

POWER, POLICY, AND PRACTICE: THE DEPARTMENT OF JUSTICE'S PLEA BARGAIN POLICY AS APPLIED TO THE FEDERAL PROSECUTOR'S POWER UNDER THE UNITED STATES SENTENCING GUIDELINES¹

I. INTRODUCTION

The overall objective of the Sentencing Reform Act of 1984² was to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”³ Inherent in this broad aim were three sub-goals: honesty, uniformity, and proportionality of sentencing.⁴ Before the U.S. Sentencing Guidelines⁵ were enacted, an offender’s sentence appeared to be largely dependent upon the particular judge imposing the punishment—rather than the crime committed.⁶ As a result of the disparate sentences imposed by different judges for similar crimes, the public began to voice its displeasure with what it perceived as the lenient and unpredictable sentencing practices of federal judges. The Sentencing Guidelines were enacted in 1984 to curtail the federal judiciary’s discretionary power with regards to sentencing, thereby ensuring that roughly the same sentence was imposed for offenses committed under similar circumstances.⁷

While the main focus of the Sentencing Guidelines appeared to be narrowing judicial discretion in sentencing, some critics argued that the Sentencing Guidelines merely shifted the federal judges’ discretionary power to

1. On January 12, 2005, the Supreme Court upheld the overall constitutionality of the United States Sentencing Guidelines (U.S.S.G.) while invalidating two important aspects of the guidelines with its ruling in *United States v. Booker*, 125 S. Ct. 738 (2005). First, the Court held that, because 18 U.S.C. § 3553(b)(1) (requiring federal courts to impose a sentence within the range prescribed by the defendant’s conduct absent circumstances warranting a departure) is incompatible with the Sixth Amendment’s right to a jury trial, that provision must be severed from the U.S.S.G. *Booker*, 125 S. Ct. at 764. Second, the Court ruled that 18 U.S.C. § 3742(c) (requiring the de novo standard of review on appeal for sentencing departures) must also be excised. *Id.* Because the purpose of § 3742(e) was to “make Guidelines sentencing even more mandatory that it had been,” and the Guidelines are no longer mandatory, the Court found that § 3742(e) had “ceased to be relevant.” *Id.* at 765. The Court reinstated the “unreasonableness” standard of review that predated the PROTECT Act’s implementation of the de novo standard of review. *Id.* at 765-66; see *infra* Part IV.A. This Comment will refer to both the “pre-*Booker*” Sentencing Guidelines and the Guidelines as they stand after *Booker*.

2. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

3. THOMAS W. HUTCHISON ET AL., *FEDERAL SENTENCING LAW & PRACTICE* 2 (2003).

4. *Id.*

5. U.S. SENTENCING GUIDELINES MANUAL (2003) [hereinafter U.S.S.G.].

6. Edward Lazarus, *Ashcroft’s New Charging, Plea Bargaining, and Sentencing Policies: Consideration Necessary, but Criticism Overstated* (Oct. 3, 2003), at <http://www.cnn.com/2003/LAW/10/03/finclaw.analysis.lazarus.ashcroft/>.

7. HUTCHISON, *supra* note 3, at 2.

federal prosecutors. Until the Supreme Court recent decision in *United States v. Booker*,⁸ the sentence given depended more on what was charged than on a judge's assessment of what sentence was appropriate.⁹ Nonetheless, under the present Sentencing Guidelines, federal prosecutors have broad discretionary powers in charging a defendant and recommending a sentence if the defendant is convicted. Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file.¹⁰ Because many criminal acts potentially involve a number of offenses—the sentences for which vary (sometimes greatly)—the prosecutor's decision as to which “base offense” to charge could have an enormous impact on the length of the sentence imposed.¹¹ For example, suppose a man assaults his ex-girlfriend's new boyfriend in an alley, and the new boyfriend sustains permanent bodily injury as a result of the beating. Depending on the facts and circumstances surrounding the assault, the prosecutor may charge the ex-boyfriend with “assault with intent to commit murder” under section 2A2.1 of the Sentencing Guidelines, or “aggravated assault” under section 2A2.2.¹² The base offense level for assault with intent to commit murder is 22 (assuming “the object of the offense would [not] have constituted first degree murder”), and the new boyfriend's permanent bodily injury increases the offense level score to 26.¹³ On the other hand, the base offense level for aggravated assault is 15, with an increase of six for the permanent injury. Thus, the offense level scores for the two charges differ by five, which translates roughly to a two-year difference in the sentence imposed.¹⁴

The federal prosecutor also has the power to decide which, if any, aggravating factors will be presented to the court.¹⁵ The totality of the prosecutor's decisions as to which offenses will be charged and which aggravating factors to present points to one sentencing range.¹⁶ If the defendant is convicted, the presiding judge should sentence the offender to a term of years within that range, unless the judge feels that a departure from the Sentencing Guidelines is warranted.¹⁷ Thus, the prosecutor's power on many

8. 125 S. Ct. 738 (2005).

9. Lynne Goodstein & John H. Kramer, *Case Processing and the Federal Sentencing Guidelines*, in *THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE* 111, 118 (Dean J. Champion ed., 1989) [hereinafter *GUIDELINES*].

10. Kay A. Knapp & Denis J. Hauptly, *U.S. Sentencing Guidelines in Perspective: A Theoretical Background and Overview*, in *GUIDELINES*, *supra* note 9, at 3, 13.

11. *Id.*

12. U.S.S.G., *supra* note 5, §§ 2A2.1, 2A2.2; HUTCHISON, *supra* note 3, at 180, 185.

13. U.S.S.G., *supra* note 5, § 2A2.1.

14. *Id.* at 2A2.2; HUTCHISON, *supra* note 3, at 1423. The sentencing range for aggravated assault with no prior convictions (as in this scenario) is between 37 and 46 months. Conversely, the sentencing range for assault with intent to commit murder (with no prior convictions) is between 63-78 months. HUTCHISON, *supra* note 3, at 1423.

15. Knapp, *supra* note 10, at 13; *see infra* Part II.

16. Knapp, *supra* note 10, at 13.

17. *Id.* Before *Booker*, judges were bound to apply a sentence within the specified range. Now, however, the Guidelines are no longer mandatory, and judges may use their discretion when imposing sentences. Departures from the Guidelines are reviewed for unreasonableness. *See Booker*, 125 S. Ct. at

levels of criminal proceedings, such as deciding whether to press charges, the level of the charge, and whether to reduce the charge, seemingly makes the federal prosecutor the most powerful actor in the criminal justice system.¹⁸

This Comment will address the intersection of a federal prosecutor's duties under the September 22, 2003, plea bargaining Memorandum issued by the Department of Justice (DOJ) and a prosecutor's power under the Sentencing Guidelines. Part II of this Comment deals with the role of the federal prosecutor under the Sentencing Guidelines. Part III addresses the Memorandum. Part IV examines the practical implications of the DOJ Memorandum on the role of the federal prosecutor in the criminal justice system. Part V concludes the Comment.

II. THE U.S. SENTENCING GUIDELINES AND THE ROLE OF THE FEDERAL PROSECUTOR

In order to fully understand a federal prosecutor's power, it is helpful to first gain a working knowledge of the basic mechanics and proper application of the U.S. Sentencing Guidelines. Under the Sentencing Guidelines, every felony "has a corresponding range of months of incarceration established by the [Sentencing] Commission."¹⁹ Every offense has a "base level" score,²⁰ to which levels can be added or subtracted. The final calculation of these points results in an offense level score. The offense level is primarily determined by examining certain facts and circumstances surrounding the alleged offense. The factors that influence a defendant's overall offense level are referred to as instances of "relevant conduct."²¹ Examples of "relevant conduct" include the "degree of bodily injury inflicted, value of property taken or damaged, the type of victim selected, and the degree of planning involved."²²

To illustrate, section 2A3.1 of the Sentencing Guidelines addresses "criminal sexual abuse; attempt to commit criminal sexual abuse."²³ The base offense level for criminal sexual abuse is twenty-seven. Under section 2A3.1(b)(2)(A), if the victim was under the age of 12 at the time of the offense, the offense level is increased by four.²⁴ Alternately, if the victim was between the ages of 12 and 16, the offense level is increased by two.²⁵ Furthermore, if the offender kidnapped the victim, the score is increased by

767.

18. *Id.* at 13.

19. Ellen Hochstedler Steury, *Prosecutorial and Judicial Discretion*, in GUIDELINES, *supra* note 9, at 93, 94-95.

20. *Id.* at 95. The prosecution establishes aggravating factors through a "presentence report," which is "independent of the information offered by the prosecutor or stipulated in a plea agreement." *Id.*

21. U.S.S.G., *supra* note 5, § 1B1.3; HUTCHISON, *supra* note 3, at 65-117.

22. Steury, *supra* note 19, at 95.

23. U.S.S.G., *supra* note 5, § 2A3.1; HUTCHISON, *supra* note 3, at 199.

24. U.S.S.G., *supra* note 5, § 2A3.1(b)(2)(A).

25. *Id.* § 2A3.1(b)(2)(B).

four levels.²⁶ Additionally, “knowing misrepresentation” of the offender’s identity or use of a computer or other device capable of accessing the internet “to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct,” will increase the offense level by two.²⁷ Therefore, if the offender sexually abused a minor under the age of 12 by enticing the minor over the internet, and then kidnapping the child, the total offense level would be 37.

Although the federal courts were generally constrained by the sentencing ranges provided by the pre-*Booker* Sentencing Guidelines, the courts could add or subtract points from the base level score when the prosecution established certain aggravating factors.²⁸ For example, if a death resulted from the commission of the offense, “the court [could] increase the sentence above the authorized guideline range.”²⁹ Conversely, if the court found that the victim’s “wrongful conduct” played a considerable role in inciting the defendant’s criminal behavior, then the court could decrease the sentence to a term of years below the guideline range “to reflect the nature and circumstances of the offense.”³⁰ Under the post-*Booker* Guidelines, the sentencing court must still consider the applicable Guideline range. However, the court is now free to “tailor the sentence in light of other statutory concerns as well.”³¹

In conjunction with the offense level score, each defendant is also assigned a criminal history score.³² The criminal history score takes into account the “number, length, and recency of prior sentences.”³³ Once calculated, the criminal history score is “cross-tabulated” with the offense level scores, generating the appropriate sentencing range.³⁴

While the sentencing judge considers a number of factors that could potentially increase a defendant’s sentence, there are a number of factors within the control of either the prosecutor or defendant (or both) that can decrease the offender’s sentence. First, if the “defendant demonstrates ‘acceptance of responsibility for the crime,’” the court may subtract two points from the offense score.³⁵ Second, according to section 5K1.1 of the Sentencing Guidelines, the court may grant a downward departure from the guidelines if the defendant has provided “substantial assistance” to the “investigation or prosecution of another person who has committed an offense.”³⁶

26. *Id.* § 2A3.1(b)(5).

27. *Id.* § 2A3.1(b)(6).

28. Steury, *supra* note 19, at 95.

29. U.S.S.G., *supra* note 5, § 5K2.1; HUTCHISON, *supra* note 3, at 1617.

30. U.S.S.G., *supra* note 5, § 5K2.10.

31. *Booker*, 125 S. Ct. at 757; *see* 18 U.S.C. § 3553(a) (Supp. 2004).

32. Steury, *supra* note 19, at 95.

33. *Id.*

34. *Id.*

35. *Id.*

36. U.S.S.G., *supra* note 5, § 5K1.1; HUTCHISON, *supra* note 3, at 1607-08. Section 5K1.1 states: Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Section 5K1.1 makes it fairly evident that the prosecutor is largely responsible for demonstrating the extent to which a defendant's "assistance" has aided in the prosecution of another person.³⁷ Therefore, the prosecutor has the power to effect a substantial reduction in the defendant's sentence—but only if the defendant fully cooperates.

Though the prosecutor has some measurable power during the sentencing portion of the trial, she has far greater discretionary authority during the charging phase of a criminal proceeding. For example, U.S. Attorneys often use "charge bargaining" to clear cases quickly, or to induce a defendant to plead guilty in exchange for a lighter sentence.³⁸ "Charge bargaining" is a term used to describe the negotiation process between the prosecutor and defendant where the prosecutor agrees to charge the defendant with a more modest offense in order to obtain a guilty plea.³⁹ For example, if a defendant is arrested for possession of fifteen grams of heroin, the prosecutor could charge the defendant with "unlawful possession," which carries a lower base offense level score, rather than "unlawful manufacturing, importing, exporting, or trafficking."⁴⁰

Next, prosecutors have been known to use "fact bargaining" by persuading a defendant to plead guilty and "stipulate to certain facts related to the offense."⁴¹ In this situation, even if the prosecutor has evidence to support a more serious charge, the defendant will be permitted to stipulate to a "less serious" criminal offense carrying a lighter sentence.⁴² Fact bargaining is particularly useful where the crime involves a number of aggravating factors that would increase the base offense level dramatically. For instance, even if a prosecutor could readily prove that a defendant was caught with 15 grams of heroin, the defendant may be allowed to stipulate that the quantity of heroin was nine grams in exchange for a guilty plea.⁴³ To illustrate, suppose that the defendant was caught with 15 grams of heroin and had used a

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

U.S.S.G., *supra* note 5, § 5K1.1.

37. See Steury, *supra* note 19, at 95.

38. Goodstein & Kramer, *supra* note 9, at 111, 119.

39. Edward Lazarus, *Ashcroft's New Charging, Plea Bargaining, and Sentencing Policies* (Oct. 3, 2003), at <http://www.cnn.com/2003/LAW/10/03/findlaw.analysis.lazarus.ashcroft/>.

40. HUTCHISON, *supra* note 3, at 391, 531; Goodstein & Kramer, *supra* note 8, at 119. Compare U.S.S.G., *supra* note 5, § 2D2.1 with U.S.S.G., *supra* note 5, § 2D1.1.

41. Goodstein & Kramer, *supra* note 9, at 120. Fact bargaining is not permitted under the DOJ memo. See *infra* Part III(B).

42. Goodstein & Kramer, *supra* note 9, at 120.

43. *Id.*

minor to traffic the heroin within one thousand feet of a school yard.⁴⁴ The drug quantity would double once for the minor trafficking, and again for the school yard violation.⁴⁵ Thus, if the defendant was charged for 15 grams of heroin, the sentence would be computed as follows: $15 \text{ g.} \times 2$ (youth enhancement) = $30 \text{ g.} \times 2$ (1,000 ft. from school) = 60 g. ⁴⁶ The base offense level for sixty grams of heroin is 22.⁴⁷ If we assume further that the defendant has no prior convictions, the sentencing range would be between 41 and 51 months.⁴⁸ However, if the prosecutor permits the defendant to stipulate that only nine grams were involved, then the sentence would be computed as follows: $9 \text{ g.} \times 2$ (youth enhancement) = $18 \text{ g.} \times 2$ (1,000 ft. from school) = 36 g. ⁴⁹ If the defendant has no prior convictions, the base offense level would be 18, and the sentence would be between 27 and 33 months.⁵⁰

A final tool used by prosecutors is "guidelines bargaining."⁵¹ Under the Sentencing Guidelines, considerable discretionary power is afforded prosecutors when it comes to interpreting certain issues relevant to the determination of the defendant's offense level. For example, an offender's "acceptance of responsibility" can lead to a reduction of two levels.⁵² However, a plea of guilty does not automatically trigger this reduction.⁵³ Even though the prosecutor is technically required to assess whether or not the defendant has actually "accepted responsibility," the acceptance of responsibility reduction is a tool used by prosecutors to induce a guilty plea.⁵⁴

As illustrated, federal prosecutors have had considerable power under the Sentencing Guidelines to date. However, the powers related to plea-bargaining were revisited and clarified in a recent memorandum issued by the Department of Justice.

III. THE DEPARTMENT OF JUSTICE'S POLICY

On Monday, September 22, 2003, in an effort to bring the federal prosecutors back within the uniform framework of punishment first envisioned by Congress, former Attorney General John Ashcroft released a memorandum to the 94 U.S. Attorneys outlining the official policy of the DOJ regarding the enforcement of criminal law. The Memorandum has two main parts. First, the Memorandum discusses the DOJ's policy on the charging and prosecution of crimes.⁵⁵ Next, the Memorandum addresses the

44. *Id.* at 114.

45. *Id.* at 114.

46. *Id.* at 115.

47. *Id.*; U.S.S.G., *supra* note 5, § 2D1.1.

48. Goodstein & Kramer, *supra* note 9, at 115.

49. *Id.* at 120.

50. *Id.* at 114-15, 120.

51. *Id.* at 120.

52. *Id.*

53. *Id.* at 121.

54. *Id.*

55. Memorandum from United States Attorney General John Ashcroft, to all Federal Prosecutors 2-

DOJ's stance on plea agreements.⁵⁶ This Comment will address each portion of the DOJ Memorandum below.

A. *Part I: The Charging and Prosecution of Criminal Offenses*

Part I of the Memorandum affirmatively states that federal prosecutors have a “general duty to charge and to pursue the *most serious, readily provable offense* in all federal prosecutions.”⁵⁷ The “most serious” offense is defined as the offense that “generate[s] the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.”⁵⁸ For an offense to be “readily provable,” the prosecutor must not have “a good faith doubt, for legal or evidentiary reasons, as to the government’s ability readily to prove a charge at trial.”⁵⁹ In addition to this general duty, the Memorandum makes it clear that prosecutors should not charge a defendant “simply to exert leverage to induce a plea,” because once filed, charges cannot be dismissed, unless all those charges are dismissed under one of the “limited exceptions” listed in the Memorandum.⁶⁰

The Memorandum lists six limited exceptions to the general duty to charge the most serious offense. First, the prosecutor does not have to pursue the most readily provable charge if the sentencing guideline range for the offense would not be affected by a decision to charge one offense over another. For example, the two offenses of “threatening or harassing communications” and “stalking or domestic violence” may involve similar predatory behavior. Under the Sentencing Guidelines, the base offense level for “[t]hreatening or [h]arassing [c]ommunications” is twelve, but if the harasser demonstrated “an intent to carry out [the] threat,” then the level is increased by six.⁶¹ Assuming none of the aggravating factors apply, the base offense level for “[s]talking or [d]omestic [v]iolence” is 18.⁶² Therefore, if both crimes involved a maximum base level of 18, and the defendant has one or no prior convictions, then the prosecutor could charge the suspect with either offense, and if convicted, the defendant would receive a sentence ranging from 27 to 33 months imprisonment.⁶³ However, this exception is subject to one limitation—prosecutors must charge a defendant with all counts “essential to establish a mandatory minimum sentence” if the “most serious readily provable charge involves a mandatory minimum sentence

5 (Sept. 22, 2003), <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrghmem.pdf>. [hereinafter Memorandum].

56. *Id.* at 5-7.

57. *Id.* at 2 (emphasis added).

58. *Id.*

59. *Id.*

60. *Id.*

61. U.S.S.G., *supra* note 5, § 2A6.1; HUTCHISON, *supra* note 3, at 241.

62. U.S.S.G., *supra* note 5, § 2A6.2; HUTCHISON, *supra* note 3, at 249.

63. HUTCHISON, *supra* note 3, at 1423.

that exceeds the applicable guideline range.”⁶⁴ Mandatory minimum sentences generally apply to drug offenses, and the sentence imposed largely depends on the amount of drugs involved—not the facts and circumstances of the case.⁶⁵

The second exception relates to “fast-track” programs allowing a downward departure of up to four levels “pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.”⁶⁶ Fast-track programs are downward departure programs implemented in districts with an extremely high volume of a certain type of case. For example, border states face a multitude of illegal immigrant cases. Thus, several of these states can, with the appropriate approval, implement fast track programs to allow prosecutors to offer lower sentences in exchange for guilty pleas, thereby promoting efficiency in dealing with immigration violations.⁶⁷

A third exception to the general duty is permitted when a prosecutor determines after the indictment that, due to a “change in the evidence or some other justifiable reason,” the most serious offense is not readily provable.⁶⁸ In this situation, the prosecutor must obtain written approval from “an Assistant Attorney General, United States Attorney, or designated supervisory attorney” in order to dismiss the charges.⁶⁹ This exception is most likely to come into play when a key piece of evidence is inadmissible, and the government can no longer readily prove its case against the defendant.

The fourth exception is recognized where a defendant “substantially assists” in the prosecution or investigation of another person.⁷⁰ Although a prosecutor should “charge the most serious readily provable offense and then . . . file an appropriate motion,”⁷¹ in rare instances, a “prosecutor [can] decline to charge . . . a readily provable charge as part of [a] plea agreement.”⁷² According to the U.S. Attorneys’ Manual, “[g]enerally speaking, a willingness to cooperate should not, by itself, relieve a person of criminal liability.”⁷³ However, the manual recognizes that “[t]here may be some cases . . . in which the value of a person’s cooperation clearly outweighs the federal interest in prosecuting him/her.”⁷⁴ For example, if the government arrests a low-level drug dealer with no criminal history, the prosecutor may, with appropriate approval, bargain to drop the charges against the dealer in

64. Memorandum, *supra* note 55, at 3.

65. John Gibeaut, *Opening Sentences*, 90 A.B.A. J. 55, 58 (Mar. 2004).

66. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

67. G. Jack King, Jr., *USAOS Deny Ashcroft Memo Affecting Plea Bargaining*, 27 CHAMPION 6, 6 (2003).

68. Memorandum, *supra* note 55, at 3.

69. *Id.*

70. *Id.*

71. *Id.*; see U.S.S.G., *supra* note 5, § 5K1.1; 18 U.S.C. § 3553(e); FED. R. CRIM. P. 35(b).

72. Memorandum, *supra* note 55, at 3.

73. U.S. ATTORNEYS’ MANUAL § 9-27.230(B)(6) (2003).

74. *Id.*

exchange for information that would lead to the arrest of a drug lord with a history of drug- or violence-related convictions.⁷⁵

The fifth exception deals with statutory enhancements and the conditions under which a prosecutor must file them.⁷⁶ Some provisions under the U.S. Code provide that, for certain offenses committed under specified circumstances, the defendant should receive either the sentence recommended under the U.S. Code or the Sentencing Guidelines, whichever is greater. For example, 18 U.S.C. § 924(c)(1)(A) provides that if a defendant is in possession of a firearm while committing a drug trafficking offense, the defendant “shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years.”⁷⁷ In addition to the requirement of a negotiated plea agreement, the prosecutor must receive “written or otherwise documented” authorization, which should be granted only “after careful consideration of the factors set forth in Section 9-27.420⁷⁸ of the United States Attorneys’ Manual.”⁷⁹ Moreover, if the defendant is charged with a violation of 18 U.S.C. § 924(c), several other limitations apply.⁸⁰

Lastly, among the listed exceptions, the Memorandum provides that prosecutors may decide to “dismiss readily provable charges in other exceptional circumstances.”⁸¹ This umbrella provision is subject to the additional requirement of written authorization. However, the Memorandum makes it clear that “such case-by-case exceptions should be rare; otherwise, the goals of fairness and equity will be jeopardized.”⁸²

75. See *supra* note 35 and accompanying text.

76. Memorandum, *supra* note 55, at 4.

77. 18 U.S.C. § 924(c)(1)(A) (2003).

78. Section 9-27.420(A) instructs prosecutors to “weigh all relevant considerations, including: (1) The defendant’s willingness to cooperate in the investigation or prosecution of others; (2) The defendant’s history with respect to criminal activity; (3) The nature and seriousness of the offense or offenses charged; (4) The defendant’s remorse or contrition and his/her willingness to assume responsibility for his/her conduct; (5) The desirability of prompt and certain disposition of the case; (6) The likelihood of obtaining a conviction at trial; (7) The probable effect on witnesses; (8) The probable sentence or other consequences if the defendant is convicted; (9) The public interest in having the case tried rather than disposed of by a guilty plea; (10) The expense of trial and appeal; (11) The need to avoid delay in the disposition of other pending cases; and (12) The effect upon the victim’s right to restitution.” U.S. ATTORNEYS’ MANUAL § 9-27.420(A) (2003).

79. Memorandum, *supra* note 55, at 4. If the statutory enhancement involves prior criminal convictions, authorization can be given only “after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.” *Id.*

80. *Id.* A prosecutor may dismiss or fail to pursue a charge of a violation of 18 U.S.C. § 924(c) with written authorization, and such decision is subject to two limitations: “In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued,” and in “cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations.” *Id.*

81. *Id.*

82. *Id.* at 4-5.

B. Part II: DOJ Policy Concerning Plea Agreements

Part II(A) of the Memorandum discusses the Justice Department's policy regarding plea agreements. The Memorandum simply states that felony plea agreements must either be in writing or clearly stated on the record.⁸³

Part II(B) of the Memorandum deals with the Justice Department's requirement of honesty with regards to sentencing recommendations that include plea agreements.⁸⁴ Namely, a prosecutor has a duty to disclose any readily provable facts to the court if they "are relevant to calculations under the Sentencing Guidelines."⁸⁵ Moreover, prosecutors may not "fact bargain,"⁸⁶ nor may prosecutors "be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing."⁸⁷ Furthermore, prosecutors have a duty to inform the court if a "charge bargain"⁸⁸ was included in the plea agreement.⁸⁹

The Memorandum next states that only two types of sentence bargains are authorized by the Justice Department. First, prosecutors may execute a plea agreement with a sentence that is within the applicable guideline range, instead of arguing for a sentence at the top of the range.⁹⁰ For instance, if a defendant's crime has a base offense level of twelve, and the defendant has two or three prior convictions, then the applicable sentencing range would be between 12 and 18 months.⁹¹ Under this type of sentence bargain, the prosecutor can execute a plea agreement for 12 months in exchange for a guilty plea, instead of arguing for a sentence of 18 months following a trial and conviction.

Second, prosecutors can request a downward departure from the specified sentencing range where a defendant has provided "substantial assistance" to the government.⁹² Downward departures are also permitted in accordance with a "fast-track" prosecution program.⁹³ Other downward departures are not permissible, except in rare circumstances.⁹⁴

83. *Id.* at 5.

84. *Id.*

85. *Id.*

86. Goodstein & Kramer, *supra* note 9, at 120.

87. Memorandum, *supra* note 55, at 5.

88. Goodstein & Kramer, *supra* note 9, at 119.

89. Memorandum, *supra* note 55, at 5.

90. *Id.* at 6.

91. See HUTCHISON, *supra* note 3, at 1423.

92. Memorandum, *supra* note 55, at 6; see *supra* note 35 and accompanying text.

93. *Id.* at 6.

94. *Id.*

IV. APPLICATION OF THE PLEA BARGAINING POLICY TO THE SENTENCING GUIDELINES

With a basic understanding of the Sentencing Guidelines and the Memorandum in place, it is now necessary to examine the intersection of a federal prosecutor's power under the Sentencing Guidelines with a prosecutor's duties under the Memorandum.

The main purpose of the Memorandum was "to set forth basic policies that all federal prosecutors must follow in order to ensure that the Department fulfills its legal obligation to enforce faithfully and honestly the Sentencing Reform Act, the PROTECT Act,⁹⁵ and the Sentencing Guidelines."⁹⁶ As discussed in Part I, the main objective behind the Sentencing Reform Act and the Sentencing Guidelines was to ensure honesty, uniformity, and proportionality of sentencing.⁹⁷ The interrelationship between the Memorandum and the Sentencing Guidelines is evident. However, the connection between the PROTECT Act, an Act designed "[t]o prevent child abduction and the sexual exploitation of children,"⁹⁸ and the Memorandum is less obvious.

A. *The Role of the PROTECT Act in Sentencing and Plea-Bargaining*

On March 26, 2003, the night before the PROTECT Act was scheduled for debate on the floor of the House, House Representative Tom Feeney⁹⁹ inserted what has now become widely known as the "Feeney Amendment" into the Act's provisions.¹⁰⁰ Even though the Feeney Amendment exceeded the scope of the Act's purpose, the amendment was quickly accepted, and no hearings were held on the proposed additions.¹⁰¹ Within two short weeks, the PROTECT Act easily passed the House and Senate.¹⁰² Unfortunately, the speed with which the PROTECT Act was enacted did not give federal judges (or anyone else, for that matter) the opportunity to halt the legislative process in time to expose the contents and potential ramifications of the Feeney Amendment. Upon further examination, members of the House and Senate would have discovered that the Feeney Amendment encompassed

95. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 401(b)(1) (2003). The Act's principal aim is to fund "Amber Alert," a program "aimed at quickly and widely alerting the public when a child is abducted," and "to increase penalties for sex offenses involving children." Mark H. Allenbaugh, *Heatwole: A Test Case for Sentencing Sanity*, 18 CRIM. JUST. 28, 29 (2004).

96. Memorandum, *supra* note 55, at 2.

97. HUTCHISON, *supra* note 3, at 2.

98. See *supra* note 69 and accompanying text.

99. Representative Feeney has, to date, demonstrated strong opinions regarding Congress's power to regulate sentencing. Feeney once commented that federal judges "are a child of Congress, whether they like it or not," and that, if Congress wanted to, it "could give judges no discretion whatsoever in sentencing." Gibeaut, *supra* note 65, at 59.

100. *Id.* at 59.

101. *Id.*

102. *Id.*

“the most sweeping changes in punishment since the Sentencing Reform Act of 1984 ushered in the guidelines.”¹⁰³ The Feeney Amendment affirmatively states that judges should not grant downward departures unless the ground for departure has been “expressly enumerated in . . . Part K as a ground upon which a downward departure may be granted.”¹⁰⁴ The Amendment also requires federal district judges to submit, in writing, the specific reasons for a downward departure from the Sentencing Guidelines.¹⁰⁵ The practical effect of this portion of the Feeney Amendment is to drastically reduce the opportunity for federal defendants to obtain more lenient sentences. Moreover, these written reports are submitted to the Sentencing Commission, who must inform Congress which district courts have failed to comply with the requirements on an annual basis.¹⁰⁶ The Feeney Amendment also requires the written reports and all underlying records accompanying those reports to be made available to the House and Senate Committees on the Judiciary and the Justice Department upon demand.¹⁰⁷ This requirement raises valid concerns that the “release of some sentencing documents, such as cooperation agreements, could endanger individual defendants and law enforcement officers.”¹⁰⁸

A change in the standard of review given to sentences further insulted federal district judges. In addition to the reporting restrictions and requirements of the Feeney Amendment, the clearly erroneous standard of review of sentences is replaced with the *de novo* standard of review. In cases where a district court departs from the Sentencing Guidelines and does not provide a written statement of the reasons for the departure, or when the departure is unjustified in light of the facts of the case or unauthorized by applicable statutes, the appellate court will no longer review the sentence with the traditional deference, but will review the case *de novo*, greatly increasing the possibility of reversal.¹⁰⁹

While Congress (and Representative Feeney) scored a small victory with the passage of the PROTECT Act, the success was short lived. When the Supreme Court announced its ruling in *Booker*, the Court invalidated the *de novo* standard of appellate review, and implicitly canceled out nearly all of the PROTECT Act’s attendant sentencing provisions.¹¹⁰ As Justice Breyer noted, the *de novo* standard of review is no longer necessary because the Guidelines are discretionary and the purpose of the *de novo* standard was to make the Guidelines more mandatory.¹¹¹

103. *Id.*

104. Pub. L. No. 108-21, § 401(b)(1) (2003); see HUTCHISON, *supra* note 3, at 1607-38 (giving the pre-authorized reasons for departing from the Sentencing Guidelines).

105. § 401(c)(1) (2003).

106. § 401(h) (2003).

107. Gibeaut, *supra* note 65, at 59.

108. *Id.*

109. § 401(d)(1)(2).

110. *United States v. Booker*, 125 S. Ct. 738, 764 (2005).

111. *Id.* at 765.

B. Reaction to the DOJ Memorandum

When attempting to gauge the practical implications of the DOJ Memorandum, it is necessary to view the Memorandum through the eyes of numerous players in the criminal justice system—members of the media, criminal defense attorneys, federal prosecutors, and federal judges. While a number of critics have blasted the DOJ's current policy as a radical departure from Attorney General Reno's preceding policy, a closer look reveals that the policies are substantially similar, and that the present policy actually signals a return to the initial directives of Reno's predecessor, Attorney General Richard Thornburgh.¹¹²

After the United States Supreme Court upheld the Sentencing Guidelines in 1989, Attorney General Thornburgh sought to guarantee that federal prosecutors' actions reflected Congress's goal of "equity, fairness, and uniformity" in sentencing.¹¹³ When Reno replaced Thornburgh as Attorney General, she too sought to attain uniformity in sentencing by urging prosecutors to charge the "most serious, readily provable offense."¹¹⁴ However, Reno's policy allowed federal prosecutors some individual discretion by adding that the "most serious readily provable offense" must also reflect the severity of the defendant's actions.¹¹⁵ In response to the often disparate policies for charging defendants, Ashcroft decided to remove individual prosecutorial discretion by once again directing prosecutors to charge the "most serious readily provable offense," with very few exceptions.¹¹⁶

Among the criminal justice players most incensed by the current plea bargaining policy are criminal defense attorneys. In a criminal justice system where over ninety percent of defendants plead guilty under some type of plea bargain agreement, critics of the DOJ's policy fear that the federal courts will soon become hopelessly overworked, and federal prisons will become even more overcrowded due to the harsher sentences imposed on defendants.¹¹⁷ Indeed, one of the principal complaints regarding the DOJ's policy is that, by forcing federal prosecutors to charge the most serious offense, defendants will have less incentive to plead guilty and will instead opt for expensive, prolonged trials.¹¹⁸ Opponents argue that coupling the formulaic nature of the Sentencing Guidelines with rigid charging requirements has resulted in the Justice Department successfully "removing humanity from justice and reducing it to a cold, by-the-numbers calculation."¹¹⁹

112. Associated Press, *Ashcroft Reducing Plea Bargain Discretion* (Sept. 22, 2003), available at <http://www.why-war.com/news/2003/09/22/ashcroft.html>; see also Lazarus, *supra* note 6.

113. Memorandum, *supra* note 55, at 1.

114. Lazarus, *supra* note 6.

115. Torsten Ove, *Ashcroft Policy on Plea Bargains Proves Controversial*, PITTSBURGH POST-GAZETTE (Sept. 30, 2003), available at <http://postgazette.com/pg/03273/227180.stm>.

116. *See id.*

117. Lazarus, *supra* note 6, at 1.

118. *See id.*

119. Ove, *supra* note 115.

Joining the opposition to the current policy is a growing number of U.S. Attorneys who resist the notion that the Justice Department's power should be centralized in Washington D.C. These federal prosecutors prefer Reno's method of administration. Under Reno, each U.S. Attorney's office was free to use its own judgment when charging defendants and to focus its resources on the district's greatest areas of concern.¹²⁰ Furthermore, most would argue that local U.S. Attorneys have a greater awareness of the needs of a particular jurisdiction than their counterparts in Washington D.C. Nonetheless, the Justice Department would argue that the ultimate goal of uniformity surpasses the need for individualized discretion among prosecutors.¹²¹ As Ashcroft stated, "[j]ust as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case."¹²²

Not every U.S. Attorney opposes the DOJ's policy. Some federal prosecutors insist that nothing has changed since the Memorandum was issued on September 22, 2003.¹²³ In a recent survey of fifteen U.S. Attorney's offices by the National Association of Criminal Defense Lawyers, participants were asked: "Has the September 22 Ashcroft memo on charging and plea bargaining changed your office's policies or procedures in any way?"¹²⁴ In response, U.S. Attorney (USA) Paul Brysh commented that his office may have "fine-tuned" certain procedures in response to the requirements of the memo, but he maintained that "charging the most readily-provable offense has been our office's policy," and that "[o]ur charging and plea policies have remained fairly constant over the years, with small wrinkles from administration to administration."¹²⁵ USA Norm Cairns echoed Brysh's sentiments by saying, "We may have changed our reporting requirements, but . . . our plea bargaining system . . . has not really changed."¹²⁶

Federal judges also feel the presence of the DOJ's policy in their courtrooms. While federal prosecutors are members of the executive branch, federal judges compose the judiciary—a separate and allegedly independent branch of government. As discussed above, federal prosecutors have not only the duty to charge the most serious offense, but also to vigorously oppose a defendant's request for downward departures at sentencing. However, the DOJ arguably encroached upon the independence of the judiciary and the separation of powers doctrine when it instructed U.S. Attorneys to report to the Department of Justice any federal judge who dared to deviate from the Sentencing Guidelines by departing [downward] from the pre-

120. Lazarus, *supra* note 6.

121. *Id.*

122. Memorandum, *supra* note 55, at 2.

123. King, *supra* note 67, at 7.

124. *Id.*

125. *Id.*

126. *Id.*

scribed sentencing range.¹²⁷ One might argue that it is enough that federal judges are subject to the Sentencing Guidelines, but creating a judicial blacklist for judges who stray from the rigid sentencing ranges is an apparent attempt by one branch of the government to subject another to its will—a danger John Marshall warned against when addressing the Virginia State Convention in 1830: “I have always thought . . . that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was . . . a dependant judiciary.”¹²⁸ Moreover, Judge Roger P. Patterson of the U.S. District Court for the Southern District of New York noted:

Trial judges have many more years of experience in sentencing, both under the United States Sentencing Guidelines and prior thereto, than the Assistant U.S. Attorneys (AUSA). Each trial judge sentences far more defendants in a year, than an individual AUSA prosecutes. Thus, the report on departures required by Congress are by a party less competent, less familiar with, and less involved in, the difficult decisions which the sentencing judge must make under the guidelines to perform the traditional role of an independent, fair and just arbiter. If, as a result of Congress’ increasing pressure to eliminate any departures from the Guidelines, trial judges’ sentencing decisions do not comply with the basic tenets of fairness and justice, the confidence of our citizens that the courts play an independent and fair role in the dispensation of justice will be diminished or lost. Then our system of justice will be regarded as subservient to the other branches of government—the system that prevailed for so many years behind the Iron Curtain.¹²⁹

The fact that every criminal defendant is afforded the opportunity to be represented by counsel is indicative of society’s belief that no two cases are alike, and that every defendant’s circumstances are different. If the DOJ is unwilling to allow prosecutors to determine whether a defendant’s circumstances warrant a plea bargain or a departure from the Sentencing Guidelines, then it should be willing to leave the sentencing of a defendant in the hands of the judiciary. As one former U.S. Attorney observed, the effect of the Justice Department’s pressuring of judges and controlling of prosecutors is that the Department is “turning judges, prosecutors and defense attorneys into a bunch of clerks.”¹³⁰

While the opposition to the DOJ’s policy certainly raises valid concerns, is all of the criticism overblown? In a speech made only a few days after the memo was issued in September 2003, Ashcroft defended the policy by citing the federal government’s interest in “uniformity and equality in

127. Gregory J. Wallace, *Arguments: A Judiciary in Peril*, AM. LAWYER, Nov. 2003, at 65.

128. *Id.* at 67.

129. *United States v. Kim*, 2003 WL 22391190, at *8 (S.D.N.Y. Oct. 20, 2003).

130. *Ove*, *supra* note 115 (quoting J. Alan Johnson).

justice across the board.”¹³¹ Ashcroft also insisted that “[w]e don’t seek to avoid plea bargains. We just don’t seek to plea bargain with individuals who aren’t cooperating with the government.”¹³²

The DOJ would likely argue that Ashcroft acted within his powers by directing prosecutors to charge the “most serious, readily provable” offense, instead of allowing prosecutors to charge defendants for a lesser crime than the crime actually committed.¹³³ Furthermore, the prosecutor is bound only by the requirement if the offense is “readily provable.”¹³⁴ Thus, if the prosecutor has a “good faith doubt” as to the government’s ability to get a conviction at trial, the prosecutor does not have a duty to charge the “most serious” offense.¹³⁵ Moreover, the Memorandum requires only that the plea deals be approved by an Assistant Attorney General, U.S. Attorney, or designated supervisory attorney, which indicates that much of the charging and plea agreements will still be localized decisions.¹³⁶ Nevertheless, critics may insist that this approach fails to leave ample room for the prosecutor to take an individual defendant’s situation into account before charging, and does not do much to alleviate concerns over prison overcrowding and overburdening the courts. However, in a September 26, 2003 speech, Ashcroft predicted that under the threat of maximum penalties, defendants will be “more likely to become cooperators,” and that the policy will ultimately lower the crime rate, meaning “fewer cases will go to trial.”¹³⁷

C. *Practical Implications of the September 22 Memorandum, the Sentencing Guidelines, and the PROTECT Act*

So what, if any, are the practical implications of the DOJ Memorandum, the Sentencing Guidelines, and the PROTECT Act? Until the Supreme Court’s decision in *Booker*, these documents collectively meant that the justice system was more rigid than ever.

One recent case provides a timely illustration of the major drawback of the pre-*Booker* Guidelines and the Memorandum’s restrictions on downward departures and plea-bargaining—the lack of flexibility. Recently, a twenty-year old college student named Nathaniel Travis Heatwole was charged with violating 49 U.S.C. § 46505(b)(1) after smuggling “box cutters, knives, matches, bleach,” and “a simulated plastic explosive aboard” several different airplanes on at least six separate occasions.¹³⁸ Heatwole exposed his experimental activities to the federal government claiming his

131. Joe Gyan Jr., *Ashcroft Seeks End to “Revolving Door” for Violent Criminals*, *ADVOCATE*, Sept. 26, 2003, at 2.

132. *Id.*

133. E.E. Edwards, *Ashcroft Must Be Stopped*, *CHAMPION*, Nov. 27, 2003, at 4; Memorandum, *supra* note 55, at 2.

134. Memorandum, *supra* note 55, at 2.

135. *Id.*

136. King, *supra* note 67, at 9.

137. Gyan, *supra* note 131, at 2.

138. Allenbaugh, *supra* note 95, at 29.

actions were “act[s] of civil disobedience with the aim of improving public safety for the air-traveling public.”¹³⁹ The government charged Heatwole with the general offense of “[c]arrying a weapon or explosive on an aircraft” under § 46505(b)(1), and Heatwole could have been sentenced up to ten years in prison and fined up to \$250,000¹⁴⁰ for his “noble criminality.”¹⁴¹ Fortunately, common sense prevailed, and the judge sentenced Heatwole to two years of supervised probation.¹⁴² The judge also levied one thousand dollars in fines and ordered Heatwole to perform one hundred hours of community service.¹⁴³

Given the facts and circumstances surrounding Heatwole’s actions and arrest, his punishment was relatively lenient. Under the Sentencing Guidelines, the young college student could have been charged with a more serious offense under § 46505(c) for “willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, violat[ing] subsection (b) of [§ 46505].”¹⁴⁴ Even if Heatwole was not charged under § 46505(c), the sentencing judge could have considered the “reckless disregard for the safety of human life” element, and could have increased Heatwole’s sentence to 15 years.¹⁴⁵ Moreover, under Part I(B) of the Memorandum, federal prosecutors are “strongly encouraged” to seek statutory enhancements, and are further urged to “take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements . . . are sought in *all* appropriate cases.”¹⁴⁶ Therefore, the government could have argued for the statutory enhancement to be used to increase Heatwole’s sentence to 15 years.¹⁴⁷ More troubling is the fact that the government only needed to prove the “reckless” element by a preponderance of the evidence.¹⁴⁸ Thus, “[b]y charging Heatwole with the less-serious offense,” the government could have ensured that he was sentenced “as if he had been convicted of the aggravated version without having its burden of proof rest on the ‘reckless’ element.”¹⁴⁹

In this case, Heatwole certainly acted “willfully.” However, the key question was whether he acted “without regard” or “with reckless disregard for the safety of human life.”¹⁵⁰ Here, if the sentencing judge did not find that Heatwole acted either “without regard” or “with reckless disregard,” so

139. *Id.*

140. 49 U.S.C. § 46505(b)(1) (2003).

141. Allenbaugh, *supra* note 95, at 29.

142. *A Wise Sentence for a Public Servant*, STAR NEWS (WILMINGTON, N.C.), June 28, 2004, available at 2004 WL 59042516.

143. *Id.*

144. 49 U.S.C. § 46505(c) (2003); Allenbaugh, *supra* note 95, at 32.

145. 49 U.S.C. § 46505(c) (2003); Allenbaugh, *supra* note 95, at 32.

146. Memorandum, *supra* note 55, at 4 (emphasis added).

147. Allenbaugh, *supra* note 95, at 32.

148. *Id.*

149. *Id.*

150. 49 U.S.C. § 46505(c); Allenbaugh, *supra* note 95, at 32.

Heatwole was sentenced to probation (presumably, after he accepted responsibility for his actions).¹⁵¹

If the government successfully argued for the enhancement, Heatwole's offense level would have jumped from 9 to 24, which would have increased the sentencing range from between 4 and 10 months to between 51 and 63 months.¹⁵² But, if Heatwole accepted full responsibility for his conduct, the range could have been lowered to between 37 and 46 months.¹⁵³

In this case, the nature and circumstances surrounding Heatwole's offense warranted at least two grounds for a downward departure. First, Heatwole likely argued that he "‘committ[ed] a crime in order to avoid a perceived greater harm’ and that his ‘conduct [did] not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue.’"¹⁵⁴ Heatwole also likely sought a downward departure on other grounds, such as his voluntary disclosure, his acceptance of responsibility for his actions, and the fact that his conduct would probably not have been discovered if he had not come forward.¹⁵⁵ These grounds for downward departure notwithstanding, there were several bases for which the government could have moved for an *upward* departure under the pre-*Booker* Guidelines. The sentencing judge could have found that Heatwole "‘significantly endangered public safety’ or “‘disrupted a governmental function because every commercial airliner had to be checked for hidden weapons.’"¹⁵⁶

Strangely enough, some of the very members of Congress¹⁵⁷ who last spring voted for stricter penalties and longer sentences through the PROTECT Act spoke out on Heatwole's behalf, urging leniency and no jail time for the college junior.¹⁵⁸ Many would agree that Heatwole's case was special, and that the sentencing judge exercised appropriate discretion when determining Heatwole's sentence—even though this discretion might technically have run afoul of Congress's latest attempt to restrict downward departures in the PROTECT Act.

V. CONCLUSION

If, as a number of U.S. Attorneys insist, the DOJ's policy merely puts in writing the duties and obligations long impressed on each U.S. Attorney, then why has it created such a firestorm of criticism? Perhaps the overall frustration expressed by various legal commentators, criminal defense attor-

151. 49 U.S.C. § 46505(c); Allenbaugh, *supra* note 95, at 32.

152. U.S.S.G., *supra* note 5, § 2K1.5, HUTCHISON, *supra* note 3, at 768, 1423; Allenbaugh, *supra* note 95, at 32.

153. Allenbaugh, *supra* note 95, at 32.

154. *Id.*; U.S.S.G., *supra* note 5, § 5K2.11.

155. Allenbaugh, *supra* note 95, at 32; U.S.S.G., *supra* note 5, § 5K2.16.

156. Allenbaugh, *supra* note 95, at 32.

157. These members of Congress include Rep. Nancy Pelosi (D-Cal.) and Rep. Ed Markey (D-Mass.). Allenbaugh, *supra* note 95, at 1.

158. *Id.* at 29.

neys, and judges alike is misplaced. Assuming *arguendo* that the DOJ Memorandum stated nothing new, it may be that—at the very least—the Memorandum revived the debate on the overall effectiveness and prudence behind the enactment of the Sentencing Guidelines. While the government’s stated interest in uniformity is certainly compelling, recent events (such as the *Heatwole* case) indicate that the pendulum has swung too far in the direction of a seemingly endless push for stricter, more rigid, sentencing requirements. In other words, instead of seeking to achieve a balance between the uniformity of charging and sentencing and individualized case disposition, the Justice Department, at the direction of Congress, has emphasized numbers over people, principle over practicality. The *Booker* case represents a positive shift in the balance of power between prosecutors and federal judges as it reinstates much of the judges’ discretionary powers that Congress had steadily eroded in the years following the Sentencing Reform Act of 1984. However, it is likely that the Supreme Court will not have the last word on the Sentencing Guidelines. The Court recognized in *Booker* that Congress “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.”¹⁵⁹ Nonetheless, the fact that Congress can act in response to *Booker*’s holding does not necessarily mean that Congress should act. Perhaps Congress’s best course of action is inaction—unless and until it appears that the judiciary is collectively exercising its newly regained discretion in a way that contravenes Congress’s goals of honesty, uniformity, and proportionality of sentencing.

Joy Anne Boyd

159. *United States v. Booker*, 125 S. Ct. 738, 768 (2005).

