

Fact Sheet: The Commission’s Proposal for “Heightened Review” of a District Court’s Finding that the Guideline Itself Fails To Achieve § 3553(a)’s Objectives Is Contrary to Supreme Court Law and Would Suppress Judicial Feedback to the Commission.

The Commission seeks a “heightened standard of review for sentences imposed as a result of a ‘policy disagreement’ with the guidelines.”¹

The Supreme Court has forbidden de novo review, has rejected “heightened” review for any sentence outside the guideline range, and has consistently rejected “closer review” of a district court’s finding that a guideline is unsound.

There are only two standards of review for mixed questions of law and fact, such as the determination of the appropriate sentence under § 3553(a), *de novo* and abuse-of-discretion.² The Supreme Court has forbidden both an explicit *de novo* standard of review,³ and a *de facto de novo* standard of review.⁴ “[C]ourts of appeals must review all sentences-whether inside, just outside, or significantly outside the Guidelines range-under a deferential abuse-of-discretion standard.”⁵ Applying “a heightened standard of review to sentences outside the Guidelines range . . . is inconsistent with the rule that the abuse-of- discretion standard of review applies to appellate review of all sentencing decisions-whether inside or outside the Guidelines range.”⁶ Abuse of discretion is the standard of review for all sentences outside the guideline range, whether based on individualized circumstances as in *Gall*, or a conclusion that the guideline itself fails to achieve § 3553(a) objectives as in *Kimbrough*.⁷

As stated by the Solicitor General: “Under *Booker*, all guidelines are advisory, and the very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a).”⁸

A guidelines system that permits judges to sentence outside the guideline range based only on case specific facts, but not based on a “policy judgment” in light of the “general objectives of sentencing,” violates the Sixth Amendment.⁹ District courts may not apply a “legal presumption that the Guidelines sentence should apply,” and accordingly may vary when “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations.”¹⁰ Courts may vary “based solely on policy considerations, including disagreements with the guidelines,”¹¹ and “‘reasonableness’ is the standard controlling appellate review” of such a variance.¹² Because “the cocaine Guidelines, like all other Guidelines, are advisory only,”¹³ it “would not be an abuse of discretion . . . to conclude . . . that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”¹⁴

The Commission claims that a “heightened” standard of review would be “consistent” with certain *dicta* in *Kimbrough*. There, the Court discussed a suggestion (made by Justice Breyer at oral argument in *Gall*) that “closer review” might apply to a variance “based *solely on the judge’s view*” that the guideline itself fails properly to reflect § 3553(a) considerations.¹⁵ The theoretical justification for this suggestion was that the Commission has the capacity “to base its determinations on empirical data and national experience.”¹⁶ The Court rejected the suggestion because its justification would not apply to guidelines not developed in that manner: “The crack cocaine Guidelines . . . present no occasion for elaborative discussion of this matter because

those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, . . . the Commission . . . did not take account of ‘empirical data and national experience.’”¹⁷

The Court reiterated this point in *Spears*,¹⁸ and again in *Pepper*: “[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guideline sentence based on a disagreement with the Commission’s views,” and particularly “where, as here, the Commission’s views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.”¹⁹ And the *Pepper* majority declined Justice Breyer’s invitation to adopt *Kimbrough’s dicta* as a rule.²⁰

Even if *Kimbrough’s dicta* were a holding, any “closer review” of a disagreement with a guideline could apply only if the Commission developed the guideline based on “empirical data and national experience.” While the Commission has not proposed any language for “heightened review” of policy disagreements, we suspect that it would not include such a limitation.

Further, if “heightened” or “closer” review were enacted by statute, arguments would be raised regarding its constitutionality. Since the Court has rejected “closer review” on other grounds, it has not addressed whether it would violate the Constitution.²¹

The proposal would suppress meaningful judicial feedback to the Commission.

Congress directed the Commission in the SRA to “review and revise” the guidelines “in consideration of data and comments coming to its attention.”²² Congress expected that the Commission would be alerted to problems with the guidelines in operation by data and reasons resulting from judicial departures.²³ District courts would state their reasons,²⁴ appellate courts would uphold “reasonable” departures,²⁵ and the Commission would collect and study the resulting data and reasons, their relationship to the factors set forth in § 3553(a), and their effectiveness in meeting the purposes of sentencing.²⁶ The Commission would revise the guidelines based on what it learned.²⁷

The judicial feedback mechanism did not function well during the mandatory guidelines era. The Commission instructed sentencing courts that they could depart from the guideline range only based on a circumstance that was “atypical” or “exceptional,” and that they were not permitted to disagree with the policy judgments of the Commission.²⁸ Thus, for example, the disparity caused by the powder/crack quantity ratio was not a permissible ground for departure because that circumstance was “typical” of all crack cases.²⁹

The Supreme Court has resuscitated the important judicial feedback mechanism. The courts’ “reasoned sentencing judgment[s], resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors . . . should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”³⁰ As the Commission “perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission’s recommendations.”³¹ “[O]ngoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”³²

The Commission now asserts that “lack of rigorous review of policy disagreements undermines the role of the guidelines system,” and “risks increasing unwarranted sentencing disparity” as judges substitute their own judgments “for the collective policy judgments of Congress and the Commission.”³³ The Commission’s concerns are misplaced. When judges on the front lines provide meaningful feedback about problems with the collective policies of the Commission and Congress, issued far from real cases, and this advice is taken into account, the guidelines system is *strengthened* and injustice is *avoided*. After *Booker*, the Commission has relied on this very kind of feedback to review and revise the guidelines:

1) After *Booker* was decided on January 12, 2005, judges began to impose reduced sentences to correct for the excessive punishment and unwarranted disparity created by the crack guidelines, as reported by the Commission since 1995. Some courts of appeals held that this was impermissible, creating a circuit split, and the Supreme Court granted certiorari. On January 22, 2007, two of the original sponsors of the SRA, Senators Kennedy and Hatch, along with Senator Feinstein, filed an *amicus* brief in the Supreme Court, arguing that judges should be permitted to disagree with unsound policies reflected in the guidelines, such as the crack/powder disparity.³⁴ Prompted by these developments, the Commission took the next step.³⁵ On May 21, 2007, it voted to reduce the crack guidelines by 2 levels, and urged Congress to take further action as this was not a complete solution to an urgent and compelling problem.³⁶ The Supreme Court then held that sentencing courts are permitted to vary from guideline ranges, subject to appellate review for reasonableness, based on a conclusion that the guideline sentence itself fails properly to reflect § 3553(a) considerations.³⁷ The rate at which judges sentenced outside the guideline range in crack cases increased.³⁸ Congress enacted the Fair Sentencing Act on August 3, 2010, and the crack guidelines were substantially reduced on November 1, 2010.

The *overall* below-range rate dropped concurrently, from 18.7% during the quarter ending September 30, 2010, to 16.9% during the quarter ending June 30, 2011.³⁹

2) In 2010, the Commission eliminated recency points from the criminal history score in response to reasons for below-range sentences and empirical research regarding recidivism.⁴⁰

3) In response to an appellate decision holding that an enhanced sentence under the illegal reentry guideline was substantively unreasonable because it was based on a 25-year-old prior conviction, the Commission reduced by 4 levels the 16- and 12-level increases in illegal reentry cases based on a prior conviction when the conviction is too old to count under the criminal history rules.⁴¹

4) The Commission is conducting a review of the guideline for possession of child pornography, prompted by a high rate of variances and numerous written opinions by judges and courts of appeals explaining flaws in that guideline, which the Commission will report to Congress.⁴²

A “heightened” standard of review, whatever its terms, would suppress the judicial feedback mechanism just as it is beginning to work. Some judges would impose guideline sentences that are not justified by the purposes of sentencing, and others would mask their policy disagreements as individualized determinations.⁴³

¹ Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 56 (Oct. 12, 2011) (hereinafter Commission Testimony).

² Harry T. Edwards & Linda A. Elliott, *Federal Courts — Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions*, ch.1, pts. B, E (2007).

³ *Booker*, 543 U.S. 220, 262 (2005).

⁴ *Gall v. United States*, 552 U.S. 38, 56 (2007).

⁵ *Id.* at 41.

⁶ *Id.* at 49.

⁷ *Kimbrough v. United States*, 552 U.S. 85, 110 (2007).

⁸ Brief of the United States at 11, *Vazquez v. United States*, No. 09-5370 (Nov. 16, 2009).

⁹ *Cunningham v. California*, 549 U.S. 270, 278-81, 286-87 & n.12 (2007) (invalidating California system because, unlike the federal system under § 3553(a), it required a sentence to a specified term unless the court found “facts” about the offense or the offender, and did not permit a sentence outside the specified term based on a “policy judgment” in light of the “general objectives of sentencing”); *see also id.* at 300, 304-05 & n.6, 307-08 (Alito, J., dissenting) (contending that the California system, like the federal system under § 3553(a), permitted courts to sentence outside the specified term based on “policy considerations” such as the purposes of sentencing).

¹⁰ *Rita v. United States*, 551 U.S. 338, 351, 357 (2007).

¹¹ *Kimbrough v. United States*, 552 U.S. 85, 101-02 (2007) (quoting Brief for the United States and citing *Rita*, 551 U.S. at 351) (internal punctuation omitted).

¹² *Kimbrough*, 552 U.S. at 91.

¹³ *Id.* at 91.

¹⁴ *Id.* at 110.

¹⁵ *Id.* at 109 (citing Tr. of Oral Arg. in *Gall v. United States*, O.T. 2007, No. 06-7949, pp. 38-30).

¹⁶ *Id.*

¹⁷ *Id.* at 109.

¹⁸ *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (“Our opinion said, however, that the ‘crack cocaine Guidelines . . . present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role.’ *Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect.”).

¹⁹ *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011).

²⁰ *Cf. Pepper*, 131 S. Ct. at 1254 (Breyer, J., concurring).

²¹ *Kimbrough*, 552 U.S. at 112-14 (Scalia, J., concurring) (joining the opinion “only because I do not take this” discussion of “closer review” to be “an unannounced abandonment of the following clear statements in our recent opinions,” which “mean that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines. If there is any thumb on the scales; if the

Guidelines *must* be followed even where the district court’s application of the § 3553(a) factors is entirely reasonable; then the ‘advisory’ Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by the judge rather than the jury. This, as we said in *Booker*, would violate the Sixth Amendment.”).

²² 28 U.S.C. § 994(o).

²³ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) (“[T]he system is ‘evolutionary’ – the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time.”); Edward M. Kennedy, Sentencing Reform—An Evolutionary Process, 3 Fed. Sent’g Rep. 271 (1991) (“[T]he structure of the guidelines system draws upon the expertise of the judiciary in addressing [key] issues,” departures “will lead to a common law of sentencing,” and “the guideline system [will] be evolutionary in nature.”); *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.) (“[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures,” the “courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons,” and “the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.”).

²⁴ 18 U.S.C. § 3553(c).

²⁵ 18 U.S.C. § 3742(e) (1990).

²⁶ 28 U.S.C. § 995(a)(13)-(16).

²⁷ See S. Rep. No. 98-225, at 80 (1983) (“The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.”); *id.* at 151 (“Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines,” which “will assist the Sentencing Commission in refining the sentencing guidelines.”); *id.* at 182 (“research and data collection . . . functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”).

²⁸ USSG § 5K2.0 (backg’d.) (1995-2011).

²⁹ See *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369-70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996); *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004).

³⁰ *Rita*, 551 U.S. at 358; see also *Booker*, 543 U.S. at 264 (“[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”).

³¹ *Rita*, 551 U.S. at 382-83 (Scalia, J., concurring in part and concurring in the judgment).

³² *Kimbrough*, 552 U.S. at 107.

³³ Commission Testimony at 56.

³⁴ Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007. The *Claiborne* case was later replaced by *Kimbrough* when Mario Claiborne died.

³⁵ U.S. Sent’g Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy*, Chapter 6 (May 2007) (discussing pre-*Booker* law under which all attempts to “depart” based on the crack disparity were rebuffed, the circuit split after *Booker* on whether courts could disagree with the crack guidelines, the pending *Claiborne* case, and the arguments made by the Senators).

³⁶ 72 Fed. Reg. 28558, 28573 (May 21, 2007).

³⁷ See *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).

³⁸ See Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 5 Fed. Sent’g Rep. 326, 331 (in FY 2009, among crack defendants without trumping mandatory minimums, 57.9% were sentenced below the guideline range); USSC 2010 Monitoring Dataset (rate of below-range sentences in all crack cases increased from 43.8% in 2008, to 51% in 2009, to 60.4% in 2010).

³⁹ U.S. Sent’g. Comm’n, 2011 Third Quarter Preliminary Data Report, tbl. 4.

⁴⁰ USSG App. C, amend. 742 (Nov. 1, 2010) (Reason for Amendment).

⁴¹ USSG App. C, amend. 754 (Nov. 1, 2011) (Reason for Amendment) (citing *United States v. Amezcua-Vazquez*, 567 F.3d 1050, 1055 (9th Cir. 2009)).

⁴² U.S. Sent’g Comm’n, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); U.S. Sent’g Comm’n, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010).

⁴³ *Spears*, 129 S. Ct. at 844.