



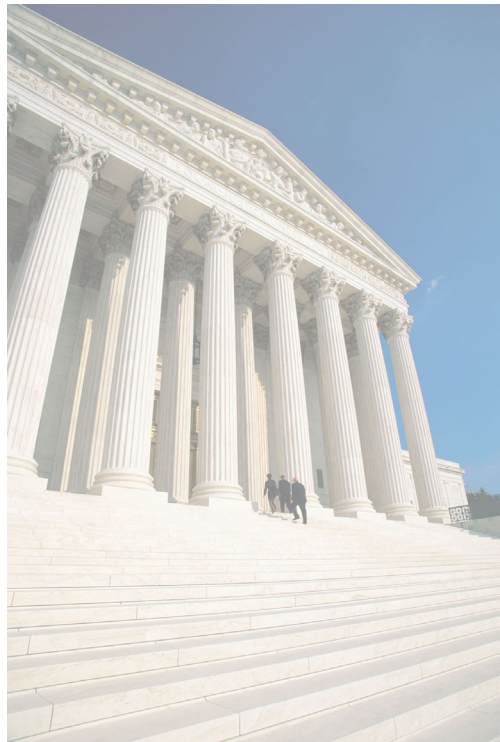
Justice at Stake
c a m p a i g n

Courts...or Calculators?

The Role of Courts in Criminal Sentencing

A JUSTICE AT STAKE ISSUE BRIEF

How politicians are
grabbing the gavel
from our courts of law—



and how a new Supreme
Court case could trigger a
Congressional end run around the
Constitution.

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Criminal Sentencing in Turmoil: The Coming Debate

On October 4, the U.S. Supreme Court will open its term with arguments in two cases, *United States v. Booker* (04-104) and *United States v. Fanfan* (04-105). The decisions could spark the biggest national debate over criminal sentencing in a generation. The case is technical, but the stakes are high: ***Who should select punishments to fit a crime—courts that see the witnesses and the evidence, or politicians preparing for the next election?***

This Justice at Stake Issue Brief:

- reviews the upcoming cases and their drastic implications for federal sentencing,
- explains why courts are best qualified to pick punishments that fit the crime,
- shows how the power to punish criminals is being taken away from our courts of law,
- assesses how federal judges have exercised their sentencing power,
- identifies the political forces gathering for a major national showdown—***and how a political surprise could be on the horizon***, and
- reveals how the attacks on sentencing discretion are part of a broader war on the courts.

The *Booker* and *Fanfan* cases grow out of the Court’s June 24 decision in *Blakely v. Washington*, striking down part of Washington State’s criminal sentencing guidelines. The Court held that the U.S. Constitution’s Sixth Amendment—which guarantees a trial by jury—requires that any fact used to increase a defendant’s sentence beyond the maximum statutory penalty be proven to a jury beyond a reasonable doubt, rather than merely proven to a judge under a weaker standard of proof (a “preponderance of the evidence”).¹

Because the federal government (and many states) use sentencing systems with features similar to the provision struck down in *Blakely*, the constitutionality of parts of the Federal Sentencing Guidelines were immediately thrown into doubt and criminal prosecutions across the nation were sent into sudden turmoil.

Within days of the case, the “Tractor Man”—who snarled D.C. traffic for days sitting on a tractor in the Reflecting Pool, pretending to be armed—was released, because more than four years of his sentence had been based on facts proven to a judge under the lower standard, not to a jury beyond a reasonable doubt. Federal courts began issuing conflicting interpretations.

The Justice Department ordered federal prosecutors to pursue sentences only within statutory ranges for the underlying crimes on which a defendant was convicted, while obtaining on-the-record agreements for alternative sentences that can be imposed once the Court resolves the *Blakely* disputes. To help settle the confusion, the Supreme Court agreed to hear the *Booker* and *Fanfan* cases.

If the Court strikes down the same aspect of the federal sentencing guidelines struck down in Washington state, Congress will be forced to re-debate criminal sentencing from square one—and if the recent war on judicial discretion is any indication, the historic role of the courts in punishing criminals could be in jeopardy.

Why Should Courts Have Discretion to Punish Criminals?

Some politicians and pundits seem to view our courts as the last step in an assembly line, calming fears and soothing anger by shepherding a parade of hardened criminals off to the harshest possible fate. In this world, it's insulting and soft-headed to worry about whether courts have enough discretion to fit punishments to crimes.

But the job of our courts is to deliver *justice*—to sort out the guilty from the innocent, and hand down punishments that fit the crime. Of course, the simplest system would be to put all criminals away for life or execute them, be they tax cheats or murderers. But our system of justice, as spelled out in the Constitution, and built on traditions of human wisdom going all the way back to the ancient Greeks, is predicated on fairness: “let[ting] the punishment match the offense,” as the Roman senator Cicero put it.

Indeed, sentencing is far more art than science—because it calls upon the wisdom, reasoning and sophistication of the human mind, unfettered by politics. Society's demands include retribution, deterrence, incapacitation, restitution and rehabilitation, goals that sometimes conflict with one another. The number of variables in a criminal case can be as rich as life itself, including factors like the defendant's capacity and motive, whether the defendant accepts responsibility, the welfare of the defendant's family, and restitution to the victim. And since most crimes do not carry life sentences, the punishment selected could affect the criminal's chances for rehabilitation when he or she is freed. That's why neutral judges, not prosecutors and politicians, are called upon to craft appropriate sentences.

Indeed, America's founders quite consciously placed the awesome power of determining a criminal's fate in the hands of independent courts. In Federalist No. 78, Hamilton proclaimed the “complete independence” of the judiciary “essential” and observed how rare it was to find individuals who would possess both the appropriate integrity and knowledge to qualify as judges. In Federalist No. 83, he refers to punishments fitting the “circumstances of the case.”

Any time one branch of government seeks to strip another of power, Americans should prick up their ears. Consolidation of power in one place, especially in the service of bumper sticker politics, runs against traditions that keep us free by checking government abuse. Too many politicians are turning the war on crime into a war against the courts.

The Diminishing Power of the Courts to Punish Criminals

Judicial discretion in the sentencing of criminals has been under siege for some time. Before the adoption of the sentencing guidelines, federal judges had virtually unfettered discretion in sentencing convicted criminals, and judges were not required to explain the reasons for the sentences they imposed. Disparities were common—too often based on race—and wild inconsistencies like bank robbers getting sentences ranging from 4 to 40 months enraged conservatives and liberals alike.

Under the Guidelines, mandated by Congress in 1984 and written up by the new U.S. Sentencing Commission in 1987, Congress was to set broad outlines for sentencing criminals, the Commission would write them into principles, and judges would analyze the details of a given case to pick a punishment that fits the crime. In exceptional cases, variations were permitted. Some grumbled that judges were forfeiting too much of their power to an administrative body—the U.S. Sentencing Commission—but a political consensus had developed to reduce disparities by reducing judicial discretion.

But the ink was hardly dry on the guidelines when the politics of crime began whittling them down. The past two decades have seen a succession of mandatory minimums, “three strikes,” and other tough-sounding, one-size-fits-all measures. For example, the latest mandatory minimum, passed this spring, reduces judicial discretion for identify theft offenses.

Consider the words of former federal Judge John S. Martin—also a former prosecutor—who quit the bench in part to protest the Feeney Amendment, delivered in a speech to Justice at Stake:

“The problem arises in large part because Congress legislates for stereotypes while judges impose sentences on real people—and judges see that we are imposing inordinately long sentences on people that simply do not deserve them.”²

Last year, Supreme Court Justice Anthony Kennedy said ‘enough is enough,’ and called upon the American Bar Association to launch a major review of federal sentencing. The current combination of guidelines and mandatory minimum sentences, he argued, irrationally constrain judicial authority in sentencing:

“The policy . . . gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.”³

How the Death of Discretion is a “Prosecutors Paradise”

Last year, what remained of the grand compromise envisioned in the Guidelines was dealt a mortal blow by the “Feeney Amendment,” sharply limiting the ability of federal judges to issue sentences below the guidelines. The Amendment was passed without any hearings, or any effort to seek the views of a single judge. (“It surely improves the legislative process at least to ask the Judiciary its views on such a significant piece of legislation,” observed Chief Justice Rehnquist.)

The Feeney Amendment nearly completed the transfer of sentencing power from one branch to the others: not just from the courts to Congress, but to courtroom prosecutors, many of them young and hungry to build their careers, and who now possess far greater powers to set sentences than Senate-confirmed judges with decades of experience, training and wisdom. For under the Guidelines, it is prosecutors who have been able to pick and choose among charging offenses, dangle plea bargains, and decide whether to seek downward departures based on “substantial assistance” from defendants.

Federal judges are on their way to becoming more stenographer than Solomon. *If the Supreme Court strikes down the federal guidelines, and Congress has to rewrite the federal sentencing system, many people fear that the political addiction to mandatory minimums and other tough-sounding measures will carry the day—and the role of the courts in picking punishments that fit the crime will be further eviscerated.*

The Phony Crisis: Are Federal Judges Out of Control?

Rep. James Sensenbrenner argued that the Feeney Amendment was essential to prevent judges from “giving offenders a slap on the wrist, which is exactly what is happening today with increased frequency.”⁴ *But the world of criminal sentencing has changed since the Guidelines were adopted, and the culture of judging has adapted to them.* The most recent U.S. Sentencing Commission data available shows that in FY 2001, judges granted “non-substantial assistance” downward departures in 10.9 percent of cases.⁵ That’s hardly a crisis; the 2002 downward departure rate in Minnesota, for example, was nearly double that (19 percent).⁶

And of those federal departures, at least 40 percent were initiated by prosecutors. Indeed, the General Accounting Office found that downward sentencing departures were more frequently due to prosecutors’ substantial assistance motions than for any other reason.⁷

The Sentencing Commission reports that almost a third of these (31 percent) were pursuant to plea agreements, prosecutor-initiated “fast track” cases and deportations. An additional 24 percent were justified by “general mitigating circumstances”—most of them stemming from three districts along the Mexican border, most involving foreign defendants. Another 20 percent involved cases where the crime was shown to be a single unplanned act by an otherwise law-abiding person, or where the defendant’s criminal history “score” was shown to exaggerate their actual pattern of prior criminal offenses.

Of course, handcuffing judges is more than a courtroom issue: it leads to patently unjust results. Monica Clyburn is serving 15 years in prison, 200 miles from her four children, after signing a pawnshop slip for her boyfriend’s gun to raise \$30. Because she’d been caught selling three \$20 rocks of cocaine to an undercover officer three years before, she was a “felon in possession of a firearm.” (Cost to taxpayers: over \$300,000.)⁸ Kemba Smith, a college student without any prior felonies, was given a 24 year sentence for involvement in her boyfriend’s drug ring—even though prosecutors said she never used, held, or sold drugs. She served nearly seven years in prison before the President commuted her sentence. (Cost to taxpayers: almost \$154,000).⁹

The war on the courts has hit minorities the hardest. Of those receiving mandatory sentences in 1999, 39 percent were Hispanic, 38 percent African American, and only 23 percent were whites.¹⁰ African Americans constitute 59 percent of those convicted of drug offenses, but because they are less likely to strike a favorable plea bargain with prosecutors they constitute 74 percent of those sentenced to prison for such offenses.¹¹ Indeed, African American males sentenced in state courts on drug felonies receive prison sentences 52 percent of the time, while white males get hard time only 34 percent of the time.¹²

The war on judges is also affecting white-collar defendants. Most white-collar offenders serve terms of 18 months or less. Fines are widely believed to be the most potent deterrent to boardroom crimes,¹³ but lock-'em-up politics—including statutes like the 2002 Sarbanes-Oxley Act—have ramped up the penalties.¹⁴ Consider the cases of Jamie Olis, a mid-level tax accountant at a company called Dynegy. He and two colleagues engaged in an accounting gimmick later deemed illegal (even though it might have been permissible prior to the Enron case). When Dynegy restated its results, all three were indicted. Olis's two colleagues pled guilty and each received five years. But Olis was convicted at trial and sentenced to more than 24 years in federal prison, mostly because the size of Dynegy, with its multitude of investors, meant that even minor flaws in accounting practices could have caused the scope of financial losses that increase sentences under the Guidelines.

The Politics of Sentencing: Seven New Reasons Why the Tide Could Turn

Of course, the political conventional wisdom insists that no office-seeker can go wrong by running against judges and being tougher on crime. Indeed, Bill Clinton recaptured the presidency for his party after three Republican terms and went on to re-election in part by supporting the death penalty, more police and a massive crime bill—and browbeating one of his own judges for excluding evidence in a criminal case.

But pundits beware: the politics of crime are changing. Being tough on lawbreakers isn't going out of style any time soon, and no one favors more crime or punishing anyone less than they actually deserve. But counterforces are gathering—seven political factors emerging as part of a backlash against decades of one-size-fits-all crime policy:

1. *States are showing how to make balanced crime-fighting policies work:* Reflexively harsh sentencing policies are being rethought, as alternatives like drug treatment are gathering strength. Louisiana has eliminated mandatory minimums for nonviolent crimes and narrowed its “three strikes” policy to require that all three “strikes” be for violent offenses. Mississippi is permitting limited parole after one quarter of a sentence is served. North Dakota has eliminated mandatory minimum sentences for first-time drug offenders, and Connecticut is allowing judges to waive them for certain non-violent drug crimes. Hawaii has mandated drug treatment instead of prison time for first-time drug possessors who have not been convicted of violent felonies in the previous five years.
2. *Conservatives are stepping forward:* Supreme Court Justice Anthony Kennedy invoked the Biblical promise of mitigation at judgment for those who aid prisoners and plainly stated, **“Our resources are misspent, our punishments too severe, our sentences too long.”**¹⁵ The Cato Institute's Erik Luna calls the Guidelines “unfair and unworkable” for their overly harsh and mechanical application devoid of moral reckoning.¹⁶

3. *Harsh white-collar sentences are bringing new constituencies to the table:* Business groups, who have typically been either disinterested in criminal policy issues or aligned with supporters of a “tough-on-crime” agenda, are protesting the harshness of sentences now that they are being applied to regulatory violations. For example, groups like the Washington Legal Foundation are attacking the lack of judicial discretion to reduce sentences for business executives.
4. *Minorities are dead serious about reform:* For example, the Leadership Conference on Civil Rights has released a major report on racial disparities in sentencing that prevail even after the advent of the Federal Sentencing Guidelines, and has said that civil rights must be at the heart of any debate over restructuring the sentencing system.
5. *The public is more open-minded than politicians think:* The public understands that the “tough on crime,” prison-oriented strategies of the 1990s have real limits and real failings. According to a 2001 poll conducted by Peter D. Hart Research Associates, 75 percent of Americans believe that nonviolent offenders should be sentenced to supervised community service or probation instead of prison. 54 percent believe that prevention and rehabilitation should be the highest priority method of dealing with crime, ahead of punishment and enforcement, and 66 percent believe that rehabilitation of prisoners through education and job training is the best way to reduce crime. ***Only 38 percent of Americans favor mandatory sentences, while 45 percent believe that judges should have the discretion to craft appropriate sentences.*** 76 percent support supervised mandatory drug treatment and community service instead of prison for drug possession, while 71 percent support such a course of action even for minor drug sales.
6. *Unbalanced crime policies have spawned political opposition:* Groups like Families Against Mandatory Minimums, The November Coalition, The Center on Juvenile and Criminal Justice, and Citizens United for Rehabilitation of Errants are organizing Americans outraged when they learn how out of balance the system has become.
7. *Hardened crime-fighters are rethinking their approaches:* At the end of his two terms, one of President Clinton’s commutations went to Kemba Smith, the college student sentenced to 24 years for transporting drugs under threat of harm to herself and parents by her abusive boyfriend. Even tough Texas prosecutors like Williamson County D.A. John Bradley helped craft a new consensus for increased treatment of nonviolent offenders and greater judicial discretion in the imposition of sentences.¹⁷

Are handcuffed judges and mandatory minimums here forever? Consider the conventional wisdom of the early 1930s, as pointed out by Cato Institute scholar and University of Utah Professor Erik Luna: “There is as much chance of repealing [Prohibition] as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail.”¹⁸

Conclusion: The Growing War on the Courts

Attacks on sentencing discretion are part of a broader war on the courts that protect our rights, and the judges who uphold the Constitution. Congress periodically engages in waves of “court-stripping,” often to punish the courts for particular rulings on hot-button social issues. After the Supreme Court’s 1954 *Brown v. Board of Education* decision that school segregation violated the Constitution, furious lawmakers sought to exempt federal courts from ruling on public education laws. During the 1960s and 1970s, issues like the draft, Miranda warnings, busing, school prayer and abortion sparked efforts to cut the courts’ power to hold laws up to the standards of our Constitution.

In the 1990s, Congress passed legislation curbing judicial review in cases involving the death penalty, asylum, deportation, and prison conditions. The 2001 Patriot Act reduced judicial discretion to review law enforcement efforts to detain suspects, monitor private Internet communications, obtain certain personal records and share wiretaps with intelligence agencies.

There’s no shortage of recent proposals, sometimes aimed at evils not quite as weighty as crime or terrorism. The House of Representatives recently passed a measure that would strip federal court jurisdiction to rule on challenges to the Pledge of Allegiance. The “Constitution Restoration Act” would deny federal courts the power to hear any suit involving a governmental official’s “acknowledgment of God as the sovereign source of law, liberty, or government.” (For good measure, any judge caught exceeding his or her jurisdiction could be impeached.) A separate measure would allow Congress to reverse any Supreme Court decision that struck down a law on constitutional grounds, lowering the curtain on two centuries of judicial review. The “Marriage Protection Act” singles out one law (the Defense of Marriage Act) for special treatment, exempting it from any review by the federal courts.

Of course, judges are handy election-year targets: they have to make unpopular decisions and they don’t fight back on cable talk shows. Indeed, Congressman John Hostettler recently boasted that the Marriage Protection Act provides a “great political window of opportunity into what Congress can do to limit the courts.” Some lawmakers have begun to talk more openly of impeaching judges they don’t like.

Courts shouldn’t be immune from criticism and controversy. But our founders gave judges a special job—to protect the Constitution, and decide cases based on the facts and the law, not pressure and politics. Tearing down the courts that protect our rights can only weaken the American judicial system that Chief Justice Rehnquist calls the “crown jewel” of our democracy.

Justice at Stake is a nonpartisan national campaign of more than 40 partners working to keep our courts fair, impartial and independent, and to protect the courts that protect our rights. The positions and policies of Justice at Stake and its campaign partners are their own, and do not necessarily reflect those of other campaign partners.

Resources for Reform: Finding Out More

JUSTICE AT STAKE PARTNERS

American Bar Association Standing Committee on Judicial Independence:

<http://www.abanet.org/judind/home.html>

Brennan Center for Justice:

<http://www.brennancenter.org>

The Constitution Project:

<http://www.constitutionproject.org>

National Center for State Courts:

<http://www.ncsconline.org/>

OTHER ORGANIZATIONS

Administrative Office of the US Courts

<http://www.uscourts.gov/adminoff.html>

American Bar Association Justice Anthony Kennedy Commission

<http://www.abavideonews.org/ABA288/index.htm>

CATO Institute – Federal Sentencing Guidelines Research

<http://www.cato.org/research/criminal-justice/guidelines.html>

Families Against Mandatory Minimums (FAMM)

<http://www.famm.org/index2.htm>

National Association of Criminal Defense Lawyers

<http://www.criminaljustice.org/public.nsf/freeform/publicwelcome?opendocument>

The November Coalition

<http://www.november.org/index.html>

Prison Policy Initiative

<http://www.prisonpolicy.org/>

Sentencing Law and Policy Blog

(maintained by Douglas Berman of the Moritz College of Law at Ohio State University):

http://sentencing.typepad.com/sentencing_law_and_policy/

The Sentencing Project:

<http://www.sentencingproject.org/>

U.S. Sentencing Commission

<http://www.ussc.gov/>

Vera Institute of Justice Sentencing and Corrections Project

http://www.vera.org/section3/section3_1.asp

Washington Legal Foundation

<http://www.wlf.org>

ENDNOTES

¹ *Blakely* redefines “statutory maximum” for these purposes as the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” It is currently unclear whether *Blakely* applies to a wide range of sentencing schemes or only a few narrow types. See *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004).

² Judge John S. Martin. “Speech to the 2004 Justice at Stake Summer Workshop.” Justice at Stake Summer Workshop. Phoenix Park Hotel, Washington, DC. 13 July, 2004.
<<http://justiceatstake.org/files/JudgeMartinRemarks.pdf>>.

³ Justice Anthony Kennedy. “Speech at the American Bar Association Annual Meeting: An Address by Anthony M. Kennedy.” American Bar Association Annual Meeting. Moscone Center. San Francisco. 9 Aug. 2003.
<<http://abanews.org/kencomm/amkspeech03.html>>.

⁴ *Cong. Record*. 10 April, 2003: H3066.

⁵ United States Sentencing Commission, *Downward Departures From the Federal Sentencing Guidelines*, November 2003. The Commission excludes “substantial assistance” departures, where a defendant helps law enforcement with another investigation or prosecution.

⁶ Minnesota Sentencing Guidelines Commission, *2002 Sentencing Departure Data*, March, 2004.

⁷ General Accounting Office, *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1991-2001*, 24 October 2003.

⁸ *Profiles of Injustice: Monica Clyburn*. 2002. Families Against Mandatory Minimums. 21 Sept. 2004
<http://www.famm.org/Federal%20prisoner%20profiles%20women/monica_clyburn_profile.htm>.

⁹ *Where Have All the Young Men Gone? The Impact of Mandatory Minimum Sentences on African American Citizens*. 20 Jan. 2002. Families Against Mandatory Minimums. 21 Sept. 2004
<<http://www.famm.org/pdfs/GENERAL%20WHATYMG%20Jan%202002.pdf>>.

¹⁰ United States. Cong. House. Committee on Governmental Reform, Subcommittee on Criminal Justice. *Testimony of John Steer, vice chair, U.S. Sentencing Commission*. Hearing, 11 May, 2000. 106th Cong., 2nd sess.

¹¹ Weich, Ronald H. and Carlos T. Angulo. *Justice on Trial: Racial Disparities in the American Criminal Justice System*. 2002, p. 27. Leadership Conference on Civil Rights and Leadership Conference Education Fund. 21 Sept. 2004 <<http://www.civilrights.org/publications/reports/cj/justice.pdf>>.

¹² Weich & Angulo, p. 24.

¹³ Kahan, Dan M. and Posner, Eric. “Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines,” 42 *Journal of Law and Economics* 365, p. 384 (1999).

¹⁴ See generally 18 U.S.C. App. § 2B1.1, 18 U.S.C. § 1349, 18 U.S.C. § 1341.

¹⁵ Justice Anthony Kennedy. “Speech at the American Bar Association Annual Meeting: An Address by Anthony M. Kennedy.” American Bar Association Annual Meeting. Moscone Center. San Francisco. 9 Aug. 2003.
<<http://abanews.org/kencomm/amkspeech03.html>>.

¹⁶ Luna, Erik. *Policy Analysis No. 458: Misguided Guidelines: A Critique of Federal Sentencing*. 1 Nov. 2002. p. 1. Cato Institute. 21 Sept. 2004. <<http://www.cato.org/pubs/pas/pa458.pdf>>

¹⁷ Caher, John. *Texas Prosecutor Takes Aim at NY Drug Laws*. 23 April 2004. Law.com. 21 Sept. 2004
<<http://www.law.com/jsp/article.jsp?id=1082571458663>>.

¹⁸ Luna, p. 19.

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