

**Responses of Ketanji Brown Jackson
Nominee to be a Member of the United States Sentencing Commission
to Written Questions for the Record from Senator Jeff Sessions**

1. Pursuant to the Supreme Court’s decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. Under the current system, it appears to me that as long as the sentencing judge (1) correctly calculates the guidelines, and (2) appropriately considers factors set forth in 18 U.S.C. 3553(a), he or she may impose any sentence ranging from probation to the statutory maximum. Following the Supreme Court’s decision in *Gall v. United States*, appellate courts must apply the highly deferential “abuse of discretion” standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is virtually no substantive review on appeal.

- a. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Yes, I agree that a defendant’s sentence for a particular crime should not depend on the judge who sentences him or her. The federal sentencing system should embody the principle that similar offenders who commit similar crimes should be treated similarly.

- b. Do you believe the current sentencing structure undermines several of the key goals of the Sentencing Reform Act of 1984, specifically, reducing unwarranted sentencing disparity?

There are clear indications that the post-*Booker* advisory guidelines scheme is less effective at reducing sentencing disparities among similarly-situated defendants than the pre-*Booker* mandatory guidelines regime. One of the stated purposes of the guidelines under the Sentencing Reform Act of 1984 was to “provide certainty and fairness in meeting the purposes of sentencing” by “avoiding unwarranted sentencing disparities among defendants,” 28 U.S.C. § 991(b)(1)(B), and it is fair to say that the current advisory sentencing structure makes achievement of that statutory goal more difficult than the mandatory sentencing system that Congress originally envisioned.

2. Statistics compiled by the U.S. Sentencing Commission suggest that the rate of sentences imposed below the guideline range has risen dramatically post-*Booker*. (Not including government sponsored sentences below range, such as those where the defendant receives credit for substantial assistance.) For instance, according to the Commission’s 2009 Third Quarter Preliminary Report, a national comparison of sentences shows that district court judges imposed sentences below the guidelines range approximately 16% of the time. That is nearly four times as many below

range sentences than were reported for the first quarter of 2005, when the percentage was 4.3%. *Booker* was decided in January of 2005.

- a. **How would you propose we address what appears to be the rise in below range sentences, and the sentencing disparities that will necessarily accompany this rise?**

Any proposal to address the apparent rise in below-range sentences and sentencing disparities would need to be based on aggregated data over time and must reflect realistic views about whether the current guidelines system can adequately reduce unwarranted disparities while providing judges with sufficient flexibility to impose fair sentences. Thus, if confirmed, I would want to continue gathering data, information, and opinions about the operation of the guidelines—as the Commission is currently doing through its regional hearings and data-analysis divisions—and consider structural and substantive amendments to the guidelines themselves. If those were not sufficiently effective, I would consider fashioning a broader legislative proposal to address sentencing disparities under the advisory system in the aftermath of *Booker*.

- b. **Do you believe that Congress should consider statutory reform that would create a binding but constitutional system?**

I would certainly consider the creation of a binding and constitutional federal sentencing guidelines system. I believe that Congress should wait in its consideration of statutory reforms, however, to determine if acceptably consistent, predictable, and fair sentencing results can be achieved under the current advisory scheme and to get the results of the Commission's ongoing review.

The Commission is currently holding regional hearings across the country and receiving broad input from prosecutors, defense counsel, judges, and academics regarding the direction and future of federal sentencing. I would expect that the Commission plans to revisit the guidelines, both structurally and substantively, as a result of what it learns from this extensive information-gathering mission. If the guidelines are adjusted to reflect the new reality of the advisory system and to take into account the views of criminal justice practitioners regarding the appropriate sentences for various crimes, it is possible that the rate of judicial imposition of below-guideline sentences may decline, resulting in a reduction in sentencing disparities that would render congressional intervention unnecessary.

Congress should, of course, remain ever mindful of unacceptable disparities in sentencing that persist over time and that undermine the public's perception of the fairness of the system as a whole. Statutory reforms that reestablish a constitutional and binding sentencing system might prove necessary if the advisory guideline system itself cannot address and resolve the problem of unwarranted and unjustified sentencing disparities.