



# Judicial Fact-Finding and Criminal Sentencing: Current Practice and Potential Change

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Central to the calculation of a federal criminal defendant’s sentence under the [United States Sentencing Guidelines](#) (Guidelines) is the defendant’s “relevant conduct.” That term, while encompassing conduct found by a jury or admitted by the defendant, can also include conduct that was not charged, as well as the conduct underlying charges of which the defendant was acquitted. The lower federal courts have almost uniformly approved of the use of acquitted or uncharged conduct at sentencing, so long as a judge finds by a preponderance of the evidence that the conduct occurred. The Supreme Court has also [held](#) that the use of acquitted conduct pursuant to the Guidelines presents no double jeopardy issue under the Constitution. Judicial fact-finding at sentencing has not been without its critics, however; legal commentators and multiple Justices have expressed misgivings about the continued judicial reliance on such conduct to increase sentencing ranges under the Guidelines, largely focusing on the constitutional right to a jury trial. In fact, both of President Trump’s nominees to the Supreme Court—Justice [Gorsuch](#) and, most recently, Judge Brett [Kavanaugh](#) of the United States Court of Appeals for the D.C. Circuit—have suggested during their tenures as Circuit judges that they may view judicial fact-finding at sentencing to be constitutionally problematic. [Two bills](#) have also recently been introduced in the House of Representatives that would alter the practice legislatively. Given the possibility of judicial or legislative changes in this area of criminal sentencing law, this Sidebar provides an overview of the issue by briefly describing the use of relevant conduct under the Guidelines and tracing the Supreme Court case law that has informed the practice, before addressing judicial commentary and recently proposed legislation regarding the use of acquitted or uncharged conduct at sentencing.

**Relevant Conduct Under the Sentencing Guidelines:** Pursuant to the Sentencing Reform Act of 1984 (SRA), Congress created the United States Sentencing Commission and [authorized](#) it to develop [binding](#) criminal sentencing guidelines. The resultant [guidelines](#) system went into effect in 1987 and changed

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federal sentencing from an exercise in judicial discretion within broad statutory parameters to a formalistic application of complex rules for calculating and adjusting sentence lengths based on the specific offense and defendant at issue. Though, as discussed below, the Guidelines subsequently lost their mandatory character by virtue of the Supreme Court's 2005 decision in *United States v. Booker*, both the original and the current versions of the Guidelines provide for calculation of a range of punishment by reference to a "[base offense level](#)"—set for the particular crime of which the defendant has been convicted—that is adjusted up or down in light of offender- and offense-specific characteristics. The guidelines define the "[relevant conduct](#)"—i.e., the acts specific to the defendant and his offense—for purposes of many Guidelines range calculations to include acts or omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction." An [application note](#) to the Guidelines makes clear that such conduct, even if "not formally charged" and "not an element of the offense of conviction[,] may enter into the determination" of the applicable sentencing range.

In other words, the Guidelines permit a court to find facts at sentencing that were not proved to a jury and use those facts in calculating the sentencing range (among other things), potentially increasing the ultimate sentence to which a defendant is subject. Guidelines [commentary](#) indicates that a "preponderance of the evidence" standard of proof (i.e., proof that a fact is more likely than not to have occurred) is sufficient for such findings. In this respect, the Guidelines effectuate the statutory mandate of [18 U.S.C. § 3661](#), which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

**Acquitted Conduct and *United States v. Watts*:** During the period when the Guidelines were mandatory, courts routinely upheld the practice of judicial fact-finding at sentencing in the face of constitutional challenges. [Eleven circuits](#) concluded that not only could courts appropriately consider at sentencing uncharged conduct or conduct underlying dismissed charges, courts could also rely on conduct underlying charges that a jury had considered and of which it had acquitted a defendant (so long as the conduct was supported by the preponderance of the evidence).

Then, in 1997, the permissibility of judicial fact-finding at sentencing under the mandatory Guidelines came before the Supreme Court in *United States v. Watts*, and in a brief *per curiam* opinion, the Court appeared to broadly approve of the practice—including the use of acquitted conduct in determining a defendant's sentencing range. Relying on 18 U.S.C. § 3661, pre-Guidelines practice, and the "sweeping language" of the Guidelines and commentary, the Court in *Watts* [determined](#) that Congress had authorized judicial fact-finding at sentencing, even with respect to conduct underlying charges of which a defendant was acquitted by a jury. Moreover, the Court rejected what it viewed as the lower court's "erroneous views of [the Court's] double jeopardy jurisprudence." (While the lower court believed that a sentence increase based on facts underlying a charge of which a defendant was acquitted impermissibly inflicted punishment for that charge, the *Watts* Court explained that sentencing enhancements only reflect the *manner* "in which [a defendant] committed the crime of conviction.") The Court also noted that "application of the preponderance [of the evidence] standard [of proof] at sentencing generally satisfies due process" in most circumstances, citing to an [earlier case](#) in which the Court had reasoned that "sentencing takes place only after . . . the reasonable-doubt standard has been applied to obtain a valid conviction."

**Post-*Watts* Limits:** In light of *Watts*, it appeared that the Supreme Court had endorsed judicial fact-finding under the Guidelines, even as to acquitted conduct, seemingly insulating it from constitutional challenge. However, in a series of subsequent cases, the Court recognized important limits to the practice based on a constitutional provision not considered in *Watts*: the Sixth Amendment, which establishes a right to a jury trial in all criminal prosecutions. First, three years after *Watts*, in *Apprendi v. New Jersey*, the Supreme Court addressed a state statute containing a hate crime sentence enhancement and determined that the enhancement, because it increased the statutory maximum sentence to which a

defendant would otherwise be subject, constituted an element of the crime and could not be based on a judge's finding by a preponderance of the evidence that the requisite fact of biased purpose existed. Rather, the Sixth Amendment required the prosecution to submit to the jury the question of biased purpose and to prove that purpose beyond a reasonable doubt. Subject to an exception for prior convictions, the Court in *Apprendi* endorsed the rule that it is "unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," and "such facts must be established by proof beyond a reasonable doubt." In the later case of *Alleyne v. United States*, the Court extended *Apprendi*'s holding to facts that increase a mandatory minimum sentence as well.

As a result of *Apprendi* and *Alleyne*, the Constitution requires facts that raise the floor or ceiling of a sentence to be proved to a jury beyond a reasonable doubt. Yet the Court in *Apprendi* was careful to note that it did not mean to undermine the judicial "exercise [of] discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute," pointing out that judges had long exercised such discretion "bound by the range of sentencing options prescribed by the legislature" for the crime of conviction. This left open the crucial question of whether and to what extent *Apprendi* could be reconciled with the Guidelines (which, at the time *Apprendi* was decided, were mandatory).

The question was answered in *United States v. Booker*, with a majority of the Court concluding that the Sixth Amendment bars any judicial fact-finding pursuant to the Guidelines that would increase a defendant's sentencing range beyond what the Guidelines would mandate based solely on facts admitted by the defendant or found by the jury. The *Booker* majority recognized that this conclusion was driven by the Guidelines' mandatory nature, which impelled judges to impose higher sentences than they could have imposed based on jury-found facts alone (though both the jury-based and judge-enhanced Guidelines ranges would still fall within the bounds of the relevant statutory outer limits). This recognition, in turn, prompted a different majority of the *Booker* Court to excise the SRA provisions that made the Guidelines mandatory, leaving them "effectively advisory" and, in the opinion of the Court, free of constitutional defect.

**Post-Booker Commentary:** After *Booker*, district courts are not bound to apply the Guidelines, but they must still "consult" them and take them into account (along with other statutory factors) to reach a sentence that is "reasonable." Relying on *Watts*, the Guidelines' now-advisory nature, and *Booker*'s apparent resolution of Sixth Amendment concerns, courts after *Booker* have continued to find facts at sentencing pursuant to the Guidelines—including finding that defendants engaged in conduct underlying offenses of which the defendants have been acquitted. In so doing, the lower courts have rejected constitutional challenges to such fact-finding. In turn, a number of commentators have decried the persistence of judicial fact-finding under the Guidelines, which are still the starting point and "lodestar" of federal sentencing. Though most critical commentary has focused on the continued use of acquitted conduct specifically, some commentary has suggested that any judicial fact-finding which meaningfully increases an offender's sentence could be viewed as constitutionally suspect in light of the Sixth Amendment principles established in the *Apprendi* line of cases.

This view appears to have adherents on the Supreme Court, as well: In a 2014 dissent from the denial of certiorari in *Jones v. United States*, Justice Scalia (joined by Justices Ginsburg and Thomas) argued that judicial fact-finding justifying a sentence that would be unreasonable but for the judge-found facts may run afoul of the Sixth Amendment. Likewise, Justice Scalia's replacement, Justice Gorsuch, wrote in an opinion during his tenure on the United States Court of Appeals for the Tenth Circuit that it is "questionable" whether the Constitution allows a court to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent," citing to Justice Scalia's *Jones* dissent.

Also of note are comments by the latest nominee to the Supreme Court, Judge Brett Kavanaugh. Judge Kavanaugh has suggested that the judicial use of both uncharged and acquitted conduct at sentencing could

be constitutionally problematic, even after *Booker*. In a 2015 concurring statement to the D.C. Circuit’s denial of petitions for rehearing *en banc* in *United States v. Bell*, Judge Kavanaugh wrote that “[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.” He went on to note, however, that recognition of a constitutional bar to the use of such conduct would require “a change of course by the Supreme Court.” On other occasions, Judge Kavanaugh has appeared to criticize the coherence of the Court’s Sixth Amendment jurisprudence in the area writ large, making clear in testimony before the United States Sentencing Commission that he disagrees with the use of at least acquitted conduct under the Guidelines as a policy matter. These statements hint at a possible contrast with the view of the Justice that Judge Kavanaugh could replace, Justice Kennedy, who joined a partial dissent by Justice Breyer in *Booker* arguing that “nothing in the Sixth Amendment . . . forbids a sentencing judge to determine . . . the manner or way in which the offender carried out the crime” of conviction (which, from Justice Breyer’s perspective, was all the mandatory Guidelines authorized).

Nevertheless, it is by no means a certainty that a majority of the Court would be willing to revisit and depart from *Watts* and the second *Booker* majority’s recognition that an advisory Guidelines regime clears Sixth Amendment scrutiny, particularly given the aforementioned view expressed by Justice Breyer that even the mandatory iteration of the Guidelines was constitutionally sound. At the same time, the fact that the judiciary has increasingly signaled discomfort with judicial fact-finding under the Guidelines, at least with respect to acquitted conduct, could presage significant changes for federal sentencing.

**Current Legislation:** Beyond the issue of the constitutionality of sentencing based on judge-found facts, Congress has showed recent interest in altering the court’s role with respect to these matters. At least two bills have been introduced in the current Congress that would address judicial fact-finding at sentencing as part of larger criminal justice reforms and changes to other areas of law: [H.R. 4261](#) and [H.R. 5785](#). The relevant provisions of the two bills are identical: they amend 18 U.S.C. § 3661 (which, as noted above, establishes that “[n]o limitation shall be placed” on the information concerning conduct that a court may consider at sentencing) by adding the concluding phrase “except that a court shall not consider conduct of which a person has not been convicted.” Although the section headings for the relevant provisions of the two bills indicate that the proposed language would result in “[e]xclusion of [a]cquitted [c]onduct” at sentencing, the effect of the language would appear to be to remove from consideration both acquitted and uncharged conduct, as either category would seem to constitute conduct “of which a person has not been convicted.” Both bills are currently in committee.