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### OP-ED

## A Return to Power

By Patrick Mullin  
 New Jersey Law Journal  
 February 8, 2008

In two major decisions last December, *Gall v. U.S.* and *Kimbrough v. U.S.*, the U.S. Supreme Court gave back to federal judges their rightful central role in the sentencing process.

Before the Sentencing Reform Act of 1984, federal judges enjoyed enormous discretion in sentencing. But as part of Congress's war on crime and its effort to emasculate "activist" judges, lawmakers handed the newly formed U.S. Sentencing Commission the authority to generate, subject to approval by Congress, mandatory, statistically driven guidelines.

The primary escape clause from these guidelines was sec. 5K101, known as the 5K letter, which allows prosecutors to reward cooperating defendants by bringing applications for reduced sentences. Federal judges cannot depart downward on their own initiative from the guidelines in such cases; only the U.S. Attorney's Office can do so.

As a result, real power in sentencing rested with prosecutors, with the federal defense practice often becoming a race to the U.S. Attorney's Office to obtain the treasured 5K letter. In contrast, federal judges were left to the monotonous task of computing a sentence within a range generated by the guidelines.

The prosecutors' clout was reinforced in 1996 when the U.S. Supreme Court rejected my argument in *Melendez v. U.S.* that prosecutors had assumed too great a role in the sentencing of cooperating defendants and that such power should return to judges.

Nine years later, in *U.S. v. Booker*, however, the Supreme Court reversed course and gave back to federal judges a meaningful role in sentencing. First, the Court found that the commission guidelines violated the Sixth Amendment by invading the jury's province in setting sentences above maximum limits. The Court then found that the guidelines could be used in an advisory capacity, along with other statutory factors, in shaping a sentence.

In the aftermath of *Booker*, however, there remained considerable question as to the breadth and scope of a federal judge's power to craft sentences at variance with the applicable guidelines.

In *Gall* and *Kimbrough*, the Supreme Court made it clear that federal judges are no longer chained to these guidelines, but can determine, on a case-by-case basis, the type and extent of sanctions.

In *Gall*, an Ecstasy dealer was given probation despite guidelines calling for a three-year sentence. Justice John Paul Stevens reversed the appeals court, making it clear that while the guidelines are a "starting point and initial benchmark," federal judges must be accorded "due deference" in deciding a defendant's fate.

Similarly in *Kimbrough*, Justice Ruth Bader Ginsburg approved a sentence lower than that prescribed in the guidelines for a cocaine distributor. While the "statute still requires a court to give respectful consideration to the Guidelines . . . *Booker* permits the court to tailor the sentence in light of other statutory concerns." Bolstering the Stevens majority in *Gall*, Ginsburg reaffirmed that federal judges remain in the best position to "find facts and judge their import . . . in each case."

It is essential that federal judges not squander their newly regained sentencing power. By statute, they are now required to consider a defendant's individual characteristics as well as factors such as the amount of money and drugs involved, whether anyone was injured and whether a public official was involved. For the first time in 20 years, a judge is no longer enslaved to robotic guidelines but can view a defendant's entire picture. The opportunity now exists for courts to fashion sentences that are fair and just.

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