

Fact Sheet: The Commission’s Proposal to Require Sentencing Courts to Give “Substantial Weight” to the Guidelines Has Been Rejected by the Supreme Court as Unconstitutional.

The Commission states that there is “uncertainty” about the weight to be given the guidelines, and asks Congress to “clarify its statutory intent that courts should give the guidelines substantial weight.”¹ The proposal rests on the notion that the guidelines “take into consideration” all of the sentencing purposes and factors that judges are required to consider under § 3553(a),² a theory that would make the guidelines even more mandatory than they were before *Booker*, which was advanced by the Commission in trainings immediately after *Booker* urging courts to give the guidelines “substantial weight.”³ Splits among the courts soon developed, with some giving the guidelines “substantial weight” at sentencing, adopting a conclusive presumption of reasonableness for guideline sentences on appeal, applying a presumption against sentences outside the guideline range at sentencing and on appeal, applying various forms of “heightened review” to non-guideline sentences such as requiring proportional justifications for variances, and deeming disagreements with the Commission’s policies to be impermissible. These courts “continued to treat the Guidelines as virtually mandatory after . . . *Booker*.”⁴ Other courts declined to accept the premise that the guidelines embody § 3553(a) or the various devices that flowed from it, recognizing that to do so would be unconstitutional.

These issues have now been resolved by the Supreme Court, contrary to the position the Commission proposes. As the Court held:

- The guidelines and policy statements may not be given special “weight” at sentencing.⁵
- District courts *may not* presume that the guideline sentence is the appropriate sentence.⁶
- District courts must “consider all of the § 3553(a) factors,” and “treating the guidelines as mandatory” or “failing to consider the § 3553(a) factors” is significant procedural error.⁷
- “The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable” by sentencing courts.⁸
- Courts may not “elevate” policy statements disapproving grounds for sentences outside the guideline range above factors that are relevant under § 3553(a), and must instead give appropriate “weight” to such relevant factors.⁹
- At best, “the Guidelines, insofar as practicable, reflect a *rough* approximation of sentences that *might* achieve § 3553(a)’s objectives.”¹⁰ A guideline sentence may “fail properly to reflect § 3553(a) considerations,” reflect an “unsound judgment,” or fail to “treat defendant characteristics in the proper way,”¹¹ and judges are free to disagree with the Commission’s views.¹²

Thus, contrary to the Commission’s proposal, there is no uncertainty about the weight to be given the guidelines — they are one factor among several under § 3553(a) that courts must consider in determining an appropriate sentence, nothing less and nothing more.¹³

¹ Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 58 (Oct. 12, 2011) (hereinafter Commission Testimony).

² *Id.* at 6, 58.

³ See U.S. Sent’g Comm’n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (March 2006); Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005); Prepared Testimony of Judge Ricardo H. Hinojosa before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives at (March 16, 2006).

⁴ *Rita v. United States*, 551 U.S. 338, 366 (2007) (Stevens & Ginsburg, JJ., concurring).

⁵ Compare *Gall v. United States*, 552 U.S. 38, 53-60 (2007) (upholding variance based on factors the policy statements deem never or not ordinarily relevant) *with id.* at 69-70 (Alito, J., dissenting) (arguing guidelines and policy statements should be given “some significant weight”).

⁶ *Rita*, 551 U.S. at 351.

⁷ *Gall*, 552 U.S. at 49-51.

⁸ *Nelson v. United States*, 555 U.S. 350 (2009) (emphasis in original).

⁹ *Pepper v. United States*, 131 S. Ct. 1229, 1249-50 (2011).

¹⁰ *Rita*, 551 U.S. at 350 (emphasis added).

¹¹ *Id.* at 351, 357.

¹² *Kimbrough v. United States*, 552 U.S. 85, 96, 109-10 (2007); *Pepper*, 131 S. Ct. at 1247; *Gall*, 552 U.S. at 46 n.2.

¹³ *Kimbrough*, 552 U.S. at 90.