

**Position Paper of the American Bar Association  
Regarding Section 12 of HR 1528<sup>1</sup>**

Section 12 of HR 1528 is a response to the Supreme Court's decisions in *United States v. Booker* and *Fanfan*. In those cases, the Court ruled that the Sixth Amendment prohibits increasing a defendant's guideline range on the basis of facts found only by a judge rather than a jury. The Federal Sentencing Guidelines passed Constitutional muster under this ruling only after striking their mandatory nature, rendering them advisory factors to be considered along with a number of other statutory purposes of sentencing. HR 1528 would effectively eliminate the advisory nature of the guidelines on the low end by virtually prohibiting a Court from imposing a sentence below the applicable guideline range. This would fundamentally alter federal criminal sentencing law in a manner that is both poor policy and quite possibly unconstitutional.

**1. HR 1528 eliminates virtually all downward departures.**

- HR 1528 eliminates virtually all downward departures or other sentences below the guidelines range except for those sought by the government for substantial assistance or participation in an authorized "fast track" program.
- Even the grounds for departure expressly *encouraged* by the guidelines are eliminated by HR 1528.

**2. HR 1528 raises significant constitutional concerns.**

- By eliminating virtually all downward departures, the guidelines are effectively converted from advisory to mandatory with respect to the low end of the sentencing range. In many cases this would, solely on the basis of judicial fact-finding, *mandate* a sentence above the range determined by the jury's verdict. ***It is quite possible if not likely that a majority of the Supreme Court would find this statute inconsistent with its rulings in Blakely, Booker, and Fanfan.*** And if the Court's tenuous 4-1-4 decision in *Harris* is no longer good law, HR 1528 is without question unconstitutional.
- At best, ***the constitutional issues presented by HR 1528 will mire federal***

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<sup>1</sup>This position paper addresses only Section 12 of HR 1528. The ABA will be addressing numerous other provisions in this legislation in more detailed future correspondence.

- *sentencing in litigation from day 1 and result in chaos and uncertainty in a criminal justice system still recovering from the uncertainty between Blakely and Booker.*

### 3. HR 1528 eliminates rehabilitation as a purpose of sentencing.

- HR 1528 not only eliminates the need for educational and vocational training as a factor the sentencing court *must* consider, it goes further to *prohibit* a court from considering such needs for rehabilitation.

### 4. The summary of HR 1528 prepared by some of its supporters is inaccurate and misleading.

Supporter summary: “Booker eliminated the de novo appellate review. This bill does NOT restore it.”

Response: **The de novo appellate review eliminated by *Booker* was of downward departures. HR 1528 does not restore such appellate review because *it virtually eliminates the departures themselves.***

Supporter summary: “Booker created a new reasonableness appellate standard of review. This bill does NOT alter that.”

Response: **As noted above, HR 1528 does not alter such appellate review. But, it remains only for sentences within or above the guidelines range because *the downward departures to be reviewed under this standard are virtually eliminated by the Bill.***

Supporter summary: “Booker declared the sentencing guidelines are advisory - not mandatory. This bill does NOT alter that ruling.

Response: This statement is true only in the most literal sense that the bill does not explicitly state that the guidelines are now mandatory. ***By prohibiting consideration of virtually every factor other than the guidelines, however, HR 1528 accomplishes essentially the same result and transforms the guidelines into a complex set of mandatory minimums.***

### 5. Downward departures are an essential component of a just sentencing system

- Departures have always been a critical component of the guidelines because it is impossible to foresee and capture in a single set of guidelines the vast range of human conduct potentially relevant to a sentencing decision.