

It's Time to Fix Our Sentencing Laws

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Years after the Supreme Court Put the Ball in Congress's Court, the Sentencing Commission Can Finally Spur Action

The US Sentencing Commission is confronting a challenge to its own existence. Critics of the Commission's budget and inaction on sentencing reform have begun to call for massive cutbacks and even full elimination of the Commission. Yet unlike other agencies that face similar crises, the Commission has the power to propose reforms to justify and strengthen its role.

For more than six years—since the US Supreme Court invalidated parts of the federal law governing sentencing policy in *Booker v. United States*—courts have increasingly disregarded the federal sentencing guidelines. At the same time, racial disparities have increased. The Supreme Court called for policymakers to respond, stating “The ball now lies in Congress's court.” But over a half decade later, neither Congress nor the Commission has acted.

The time for action is now, and the Commission has the opportunity to urge changes to restore order to our system. Given the impact of the Commission's reports on crack cocaine sentencing—resulting in passage of the Fair Sentencing Act—a Commission-led *Booker*-fix proposal could be a game changer.

Why Legislation Is Needed

Following *Booker* in 2005, federal sentencing law went from a statutory mandate requiring guideline-based sentences to a guideline-optional system driven by piecemeal

Supreme Court decisions. This shift occurred because *Booker* struck down key portions of the federal sentencing statute, including the appellate review standard. Congress has still not rewritten those provisions.

Since *Booker*, courts have drifted farther from guideline-based sentences, with many courts applying the guidelines less than half the time. Even more troubling, racial disparities in federal sentencing are on the rise. According to a recent Commission report on demographic disparities post-*Booker*, the difference in sentences given to black versus white defendants has “been increasing steadily since that decision.” Sadly, racial and educational disparities have grown in a system that is increasingly determined by the judge a defendant draws. Making matters worse, federal appellate judges find themselves out of the sentencing business due to the lack of a meaningful appellate standard and the broad discretion retained by district courts.

One of Congress's purposes in creating the guidelines was to create uniformity and certainty in sentencing, so a defendant would not face the risk of a different sentence on the same facts within the same courthouse. The bizarre sentencing history of Richard Christman helps demonstrate how compromised Congress's goal has become. Christman, who pled guilty to child pornography possession, was sentenced to 57 months in prison in October 2005, but following a reversal on procedural grounds, was sentenced to a mere five days imprisonment—by the same judge. If a single federal judge cannot sentence the same defendant consistently in the same case, something is very wrong.



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What Reforms Should Be Considered

Immediately following the *Booker* decision, bold proposals were floated to return mandatory effect to the guidelines. One proposal, supported by the Department of Justice, suggested a “topless” guidelines system that would have reinstated mandatory guidelines based on the rationale of a narrowly decided Supreme Court ruling from years earlier. These proposals were tabled to allow for study of the impact of *Booker*.

The appetite for reform appears to have returned. Conservative law professor William Otis has called for a rewrite of the 1984 Sentencing Reform Act to once again make the guidelines mandatory, albeit with certain enhancements decided by a jury. And past Commission Chair William Sessions, a federal judge, has proposed a grand reform to broaden the discretion given judges under the guidelines, while also restoring certainty and consistency to the system by making the guidelines “presumptive” rather than merely “advisory.”

Although such reforms may take time, the Commission should immediately recommend basic reforms like codifying an appellate standard to replace the language struck down by *Booker*. The Supreme Court made clear that the standard that existed before the 2003 Feeney amendment would withstand constitutional challenge, and that standard is a worthwhile place to start. More recent Supreme Court decisions, including *United States v. Rita*, provide further components that could be added to the old appellate review standard, including a presumption of reasonableness for properly calculated sentences within the guidelines.

Additionally, the Commission should demand reforms that require judges to provide a heightened justification for any major departure from the prescribed guideline sentence.

Hope for Meaningful Action

In the absence of congressional action, federal courts will continue to struggle to apply constitutional principles to fill gaps in the sentencing statute. In essence, courts will be left to legislate from the bench.

Although many saw the *Booker* decision as the Judicial Branch pushing back against a prescriptive legislative scheme, the Supreme Court clearly intended for Congress to reenter the arena. The Commission should urge reforms to close the long-open gaps in our federal sentencing law—and Congress needs to take up the ball left by the Supreme Court. Otherwise we’ll have to be content with sentences determined more by luck than by law.

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