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Commentary

Post-*Booker* Task: Reform Criminal Code

By Patrick Mullin

Now that the U.S. Supreme Court in *Booker* and *Fanfan* has restored judicial discretion in federal sentencing by finding the sentencing guidelines no longer mandatory, it is time to take a hard look at another byproduct of a former era — the sprawling federal criminal code.

The intersection of the guidelines and the code can be traced back to the late 1960s and early 1970s. Until then, judges enjoyed almost unfettered discretion, free from guidelines and appellate review, and Congress generally treaded lightly on state criminal turf. However, as reported violent and drug crimes rose dramatically, the perception took hold that unchecked judicial sentencing authority was a contributing factor. Likewise, the public's thirst grew for congressional action in waging a war on crime.

On the sentencing front, the landmark Sentencing Reform Act of 1984 formed a sentencing commission, imposed mandatory guidelines and, in the process, converted federal judges into scorekeepers.

Congress also went on a crime-legislation spree. As reported by a 1998 American Bar Association Task Force, the number of federal criminal statutes increased by more than 40 percent since 1968, with 3,300 criminal offenses and nearly 10,000 administrative regulations imposing criminal and civil penalties. Far too many of these statutes carry mandatory minimum penalties.

Formerly, there was at least tacit homage paid to the Tenth Amendment's mandate that residual powers, including police powers, be reserved for the states. No longer. Now, there are 50 titles covering more than 27,000 pages, encompassing among other areas such traditionally exclusive state matters as child support, odometer fraud, domestic violence and car jacking. In the process, a federal police power has effectively been engrafted on Article I's Commerce Clause.

The results of this legislative binge are clear. In 1986, about 30,000 inmates were in federal prison. Eighteen years later, the number had swelled to 160,000. Each year, about 60,000 defendants are sentenced in the federal courts. Rightfully, Chief Justice William Rehnquist has decried the explosion of federal prosecutions, especially as to essentially state law violations, which have caused a workload crisis in the federal courts. As a result, civil cases have taken a back seat to the Speedy Trial Act-driven criminal cases.

This increasing statutory arsenal magnifies concern for abuse by well-funded U.S. attorneys. Witness the recent use of the PATRIOT Act by the FBI to secure financial records in a probe targeting Las Vegas public officials dealings with a strip club owner. Or the more visible prosecution of Martha Stewart on securities fraud grounds for publicly proclaiming her innocence. We federal practitioners have repeatedly witnessed the transformation of RICO, originally targeted for the mob and money laundering involving drug trade, into a weapon against a wide range of mainstream defendants, including business executives and politicians.

Now that *Booker* has brought a balanced federal sentencing scheme with judicial discretion, tempered by advisory guidelines and subject to a reasonableness standard on appellate review, it is time to reshape the outsized federal code and limit potential prosecutorial abuses.

For starters, the Supreme Court should reconsider its far-too-expansive reading of the Commerce Clause, which has provided a constitutional basis for many federal criminal laws, starting with *Perez v. United States*, 402 U.S. 146 (1971). There, the justices blessed the federal criminal prosecution of a loan shark under a provision of the Consumer Credit Protection Act for extortion activities covered by state law. A template for tightening the breadth of the code can be found in the Supreme Court's ruling in *Lopez v. United State*s, 514 U.S. 549 (1995), which struck down a gun statute affecting intrastate actions as a Tenth Amendment violation.

The groundswell for change in the code must continue. From the conservative Heritage Foundation and President Reagan's attorney general, Edwin Meese,

Mullin, a New Jersey certified criminal trial attorney in Hackensack and New York City, is a member of the Practitioners Advisory Group to the U.S. Sentencing Commission.

to a broad spectrum of the judiciary, defense bar and academia, there is growing recognition that the code's expansion must be put in check.

In 1966, at President Lyndon Johnson suggestion, Congress created a National Commission on Reform of Federal Criminal Laws. The 1971 commission's report, among other things, immensely streamlined the code and encouraged federal prosecutors to use restraint where concurrent state jurisdiction exists.

Unfortunately, a dozen-year effort to enact the report's recommendations was for naught. Given the nightmarish expansion of the code since then, it is time that another blue-ribbon commission composed of legislators, judges, academics, prosecutors and practitioners be created to provide the blueprint for code reform.

For almost 20 years, I have seen firsthand the wreckage wrought by the mandatory guidelines and most welcome *Booker*'s balanced sentencing scheme. *Booker* must ultimately be viewed, however, as just a healthy start in reforming the federal criminal system. ■