

Fact Sheet: The Appellate Standard of Review is Working Just As It Should.

The Commission’s description of the state of appellate review is that the Supreme Court “has taken some of the ‘teeth’ from appellate review of federal sentencing decisions.”¹ That was the point. Appellate review before *Booker* substituted the judgment of the Commission and the courts of appeals for that of the district court judge. That is “no longer an open choice.” Rather than “invalidat[e] the entire Act, including its appellate provisions,” the Court adopted the reasonableness standard of review for all sentences, within or outside the guideline range.²

The Commission now asks Congress to instruct courts of appeals to require proportional justifications for variances from the guideline range, to apply “heightened review” to a determination that a guideline itself fails to achieve § 3553(a)’s objectives, and to presume all guideline sentences to be reasonable. While the Commission claims that it seeks more “robust” review, what it seeks is greater enforcement of the guidelines. The Commission’s proposals are in several respects contrary to Supreme Court law, and would renew constitutional doubt about the guidelines and engender disruptive litigation, as explained in separate Fact Sheets on the individual proposals. The Commission’s account of how the appellate review standard evolved and how it is actually working is not accurate:

- The current “reasonableness” standard originated in the Sentencing Reform Act itself, but is more “robust” than that standard because it now applies to all sentences, within or outside the guideline range. The “reasonableness” standard enacted in the SRA was first displaced by the courts, and then replaced by Congress in 2003, with standards of review that required courts of appeals to enforce the guidelines and the Commission’s restrictions on departures, and to substitute their own judgments for those of district court judges. Those standards are unconstitutional.³
- Contrary to the Commission’s suggestion that the government can’t win under the current standard of review, the data show that the government (1) asks for or agrees with the vast majority of sentences imposed, including at least half of below-range sentences sought by defendants, (2) appeals as many sentences as it did before *Booker*, and (3) has as high a success rate on appeal as it did before *Booker*.⁴
- Appellate judges testifying at the Commission’s hearings did not support a standard of review more strictly enforcing the guidelines. Instead, they recognized that such a standard would be unconstitutional, and was not warranted.⁵
- Actual appellate decisions show that the courts of appeals have all the tools they need to reverse sentences as procedurally or substantively unreasonable.⁶ The only examples provided in support of a stricter standard of review reversed sentences as too low, demonstrating that no statutory change is warranted.⁷
- The Commission’s account of Supreme Court and appellate decisions regarding “policy disagreements” is not accurate and therefore not relevant.⁸

¹ Prepared Testimony of Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 12 (Oct. 12, 2011).

² *United States v. Booker*, 543 U.S. 220, 263 (2005).

³ See Letter from Thomas W. Hillier, II, to House Subcommittee on Crime, Addendum 32-36 (Oct. 11, 2011) [hereinafter Hillier Letter], http://www.fd.org/pdf_lib/Defender%20Letter%20Oct%2011%202011.pdf.

⁴ *Id.*, Addendum 36-37.

⁵ *Id.*, Addendum 40-43.

⁶ *Id.*, Addendum 38; Appellate Decisions After *Gall* (Nov. 10, 2011), http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf.

⁷ See Hillier Letter, Addendum 39-40.

⁸ *Id.*, Addendum 44-46.