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February 9, 2005

The Honorable Howard Coble, Chairman
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
2468 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert Scott, Ranking Member
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
2464 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble and Congressman Scott:

We write as the co-chairs of a Sentencing Initiative established by the Constitution Project, a bipartisan nonprofit organization that seeks consensus-based solutions to difficult legal and constitutional issues through careful study, wide-ranging consultation, and policy advocacy. As Congress considers the appropriate response to the Supreme Court's decision in *United States v. Booker*, we respectfully urge caution. *Booker* raises important and complicated questions for the future of the federal criminal justice system. We believe that a period of careful study and deliberation, rather than any immediate legislative action, is most likely to lead to a stable, just, and effective federal sentencing system.

The Constitution Project established the Sentencing Initiative after the Supreme Court's decision last June in *Blakely v. Washington* called into question the constitutionality of the federal sentencing guidelines. The Sentencing Initiative brought together a group representing a broad cross-section of institutional interests and political views. Each member has long experience in American criminal justice and special expertise in the challenges facing federal and state criminal sentencing systems. We have enclosed a list and brief biographies of our membership.

Congress should respond to the *Booker* decision with caution for at least four reasons. First, *although Booker is a complicated decision that leaves a number of important questions unanswered, the federal courts are addressing these questions expeditiously, federal sentencings are proceeding with little obvious*

disruption, and the federal sentencing system is not in immediate crisis. The *Booker* decision renders the federal sentencing guidelines “effectively advisory.”¹ Nonetheless, under the Sentencing Reform Act and *Booker*, judges are obliged to calculate and carefully consider the appropriate sentencing guidelines range, along with other statutory directives, such as the need to avoid unwarranted sentencing disparities. Judges must explain their sentences, which are reviewable on appeal for reasonableness. It is therefore far too early to conclude that sentences imposed after *Booker* will differ very much from those that would have been imposed under the pre-*Booker* guidelines system.

Second, *precisely because Booker is complicated and leaves important questions unresolved, Congress should be cautious about legislating on such uncertain constitutional ground.* After the post-*Booker* sentencing system develops more fully, Congress might decide that it represents an effective, sensible modification of the pre-existing guidelines regime. On the other hand, Congress might decide to enact legislation changing the current structure. If Congress decides to act, the most basic requirement for a new system is reasonable certainty that it will survive constitutional challenge. The *Blakely* decision precipitated seven months of uncertainty for federal courts and criminal litigants. If a new statutory system were enacted to replace the system of advisory guidelines authorized by *Booker*, only to be overturned after considerable litigation, the uncertainty and disruption experienced between *Blakely* and *Booker* would be immeasurably compounded.

Third, *any legislative response to Booker that does not suffer from constitutional uncertainty would require significant modifications of the current federal sentencing system and would thus require substantial time for careful study, drafting, consultation, and refinement.* Realistically, significant revision and simplification of the existing federal guidelines and associated statutes and court rules would require broad consultation among Congress, the Justice Department, judges, defense attorneys, and others concerned with federal sentencing. Such a project could not be accomplished immediately. It would require time, resources, and careful thought.

The fourth reason for caution is that *Congress should treat the Booker decision as an opening to address some long-term problems with the federal sentencing system.* Our committee’s deliberations to this point have identified significant structural problems with the federal sentencing guidelines. We will be issuing a detailed report, but we can summarize our general conclusions. Although sentencing guidelines represent one of the great advancements in criminal justice in the past several decades, the federal guidelines have not been nearly as successful as many state guidelines systems. This is principally because the federal sentencing guidelines, at least as they existed before *Booker*, have been overly complex and rigid, rely too heavily on quantifiable factors and not enough on other important measures of culpability, are based on a problematic system of “relevant conduct,” and have produced distortions in the optimal division of sentencing authority among various institutional actors.

¹United States v. Booker, 125 S.Ct. 738, 757 (2005).

Booker presents an unparalleled opportunity for carefully examining the guidelines and working towards major improvements. We hope Congress will proceed cautiously in order to take advantage of that opportunity and will resist adopting any “quick fix,” such as “topless guidelines,” which is inconsistent with the concerns we have raised in this letter. The Constitution Project is working toward presenting Congress and other interested parties a set of recommendations for appropriate responses to the *Booker* decision and significant improvements of the federal sentencing system. We hope our efforts will be of assistance to Congress as it carries out its work, and we invite you to call on us at any time.

Respectfully,



Edwin Meese, III



Philip Heymann

Enclosures

Cc: Members, Subcommittee on Crime, Terrorism, and Homeland Security