

**The Supreme Court, the Senators and DOJ All Agree:
Judges *Must* Be Free to Disagree with the Sentencing Commission
as a Matter of Policy in Order to Avoid a Sixth Amendment Violation**

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In Cunningham v. California, 127 S. Ct. 856, decided Jan. 22, 2007, California's sentencing system was at issue, but the US Sentencing Guidelines were on everybody's mind.

Both the majority and dissent made clear that judges' authority to disagree with the Sentencing Commission – based on policy reasons alone, that is, the purposes of sentencing -- is *essential* to a constitutional advisory system. Why? Because if the only way a judge can sentence outside the guideline range is to make a fact finding, that fact finding violates the Sixth Amendment.

The disagreement between the majority and the dissent was whether the California sentencing system allowed judges to sentence outside the presumptive term based on sentencing purposes "alone" or requires a fact finding. The dissent contended the former, but the majority found that it required a fact finding and so was unconstitutional.

The majority concluded by saying that a constitutional system must "permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal."

The Amicus Brief filed by Senators Kennedy, Hatch and Feinstein in *Claiborne v. United States* argues that judges *should* take account of the racially disparate impact reflected in the crack guideline, that is, they believe courts should be free to disagree with policies adopted by the Commission that do not advance the purposes of sentencing. They explicitly disagree with the position of the circuits (starting with the First Circuit's decision in *Pho*) that outside-guideline sentences may only be based on case-specific facts without reference to broader sentencing principles. See Brief, http://www.nycdl.org/ItemContent/booker/Amici_Curiae_Senators.pdf. See Analysis of Brief, http://www.fd.org/pdf_lib/critique%20of%20senators%20brief.pdf.

The government conceded this point at oral argument in *Rita* and *Claiborne*. In response to Justice Scalia's question to Mr. Dreeben how the system he was describing differed from the mandatory guidelines, Mr. Dreeben said, "It is different precisely on the area that you yourself articulated. The judge can disagree with the sentencing guidelines." See Transcript of Oral Argument at 50, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007), http://www.fd.org/pdf_lib/Rita%20oral%20argue.pdf; see also Transcript of Oral Argument at 32-33, *Claiborne v. United States*, No. 06-5618 (U.S. argued Feb. 20, 2007), <http://www.fd.org/Claiborne%20oral%20argue.pdf>.

This, of course, is exactly the opposite of what the government argues in court everyday and what many courts are doing since *Booker*, but DOJ has now conceded that it violates the Sixth Amendment.