

Letting judges be the judge

By Peter G. Verniero



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In its recent decision in *United States vs. Booker*, the Supreme Court removed the teeth from the federal sentencing guidelines by making them merely advisory. The result is that federal judges will have more leeway than they've had in two decades when sentencing criminal defendants. The court's action has prompted what likely will become a hot debate about crime and punishment. It's a debate worth having, and long overdue.

Essential to understanding the court's splintered decision is that the sentencing guidelines were not really guidelines but rather a set of rules imposed on judges to restrict their discretion. A congressional statute made the guidelines mandatory, purportedly to make prison terms more uniform throughout the country. According to the court's five-justice majority, the constitutional problem was that the guidelines required judges to enhance a defendant's prison term when finding certain facts beyond those found by the jury alone.

In addressing that problem, the justices seemingly left undisturbed other aspects of the system, although some practices might have to be amended to comply with the court's decision. Lawmakers, for example, are still free to establish mandatory minimum sentences so that no person will get off lightly when convicted of a serious offense. Plea bargains, which result

from a defendant admitting facts and waiving his or her right to trial, also should be unaffected.

Interestingly, the two famously conservative justices, Antonin Scalia and Clarence Thomas, were among the five court members who considered certain applications of the guidelines to be an infringement on a defendant's right to trial by jury. They were joined by Justices John Stevens, David Souter and Ruth Bader Ginsburg, the so-called court liberals. This proves that labeling judges as conservative or liberal as a predictor of outcomes can be a futile exercise.

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A separate five-justice majority (Justice Ginsburg supplied the fifth vote for each coalition) declared the court's remedy. In a

nutshell, the court ruled that the guidelines must be considered advisory only. Essentially, this second group of justices believed that, if confronted with the constitutional problem identified by the first group, Congress would have wanted the court to preserve the sentencing guidelines, at least in advisory form.

And so the debate will begin on whether the court guessed right as to what Congress would have intended in these circumstances. Like many public discussions, this one already is being engulfed by stout rhetoric, with some members of Congress portraying the court's decision as no more than a power grab by the judiciary. Rhetoric aside, the decision resurrects two profound questions about the branches of government as

old as the republic itself: How independent should judges be? Who should set national policy, the courts or Congress?

The founders answered the first question unequivocally. In the federalist papers, which were published to persuade the fledgling states to adopt what later became the U.S. Constitution, Alexander Hamilton referred to lifetime tenure for judges (what he quaintly called "permanency in office") as a major contributor to judicial independence. That the system also appoints rather than elects judges further supports the fact that the judiciary is supposed to act outside the political realm, where the other two branches reside.

The second question regarding national policy is trickier. Unquestionably, Congress is the appropriate body to set such policy through enactments that either are approved by the president or adopted by Congress after overriding a president's occasional veto. But judges have a role to play as well. They must act when Congress oversteps its constitutional boundaries, as the justices effectively did in the Booker case.

The policy at stake here – the extent by which a person's liberty should be curtailed following a conviction – is central to the criminal justice system. Indeed, few judicial tasks are more serious or sobering than sending someone to prison. No one seriously questions the wisdom of having elected lawmakers set the broad range of penalties associated with criminal conduct. The public policy question implicated in the Booker decision is whether lawmakers or judges should decide the precise prison term to be imposed in individual cases.

The fear by some in Washington is that judges cannot be trusted with such critical decisions. Put less politely, the tough-on-crime crowd in Congress does not want a handful of unelected judges going soft on convicted felons. Although uniformity is a stated goal of the sentencing guidelines, let us not fool ourselves into believing that lawmakers want judges to impose uniformly lenient sentences.

The real purpose in making the guidelines mandatory was to tie the hands of judges to ensure that they imposed harsher rather than lighter sentences (a point suggested by some of the justices in Booker). As a former state attorney general, I actually find some merit in that goal. I have great empathy for victims of crime, particularly children, and consider punishment a legitimate purpose of our criminal laws. When

punishment does not fit the crime, the public becomes cynical and the system is mocked.

As a former judge, however, I see a broader picture. Punishing criminals is part of the system's larger mission of achieving justice. Moreover, as I discovered on the bench, justice is easier said than done. To arrive at a just result, we must consider the totality of circumstances in a given case and balance the severity of a convicted person's conduct against mitigating factors that also might be present. As someone who has sat at both sides of the table, so to speak, I side with judges on this question of who should decide individual sentences.

By and large divorced from politics once appointed, judges have the ability to mete out justice after considering all relevant factors, including the victim's perspective. So long as they impose sentences within the range established by lawmakers and supported by the jury's verdict, judges should be left alone to do what the system asks of them – to achieve a just result in the cases tried in their courtrooms. We all would do well to accept that basic concept and leave judging to judges.

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