

Amicus Brief of Senators Kennedy, Hatch and Feinstein

Senators Kennedy, Hatch and Feinstein filed a brief on behalf of the government in *United States v. Claiborne*, No. 06-5618. Nonetheless, the Senators' brief contains many truths that the Department of Justice and/or the Sentencing Commission deny.

First (unlike DOJ), the brief honestly describes the legislative history of the SRA, pointing out that the original version of the bill that became the SRA was essentially the same as section 3553(a) and *Booker*'s advisory guideline remedy in giving judges "substantial discretion to depart from the guidelines." Section 3553(b) was added during the legislative debates to make the guidelines "presumptive." Senators Brief 9-10, 12 n.2, 16-17. It would seem to follow that a presumption of reasonableness is inconsistent with the *Booker* remedy and with the Sixth Amendment. Further, the Senators (unlike DOJ and most of the presumption circuits) believe that a careful statement of reasons grounded in § 3553(a) is required not only for outside guideline range sentences, but for within guideline sentences as well. *Id.* at 22.

Second (unlike DOJ and the Commission), the Senators make perfectly clear that Congress never intended even the presumptive guidelines to be a system of mindless uniformity: "Congress did not intend to eliminate judicial discretion. Instead, it sought to achieve increased transparency, consistency, and proportionality in sentencing while preserving the discretion of courts to impose appropriate sentences based on the specific characteristics of offenders and crimes." Senators' Br. at 10-11. Even in their presumptive form, Congress expected that judges would depart in as many as 20% of cases. Senators Br. 14 (citing S. Rep. No. 98-225 at 52 n.193 (1983)). (Because the Sentencing Commission put so many bases for departure off limits, that goal was never achieved. The rigidity of the Guidelines has become so entrenched that even after *Booker*, judges in only a few districts have sentenced outside the guideline range as often as Congress intended even when the Guidelines were presumptive.)

Third (unlike DOJ and the Commission), the Senators "acknowledge that the performance of the Commission has not always matched reformers' expectations. Indeed, the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and cocaine – a ratio currently incorporated in the sentencing guidelines – demonstrate that the guidelines do not always reflect objective data or good policy." Senators Br. 21 (citations omitted). This strongly suggests that the Commission need *not* have incorporated the crack ratio from the mandatory minimum law into the guidelines, contrary to the Commission's continuing insistence, DOJ's persistent arguments after *Booker*, and the courts of appeals' acquiescence to those arguments. *But see* Fifteen Year Report at 49 (it was Commission's choice to incorporate mandatory minimum penalties at all levels).

Fourth (unlike DOJ and the Commission), the Senators argue that judges *should* be able to take account of the racially disparate impact reflected in the crack guideline, that is, courts are free to disagree with this policy (and presumably other policies adopted by the Commission) that do not advance the purposes of sentencing:

It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, *see* ABA Justice Kennedy Commission Report, *supra*, Res. 121A at 28-29, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § **3553(a) enables courts to consider this impact as they develop principled rules on sentencing.**

Senators Brief 29 (emphasis supplied). The Senators suggest that “courts might cite the disproportionate emphasis assigned by the guidelines to the relevant quantity of crack cocaine as a principled basis for imposing a sentence below the applicable range. . . . [T]he district court did not cite it as a factor in imposing sentence. Attention to this problem, however, is long overdue.” *Id.* at 27-28. Further, the Senators specifically disagree with the proposition that had its genesis in the First Circuit’s decision in *Pho* that outside-guideline sentences may only be based on case-specific considerations without reference to broader principles. *Id.* at 23 n.5.

Fifth, the Senators sharply criticize mandatory minimum laws in general, and suggest that they might be repealed altogether. *Id.* at 13, 28-29.

The only problem with the Senators Brief is that it was filed in support of the government and seeks affirmance of the Eighth Circuit’s reversal of the below-guideline sentence imposed on Mario Claiborne. The Senators say the district court judge should have better articulated her reasons. But if the government wins, Claiborne is likely to be stuck with a racially disparate crack guideline sentence. The judge gave reasons for the sentence based on the Claiborne’s personal history and characteristics and the purposes of sentencing, emphasizing the injustice of the guideline sentence compared with other drug cases involving greater amounts of drugs, and rehabilitation in the most effective manner without “throwing you away.” The Eighth Circuit (applying the equivalent of the PROTECT Act standard of review) said these reasons were not “extraordinary” enough for a 22-month variance. If section 3553(a) is the sentencing law, the judge’s reasons should be enough for this young man with no record, a family he lived with and supported, and a steady work history, who was charged with selling .23 g. of crack and with possession of 5.03 g. of crack. If the Supreme Court were to affirm the Eighth Circuit’s reversal on the basis that the judge did not sufficiently articulate her reasons, it is unlikely it would say, “but the district court judge may impose a sentence below the guideline range based on the racially disparate impact of the crack guideline,” since that precise issue is not before the Supreme Court. Thus, the district court judge would probably not be able to lower Claiborne’s sentence on the basis of the racially disparate impact of the crack guideline, even though the Senators believe she should be allowed to do so. As the government joyfully points out, that is a “prohibited reason” in the Eighth Circuit.