheet metal apprentice, mail clerk, telephone operator, and laborer.³²⁹

In 1992, however, he was having trouble finding work and had just become engaged to his girlfriend of eight years. Perhaps because he became concerned about finances due to his impending marriage, or simply from bad judgment, Gerard made a fateful decision in that summer. In the course of purchasing marijuana for himself, a drug dealer he knew offered to pay him to make a single trip across the country to transport drugs back to the District of Columbia. The dealer arranged for him to be accompanied by Judy Boone and the two traveled to California where they picked up five single gallon bottles of liquid PCP and some marijuana

³²⁴See *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984) (discussing threats made to drug courier from Columbia).

³²⁵Western Republican Judge 1, Anonymous Interview (Sept. 30, 2002).

³²⁶Western Republican Judge 3, Anonymous Interview (Sept. 30, 2002).

³²⁷ Western Republican Judge 2, Anonymous Interview (Oct. 2, 2002).

³²⁸See Profile of Judge David Sam (D. Utah); See also Profiles of Judge Garnett Thomas Eisele (E.D. Ark); Judge Ronald Longstaff (S.D. Iowa); Judge James A. Parker (D. N.M.); Judge James M. Rosenbaum (D. Minn.), Appendix A.

³²⁹Profile of Judge David Sam (D. Utah), Appendix A.

from a wholesaler named “Dip.”³³⁰

They then commenced their cross country trip but made it only as far as Utah where their car was stopped for going six miles over the speed limit. The officer issued only a warning, but he also ran a check on Boone, who had been driving. That check revealed that Boone had an outstanding warrant for a forgery charge in Maryland but that extradition was only authorized from an adjoining state so he could not arrest her. Nevertheless, the officer’s interest was further piqued and while awaiting backup, he ordered the two out of the car and began to search the car. He found a package under the backseat that appeared to be marijuana just as another deputy arrived. At this point, Gerard and Boone panicked, got back into the car, and attempted to flee against the instructions of the officers. As Gerard drove, Boone threw the bottles of PCP from the car. A dangerous chase ensued until the officers shot out the rear tire of their car.³³¹

Judge Sam then selected 192 months as Gerard’s sentence. After pronouncing the sentence, Judge Sam told Gerard

I am certainly impressed with your family, their support of you, and it does appear to the Court that certainly they were not aware of any conduct of this nature because of your record in the past which does not appear to be one that in any way would indicate your involvement in this type of conduct. It is the view of the Court that you do have many positive strengths and I hope that you involve yourself in programs that will enhance those strengths and bring you back to society a law-abiding citizen that contributes to society’s order. I want you to know of my interest in you. . . .³³²

After his direct appeal and post-conviction efforts were unsuccessful, Gerard obtained *pro bono* counsel who filed a commutation petition on his behalf. The attorney contacted Judge Sam who agreed to write a letter on his behalf to President Clinton. In his letter, Judge Sam cited several factors that he felt weighed in favor of commutation. First, Judge Sam noted that if Gerard had been sentenced a year later, he would have benefitted from the “safety-valve” which would have reduced his sentence by almost three years. Second, he noted that Gerard received less than adequate assistance of counsel, particularly because of his attorney’s unwillingness to enter early negotiations for a plea that could have resulted in a cooperation agreement, or at least an additional reduction for early acceptance of responsibility. Judge Sam wrote in this regard that “It is noteworthy that Mr. Greenfield, on his own, had initiated contact and discussions with the government before being stopped by . . . his [later] disbarred attorney.” More generally, Judge Sam noted that

There is little doubt, given Mr. Greenfield’s background and character, that prior to the guideline system, I would have imposed a shorter sentence. It is apparent that Mr. Greenfield’s role was that

³³⁰*Id.*

³³¹*Id.*

³³²*Id.*

of a courier, and his financial stake in the drug transaction in which he was involved was small in comparison to that of those for whom he worked.³³³

Gerard was one of seventeen non-violent drug offenders who was granted a commutation by President Clinton as he left office in 2001. While some of President Clinton's other clemency decisions were severely criticized, most notably his pardon of fugitive financier, Marc Rich, the commutation for Gerard and the others like him were widely praised.³³⁴

D. "Life" Sentences for Non-violent Offenses and First-time Offenders.

A surprising result of my research was the discovery of a substantial class of cases that troubled Republican judges but which has received virtually no media or scholarly attention. The sentences in these cases were all very long and included life without parole or a virtual life term (given the defendant's age at sentencing). Without question, these defendants were more serious offenders than the low-level girlfriends, addicts, and couriers discussed in the previous section. Sometimes, they even played supervisory roles in their small to medium size drug operations. But, because none of these defendants had been convicted of a violent offense, these judges felt that such lengthy sentences were disproportionate punishment.

This was especially true for judges who had moved over to the federal system after serving as state judges. For these judges, life sentences for non-violent crimes seemed wrong. For them, such sentences had always been reserved for heinous murders, violent rape, and other serious violent recidivists. These was true even for judges who articulated a strong "just desserts" sentencing philosophy and were otherwise considered to be tough sentencers

For sentences that were less than life or virtual life, Republican judicial concern showed up most often in cases involving first-time offenders, but these concerns registered even for defendants with prior drug offenses but who had been treated very leniently by the state courts. For judges with prior criminal justice experience, graduated punishment was central to their belief about deterrence and fairness. Thus, when a state court has essentially slapped a defendant on the wrist before, these judges had some sympathy for defendants who then got the equivalent of "sticker shock" when they were brought to federal court to face the Guidelines sentencing regime. Thus, while no one doubted that these defendants had been enmeshed trafficking, a

³³³*Id.*

³³⁴See Randy Barnett & Morgan Reynolds, *Well-Deserved Commutation of Sentences*, The Record, Northern New Jersey, January 5, 2001 at L9, 2001 WL 5232289 (noting that authors rarely agreed with President Clinton and that one author was a former prosecutor); Brent Israelsen, *Pardon Panel is Misguided*, Salt Lake City Tribune, March 5, 2001 at A1. When released, Gerard returned to the Washington, D.C. area to his father's home. With strong family support, he was able to re-adjust and eventually married and had a child. He works full-time as a bus driver and his family feels that he has fully left his past behind him. Profile of Judge David Sam (D. Utah), Appendix A.

severe term for a non-violent drug crime was palatable only if defendant had been “put on notice” and had not “learned their lesson.”

Republican judges also expressed utilitarian concerns about both life and very long sentences for non-violent drug offenses. One Republican judge interviewed stated that sentences for non-violent crimes that extend past the age of sixty are “pointless.”³³⁵ Moreover, if there is no likelihood of release before death or old age, some judges were troubled that these defendants would have no hope, and therefore, little incentive to be “model prisoners.” A good number also remark on the financial wastefulness of the sentence. Thirty years when fifteen would accomplish the same goal also made no sense to appointees from a party that preaches fiscal conservatism and reduced federal spending.

However, because these defendants were not nearly as sympathetic as the girlfriend defendants, these judges were not eager to ally themselves with these men. Thus, in these transcripts, the judges typically emphasized the wrong the defendant had done and the harm they have caused to their communities before they condemned the excessiveness of the sentence.

One good example from the life without parole category is the Robert Riley case from Judge Ronald Longstaff (S.D. Iowa).³³⁶ Robert was a loyal fan of the Grateful Dead who was able to follow the band, in part, by using, sharing, and regularly selling LSD and other drugs to fellow “Deadheads.” Before his federal case, he had previously pled to four separate charges involving small amounts of marijuana, hashish, and amphetamines, and he had spent short periods in county prisons in California and Wisconsin for two of these offenses. In his first federal case (for conspiracy to distribute more than 10 grams of LSD), the prosecutor filed recidivist papers, which required a mandatory life sentence because Robert had two prior felony drug convictions.

Convicted at trial, Robert appeared before Judge Longstaff for sentencing. Judge Longstaff first told Robert that “it disturbs me that you’re obviously still a strong advocate of the LSD culture, and you will be, I predict, until the day you depart us. And I fear that if you do get out some day, I’m afraid you’re still going to be an advocate of that culture; and I think it may lead to further problems unless somehow you reach back and step back from your full support of that culture.” On the other hand, Judge Longstaff stated that: “The mandatory life sentence as applied to you is not just, it’s an unfair sentence, and I find it very distasteful to have to impose it. . . .”³³⁷

³³⁵ He added, “A life sentence is a horrible thing.” Atlantic Judge 1, Anonymous Interview (Oct. 15, 2002).

³³⁶ See Profile of Judge Ronald Longstaff (S.D. Iowa), Appendix A; see also Profiles of Judge J. Phil Gilbert (S.D. Ill.); Judge William M. Nickerson (D. Md.); Judge Philip Reinhard (N.D. Ill.); Judge Lyle E. Strom (D. Neb.); Judge Clyde Roger Vinson (N.D. Fla.), Appendix A.

³³⁷ See Profile of Judge Ronald Longstaff, Appendix A.

Some years later, Judge Longstaff wrote about this case

Given the circumstances . . . it was difficult for me to impose the required life sentence. To this day it remains the harshest punishment I have imposed as a district court judge. There was no evidence presented in Mr. Riley's case to indicate that he was a violent offender or would be in the future. It gives me no satisfaction that a person such as Mr. Riley will remain in prison the rest of his life.³³⁸

In an interview, Judge Longstaff commented that for Bob Riley, he believed that a ten to twelve year sentence would have been sufficient.³³⁹

A typical example of a long sentence but short of life is the case of Wesley Hawkins from Judge M. James Rosenbaum (D. Minn.).³⁴⁰ At age twenty-five, Wesley Hawkins initially received a sentence of almost twenty-seven years for drug and weapons charges.³⁴¹ The police discovered the evidence that led to his conviction because of a domestic dispute with wife, Canary, on October 21, 1993. She initially fled their apartment and called the police to report that Wesley had displayed a handgun during an argument. When the police arrived at the home, she also told them that he was selling drugs.

Wesley consented to a search of the apartment in which no gun or drugs were found. However, when the police searched Wesley incident to his arrest for domestic assault, they found two keys in his pocket. He told the police the keys were for a storage locker in the apartment complex. The police obtained a search warrant for the locker which contained 19 grams of crack cocaine, a brick of powder cocaine weighing 2.2

³³⁸*Id.*

³³⁹Telephone interview with Judge Longstaff (October 28, 2002). As noted in Part III in 1994, the Sentencing Commission partially addressed the life sentence issue by amending the drug quantity table to preclude a life sentence for a first-time offender based solely on drug quantity. However, because of possible enhancements for simple gun possession or a supervisory role, first-time offenders could still reach the top of the sentencing chart without committing a violent act. Thus, while judges felt this amendment made a lot of sense, it was far short of eliminating this kind of Guideline sentence. Moreover, and as shown by Judge Longstaff's Robert Riley case, a Guidelines amendment, of course, had no effect on mandatory life sentences required by the recidivist provisions of the 1986 statute.

³⁴⁰See Profile of Judge James M. Rosenbaum, Appendix A; see also Profiles of Judge Charles R. Butler, Jr. (S.D. Ala.); Judge Robin J. Cauthron (W.D. Okla.); Judge Robert H. Cleland (E.D. Mich.); Judge Fernando J. Gaitan, Jr. (W.D. Mo.); Judge Thomas A. Higgins (M.D. Tenn.); Judge Robert E. Jones (D. Or.); Judge Alex Kozinski (9th Cir.); Judge Hector M. Lafitte (D. P.R.); Judge Richard P. Matsch (D. Co.); Judge Dennis W. Shedd (4th Cir.); Judge Richard W. Vollmer, Jr. (S.D. Ala.), Appendix A.

³⁴¹The 60 month gun count was later vacated in response to the Supreme Court's decision in *Bailey*, see *supra* note __; *United States v. Hawkins*, 116 S.Ct. 1257 (1996); *United States v. Hawkins*, 59 F.3d 723 (8th Cir. 1995).

pounds, and a loaded semi-automatic handgun.

Based on this evidence, Wesley was charged with possession with intent to distribute powder and crack cocaine, using a firearm during a drug trafficking offense, and because he had a criminal record, an additional charge of possession of a firearm by a felon. Wesley went to trial and was convicted. His wife testified on his behalf and recanted her statements to the police but to no avail, as the jury convicted on all counts.

Wesley had two juvenile adjudications for auto theft and simple assault, but it was his two adult convictions at age eighteen that severely impacted his Guidelines sentence in this case. In 1987, he was convicted of burglary in Fargo, North Dakota for breaking into several apartments with a juvenile co-defendant. He was originally sentenced to serve one year on this offense. That same year, he was convicted of distribution of cocaine in federal court in Fargo and received a three year sentence. Based on his record and the drug amount, he was subject to a Guideline range of 262-327 months.³⁴² Judge Rosenbaum first told Wesley that he thought the verdict was fair and supported by the facts.³⁴³ On the other hand, he said that he “will take whatever steps as I am able to do. . . . I will sentence you according to the Guidelines at the lowest number that I’m able to give you. [But that] is a precious small remedy.”³⁴⁴ He also addressed their relative ages, telling Wesley that

³⁴²Because both his prior offenses crimes were considered crimes of violence and thus he was treated as a career criminal by the Guidelines. This classification increased his Criminal History Category from IV to VI and required that his offense level increase from Level 28 to Level 34. Without the career criminal enhancement he would have been looking at a sentencing range of 170-197 months. At sentencing, Wesley’s attorney requested a reduction for acceptance of responsibility. His attorney was candid, saying that “without acceptance of responsibility [he] is facing 27 to 32 years in prison. I think if there’s any opportunity whatsoever to give the man a two point reduction, we should do so in this case because the numbers are so overwhelmingly awful.” Judge Rosenbaum denied this request, stating he made this decision even though “I know how long you are going to have to go away,” and that it made him “very, very sad to do that.” See Profile of Judge James M. Rosenbaum, Appendix A.

³⁴³When it was Wesley’s turn to speak, he first maintained his innocence and tried to explain why his wife’s testimony at trial was truthful. He then stated that he didn’t “think the prosecution was after the truth. I think they’ve been after conviction.” He also complained that he was convicted by an all white jury and that there had been no witnesses who could testify that he had been selling drugs at the time. He asserted that since he had gotten out of jail the last time, he had been working and attending college classes and had not sold drugs since his last arrest in 1987. While he felt that the criminal justice system had done him great injustice, he told Judge Rosenbaum that he had been “a very just judge. . . . And all I can say is I appreciate your candor, and, and your fairness, but it hasn’t been fair by everybody.” *Id.*

³⁴⁴Judge Rosenbaum also admitted that he didn’t “know what to say to someone who’s going to be going for better than 20 years. I mean, if I say anything particularly useful, you’d forget it anyway in 20 years. Every human would. And I don’t know whether I have anything useful to say.”

You are essentially the same age that I was when I came out of law school. . . . I'm now approximately the age that you will be when you are released. And I suspect standing where you are you are looking at an old man. I plan on being older some day, but I don't know how many more of those you get.

The judge then spoke very simply to him about why in his view, the punishment did not fit the crime

The Court is comfortable that you committed this crime. That having been said, you did not do 25 years of bad, or 27 years of bad. You just did some bad stuff. If I had a choice I would have sentenced you hard for having a weapon under these circumstances and for dealing dope under the circumstances, and having access to that dope, but in this Court's view, hard would have been ten years, at the long side 15, at the far outside if you add five on the back end.

Lastly, Judge Rosenbaum explained why he felt the need to mention his personal views:

I mention these things first of all to indicate why I'm going to the bottom of the Guidelines. There's simply no reason to confine a man until he becomes completely unproductive in the world. That is bad policy. The other reason, and I trust you will not remember these words precisely, but they may be of some use to you when there does come a day when I hope that we will remake part of our sentencing system and reconsider exactly what we are doing here. And there will be a record of the judge who saw this case, and the judge who . . . saw a person who made a terrible mistake after having done some bad things before. Sir, you did not do well, but you did not do 27 years bad. . . . And to that extent, that statement would be available to you to present to someone in hopes that they will ameliorate what has happened here.³⁴⁵

While Judge Rosenbaum did not respond to an inquiry about what he would have liked to have given Wesley as a sentence, other Republican appointees anonymously interviewed for this study have given some general parameters for similar cases. What is most interesting is the gulf between the Guideline or statutory sentence in these cases and what these judge would rather impose. For example, for a street level crack dealer, one Reagan appointee suggested as low in as three to five years (with education and vocational counseling).³⁴⁶ However, there was not a clear consensus on sentence length, probably because judicial disagreement with these sentences sometimes reflected concerns about penalties for a specific drug such as crack cocaine, or reflected larger concerns about culpability assessments, and even the overall severity of federal sentences in

³⁴⁵*Id.* Wesley writes from prison that he “doesn't want to be portrayed as the dumb or illiterate black man who, because he was abused by his step-father, couldn't function in normal society and therefore couldn't stay out of prison. Yes, I had a difficult upbringing but I can function in society and can be very successful if given the opportunity.” *Id.*

³⁴⁶ Atlantic Judge 3, Anonymous Interview (Oct.11, 2002).

the Guidelines era.

E. Mandatory Minimums and Prosecutor-Created Disparity.

It is axiom amongst federal judges that the Sentencing Guideline regime gave prosecutors too much control over sentencing outcomes. As has been explored at length in academic and judicial writing on this subject, prosecutors had a myriad of ways to control or influence a defendant's sentence.³⁴⁷

At the outset, federal prosecutors have complete discretion over whether to decide to accept a case or decline in favor of a state prosecution, where judges typically had more sentencing discretion.³⁴⁸ Once accepted, federal prosecutors often have the option to charge an offense with a mandatory minimum penalties that trumps or has to be served consecutive to a Guidelines sentence, and as part of plea bargaining, prosecutor could chose forgo charges. With the sole authority to file a motion for substantial assistance, prosecutors also control the primary key to a sentence below any applicable mandatory minimums. And even before indictment, prosecutorial supervision of the investigation could greatly influence the sentence by influencing the length and nature of any controlled transactions.³⁴⁹

³⁴⁷See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011-12 (2005) (highlighting the ability of prosecutors to pick and choose charges as a means of controlling sentencing); Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 626 (2005) (“prosecutors retain the power to guide investigations, accept or decline cases, draft charges, press for convictions through plea negotiation, and seek specific sentences”); Norman Bay, *Prosecutorial Discretion in the Post-Booker World*, 37 MCGEORGE L. REV. 549, 557 (2006); Chris Zimmerman, *Prosecutorial Discretion*, 89 GEO. L.J. 1229, 1233 (2001).

³⁴⁸See Profile of Judge Lyle Strom Appendix A (recognizing that defendant's brother and another co-defendant were prosecuted in state court and received significantly less time).

³⁴⁹For cases involving government action that lengthen sentences beyond what the judges thought necessary, see Profiles of Judge Donald D. Alsop (D. Minn.); Judge James M. Ideman (C.D. Cal.), Appendix A. And of course, prosecutors could chose how much relevant conduct to reveal to the probation officer writing the report and decide whether to oppose or concede to any Guideline adjustments or downward departures. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010, 1011-12 (2005) (“Thus, sentencing guidelines have become one force among many that combine to give prosecutors extraordinary power - maybe unsurpassed power - in the American criminal justice system”); Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 Val. U. L. Rev. 625, 626 (2005) (“Though they may not have the same ability post-*Booker* to leverage mandatory Sentencing Guidelines, prosecutors retain the power to guide investigations, accept or decline cases, draft charges, press for convictions through plea negotiation, and seek specific sentences.”).

Because these and other prosecutorial decisions were not regularized across the country, or sometimes even within a single United States Attorney's office, some judges were acutely aware that the transfer of discretion from judges to prosecutors had not cured sentencing disparity. Instead, the new system had driven discretion, and its cousin - disparity - underground; hidden in the back offices of prosecutors and law enforcement agencies where it was hard to see and virtually unreviewable.³⁵⁰ This particularly was offensive to some judges because while the Guidelines forced them to justify each and every minor sentencing adjustment in open court, there were no controls on prosecutorial discretion, which could have a much greater impact on the sentence.³⁵¹

For most part, Republican appointees, like their Democratic counterparts were unhappy with the transfer of power to prosecutors under the Guidelines. However, in interviews, broad criticism of the government tended to be milder. Instead, these judges tended to disperse blame for the flaws of the sentencing regime onto the Commission, and sometimes to Congress. This should not be surprising, because while a strong libertarian streak might be run through grassroots and academic Republicans, its judges were generally more in the mode of Chief Justice Rehnquist; receptive to claims of executive and legislative power and generally adopting a "law and order" approach to criminal justice.³⁵²

Nevertheless, my research found a significant group of Republican judges who sounded as bitter and angry about the increase in prosecutorial power as any liberal holdover from the days of unfettered judicial sentencing discretion. As one of these judges complained, "Congress has been dishonest with the American people. Discretion can't be destroyed, it can only be dispersed."³⁵³ Similarly, others argued that while judicial disparity was reduced, gross and unwarranted disparities had been created by prosecutorial decisions at the local level and at Main Justice. One Reagan judge scorned that the "Justice Department is the new emperor with regard to disparity."³⁵⁴

³⁵⁰This section focuses primarily on prosecutor-created disparity, but it is clear from recent studies that other forms of disparity, such as regional sentencing preferences, that required the participation of all players persisted under the Guidelines. See Ian Weinstein, *The Historical Roots of Regional Sentencing Variation*, 11 ROGER WILLIAMS U. L. REV. 495, 497 (2006).

³⁵¹For cases in which charging or plea bargain disparity troubled Republican appointees, see Profiles of Judge Thomas Gray Hull (E.D. Tenn.); Judge Hector M. Lafitte (D. P.R.); Judge James C. Fox (E.D. N.C.); Judge Marilyn L. Huff (S.D. Cal.), Appendix A.

³⁵²Support for the conclusion that Republican appointees tended to be deferential to prosecutorial power is also found in the pro-government rating for most of these judges in the Federal Almanac of the Judiciary.

³⁵³Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002).

³⁵⁴Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002).

The antipathy of this group of judges tended to arise from specific situations in which these judges believed that prosecutors had grossly abused their charging discretion, especially where the government sought a mandatory minimum sentence for minor, petty offenses. For example, in drug cases, agents might make multiple purchases of small quantities, which when aggregated, triggered a mandatory minimum for a defendant whose conduct hardly seemed worthy of a federal sentence.³⁵⁵ Many judges were also distressed by the acquitted conduct rule which held that even if the jury acquitted a defendant on certain counts, the judge was still required to count these drug quantities as relevant conduct if the government could meet the preponderance of the evidence standard.³⁵⁶

However, by far, the most severe complaints arose in firearms offenses under the statutes barring of a firearm by a convicted felon and the statute criminalizing the using or carrying a firearm while committing a drug offense or violent crime.³⁵⁷ The federal felon-in-possession statute generated complaints because it applies regardless factors that one suppose might be relevant to both culpability and dangerousness. For example, a prior felony counts regardless of whether the prior conviction was state or federal charge. Moreover, it applies whether or not the gun was licensed and even if the conduct involved simple gun possession. In other words, the a defendant could be guilty of this federal offense even if the facts did not indicate that the defendant was engaged in any other criminal conduct at the time. As one Western Republican judge put it, many of these defendants he saw were “just quail hunters,” and he couldn’t understand why they were charged in federal court.³⁵⁸

In addition to the petty nature of many of these felon-in-possession cases, a subset also triggered the penalty

³⁵⁵An Atlantic judge talked about cases in which it was “ the agent who tried to get the defendant to convert powder to crack or how they can keep going on with the buys.”Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002). A Western judge battled a similar prosecutorial tactic in “backpacker” courier cases. In these cases, a group of couriers, who were not previously acquainted with one another, were recruited by a trafficker to travel together across the southern border together, each carrying about fifty pounds of marijuana. When these human convoys were arrested together, for a time, the U.S. Attorney in this district aggregated the amount of drugs and argued that each defendant was responsible for the entire amount. If the convoy was large enough, there would be more than the 100 kilograms grams of marijuana necessary to trigger a five year mandatory minimum. In referring to these cases, the judge noted the temptation for these defendants, stating “These are kids making \$200 for three hours of work when their regular wages are \$20-\$30 a week.” Western Judge 5, Anonymous Interview (Oct. 2, 2002). Eventually, that office stopped the practice of aggregation in these cases on its own, not because any appellate court disproved of the practice.

³⁵⁶See Profiles of Judge Ira DeMent (M.D. Ala.); Judge Richard P. Matsch (D. Co.); Judge William M. Nickerson (D. Md.); Judge Frederic N. Smalkin (D. Md.), Appendix A.

³⁵⁷18 U.S.C.A. §924(e) (2000).

³⁵⁸ Western Judge 1, Anonymous Interview (Sept. 30, 2002).

provisions of the Armed Career Criminal Act (“ACCA”) which require a mandatory fifteen year sentence if the defendant has three prior “crimes of violence” or “serious drug offenses.” The statute made simple burglary a “crime of violence” as well as any drug conviction, state or federal, that carried at least a ten year maximum sentence.³⁵⁹ Under many state codes, unarmed burglaries of unoccupied dwellings therefore qualified as a crime of violence for purposes of the ACCA.³⁶⁰ Similarly, most state drug statutes provided at least a ten year maximum for the distribution or possession with intent to distribute of any amount of cocaine, heroin, or other serious drugs.³⁶¹

Under this statutory framework, petty offenders such as non-violent drug addicts desperate for a “fix,” could easily amass the requisite three convictions to qualify for the fifteen year mandatory, simply by selling small amounts of drugs or breaking into stores at night. As a result, some of these alleged “career criminals” had never been to state prison, having received either probation or short stints in county facilities.³⁶² Thus, while Republican judges voiced agreement with the intent of this bill, the over broad definition of a “crime of violence” and “serious drug offense” in the statute frequently swept up defendants that judges felt did not need a fifteen year sentence. For example, the same Western Republican judge bothered by the “quail hunter” prosecutions also complained that these defendants were not truly “armed career criminals” the way that Congress and the public conceived of that term and he felt that prosecutors should give more consideration to nature of the qualifying convictions before bringing federal charges carrying mandatory time.³⁶³

³⁵⁹§924(e)(2)(b)(i)(ii)(B)’s definition of “violent felony” includes burglary or “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

³⁶⁰ See *Shepard v. United States*, 544 U.S. 13, 26(2005) (“We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a non-generic statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.”).

³⁶¹ See The ImpacTeen Illicit Drug Team, *Illicit Drug Policies: Selected Laws from the 50 States*, at 22 (2002) (copy on file with author).

³⁶²An example of this situation is the case of Jimmy Sluder. Troubled and alcoholic as a youth, he received probation for three early unarmed burglaries. He eventually became sober, married, and had a child with a minister’s daughter. However, he had a relapse and was arrested several years later when he was arrested walking around with a gun. Because no one was hurt and Sluder fully cooperated with the officer called to the scene, a state judge saw fit to give him only a 30-day suspended sentence for possession of an unlicensed gun. However, the federal government then prosecuted him under the ACCA and he received a fifteen-year sentence. See David Wagner, *Is There Anyone Guarding the Guardians of Justice*, Insight, The Washington Times 15 (August 4, 1997). See also *United States v. Sluder*, No.3:94-cr-00005-1 (January 21, 1994 E.D. Tenn.) (copy of docket sheet on file with author).

³⁶³Western Judge 1, Anonymous Interview (Sept. 30, 2002).

William Horne, sentenced by Reagan appointee Judge Frederic Smalkin (D.Md.), provides a good example of the ACCA cases that bothered these judges.³⁶⁴ In 1999, William walked past a Blockbuster Video in Baltimore carrying a rifle. A housing authority officer saw him and ordered him to stop. William complied immediately. When asked what he was doing with the gun, William replied that he was taking it to a nearby pawn shop. William was drunk at the time but the gun was unloaded (although he had ammunition for it in his pocket).

William was originally charged in state court and was offered a plea bargain which would have resulted in a 15 month sentence. He decided to opt for a trial, but before the state case could commence, the Maryland U.S. Attorney charged him as a felon-in-possession under the ACCA. Based upon William's long history of burglary and theft convictions, he qualified for the fifteen year sentence.³⁶⁵ With no real defense, he was easily convicted.

At sentencing, Judge Smalkin stated that if he had "sentencing discretion here for the offense of having a firearm in your possession under the circumstances that this involved, there is no way I would sentence you to 180 months. That is well beyond the pale, but that's what Congress wants. . . ."³⁶⁶ When interviewed about this case, Judge Smalkin elaborated, stating that there was no real criminal intent in this case. He felt that some punishment was in order because Horne was drunk and carrying a gun. But if he had more discretion, the judge probably would have given him a year and day.³⁶⁷

The second category of gun cases, which provoked even greater disagreement from Republican judges, involved the "stacking" of escalating mandatory minimums under 18 U.S.C. § 924(c)'s penalties for using or carrying a firearm during a drug crime or violent offense. During most of the Guidelines period, a first offense carried a five year consecutive mandatory minimum and any subsequent offenses, an additional twenty year consecutive sentence.³⁶⁸ Moreover, to the chagrin of many judges, the escalation clause could be invoked

³⁶⁴See Profile of Judge Frederic Smalkin, Appendix A; see also Judge John C. Coughenour (W.D. Wash.); Judge Michael R. Hogan (D. Or.); Judge Robert E. Jones (D. Or.); Judge James A. Parker (D. N.M.), Appendix A.

³⁶⁵In addition to a variety of petty offenses, he was convicted of burglary (1990), theft (1991), battery (1993), storehouse breaking (1994), and two more burglaries in 1997. He was also on probation at the time of this crime.

³⁶⁶Profile of Judge Smalkin, Appendix A.

³⁶⁷Telephone Interview with Judge Smalkin (Oct. 11, 2002).

³⁶⁸As discussed in Part II, after the *Bailey* decision, the statute was amended to criminalize possession of a gun in connection with these offenses and created a seven year sentence for brandishing a weapon, keeping the escalation provisions largely the same. The statute was amended again in 1998 to increase subsequent offenses to twenty five years each.

even if the defendant had not yet been convicted under the statute when he committed a second 924(c) offense.³⁶⁹ This interpretation allowed prosecutors to charge multiple 924(c) counts in a single indictment, if during the course of an investigation, the defendant had a gun during more than one drug sale, even if it was the same gun and even though the defendant was not arrested until after the second buy was made.

This is exactly what the government did in the Weldon Angelos case. The judge in that case, Paul Cassell (D. Ut), had been a prominent conservative academic.³⁷⁰ He was appointed to the bench by President George W. Bush and confirmed in 2002. In this case, Weldon Angelos, a small time marijuana dealer, made several retail sales to an undercover officer over the course of just a few weeks in the summer of 2002. A gun was observed by the officers during two of the sales and handguns were recovered from his home after arrest. However, Weldon was not accused of using or brandishing the weapon and he had no prior convictions.³⁷¹

Weldon refused the initial plea offer of fifteen years, and in response the prosecutor returned to the grand jury and obtained a new indictment charging five counts under 924(c). At trial, he was convicted on the drug charges and three counts of 924(c). The Guidelines range for the drugs was only 78-97 months,³⁷² but the escalation clause in 924(c) required consecutive terms of five, twenty-five and another twenty-five years, for a total of an additional fifty-five years of mandatory time.³⁷³

Judge Cassell wrote a lengthy opinion in which he explored the options which might have allowed him to refuse to impose the consecutive 924(c) sentences. In this opinion, however, he ultimately decided he lacked the authority to do so. Because Weldon's sentencing occurred after *Booker*, Judge Cassell was able to use his newly restored discretion to reduce the Guidelines' portion of the sentence for the drugs to just one day, still leaving Weldon with fifty-five years of mandatory time.³⁷⁴ In ruling against Weldon's motion for a

³⁶⁹See *Deal v. United States*, 508 U.S. 129 (1993).

³⁷⁰In academia, Professor Cassell was particularly known for his longstanding critique of the Miranda decision. See Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, 'Prophylactic' Supreme Court Inventions*, 28 Ariz. St. L. J. 299 (1996).

³⁷¹Eva Nilsen, *Indecent Standards: The Case of U.S. versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 538 (2006)

³⁷²*United States v. Angelos*, 345 F. Supp. 2d 1227, 1232 (D Utah 2004).

³⁷³*Id.*

³⁷⁴ See *United States v. Angelos*, 345 F. Supp.2d 1227, 1232 (D Utah 2004). On the appeal of this case to the Tenth Circuit, 163 former Justice Department prosecutors signed an amicus brief urging reversal. See Amici Curiae Brief, *United States v. Weldon Angelos*, D.C. No. 02-CR-708 (PGC) (June 21, 2005).

reduced sentence, Judge Cassell noted “an additional fifty-five year sentence for Mr. Angelos under §924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence-but nonetheless constitutional. . . .”³⁷⁵ He also urged the President to commute this defendant’s sentence.³⁷⁶

The Angelos received a great deal of publicity, thanks in part to Judge Cassell’s efforts and reputation. But, stacked 924(c) counts were not unusual during the Guidelines era when judges lacked the power to reduce the Guidelines portion of the sentence as well. A typical case of this nature from that era is the Michael Prikakis case from Judge Vinson (N.D. Fla.).³⁷⁷

Michael Prikakis was born in Greece and he moved to the United States after marrying an Air Force sergeant. Although both he and his wife were working in 1991, they had more than \$5,000 in credit card debts as well as liens against their cars. Foolishly, Michael turned to selling powder cocaine to address their money problems. Tipped off by an informant, over a seven day period Prikakis made three sales to a team of undercover officers. In total, he sold 86 grams of powder worth approximately \$5,000.

Under the Guidelines, the sentence for this amount of cocaine was 15 - 21 months.³⁷⁸ The undercover agents claimed that Prikakis had a pistol with him during each sale. Armed with this information, the prosecutor also charged Michael with three counts of carrying a firearm during a drug trafficking offense. Prikakis admitted selling the cocaine but contested the gun counts, which carried an additional and consecutive forty-five years, but the jury believed the officers and he was convicted.

When Judge Vinson appeared before the Senate Judiciary Committee in 1983 for confirmation, he said that drugs are "the most serious overall crime problem facing this country," and therefore he "would favor

The Tenth Circuit, however, denied Angelos’ appeal. *See United States. v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

³⁷⁵*Angelos*, 345 F.Supp.2d at 1261.

³⁷⁶Judge Cassell added, “This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders - including violent offenders and even a murderer - who have been before me. For the reasons explained in my opinion, I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.” *Id.* at 1261.

³⁷⁷*See* Profile of Judge Roger Vinson, Appendix A; *See also* Profiles of Judge William M. Acker, Jr. (N.D. Ala.); Judge Malcolm J. Howard (E.D. N.C.), Appendix A. .

³⁷⁸*Id.*

maximum sentences in those cases.¹⁶⁷⁹ Nevertheless, Judge Vinson thought that the Prikakis case was "[t]he most absurd situation I've ever seen, and to me it constitutes an abuse of the prosecutorial discretion . . . to impose a forty-five year mandatory minimum consecutive sentence for this offense."¹⁶⁸⁰

Judge Vinson also expressed his concern that because the case involved controlled buys, the government had complete and unfettered discretion to increase the defendant's mandatory time by prolonging the investigation and making more buys. He complained, "[I]t leaves it entirely in the discretion of the law enforcement and the prosecutorial arm to determine the sentence of the defendant, knowing that you've got this [924(c)] statute,"¹⁶⁸¹ adding that the prosecutor was "essentially bypassing the judge's discretion" by charging the defendant in this way.¹⁶⁸² Lastly, Judge Vinson thought that the jury that convicted Mr. Prikakis would be shocked to learn of the sentence; "I think they would rise up in indignation, as anybody else would, if they know about how this law is being applied and construed in circumstances such as this, which is essentially one underlying offense."¹⁶⁸³

Clearly, judges like Vinson and Cassell were upset by the harshness and disproportionate nature of the sentences in the 924(c) stacking cases. But in addition, these cases forced them to recognize that the unchecked power of prosecutors under the Guidelines regime was being used for goals that had nothing to do with just punishment. While the prosecutorial motives in each case cannot be known for certain, evidence suggests somewhat different reasons for the prevalence of these cases.

In the felon-in-possession cases, it may be that both politics and resource allocation factors were motivators. Beginning in 1991, the Justice Department vigorously encouraged its local offices to increase the number of felon-in-possession indictments under the rubric of "Project Triggerlock."¹⁶⁸⁴ Most importantly, local U.S.

¹⁶⁷⁹*Id.*

¹⁶⁸⁰*Id.*

¹⁶⁸¹*Id.*

¹⁶⁸²*Id.*

¹⁶⁸³*Id.*

¹⁶⁸⁴Operation Triggerlock" was implemented in April of 1991, and is described as "an effort by the Justice Department to use federal firearms statutes to target the most dangerous violent criminals." Patrick Walker and Pragati Patrick, TRENDS IN FIREARMS CASES FROM FISCAL YEAR 1989 THROUGH 1998, AND THE WORKLOAD IMPLICATIONS FOR THE U.S. DISTRICT COURTS, (Apr. 4, 2000) (Administrative Office of the United States Courts), *available at* http://www.uscourts.gov/firearms/firearms00.html#N_9. For the government's explanation of "Operation Triggerlock," *see* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ffo98.pdf> at 4 of 19. "Operation Triggerlock" continued under the George H.W. Bush Administration. The Clinton administration followed suit with its "Weed and Seed" program which attempted to allow each jurisdiction to create a firearm's prosecution policy suited to local needs and tried to provide funding for social services as

Attorney's offices and federal law enforcement agencies were provided additional funding to pursue these cases.³⁸⁵ Thus, while the Justice Department's literature claimed that Triggerlock prosecutions would be targeted at habitual violent offenders such as gang members, drug dealers and gun runners, in reality the funding incentive generated a more indiscriminate sweep of qualifying cases.³⁸⁶ For example, in some jurisdictions, ATF agents simply combed state court records for gun possession cases to discover defendants charged with gun possession. If these defendants had the requisite number of qualifying convictions, a federal indictment under the ACCA was brought. Moreover, if the defendant had already plead guilty in state court, he had no defense at all and these became easy cases, padding the statistics for the program. In this way, Project Triggerlock allowed both local U.S. Attorneys and the Justice Department to proclaim progress in the war against both gun crimes and career criminals.

In the 924(c) stacking cases, it appears that consecutive counts were usually part of an effort to coerce a plea or as punishment after a defendant rejected an initial offer. However, in some cases, no explanation is apparent other than the prosecutor simply 'piling on' in an effort to get the maximum sentence the law would permit. For Republican appointees who had long trusted and deferred to prosecutors, this kind of abusive charging practice led to sentencing transcripts that resonate with the sound of betrayal and the rawness of someone whose blinders have been suddenly removed.

V. Republican Appointees and Sentencing Reform in the Post-Booker Era.

This section explores ways in which advocates for more moderate sentencing policy might be able to use the findings of this study in the post-*Booker* world. First, Republican appointee dissatisfaction during the Guidelines era can be used to forestall a "*Booker* fix" through legislation that recreates a facsimile of mandatory guidelines or further restricts judicial discretion by imposing more mandatory minimums. Second, sentencing activists could use the issues that most distressed Republican judges (which were not remedied by *Booker*) as a roadmap for proactive reform.

well as prosecution. Richmond's highly touted "Project Exile" rekindled interest in federal prosecutions for felons-in-possession and President George W. Bush followed with Project Safe Neighborhoods, which provided for additional funding and designated prosecutors and agents for these cases. *See also* Memorandum, Robert S. Mueller, III, Prosecutions Under 922(g), (Nov. 3, 1992) ("It is appropriate to charge a defendant who has multiple qualifying factors with a separate count of unlawful weapons possession under §922(g) for each qualifying status.").

³⁸⁵ *See supra* note 54.

³⁸⁶ *See* H. Scott Wallace, *Compulsive Disorder: Stop Me Before I Federalize Again*, 28-Jun Prosecutor 21, 24 (May/June 1994). Wallace cites Bureau of Alcohol, Tobacco and Firearms statistics in saying that the majority of "armed career criminals" convicted under Project Triggerlock consisted of state burglary convictions. *Id.*

A. Republican Appointees and Preserving the Post-*Booker* Status Quo.

Understanding how the experiences of Republican appointees in the Guidelines era can inform sentencing policy in the post-*Booker* period is somewhat complicated, because at first blush, the Supreme Court's intervention accomplished much of what judges and academics had been urging throughout the Guidelines era - sentencing guidelines that are really guidelines rather than mandatory rules, coupled with appellate review to guard against truly idiosyncratic sentencing decisions. Moreover, despite having greater discretion under *Booker*, judicial sentencing practices have changed very little; in fact the average post-*Booker* sentence is actually slightly longer than before the decision, an outcome few thought possible.³⁸⁷ Post-*Booker* data from the Sentencing Commission also shows that when judges have sentenced below the Guidelines ranges, these downward variances have been a matter of months, not years, suggesting that judges are tinkering rather than abandoning the Guidelines approach to sentencing.³⁸⁸

However, although judges may be more satisfied with the current system, conservative outrage over the perceived end-run by the Supreme Court on their heretofore winning campaign to restrict judicial discretion has led to repeated effort to find a legislative "fix" to undo the decision. To support their claims that a legislative response to *Booker* is necessary, conservatives have contended that both leniency and sentencing disparity are on the rise and point to both individual sentences and sentencing patterns that justify the re-imposition of restrictions on judicial discretion.

For example, on June 21, 2005, Attorney General Gonzalez cited two child pornography cases in which he claimed judges had used their newly returned discretion to impose highly disparate sentences. In one case cited, a defendant was given probation while in the other, the judge imposed an above Guidelines sentence of 40 months.³⁸⁹ At the macro level, conservatives have noted that sentences outside the Guidelines increased ten percent in the first thirteen months after *Booker*,³⁹⁰ and looking deeper into the data, they point to particular districts where compliance with the Guidelines is allegedly now below fifty percent, buttressing their

³⁸⁷ U.S. Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing [hereinafter Impact of *Booker* Report] at 46-47 (2006).

³⁸⁸ *Id.* at 65 (noting that non-government downward departures have been approximately six months). Even critics of the Guidelines regime, such as Judge Ronald Longstaff (S.D. Iowa), have stated that post-*Booker*, "I think I'm still letting the guidelines be a very important factor in the sentence, I'm just not letting it be the only factor." *More Judges Deviate from Mandatory Sentences*, <arch 21, 2006 available at <http://www.jointogether.org/news/headlines/inthenews/2006/more-judges-deviate-from.html>.

³⁸⁹ Attorney General Gonzales made his remarks at the 2005 victims of crime conference in Washington DC. See <http://www.usdoj.gov/ag/speeches/2005/06212005victimsocrime.htm>.

³⁹⁰ Statement of William Mercer, United States Attorney for the District of Montana, (Mar. 16, 2006), available at <http://judiciary.house.gov/media/pdfs/mercerc031606.pdf>;

claim that “liberal pockets” of judges are undermining sentencing uniformity.³⁹¹ Lastly, they have pointed out that downward variances under *Booker* have exceeded upward variances by a ratio of 22:1, reflecting judicial efforts to undermine the severity of the sentencing regime.³⁹²

Conservative thinking about a legislative “*Booker* fix” have coalesced around two approaches. The first is “topless guidelines,” which would essentially re-establish the bottom of each defendant’s Guidelines range as the mandatory sentencing floor. The Bush Administration’s Justice Department has repeatedly endorsed “topless guidelines,” despite real questions about the constitutionality of such a system.³⁹³

The second approach to circumventing *Booker* relies on more mandatory minimums to curtail judicial discretion. Conservative members of the House and Senate have introduced a number of bills over the past several years to significantly increase the number of offenses subject to mandatory minimum terms and to create new crimes carrying such penalties.³⁹⁴ Some favor this approach, in part, because it avoids the

³⁹¹See Sean O’Sullivan, *State’s Judges Showing More Leniency*, Apr. 4, 2005, available at www.delawareonline.com (reporting claims of the Delaware U.S. Attorney’s Office that Delaware federal judges are sentencing below the Guidelines in a large percentage of cases).

³⁹²Jeff Eckhoff, DES MOINES REGISTER, *Data Show More Variety In Sentencing Some Judges Use Too Much Discretion, Are Too Lenient, Critics Say*, Mar. 19, 2006, available at <http://www.november.org/stayinfo/breaking06/SentencingData.html>.

³⁹³See *supra* note 31; *Bush Seeks To Re-Impose Mandatory Minimums*, CBS News, June 13, 2007 (reporting that Attorney General Gonzalez again called for legislation imposing topless guidelines) available at <http://www.cbsnews.com/stories/2007/06/13/politics/main2924206.shtm>; see also *Attorney General Alberto R. Gonzales Announces Expansion of Justice Department Efforts and Proposes New Legislation to Help Prevent and Combat Violent Crime*, press release available at http://www.usdoj.gov/opa/pr/2007/June/07_ag_398.html. As conceived, “topless guidelines” would use the jury verdict to set the bottom of a defendant’s Guideline range but set the top of the range at the statutory maximum. Thus, judges would again be limited to narrow Guideline departures to find a way to impose a sentence below the bottom of the Guidelines range. There would, however, be no restraints on higher sentences. See *A Counsel of Caution: Hearing on the Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee 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*). See also *Letter from the Judicial Conference Concerning H.R. 1528*, 17 Fed. Sent. Rep. 315 (2005) (“converting the floors of the now-advisory sentencing guideline ranges to mandatory minimum sentences could be challenged as an unconstitutional evasion of *Blakely* and *Booker*.”).

³⁹⁴See H.R. 1279, “The Gang Deterrence and Community Prevention Act of 2005 (adding new mandatory minimums to crimes, including drug offenses, committed by members of “street gangs,” which was very broadly defined and would have included many first time drug offenders who committed no acts of violence); H.R. 1528, “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child

constitutional issues raised by the “topless guidelines” approach.

Since *Booker*, however, the Sentencing Commission, Judicial Conference, and many commentators have been able to stave off both kinds of *Booker* fixes by advocating a “go slow” and “wait and see” approach; essentially a rearguard action designed to maintain the *Booker* status quo. This strategy has succeeded to date, aided in part by the fact that judges have shown significant restraint in exercising their recovered discretion.³⁹⁵ However, given the power of crime legislation in past elections³⁹⁶ suggests that the post-*Booker* stand-off between conservatives and the federal judiciary is not likely to prevail indefinitely.

Therefore, this Report urges defenders of judicial sentencing discretion to more aggressively argue that the mandatory Guidelines era was not a Golden Age of sentencing uniformity and fairness and therefore the future of federal sentencing policy should not be sought in replicating its past. It is here that Republican appointees’ experience under the Guidelines can make a difference. The case profiles in Appendix A show that judicial dissatisfaction with the Guideline regime’s results was not limited to just “liberal” judges, but in fact, included many Republican appointees with solid conservative credentials. The negative experiences of Republican appointees under the Guidelines regime suggests that both “topless Guidelines” or more mandatory minimums would produce sentences that these judges would find unjust and unnecessary. Thus, reimposing harsh and inflexible rules to control a minority of “wayward” judges is not worth the cost to the many more conservative and law-following judges who need the ability to tailor sentences for the unusual case or to remedy unwarranted exercises of prosecutorial discretion.

B. Republican Appointees and Pro-Active Sentencing Reform.

Given the acknowledged instability of the post-*Booker* sentencing regime, this Report urges that Republican

Protection Act of 2005”) (Rep. Sensenbrenner’s “*Booker* fix bill which also contained new mandatory minimums); *see also* S. 155 (Senate version of the “gang bill” which also sought to increase first offense penalties under § 924(c) from five to seven years and make those guilty of conspiracy to possess a firearm subject to the same sentences as those who actual use or carry the weapons); H.R. 3132, “Children’s Safety Act” (including a new five year mandatory minimum for sex offenders who fail to register); H.R. 1751, 109th Cong., 1st Sess. (2005) (seeking to establish mandatory minimums for courthouse crimes.).

³⁹⁵In the immediate aftermath of *Booker*, some judges privately and publically urged their peers to use their restored discretion sparingly to forestall a legislative response from Congress. *See e.g.* Statement of Judge Piersol, February 15, 2005, United States Sentencing Commission Hearing (expressing the view of the Federal Judges Association that Congress should “allow the present situation time to work” before enacting any legislative fixes).

³⁹⁶ *See* Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 476-81 (2006) (explaining electoral gains from ‘tough on crime’ sentencing legislation directed at insular minorities helped push legislatures away from “a long tradition of legislative laissez-faire” in sentencing.).

appointees dissatisfaction with sentencing policy be mustered in support of needed reforms to federal sentencing law rather than just as support for maintaining the status quo. Certainly, this endeavor requires a careful balancing act, because it is clear that these judges would not support a wholesale abandonment of the Guidelines' goals of greater uniformity and tough sentences. Nevertheless, my research suggests that there are discrete issues on which these judges clearly would favor changes that would allow more flexibility and less severity. Moreover, sometimes the best defense is a good offense. Rather than continually being cast in a defensive posture trying to forestall conservative efforts to undo *Booker*, sentencing advocates need to take the fight to conservatives by showing that aspects of the *post-Booker* are still too severe and too rigid.

What is needed is a roadmap for legislation that can capitalize on the views of these Republican judges, while being realistic about the difficult political environment in which crime policy takes place. To find such issues, one need look no further than the specific concerns of Republican judges laid out in Part IV of this Report. The advantage of focusing on these issues is that even if these Republican appointees are unwilling to actively participate in the policy process, there is sufficient record in these cases to demonstrate their belief that the penalty structure is too often inequitable. Additionally, incremental proposals that focus on the concrete cases that are likely to strike the judiciary, press, and public as extremist and pointlessly harsh, are probably the best bets for garnering political support.

For example, although few if any Republican appointees support mandatory minimums, an all out effort to repeal them would almost certainly be politically fruitless. However, focusing on sympathetic low-level offenders who are still receiving mandatory minimums because they are ineligible for the safety-valve would likely be popular with many Republican judges. Moreover, the press has shown a willingness to give such cases favorable coverage. Moreover, a variety of legislative routes are available to make this possible, although perhaps the simplest would be to expand the safety-valve to cover defendants with minor criminal records, or whose co-defendant's possessed firearms, or who are unwilling to give a full accounting of their co-defendant's activities due to a reasonable fear of retribution.³⁹⁷ More complicated approaches could seek to lessen the sentences of low-level offenders by finding ways to strengthen the importance of culpability over quantity for these defendants.³⁹⁸

Also on the short list of *post-Booker* sentencing reform should be the crack/powder disparity. While Republican appointees may not all be ready to advocate for lowering crack penalties to achieve a 1:1 ratio with powder, there is clearly significant support from these judges for a reduced ratio and few Republican

³⁹⁷More creative solutions could be found as well. Girlfriend and other low-level defendants such as drug couriers could be exempted from relevant conduct sentencing, even if they were aware of the scope of the organization.

³⁹⁸For example, defendants driven to trafficking by addiction could be exempted from mandatory minimum sentences if they demonstrated significant post-arrest drug rehabilitation and were subjected to strict monitoring by probation.

appointees see the need to raise powder sentences as part of the solution.³⁹⁹ Moreover, addressing the crack/powder disparity is relatively politically safe for judges. As noted in Part III, lowering crack penalties has also been endorsed twice by the Sentencing Commission and has broad support from many former federal prosecutors from both parties⁴⁰⁰ and the Judicial Conference. Several prominent Republican members of Congress have themselves proposed legislation to partially remedy the disparity.⁴⁰¹ Lastly, because the issue, especially the racial aspect, has already received widespread coverage in the press, it should be easier to move the issue to center stage.

Topping off the list sentencing reforms in which Republican appointee opinions might make a difference should also include aspects of firearms penalties. A significant first step that these judges would support would be legislation to prevent the unfair “stacking” of 924(c) counts. Adding statutory language to prevent prosecutors from charging multiple 924(c) counts in a single indictment where the same firearm was used in a single course of conduct might suffice to stop the most blatant prosecutorial abuses of this charge.⁴⁰² Pushing this issue would

³⁹⁹Some Republican appointees do support lowering crack penalties to achieve a 1:1 ratio. Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002). Others advocate somewhat higher penalties for crack, although it is not clear to what extent this view is because they think that crack is a more dangerous drug, or that 1:1 is politically unfeasible, or that it feels safer and less partisan to endorse the most recent suggestion of the Sentencing Commission and Republican sponsored bills in Congress. Likely, all three factors may play a role. See U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy*, at 91 (May 2002) (recommending 20:1 ratio as reasonable, incremental step to the penalty structure); See also *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005) (Judge William Smith, a George W. Bush appointee, endorsing the 20:1 ratio as reasonable in a post-*Booker* context); reversed by *United States v. Pho*, 433 F.3d 53 (2006) (which reversed another Rhode Island judge, Ernest Torres, a Ronald Reagan appointee, who had also found the disparity irrational).

⁴⁰⁰As discussed previously, a movement to address crack penalties would also draw support from many former federal prosecutors from both parties. See *supra* note __ discussing Amici Curiae Brief in the *Angelos* case.

⁴⁰¹See e.g. “Drug Sentencing Reform Act of 2006,” S.B. 3725, 109th Cong. (2006). The bill Introduced by Sen. Jeff Sessions (R.-Ala.) and co-sponsored by Sen. John Cornyn (R. Tex.), seeks to reduce the crack-powder disparity to 20:1. See also *New Crack bill Only Gets it Half Right*, 16 FAMM-GRAM 3 at 9 (Fall 2006). That bill, however, did not receive a roll call vote by the end of the legislative session. *Penalties for Crack Cocaine under Renewed Scrutiny on Capitol Hill*, 16 FAMM-GRAM 4 at 9 (Winter 2006). Earlier efforts at shortening or eliminating the disparity, spearheaded by Republicans, include H.R. 48, 109th Cong. (2005), the “Powder-Crack Cocaine Penalty Equalization Act of 2005,” sponsored by Rep. Roscoe Bartlett (R.-Md.), although that bill sought to equalize the quantity of each that triggers the mandatory minimum, it sought to do so by lowering the amount of powder required. See *Other Federal Bills of Interest*, 15 FAMM-GRAM 2 at 7 (Summer 2005).

⁴⁰²This could be accomplished in several ways, including requiring an actual prior conviction for this offense before the events underlying a second offense for this crime, or by requiring that additional counts in an indictment be supported by a second firearm.

also would highlight the role of prosecutorial discretion in creating extreme examples of sentencing disparity, weakening conservative claims that judges are the culprits of sentencing disparity. With regard to the felon-in-possession statute, similarly these judges would likely support proposals that would limit the fifteen year mandatory minimums under the ACCA to defendants with a truly violent criminal record.⁴⁰³

C. Republican Appointees and Sentencing Philosophy in the Post-Booker Era.

Attempts to achieve proactive sentencing reform, even on the narrow issues outlined in the previous section are still likely to fail if grounded solely assertions that sentences are too severe or that judges lack sufficient discretion. Unfortunately in this political environment, proposals based on claims of sentence severity are vulnerable to being branded as soft-on-crime and demands for greater sentencing discretion as proxies for a power hungry judiciary. Thus, proponents of post-Booker sentencing reform need to consider how to craft their appeal on a theoretical level that will also appeal to moderates and conservatives. This final section suggests a few ideas on this subject.

⁴⁰³Simple solutions could include a statute of limitation provision for qualifying felonies or by limiting the predicate felonies to offenses that better correlate to the paradigm of the armed career criminal. Reforming the ACCA in a manner designed to protect hunters with criminal records from the distant past might also garner support from some gun groups. The National Rifle Association's current position is that all federal gun offenses should be prosecuted to the full extent of the law. However, other gun rights groups have recognized that the federal gun statutes are over broad as written and as enforced by federal prosecutors. See Gene Healy, *The NRA Takes Aim at 10th Amendment*, Jun 1, 2002, AFF's Weekly Online Magazine available at <http://www.affbrainwash.com/archives/007489.php> (quoting NRA spokesperson's call for expanding efforts to "enforce the gun laws on the books" and criticizing this position President Bush's Project Safe Neighborhood initiative on Second and Tenth Amendment grounds). /; second amendjprosiSveSafdion constitutional grounds). America's Future Foundation ("AFF") states that its mission is to promote limited government, free-markets, and personal responsibility and to identify and develop these future conservative and libertarian leaders. Other gun rights groups that oppose federal gun policies and the existing statutory penalties include Jews for the Preservation of Firearms Ownership ("JPFO"). See <http://www.jpfo.org/about.htm> (proclaiming group's goals are to destroy "gun control" and to encourage Americans to understand and defend all of the Bill of Rights for everyone. The group was founded by Jews and initially aimed at educating the Jewish community about the historical evils that Jews have suffered when they have been disarmed, but it welcomes persons of all religious beliefs who share a common goal of opposing and reversing victim disarmament policies while advancing liberty for all); see also David Holthouse, *Living in Exile: Federal prisons are filling up with people whose only crime is the possession of a gun,* accessed at <http://www.keepandbeararms.com/information/XcIBViewItem.asp?ID=3326> (website of the group Keep and Bear Arms which seekss to help lawful people maintain their abilities to protect themselves and the people they love effectively from anyone who would do them harm - through legal, private ownership and use of guns. The group stands for the repealing of all gun laws which infringe on the civil rights of peaceable people to defend their own lives and property).

In essence, sentencing reformers need to shift the rhetorical paradigm of sentencing policy. Throughout the Guidelines era, conservatives were able to make severity and uniformity the dominant rhetoric themes of the debate. In addition, by portraying “liberal” and “activist” federal judges as source of sentencing leniency and disparity, conservatives were able to give federal prosecutors virtually unlimited and unreviewable discretion.

Changing the rhetorical triad of uniformity, severity, and mistrust of the judiciary will be difficult, but Republican appointee concerns can provide both support and direction. First, sentencing advocates must articulate as their core claim that it is the ideological conservatives in Washington, D.C. who are out of step with each community’s sentencing values, not the federal judges who live and work there. In fact, for all the reasons discussed in Part I, sentencing reformers must make the case that life tenured judges can be trusted to help assess the contribution that the federal criminal justice system can make to crime control in their own communities.

Second, advocates need to better explain why there are striking differences between the sentences that some Republican appointees believed would be sufficient and the results under the Guidelines regime. For example, one Western Republican judge felt that for most “non-kingpin” drug dealers, six to seven years incarceration was enough and he proposed only 18-36 months for drug couriers.⁴⁰⁴ Other Republican judges suggested three to five years for street dealers,⁴⁰⁵ and two to three years for crack and meth dealers, especially those who were drug addicted.⁴⁰⁶ Yet, at the same time, in interviews and in sentencing transcripts, these Republican judges stress that tough punishment and sentencing uniformity are important, even primary in most cases.

This Report contends that the reason for the disjunction between judicial tough on crime rhetoric and the Guidelines regime’s sentencing results lies in critical philosophical differences between Congress and Republican judges about sentencing policy. While Republican judges care very much about uniformity and just desserts, their day-to-day exposure to sentencing actual human beings has yielded a sentencing philosophy that more pragmatically acknowledges that individual cases require a tailored mix of traditional sentencing justifications including “just deserts,” incapacitation, deterrence, and yes, even rehabilitation, for some defendants.⁴⁰⁷

⁴⁰⁴ Western Judge 4, Anonymous Interview (Oct. 17, 2002.)

⁴⁰⁵ Atlantic Judge 3, Anonymous Interview (September 6, 2002.)

⁴⁰⁶ Southern Judge 1, Anonymous Interview (September 4, 2002.) The average sentence for crack cocaine (including trafficking) was 123 months prior to the Feeney Amendment, 127 months after Feeney, and 127 months after *Booker*. Sentences for methamphetamine averaged 95, 101, and 97 months in each of the respective time frames. Impact of *Booker* Report, *supra* note _ at 130.

⁴⁰⁷ While the SRA directed the Commission and judges to weigh and balance these very same considerations, *See* 18 U.S.C. §3553(a), many commentators agree that the Guidelines regime came to be dominated by a “modified just deserts” philosophy that has elevated punishment to the primary consideration (with incapacitation as the secondary influence on sentence length). *See* Paul J. Hofer & Mark H.

Thus, in contrast to the gun and drug warrior focus on severity and uniformity (by restricting judicial discretion), Republican appointee sentencing philosophy, to the extent that generalizations can be made, can best be characterized as stressing “public safety,” closely followed by a desire for actual rather than theoretical uniformity. That is not to say that under a “public safety” perspective, punishment does not matter. It is just that for Republican judges, punishment is more closely linked to the moral culpability and the dangerousness of the offender, not just the Guidelines’ blunt quantification of social harm. Thus, in cases where the Guidelines failed to account for the lesser culpability of offenders motivated, for example, by love, loyalty, desperation, or addiction, rather than profit, the resulting Guidelines sentences seemed to be both morally wrong and practically unnecessary. Under a broader “public safety” perspective, judges should have room to place greater weight on preventing recidivism through consideration of specific deterrence and rehabilitation.⁴⁰⁸

Thus, for non-violent crimes, ranging from drug to firearms to white collar offenses, many Republican judges in the Guidelines era believed that the public would be better protected by shorter prison terms and more concrete steps that addressed the offender’s problems, such as the possibility of serving some portion of the sentence in inpatient drug treatment, or alternatively, for employed defendants with families to support, home confinement or a halfway house with work release

Moreover, the public safety perspective extends beyond just low-level offenders. With the exception of violent offenders, for whom both Republican and Democratic appointees generally state that punishment and incapacitation should be the key considerations, for defendants with higher levels of culpability, some Republican judges worried that excessively long sentences robbed these defendants of hope and actually undermined public safety by ensuring these men will be unskilled and unemployable when released and a danger to other inmates and prison guards. In addition, while deference to the elected branches is important to Republican judges, they also have learned from hard experience that they need some power to check the executive branch, especially when prosecutorial charging policies threaten the goals of uniformity and proportionate punishment, such as in the 924(c) “stacking” cases.

Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 20-26 (2003).

⁴⁰⁸For example, a judge from a medium size city with significant poverty in its African-American population said that he sees “a lot of inner city kids who never had a chance.” He further stated that “if there is a chance to save a young person, he wants to do that but not when its their second or third time through the system.” Atlantic Judge 1, Anonymous Interview (Oct. 15, 2002.) Similarly, even for more serious offenders, a Southern Republican judge stated that punishment should be long enough to serve its purposes but not so long as to defeat rehabilitation. He said that he hoped that when he sentences someone without a tendency to violence, they would get out one day and have enough life ahead of them to participate. He worries that some defendants become institutionalized and embittered by unduly long sentences which leads to trouble in prison and no hope of gainful employment when get out. Southern Judge 1, Anonymous Interview (Sept. 4, 2002.)

Thus, Republican judges in the Guidelines era sought more sentencing discretion not for discretion's sake but rather, because the Guidelines so often botch the punishment calculus and neglect to consider public safety concerns outside of the punishment scale and because prosecutors were not always focused on the goal of public safety. Based on the experiences of these judges, this Report contends that a political viable new sentencing rhetoric based upon the concept of public safety and real, not false uniformity, could provide the theoretical ground meaningful sentencing reform. In fact, in some state systems, judges and sentencing commission are trying to tackle sentencing from a public safety perspective in what might be the third wave of sentencing reform in the modern era.⁴⁰⁹

VI. Conclusion: Exploding the Myth of Liberal Judiciary.

The conservative storyline is that the Sentencing Guidelines regime helped to lower crime rates and reduce unwarranted sentencing disparities. To the extent that some "girlfriends" and other low-level offenders received unduly long sentences in the early days, these problems were ameliorated by the 1994 safety-valve and other Guideline "fixes." Thus, any continuing judicial complaints about sentencing policy emanated from liberal, elitist judges who were out of sync with mainstream America's concerns about crime and punishment.⁴¹⁰

The results of this study explodes the myth that only liberal judges were unhappy with the pre-*Booker* sentencing regime because there are simply too many examples of Republican appointees expressing frustration and anger over sentences they were required by law to impose. In fact, Republican appointees seemed to share many of the same concerns as their Democrat counterparts. Both groups agreed that mandatory minimums penalties are imprudent as policy and sometimes unjust in result. Additionally, a critical mass of Republican appointees express skepticism about the effectiveness of prosecuting a large volume of low-level, local drug and gun crimes in the federal courts. Like most Democratic judges, a significant number of Republican

⁴⁰⁹For example, in the Oregon state system, Judge Michael H. Marcus on the Circuit Court of Multnomah County, Oregon, has championed judicial sentencing based upon providing judges with more empirical information about what kinds of sentences improve "public safety" in each case and with each type of offender. See Michael H. Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 FED. SENT. RPTR. 227 (2006); "Smart Sentencing: Sentencing for Public Safety and Harm Reduction," (Judge Marcus' website promoting his approach to sentencing, available at <http://ourworld.compuserve.com/homepages/SMMarcus/whatwrks.html>). While not endorsing his specific approach, the Multnomah County experience suggests that a new paradigm of sentencing discourse, promoted and championed by judges, is possible.

⁴¹⁰Conservatives also argue that the judiciary has missed the shift in public opinion to the right on drugs and crime. Thus, penalties are increasing because Congress and the Justice Department are reacting to what the country wants. When life-tenured judges appointed in a different era attempt to use their discretion to undermine this policy, the political branches respond by including restraints on judges as part of their crime control platform. However, this view of public opinion is too simplistic and contrary to public opinion polls and other evidence.

appointees also came to be troubled by the transfer of sentencing discretion to prosecutors, especially those who saw first hand, arbitrary charging decisions. Finally, most Republican judges were as bewildered and outraged by the 2002 Feeney Amendment's reporting provisions and other pre-*Booker* efforts by Congress to squeeze the last vestiges of discretion from the judiciary.

This is not to say that Republican judges in the Guidelines era magically transformed into liberals after appointment. It is clear from talking to these judges and reading their sentencing transcripts that they see themselves as "law and order" judges who believe in tough sentences for illegal drugs, gun offenses, and for violent crime. And while they may have been distressed by a narrower slice of sentences than their colleagues, the problem cases were still numerous enough to fall into discrete and recurring patterns.⁴¹¹

In light of this evidence, the obvious question is why so many apparently rock solid conservative judges disagree with Congressional sentencing policy decisions over the past twenty years? This Conclusion does not contemplate a single answer to this question but instead considers the possible options.

Critics of the judiciary contend that malcontent Republican judges have chosen to identify along institutional rather than political lines. Cynically, their judicial griping over sentencing policy was little more than sour grapes over the continuing loss of judicial discretion under the modern sentencing reform movement. Under this view, judges appointed before the Guidelines took effect would be the most strident objectors, but that all judges share the knowledge of what has been lost. Thus, this argument goes, while these judges may have personal views that can be classified as conservative, their primary objective in their professional position is to maximize their power to influence sentencing outcomes.

Certainly, some of the judges included in this study were appointed before 1989, and can thus be identified as "transition" judges. Moreover, recent surveys do suggest that at least before the Feeney Amendment riled the judicial waters again, there was significant movement towards a grudging acceptance of the Sentencing Guidelines, if not mandatory minimums. However, if greater judicial power was the *causa bella*, than one would expect these judges to advocate for a return to unfettered discretion. However, there is no indication that the Republican appointees favored this solution. Instead, consistent with their political beliefs, these judges articulated a preference for some form of guided discretion, whether advisory or mandatory guidelines, and appellate review of sentences. More importantly, the judicial power argument ignores the fact that Republican judicial dissatisfaction, especially for post-Guidelines judges, tended to cluster around discrete sentencing issues discussed in Part IV rather than purely systemic complaints.

In contrast to the judicial power critique, most academic theories posit that judicial complaints about the Guidelines regime reflected real problems with sentencing policy, and as a byproduct of the destructive influence of the politicalization of crime. These theories take different forms. The most neutral articulation looks at the difference between the paradigmatic offenders and offenses that Congress considered in passing sentencing laws and the defendants and offenses actually indicted by the government under these laws. Judges find fault

⁴¹¹See *supra* Part IV.

with sentences for certain offenders who meet the technical requirements of the statute, but who nevertheless look very different from the dangerous archetype that Congress had in mind.

If neither judges nor legislators are to blame under this theory, the culprit must be the federal prosecutors who indict these cases and the rigid Justice Department policies that require pleas to counts that carried long sentences. Thus, it was abusive prosecutorial decision-making that is the overarching explanation for sentences that troubled judges. In other words, if federal prosecutors had just declined more cases or offered more realistic plea bargains, most of the judicial complaints about excessive sentences, prosecutorial abuse, and the federalization of crime would have disappeared.⁴¹²

Most academic theorists, while laying some blame on the Justice Department, are not willing to let Congress off the hook.⁴¹³ For example, Professor William Stuntz claims that Congress never challenges prosecutorial charging policies, not because they are rationale as crime fighting policy, but because they have no political reason to do so. He argues that the executive and legislative branches have forged a mutually beneficial alliance because both want to convince the public that criminals will be found guilty and subject to harsh punishment, particularly for offenses that outrage the public or during a period of increasing crime.⁴¹⁴ Thus, both branches benefit politically from increasing the scope of the criminal law together with the broadest definition for each crime and the fewest barriers to conviction.⁴¹⁵ Thus, when either prosecutors or Congress are unhappy with any subset of sentencing decisions (or even a single case), either can easily obtain a legislative remedy in the form of increased penalties and/or limits on judicial discretion.⁴¹⁶ In face of this alliance, there is no place at the table for judicial contentions about over-criminalization or excessive punishment.

Political scientists and sociologists to the understanding of this issue by providing an explanation for the larger political shift on crime policy. Some attribute responsibility primarily to conservatives seeking a cure for their

⁴¹²Federal prosecutors have deflected the blame by claiming that harsh sentencing laws must apply to all defendants to coerce cooperation, to send a message of deterrence to the criminal class, and as a bulwark against "liberal judges" who would undermine sentencing uniformity if given the chance. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-10 (2001).

⁴¹³*Id.*

⁴¹⁴ *See id.* at 529-40. "Legislators are better off when prosecutors are better off." *Id.* at 510.

⁴¹⁵ *See id.* at 512-23. The fact that criminal law is at once both "broad and deep" results in a "shift in lawmaking from courts to law enforcers," "gives the prosecutors the power to adjudicate," and "the use of the criminal justice system not primarily to make and carry out laws, but to send signals." *Id.* at 512, 519-520.

⁴¹⁶ The politics of crime "have become increasingly nationalized, with an ever greater focus on federal law-making." *Id.* at 533.

perceptions about disintegration of community and traditional American values.⁴¹⁷ Others describe this social movement more broadly as a shift towards a "culture of fear," driven by both real crime in the streets and mass hysteria mutually abetted by politicians and the popular press.⁴¹⁸ Finally, some focus on the most virulent component of the politicization of crime - the racial aspect. It has been said many times that in America that the social construction of crime has been closely tied to negative stereotypes of racial minorities.⁴¹⁹ Thus, the fact that crack penalties that have disproportionately incarcerated African-Americans involved in the cocaine trade is just the most recent example of the tendency to vilify and over-punish minority participants in criminal activities.⁴²⁰ For example, Naomi Murakawa has shown how the electoral process rewards legislators whose sentencing policies overwhelmingly target disfavored minorities.⁴²¹

In the face of these daunting political challenges, Congress must find a way to break free of the dead end paradigm that seeks severity for severity's sake and sentencing uniformity through the elimination of judicial discretion as the sole goals of sentencing policy, and return its eye to the real prize – protecting the public. While this Report focuses on the greater role that judges can play, it is also becoming clear that conservative voices beyond the judiciary are now also joining in to suggest that a new less punitive and ideological direction is necessary. For example, James Q. Wilson and John DiIulio,⁴²² now agree that the nation has 'maxed out'

⁴¹⁷ See generally Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW AND SOC. INQUIRY 1111, 1113 (2000). Simon believes governing through crime has also led to growth in the managerial function of government and a likely exacerbation of racism, inequality, and "the least defensible features of the old regime (patronage driven by large public unions and election contributions).

⁴¹⁸ Barry Glassner, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (1990); Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 UCLA L. REV. 1411, 1426 (2001); Tonya L. Brito, *Paranoid Parents, Phantom Menaces, and the Culture of Fear*, 2000 WIS. L. REV. 519, 519-520.

⁴¹⁹ Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775 (1999). See also, Tracey L. Mearers & Dan M. Kahan, *Law and (Norms of) Disorder in the Inner City*, 32 L. & Soc'y Rev. 805 (1998).

⁴²⁰ While there was some early evidence that crack was more dangerous than powder cocaine, commentators have made powerful arguments that resistance to lowering the 100:1 ratio is still very much a story about stereotyping of dangerous ghetto blacks. See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249 (1996).

⁴²¹ Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 480-487 (2006).

⁴²² DiIulio was the head of the George W. Bush Administration's Office of Faith-Based and Community Groups. James Q. Wilson is now the Ronald Reagan Professor of Public Policy at Pepperdine University, and previously served as a member of the President's Foreign Intelligence Advisory Board under

on the public safety value of incarceration,’ and the ‘pendulum has now swung too far away from traditional judicial discretion.’⁴²³ Prominent Republican jurists have also begun to stress the judicial voice. Most recently, retired Justice Sandra Day O’Connor has joined Chief Justice Rehnquist and Justice Anthony Kennedy on this issue.⁴²⁴ She reportedly stated that the judiciary doesn’t upset Presidents, Congress, or governors once in awhile, “we probably aren’t doing our jobs as judges, and our effectiveness,” she said,” is premised on the notion that we won’t be subject to retaliation for our judicial acts.”⁴²⁵ In sentencing policy, this Report maintains that the views of Republican judges may be the ingredient necessary to dispel the myth that a liberal judiciary is the sole obstacle to rationality and moderation in sentencing policy.

Presidents Reagan and George H.W. Bush.

⁴²³Stuart Taylor, Jr, *Ashcroft and Congress are Pandering to Punitive Instincts*, *National Journal*, (January 26, 2004). See also “How Washington Subverts Your Local Sheriff” by Edwin Meese III & Rhett DeHart *Policy Review* January-February 1996, Number 75 (bemoaning the increase in the federalization of crime including the passage of a federal car jacking and other unnecessary duplications of traditionally state defined crimes).

⁴²⁴In an August 9, 2003 speech to the American Bar Association, Justice Kennedy argued that “I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases mandatory minimum sentences are unwise and unjust. . . .” He added that in the federal criminal justice system, “Our resources are misspent, our punishments too severe, our sentences too long.” *available at* http://www.famm.org/si_judges_speak_out.htm. Chief Justice Rehnquist also found fault with mandatory minimum sentencing and the burdens placed on the federal courts by unnecessary federal criminal legislation and prosecutions. William H. Rehnquist, “Luncheon Address,” in U.S. Sentencing Commission, *Drugs and Violence*, pp. 286-87 (“These mandatory minimum sentences are perhaps a good example of the law of unintended consequences. . . . the mandatory minimums have [] led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space. . . . Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.”).

⁴²⁵See NPR Morning Edition, March 10, 2006, speech reported by Nina Totenberg and available for ordering at <http://www.npr.org/templates/story/story.php?storyId=5255712>; see also *Retired Supreme Court Justice hits attacks on courts and warns of dictatorship*, March 10, 2006 available at http://rawstory.com/news/2006/Retired_Supreme_Court_Justice_hits_attacks_0310.html.