

The Future of Federal Sentencing Policy:
Learning Lessons from Republican Judicial Appointees
in the Guidelines Era

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Forthcoming 79 U. COLO. L. REV. __ (2007)

ABSTRACT

In the two years since the landmark Booker decision, federal sentencing policy has been in a state of suspended animation. This Article urges federal sentencing reform advocates to look to an unlikely source for realistic goals and ideological support - the experiences of Republican judicial appointees in the Guidelines era. My findings are based upon a long-term research project into cases in which Republican appointees stated their disagreement with the sentences required by law from the bench. The Article discusses the primary product of my research, forty comprehensive case profiles and their policy implications. Specifically, the Article demonstrates how the lessons of these Republican appointees are relevant to three of the critical issues in the post-Booker sentencing debate; first, the need for mandatory minimums, second, the desirability of a legislative “Booker fix,” and finally, specific areas for reform, such as the disparity between crack and powder cocaine sentences, that might have traction in what is likely to be a cautious Democratic Congress on criminal justice issues. By making use of these judges’ insights, I argue that the sentencing debate can transcend tough-on-crime posturing to smart-on-crime policies that better protect both public safety and the public fisc. The Article concludes by drawing on these judges’ words and deeds to construct a rhetorical framework for meaningful, bipartisan sentencing reform in the post-Booker era.

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INTRODUCTION

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.

*Honorable William W. Wilkins, Sr.*¹

In the two years since the landmark *Booker* decision,² federal sentencing policy has been in a state of suspended animation. While many academics and judges were pleased that the decision returned a modicum of sentencing discretion, conservatives in Congress and the Justice Department immediately sought to devise a “*Booker* fix” to reverse the decision. Nevertheless, the Republican majority was unable to coalesce around a particular legislative solution before they lost control of Congress in the 2006 midterm elections.

With the new Democratic majority, sentencing reformers have been re-energized and are considering ambitious post-*Booker* proposals from academia and sentencing reform groups.³ Still, their optimism may be misplaced. Modern sentencing policy has seemingly defied the law of gravity. With few exceptions,⁴ penalties that go up seem to stay up because politicians of both parties fear being labeled soft on crime. Therefore, this Article urges sentencing advocates to look to an unlikely source for realistic goals and ideological support -- the experiences of Republican judicial appointees during the mandatory Guidelines era.

¹*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). Honorable Wilkins, appointed in 1986 by Reagan, served as the Chair of the U.S. Sentencing Commission from 1985-1994.

²*Booker v. United States*, 543 U.S. 220 (2005).

³*See, e.g.*, Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 256-59 (2005) (advocating a simplified and more lenient guidelines system); Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 416-23 (2006) (advocating a closer look at the constitutional guarantee of a jury trial, and suggests a system that better balances the roles of the judge and the jury in sentencing); *see also* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 220-33 (2005) (advocating the creation of a Judicial Sentencing Agency in the Judicial Branch composed of a majority of federal judges); The Constitution Project, *Recommendations for Federal Criminal Sentencing in Post-Booker World*, at 11-18 (July 2006) (providing an outline of a simplified federal guidelines system).

⁴*See infra* at ___, for a discussion of the “safety-valve,” 1994 legislation that permitted judges to sentence low level offender below a mandatory minimum in certain limited situations. *See* 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 §5C1.2 of the U.S. Sentencing Guidelines.

My findings are drawn from a long-term research project that included anonymous interviews of federal judges and research on cases in which federal judges stated from the bench their disagreement with the sentence required by law.⁵ The most recent product of my efforts are forty comprehensive profiles of these cases, all involving Republican appointees. This Article discusses the profiles and their policy implications and also provides internet links to the profiles for readers, researchers and policymakers.

Part I briefly lays out the pre- and post-*Booker* sentencing regime, paying attention to what *Booker* did and did not change, and explains the two year sentencing policy stalemate since the decision. Part II explains the importance of case studies for sentencing policy and elaborates upon my rationale for using only a Republican appointee data set. Part III explores the root causes of Republican appointee dissatisfaction during the mandatory Guidelines era and isolates four kinds of cases that most distressed these judges. Part IV shows how the lessons of Republican appointees from the Guidelines era are directly relevant to three of the critical issues in current sentencing policy; first, the need for mandatory minimums; second, the desirability of a legislative “*Booker* fix” proposal; and finally, specific areas for reform that might have traction in what is likely to be a still cautious Democratic Congress on criminal justice issues. Part V draws on these judges’ statements and deeds to provide a theoretical and rhetoric framework for moderate but meaningful sentencing reform. The Conclusion ends with a plea for the new Congress to listen to these federal judges. By making use of these judges’ insights, I argue that the sentencing debate could move tough on crime posturing to smart on crime policies that better protect both public safety and the public fisc.

I. THE SENTENCING WORLD BEFORE AND AFTER *BOOKER*.

A. THE FEDERAL SENTENCING REGIME IN THE PRE-*BOOKER* YEARS.

1. The Sentencing Guidelines.

Before *Booker*, twenty-five years of “tough-on-crime” politics had dramatically altered the sentencing universe in the federal courts. Before 1984, federal sentencing permitted unfettered judicial sentencing discretion and significant back-end parole board power with a strong emphasis on rehabilitation. However, perceived sentencing disparities and judicial leniency led to the Sentencing Reform Act of 1984 (“SRA”).⁶ By abolishing parole, the SRA solved the

⁵See also 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); David M. Zlotnick, *Symposium on Sentencing Rhetoric: Competing Narratives in the Post-Booker Era*, 11 ROGER WILLIAMS U. LAW. REV. 449 (2006).

⁶18 U.S.C. §§ 3551-3626 and 28 U.S.C. §§ 991-998. 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 the coalition. KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 35-37

problem of post-sentencing disparity.⁷ At the front end, the SRA created the United States Sentencing Commission ("Sentencing Commission") with a mandate to create a sentencing guideline system for all federal crimes.

After three years of controversy, the Sentencing Commission released the first version of the Sentencing Guidelines in 1987.⁸ The critical feature of the new Guidelines was their mandatory nature. In the majority of cases, judges were restricted to a narrow sentencing range somewhere on a 138 box sentencing grid.⁹ The vertical axis of the grid was controlled by the offense level (and offense-related characteristics),¹⁰ the horizontal axis by features of the defendant's criminal record.¹¹ For offenses involving narcotics and financial loss, the Sentencing Commission chose

(1998).

⁷ The statute requires inmates to serve at least 85% of their sentences. 18 U.S.C. § 3624(b)(1) (2000) (limiting good behavior credit to 54 days per year).

⁸ The first Commissioners had significant conflicts over 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).

⁹ The SRA requires that each box on the grid prescribes a range with a high end generally not more than twenty-five percent longer than the low end. There were two initial exceptions. First, the government could elect to move for a downward adjustment based upon a defendant's cooperation with law enforcement. Second, the Guidelines also made provisions for exceptions called "departures" which allowed judges to 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 were specifically forbidden or discouraged. All departures, and in fact all Guidelines calculations, were made subject to judicial review. Despite encouragement from the Supreme Court in the *Koon* case, *Koon v. United States*, 518 U.S. 81, 97 (1996) ("Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion."), many Courts of Appeals remained hostile to creative uses of the departure power. *See United States v. Rybicki*, 86 F.3d 754, 757-59 (4th Cir. 1996). The 2002 Feeney Amendment further cut back on this option. PROTECT Act, 117 Stat. at 669-69 (codified at 18 U.S.C. § 3553(b)(2); *see also* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 213 (2004) ("The Feeney Amendment provisions have the potential to gut downward departures . . .").

¹⁰ 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 or the defendant's acceptance of responsibility (for pleading guilty), U.S.S.G. § 3E1.1, or obstruction of justice (lying at trial), U.S.S.G. § 3C1.1.

¹¹ The horizontal axis of the Guidelines quantifies the defendant's criminal history. Points are assigned for prior convictions based 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 in the higher categories. Once a defendant's adjusted offense level and criminal history category is determined, the Guidelines direct the sentencing judge to a the range on the grid. For example, a defendant with an offense level of twenty-six and a criminal history category of I was subject to a

to set offense levels largely based upon the quantifiable component of the crime. This choice resulted in drug sentences being driven more by drug amounts than culpability factors. The Commission also amplified the impact of an offense's quantifiable component by adopting a "real offense" sentencing system. "Real offense" sentencing required the sentencing judge to look at all related "relevant conduct" to determine the offense level, not just the conduct related to the offense of conviction.¹² Thus, in drug cases, relevant conduct soon became more important than the offense of conviction.

2. Mandatory Minimums for Narcotics and Firearms Offenses.

However, the Pre-*Booker* sentencing regime had another component as important as the Sentencing Guidelines – mandatory minimum statutory penalties that operated independently of the Guidelines. The most significant modern mandatory minimums, those for narcotics offenses, were born in the national hysteria that followed the cocaine induced death of Boston Celtic draft pick Len Bias.¹³ Congress responded with the Anti-Drug Abuse Act of 1986 ("the 1986 Act") which created quantity based mandatory minimums for most drug felonies.¹⁴ These mandatory penalties started at five and ten years for fairly minor quantities,¹⁵ and escalated to twenty years

sentence that falls between sixty-three and seventy-eight months. See 2005 Federal Sentencing Guidelines §5A Sentencing Table.

¹²For example, assume a defendant 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.

¹³ 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.). At the time, most thought that Bias died of a crack overdose, leading to a hysteria over that drug in particular. Later, it was determined that his death was due to snorting powder, not smoking crack. Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, BOSTON GLOBE, July 5, 2006, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

¹⁴See P.L. 99-570, codified at 21 U.S.C. § 841(b)(1)(A)

¹⁵ 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. While intended to punish dealers who increased their sales by using cutting agents, 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 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. Because a ten-year mandatory sentence requires only ten grams of LSD, most LSD dealers who used paper of a regular weight easily exceeded the ten gram requirement. For example, from October 1995-September 1996, 39.8% of LSD defendants received at least a 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.ussc.gov/annrpt/1996/tab-38.pdf>.

and life without parole for recidivists.¹⁶ In 1988, Congress extended the reach of the drug mandatory minimums by making them applicable to conspiracy charges to possess or distribute narcotics.¹⁷

During the Guidelines era, Congress also added important mandatory minimum penalties for offenses involving firearms. In 1984, the penalty for using or carrying a firearm during a violent crime was made a consecutive, five year mandatory term.¹⁸ In 1986, Congress extended this penalty to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.¹⁹ In later amendments to this statute, Congress increased the penalty for a "second or subsequent conviction" to a consecutive and mandatory minimum of twenty years.²⁰ In 1986, Congress also passed the Armed Career Criminal Act ("ACCA") which made possession of a firearm or ammunition by a felon with three prior convictions for "crimes of violence" subject to a fifteen year term mandatory minimum.²¹ This new fifteen year mandatory

¹⁶ 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. For instance, Congress intended "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. However, the triggering quantities were lowered as Democrats and Republicans and the House and Senate, each tried to out-tough each other. See Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, *supra* at n. ___. For example, the 1986 Act requires five and ten year mandatory minimum for just five and fifty grams of crack cocaine, amounts generally transacted by the lowest level street dealers.

¹⁷ See P.L. 99-570. 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. 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. 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 . . . [it] is a material factor.").

¹⁸ Pub. L. No. 98-473, § 1005(a), 98 Stat. 2028, 2138 (1984).

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

²⁰ Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

²¹ Armed Career Criminal Act (ACCA) (18 USCS § 924(e)) 98 P.L. 473; 98 Stat. 1837 (1986). Possession of a firearm by a convicted felon (regardless of whether the felony was a state or federal conviction) had been a federal offense since 1968 but the mandatory minimum was just a year. See Gun Control Act of 1968 Pub. L. No. 90-618.

minimum applied even to an ex-felon's simple possession of a firearm (or even a bullet), without any requirement of related criminal conduct.²²

3. The First Sentencing Commission and the New Mandatory Minimum Statutes.

The new drug and gun mandatory minimums were problematic for the first Sentencing Commission, which had largely been relying on past sentencing data to establish the penalties for the draft Guidelines.²³ Because the new mandatory minimums were substantially higher than past drug sentences, the first Commission decided to use the mandatory minimums to set the floor for most Guideline sentences for drug offenses. Quantities above the amount necessary to trigger a mandatory minimum were set incrementally even higher. With this decision, the Commission guaranteed that most Guideline drug sentences would be even more severe than the new mandatory minimums. The Commission chose this route, in part, because the Commission was powerless to permit sentences below a mandatory minimum.²⁴ The only exception initially provided by Congress was a government controlled motion for defendants who cooperated in the investigation and prosecution of another offender.²⁵

4. The Impact of Prosecution Policies on the Pre-*Booker* Sentencing Regime.

While Congressional action created the Guidelines and new mandatory minimums, it is critical to recognize the role that prosecutorial policy set by the Justice Department and the charging practices of local United States Attorneys Offices played during the pre-*Booker* years. At the start of the Sentencing Guidelines era, the Reagan Administration declared a federal "War on Drugs" and stressed the importance of increasing drug and gun prosecutions and issued tougher plea policies that called for more severe sentences.²⁶ The budgets of the Justice Department and federal law enforcement agencies such as the FBI, DEA, and ATF also ballooned. In response,

²²As will be discussed infra at Part III, the definition of what constituted a "crime of violence" was also defined very broadly.

²³Symposium, Speech by Commissioner Ilene H. Nagel, 1 Fed. Sent. Rptr. 96, *9 (1988) (stating that in its first iteration of guidelines, the Commissioners chose "to anchor the sentencing guidelines to estimates of past practice, that is, to estimates of time actually served" and the "research staff provided us with analyses of 10,000 cases as well as additional data for a larger sample of 40,000 cases.").

²⁴As statutory penalties, the mandatory minimums trumped the Guidelines. For example, if the Guidelines called for a sentence of seventy to eighty-seven months, but the statutory mandatory minimum called for ten years, the Guideline sentence had to be adjusted to 120 months. U.S.S.G. § 5G1.1(b).

²⁵Judges were powerless to sentence below a mandatory minimum even when the defendant makes a good faith effort to cooperate but is unable to do enough to satisfy the government. 18 U.S.C. §3553(e); see also *United States v. Wade*, 504 U.S. 181, 183-84 (1992) (holding that judges have "no power to go beneath the minimum" without a "substantial assistance" motion from the prosecution.).

²⁶Under the "Thornburgh Memo," federal prosecutors across 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. 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 W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 622, supp. app. 12 (1989).

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.²⁷ As a result, federal prosecutions rose from 59,682 in 1986 to 116,582 in 2004, with narcotics enforcement by far leading the increase.²⁸ 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.²⁹ The impact of the increase in penalties and the more aggressive prosecution policies on the federal criminal justice system was staggering. In 1984, the federal prison population was 32,317 and by 2006 it stood at 191,116.³⁰

B. THE POST-*BOOKER* SENTENCING WORLD.

²⁷Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, Cato Policy Analysis No. 180, n.35 (Oct. 2, 1992); *President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime*, (Oct. 14, 1982), Weekly Compilation of Presidential Documents, vol. 18, at 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 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.

²⁸See http://trac.syr.edu/tracreports/crim/136/include/table_3.html;

<http://www.ojp.usdoj.gov/bjs/abstract/fccp02.htm>

²⁹See *infra* at ___ for a discussion of Operation Triggerlock and its successor programs.

³⁰Federal Bureau of Prisons Population Report at www.bop.gov/locatins/weekly_Reports.jsp.

Accessed on 24 July 2006. 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 www.ojp.usdoj.gov/bjs/pub/pdf/fccp93.pdf. With the war on drugs and 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 www.usdoj.gov/usao/reading_room/Reports/asr2003/03_STAT_Report.pdf. 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 Admin. 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]. By 1991, the average federal drug sentence 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 continued to increase. Federal prosecutions rose from 71,437 in 1995 to 116,582 in 2004 http://trac.syr.edu/tracreports/crim/136/include/table_3.html.

1. The *Booker* Decision & the End of Mandatory Guidelines.

This section first discusses the impact of *Booker* on the sentencing regime and then moves on to describe the policy stalemate that followed. The *Booker* opinion has two separate majorities. The “merits majority” held that the Sixth Amendment forbids any judicial fact finding that results in a mandatory increase in a defendant’s sentence.³¹ That kind of fact finding, *Booker* holds, is reserved for juries. As a result, the provisions of the SRA that made the results of judicial Guideline calculations mandatory are unconstitutional. Thus, the “merits majority” is the portion of the opinion that killed the mandatory Guidelines that had governed federal sentencing since 1987.³²

A separate “remedial majority,” authored by Justice Breyer, held that the best way to effectuate Congressional intent in the SRA was to make the Guidelines “advisory” in nature but otherwise uphold the rest of the SRA.³³ Thus, *Booker* instructs judges to continue to calculate and consider the Guideline range, but also requires them to weigh the other traditional sentencing factors set forth in the SRA codified at 18 U.S.C. §3553(a). In addition, the “remedial majority” held that the Court of Appeals should continue the review of sentences on appeal, but instituted a “reasonableness” standard of review, which itself has been the subject of substantial litigation that is before the Supreme Court this year.³⁴

Thus, post-*Booker*, while judges are no longer strictly bound by the Guidelines ranges, it is critical to recognize statutory mandatory minimums for drug and gun offenses survived. Mandatory minimums were not affected by *Booker* because unlike the Guidelines, which require a series of judicial 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 fact required to trigger mandatory minimums in most criminal cases.³⁵

³¹ *Booker v. United States*, 543 U.S. 220, 225-44 (2005).

³²The merits majority in *Booker* was the culmination of a revolutionary line of Sixth Amendment jurisprudence that did not exist when the Sentencing Guidelines were born. See David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely, and Booker*, 50 VILL. L. REV. 163 169 (2005); Peter B. Rutledge, *The 2004 Gunderson Lecture: Apprendi, Blakely and Federalism*, 50 S.D. L. REV. 427, 432 (2005).

³³*Booker*, 543 U.S. at 244-68.

³⁴For example, there is currently a split among the circuits as to whether sentences that fall within the guideline ranges are presumptively reasonable. See Jason Hernandez, *Presumption of Reasonableness for Guidelines Sentences After Booker*, 18 FED. SENT. R. 252 (2006) (noting that the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits have adopted the rule that such sentences are reasonable, while the first, second and third circuits have rejected it). This issue is before the Supreme Court this term in the *Rita* and *Claiborne* cases. See *Rita v. United States*, 127 S. Ct. 551 (2006) (granting writ of certiorari on the question); *Claiborne v. United States*, 127 S. Ct. 551 (2006) (granting writ of certiorari on the question).

³⁵This 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

2. The Politics of Stalemate.

At the end of Justice Breyer's remedial majority, he explicitly recognized Congress' right to have the final word on sentencing policy.³⁶ Given that *Booker* outraged conservatives, who viewed the opinion as a judicial coup d'état,³⁷ many commentators initially believed it was only a matter of time before Congress acted.³⁸ For more than two years, however, that didn't happen. Some credit restraint on the part of the Sentencing Commission, the Judicial Conference, and many commentators who repeatedly advocated a "go slow" and "wait-and-see" approach, essentially a rearguard action designed to maintain the *Booker* status quo.³⁹ More importantly,

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. For drug mandatories, indictments included the quantity trigger and for felon-in-possession cases, that fact that the defendant had been previously convicted of a felony offense.

³⁶"Ours, of course, is not the last word. The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Booker*, 543 U.S. at 265.

³⁷Rep. Tom Feeney (R-FL), said that "The Supreme Court's decision to place this extraordinary power to sentence a person solely in the hands of a single federal judge -- who is accountable to no one -- flies in the face of the clear will of Congress," and added that the decision was an "egregious overreach." See Supreme Court Ends Current Federal Sentencing System 1/14/05 viewed at <http://stopthedrugwar.org/chronicle/370/big ruling.shtml>. According to a defense attorney group, "The Justice Department is livid" over the opinion as well. *Id.* (quoting Jack King, communications director for NACDL).. See also Testimony of Daniel P. Collins (former federal prosecutor and Deputy Attorney General), Feb. 10, 2005 (claiming that *Booker* "effectively demolished in one stroke the entire edifice of federal sentencing reform that has been carefully built over the last 20 years.") (copy on file with author).

³⁸See 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, 257-58 (2005); Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone*, 83 WASH. U. L. Q. 151, n.255 (2005).

³⁹See, e.g., Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?* 38 ARIZ. ST. L.J. 425, 462-63 (2006) (citing examples of the go slow approach); Sandra D. Jordan, *Have We Come Full Circle? Judicial Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 675 (2006) (urging everyone to take a "wait and see" approach to sentencing post-*Booker*). Ronald F. Wright, *Incremental and Incendiary Rhetoric in Sentencing After Blakely and Booker*, 11 ROGER WILLIAMS U. L. REV. 461, 468-71 (2006) (noting that judges have taken varied approaches in sentencing post-*Booker* to try to mitigate Congressional backlash to their actions). See also *Judges urge Congress to respond slowly to U.S. Supreme Court's*, DAILY RECORD (Rochester, NY), Feb. 25, 2005 (reporting on testimony before Sentencing Commission from judges urging caution in responding to *Booker*); Judge Paul Cassell, Chair, Judicial Conference Committee on Criminal Law, Mar. 16, 2006 Testimony Before Subcommittee on Crime, Terrorism, and Homeland Security (stating on behalf of the Judicial Conference that there is no need for any immediate action on sentencing legislation); More than forty former U.S. Attorneys signed a "go slow" letter to Congress. See Mar. 1, 2005 available at <http://www.nacdl.org/public.nsf/75164f8d67544f8a85256ada0066b78e/386f8f203041a2e285256f593c?OpenDocument#news000>.

for two years, district judges showed significant restraint in exercising their newly recovered discretion and largely continued to sentence as if the Guidelines were still mandatory. Thus, Sentencing Commission data from the first two years after *Booker* reveals only a slight rise in sentences below the advisory Guidelines ranges.⁴⁰

In addition, at least in the initial post-*Booker* period, conservatives struggled to find a viable “*Booker* fix.” Justice Department prosecutors were not in favor of jury sentencing, fearing that complicated verdict forms spelled more acquittals.⁴¹ While some new mandatory minimums were proposed, these bills did not gain sufficient traction as the Iraq war and other issues had more resonance with the public than crime in the streets. However, as more post-*Booker* data became available, conservatives began to hone their message that both leniency and sentencing disparity were on the rise. They also claimed to have found both troubling individual sentences and sentencing patterns that justify the re-imposition of restrictions on judicial discretion.⁴² At the macro level, conservative critics have noted that sentences outside the Guidelines increased ten percent in the first thirteen months after *Booker*, and looking deeper into the data, they also point to particular districts where compliance with the Guidelines is now below fifty percent, buttressing their claim that “liberal pockets” of judges are undermining uniformity.⁴³ Lastly, they 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.⁴⁴

⁴⁰See *Final Report on the Impact of United States v. Booker on Federal Sentencing*, United States Sentencing Commission, March 2006 (finding that sentencing severity has remained constant, above guidelines range sentences doubled to 1.6 percent and that sentences below range did not substantially increase in percentage or scope).

⁴¹See Brief for the Petitioner at 11, *United States v. Booker*, 125 S.Ct. 25 (2004) (Nos. 04-104, 04-105) (the U.S. Government emphasized that “requiring jury verdicts on sentence-enhancing facts would produce a distorted and unmanageable system that would regularly produce sentences that were not proportional to the offense of conviction, failed to recognize important differences between defendants, and failed to operate in a consistent manner.”).

⁴²For example, on June 21, 2005, Attorney General Gonzalez cited a child pornography case in which he claimed a judge had used his newly returned discretion to award a lenient sentence to dangerous individual. He also cited a different case that resulted in an upward variance from the Guidelines to warn about an increase in sentencing disparity post-*Booker*. The full text of his remarks are available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsocrime.htm>. 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.).

⁴³Statement of William Mercer, United States Attorney for the District of Montana, (Mar. 16, 2006), available at <http://judiciary.house.gov/media/pdfs/mercer031606.pdf>; see also Sean O’Sullivan, *State’s Judges Showing More Leniency*, Apr. 4, 2005, available at www.delawareonline.com (reporting claims of Delaware U.S. Attorney’s Office that Delaware federal judges are sentencing below the Guidelines in a large percentage of cases); Jeff 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>.

⁴⁴*Id.*

With this ammunition, in 2006, conservative legislators started to more aggressively promote new and broader mandatory minimums.⁴⁵ Separately, the Justice Department and at least one key conservative Congressman settled on the concept of “topless” guidelines as their favored “Booker fix solution.”⁴⁶ Under a “topless guidelines” regime, the lower end of a defendant’s guideline range would be established by the facts found by the jury. However, instead of the current narrow ranges in each box on the grid, the upper end of every defendant’s range would be the statutory maximum for each crime. The proponents of “topless” guidelines believe that this setup would technically comply with *Booker*, because sentences above the minimum would be at the discretion of the judge, not dependent on any mandatory judicial fact finding.⁴⁷ But, by instating a mandatory sentence floor based on the jury verdict, judges would be prevented from lowering sentences based on non-Guideline factors currently allowed by the *Booker* decision.⁴⁸

The Democratic Congressional victories in the 2006 midterms definitely slowed the momentum for topless guidelines and encouraged sentencing reform advocates to believe that legislation to ameliorate some of the worst inequities of the current regime might be possible; for example, the disparity between crack and powder cocaine, as well as broader, structural issues such as the Guidelines’ over-reliance on quantity-based sentencing and prosecutorial charging practices that

⁴⁵See 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). See *infra* at __ for a discussion of the gang bill.

⁴⁶See 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/2005/06212005victimsofcrime.htm>. Rep. Sensenbrenner, who chaired the Judiciary Committee in the House, introduced H.R. 1528, “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005.” Section 12 of the Act would have eliminated all downward departures from the Guidelines range, thereby not just “fixing” *Booker* but going further and ensuring that there would be no sentences below the Guidelines range without a government motion. http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/topless_guideli.html. See *infra* at __ for a discussion of the debate on the constitutionality of “topless guidelines.”

⁴⁷Gina Holland, *Judges Press Sentencing Commission on Federal Guidelines*, THE ASSOCIATED PRESS, Nov. 18, 2004 (quoting Assistant Attorney General Christopher Wray that “Of all the legislative proposals being discussed as possible solutions,” topless guidelines “adheres most closely to the principles of sentencing reform -- truth-in-sentencing, certainty and fairness in sentences, and the elimination of unwarranted sentencing disparities.”), available at <http://www.law.com/jsp/article.jsp?id=1100535357414>; see also Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 357-58 (2006) (suggesting that “topless provisions would likely be constitutional in an advisory guidelines system); but see U.S. District Judge Paul Cassell, *Written Testimony of Judge Cassell at the Booker Hearing Before the House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security*, 18 FED. SENT. R. 198 (February 2006) (stating that the constitutionality of “topless provisions” hinges largely on the vitality of the Supreme Court decision in *Harris v. U.S.*, 536 U.S. 545 (2002), but that *Booker* seriously calls *Harris* into question).

⁴⁸See *infra* at __ for a more detailed discussion of the merits of “topless guidelines.”

result in draconian mandatory minimum sentences.⁴⁹ This Article now turns to how my cases profiles of Republican appointees can be used to continue to forestall reactionary *Booker* fixes such as more mandatory minimums or “topless guidelines” and to determine if there are sentencing reform issues for which there may be broad bipartisan support within the judiciary.

II. THE CASE FOR THESE CASE STUDIES IN SENTENCING POLICY.

A. WHY CASE STUDIES?

The Sentencing Commission, the Justice Department, and groups such as The Sentencing Project⁵⁰ publish and analyze a myriad of data about sentencing decisions, and there is much to learn in these numbers. My research, in contrast, employed the case study method. As a result of this methodological choice, this Article makes no claims of statistically significant results. Nevertheless, the case study method has much to offer sentencing policy makers.⁵¹ First, while the media has long reported judicial complaints about sentencing policy in a variety of formats, this Article and its profiles are the most detailed portraits of individual federal cases currently available from the mandatory Guidelines era.

Second, the case study method is particularly well-suited for exploring sentencing policy because of the Anglo-American tradition that the 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.⁵² Thus, just knowing the

⁴⁹For a more detailed discussion of this issue, see *infra* at ___ for a discussion of the “stacking” of consecutive and escalating 924(c) gun counts.

⁵⁰See www.sentencingproject.org.

⁵¹My methodology is discussed in more detail on my website. Initially, I conducted about twenty-five telephone and in-person interviews of federal judges. In a few districts, I spoke to multiple judges. For larger districts, I talked to just a few but spread these out over the country. I tried to obtain interviews based on personal contacts, not because a judge had a reputation for having strong views about sentencing. Once at the courthouse, many judges were willing to pass me onto the next office as well. Because most of these judges preferred to remain anonymous, to obtain cases to profile, I searched the files of Families Against Mandatory Minimums (“FAMM”). For over ten years, FAMM has been collecting information from federal inmates about their cases. FAMM’s basic case summary form, sent into prisons through their publications asks “Did the judge say he wished he didn’t have to give you such a long sentence?” See *generally* <http://www.FAMM.org>. These files helped identify possible judges to research. I then followed up with the inmates and their families to obtain sentencing transcripts and Presentence Investigation Reports (“PSIs” or “PSRs”). Due to changes in Bureau of Prison regulations in 2002, obtaining PSIs became very difficult. Thus, while the prerequisite for followup was that a judge spoke out at sentencing, inclusion of a judge and a case in the forty profiles was governed by my ability to obtain sufficient official documentation about the case. While I sent the draft profiles to the judges, their willingness or unwillingness to comment did not affect whether I decided to publish the profile. Please note that all references to “Anonymous Interviews” in this Article reference conversations with Republican appointees.

⁵²See 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

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 the sentencers notions of just punishment. Only by looking at 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 cabined by legislative restrictions on discretion.

Third, case studies offer other insights that would be missed by only looking at aggregate data. For example, in these profiles the judges only stated their reservations about the length of the sentence in open court rather than bend the Guidelines calculations or the rules for downward departures (as critics argue judges routinely do). As a result, these cases never showed up in departure statistics or anywhere else that would capture these judges' concerns. Only by gathering the sentencing transcripts and the pre-sentence reports was I able to capture this otherwise hidden cross-section of cases and the underlying policy issues they represent.

Fourth, these case profiles also provide a much needed counterweight to the negative image of the federal judiciary advanced by conservatives over the past twenty-five years.⁵³ In my profiles, although the defendants are arguably less culpable or less dangerous than envisioned by Congress when it predetermined the punishments that applied, these judges followed the law despite their desire for a different result. In other words, these case studies provide a storehouse of "dog-did-not-bite-man," counter-stories to add balance and realism to the often distorted debate over sentencing policy and judicial discretion.⁵⁴

Fifth, reproducing portions of the transcripts in the profiles captures the human element of sentencing. No statistics can match the power of the moment when personal conscience conflicts with fidelity to office. In these profiles, one can hear these judges try to explain their lack of discretion, express their outrage at Congress, and sometimes apologize to the defendant (while at

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).

⁵³See, e.g., Stephanie Simon, *Conservative Measures Rein in 'Activist Judges*, LOS ANGELES TIMES, Oct. 14, 2006, (noting that conservatives lawmakers are introducing legislation to curb the actions of what they term “runaway judges.”). See also Catherine G. Patsos, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205, 254 (1998) (quoting then Senator Bob Dole as accusing liberal judges appointed by President Clinton of being "the root causes of the crime explosion."); Todd Gillman, *GOP Group Plans to Turn Up Scrutiny on Federal Judges*, July 27, 2003 available at http://www.dallasnews.com/images/gbl_logo.gif (last visited July 28, 2003) (on file with author).

⁵⁴Sentencing policy is too 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 generally poorly explained examples of supposed lenient sentences. See Edwin Meese & Rehett Dehart, *How Washington Subverts Your Local Sheriff*, POL'Y REVIEW (Jan.-Feb. 1996) at 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).

the same time not condone or excuse the defendant's criminal conduct). But these transcripts are more than monologues, they are also conversations with the defendants. While a few of these defendants are defiant and angry, most tended to apologize to the judge, family, and community for the harm they have caused, even as they complain about the 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 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 maybe he does want to give him that time, and maybe he doesn't. But I pretty much know its out of your hands, and that must be an awful feeling.⁵⁵

B. WHY REPUBLICAN APPOINTEES FROM THE GUIDELINES ERA?

I focused on cases from Republican appointees for several reasons.⁵⁶ Law review articles and surveys tend to examine the judiciary in the aggregate.⁵⁷ Moreover, while the media has covered Republican appointees, including Chief Justice William Rehnquist and Justice Anthony Kennedy, who have voiced their opposition to reduced judicial discretion and long sentences,⁵⁸ no survey or study has sought to identify the sentencing policy concerns of Republican appointees at the district court level. By focusing on Republican sentencers, I hoped to first determine if this subgroup of judges had distinct concerns or less severe complaints than their

⁵⁵ Transcript of Record at 52-53, *United States v. Rudy Martinez*, No. 91-Cr-53 (N.D. Ill. Apr. 23, 1992)(remarks made by defendant Rudy Martinez to Judge Milton I. Shadur).

⁵⁶My initial research included judges appointed by all Presidents. A discussion of additional insights from those interviews and case studies can be found in my earlier articles and in additional profiles and judicial quotes on the website.

⁵⁷*See infra* at ___.

⁵⁸In an August 9, 2003 speech to the American Bar Association, Justice Kennedy stated 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." U.S. Supreme Court Justice Anthony Kennedy, Address to the American Bar Association 2003, *available at* <http://www.famm.org/PressRoom/PressKit/Judgesspeakout.aspx>. *See also* William H. Rehnquist, "Luncheon Address," (June 18, 1993), in U.S. SENTENCING COMM'N, DRUGS & VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES: JUNE 16-18, 1993, WASHINGTON D.C. at 286-87 (1993) ("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.").

Democratic counterparts.⁵⁹ While this information would be interesting in its own right, given the politics of criminal justice reform, identifying issues that most troubled Republican appointees might help sentencing reformers to prioritize their agenda and formulate proposals on which they might find credible allies.

Second, by excluding Democratic appointees, I hoped to immunize my findings from accusations that they were biased by the views of “liberal, activist” judges and therefore undermine the rhetoric that only liberal judges were dissatisfied with the pre-*Booker* regime. In my opinion, for there to be any movement on sentencing policy, the myth that only liberal judges thought pre-*Booker* sentences were too long and discretion too limited must be shattered. The profiles in this Article provide just that ammunition.

To the charge that my sample size is too small and too distant in time to be relevant to the current debate, for the broadest issues discussed in this Article; opposition to mandatory minimums, mistreatment of low level offenders, and the need to decrease the role of the quantity component in sentencing calculations, there is significant evidence that the views of my profiled judges were well within the mainstream of the federal judiciary in this period, as reflected by the policy positions and reports of the official organs of the judiciary, whose committees were

⁵⁹*See infra* at __ for my impressions of the impact of party affiliation.

dominated throughout this period by Rehnquist appointees,⁶⁰ as well as by surveys of the federal judiciary.⁶¹

With regard to whether my results are still representative of Republican appointees in the post-*Booker* era, I have several responses. First, many of these judges are still sitting. Second, the current Judicial Conference and its committees have remained steadfast since *Booker* in their opposition to mandatory sentencing and any “Booker fix” that mimicked the inflexibility of the

⁶⁰ See generally www.uscourts.gov/judconf.html (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 entirely by the Chief Justice). See Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference, to Honorable Orrin Hatch, Chairman, Committee on Judiciary (Apr. 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, (Apr.25, 2005) (on file with author). See also U.S. GENERAL ACCOUNTING OFFICE, MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM? (November 1993); U.S. SENTENCING COMM’N, 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, FEDERAL JUDICIAL CENTER, (1992). Prior to the Feeney Amendment in 2002, by statute, a majority of the Commissioners had to be federal judges, balanced by the party of the appointing president. The Commission consistently has recommended that crack penalties be lowered. See *infra* at ___; U.S. COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at G-145, 5(D)(3) (1995), available at <http://www.ussc.gov/crack/chap1-4.pdf>; U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at 1, (Aug. 1991). I have also collected more than forty additional public statements of Republican appointees from transcripts and speeches, in addition to the judges profiled (which are also available on the website), as well as the additional anonymous interviews I conducted to supplement my case research. To the extent that specific issues, such as “924(c) stacking” did not appear on the radar screen of a majority of Republican appointees during the mandatory Guidelines era, I would contend this was likely a result of differences in local federal prosecutorial policy, rather than in an endorsement of such policies by other judges in this cohort.

⁶¹ See Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 79-Oct A.B.A. J. 78 (Oct. 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 reported 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. See 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*, FEDERAL JUDICIAL CENTER (1997); U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, (Nov. 2004); Linda Drazga Maxfield, *Survey of Article III Judges on the Federal Sentencing Guidelines*, U.S. SENTENCING COMM’N, (2003).

Guideline's floors.⁶² Third, post-Booker, several George W. Bush appointees have written powerful and influential opinions criticizing some of the issues highlighted in Part III, including the crack/powder disparity and prosecutorial "stacking" of firearm mandatory minimums,⁶³ suggesting that a tectonic shift in this group has not occurred.⁶⁴

More fundamentally, even if one is not persuaded that views of the judges interviewed and profiled in this Report still represent the majority view of Republican appointees on sentencing policy, the very existence of this substantial cohort of Republican appointees who were this outraged by sentencing outcomes undermines the conservative drumbeat that discretion has to be curtailed to control liberal, soft on crime judges. In fact, for sheer vehemence, some of the rhetoric from these judges is easily on par with statements by the most liberal Democratic appointees. For example, in explaining his inability to depart, Judge Lyle E. Strom (D. Utah), appointed by President Reagan, told a defendant that "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."⁶⁵

⁶²See Letter to Congress from Sim Lake, Chairman, Committee on Criminal Law of the Judicial Conference of the United States, (Apr. 25, 2005) (opposing Section 12 of H.R. 1528 which contained Rep. Sensenbrenner's "Booker fix," stating "Section 12 does not represent a sound alternative to the present day advisory guideline system, the Judicial Conference strongly opposes this proposal."). Judge Lake is a Reagan appointee.

⁶³In *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D. RI. 2005), Judge William Smith criticized the 100:1 crack to powder ratio and reflected "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. *See also* *United States v. Angelos*, 345 F. Supp. 2d 1227, 1241- 43 (D. Utah 2004). *See supra* at ____.

⁶⁴It is probably fair to say that Bush II judges in the 2000-2005 period tended to be slightly more conservative in political outlook, especially in their views on "judicial activism," as well as younger. Given their view of judicial power, and perhaps their own recognition of their relative inexperience both on and off the bench, fewer of these judges seemed willing 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. To the extent that some distinctions can be made by the appointing President, holdover Nixon appointees were probably the most vested in the pre-Guidelines rehabilitative ethos. Some of them had cut their teeth as private and public lawyers in the civil rights era, thus some of these judge may have been protective of judicial power vis a vi the other branches. (For example, Judge Robert Carter Lee (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). Judges appointed by President George H.W. Bush are also represented in my sample but they are a hard group to characterize, perhaps because this president had to obtain the advise and consent of a Democratic Senate. Certainly, having come into the system with the Guidelines already in place, these judges tended to focus their objections more on specific cases and substantive issues than at the system generally. It is fair to say that some of these judges were considered sentencing moderates and some as very conservative by lawyers.

⁶⁵See Profile of Lyle E. Strom, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. Similarly, Judge Garnett Thomas Eisele (E.D.A.K.) labeled one guideline sentence "truly tragic." *See also* Profile of Judge Garnett Thomas Eisele available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. During an anonymous interview, another Reagan appointee stated: "I feel like an apparichik in a

Moreover, while all the modern Republican Presidents are represented here, the largest cohort in my sample are judges appointed by President Reagan, the first president in the modern era who consciously set about to remake the federal judiciary, and under whose administration the war on drugs and crime began. The fact that so many Reagan judges were fierce opponents of the new mandatory minimums and mandatory Guidelines should shatter the notion that judicial dissatisfaction with the pre-*Booker* world can be attributed to a liberal, power hungry judiciary.⁶⁶

III. REPUBLICAN APPOINTEES IN THE SENTENCING GUIDELINES ERA.

This Part begins with a brief overview of what is already generally known about how Republican appointees viewed the pre-*Booker* sentencing regime. This introductory section also briefly clarifies the occasional confusion in judicial statements between the Guidelines and mandatory penalties and reveals how persistent and largely hidden regional differences in federal prosecution policies led to some variation in judicial experiences under the pre-*Booker* regime. The substantial middle of this Part details the main contribution of this Article, an exploration of four specific issues that appear to have provoked the most serious disagreement from Republican appointees in this period -- the disparity between crack and powder cocaine, sentences for low-level offenders, life or “virtual life” sentences for more serious, but still non-violent first time drug offenders, and two kinds of firearms cases involving mandatory minimum penalties. Here, I make substantial use of materials from my web-based profiles, as well as providing quotations from my anonymous judicial interviews.

A. THE ROOTS OF JUDICIAL DISSATISFACTION WITH THE *PRE-BOOKER* SENTENCING REGIME.

1. Mandatory Minimums and the Guidelines.

It is well accepted that judicial opposition to mandatory minimum sentencing was overwhelming during the pre-*Booker* period. Indeed, abolition of mandatory minimum statutes was the official position of the federal judiciary during the pre-*Booker* regime, including official organs such as the Judicial Conference’s Criminal Law Committee, whose members were appointed by Chief

totalitarian regime...”, mandatory guidelines are “horrid in theory, worse in practice.” Atlantic Judge 3, Anonymous Judge Interview, (Sept. 6, 2002). At least one Reagan appointee, Judge John Martin, resigned from bench in protest over Congressional restrictions on judicial discretion. See Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, December 8, 2003, at B1.

⁶⁶ With the passage of the Guidelines, Reagan judges were being instructed how to sentence in minute detail by Congress and the Sentencing Commission in far away Washington, clearly contrary to the Reagan Revolution’s anti-Washington rhetoric and federalism themes. In addition, while many of the Reagan era judges describe themselves as tough on crime, many if not most were not longtime criminal practitioners or deeply ideological about criminal justice issues before ascending the bench. Lacking the drug warrior mentality that dominated at Main Justice, some of the outcomes in drug and gun cases seemed a foolish waste of both financial and human resources.

Justice Rehnquist.⁶⁷ My research suggests that rank and file Republican appointees who did not serve in leadership positions were also part of the majority of the federal judges who felt that mandatory minimums sometimes resulted in unjustifiably harsh sentences.⁶⁸ Moreover, most Republican judges I interviewed also stated that they saw no need for mandatory penalties because the Guidelines and appellate review were sufficient to guard against excesses in judicial discretion.⁶⁹

In fact, during the research for my study, only one Republican appointee 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.⁷⁰ In contrast, every other Republican judge interviewed or profiled for this study was willing to say that they had personally imposed at least one mandatory minimum sentence (and sometimes many) that was unnecessary and unjust.

In addition, a significant number of judges I interviewed would have preferred voluntary Guidelines or at least mandatory guidelines with greater room for downward departures.⁷¹

⁶⁷Both 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.”).

⁶⁸*See supra* at ____. Comments from Republican judges interviewed included, “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).

⁶⁹Some also noted that mandatory minimum statutes distorted the proper functioning of the Guidelines. Comments included; “Why do we need mandatory minimums if we have guidelines?” Southern Judge 1, Anonymous Interview, (Sept. 4, 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.”). 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.

⁷⁰ *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.*

⁷¹ The judicial reaction to the Guidelines and mandatory minimums in the pre-*Booker* era was probably the result of the relationship between judicial discretion and sentencing severity. Thus, while it is fair to say that there has been a strong judicial consensus that Congress has taken too much sentencing discretion from judges, there is real disagreement over how much discretion judges actually need.

Republican appointees often also agreed with their Democratic counterparts that the Sentencing Guidelines as written, were too complex and inflexible and had their own significant problems, both structurally and with regard to specific offenses.⁷² But, because many judges were unhappy with both the Guidelines and mandatory minimums, their statements in sentencing transcripts and speeches often refer to them interchangeably. In addition, 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 mandatorys, it is sometimes hard to separate out whether a judges' complaint about a sentence in a case is the result of just a mandatory and/or also the operation of the Guidelines. For this reason, the profiles discussed in this Part attempt to tease out in each case whether a particular sentence objected to was the result of a mandatory minimum, a Guideline provision, or a combination of both, even if the judges did not do so, to enable sentencing reformers to determine how to best address these judicial complaints.

Lastly, while this Part is organized by issue, there was an important historical aspect to the judicial response to the pre-*Booker* sentencing regime that is beyond the scope of this Article. In briefest summary, the initial judicial reaction to the Sentencing Guidelines and the new mandatory minimums was overwhelmingly negative.⁷³ However, the federal judiciary's

Second, while many federal judges also believed that many post-1986 sentences were more severe than necessary, there again was a wide difference on the scope of this problem. However, what largely united the judiciary in this period was that the combination of less discretion coupled with higher penalties created too great a potential for an unjust sentencing outcome that they were powerless to affect. 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. In addition, there were also areas where some judges, both Democrat and Republican appointees 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. Southwestern Border State Judge 1, Anonymous Interview, (Sept. 30, 2002).

⁷²For 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). In particular, the mandatory use of acquitted conduct was singled out as philosophically unfair. One profile in particular in my study demonstrates this issue. See Profile of Judge Ira DeMent available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. See also Freed, Daniel J., Reforming the Commission: Internal Rules and Revised Guidelines, 9 Fed. Sent. Rptr. 64, *3 (1996) (noting that in a 1996 survey, "fewer than 20% of district judges and probation officers thought acquitted conduct should be considered at sentencing.).

⁷³See, 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"); 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). Approximately two hundred judges even held that the Sentencing

opposition to the Guidelines softened over time. The softening process involved a variety of factors too extensive to fully discuss in this Article but which certainly included; judges learning “to live with” the Guidelines,⁷⁴ new judges without pre-Guidelines experience more readily accepting the existing regime,⁷⁵ legislation and Guideline amendments that ameliorated some judicial complaints,⁷⁶ and moderation of Justice Department prosecutorial policies during the Clinton presidency.⁷⁷ However, the pendulum swung back in 2002, with the Feeney Amendment, more rigid prosecutorial policies by the new Bush Administration, and other high profile conflicts with the federal judiciary.⁷⁸

Guidelines were unconstitutional as a violation of the separation of powers doctrine. *See, e.g.*, *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988). In 1989, however, the Supreme Court reversed these lower court decisions and upheld the constitutionality of the Guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989).

⁷⁴When the judiciary realized that it would have to live with this system, many judges 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. *See U.S. SENTENCING COMM’N, ANNUAL REPORT*, (1995).

⁷⁵In 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 other rulings adverse to the government. Bowman 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 the 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).

⁷⁶*See 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 §5C1.2 of the U.S. Sentencing Guidelines, which created the safety-valve, discussed *infra* at __; U.S.S.G. App. C, amend. 459 (2000) (amended Nov.1, 1992) (allowing additional Guideline reduction for early plea); U.S.S.G. App. C, amend. 503 (1998) (amended Nov. 1, 1994) (limiting relevant conduct to quantities transacted after a defendant joined a conspiracy); 2002 U.S.S.G. § 2D1.1(c) amend. 516 (1995) (amending the manner in which marijuana plants are counted); 2002 U.S.S.G. § 2D1.1(c), amend. 488 (1993) (amending the manner in which LSD is weighed for sentencing purposes); U.S.S.G. app. C, amend. 505 (1998) (amended Nov. 1, 1994) (capping the drug table at Level 38 to prevent life sentences based solely on quantity). There was also a little help from the Supreme Court. *See also United States v. Koon*, 517 U.S. 1234 (1996) (adopting more lenient standard of review for downward departures).

⁷⁷Under Attorney General Reno, plea agreements could now be based on “an individualized assessment of the extent to which particular charges fit the specific circumstances of the cases.” Memorandum from Attorney General Janet Reno, to United States Attorney’s and Litigating Divisions, entitled *Principles of Federal Prosecution* (Oct. 12, 1993) (on file with author) (more commonly known as the “Reno Blue Sheet”).

⁷⁸*See Zlotnick, supra* ___, *The War within the War on Crime* (discussing Feeney Amendment and judicial reaction to it); *see also* Mark Hamblett, *Federal Judges Attack Sentencing Restrictions*;

2. Over-Federalization of Crime.

In addition to mandatory minimums and too rigid Guidelines, my research suggests that over-federalization of crime was another major root cause of Republican appointee dissatisfaction with the pre-*Booker* sentencing regime.⁷⁹ 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."⁸⁰ A western Republican appointee went so far as to state that all the drug cases he had seen so far belonged in state court as did fifty percent of the felon-in-possession gun cases.⁸¹ Some judges were also concerned about disparity issues, noting that defendants prosecuted in state court for essentially the same offenses received very different sentences.⁸²

This viewpoint was fueled in part 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.⁸³ The

Judicial Conference Calls for Feeney Amendment Repeal, N.Y.L.J. 1 (col. 4) (Sept. 24, 2003). Memorandum from John Ashcroft, Attorney General, United States Department of Justice, to All Federal Prosecutors (Sept. 22, 2003) (essentially repealing the Reno Bluesheet and requiring pleas to the most severe charge in the indictment and otherwise attempting to end charge and fact bargaining by prosecutors); see also Mike Allen, *Delay Wants Panel to Review Role of Courts Democrats Criticize His Attack on Judges*, WASHINGTON POST, Apr. 2, 2005, at A9 (reporting that House Majority Leader Tom DeLay said that "the time will come for the men responsible for this to answer for their behavior," after the refusal of several federal courts to interfere with the Florida judicial system's decisions in the Terry Schiavo case).

⁷⁹See Edwin A. Meese, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 793 (1998) (suggesting that an effective way to limit judicial activism is for Congress to limit the federalization of crime and federal jurisdiction in general).

⁸⁰Atlantic Judge 3, Anonymous Interview (Oct. 11, 2002).

⁸¹Western Judge 1, Anonymous Interview (Sept. 30, 2002).

⁸²See Profile of Judge Lyle Strom available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (recognizing that defendant's brother and another co-defendant were prosecuted in state court and received significantly less time). In general, judges active on national committees or who otherwise had strong interests in sentencing tended to be more aware of disparity issues. However, many saw regional disparity as a byproduct of the federalization of crime rather than as a failure of the Guidelines. In other words, they were less troubled that judges, prosecutors and others had attempted to maintain local norms over crimes that they felt had been unnecessarily dragged into federal court. Others recognized that while the offense on paper might seem the same, possession with intent to distribute 500 grams of cocaine, there is a big different between the Mexican illegal alien paid \$100 to carry it across the desert and those same 500 grams in the hands of a Wall Street dealer with a cellphone and a list of clients.

⁸³Drug 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 of criminal filings

result has 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.⁸⁴

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.⁸⁵ In this vein, one judge noted that he thought the car jacking statute was an absurdity.⁸⁶ 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.”⁸⁷

Surprisingly, 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 by some that federal intervention

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), available at <http://www.uscourts.gov/firearms/firearms00.html>. See also Frank 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 (forthcoming 2006).

⁸⁴ Western Judge 5, Anonymous Interview (Oct. 2, 2002).

⁸⁵ Congress federalized a variety of other offenses, such as car jacking and child pornography, and added mandatory penalties to some of these crimes. Some of the sentences in these cases also troubled individual judges. See Benjamin Weiser, *A Judge's Struggle to Avoid Imposing a Penalty He Hated*, THE N.Y. TIMES, Jan. 13, 2004. More recently, the wave of corporate scandals resulted in legislative directives to increase the Guideline penalties for white collar criminals in the Sarbanes-Oxley bill. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 805, 905, 1104 (directing the Sentencing Commission to increase the Guidelines; imposing higher penalties for white collar offenders based on a variety of factors) which have recently produced some long white collar sentences, such as WorldCom Founder Bernard Ebbers, who received a twenty five year sentence. See Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936357. Nevertheless, it is fair to say that the story of judicial dissatisfaction during the mandatory Guideline era was largely driven by the penalties, both mandatory and under the Guidelines, for drug and gun cases.

⁸⁶ Western Judge 1, Anonymous Interview (Sept. 30, 2002). Car jacking 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 car jacking. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH L. REV. 505, 532 (2001) (noting that car jackings are rare but that the bill was a “politically valuable symbolic statement to voters.”).

⁸⁷ Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002). 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. 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.” Southern Judge 3, Anonymous Interview (Nov. 2, 2002).

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 offender 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.”⁸⁸

However, the degree of concerns about over-federalization of crime seemed to depend heavily on the policies and priorities of the local United States Attorney’s Office in each federal judicial district. While ostensibly controlled by the Justice Department, in reality local U.S. Attorney’s Offices had enough independence during the Sentencing Guidelines era to shape very different sentencing environments within which judges had to operate.⁸⁹ For example, studies have shown 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 impacted the number of defendants who must face mandatory minimum sentences. Other regional differences flowed from differences in crime patterns and jurisdictional

⁸⁸ See Profile of Judge Richard P. Matsch available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. A few Republican appointees gravitated to an even 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. It’s 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].” Southern 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). 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. On the other hand, many other Republican appointee statements about the war on drugs tend to be more nuanced and sometimes self-conflicting. Republican appointees expressed 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 the war on crime by themselves, and hence needed federal assistance. “State courts are in a state of collapse, are under-funded and staffed. They cannot deal with the fallout of the drug culture.” Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002). They also 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. Southern Judge 3, Anonymous Interview (Nov. 2002).

⁸⁹The 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 personal gun ownership. While several administrations, including the current one, 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).

anomalies.⁹⁰ Examples include the flood of drug and immigration cases in the border states 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.⁹¹ Thus, this Part also tries to note where regionalism issues, especially the policies of their local U.S. Attorney, affected the consistency of my findings on each of the specific issues discussed in this Part.

B. SPECIFIC AREAS OF CONCERN FOR REPUBLICAN APPOINTEES.

1. The Special Case of Crack Cocaine.

There is ample evidence that a majority of the federal judiciary has long believed that sentences for crack cocaine are too severe in comparison to other drug offenses, most particularly powder cocaine. Twice the Sentencing Commission has recommended that Congress lower the mandatory minimums for crack and as recently as September 2006, the Judicial Conference voted in favor of a recommendation from its Criminal Law Committee that the disparity between crack and powder be remedied.⁹²

Many individual judges have also spoken out on the excessiveness of crack penalties and their disparate racial impact.⁹³ For example, 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.”⁹⁴ The letter went on to add that the solution was not to raise penalties for

⁹⁰Even 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.

⁹¹Technically 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).

⁹²That Committee is now chaired by Judge Paul Cassell (D. Ut), a well known conservative academic and now judge. See *infra* at ___.

⁹³See Profile of Judge William M. Nickerson available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. Public commentary by judges about crack continues to this day. For example, Judge Reggie B. Walton (D.D.C.), a Bush II appointee who has served in as the Associate Director of the Office of Drug Control Policy under Bush I, recently criticized the sentencing disparity as “unconscionable.” Matt Apuzzo, Judge: Cocaine Sentencing Disparity “Unconscionable,” THE ASSOCIATED PRESS, Nov. 15, 2006.

⁹⁴1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees, reprinted in 10 Fed. Sent. Rptr. 14-95 (1998). The 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

powder because, the judges wrote, these sentences are already “severe.”⁹⁵ These judges were appointed by every President between Nixon and Clinton and included fourteen Republican appointees.⁹⁶

My research suggests that the Republican signatories of the 1997 letter fairly represent the majority view of Republican appointees, although there may be a contingent, even a majority, whose sentiment is that crack penalties should still be somewhat higher than for powder cocaine.⁹⁷ They have stated that the crack penalties constitute a “grave injustice”⁹⁸ and that the crack/powder disparity is “completely unacceptable,”⁹⁹ and a “discrepancy that has no basis in fact.”¹⁰⁰

One example is the case of William Gaines, sentenced by Judge Robin Cauthron (W.D. OK), a President George H.W. Bush appointee.¹⁰¹ 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 and cook trainer” and as a distributor of small quantities of crack.¹⁰² While William admitted that he sold marijuana off and on to

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, *available at* http://www.ussc.gov/r_congress/02crack/ch1.pdf. at 2, n.6 (copy on file with author).

⁹⁵*Id.*

⁹⁶The 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 (copy on file with author).

⁹⁷*See infra* Part IV(C)(1) at ___.

⁹⁸Midwest Judge 1, Anonymous Interview (Nov. 26, 2002).

⁹⁹Western Judge 4, Anonymous Interview (Oct. 17, 2002).

¹⁰⁰Midwest Judge 2, Anonymous Interview, (Oct. 28, 2002).

¹⁰¹*See* Profile of Judge Robin Cauthron, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁰²The government presented testimony that a leader of the group asked William to show someone else how to cook powder cocaine into crack. The process of making crack cocaine can be easily found on the Internet. *See* <http://www.a1b2c3.com/drugs/coc05.htm>.

support his family, he denied being part of this organization. However, based on audio recordings and the testimony of several co-conspirators, William was found guilty.

He was sentenced to 292 months despite being a first offender, in part, because the conspiracy was alleged to have trafficked approximately 10.6 kilograms of crack, which was assessed as relevant conduct against William. 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.¹⁰³

It also 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 connection and the wholesaler who provided virtually all the crack and powder for a period of time, received only a 72 month sentence.¹⁰⁴

While many judges and commentators have focused on the racial impact of crack sentences,¹⁰⁵ Republican appointees seem to be mostly concerned with proportionality. Particularly for small time figures like William, meting out crack sentences that far exceeded the penalties imposed for armed robbers, rapists, and even some murderers troubled these judges.¹⁰⁶ This is particularly

¹⁰³Judge Cauthron Profile, *supra* n__.

¹⁰⁴ Morris Johnson, who at least for a time was the number three person in the organization was sentenced to 120 months. Floyd Bush and Charles Watson, who testified against William got 120 months despite their acknowledged roles as steady distributors for the organization in Oklahoma City. Three of those convicted along with William were given more severe sentences: Timothy Johnson, 410 months; Kevin Johnson, 292 months; and Nick Owens, 360 months (remanded for resentencing). *Id.*

¹⁰⁵See U.S. Sentencing Comm'n, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, Chapter 7(D)(4) (Feb. 1995) ("The 100-to-1 [crack/powder disparity] is a primary cause of the growing disparity between sentences for Black and White federal defendants.").

¹⁰⁶ See Profile of Judge Alex Kozinski available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge Richard W. Vollmer, Jr. available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. 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).

true for first time offenders and lower level retail dealers.¹⁰⁷ In addition, Congress stated it wanted the mandatory minimums to apply to kingpins and importers, but it is well understood that cocaine is imported into the United States as powder and is only converted to crack at the end of the retail chain. Thus, the real kingpins and importers are subjected to much less severe penalties than the largely poor minorities and addicts who deal in small quantities of crack. For the judges who have to impose these penalties, they found something perverse about punishing the smallest fish in the distribution chain the most severely.¹⁰⁸

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

In sentencing low level offenders, Republican appointees come face-to-face with the 1986 Act mandatory minimum triggers and the Guidelines' real offense approach to relevant conduct; as one Mid-Atlantic Reagan appointee put it: "Quantity shouldn't mandate result."¹⁰⁹ Another Republican looked at the problem more philosophically, arguing that the Guidelines failed to sufficiently individualize punishment. This judge was very direct about her desire to "look at the whole person and not hold a ghetto dealer to the same standard as a bank president." But she noted, "Congress worried about empathy, so it tied judges' hands."¹¹⁰

Quantity and culpability collided most often for Republican appointees in cases that involved three types of offenders; those who became involved as romantic partners, through substance abuse, or as drug couriers working for minimal remuneration. Because of their prevalence, these three categories are discussed in more detail in this section. However, this basic issue showed up for other types of low level offenders worth mentioning in passing such as both very young and older defendants,¹¹¹ and law enforcement officials convicted of assaultive conduct.¹¹²

¹⁰⁷See Profile of Judge Joseph F. Anderson, Jr. available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge Sharon Lovelace Blackburn available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁰⁸One Atlantic judge observed he has yet to see a kingpin in his court, instead he dealt mostly with dealers who controlled only a few blocks and nevertheless ended up being sentenced to 300-400 months. Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002).

¹⁰⁹Atlantic Judge 2, Anonymous Interview (Dec. 26, 2002).

¹¹⁰Midwest Judge 1, Anonymous Interview (Nov. 26, 2002).

¹¹¹See Profile Judge James C. Fox available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (very young defendant); Profile of Judge Hector M. Lafitte <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (young crack defendant); Profile of Judge Marilyn Huff, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (older defendant).

¹¹²One Bush II appointee who presided over such a case stated he felt the inmate created a risk of harm, but that guards didn't stop beating him so they were guilty of the crime. Still, he felt their behavior "was aberrant and deserved less time," even if the Guidelines rules did not allow a departure under the circumstances. Western Judge 2, Anonymous Interview (Oct. 2, 2002).

immigration sentences for non-violent offenders, arguing that these defendants were going to be deported anyway and the government should shorten sentences to save money.¹¹³

a. The “Girlfriend” Cases.

Of all the low level offender cases, the so-called “girlfriend” cases seemed to bother Republican appointees the most. Generally, these female defendants had a minor role in the offense. They may have taken messages, stored drugs, assisted in transport, or 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.”¹¹⁴ 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.¹¹⁵

¹¹³ One western 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). However, these concerns seem restricted to border states which saw a lot of these cases and hence did not appear to necessarily constitute a national theme.

¹¹⁴ See Profile of Judge Sam Sparks available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. See also Southern Judge 1, Anonymous Interview (Sept. 4, 2002). Another stated that it’s hard to disregard things the Guidelines tell judges to ignore like the fact that these are “mothers with children.” Western 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 Judge 3, Anonymous Interview (Sept. 30, 2002).

¹¹⁵ The issue of cooperation disparity in these cases is just one aspect of the larger issue about the distorting effect of cooperation agreements, which itself 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...prosecutor’s have unilateral discretion.” Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002). Overall, however, this issue did not rise to the fore for Republican judges. In some instances it was because 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 agreements when not warranted to be fair in sentencing. Midwest Judge 1, Anonymous Interview (Nov. 26, 2002). Others indicated they would not sentence the cooperators until all the other defendants were sentenced to allow them the opportunity to give a more culpable cooperator a higher sentence to avoid co-defendant disparities. Western Judge 1, Anonymous Interview (Sept. 30, 2002). Still others, because of a pro-government orientation, were willing to tolerate some cooperation disparity because of the Government’s obvious need for this kind of evidence in drug conspiracies.

Without question, the 1994 "safety-valve" law helped to reduce the sentences of some of these defendants.¹¹⁶ 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.¹¹⁷ 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 2001.¹¹⁸ However, my research revealed some "girlfriend" cases continued to trouble judges because of limitations written into the safety-valve which excluded defendants judges believed were deserving of sentence relief.¹¹⁹ A poignant illustration of a post-safety valve "girlfriend" case comes from a 2002 case before a Reagan appointee, Judge James D. Todd (W.D. Tenn.).¹²⁰

The defendant, Lakisha Murphy had been with her boyfriend, Cedric Robertson, since she was fifteen.¹²¹ 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 still a principal of the group, despite his handicap. In the course of the investigation, Lakisha

¹¹⁶*See supra* n. ___.

¹¹⁷The safety-valve requires: that the defendant does not have more than one criminal history point, 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, the offense did not result in death or serious bodily injury to any person, the defendant was not an organizer, leader, manager, or supervisor of others in the offense, and 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. *See supra*, note ___. The Commission also took steps to ensure that the safety-valve actually benefited the defendants who qualified by providing for a two-point Guideline reduction for safety-valve defendants. *See* U.S.S.G. §5C.1 (providing two-point offense level reduction to safety-valve eligible with an offense level of 26 or higher).

¹¹⁸*Drug Offenders Receiving Safety Valve and Mandatory Minimums For Each Drug Type*, Table 44 2001 U.S. Sentencing Commission, 2001 Data File, USSCFY01, *available at* <http://www.ussc.gov/ANNRPT/2001/table44.pdf>.

¹¹⁹Referring to the criminal history limitation, a Republican judge noted that "some pretty minor conduct can disqualify a defendant" from the safety valve. Midwest Judge 2, Anonymous Interview (Oct. 28, 2002). More frequently, 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 a conspiracy case with lots of relevant conduct or a large seizure. In such cases, even if eligible, the safety valve would only help with a two-point offense level reduction. *See* Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and The Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1498-99 (2000).

¹²⁰*See* Profile of Judge James Todd available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹²¹*Id.*

admitted she occasionally helped him with his drug business and even made a few retail sales when none of Cedric's gang mates were around.¹²² However, when she was not helping Cedric with his health needs, she usually had a job as a cashier to support herself and was not considered to be a full-time employee of the conspiracy by the government.

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.¹²³ 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 the other 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 "it seems unfortunate in this case that you're doing more time than some of these guys did . . . and there's nothing I can do about it."¹²⁴ Judge Todd also spoke directly to Lakisha at the sentencing hearing before he imposed the ten year sentence, 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.¹²⁵

b. Drug Addicted Defendants.

A significant number of drug addicted persons become involved in low level distribution activities to support their own substance abuse problems.¹²⁶ The Sentencing Guidelines do not allow judges to consider drug addiction at sentencing, and of course, the statutory mandatory minimums have no exception except cooperation. Some Republican appointees disagree 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 saw people from the lower levels, many who were only involved because they are addicts. This was where he

¹²²*Id.*

¹²³*See supra* n. .

¹²⁴Judge Todd Profile, *supra* at ___.

¹²⁵*Id.*

¹²⁶Addicts 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).

“really struggle[d] with the Guidelines.”¹²⁷ Another stated that while he is “not sympathetic to those who victimize others,” he was “sympathetic to those with substance abuse problems.”¹²⁸

Methamphetamine cases in particular seem to typify this kind of case. 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.”¹²⁹ However, as a result of lengthy Guideline 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.¹³⁰

However, the type of addict case which seemed to most infuriate Republican judges were the ones in which the defendant was able to successfully complete drug treatment while on bail. An excellent example of this kind of case comes from another Reagan appointee, Judge James Parker (D. N.M.).¹³¹ The defendant, Amanda James, left home at fifteen and eventually became romantically involved with her co-defendant, 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. However, Amanda entered treatment while on bond and made substantial progress combating her addiction. She also reunited with her mother who had her own history of substance abuse and who now did counseling for other addicts.

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

¹²⁷Midwest Judge 2, Anonymous Interview (Oct. 28, 2002).

¹²⁸Western Judge 2, Anonymous Interview (Oct. 2, 2002).

¹²⁹Midwest Judge 1, Anonymous Interview (Nov. 26, 2002).

¹³⁰*Id.*

¹³¹*See* Profile of Judge James Parker, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>;

See also Profile of Judge Garnett Thomas Eisele available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>

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.”¹³² Judge Parker responded by saying

. . . 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.¹³³

Judge Parker's view of this “successful treatment case” reflects a theme seen in other Republican appointees with a background, like his, 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 recognized when there was a win-win situation for all parties. Thus, while they might generally see themselves as tough on crime, the “successful treatment cases” in particular tended to invoke and confound their problem solving identities. Moreover, many conservative judges were genuinely moved by the efforts of these defendants and the hurdles they overcame to address their addictions, particularly in a system that sees few successes at the time of sentencing. For judges who had little contact with the criminal justice system before their appointment, these defendants seemed deserving of special consideration because they did not “look” or act like criminals.

c. Drug Courier Cases.

The last significant category which most concerned Republican appointees was drug courier cases. While all districts had some of these cases, they were most prevalent along the southern border, as well as districts with major airports from source countries. 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 have no dealings with them. In addition, many couriers were minimally connected to the conspiracy, sometimes recruited abroad or allowed contact with only one person by cellphone or pager. Even when couriers had more information about the conspiracy, many expressed fear for themselves or loved ones back home if they cooperated.¹³⁴

¹³²*Id.*

¹³³*Id.* Amanda's case could also be categorized as a “girlfriend case” because as the judge noted at sentencing he was “left with the distinct impression that its really Mr. Santisteven who put Ms. James in this position.”

¹³⁴*See* United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984) (discussing threats made to drug courier from Columbia).

Because the primary sentencing factor under the 1986 Act and the Guidelines was the weight of the drugs, over which the courier has no control, courier sentences could be quite high in comparison to their culpability and role in the conspiracy.¹³⁵ One Republican judge stated that while he did “not condone drugs, I think the guidelines are out of whack.”¹³⁶ He noted that a drunk driving case in which a defendant caused four deaths had a lesser Guideline sentence than a routine drug courier case who could easily receive twenty years. Courier sentences did not sit well with other Republican judges. One border state Republican appointee said that one year in prison would probably be enough for most drug couriers.¹³⁷ 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.”¹³⁸

3. ‘Life’ Sentences for Non-violent Offenses and First-time Offenders.

A surprising result of my research was the discovery of a class of drug cases which troubled Republican appointees, but has received virtually no media or scholarly attention. The sentences in these cases were very long, such as life without parole or so many years as to amount to 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 above, and sometimes they played supervisory roles in their small to medium size drug operations. But, because none of these defendants had been convicted of a violent offense, for these judges, their sentences felt disproportionate.¹³⁹ In addition, these judges were also disturbed when substantially more culpable co-defendants received huge sentence breaks because of their cooperation with the government, leaving lesser players to serve much longer sentences.¹⁴⁰

This was especially true for judges who had moved over to the federal system after serving as state judges. For these judges, life sentences without parole for drug crimes seemed particularly wrong. For them, such sentences had always been reserved for heinous murders, violent rapes, and other serious and inveterate recidivists deemed beyond any hope of rehabilitation. This was true even for judges who articulated a strong “just desserts” sentencing philosophy and were

¹³⁵ See Profile of Judge David Sam available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹³⁶ Western Judge 2, Anonymous Interview (Oct. 2, 2002).

¹³⁷ Western Judge 1, Anonymous Interview (Sept. 30, 2002).

¹³⁸ Western Judge 3, Anonymous Interview (Sept. 30, 2002).

¹³⁹ See Profile of Fernando J. Gaitan, Jr. available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (life sentence); Profile of Judge J. Phil Gilbert available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. See also Profile of Judge Donald D. Alsop available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge Philip Reinhard available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁴⁰ See Profile of Judge Samuel G. Wilson available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

otherwise considered to be tough sentencers. For the cases involving lengthy sentences short of life without parole, Republican appointees showed the most concern in cases involving first-time offenders.¹⁴¹

Additionally, some Republican appointees expressed concerns in cases where the defendants had prior drug offenses, were they had been treated very leniently by the state courts for these offenses. Especially for judges with prior criminal justice experience, graduated punishment is central to notions of deterrence and fairness. When a state court had essentially slapped a defendant on the wrist before, conservative judges had some sympathy for these defendants who got the equivalent of “sticker shock” when they were brought to federal court to face the Guidelines sentencing regime. For these judges, a severe term for a non-violent crime was more palatable only if the defendant had been “put on notice” and had not “learned his lesson.” Thus, while no one doubted these defendants had been enmeshed in trafficking, virtual life sentences for non-violent offenses contradicted values imbedded from years of state practice.

Lastly, Republican judges expressed some utilitarian concerns about these sentences. One Republican judge interviewed stated that sentences for non-violent crimes that extend past the age of 60 are “pointless.”¹⁴² 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 remarked on the financial wastefulness of the sentence. Thirty years when fifteen would accomplish the same goal made no sense to appointees from a party which preaches fiscal conservatism and reduced federal spending.¹⁴³

However, because these defendants were not themselves particularly sympathetic, judges were not as eager to ally themselves with these men. Thus, in these transcripts, the judges typically first emphasized the harm these defendants had caused to their communities before criticizing the excessiveness of the sentence. One good example is the Robert Riley case from Judge Ronald Longstaff (S.D. Iowa), a Reagan appointee.¹⁴⁴ Robert (a.k.a. “Mushroom Bob”) was a devotee 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 guilty to four separate charges involving small amounts of marijuana, hashish, and amphetamines, and had spent short periods in county prisons in California and Wisconsin these offenses. In his first federal case (for conspiracy to distribute more than 10 grams of LSD),

¹⁴¹See Profile of Judge Robert F. Jones available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge Stephen M. Reasoner available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁴²He added, “A life sentence is a horrible thing.” Atlantic Judge 1, Anonymous Interview (Oct. 15, 2002).

¹⁴³See Profile of Judge James M. Rosenbaum available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁴⁴See Profile of Judge Ronald Longstaff, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

the recidivist provision of the 1986 Act required a mandatory life sentence without parole because he had three prior drug felony convictions.

At the sentencing hearing, Judge Longstaff told Bob 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, “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. . . .”¹⁴⁵ 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.¹⁴⁶

What is also interesting is the gulf between the Guideline or statutory sentence in these cases and what these judge would rather impose. For the street level crack dealer, one Reagan appointee suggested sentences as low as three to five years (with education and vocational counseling).¹⁴⁷ In an interview, Judge Longstaff commented that for Bob Riley, he believed that a ten to twelve year sentence would have been sufficient.¹⁴⁸

In 1994, the Sentencing Commission partially addressed judicial concerns in this area by amending the drug quantity table to preclude a life sentence for a first-time offender based solely on drug quantity.¹⁴⁹ However, because of possible enhancements for simple gun possession or a supervisory role, first-time offenders can still reach the top of the Guideline sentencing chart without committing a violent act. Thus, while judges felt this amendment made a lot of sense, it was far short of eliminating Guideline sentences of thirty years or more based mostly on drug quantity and no violent conduct. Moreover, and as shown by Judge Longstaff’s case, a Guidelines amendment, of course, has no effect on mandatory life sentences required by the recidivist provisions of the 1986 statute.

4. Gun Cases.

It is an axiom among most federal judges that the Sentencing Guideline regime gave prosecutors too much control over sentencing outcomes without necessarily reducing unwarranted disparity.

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷ Atlantic Judge 3, Anonymous Interview (Oct.11, 2002).

¹⁴⁸Telephone interview with Judge Longstaff (Oct. 28, 2002).

¹⁴⁹*See supra* __.

As has been explored at length in academic and judicial writing on this subject, prosecutors have a myriad of ways to control or influence a defendant's sentence.¹⁵⁰ One of the most significant decisions is whether to charge an offense with a mandatory minimum penalty which trumps or has to be served consecutive to a Guidelines sentence. Because this kind of prosecutorial discretion has not been regularized across the country, or sometimes even within a single United States Attorneys Office, judges were acutely aware of the transfer of discretion from judges to prosecutors.¹⁵¹ The new system simply drove disparity underground, hidden in the back offices of prosecutors and law enforcement agencies where it was hard to see and virtually unreviewable by judges. Republican appointees were sometimes unhappy with this transfer of power to prosecutors and offended by particular instances of what appeared to be overcharging of petty conduct.¹⁵² However, my research found two types of guns cases in which prosecutorial charging discretion particularly seemed to outrage Republican judges; felon-in-possession cases under the Armed Career Criminal Act and "stacking" of mandatory minimums for using or carrying a firearm while committing a drug or violent crime.

¹⁵⁰See 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"). As noted earlier, prosecutors had the sole authority to file a motion for substantial assistance, and thus prosecutors controlled the key to a sentence below the Guideline range or applicable mandatory minimum in most cases. See 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).

¹⁵¹Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1591 (1997).

¹⁵²In some cases, a mandatory minimum threshold was only reached because agents made multiple purchases of small quantities, which when aggregated, were sufficient. One 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, Anonymous Interview (Oct. 15, 2002). A western Republican appointee battled a similar prosecutorial tactic in "backpacker" courier cases in which unacquainted couriers were recruited to carry narcotics across the border. When these human convoys were arrested together, for a time, the United States Attorney in this district aggregated the amount of drugs and argued that each defendant was responsible for the entire amount. 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). More generally though, Republican appointee criticism of the government in most cases tended to be mild. 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 receptive to claims of executive and legislative power. Support for the conclusion that Republican appointees usually were deferential to prosecutorial power is also found in the pro-government rating for most of these judges in the Federal Almanac of the Judiciary.

a. ACCA Felon-in-Possession of Firearm Cases.

The federal felon-in-possession statute criminalizes possession of a firearm, or even ammunition, by any convicted felon. The prohibition applies regardless of whether the prior conviction was state or federal, or whether or not the gun was licensed.¹⁵³ Many cases brought in federal court during the pre-*Booker* period under this statute involved simple gun possession; meaning 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 the defendants he saw were “just quail hunters,” and he could not understand why they were charged in federal court.¹⁵⁴

In addition, many felon-in-possession cases were brought because federal prosecutors could invoke the penalty provisions of the Armed Career Criminal Act (“ACCA”), which requires a mandatory fifteen year sentence if the defendant has three prior “crimes of violence” or “serious drug offenses.”¹⁵⁵ 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.¹⁵⁶ Under many state codes, unarmed burglaries of unoccupied dwellings, and therefore, qualified as a crime of violence for purposes of the ACCA.¹⁵⁷

Similarly, most state drug statutes provide 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.¹⁵⁸ Thus, petty offenders, especially 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 cars or stores at night. As a result, some of these alleged “career criminals” had never been to state prison for their crimes, having received either probation or short stints in county facilities.¹⁵⁹ Thus, while Republican judges voiced agreement

¹⁵³ See *supra* n. ___.

¹⁵⁴ Western Judge 1, Anonymous Interview (Sept. 30, 2002). See also Profile of Judge Robert F. Jones available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (defendant was camping with his family).

¹⁵⁵ 18 U.S.C.A. §924(e) (2000).

¹⁵⁶ §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.”

¹⁵⁷ 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.”).

¹⁵⁸ See The ImpacTeen Illicit Drug Team, *Illicit Drug Policies: Selected Laws from the 50 States*, at 22 (2002) (copy on file with author).

¹⁵⁹ An example of this situation is the case of Jimmy Sluder. A troubled and alcohol youth, he received probation for three unarmed burglaries early in his life. After completing his probation, he was arrested several years later for possession of an unlicensed firearm. Although the state court saw fit to give him only a 30-day suspended sentence, the federal government prosecuted him under the ACCA, and he received a fifteen-year sentence in federal prison despite never having served any time in state prison.

with the intent of the ACCA, the over broad definition of a “crime of violence” and “serious drug offense” frequently swept up defendants that judges felt did not need a fifteen year sentence.¹⁶⁰

The William Horne case from Reagan appointee Judge Frederic Smalkin (D.Md.) provides a good example.¹⁶¹ In 1999, Horne walked past a Blockbuster Video in Baltimore carrying a rifle. A housing authority officer saw him and ordered him to stop. Although William was drunk, he complied immediately. When asked what he was doing with the gun, he replied that he was taking it to a nearby pawn shop. The gun was unloaded, although William had ammunition on his person.

William was originally charged in state court and was offered a plea bargain which would have resulted in a fifteen month sentence. He decided to opt for a trial, but before the state case commenced, the Maryland U.S. Attorney charged him as a felon-in-possession under the ACCA. Based upon Horne’s long history of burglary and theft convictions, he qualified for the fifteen year sentence.¹⁶² 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”¹⁶³ 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 Mr. Horne was drunk and carrying a gun, but that if allowed he probably would have given him a year and day.¹⁶⁴

b. “Stacking” of 924(c) Counts.

The second category of gun cases which provoked serious concern from Republican appointees involved the “stacking” of mandatory minimums under 18 U.S.C. §924(c)’s penalties for using

See David Wagner, *Is There Anyone Guarding the Guardians of Justice*, *Insight*, The Washington Times 15 (August 4, 1997). *See also* Docket Sheet, U.S. District Court for the Eastern District of Tennessee, No.3:94-cr-00005-1 (January 21, 1994) (copy on file with author).

¹⁶⁰ 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 Congress and the public conceived of that term and felt that prosecutors should give more consideration to the nature of the qualifying convictions before bringing federal charges carrying mandatory time. Western Judge 1, Anonymous Interview (Sept. 30, 2002).

¹⁶¹ Profile of Judge Frederic Smalkin available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; *See also* Profile of Judge John C. Coughenour available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge Michael R. Hogan available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge James A. Parker available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁶² In 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. *Id.*

¹⁶³ *Id.*

¹⁶⁴ Telephone Interview with Judge Smalkin, (Oct. 11, 2002).

or carrying a firearm during a drug or violent offense. Under this statute, a first offense carried a five year consecutive mandatory minimum and for any subsequent offenses, an additional twenty year consecutive sentence.¹⁶⁵ To the chagrin of many judges, the escalation clause could be invoked even if the defendant had not been convicted under the statute when he committed a second 924(c) violation.¹⁶⁶ This interpretation allowed prosecutors to charge multiple 924(c) counts in a single indictment if 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.

The 924(c) stacking case that has received the most press, post-*Booker* is Weldon Angelos' fifty-five year sentence reluctantly handed down by George W. Bush appointee Judge Paul Cassell (D. Ut).¹⁶⁷ From the pre-*Booker* era, the Michael Prikakis case from Judge Vinson (N.D. Fla.) provides another paradigmatic example.¹⁶⁸ Prikakis' story is as follows: born in Greece, 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 \$5,000.00 in credit card debts as well as liens against their cars. Foolishly, Michael turned to selling powder cocaine to address their money problems. Over a seven day period, Michael made three sales to a team of undercover officers. In total, he sold 86 grams of powder worth approximately \$5,000.00. Under the Guidelines, the sentence for this amount of cocaine would have been fifteen to twenty-one months.¹⁶⁹

However, the undercover agents claimed he had a pistol with him during each sale. Therefore, the prosecutor also charged Michael with three counts of carrying a firearm during a drug trafficking offense. Michael admitted selling the cocaine but contested the gun counts. The jury believed the officers and he was convicted on all counts. Under the escalation clause of 924(c), the first count carried five years and the next two counts, an additional twenty years, all counts required to be consecutive.

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 maximum sentences in those cases."¹⁷⁰ 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."¹⁷¹ Judge Vinson also expressed his concern that because

¹⁶⁵See *supra* at ___.

¹⁶⁶See *Deal v. United States*, 508 U.S. 129 (1993).

¹⁶⁷See *infra* at ___.

¹⁶⁸Profile of Judge Roger Vinson available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>. See also Profile of Judge Malcolm J. Howard available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁶⁹*Id.*

¹⁷⁰1 ALMANAC OF THE FEDERAL JUDICIARY 26-27 (11th Cir. 2004).

¹⁷¹Profile of Judge Vinson, *supra* n. ___.

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."¹⁷²

Clearly, the judges in these firearms cases were upset by the harshness and disproportionate nature of the sentences. But in addition, these cases forced judges to recognize that the unchecked power of prosecutors was being used for goals which had nothing to do with just punishment. While the prosecutorial motives in each case cannot be known for certain, in many of 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."¹⁷³ Most importantly, local U.S. Attorney's Offices and federal law enforcement agencies were provided additional funding to pursue these cases. 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.¹⁷⁴ 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 pled guilty in

¹⁷²*Id.*

¹⁷³"Operation Triggerlock" was implemented in April of 1991, and is described as "an effort by DOJ 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. 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 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.")

¹⁷⁴*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 consist of state burglary convictions. *Id.*

state court, he had no defense at all and these became easy cases, padding the statistics for the program.¹⁷⁵ In this way, Operation Triggerlock allowed both local U.S. Attorneys and the Justice Department to proclaim progress in the war against both gun crimes and career criminals.

There were also patterns for the prosecutorial motives in the 924(c) stacking cases that were unrelated to proportionate punishment. Most frequently, the threat of multiple and consecutive 924(c) counts was used to try to coerce a plea to fewer counts. In other cases, no explanation appears other than the prosecutor simply piling on because he or she could, in an effort to get the maximum sentence the law would permit. For Republican appointees, like Judge Vinson, who generally trust and deferred to federal prosecutors, these transcripts resonate with rawness and outrage.¹⁷⁶

IV. REPUBLICAN APPOINTEES AND SENTENCING REFORM IN THE POST-*BOOKER* ERA.

There are three significant areas in which Republican appointee dissatisfaction during the mandatory Guideline era is still relevant to the post-*Booker* policy environment. This Part addresses this issue in three parts; mandatory minimums, topless Guidelines, and solutions for the discrete types of cases discussed in Part III.

A. THE POST-*BOOKER* WORLD AND MANDATORY MINIMUMS.

At first blush, the Supreme Court's intervention accomplished much of what many judges and academics had urged 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 about a month longer than before the decision, an outcome few thought possible.¹⁷⁷

However, while *Booker* invalidated the Guidelines, the decision left untouched the statutory mandatory minimum penalties for drug and gun offenses. Mandatory minimums were not affected by *Booker* because, unlike Guidelines which required a series of fact finding decisions, the statutory mandatory minimums generally have a one-fact trigger which can and have, at least

¹⁷⁵See, e.g., Wagner, *supra*, note ___.

¹⁷⁶See also Profile of Judge William Acker, Jr. available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁷⁷U.S. Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing [hereinafter Final *Booker* Report] at 46-47 (2006). Post-*Booker* Sentencing Commission data also shows that when judges have sentenced below the Guidelines' range, these downward variances have been a matter of months, not years, suggesting that judges are tinkering rather than abandoning the Guidelines approach to sentencing. *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. See Profile of Judge Longstaff, *supra*, note ___.

since 2000, easily been submitted to a jury for determination in federal criminal cases.¹⁷⁸ In addition, because the Sentencing Commission continues to set most drug guidelines using the mandatory minimums as the bottom of the range, and because judges continue to heavily rely on the Guidelines range to satisfy *Booker* reasonableness, mandatory minimums continue to impact many, if not most drug cases either directly or indirectly.¹⁷⁹

Thus, the complaints in these cases about inflexible mandatory minimums are as relevant to today as before. These Republican voices are important, but not because anyone believes that Congress is about to repeal the 1986 Act or gun mandatory minimums.¹⁸⁰ Rather, they might forestall efforts by conservatives to legislate more mandatory minimums to replace the constraints of now unconstitutional mandatory Guidelines. In fact, in response to *Booker*, some conservatives favored the mandatory minimum approach because unlike other proposals, it clearly avoids the constitutional issues raised by *Booker*. A number of these bills were proposed since *Booker*.¹⁸¹ One, “the gang bill,” passed the House but not the Senate in 2005.¹⁸²

¹⁷⁸The decision of prosecutors to charge and prove at trial the one fact triggers 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 Prosecutors, re: Guidance Regarding the Application of *Blakely v. Washington*, to Pending Cases, p. 8, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf.

¹⁷⁹ This is certainly proved by the resilience of sentences within the Guidelines ranges after *Booker*. Approximately 60% of sentences still fall 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 Comm’n, 2005 Data File, USSCFY05, Post-*Booker* Only Cases (Jan.12, 2005, through Sept. 30, 2005).

¹⁸⁰However, if the past is prologue, repeal is not a pipedream. Congress had in fact experimented with less severe mandatory minimums for drug crimes in the 1970s but this experiment was declared a failure and these penalties were repealed. U.S. Sentencing Comm’n: *Mandatory Minimum Penalties in the Federal Criminal Justice System*, 5 (1991), available at http://www.ussc.gov/r_congress/MANMIN.PDF.

¹⁸¹See 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 could include 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 Protection Act of 2005”) (Rep. Sensenbrenner’s “*Booker* fix bill also containing 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). The latter bill passed House Judiciary Committee in 2005 but went no further. See also H.R. 1751, 109th Cong., 1st Sess. (2005) (setting mandatory minimums for courthouse crimes.).

¹⁸²See H.R. 1279, 109th Cong., 1st Sess. (2005) (“Gang Prevention and Effective Deterrence Act of 2005” setting new mandatory minimums for gang-related crime.); H.R. 1751, 109th Cong., 1st Sess. (2005)

B. THE POST-*BOOKER* WORLD AND “TOPLESS” GUIDELINES.

The experience of these judges under the Guidelines is also relevant to assessing proposals to circumvent *Booker* by mimicking the Guidelines’ limitations on judicial discretion to lower sentences. As noted in Part II, the most likely such “*Booker* fix” at the moment is the “topless guidelines” proposal, despite real questions about the constitutionality of such a system.¹⁸³ To the extent conservative judicial voices can be mustered to say that the Guideline minimums were excessive in a significant cross-section of cases, “topless guidelines” would recreate the same concerns. These cases, however, can be used to show that the Guidelines era was not a Golden Age of sentencing uniformity and fairness; and that dissatisfaction was not limited to just liberal judges, but in fact, included many Republican appointees with solid conservative credentials. Thus, re-imposing harsh and inflexible rules to control *Booker*-created disparity would not be worth the cost to the many conservative judges, who believed that they needed the ability to tailor sentences for the unusual case. Thus, these pre-*Booker* cases are still relevant to assessing the judicial response to efforts designed to undo *Booker*.¹⁸⁴

C. THE POST-*BOOKER* WORLD AND ISSUE ORIENTED SENTENCING REFORM.

However, using the cases and judges in this Article only to preserve the status quo would be short-sighted. While the Republican appointees in my study would not support a wholesale abandonment of the Guidelines’ goals of greater uniformity and tough sentences, Part III suggests that there are discrete issues on which these judges clearly would favor changes to permit more flexibility and less severity. The advantage of focusing on these issues is that even if these or other Republican appointees are unwilling to actively participate in the policy process, there is sufficient record in these cases to demonstrate their belief that the laws, as written and enforced, are inequitable. Additionally, given that crime policy is so often “story focused,” the profiles provide the concrete cases needed to mobilize the judiciary, press, and public opinion.

1. The Crack/Powder Disparity.

(setting mandatory minimums for certain offenses), this proposal has serious constitutional problems. 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). 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*.”). It is also worth pointing out that the law professor 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>

¹⁸⁴Under the topless Guidelines, judges would once again only have the downward departure method to sentence below a Guideline range, an avenue seriously restricted by the Courts of Appeals and the Feeney Amendment. See Zlotnick, *The War Within the War on Crime*, *supra*, note __ at 212.

On the short list of post-*Booker* affirmative sentencing proposals should be the crack/powder disparity. First, supporting changes to crack cocaine penalties (both under the Guidelines and the statute) is now politically safe for judges. As noted in Part II, lowering crack penalties has also been endorsed twice by the Sentencing Commission and has broad support from many former federal prosecutors from both parties.¹⁸⁵ Most recently, the Criminal Law Committee of the Judicial Conference has recommended that Congress revisit this issue and prominent Republican members of Congress have themselves proposed legislation to partially remedy the disparity.¹⁸⁶ Beyond policy circles, the issue, especially the racial disparity aspect, has received widespread coverage in the press, making it easier to move the issue to center stage. In the short term, the opinions of conservative Republican judges could provide the necessary political cover to finally push this issue forward to at least a partial legislative solution. I say partial, because while Republican appointees think that crack sentences are too high, there is no consensus on a specific solution or whether crack and powder penalties should be completely equalized.¹⁸⁷

2. Low and Mid-Level Drug Offenders.

There may also be opportunities in the new Congress to provide additional relief for low-level offenders, especially those who received a mandatory minimum because they were marginally

¹⁸⁵As discussed previously, a movement to address crack penalties would also draw support from many former federal prosecutors from both parties. *supra* cites. *Supra* Part II(B)(1) and accompany notes at ___.

¹⁸⁶In July of 2006, Sen. Jeff Sessions, (R.-Ala.), introduced the “Drug Sentencing Reform Act of 2006,” S.B. 3725, 109th Cong. (2006). The bill co-sponsored by 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-GRAMM 2 at 7 (Summer 2005).

¹⁸⁷Some support simply lowering crack penalties to achieve a 1:1 ratio. Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002). Some 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, for this group of judges, 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 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).

ineligible for the safety-valve.¹⁸⁸ This issue would likely be popular with the judiciary and 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 those who cannot give a full accounting of their co-defendant's activities due to a reasonable fear of retribution.¹⁸⁹

The reaction of Republican appointees to the drug addict rehabilitation suggests that there could be judicial support for special treatment drug addicts in drug cases. For example, some jurisdictions have experimented with "addict exceptions" from mandatory minimum penalties in drug cases, provided that the defendant successfully completed treatment and a probationary period.¹⁹⁰ Lastly, sentencing outcomes in courier cases could likewise be accomplished by creating a significant statutory or Guidelines adjustment to make culpability, not quantity, the key determinant of sentence length in those cases.

The prospects of relief for those serving very long sentences for mid-level and higher drug dealing is less sanguine. Though many of these defendants can be characterized as non-violent, they are not an appealing constituency for legislators. While a retroactive crack relief bill, for example, would benefit many of them serving enhanced Guidelines sentences, those serving statutory life or with sky high adjusted offense levels, or a significant criminal history would not benefit. One limited proposal which might gain traction with Republican appointees would be legislation that prohibits a life sentence under either statute or Guidelines for non-violent offenders. While there has been no recent federal legislation like this, in Michigan in 2003, a broad coalition used these kinds of arguments to get the legislature to repeal of the "650-lifer" law, which required life in prison without parole for less than a kilo of any form of cocaine.¹⁹¹

¹⁸⁸This might include defendants with enough misdemeanor convictions to place them in Criminal History Category II, or defendants who were unwilling due to fear or out of loyalty to reveal enough facts to qualify under the disclosure requirement. *See supra*, note ___.

¹⁸⁹More creative solutions could be found as well. Defendants who are found to have been "low wage" employees of drug organizations could be exempt from relevant conduct sentencing, even if they were aware of the scope of the organization. Similar rules could be devised for the "girlfriend" cases.

¹⁹⁰*See, e.g.*, D.C. Code § 33-541(b)(2); Cal. Penal Code § 647d(b). There might even be some judicial support for programs similar to state drug courts for drug addicted defendants who meet certain reasonable criteria for inclusion in a special program that avoids prison time entirely. Nothing, however, in my study suggested Republican appointees favored this kind of solution.

¹⁹¹A bipartisan majority, including the Republican chair of the Michigan State Senate Judiciary Committee, passed three bills that repealed most mandatory minimum sentences for drug offenses. The package was the culmination of the work of a coalition of groups that included prosecutors, the state Catholic Conference and the NAACP, with organizational support from FAMM. *See* Press Release, 12/13/02, FAMM, *Michigan Legislature Repeals Draconian Mandatory Minimum Drug Sentences*, available at, <http://stopthedrugwar.org/chronicle-old/267/michiganrepeal.shtml> (last visited Feb. 27, 2007).

Lastly, the new Congress can use these cases to highlight the failure of the current administration to meaningfully exercise the clemency power.¹⁹² In particular, Congress could give fresh attention to the seventeen non-violent drug offenders pardoned by President Clinton. Two are profiled in my study and are doing well.¹⁹³ Another, Serena Nunn, graduated from the University of Michigan Law School in 2006. Her clemency petition was aided by the support of her sentencing judge, David Doty (D. Minn.), another Reagan appointee.¹⁹⁴ While clemency experts do not expect President Bush to increase his use of commutations for this purpose, the fact that a number of Republican appointees have and will continue to support these clemency petitions both aids their cause and sets up the possibility for greater use of the pardon power during a subsequent presidency. Republican appointees, especially fiscal conservatives are also likely to support the expanded use of the “compassionate release” program, which enables elderly or infirm inmates to leave prison before their term has expired.¹⁹⁵

3. Gun Cases and the Broader Issue of Prosecutorial Discretion.

Topping off the list of sentencing reforms in which Republican appointees opinions might make a difference also includes limited aspects of firearms sentencing. In addition, these cases could be a platform to examine the misuse of prosecutorial discretion in both forum and charge selection.

Preventing stacking of 924(c) counts might be the most realistic goal. Certainly, such legislation should have a strong Republican ally as current Chair of the Judicial Conference Criminal Law Committee, Paul Cassell.¹⁹⁶ Judge Cassell received national attention for his reluctant sentencing of first offender Weldon Angelos, a small time marijuana dealer, to fifty-five years

¹⁹²See Margy Colgate Love, *The Debt that can Never be Paid: A Report Card on the Collateral Consequences of Conviction*, 21 FALL CRIM. JUST. 16, 16-20 (explaining how the pardon could play an important role in prisoner re-entry, and that in recent years, it has been underutilized by presidents and governors). See also Margy Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 191-204 (2003) (discussing President Clinton's use of the pardon power).

¹⁹³See Profiles of Judge William Nickerson, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>; Profile of Judge David Sam, available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles>.

¹⁹⁴See Mark Sauer, *Then: Federal Convict; Now: Law School Grad*, SAN DIEGO UNION TRIBUNE (May 14, 2006) (noting further that a conservative lawyer was a significant help in her pursuit of a pardon). Another Clinton commuttee, Kemba Smith, is currently attending Howard University Law School. See NAACP, *Kemba Smith Receives Early Termination of Supervised Release* (June 16, 2005), available at <http://www.naacpldf.org/content.aspx?article=630> (last visited Feb. 27, 2007).

¹⁹⁵One such proposed bill was H.R. 3072, 109th Cong. (June 27, 2005). Another was the “Second Chance Act,” sponsored by Robert Portman, R-Ohio, would have created a program for the early release of non-violent, elderly convicts. H.R. 1704, 109th Cong. (April 19, 2005). See also *Second Chance Act Moves Ahead*, 16 FAMM-GRAM 3 at 9 (Fall 2006).

¹⁹⁶Before becoming a judge, Cassell was a conservative academic, best known for his opposition to 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. Judge Cassell was nominated to the bench by President G.W. Bush in 2001 and confirmed in 2002.

for three “stacked” 924(c) counts that resulted from a series of three undercover buys and a search warrant over the course of less than two weeks.¹⁹⁷

Judge Cassell wrote a lengthy opinion exploring his options for refusing to impose the consecutive 924(c) sentences, but 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 sentence for the drug offenses to just one day, still leaving Weldon with fifty-five years of mandatory time.¹⁹⁸ In ruling against Weldon’s motion for a reduced sentence, Judge Cassell noted “an additional 55-year sentence for Mr. Angelos under §924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence-but nonetheless constitutional”¹⁹⁹ He also urged the President to commute Angelos’ sentence.²⁰⁰

A politically palatable legislative solution also would be fairly simple. All that is needed is an Amendment to 924(c) that prohibits an enhanced twenty year mandatory minimum without a prior conviction before the offense date in the current indictment. Similarly, restrictions on what constitutes a “crime of violence” for purposes of the ACCA could be portrayed as a technical adjustment requested by Republican appointees rather than relaxing treatment of career offenders, as could a statute of limitation provision for qualifying felonies.

These two types of gun cases also highlight how misuse of prosecutorial charging discretion creates more extreme and unfair disparity than judicial variances under *Booker*. While Republican appointees are unlikely to support sharp limits on prosecutorial discretion, nevertheless, these cases can be used as part of a re-educational effort by the new Congress to shift scrutiny from judicial discretion to prosecutorial discretion. The cynical use of Triggerlock

¹⁹⁷Angelos was not accused of using or brandishing the weapon during the transactions and he had no prior convictions. Eva Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 538 (2006). Apparently, because Weldon refused the initial plea offer of fifteen years, the prosecutor returned to the grand jury and obtained a new indictment charging twenty counts, including five counts under 924(c). The government obtained convictions on only three of the gun counts. *Id.*

¹⁹⁸The Guidelines otherwise recommended a range of 78-97 months for the drug charges. *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*, D.C. No. 02-CR-708 (PGC) (June 21, 2005). The Tenth Circuit, however, denied Angelos’ appeal. *See United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

¹⁹⁹*Angelos*, 345 F.Supp.2d at 1261. He added, “By and large, the sentences I have been required to impose [under the Guidelines] have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason. 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.” *Id.*

²⁰⁰*Id.* at 1230-31.

gun prosecutions to pad the Justice Department's statistics or the use of multiple §924(c) counts to coerce pleas can shed light on the fact that some prosecutorial charging decisions serve prosecutorial needs rather than the SRA's goals of uniformity and proportionate punishments.²⁰¹ As one of the judges complained, "Congress has been dishonest with the American people. Discretion can't be destroyed, it can only be dispersed."²⁰² Thus, in addition to the legislative proposals outlined above, committee hearings on prosecutorial disparity might be fruitful to counter the pillorying the judicial branch took on the disparity issue under the Republican Congress.²⁰³

V. REPUBLICAN APPOINTEES AND SENTENCING RHETORIC IN THE POST-*BOOKER* ERA.

Nevertheless, sentencing reform, even on the narrow issues outlined above, is still likely to fail if sentencing reformers continue to rely on their rhetoric from the Guidelines era that sentences are too severe and that judges lack sufficient discretion. Unfortunately, this approach is too vulnerable to being branded as soft-on-crime and as advocating for a power hungry judiciary. Thus, in this Part, I argue that sentencing reformers also need to borrow Republican appointee rhetoric to craft their post-*Booker* appeals.

A. PRE-*BOOKER* SENTENCING RHETORIC OF CONFRONTATION.

There are a variety of related theories about why the pre-*Booker* sentencing regime resulted in excessive sentencing severity and unduly restricted judicial discretion. Most contend these problems flowed from an imbalance in institutional competition and as a byproduct of the destructive influence of the politicalization of crime.

The most neutral articulation looks at the differences 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. In passing criminal sanctions, Congress has in its mind the most heinous version of the offense. When an offender meets the technical requirements of the statute, but nevertheless looks very different from the dangerous archetype that Congress had in mind, judges rebel against the required sentence. For example, one Republican judge talked about an older defendant whose business was failing. In desperation he robbed a bank, but then paid his creditors with the proceeds. Although the judge felt the defendant's behavior deserved prison time, his desire to make good on legitimate business debts and his otherwise law abiding life suggested, to this judge, a kind of offender that neither

²⁰¹ See Profile of Judge John C. Coughenour available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (providing an example of where prosecutors did not charge consecutive §924(c) counts but could have).

²⁰² Atlantic Judge 2, Anonymous Interview (Oct. 15, 2002). One Reagan judge scorned that the "Justice Department is the new emperor with regard to disparity." Atlantic Judge 3, Anonymous Interview, (Sept. 6, 2002).

²⁰³ See Profile of Judge Thomas Hull available at <http://faculty.rwu.edu/dzlotnick/judgeprofiles> (involving case where defendant had been released and was successfully reintegrated into society but judge was required to send him back to prison after government won its appeal).

Congress nor the Commission had anticipated.²⁰⁴ Dissonance between offenders targeted and offenders prosecuted also captures many of the judicial complaints about quantity based drug sentencing. As one Republican appointee from an East Coast city put it, "I've yet to see a kingpin. It's usually a guy who controls a couple of blocks who gets a 300-400 month sentence. Whoever controls the drugs on a regional or national level is not in this court."²⁰⁵

Many political scientists and sociologists see a broader political agenda, attributing overly punitive sentencing policy to conservative forces seeking a cure for their perceptions about disintegration of community and traditional American values.²⁰⁶ 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.²⁰⁷ Finally, some focus on the most virulent component of the politicization of crime - the racial aspect. It has been said many times that in the United States, criminal justice and race are deeply intertwined, and therefore, the social construction of crime has been closely tied to negative stereotypes of racial minorities.²⁰⁸ Thus, the fact that crack penalties have disproportionately incarcerated African-Americans involved in the cocaine trade is just the most recent example of the tendency to vilify minority participants in criminal activities.²⁰⁹ And, as Naomi Murakawa has shown, the

²⁰⁴Southern Judge 3, Anonymous Interview (Dec.18, 2002).

²⁰⁵Atlantic Judge 3, Anonymous Interview (Sept. 6, 2002).

²⁰⁶See generally Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW AND SOC. INQUIRY 1111, 1113 (2000). I have argued that the conservative attack on judicial sentencing discretion cannot be fully understood without recognizing that it has been simply a part of a broader far right campaign against the federal judiciary. Thus, a legacy of conservative hostility to the federal courts may be the high-octane fuel that continues to feed the battle between Congress and the judiciary over sentencing policy. It is only from this perspective that congressmen like former House Majority leader Tom Delay feel free to say that federal "judges need to be intimidated. . . . 'They need to uphold the Constitution.' If they don't behave, 'we're going to go after them in a big way.'" Zlotnick, *The War Within the War on Crime*, *supra*, note ___, at 250.

²⁰⁷BARRY 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.

²⁰⁸Dorothy 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).

²⁰⁹While 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).

electoral process tends to reward legislators whose sentencing policies overwhelmingly target disfavored minorities.²¹⁰

Some commentators place more of the blame on federal prosecutors who indict these cases and the rigid Justice Department policies that require pleas to counts that carried long sentences under the Guidelines or mandatory minimum statutes.²¹¹ Thus, it is abusive and politically motivated prosecutorial decision-making that explains the sentences that trouble judges. In other words, if federal prosecutors respected federalism and declined more cases (and offered more realistic plea bargains), most of the judicial complaints about excessive sentences, prosecutorial abuse, and the federalization of crime would disappear.²¹²

William Stuntz has convincingly argued for equal blame, contending 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.²¹³ Both branches, therefore, benefit politically from the broadest definition for each crime, the fewest barriers to conviction, and the more severe sentences.²¹⁴ Thus, when either prosecutors or Congress are unhappy with any subset of sentencing decisions, either can easily obtain a legislative remedy in the form of increased penalties and/or limits on judicial discretion.²¹⁵ In the face of this alliance, there is no place at the table for judicial contentions about over-criminalization or excessive punishment.

However accurate these academic theories may be, framing the sentencing debate as a battle between liberal and conservative or the elected branches versus life tenured appointed judges will continue to be a losing proposition. As the Guidelines era showed, conservatives were enormously successful at making the case for severity, uniformity, and prosecutorial power, while conversely warning that liberal and activist judges had to be constrained to prevent them from undermining the war on crime. Thus, even in a Democratic Congress, sentencing reformers need to shift the rhetorical paradigm of sentencing policy.

B. POST-BOOKER SENTENCING RHETORIC OF PUBLIC SAFETY.

²¹⁰Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 475 (2006).

²¹¹See e.g., Bowman, *Mr. Madison Meets a Time Machine*, *supra*, note ___, at 246.

²¹²Federal 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).

²¹³ See *Id.* at 529-40.

²¹⁴See *id.* at 512-23.

²¹⁵ *Id.* at 533.

Listening to Republican judicial appointees talk about sentencing can yield some ideas for more persuasive post-*Booker* sentencing rhetoric for reformers. First, Republican appointees sound like conservatives when they talk about sentencing policy, despite their dissatisfaction with some percentage of the pre-*Booker* outcomes.²¹⁶ For example, they frequently stated their unequivocal support for the SRA's "truth in sentencing" provisions which abolished independent parole board discretion.²¹⁷ They also generally made a point to articulate their high regard for sentencing uniformity;²¹⁸ and correspondingly, expressed discomfort with sentencing disparities, regardless of the cause.²¹⁹ With regard to sentencing severity, these judges made generalized claims about the importance of law and order and the need for stiff punishment for crime and Republican appointees were more likely to identify areas in which Guideline sentences were not high enough.²²⁰

However, as the profiles in this Article have shown, while these judges care very much about uniformity and just desserts,²²¹ their day-to-day exposure to sentencing actual human beings has

²¹⁶Republican appointees were probably also dissatisfied with a smaller percentage of the Guidelines sentences on their dockets than their Democratic counterparts, although it is hard to quantify this difference. Only a few interviewees were willing to put a number the percentage of sentences with which they agreed. 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). There is one study that suggests that Republican appointees imposed slightly longer Guideline sentences for drug and gun crimes than their Democratic counterparts. Max 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.

²¹⁷"The major contribution of the Sentencing Reform Act is truth in sentencing. Parole board actions were hidden from the public and very 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).

²¹⁸One 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).

²¹⁹"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).

²²⁰Some of these areas tended to be localized issues, often in jurisdictions in which federal judges had authority over traditional crimes of violence such as in Indian country. One of these judges felt that sentences for sex crimes, especially child molestation were not long enough. Western Judge 1, Anonymous Interview (Sept. 30, 2002).

²²¹For Republican judges, however, punishment is more closely linked to moral culpability 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,

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.²²² In addition, while deference to the elected branches is important to them, 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. Thus, in contrast to the elected conservative rhetoric which exclusively emphasized severity, uniformity, and restricting judicial discretion, Republican appointee sentencing philosophy can best be characterized as stressing “public safety.”

Republican appointee rhetoric in these profiles reveals where the pre-*Booker* regime missed the opportunity to advance public safety by acknowledging a need for the proper mix of sentencing goals for the type of offense and offender. For example, for violent offenders, Republican appointees generally state that punishment and incapacitation should be the key considerations.²²³ From a public safety perspective, these offenders present a risk of future harm that is so great that there is no other option but a lengthy sentence. But for non-violent crimes, ranging from drug to firearms to white collar offenses, many Republican appointees wished to have greater ability to consider whether 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 home confinement or a halfway house with work release for those who were supporting a family.²²⁴ Even for drug 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.²²⁵

desperation, or addiction, rather than profit, the resulting Guidelines sentences seemed to be both morally wrong and practically unnecessary.

²²²In fact, the SRA itself directed the Commission and judges to weigh and balance these very same considerations. See 18 U.S.C. §3553(a). Nevertheless, Paul Hofer and Mark Allenbaugh convincingly argue that a modified just desserts regime dominated the Guidelines as a result of the weight given to relevant conduct in computing offense levels and the impact of 1986 mandatory minimums on Guideline sentences for drug offenses. Paul J. Hofer & Mark H. 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).

²²³Virtually every Clinton appointee I interviewed also stressed this same point.

²²⁴Thus, Republican appointees do believe that rehabilitation should remain a sentencing objective for some defendants, especially first time offenders. One judge from a medium size city with significant poverty in the 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, I want to do that but not when its their second or third time through the system.” Atlantic Judge 1, Anonymous Interview (Oct. 15, 2002).

²²⁵A 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

Thus, sentencing reformers can argue that Republican appointees do not seek more sentencing discretion for discretion's sake. Rather, because the Guidelines so often botched the punishment calculus, the pre-*Booker* regime's sentences conflicted with outcomes which would have truly best protected the public. In addition, given their desire for real sentencing uniformity, it is not surprising that the cases that provoked the most anger from Republican appointees were those in which extreme sentences resulted from arbitrary prosecutorial decision-making. Here, judges were faced with a regime that stripped them of discretion in the name of uniformity but then blatantly failed to accomplish that goal with very real and very troubling results. Thus, Republican appointee rhetoric can be used to argue for sentencing policies that do not concentrate too much power in the executive branch.

CONCLUSION

This Article has shown that the lessons of Republican appointees from the mandatory Guidelines are relevant to the pressing sentencing policy today; the role of mandatory minimums, the desirability of a "*Booker* fix" that would again severely curtail judicial discretion, and viable areas for bipartisan sentencing reform legislation. More broadly, the Article also encourages sentencing reformers to use Republican appointee experiences from the Guidelines era to prove that it was not a liberal judiciary, but ideological politicians in Washington who were out of step with mainstream conservative sentencing values during the mandatory Guidelines era.

Moreover, the lessons of these Republican appointees can help to rehabilitate the role that the federal judiciary should play in sentencing policy. Simple common sense suggests that as long term residents of their districts, they understand how and when their community needs the assistance of federal law enforcement. In addition, 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. Moreover, these profiles show that some measure of judicial discretion is necessary; not to impose the judges' personal preferences, but to counter the real danger of prosecutorial overreaching.

Lastly, this Article encourages reformers to adopt the language Republican appointees - the language of public safety - a more compelling rhetoric with which to break the post-*Booker* stalemate. A new sentencing rhetoric based upon the concept of public safety and real, not false uniformity, could provide the theoretical foundation for some of the proposals outlined in Part IV. With this new rhetoric, Congress can break free of the dead-end paradigm that sought severity for severity's sake and uniformity solely through the elimination of judicial discretion and return its eye to the real prize - protecting the public.

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 they when get out. Southern Judge 1, Anonymous Interview (Sept. 4, 2002).

Other conservative voices are now also suggesting that a new direction is necessary. For example, James Q. Wilson and John DiIulio,²²⁶ now agree that the nation has ‘maxed out’ on the public safety value of incarceration, and the “pendulum has now swung too far away from traditional judicial discretion.”²²⁷ In addition, in some state systems, judges and sentencing commissions are trying to tackle sentencing from a public safety perspective in what might be the third wave of sentencing reform in the modern era.²²⁸ Adapting Republican judicial rhetoric can provide political cover for those willing to stand up to reactionary *Booker* fixes as well as the affirmative language necessary to move ahead with meaningful, bipartisan sentencing reform.²²⁹

²²⁶DiIulio was the head of the Bush II 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 Reagan and Bush I.

²²⁷Stuart Taylor, Jr., *Ashcroft and Congress are Pandering to Punitive Instincts*, NATIONAL JOURNAL, Jan. 26, 2004.

²²⁸For example, in the Oregon state system, Judge Michael Marcus on the Circuit Court of, Multnomah County, Oregon, has championed judicial sentencing based upon “public safety”, attempting for example, by mining the data on recidivism, to discover more about what kinds of sentences tend to best protect the public 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 technology centered approach, the Multnomah, Oregon experiment suggests that a new paradigm of sentencing discourse, promoted and championed by judges, is possible.

²²⁹In the past, it is true that Congressional conservatives have turned on federal judges when they have made unpopular decisions or spoken out against the Guidelines regime, such as in the case of Judge Rosenbaum. See Zlotnick, *The War Within the War on Crime*, *supra*, note ___, at 227-28 (discussing the treatment of Judge Rosenbaum). Hopefully, safety in numbers and the fact that these judges did not volunteer for this Report will insulate these judges from that treatment.