

## Fact Sheet: Don't Be Fooled by the Commission's Three-Step.

The Commission has asked Congress to enact into a mandatory law its three-step process, now set forth in an advisory guideline, § 1B1.1, and states that “most circuits agree on a three-step approach.”<sup>1</sup> But none of the circuits permit the three-step approach literally set forth in § 1B1.1 and the district courts do not follow it. Instead, under Supreme Court law, the sentencing statute, and principles of adversary presentation, courts calculate the guideline range, hear the arguments of the parties, consider all factors under § 3553(a) brought to their attention, may consider a “departure” if raised by a party or *sua sponte*, need not consider policy statements or commentary regarding departures unless a departure is raised, and impose a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes.

The Commission's three-step process set forth in § 1B1.1 states as follows:

- “(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines . . .
- (b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. . . .
- (c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole.”

Step b does *not* say that the district court may consider a departure. Instead, it purports to require the district court to consider, in every case, all of the Commission's restrictions on offender characteristics, and all other policy statements or commentary “that might warrant consideration.” If enacted into law, steps b and c would require courts to consider in every case the Commission's “policy statements” and “commentary” implementing its interpretation of excised § 3553(b) and prohibiting and discouraging departures and variances based on offender characteristics and other grounds, and to prioritize these provisions over the characteristics of the defendant, the circumstances of the offense, the purposes of sentencing, and the overarching parsimony command set forth in § 3553(a).

The stated purpose of the Commission's proposal is to “ensure[]” that the guidelines “are afforded . . . the proper weight to which they are due under *Booker* and consistent with the Court's remedial opinion.”<sup>2</sup> The Commission's three-step, however, was not “articulated in *Booker*,”<sup>3</sup> but by the Commission as part of its effort immediately after *Booker* to convince courts to give the guidelines “substantial weight,”<sup>4</sup> a position the Supreme Court has rejected.<sup>5</sup>

**The courts do not follow the Commission's three-step as written because it conflicts with the law and would be a waste of time.** As explained in more detail below, Step b *is* excised § 3553(b) in another guise, and Step c would render the entire sentencing framework and all of its component parts, necessary to ensure that the guidelines are advisory only, inferior to the Commission's policies disapproving consideration of § 3553(a) factors. Steps b and c conflict with the sentencing procedure set forth in § 3553(a) and the Supreme Court's decisions, which merely permit courts to consider departures if raised or *sua sponte*, do not require courts to

address policy statements unless a departure is raised, and prohibit the elevation of restrictive policy statements above relevant factors described in § 3553(a) and § 3661.

The Commission states that “[m]ost circuits agree on a three-step approach,” citing cases that never did adopt its three-step as written or that have been overruled.<sup>6</sup> The circuits agree that courts *may* consider a departure if raised or *sua sponte*, and nothing more. Contrary to the Commission’s three-step and in compliance with Supreme Court law, the circuits hold that district courts are *not* required to consider policy statements regarding departures unless a departure is raised by a party, need not consider a departure that is raised before considering a variance,<sup>7</sup> and may *not* use policy statements to deny a variance.<sup>8</sup>

If enacted into law, the three-step would unduly burden the courts. Of all sentences below the guideline range imposed without a government motion, 80% are *not* based in whole or in part on a “departure” sanctioned by the Commission.<sup>9</sup> Large majorities of judges believe that the factors deemed by the Commission’s policy statements to be never or “not ordinarily relevant” are in fact relevant,<sup>10</sup> and that the policy statements are inadequate, too restrictive, and inconsistent with § 3553(a).<sup>11</sup> Thus, when courts are asked to consider a variance, they rarely if ever consult policy statements or commentary relating to offender characteristics or departures, and do not peruse the Guidelines Manual for policy statements and commentary that “might warrant consideration in sentencing.” To do so would be a waste of time, since those provisions tell the courts not to consider factors that the statute and the Supreme Court tell them they must consider.

**The policy statements and commentary implement excised § 3553(b) and the PROTECT Act.** The Commission defines “departure” as any “sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence.”<sup>12</sup> On its face, this includes *all* non-guideline sentences.

#### USSG § 5K2.0

- sets forth the departure standard set forth in excised § 3553(b), citing and quoting that statute, *see* § 5K2.0(a)(1), (a)(2)(A), (b), comment. (nn. 2(A), 3, 4);
- sets forth the Commission’s “heartland” interpretation of excised § 3553(b) requiring an “exceptional case” or presence to an “exceptional degree,” *see* § 5K2.0(a)(2)(B), (a)(3), (a)(4), (c), comment. (n.3), comment. (backg’d.);
- sets forth grounds for departure prohibited by the Commission, *see* § 5K2.0(d);
- states that courts may not disagree with the policy judgments of the Commission or Congress, *see* § 5K2.0(backg’d.);
- states that it implements the PROTECT Act’s directive to reduce the incidence of departures, *see* § 5K2.0(backg’d.).

USSG Ch. 5, Pts. H and K deem a variety of factors to be “not ordinarily relevant,”<sup>13</sup> never relevant,<sup>14</sup> or possibly relevant.<sup>15</sup> If “not ordinarily relevant,” the circumstance may be considered only if “present to an exceptional degree.”<sup>16</sup> If possibly relevant, a factor must be “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.”<sup>17</sup> These requirements are based on the Commission’s interpretation of excised § 3553(b).<sup>18</sup>

Chapter 5, Part H regarding offender characteristics purports to apply to *all* sentences outside the guideline range, and its introductory commentary states:

Although the court must consider “the history and characteristics of the defendant” among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range. . . .<sup>19</sup>

If enacted into a mandatory law, Step b of the Commission’s three-step would, in essence, require judges to consider excised § 3553(b) and all of its attendant restrictions in every case, and also search the *Manual* for other policy statements or commentary “that might warrant consideration in imposing sentence.”

**The Commission’s three-step is inconsistent with § 3553(a), Supreme Court law, and circuit law.** *Booker* excised § 3553(b) because the Commission’s policy statements and commentary restricting sentences outside the guideline range were incompatible with its constitutional holding.<sup>20</sup> The Court made § 3553(a) the sentencing law, “set[ting] forth numerous factors that guide sentencing.”<sup>21</sup>

Section 3553(a) requires the sentencing court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in” paragraph (2), and “in determining the particular sentence to be imposed, shall consider” first, “the nature and circumstances of the offense and the history and characteristics of the defendant,” second, the “need for the sentence imposed” to reflect the purposes of sentencing, third, the “kinds of sentences available” by statute, fourth, the guideline sentence, fifth, “any pertinent policy statement,” sixth, the need to avoid “unwarranted sentencing disparities” among defendants with similar records found guilty of similar conduct, and seventh, the need to provide restitution to any victims.

The Supreme Court instructs that the court must impose a sentence that is sufficient, but not greater than necessary, to satisfy the purposes of sentencing, after considering the guidelines, the purposes of sentencing, and all relevant factors brought to its attention.<sup>22</sup>

The Court has changed the order and emphasis of the statute in two ways. First, the court must begin by correctly calculating the guideline range and should treat that range as the starting point and initial benchmark.<sup>23</sup> Second, the policy statements need not be considered at all unless raised by a party as a basis for “departure” and may not be elevated above factors set forth in other paragraphs of the statute, or used to deny a variance.<sup>24</sup> This is necessary to ensure that the guidelines are not mandatory, since it was the policy statements and commentary that made the guidelines mandatory.<sup>25</sup> It also recognizes that sentencing is an adversary process,<sup>26</sup> and that courts may not be compelled to raise arguments not raised by a party.<sup>27</sup>

Under the Court’s procedure, after calculating the guideline range, the court must “giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate.”<sup>28</sup> The court may

hear arguments for a lower (or higher) sentence in “*either* of two forms,” a departure “*within the Guidelines framework*,” or that “application of the sentencing factors set forth in 18 U.S.C. § 3553(a) warrants a lower [or higher] sentence.”<sup>29</sup> As to the latter, the court may hear arguments that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” or “the Guidelines reflect an unsound judgment,” or the Guidelines “do not generally treat certain offender characteristics in the proper way,” or “the case warrants a different sentence regardless.”<sup>30</sup> Thus, the court need not consider departures, or policy statements regarding departures, unless raised by a party.

The Court has also made clear that policy statements disfavoring grounds for sentences outside the guideline range are not entitled to weight, and may not be elevated above or used to deny a variance based on factors that are relevant to the purposes of sentencing and the court’s overarching duty to impose a sentence sufficient but not greater than necessary to achieve the purposes of sentencing. In *Gall*, the Court approved a variance based on a number of factors the Commission’s policy statements prohibited or deemed not ordinarily relevant,<sup>31</sup> without addressing the conflicting policy statements or requiring district courts to address them.<sup>32</sup> It also rejected a “rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range.”<sup>33</sup> And it rejected Justice Alito’s argument that the policy statements should be given “some significant weight.”<sup>34</sup> In *Pepper*, the Court rejected an invitation to “elevate” policy statements above other § 3553(a) factors, and held that the court must give “appropriate weight” to offender characteristics described in § 3553(a)(1) and relevant under (a)(2), but prohibited by a policy statement.<sup>35</sup>

The Commission’s Step c says that, only after considering all policy statements and commentary in Chapter 5, Parts H and K, and any others that “might warrant consideration in sentencing,” “the court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole.” This language would relegate the entire sentencing framework and all of its component parts, which are necessary to ensure that the guidelines and policy statements are not mandatory, to an afterthought, subsidiary to the Commission’s conflicting policy statements and commentary.

The Commission suggests that its three-step merely requires courts to first consider departures and then variances.<sup>36</sup> Even if that is what § 1B1.1 actually said, it would be inconsistent with the statutory framework (where policy statements are fifth on the list, and characteristics of the defendant, circumstances of the offense, the purposes of sentencing, and the kinds of sentences available by statute are first, second and third), and the Supreme Court’s procedure requiring consideration of departures only if raised. But the three-step goes much further. Read literally, as it would be if enacted into a mandatory law, it requires courts to consider all policy statements and commentary in every case.

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<sup>1</sup> Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 57-58 (Oct. 12, 2011) (hereinafter Commission Testimony).

<sup>2</sup> *Id.* at 57.

<sup>3</sup> *Id.*

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<sup>4</sup> See Testimony of Judge Ricardo H. Hinojosa, *Implications of the Booker/Fanfan decisions for the federal sentencing guidelines: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the J. Comm.*, 109th Cong. 3-4 (Feb. 10, 2005) (arguing that the guidelines should be given “substantial weight”); U.S. Sent’g Comm’n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (2006) (“Immediately after *Booker*, the Commission developed a post-*Booker* guidelines training program. . . . The program describes federal sentencing under *Booker* as a 3-step process,” and “explains how the sentencing guidelines reflect Congress’ objectives in the SRA and that the guidelines accordingly should be given substantial weight”); Testimony of Judge Ricardo H. Hinojosa, *United States v. Booker: One year later, chaos or status quo?: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security Jud. Comm.*, 109th Cong. 2, 18 (Mar. 16, 2006) (proposing legislative response to *Booker* that would accord the guidelines “substantial weight,” and that if codified, the three-step process would “ensure” that the guidelines were accorded “substantial weight”).

<sup>5</sup> See *United States v. Booker*, 543 U.S. 220, 261 (2005); *Gall v. United States*, 552 U.S. 38, 59 (2007) (the “Guidelines are only one of the factors to consider when imposing sentence.”); compare *id.* at 53-60 (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”); *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (“[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”); *id.* at 91 (guidelines “are advisory only”); *Nelson v. United States*, 555 U.S. 350 (2009) (“The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable” by sentencing courts.); *Pepper v. United States*, 129 S. Ct. 1229, 1241 (2011) (“[A]lthough the ‘Guidelines should be the starting point and the initial benchmark,’ district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a)”; *id.* 1249-50 (court may not “elevate” the Commission’s policy statements disapproving grounds for sentences outside the guideline range above relevant factors, and must instead give appropriate “weight” to relevant factors under § 3553(a)).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *United States v. Diosdado-Star*, 630 F.3d 359, 362-66 (4th Cir. 2011) (where presentence report identified grounds for departure but district court did not consider a departure and instead proceeded directly to the § 3553(a) analysis, earlier decision suggesting that courts must “first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law” before considering a variance was overruled by *Rita* and *Gall*); *United States v. McGowan*, 315 Fed. App’x 338, 341-42 (2d Cir. 2009) (where neither party requested a departure, rejecting defendant’s argument that court should have *sua sponte* considered potentially available departures: “That some of the facts considered by the court could also have been potential bases for Guidelines departures, and that the court chose to impose a non-Guidelines sentence without determining precisely which departures hypothetically could apply, does not create procedural error.”); *United States v. Hawes*, 309 Fed. App’x 726, 732 (4th Cir. 2009) (unpublished) (any requirement to consider a guideline departure before considering a variance “no longer appears necessary under *Gall*”); *United States v. Mejia-Huerta*, 480 F.3d 713, 716, 721, 723 (5th Cir. 2007) (where government did not request an upward departure, holding that the district court did not err by failing to consider an applicable departure provision before varying upward); *United States v. Martinez-Barragan*, 545 F.3d 894, 901 (10th Cir. 2008) (when a defendant seeks both departure and variance, “[a]s long as the court takes into account all of the relevant considerations, the order in which it does so is unimportant”); *United States v. Moton*, 226 Fed. App’x 936, 939-40 (11th Cir. 2007) (while courts are required to “calculate correctly the sentencing range prescribed by the Guidelines,” they are not required to “apply departures under § 4A1.3 even when neither party requests that it do so,” and suggesting that such a requirement would make the policy statement “mandatory”).

<sup>8</sup> See, e.g., *United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009) (district court erred in declining to take account of defendant’s age and poor health in deference to policy statements); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009) (abandoning prior precedent requiring courts to follow policy statements in light of *Gall* and *Kimrough*); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009) (district court erred in failing to consider defendant’s significant health problems under § 3553(a) despite policy statement requiring “extraordinary” impairment); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009) (district court erred in declining to consider defendant’s advanced age, prior military service, health issues, employment history, and lack of criminal history in reliance on policy statements because “standards governing departures do not bind a district court when employing its discretion” under § 3553(a)); *United States v. Hamilton*, 323 Fed. App’x 27, 31 (2d Cir. 2009) (district

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court “had discretion to consider the policy argument disagreeing with the Guidelines’ refusal to consider age and its correlation with recidivism” and “abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines.”); *United States v. Blackie*, 548 F.3d 395, 399 (6th Cir. 2008) (“[A] policy statement does not automatically limit or confine the scope of a sentencing judge’s considerations.”); *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008) (where government pointed to policy statement disapproving consideration of family circumstances to “blunt” the evidence presented, such policy statements “are not decisive as to what may constitute a permissible ground for a variant sentence in a given case”).

<sup>9</sup> U.S. Sent’g Comm’n, Preliminary Quarterly Data Report, Third Quarter Release, tbl. 1 (June 30, 2011).

<sup>10</sup> U.S. Sent’g Comm’n, Results of Survey of United States District Judges January 2010 through March 2010, tbl.13.

<sup>11</sup> *Id.*, tbl. 14.

<sup>12</sup> USSG § 1B1.1, comment. (n. 1(E)).

<sup>13</sup> USSG §§ 5H1.2 (education and vocational skills); 5H1.4 (drug or alcohol dependence or abuse); 5H1.5 (employment record); 5H1.6 (family ties and responsibilities); 5H1.11 (civic, charitable or public service; employment-related contributions; similar prior good works).

<sup>14</sup> USSG §§ 5H1.4 (addiction to gambling); 5H1.7 (role in the offense); 5H1.10 (race, sex, national origin, creed, religion, socioeconomic status); 5H1.12 (lack of guidance as a youth, disadvantaged upbringing); 5K2.12 (personal financial difficulties, economic pressures on a trade or business); 5K2.13 (diminished capacity caused by the voluntary use of drugs or other intoxicants, offense involved actual or a serious threat of violence, criminal history indicates a need to protect the public, defendant convicted of a sex offense); 5K2.19 (post-sentencing rehabilitation); 5K2.0(d) (acceptance of responsibility, decision to plead guilty, fulfillment of restitution obligations to the extent required by law including the guidelines).

<sup>15</sup> USSG §§ 5H1.1 (age); 5H1.3 (mental and emotional conditions); 5H1.4 (physical condition or appearance, including physique); 5H1.11 (military service).

<sup>16</sup> USSG § 5K2.0(a)(4).

<sup>17</sup> USSG Ch.5, Pt.H, intro. comment.

<sup>18</sup> USSG Ch. 1, Pt. A(1)(4)(b) (describing “heartland” standard and explaining that it is based on Commission’s interpretation of § 3553(b)).

<sup>19</sup> USSG Ch.5, Pt.H, intro. comment.

<sup>20</sup> *Booker*, 543 U.S. at 234-35, 245, 259.

<sup>21</sup> *Id.* at 261.

<sup>22</sup> *Kimbrough*, 552 U.S. at 101; *Gall*, 552 U.S. at 51; *Pepper*, 129 S. Ct. at 1242-43.

<sup>23</sup> *Gall*, 552 U.S. at 49.

<sup>24</sup> *Gall*, 552 U.S. at 53-60; *Pepper*, 129 S. Ct. at 1242-43, 1249-50.

<sup>25</sup> See excised § 3553(b) (“In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”).

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<sup>26</sup> See *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (“In our adversary system, . . . in the first instance and on appeal, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”); see also *Rita*, 551 U.S. at 344, 351.

<sup>27</sup> *Gall*, 552 U.S. at 54.

<sup>28</sup> *Id.* at 49.

<sup>29</sup> *Rita*, 551 U.S. at 344 (first emphasis added, second emphasis in original).

<sup>30</sup> *Id.* at 351, 357.

<sup>31</sup> The Court approved of the district court’s variance based on voluntary withdrawal from a conspiracy, age and immaturity, and rehabilitation through education, employment, and discontinuing the use of drugs. Cf. USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5, p.s. While voluntary withdrawal from a conspiracy may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, see USSG § 3E1.1 comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure, see USSG § 5K2.0(d)(2), p.s.

<sup>32</sup> Compare *Gall*, 552 U.S. at 53-60 (approving of the “weight” the judge gave the mitigating factors in the case and not discussing policy statements disfavoring those factors), with *id.* at 68-70 (arguing that district courts should be required to give “weight” to the policy statements) (Alito, J., dissenting).

<sup>33</sup> *Gall*, 552 U.S. at 47.

<sup>34</sup> *Id.* at 68 (Alito, J., dissenting).

<sup>35</sup> *Pepper*, 131 S. Ct. at 1242-43, 1249-50.

<sup>36</sup> Commission Testimony at 58.