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Punishing Terrorists: Congress, The Sentencing Commission, The Guidelines, and the Courts

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ARTICLES

PUNISHING TERRORISTS: CONGRESS, THE SENTENCING COMMISSION, THE GUIDELINES, AND THE COURTS

*George D. Brown**

There is considerable uncertainty surrounding the law and policy of federal sentencing. This uncertainty can be traced to United States v. Booker, in which the Supreme Court struck down the existing system of mandatory Federal Sentencing Guidelines, but preserved them as “advisory.” Federal courts at all three levels have since struggled with the legal status of the Guidelines and how to apply them. The Court’s recent decision in Peugh v. United States seems to treat the Guidelines as true “law.”

This uncertainty has serious consequences for the “War on Terror.” The Article III courts are the principal forum in which terrorism suspects are tried. If guilty, the suspects’ sentences will often be pushed sharply upward by the operation of the “terrorism enhancement” of the Guidelines. Courts are split on how to apply the enhancement. Its status as an advisory mandatory minimum—reflecting a “get tough” policy that originated in Congress—is in tension with goals of individualized sentencing.

This Article examines that tension’s origins in Booker and examines how it has played out at both the trial and appellate levels in cases applying the enhancement. The Article also recommends drawing a distinction between cases where district courts depart from the enhancement based on an individualized application of the basic federal sentencing statute, 18 U.S.C. § 3553(a), and cases based on a policy disagreement with the enhancement. The Article criticizes the latter approach, and calls on appellate courts to overturn sentences based on it. The result may be a set of special rules for terrorism cases. However, the enhancement’s congressional origins and recent Supreme Court decisions in such diverse areas as standing, pleading, and freedom of speech support this approach.

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INTRODUCTION: A JUDICIAL PERFECT STORM

For nearly a decade, federal sentencing law—particularly the status of the Federal Sentencing Guidelines—has been in disarray. In a single 2005 case, *United States v. Booker*,¹ the Supreme Court rendered two decisions by different majorities. The first, or “merits,”² decision held that the substantial role played by the judge in administering the Guidelines violated the Sixth Amendment right to a jury trial.³ The “remedial”⁴ decision, rendered by a different majority, declared that the answer to this defect was to treat the Guidelines as advisory.⁵ The Court remains deeply divided on the status and role of the Guidelines, as evidenced by the most recent term’s decision in *Peugh v. United States*.⁶ The *Peugh* decision treated the Guidelines more as binding law than advisory, holding that the Ex Post Facto Clause is violated when a defen-

¹ 543 U.S. 220, 226 (2005) (dealing with the Federal Sentencing Guidelines). The Court previously invalidated state sentencing guidelines in *Blakely v. Washington*, 542 U.S. 296 (2004).

² See NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT*, 982–84 (5th ed. 2010) (discussing the merits and remedial majorities).

³ *Booker*, 543 U.S. at 236, 244.

⁴ ABRAMS, BEALE & KLEIN, *supra* note 2, at 982–84.

⁵ *Booker*, 543 U.S. at 245.

⁶ 133 S. Ct. 2072, 2088 (2013).

dant receives a higher sentence as a result of Guidelines promulgated after his offense.⁷

The lower courts are equally in disarray. District judges are unclear as to how much discretion they possess after *Booker*. Some are inclined to emphasize their discretion, focusing on the requirements of the general federal sentencing statute, 18 U.S.C. § 3553(a),⁸ while others take refuge in the Guidelines.⁹ The courts of appeals are equally divided on their role in reviewing sentences that depart from the Guidelines. Some emphasize the trial court's familiarity with the case and the themes of deference to trial courts and limited appellate review that can frequently be found in Supreme Court opinions on the issue.¹⁰ Others emphasize that review must be meaningful,¹¹ and that trial judges do not have a "blank check."¹² Sharp divisions within a court of appeals are not uncommon.¹³

These disagreements and uncertainties are particularly acute in the context of what used to be called the "War on Terror." Indeed, they may have an impact on society's ability to conduct that war. After an initial flirtation with such alternatives as military tribunals and "national security courts,"¹⁴ the political system has settled on the Article III courts as the forum in which domestic terrorists will be tried as criminals under existing criminal statutes.

Yet, when it comes to punishing those who have been found guilty, or who have pleaded guilty, courts send mixed messages. The problem is particularly acute in the case of "preventive prosecutions."¹⁵ These somewhat problematic prosecutions involve defendants who have not yet committed, or attempted to commit, classic acts of terrorism such as attacking public buildings and events. Thus, rather than committing an act of terrorism, the defendants in these cases seem to have been preparing themselves to be the sort of person who would commit such acts. They are guilty of such actions as receiving military training, usually abroad, taking an "oath" to support a terrorist organization, and discussing (both

⁷ *Id.* at 2081–85.

⁸ 18 U.S.C. § 3553(a) (2012).

⁹ *See Peugh*, 133 S. Ct. at 2084 (noting the district courts' tendency to follow the Guidelines).

¹⁰ For examples of cases discussing the issues of deference and appellate review, *see generally Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007); and *United States v. Booker*, 543 U.S. 220 (2005).

¹¹ *United States v. Stewart*, 590 F.3d 93, 147 (2d Cir. 2009).

¹² *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (quoting *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008)).

¹³ *E.g.*, *Stewart*, 590 F.3d 93; *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

¹⁴ *See, e.g.*, STEPHEN DYCUS ET AL., *COUNTERTERRORISM LAW*, 673–76 (2d ed. 2012) (discussing national security court proposals).

¹⁵ *See, e.g.*, Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

generally and specifically) acts of terrorism.¹⁶ Treating such persons as “criminals” raises difficult questions. How to punish them raises others.

The major source of these questions is section 3A1.4 of the Sentencing Guidelines: the “terrorism enhancement.”¹⁷ To understand its potentially “draconian”¹⁸ impact, one must first have a basic understanding of how the Guidelines operate. The Appendix shows their initial operation. All federal crimes are grouped according to offense characteristics and assigned a base offense level.¹⁹ For example, a given crime may have a base offense level of 12, which can be found on the vertical axis.²⁰ From this point of departure, the judge would consider whether there were any specific aggravating or mitigating offense characteristics, such as possession of a firearm.²¹ He or she would then consider possible further adjustments based on such factors as the victim,²² the defendant’s role,²³ and the defendant’s acceptance of responsibility.²⁴ Assuming a simple one-count case that did not trigger any other adjustments, the judge’s analysis would then move horizontally on the criminal history axis.²⁵ If the defendant had no record of prior criminal activity, the inquiry would end with the base level of 12, yielding a sentencing range of 10–16 months.²⁶ The judge would have discretion within this range.²⁷

The terrorism enhancement takes a wrecking ball to this carefully constructed edifice. The Sentencing Commission adopted the enhancement at the direction of Congress.²⁸ It provides, in part, that “[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than 32, increase to level 32.”²⁹ The enhancement also provides for an automatic criminal history of VI,³⁰ the highest point on the scale.³¹ Turning to the grid, this enhancement causes the sentencing range for a

¹⁶ *United States v. Farhane*, 634 F.3d 127, 133 (2d Cir. 2011); see Chesney, *supra* note 15, at 474–92 (discussing the use of 18 U.S.C. § 2339A in anticipatory prosecutions). Section 2339A punishes provision of material support to terrorists. 18 U.S.C. § 2339A (2012).

¹⁷ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2013).

¹⁸ James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 53 (2010).

¹⁹ U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(1)–(2).

²⁰ See *infra* Appendix.

²¹ See ABRAMS, BEALE & KLEIN, *supra* note 2, at 971.

²² See *id.* at 972.

²³ See *id.*

²⁴ See *id.* at 971.

²⁵ See *infra* Appendix.

²⁶ *Infra* Appendix.

²⁷ U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. n.3 (2013).

²⁸ See McLoughlin, *supra* note 18, at 51.

²⁹ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a).

³⁰ *Id.* cmt. n.3.

³¹ See *infra* Appendix.

level 12 base offense to jump from 10–16 months to 210–262 months.³² However, the statutory maximum may be less than the enhancement range.³³ Although one can find language to the contrary,³⁴ applications of the Guidelines cannot lead to a sentence exceeding the statutory maximum.³⁵ If there is more than one count, however, the enhancement could lead to consecutive sentences, pushing the length of the punishment upward.³⁶

The enhancement is controversial. Some judges don't like it, and seem to seek ways around it.³⁷ Courts of appeals, however, have reversed judges who refuse to apply the enhancement or who have diluted it substantially.³⁸ There is also a serious question as to whether the enhancement represents a sound way of dealing with persons whose terrorist path is far from clear. Does it provide deterrence and incapacitation, or does it promote overkill and produce martyrs?

This Article takes the position that the enhancement represents an important public policy—a statement about terrorism—that should not be lightly abandoned. The fact that it stems from a congressional directive enforces its status, rather than weakens it. It is true that the enhancement represents a sort of judicial “perfect storm”: the interaction of uncertain sentencing law with a controversial sentencing policy. As developed below, however, I think that many of the objections to it are not well-founded. I concede that it is, to paraphrase one district judge, a “blunt instrument,”³⁹ a sort of nonbinding mandatory minimum. The answer to this problem is, in my view, to affirm the discretion of trial judges to modify the enhancement's application in individual cases, while clarifying and limiting the grounds on which they may do so. How those judges should proceed, and how appellate courts should review them, are the central questions addressed in this Article.

Part I of the Article examines the complex world of federal sentencing under the now “advisory” Guidelines. The analysis begins with the *Apprendi–Booker* line of cases to determine just how advisory the Guidelines are under Supreme Court precedent. Much of the analysis is devoted to the Court's 2013 decision in *Peugh v. United States*.⁴⁰ The discussion focuses on whether *Peugh* represents a view of the Guidelines

³² *Infra* Appendix.

³³ See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.4.

³⁴ See *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000).

³⁵ U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b); *Apprendi*, 530 U.S. at 497.

³⁶ U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d); McLoughlin, *supra* note 18, at 89.

³⁷ See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 265 (4th Cir. 2008).

³⁸ *Id.*

³⁹ Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012).

⁴⁰ 133 S. Ct. 2072 (2013).

as considerably more than advisory to the point that it is in serious tension with *Booker*.

Part II analyzes the terrorism enhancement. The analysis focuses on both the difficulties presented in applying this section of the Guidelines and on the constitutional and other objections that have been made to it.

Part III turns to the sharp tensions that have emerged between trial and appellate courts in the application of the enhancement. These tensions extend across the spectrum of the Guidelines' application in the post-*Booker* world of sentencing, but they are particularly acute in the context of applying the enhancement. Many trial judges liberally apply the sentencing discretion that they possess now that the Guidelines are not mandatory.⁴¹ Many appellate courts express the need to control this discretion and to advance the policies embodied in the enhancement.⁴²

Part IV first considers whether the enhancement makes a difference. It examines briefly prosecutions under federal statutes forbidding the provision of "material support" to terrorists and terrorist organizations.⁴³ These statutes are the foundation for an essentially preventive form of prosecution,⁴⁴ a phenomenon that is likely to play an increasingly important role in any domestic war on terror. They are also the principal example of cases where application of the enhancement may seem too harsh.⁴⁵ This Part then builds on the above analysis to grapple with a major question posed by this Article: How should courts approach the enhancement in cases where it makes a real difference?

I offer a tentative conclusion that the enhancement should not be lightly disregarded. It represents the will of Congress on how to deal with a major societal problem. Its imperfections, although not of a constitutional dimension, present a problem. It is up to the courts, primarily trial courts, to deal with this problem. Their approach should be to apply it on a case-by-case basis—as part of the § 3553(a) inquiry—rather than to accept it without question or reject it out of hand. Still, the enhancement may benefit from a presumption of validity beyond that afforded other guidelines. The result of this presumption would be that appellate courts would need to review terrorism sentences more sharply than the post-*Booker* doctrine seems to allow. However, it is clear from recent Supreme Court decisions on diverse matters, such as standing, pleading,

⁴¹ See, e.g., *United States v. Stewart*, 590 F.3d 93, 144–48 (2d Cir. 2009) (discussing district court sentence of twenty-eight months in a case where the Guideline range was sixty months).

⁴² See, e.g., *id.* at 147–53 (remanding the case for resentencing).

⁴³ 18 U.S.C. §§ 2339A–2339B (2012).

⁴⁴ See generally Chesney, *supra* note 15.

⁴⁵ Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012).

and freedom of speech, that a special approach to terrorism may apply in some instances.⁴⁶ The enhancement issue is one of those instances.

I. THE UNCERTAIN STATE OF FEDERAL SENTENCING LAW

A. *The Guidelines and the Judge*

As Professors Abrams, Beale, and Klein state, “It is no exaggeration to say that federal sentencing was revolutionized by the Sentencing Reform Act of 1984, which created the current Guidelines system.”⁴⁷ The hallmarks of the previous sentencing practice were broad judicial discretion, within broad statutory sentencing ranges, and no appellate review of sentences.⁴⁸ The Guidelines sought to cabin that discretion by establishing base levels for different offenses and by directing how judges should exercise discretion over a range of possible sentencing factors. This latter aspect of the Guidelines came in only after the basic verdict, plea, or finding of guilty, and the establishment of the resulting base level.

Under the Guidelines, a judge, at this early stage, had to make findings concerning specific offense characteristics, such as the possession of a firearm,⁴⁹ and generic adjustments, such as the presence of a vulnerable victim.⁵⁰ These, and other, findings were to be made by application of a preponderance of the evidence standard and resulted in automatic upward or downward adjustments to the sentence. The Guidelines did not seek to *alter* the role of the judge vis-à-vis that of the jury. The principal goal of the Guidelines was to eliminate disparities among the sentences by *limiting* judicial discretion.⁵¹ Under both the Guidelines and pre-existing law, the judge still played a dominant role in the sentencing phase of a criminal case. In what might seem at first like a paradoxical development, the judge’s reduced discretion became a basis for an ultimately successful constitutional challenge to the Guidelines based on the defendant’s Sixth Amendment right to a jury finding of facts.

B. *From Apprendi to Booker: The Constitutional Showdown over the Guidelines*

Constitutional issues have plagued the Guidelines. They took effect in 1987. In 1989, the Supreme Court quickly dispatched a challenge, based on separation of powers, to the composition and authority of the

⁴⁶ See *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

⁴⁷ ABRAMS, BEALE & KLEIN, *supra* note 2, at 967.

⁴⁸ *Id.*

⁴⁹ U.S. SENTENCING GUIDELINES MANUAL § 5K2.6 (2013).

⁵⁰ *Id.* § 3A1.1(b).

⁵¹ See *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

United States Sentencing Commission.⁵² However, the requirement that the judge find facts that would affect the length of sentence ran into Sixth Amendment issues that had long divided the Supreme Court.⁵³ In its 5–4 2000 decision in *Apprendi v. New Jersey*,⁵⁴ the majority held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁵⁵ In particular, the majority expressed reservations about the notion of “sentencing factors”: facts “not found by a jury but that could affect the sentence imposed by the judge.”⁵⁶ As *Apprendi* came from a state system and did not involve sentencing guidelines, the first shoe dropped when the majority used similar reasoning to invalidate a system of state guidelines in *Blakely v. Washington*.⁵⁷ *Booker*⁵⁸ was the second shoe.

The paradox referred to above is that, under a pre-guidelines system, the judge possessed a very broad range of discretion in imposing a sentence. How, then, could a defendant’s rights be diminished by legislative or administrative actions that limit that discretion and set forth guideposts that judges have to respect? The answer appears to be that guidelines systems prescribe a range of punishments that must be imposed if the defendant commits X conduct. The defendant, on the other hand, has a Sixth Amendment right to have a jury determine the facts that would constitute X.⁵⁹ In a discretionary system, on the other hand, society may not have prescribed such consequences at all for “sentencing factors.” These facts are in the judge’s domain, if even found, and the defendant has no correlative right to a jury determination of them. This argument, even though rooted in history, may strike some as thin. Even thinner, perhaps, is the notion that “advisory guidelines” constitute much more than a return to the old discretionary system.

C. *Booker and the Shift of the Guidelines from Mandatory to Advisory*

Booker is an extremely complex case that grew out of a routine drug prosecution.⁶⁰ The jury convicted a defendant of possession “based on evidence that he had 92.5 grams of [cocaine base] in his duffel bag.”⁶¹

⁵² *Id.*

⁵³ *E.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

⁵⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000).

⁵⁵ *Id.* at 490.

⁵⁶ *Id.* at 487.

⁵⁷ *Blakely v. Washington*, 542 U.S. 296 (2004).

⁵⁸ *United States v. Booker*, 543 U.S. 220 (2005).

⁵⁹ *Apprendi*, 530 U.S. at 475–76.

⁶⁰ *See Booker*, 543 U.S. at 226–28 (outlining facts).

⁶¹ *Id.* at 235.

However, at a post-trial sentencing hearing a judge found, by a preponderance of the evidence, two key facts: that the defendant possessed an additional 566 grams of the drug, and that he “was guilty of obstructing justice.”⁶² Under the (then-mandatory) Guidelines, these facts pushed the defendant’s sentencing range upward to the point where he might have faced life imprisonment. The judge ultimately imposed a sentence that was almost ten years longer than he would have imposed based on the jury’s verdict and the defendant’s criminal history.⁶³

In the Supreme Court, *Booker* produced an array of opinions, including two majorities: one invalidating the Guidelines-based sentence and one prescribing a future role for the Guidelines themselves. I will follow the practice of Professors Abrams, Beale, and Klein in referring to these two opinions as the “merits majority” and the “remedial majority.”⁶⁴

For the merits majority, the case presented a straightforward example of the problem faced in *Apprendi* and *Blakely*. The judge had “impose[d] a sentence that [was] not solely based on ‘facts reflected in the jury verdict or admitted by the defendant.’”⁶⁵ This violated what the merits majority saw as a defendant’s Sixth Amendment protection “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”⁶⁶ For this majority, what the Guidelines viewed as sentencing factors that could be decided by a judge under the preponderance standard were, in effect, “elements of the crime with which he is charged.”⁶⁷ In dissent, Justice Breyer cited the longstanding tradition of “post-conviction *judge-run* sentencing procedures.”⁶⁸ Justice Breyer did not prevail on the merits. However, he was in the remedial majority and wrote its opinion in a way that preserved a significant role for the Guidelines while reinforcing the judicial discretion in sentencing they had been meant to curtail.

The merits holding, that the mandatory Guidelines created an unconstitutional judicial role in sentencing, posed serious remedial questions for the continued operation of the Guidelines system. One of the pillars of that system was the notion that judges would continue to exercise their traditional authority, subject to a carefully crafted set of constraints. If the constraints could not be mandatory, what role—if any—would they play? One option would be to shift the role of determining

⁶² *Id.* at 227.

⁶³ *See id.* at 235.

⁶⁴ *See* ABRAMS, BEALE & KLEIN, *supra* note 2, at 982–85.

⁶⁵ *Booker*, 543 U.S. at 232.

⁶⁶ *Id.* at 230.

⁶⁷ *Id.*

⁶⁸ *Id.* at 328 (Breyer, J., dissenting).

sentencing facts to the jury.⁶⁹ If such facts were actually elements of the crime, such a shift would make constitutional sense. However, the remedial majority saw this approach as unworkable and unnecessary.⁷⁰ Instead, the majority solved the problem posed by the mandatory Guidelines by making them advisory.⁷¹ As Justice Breyer put it, by removing the provision of the sentencing statute “that makes the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges’—the statute falls outside of *Apprendi*’s requirement.”⁷²

Congress’s actions in the sentencing area made it clear that the legislative body assumed that judges would play a dominant role in sentencing.⁷³ The Guidelines could be made advisory by excising discrete portions of existing statutes.⁷⁴ The language that was removed had made the Guidelines generally binding on trial judges⁷⁵ and had required de novo review at the appellate level of “departures from the applicable Guidelines range.”⁷⁶

Appellate review of sentences was preserved, although the general standard would be one of reasonableness.⁷⁷ More importantly, the remedial opinion envisaged a continued important role for the Guidelines at the trial level. Even after the excision, the general federal sentencing statute, 18 U.S.C. § 3553(a),⁷⁸ still “requires judges to take account of the Guidelines together with other sentencing goals.”⁷⁹ Moreover, Justice Breyer suggested that these goals were themselves consistent with the Guidelines.⁸⁰

Justice Breyer seemed to have squared the circle.⁸¹ The constitutional objection to the Guidelines was removed, but they remained in place. Their status was now advisory, but judges had to consider them. Appellate review was still available, and a general reasonableness standard might conceivably stretch to the Guidelines’ role in a particular sentence. Trial judges were clear winners, but neither the Guidelines nor the courts of appeals were clear losers.

⁶⁹ See *id.* at 284–86 (Stevens, J., dissenting).

⁷⁰ *Id.*

⁷¹ *Id.* at 245 (majority opinion).

⁷² *Id.* at 259.

⁷³ See *id.* at 245–47.

⁷⁴ *Id.*

⁷⁵ *Id.* at 259.

⁷⁶ *Id.*

⁷⁷ *Id.* at 262.

⁷⁸ 18 U.S.C. § 3553(a) (2012).

⁷⁹ *Booker*, 543 U.S. at 259.

⁸⁰ See *id.* at 264–65.

⁸¹ See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1492 (2008) (noting that *Booker* transformed the Guidelines from “law ‘to a lesser species, a form of quasi-law’”).

D. *The Post-Booker Trilogy*—Rita, Gall, and Kimbrough

Justice Breyer's tour de force led to an obvious contradiction. As the Supreme Court began the difficult task of fleshing out *Booker*, Justice Souter stated his concern in *Rita v. United States*:

If district judges treated the now-discretionary Guidelines simply as worthy of consideration but open to rejection in any given case, the *Booker* remedy would threaten a return to the old sentencing regime and would presumably produce the apparent disuniformity that convinced Congress to adopt Guideline sentencing in the first place. But if sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right.⁸²

Rita was the first of three cases that followed shortly after the enigmatic *Booker* decision. In *Rita*, the trial judge imposed a Guidelines sentence, which the Fourth Circuit affirmed on appeal. The Fourth Circuit stated that a properly calculated Guidelines sentence is “presumptively reasonable”⁸³ and candidly noted that “most sentences will continue to fall within the applicable guideline range.”⁸⁴

Justice Breyer's opinion for the Court emphasized that it was recognizing an *appellate* court presumption.⁸⁵ He stated that when a within-Guidelines sentence reached the appellate court it reflected a “double determination”: that of the judge who had heard the case and that of the Sentencing Commission that had articulated the appropriate punishment.⁸⁶ The key to his analysis is the role of the general sentencing objectives set forth in 18 U.S.C. § 3553(a).⁸⁷ They include consideration of such factors as offense and offender characteristics;⁸⁸ the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment;”⁸⁹ and the Guidelines themselves.⁹⁰ These objectives would have been determinative not only for

⁸² 551 U.S. 338, 390 (2007) (Souter, J., dissenting).

⁸³ *Id.* at 345–46 (majority opinion).

⁸⁴ *Id.* at 346.

⁸⁵ *Id.* at 353–54.

⁸⁶ *Id.* at 347.

⁸⁷ 18 U.S.C. § 3553(a) (2012).

⁸⁸ *Id.* § 3553(a)(1), (a)(2)(A).

⁸⁹ *Id.* § 3553(a)(2)(A).

⁹⁰ *Id.* § 3553(a)(4).

the trial judge, but also for the Commission when it wrote the Guidelines.⁹¹

There may be some tension between this normative description of the Guidelines and Justice Breyer's description, immediately following, of the Commission's *empirical* approach to sentencing.⁹² The important point, however, is that Justice Breyer built upon his suggestion in *Booker* that the § 3553(a) factors and the Guidelines are in harmony. This point dilutes the impact of any reading of *Booker* that viewed the case as a rejection of the Guidelines in favor of the statutory factors. It is hard to see a rejection if the two are essentially the same.

There were, of course, the expected qualifications. The trial judge need not apply the Guidelines.⁹³ Appellate courts are not bound to apply the presumption of reasonableness.⁹⁴ However, *Rita* made it clear that appellate review is not unbounded. Justice Breyer stated that appellate courts "exist to correct . . . mistakes when they occur."⁹⁵ He suggested approval of the approach of some circuit courts that "the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance."⁹⁶

In sum, *Rita* contains something for everyone, in large part because all three courts were in agreement on the validity of the Guidelines' application in a particular case. One might offer the somewhat incongruous conclusion that it strengthened the Guidelines by further tying them to § 3553(a) and affirming the presumption of validity, strengthened the role of the trial judge by re-affirming *Booker*'s treatment of the Guidelines as advisory, and—at the least—preserved the role of appellate courts. To the extent that *Booker* invites disharmony, *Rita* may not provide many answers.

Disharmony was very much present in *Gall v. United States*,⁹⁷ a Supreme Court decision that focused primarily on the role of appellate courts in an advisory Guidelines system. *Gall* was a routine drug case in which the trial judge imposed a probation-only sentence that was outside the Guidelines.⁹⁸ The Eighth Circuit reversed the sentence, holding that a sentence outside the Guidelines range must be supported by a justification that is "proportional to the extent of the difference between the advi-

⁹¹ *Rita*, 551 U.S. at 348 ("Congressional statutes . . . tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.").

⁹² *Id.* at 349–50.

⁹³ *Id.* at 350.

⁹⁴ *Id.* at 350–52.

⁹⁵ *Id.* at 354.

⁹⁶ *Id.* at 355.

⁹⁷ 552 U.S. 38 (2007).

⁹⁸ *Id.* at 43–45 (describing lower court proceedings).

sory range and the sentence imposed.”⁹⁹ The Supreme Court reversed the court of appeals and reinstated the sentence.

The Court’s opinion is not a model of clarity. It noted that creating a presumption of unreasonableness for sentences outside the Guidelines would come close to making them mandatory, in violation of *Booker*.¹⁰⁰ It cautioned courts of appeals to review all sentences “under a deferential abuse-of-discretion standard.”¹⁰¹ Thus, any standard of direct proportionality would be invalid.¹⁰² The Court explicitly rejected “applying a heightened standard of review to sentences outside the Guidelines range.”¹⁰³ At the same time, it said that appellate courts *can* take into account the degree of variance and deviation from the Guidelines, reaffirming the approach suggested in *Rita*.¹⁰⁴

The Court’s instructions for trial judges were considerably clearer. The district judge must give serious consideration to and explain any deviation from the Guidelines. Indeed, “a district court should *begin* all sentencing proceedings by correctly calculating the applicable Guidelines range.”¹⁰⁵ Furthermore, “a major departure should be supported by a more significant justification than a minor one.”¹⁰⁶ *Gall* is perhaps best known for setting out the sequence the trial judge must follow: correctly calculate the applicable Guidelines range; hear arguments from the parties; consider the § 3553(a) factors; and, explain his or her reasoning.¹⁰⁷ The appellate court reviews these actions by first considering whether proper procedures were followed, and then reviews the substantive reasonableness of the sentence.¹⁰⁸

Gall looks like a win for trial judges and a slap on the wrist of appellate courts. As long as the former follow the proper steps—some would say go through the motions—their decisions are relatively insulated. Appellate review still has a role to play, albeit an uncertain one, particularly if appellate judges can find wiggle-room in the concept of “procedural error.” As for the Guidelines, they remain important. The trial judge must begin the sentencing process with them and the appellate court has some ability to consider the extent of deviation. Once again, the system appears to be in a considerable state of flux.

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.* at 47 (“[Warning against] creating an impermissible unreasonableness presumption for sentences outside the Guidelines range.”).

¹⁰¹ *Id.* at 41.

¹⁰² *Id.* at 47 (rejecting “the use of a rigid mathematical formula . . .”).

¹⁰³ *Id.* at 49.

¹⁰⁴ *Id.* at 51 (stating review of sentences may include the extent of any variance from the Guidelines range); *but see id.* at 59 (cautioning against *de novo* review).

¹⁰⁵ *Id.* at 49 (emphasis added).

¹⁰⁶ *Id.* at 50.

¹⁰⁷ *Id.* at 49–50.

¹⁰⁸ *Id.* at 50.

*Kimbrough v. United States*¹⁰⁹ presented, in even sharper form, the post-*Booker* tensions between trial courts, appellate courts, the Guidelines, and the general § 3553(a) standards. In a case involving, in part, drug offenses, the trial judge declined to apply a guideline that reflected Congress's treatment of crack cocaine far more seriously than powder cocaine.¹¹⁰ He expressed disagreement with the guideline itself and with the "disproportionate and unjust effect" of the differential treatment. The court of appeals reversed on the ground that an outside-Guidelines sentence would be "per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."¹¹¹ The Supreme Court reversed that decision, in part on the noncontroversial ground that, post-*Booker*, the Guidelines are advisory and sentencing is controlled by the general § 3553(a) standards. As noted, these include such general goals as the need to "promote respect for the law" and to "provide just punishment for the offense."¹¹² There seemed to be general agreement that a court's authority under an advisory Guidelines system includes authority to reject application of a guideline based on policy differences.¹¹³

The problem with disapproval here was that the guidelines were originally based on legislation reflecting the same different treatment of the two substances.¹¹⁴ The Sentencing Commission had since changed its mind on the subject, but Congress had rejected a proposed change in the Guidelines.¹¹⁵ The Court had essentially two responses, beyond the advisory nature of any guideline. First, it contended that Congress "knows how to direct sentencing practices in express terms,"¹¹⁶ and had not done so in this context. Second, the Court stressed the continuing role of the Guidelines and their rough congruence with § 3553(a).¹¹⁷ However, the Court took the extraordinary step of declaring some Guidelines more worthy of respect than others.¹¹⁸ The Sentencing Commission's institutional strengths come from its extensive work with "empirical data and national experience."¹¹⁹ By implication, its role does not extend to policy determinations. Thus a trial judge could utilize a policy-based disagreement with a Guideline, ostensibly on the general

¹⁰⁹ 552 U.S. 85 (2007).

¹¹⁰ *Id.* at 91–93 (describing lower court proceedings).

¹¹¹ *Id.* at 93.

¹¹² 18 U.S.C. § 3553(a)(2)(A) (2012).

¹¹³ *Kimbrough*, 552 U.S. at 101–02.

¹¹⁴ *See id.* at 94–97.

¹¹⁵ *Id.* at 99.

¹¹⁶ *Id.* at 103.

¹¹⁷ *Id.* at 108–09.

¹¹⁸ *See id.* at 109–10.

¹¹⁹ *Id.* at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

ground that it would violate the sentencing statute by yielding sentences “greater than necessary” to achieve the § 3553(a) purposes.

It is hard to assess the bearing of *Kimbrough*. On the one hand, the Court emphasized the freedom of trial judges to depart from the Guidelines in any given case. By implication, this freedom would lead to a limited appellate role. But the core analysis rests on the premise that some guidelines (at least this one) deserve less respect than others. Taken together, the three cases send uncertain messages that might be summarized as follows: The Guidelines maintain an important role. Indeed, a trial judge can simply follow them as long as he or she also follows the *Gall* sequence. On the other hand, the judge can depart as long as the proper sequence is followed. Matching the sentence to the language of § 3553(a) is key. As long as that is done, appellate review, while still available, will be an uphill process.

E. Peugh

All of this makes the status of the “advisory” Guidelines less than clear, and the Court’s recent 5–4 decision in *Peugh v. United States*¹²⁰ compounds the problem by pushing the Guidelines closer to the status of “law.” Writing for the majority, Justice Sotomayor described the Guidelines as “the lodestone” of sentencing.¹²¹ For the dissenters, Justice Thomas saw them as “flexible ‘guideposts’ which inform the district courts’ discretion.”¹²² Both cannot be right. *Peugh* advances the view that the Guidelines are very close to “law,” and will serve to enhance their already considerable role.

The issue in *Peugh* was whether to apply the Guidelines in effect when a convicted defendant’s conduct occurred or those in effect when he was sentenced. The latter approach, followed by the trial court, resulted in a substantially higher sentence.¹²³ The defendant appealed, invoking the Ex Post Facto Clause of the Constitution.¹²⁴

The government advanced the straightforward argument that, because the Guidelines are advisory rather than legally binding, there could not be an ex post facto problem.¹²⁵ The majority applied the following test: “[W]hether a given change in law presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”¹²⁶ Justice Sotomayor answered the question in the affirmative, rejecting the

¹²⁰ 133 S. Ct. 2072 (2013).

¹²¹ *Id.* at 2085.

¹²² *Id.* at 2091 (Thomas, J., dissenting).

¹²³ *Id.* at 2078–79 (majority opinion).

¹²⁴ U.S. CONST. art. I, § 9.

¹²⁵ *Peugh*, 133 S. Ct. at 2085.

¹²⁶ *Id.* at 2082.

government's argument. In doing so, she drew not only on the remedial holding of *Booker*, but also on every pro-Guidelines theme of the post-*Booker* trilogy.

She described the post-*Booker* sentencing scheme as one that “aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review.”¹²⁷ She noted, for example, that trial courts must begin their analysis with a correct Guidelines calculation. Appellate review uses the Guidelines as a benchmark.¹²⁸ Courts of appeals may presume a within-Guidelines sentence is reasonable¹²⁹ and may consider the extent of any deviation as part of their reasonableness review.¹³⁰ In sum, “the Guidelines are in a real sense the basis for the sentence.”¹³¹ Not surprisingly, empirical evidence buttressed this theoretical analysis and demonstrated that the Guidelines have a significant effect on sentencing.¹³² The dissenters invoked the *Booker* merits opinion and the Court's many references to the Guidelines' advisory status,¹³³ but the pendulum appeared to have swung.

Of course, it cannot swing much further without calling *Booker* itself into question. On the analytical level, one might conclude that the present uncertainty can only be resolved by a return to *Booker* and, in particular, a revision of the remedy. If the constitutional problem is judicial finding of sentencing facts, then—in the case of trials—juries should find them. One of the ironies of the post-*Booker* cases is that there is almost no mention of the jury's role at all. The trial judge remains the principal sentencing actor, and the Guidelines—especially if closely tethered to § 3553(a)—are the judge's principal tool. Appellate courts may derive some support from the language of *Peugh*, and the notion that they have a duty to police guideline compliance. However, a trial judge who handles Guidelines questions in the proper sequence¹³⁴ is still in a strong position. *Peugh* can be read to weaken this position in a case of disagreement with a Guideline, but the fundamental dynamic remains in place. *Peugh* marks a shift in emphasis in the four-way relationship among the judge, the appellate court, the Guidelines, and § 3553(a).

¹²⁷ *Id.* at 2083.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* But see *Alleyn v. United States*, 133 S. Ct. 2151 (2013) (reaffirming *Apprendi* and holding that any fact that increases a mandatory minimum sentence is an “element” of the crime, not a “sentencing factor,” and that such facts must be submitted to the jury).

¹³² *Peugh*, 133 S. Ct. at 2084 (citing, *inter alia*, Sentencing Commission data).

¹³³ See, e.g., *id.* at 2089–90 (Thomas, J., dissenting).

¹³⁴ See *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (laying out sequence for trial judges to follow).

Still, without revisiting *Booker*, the balance of power is unlikely to change substantially.

It is against this background that the operation of the terrorism enhancement plays out. As noted, it is part of the Guidelines. It is fertile ground for disagreement between trial and appellate courts. The next section examines the enhancement and the controversies it has engendered. This inquiry leads to the important issue of whether enhancement questions are somehow different from those posed by other guidelines.

II. THE TERRORISM ENHANCEMENT AND ITS PROBLEMS

A. *Initial Questions*

The Sentencing Commission promulgated and then amended¹³⁵ the enhancement as § 3A1.4 of the Guidelines. It is open to criticism on several grounds. If applied in every case—something that should not happen in a system of advisory Guidelines—it would amount to a mandatory minimum sentence for a wide range of terrorism offenses. The combination of a high base offense level and the highest criminal history score ensure this result. The latter aspect can be totally artificial if a defendant has not committed any prior crimes. The enhancement does not itself refer to specific offenses. Instead, it refers to a “federal crime of terrorism,”¹³⁶ defined in 18 U.S.C. § 2332b(g)(5).¹³⁷ That statute lists over fifty crimes and requires that a qualifying offense be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”¹³⁸

The intent or “motivational”¹³⁹ character of this definition can lead to problems. The enhancement applies “[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism.”¹⁴⁰ It is thus necessary to untangle this first predicate before one grapples with the “calculated” issue. It makes sense to read “or” as indicating that the defendant may either have committed (through his involvement) a crime of terrorism or “intended to promote” one. If the first predicate is met, the defendant’s conduct would have to satisfy a second intent requirement: the “calculated” portion of the federal crime definition. Defendants have insisted that “calculated” requires proof of motive.¹⁴¹ However, the courts have read it as synonymous with intent. It is not

¹³⁵ See McLoughlin, *supra* note 18, at 51.

¹³⁶ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2013).

¹³⁷ *Id.* § 3A1.4, cmt. n.1.

¹³⁸ 18 U.S.C. § 2332b(g)(5)(A) (2012).

¹³⁹ See, e.g., *United States v. Awan*, 607 F.3d 306, 312 (2d Cir. 2010).

¹⁴⁰ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

¹⁴¹ See, e.g., *Awan*, 607 F.3d at 315; *United States v. Stewart*, 590 F.3d 93, 136–37 (2d Cir. 2009); *United States v. Arnaout*, 431 F.3d 994, 1001–02 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247–48 (11th Cir. 2004).

hard to conclude that the intentional commission of the crimes listed in § 2332b(g)(5)—such as conspiracy to murder, kidnap, or maim abroad¹⁴² and hostage taking¹⁴³—can usually be tied to government conduct in some way. Indeed, the Second Circuit, in *United States v. Awan*,¹⁴⁴ appears to have merged the two “intent” requirements¹⁴⁵ and eliminated any motivational aspect of “calculated.”¹⁴⁶

The issue of intent gets a little harder if a defendant’s offense of conviction is not a federal crime of terror at all, but is “intended to promote” one. We are now dealing with three apparent intent requirements: the intent to commit the crime of conviction; the intent to promote a further crime; and the “calculated” element of that second crime. It makes sense to read intention to promote more broadly than involvement,¹⁴⁷ even though the result can be application of the terrorism enhancement to conduct that is not a federal crime of terror.¹⁴⁸ One might conclude that the calculated requirement is satisfied by the future intent of others—whose future crime has already been imputed to the defendant—or one can say that by intending to promote the future crime which would affect government conduct, the defendant simultaneously intended that effect. Either way, the terrorism enhancement casts a “broad net.”¹⁴⁹

B. Constitutional Questions

Although *Booker* rendered the Guidelines advisory in order to prevent them from being found unconstitutional, the argument is sometimes raised that the enhancement is vulnerable to constitutional challenge.¹⁵⁰ Many courts give these arguments short shrift,¹⁵¹ but two arguments merit consideration.

The first possible critique is that the enhancement has become, in effect, mandatory, because appellate courts tend to treat it as the norm in all terrorism cases. In *United States v. Jayyousi*,¹⁵² a majority of the

¹⁴² 18 U.S.C. § 956 (2012).

¹⁴³ 18 U.S.C. § 1203 (2012).

¹⁴⁴ 607 F.3d 306.

¹⁴⁵ *See id.* at 316.

¹⁴⁶ *Id.* at 317.

¹⁴⁷ *See, e.g.,* *United States v. Thomas*, No. 12-14585, 2013 WL 2450741, at *3 (11th Cir. June 4, 2013).

¹⁴⁸ *See, e.g.,* *United States v. Ashqar*, 582 F.3d 819, 825–26 (7th Cir. 2009); *Awan*, 607 F.3d at 314.

¹⁴⁹ *United States v. Stewart*, 590 F.3d 93, 154 (2d Cir. 2009) (Calabresi, J., concurring).

¹⁵⁰ *E.g.,* McLoughlin, *supra* note 18, at 83.

¹⁵¹ *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011); *United States v. Abu Ali*, 528 F.3d 210, 265 (4th Cir. 2008); *Ashqar*, 582 F.3d at 824 (“We have rejected variants of this argument countless times, and we do so again here.”).

¹⁵² 657 F.3d 1085.

Eleventh Circuit vacated a sentence that had been reduced by the trial judge after initially calculating a sentence that included the enhancement.¹⁵³ Although the majority noted that the trial judge had not treated the Guidelines as mandatory,¹⁵⁴ Judge Barkett argued in dissent that the appeals court had done just that.¹⁵⁵ Her argument suggests that a widespread appellate practice of automatically insisting on the enhancement's dominance in any sentence would violate *Booker*. However, the *Jayyousi* court did not specifically rely on the enhancement in its vacation of the sentence.¹⁵⁶ Instead, it criticized the district judge's application of § 3553(a) to that terrorist defendant and to terrorists generally.¹⁵⁷ Appellate courts that agree with the enhancement and the reasoning behind it¹⁵⁸ may exhibit some variation in reviewing terrorists' sentences.¹⁵⁹ Although close to the line, it is probably not unconstitutional for the enhancement to occupy the somewhat paradoxical position of a binding advisory guideline.

A second set of critiques, exemplified by the excellent study by James McLoughlin,¹⁶⁰ also draws on *Booker*. It emphasizes the status of the enhancement, a guideline for sentencing, as almost creating a separate offense. One variation is what has been referred to as “the tail wagging the dog” perspective.¹⁶¹ Under this view, the enhancement, because of its substantial penalties, becomes more important than the offense of conviction. As McLoughlin suggests, the government can get a large sentence by having the jury convict the defendant of an easy-to-prove offense, and then having the judge increase the sentence through the enhancement that he or she finds applicable through a preponderance of the evidence standard.¹⁶² This argument has force, but is hampered by the fact that the judge can vary downward, or—in theory—not apply the enhancement at all, as long as the ultimate sentence is sufficiently anchored in § 3553(a) to survive appellate review.

A variant of the second critique focuses on the role of the judge in finding intent in applying the enhancement. Intent is an important element of most crimes. McLoughlin goes so far as to state that “[a]fter

¹⁵³ *Id.* at 1117–19.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1130–31 (Barkett, J., dissenting).

¹⁵⁶ *See generally id.* (majority opinion) (failing to explicitly invoke the enhancement).

¹⁵⁷ *Id.* at 1117–19.

¹⁵⁸ *See United States v. Benkahla*, 530 F.3d 300, 313 (4th Cir. 2008) (“Here, the district court made extensive factual findings and the terrorism enhancement is doing just what it ought to do: Punishing more harshly than other criminals those whose wrongs served an end more terrible than other crimes.”).

¹⁵⁹ *E.g.*, *United States v. El-Mezain*, 664 F.3d 467, 571 (5th Cir. 2011).

¹⁶⁰ McLoughlin, *supra* note 18.

¹⁶¹ *United States v. Hammoud*, 381 F.3d 316, 354 (4th Cir. 2004).

¹⁶² McLoughlin, *supra* note 18, at 80.

Booker and after *Blakely*, there is a serious argument that unless a jury finds beyond a reasonable doubt that a defendant had the intent required to apply Sentencing Guideline 3A1.4, there is a violation of the Due Process Clause of the Fifth Amendment and the Trial by Jury Clause of the Sixth Amendment as interpreted in *Apprendi*.¹⁶³ As discussed earlier, there may be a question whether a particular defendant's intent to commit the offense of conviction can be stretched to cover both an "intention to promote a federal crime of terror," and the "calculated" element of any such later crimes.¹⁶⁴ Courts have not been reluctant to make that stretch, particularly when known terrorist organizations are in the picture. As the Fifth Circuit put it in *United States v. El-Mezain*,¹⁶⁵ "[t]o the extent that the defendants knowingly assisted Hamas, their actions benefitted Hamas's terrorist goals and were calculated to promote a terrorist crime that influenced government."¹⁶⁶ In sum, the constitutional critique is useful in suggesting outer boundaries for the enhancement. Given *Booker* and the advisory nature of the Guidelines, however, it does not seem likely to prevail.

C. *Policy Disagreements: Are Some Guidelines More Equal than Others?*

The enhancement may well survive constitutional critiques. Its complicated structure and workability present problems, but courts seem able to resolve them. Yet, there remains the fundamental question of whether the enhancement is inherently flawed, as well as the related question of whether courts might be freer to give it little weight as compared to the usual deference shown to other Guidelines and the Sentencing Commission.

The latter question has its origins in *Kimbrough*.¹⁶⁷ That case involved the Sentencing Commission's guidelines for crack cocaine, which were based on Congress's sharply differential treatment of powder and crack cocaine.¹⁶⁸ The trial judge refused to apply the guidelines and expressed disagreement with the policy underlying them.¹⁶⁹ The Supreme Court approved this approach. It stated that the guidelines governing crack cocaine "do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses . . . the Commission looked to the mandatory minimum

¹⁶³ *Id.* at 83.

¹⁶⁴ See *supra* text accompanying notes 139–149.

¹⁶⁵ 664 F.3d 467 (5th Cir. 2011).

¹⁶⁶ *Id.* at 571.

¹⁶⁷ *Kimrough v. United States*, 552 U.S. 85, 85 (2007).

¹⁶⁸ *Id.* at 91–93 (discussing facts).

¹⁶⁹ The judge saw the case as exemplifying the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing." *Id.* at 93.

sentences set [by Congress], and did not take account of ‘empirical data and national experience.’”¹⁷⁰

In other words, the Guidelines’ prominent place in sentencing decisions flows from the expertise of the Commission and its ongoing empirical review of sentencing practices. The Commission is not a policy-making body. The Supreme Court re-emphasized this difference two years after *Kimbrough* in *Spears v. United States*,¹⁷¹ another crack cocaine case: “The only fact necessary to justify a [crack sentencing] variance is the sentencing court’s disagreement with the guidelines—its *policy* view that the 100-to-1 ratio creates an unwarranted disparity.”¹⁷² Professors Abrams, Beale, and Klein note that “a handful of opinions declining to sentence within a Guideline characterized that Guideline as a response to a congressional directive, rather a product of the Commission’s normal process.”¹⁷³ Indeed, they note that “[t]here is an increasing consensus that some Guidelines—most notably the crack Guideline—are deeply flawed and concerns have been raised about other Guidelines as well.”¹⁷⁴

Not surprisingly, this critique has been extended to the terrorism enhancement. As John McLoughlin notes, there was not much empirical data on terrorism sentences when the Sentencing Commission promulgated it.¹⁷⁵ More importantly, the Commission acted in response to directives from Congress.¹⁷⁶ In 2012, a defendant sentenced under the enhancement argued that “the terrorism enhancement, like the child pornography Guidelines, is not entitled to the respect or deference of a sentencing judge because the enhancement was not the product of empirical ‘research.’”¹⁷⁷ The Second Circuit, which had accepted such an argument in the child pornography context,¹⁷⁸ called it “unavailing”¹⁷⁹ but stated that a district court retains its freedom to disagree “with the weight the Guidelines assign to a factor.”¹⁸⁰

The argument that the terrorism enhancement deserves *less* weight because Congress directed its promulgation seems counterintuitive. Congress sets basic sentencing policy through the penalties it attaches to the crimes it creates. Perhaps the strongest statement of this position is Judge Walker’s concurring opinion in another Second Circuit terrorism

¹⁷⁰ *Id.* at 89.

¹⁷¹ 555 U.S. 261 (2009).

¹⁷² *Id.* at 264.

¹⁷³ ABRAMS, BEALE & KLEIN, *supra* note 2, at 1001.

¹⁷⁴ *Id.* at 1030.

¹⁷⁵ McLoughlin, *supra* note 18, at 115.

¹⁷⁶ *Id.* at 51.

¹⁷⁷ *United States v. Salim*, 690 F.3d 115, 126 (2d Cir. 2012).

¹⁷⁸ *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010).

¹⁷⁹ *Salim*, 690 F.3d at 126.

¹⁸⁰ *Id.*

case: *United States v. Stewart*.¹⁸¹ He began by noting Congress's desire to "ensure that crimes of terrorism were met with a punishment that reflects their extraordinary seriousness."¹⁸² The enhancement reflects Congress's and the Sentencing Commission's policy judgment that "an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that terrorists *and their supporters* should be incapacitated for a longer period of time."¹⁸³ He repeatedly referred to the enhancement as a "signal" of Congress's will.¹⁸⁴

Apart from the suggestion that the Commission plays a policymaking role akin to Congress's, Judge Walker's argument has considerable force. It is buttressed by the fact that in *Kimbrough* itself, the Supreme Court stated that "Congress has shown that it knows how to direct sentencing practices in express terms."¹⁸⁵ The Court's language clearly suggests that a guideline adopted pursuant to such "express terms" would merit greater respect than one that simply reflected the policies of an underlying penalty scheme.¹⁸⁶ The Commission's acting to carry out such a directive would seem consistent with *Mistretta v. United States*.¹⁸⁷ In that case, the Supreme Court, in upholding the Sentencing Commission's creation against a separation of powers challenge, analogized the Commission to an administrative agency and noted that Congress had given it several explicit directives.¹⁸⁸ In sum, the "policy disagreement" argument against the enhancement is not convincing. One must recognize, however, that it is part of the dialogue about the enhancement and that district judges who share this objection to the enhancement's status, or who don't like its content, can find a way to incorporate policy concerns into their § 3553(a) analysis of individual sentences. After all, the Guidelines, no matter how worthy of respect, are still advisory.

As for the view that the enhancement is inherently flawed, three critiques are worthy of note. The first is the assignment of a criminal history score of VI—the highest possible score—to defendants who may be first-time offenders. At the sentencing proceeding in *United States v. Mehanna*, the trial judge summed up this critique as follows:

¹⁸¹ *United States v. Stewart*, 590 F.3d 93, 163 (2d Cir. 2009) (Walker, J., concurring).

¹⁸² *Id.* at 172.

¹⁸³ *Id.* at 172–73. It is not clear that Judge Walker is correct in treating the Commission's role in formulating the enhancement as an example of policy-making on its part. After all, the basic policy came from Congress.

¹⁸⁴ *Id.* at 173–74 (referring three times to the enhancement as a "signal").

¹⁸⁵ *Kimbrough v. United States*, 552 U.S. 85, 87 (2007).

¹⁸⁶ The Guideline at issue in *Kimbrough* was derived initially from the penalty scheme for cocaine offenses. *See generally id.* at 94–97.

¹⁸⁷ 488 U.S. 361 (1989).

¹⁸⁸ *Id.* at 388–90.

[T]he automatic assignment of a defendant to a Criminal History Category VI is not only too blunt an instrument to have genuine analytical value, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this case, import a fiction into the calculus. It would impute to a defendant who has had no criminal history a fictional history of the highest level of seriousness. It's one thing to adjust the offense level upward to signify the seriousness of the offense. It is entirely another to say that defendant has a history of criminal activity that he does not, in fact, have.¹⁸⁹

Justification for the criminal history score rests on more than the fact that it does “just what it ought to do”¹⁹⁰ by helping increase the sentences of criminals who deserve harsh punishment. The contention is that the high criminal history score is a proxy for the propensity of terrorists to commit more crimes if not punished harshly. The Guidelines count criminal history precisely to factor this propensity into the sentence.¹⁹¹ As the Second Circuit put it in an influential opinion, terrorists, even those with no prior criminal record, “are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.”¹⁹²

A second substantive critique is that the enhancement does not take into account the extent of harm caused by the defendant. Judge Calabresi has cautioned that society gives consequences “considerable weight when we mete out punishment and blame.”¹⁹³ The enhancement cuts the other way, taking a *per se* mandatory minimum approach to any successful conviction (or guilty plea) for a federal crime of terrorism. As discussed below, some of these crimes are inchoate steps along the way to acts of terrorism: a central goal of counter-terrorism law is to prevent such acts before they happen.¹⁹⁴ Thus the absence of harm should not prevent appropriate punishment. The Fourth Circuit has cautioned

¹⁸⁹ Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012); see McLoughlin, *supra* note 18, at 113–17.

¹⁹⁰ *United States v. Benkahla*, 530 F.3d 300, 313 (4th Cir. 2008).

¹⁹¹ See U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2013) (“To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.”).

¹⁹² *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). *But see* McLoughlin, *supra* note 18, at 113–17 (criticizing criminal history score as contrary to sentencing policy, and not based on empirical evidence); see also TASK FORCE ON DETAINEE TREATMENT, THE CONSTITUTION PROJECT, REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT 295–310 (2013) (discussing controversy over recidivism by former Guantanamo detainees).

¹⁹³ *United States v. Stewart*, 590 F.3d 93, 155 (2d Cir. 2009) (Calabresi, J., concurring).

¹⁹⁴ See *infra* notes 256–261 and accompanying text.

against “wait[ing] until there are victims of terrorist attacks to fully enforce the nation’s criminal laws against terrorism.”¹⁹⁵

Both of these critiques raise a more fundamental question: Is terrorism sufficiently unique (and dangerous) that it justifies a sentencing “rule” that goes against notions of individualized sentences that reflect the inevitable differentiation among criminals? Judge Calabresi noted that a single federal crime of terrorism—the provision of material support¹⁹⁶—covers many different forms of conduct.¹⁹⁷ He concluded that “unusually broad sentencing discretion in the district court is essential.”¹⁹⁸ Judge Walker replied that Congress wanted the Sentencing Commission to do precisely what it did in the enhancement: reach the broad range of crimes that support terrorism.¹⁹⁹

The various critiques have considerable weight. Still, how one comes out on them will almost always reflect one’s position on the fundamental question of the validity of a *per se* approach. There is a clear tension between our decision as a society to treat most terrorism offenses as part of the regular criminal justice system, on the one hand, and the pull toward special rules to deal with them on the other.²⁰⁰ The enhancement is an example of such a special rule. The central, and unresolved, question for trial judges at the sentencing phase of a terrorism trial is whether to focus on the special approach, which the enhancement represents, or whether to treat the defendant like any other defendant, utilizing the standards and factors of § 3553(a).²⁰¹ Thus, the post-*Booker* debate about the relationship between that statute and the Guidelines is of particular relevance.²⁰² To some extent, judges will look to appellate courts for answers. The appellate opinions appear to tilt in favor of the enhancement and the approach it embodies. However, the value of any message that appellate courts might send is inevitably bound up with broader questions about the sentencing relationship between trial and appellate courts in the post-*Booker* era.

¹⁹⁵ *United States v. Abu Ali*, 528 F.3d 210, 264 (4th Cir. 2008) (citing the district court).

¹⁹⁶ *Stewart*, 590 F.3d at 154 (Calabresi, J., concurring).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 176–79 (Walker, J., concurring).

²⁰⁰ See generally Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501 (2010). Vladeck notes several critiques based on this tension, including “pressure on the courts to sanction exceptional departures from procedural or evidentiary norms that will eventually become settled as the rule—what we might characterize as either a ‘distortion effect’ or a ‘seepage problem.’” *Id.* at 1501.

²⁰¹ See 18 U.S.C. § 3553(a) (2012).

²⁰² See *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008); *United States v. Meskini*, 319 F.3d 88 (2d Cir. 2003).

III. TRIAL COURTS, APPELLATE COURTS, AND THE ROLE OF THE ENHANCEMENT

It is important to remember that the enhancement is a guideline: § 3A1.4. Therefore, its role should be the same as that of any other guideline in sentencing decisions. The standard approach to its application is the sequence set out in *Gall*:²⁰³ calculating the applicable Guidelines range, hearing from the parties, consideration of the § 3553(a) factors, and providing an explanation of the sentence chosen “to allow for meaningful appellate review to promote the perception of fair sentencing.”²⁰⁴

In a case involving a federal crime of terrorism, the enhancement is applicable. Thus, in calculating the Guidelines range, the trial judge would have to rule on its applicability—particularly the difficult questions of whether the offense “involved, or was intended to promote, a federal crime of terrorism”²⁰⁵—and whether the defendant exhibited the mental state necessary to commit a “federal crime of terrorism.”²⁰⁶ If the enhancement applies, the judge will thus begin with a substantial Guidelines range, apart from any other adjustments.²⁰⁷

The next important step is the more individualized inquiry called for by § 3553(a).²⁰⁸ In performing this inquiry the judge is likely to be heavily influenced by the Presentence Report (PSR) prepared by the United States Probation Office.²⁰⁹ Although PSRs are not publicly available, court decisions suggest that they include the enhancement in terrorism cases.²¹⁰ The judge thus approaches the § 3553(a) task with a double tilt toward the enhancement. Nonetheless, § 3553(a) calls for a sentence “sufficient, but not greater than necessary to comply with [its general] purposes”²¹¹ These purposes include specific inquiries.²¹² The first inquiry is “the nature and circumstances of the offense and the history and characteristics of the defendant.”²¹³ The statute also directs the judge to consider such factors as the need for the sentence to “reflect the seriousness of the offense,”²¹⁴ “provide just punishment,”²¹⁵ “afford

²⁰³ *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

²⁰⁴ *Id.*

²⁰⁵ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) (2013).

²⁰⁶ 18 U.S.C. § 2332b(g)(5) (2012).

²⁰⁷ See *supra* text accompanying notes 24–30.

²⁰⁸ See 18 U.S.C. § 3553(a).

²⁰⁹ See FED. R. CRIM. P. 32.

²¹⁰ See, e.g., *United States v. Kadir*, 718 F.3d 115, 125 (2d Cir. 2013) (“[O]ffense level exceeded by six levels the highest level on sentencing chart”).

²¹¹ 18 U.S.C. § 3553(a) (2012).

²¹² See *id.* § 3553(a)(2).

²¹³ *Id.* § 3553(a)(1).

²¹⁴ *Id.* § 3553(a)(2)(A).

²¹⁵ *Id.*

adequate deterrence to criminal conduct,”²¹⁶ and “protect the public from further crimes of the defendant.”²¹⁷

In other words, § 3553(a) seemingly loosens the tight constraints imposed by the Guidelines and permits the judge to engage in a potentially highly individualized inquiry. After *Booker*, that inquiry begins with, and is to an uncertain degree guided by, the Guidelines—so to speak. The Guidelines range does not, however, constitute a presumptive sentence.²¹⁸ *Gall* instructs the judge to:

[M]ake an individualized assessment based on the facts presented. If he decided that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.²¹⁹

It is thus in the § 3553(a) application phase that the judge can escape from the “draconian”²²⁰ application of the enhancement to the defendant. The judge might refuse to apply it on *Kimbrough* grounds, as discussed above, if he or she thinks it does not merit the normal deference shown to the Guidelines.²²¹ A more likely ground for refusal is some particular mitigating aspect of the individual or case, which the judge could emphasize in his or her application of § 3553(a).

Should such downward deviations from the Guidelines, especially if substantial, be upheld on appeal? *Booker* and its progeny suggest an affirmative answer, particularly if the judge provided a detailed explanation. Trying to figure out if this is the “correct” application of *Booker* takes us deeply into the mysteries of that case and the doctrine it has engendered. Before *Booker*, appellate review of mandatory Guidelines made sense. Mandatory Guidelines had the status of law, and review of their application was seen as necessary to promote uniformity.²²² Review of “advisory” law is a more difficult concept. In *Booker* itself, the remedial majority looked to a variety of sources—including appellate practice and the “sound administration of justice”²²³—and implied from them “a practical standard of review already familiar to appellate courts:

²¹⁶ *Id.* § 3553(a)(2)(B).

²¹⁷ *Id.* § 3553(a)(2)(C).

²¹⁸ See *Rita v. United States*, 551 U.S. 338, 351 (2007).

²¹⁹ *Gall v. United States*, 552 U.S. 38, 50 (2007).

²²⁰ McLoughlin, *supra* note 18, at 54.

²²¹ See *supra* text accompanying notes 167–188.

²²² See, e.g., ABRAMS, BEALE & KLEIN, *supra* note 2, at 985 (discussing appellate review after *Booker*).

²²³ *United States v. Booker*, 543 U.S. 220, 260–61 (2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 559–60 (1988) (internal quotations omitted)).

review for ‘unreasonable[ness].’”²²⁴ This review was to be guided by the § 3553(a) factors.²²⁵

Later cases elaborated on what the Court referred to as an “abuse-of-discretion standard.”²²⁶ *Gall* set out the key steps of appellate review. The first step is reviewing for procedural error, such as improper calculation of the Guidelines, failing to consider the § 3553(a) factors, and the failure to explain the sentence “including an explanation for any deviation from the Guidelines range.”²²⁷ After the procedural review, appellate courts should “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”²²⁸ The Court’s directives included the somewhat Delphic standard that appellate courts could, but need not, apply a presumption of reasonableness to within-Guidelines sentences, yet could not apply a presumption of unreasonableness to outside-Guidelines sentences.²²⁹

All of this seems a bit unclear, beyond the fact that appellate courts still have a role in reviewing sentences. In the well-known case of *United States v. Cervera*,²³⁰ for example, the judges of the Second Circuit, sitting en banc, disagreed sharply on how carefully an appellate court should scrutinize the trial judge’s disagreement with the Guidelines.²³¹ How should an appellate court approach the question of a judge’s application of the enhancement in a particular case? One possibility is that trial judges should apply it all the time and that appellate courts should affirm all such decisions. Sentencing decisions must begin with a calculation of the Guidelines, of which the enhancement is a part. If the enhancement was applied, the appellate court *may* presume that was reasonable. Yet, if the enhancement is automatically applied and affirmed, it becomes the equivalent of treating the Guidelines as mandatory, unconstitutional under *Booker*. Perhaps one need not worry about a convergence of this nature between the two levels. The twin facts of trial court discretion and some remaining appellate court power suggest that a monolithic approach toward the enhancement is unlikely to emerge. Yet, the enhancement will continue to play a strong role in sen-

²²⁴ *Id.* at 261 (alteration in original).

²²⁵ *See id.* (“Those factors . . . will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”).

²²⁶ *Gall v. United States*, 552 U.S. 38, 41 (2007); *Rita v. United States*, 551 U.S. 338, 362 (2007) (Stevens, J., concurring in part and dissenting in part).

²²⁷ *Gall*, 552 U.S. at 51.

²²⁸ *Id.*

²²⁹ *Id.* (stating that the appellate court “may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”).

²³⁰ 550 F.3d 180 (2d Cir. 2008).

²³¹ The court affirmed the defendant’s conviction, but there were six separate opinions in the case. *E.g., id.* at 197 (Katzmann, J., concurring).

tencing decisions in terrorism cases and a strong tilt in its favor may well be the result.

Examination of appellate cases decided since *Booker* suggests, in fact, that such a tilt already exists. When a district judge has applied the enhancement, appellate courts have tended to affirm.²³² Even if the sentence included a partial downward adjustment or used the 12 level offense level increase, but not that for criminal history, the sentence was affirmed.²³³ In *United States v. Chandia*,²³⁴ the Fourth Circuit vacated a sentence based on the district court's unsupported application of the enhancement, but permitted its imposition on remand if the court found the necessary intent.²³⁵

Cases involving a substantial downward adjustment of the enhancement-based Guidelines sentence have, however, frequently resulted in reversal. In *United States v. Stewart*,²³⁶ the Second Circuit admitted that differentiation might be possible among defendants subject to the enhancement.²³⁷ Nonetheless, it vacated a sentence that "substantially varied from the applicable Guidelines range"²³⁸ because it regarded the sentence as "strikingly low."²³⁹ The court recognized that the enhancement, like any guideline, was not mandatory.²⁴⁰ However, it reached a similar result, in effect, by tying support for terror to § 3553(a). The court focused on the fact that the sentencing statute requires the trial court to consider "the nature and circumstances of the offense" and "the need for the sentence imposed . . . to reflect the seriousness of the offense."²⁴¹ Other courts have reached the same results after engaging in a comprehensive review of the trial judge's application of § 3553(a).²⁴² In *United States v. Ressim*, the court stated that "[t]he abuse of discretion standard is deferential, but it does not mean anything goes."²⁴³

These disagreements with sentencing decisions have provoked sharp dissents on several grounds. Dissenting in *United States v. Abu Ali*,²⁴⁴ Judge Motz contended that the court was using a special form of less deferential review for terrorism cases.²⁴⁵ The more basic criticism is

²³² See, e.g., *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011).

²³³ See e.g., *U.S. v. Thomas*, 521 F.App'x 741 (11th Cir. 2013).

²³⁴ 514 F.3d 365 (4th Cir. 2008).

²³⁵ *Id.* at 376.

²³⁶ 590 F.3d 93 (2d Cir. 2009).

²³⁷ *Id.* at 144.

²³⁸ *Id.* at 146.

²³⁹ *Id.* at 148.

²⁴⁰ *Id.* at 151.

²⁴¹ *Id.* at 144, 151 (citing 18 U.S.C. § 3553(a)).

²⁴² See, e.g., *United States v. Ressim*, 679 F.3d 1069, 1088–96 (9th Cir. 2012) (reviewing and disagreeing with application of factors).

²⁴³ *Id.* at 1087.

²⁴⁴ 528 F.3d 210 (4th Cir. 2008).

²⁴⁵ *Id.* at 271 (Motz, J., dissenting).

that appellate courts that, in effect, enforce the enhancement are deviating from the Supreme Court's limitation of their role. Dissenting in *Jayyousi*,²⁴⁶ Judge Barkett accused the majority of having made the guidelines "mandatory."²⁴⁷ What appears to be at work is a stretching of the post-*Booker* appellate role in cases where the reviewing court concludes that the trial judge paid lip service to the enhancement, but then largely disregarded it, perhaps out of hostility toward it.

IV. THE ENHANCEMENT GOING FORWARD: INSTITUTIONAL ROLES AND POLICY CONSIDERATIONS

The terrorism enhancement is an important component of American counter-terrorism policy, given the role that prosecutions in Article III courts play in that policy. At the same time, the enhancement is controversial—both in terms of its harsh approach to a broad range of terrorism offenses and in terms of its role as one of the Sentencing Guidelines. Of course, debate over the enhancement must be situated in the broader context of debates over sentencing policy in general.²⁴⁸ Flaws in the concept might result in pressure for change, but there is a serious question as to where change might come from. One possibility is Congress, since the enhancement itself stemmed from congressional directives to the Sentencing Commission to promulgate one.²⁴⁹ It is virtually certain that Congress will not change its mind on an issue that is part of its tough-on-terrorism approach. Recent National Defense Authorization Acts²⁵⁰ show just how entrenched that policy is. There is concern over how to reconcile civil liberties with national security, as the controversy over surveillance shows.²⁵¹ It is exceedingly unlikely, however, that this concern extends to the sentences meted out to those guilty of "federal crimes of terror."

The Sentencing Commission also does not appear to be a source for change. It promulgated the specific enhancement—§ 3A1.4 of the Guidelines—albeit under general congressional directive. The enhancement does not appear to represent a situation like the controversy over

²⁴⁶ *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).

²⁴⁷ *Id.* at 1130 (Barkett, J., dissenting).

²⁴⁸ See generally SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 67–132 (8th ed. 2007).

²⁴⁹ McLoughlin, *supra* note 18, at 51.

²⁵⁰ E.g., National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

²⁵¹ This is a recurring theme in virtually all debates over counter-terrorism policy. For example, President Obama stated that "in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are." President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

the crack cocaine guidelines, where the Commission and Congress had serious, ongoing policy differences.²⁵² In any event, Congress must approve changes to the Guidelines.²⁵³ It disapproved proposed changes in the cocaine area²⁵⁴ and would certainly do so here. This leaves us with the courts. There would be something unsettling—particularly in terms of separation of powers—in the notion of federal courts *making* general sentencing policy for terrorism cases. If, however, the problem is seen as one of *applying* existing sentencing policy—embodied both in the congressional directives and the Guidelines—it becomes both more familiar and more manageable. But even in this role, courts will inevitably be drawn into the controversy over whether the enhancement represents sound policy.

The case for the policy behind the enhancement is strong. Terrorism is different from other crimes. Terrorist acts can intimidate a civilian population and disrupt entire communities. Anyone who lived in Boston after April 15, 2013 can attest to that.²⁵⁵ Potential effects on infrastructure are equally severe. The proverbial dirty bomb at the New York Stock Exchange would kill and injure many people as well as cripple much of the nation's economy, as would a successful attack on the air transportation system. The nation showed remarkable resiliency after September 11, 2001, but if terrorists were to succeed now, with all the efforts devoted to thwarting them, the results would put that resiliency to the test. If terrorists are to be tried in the regular criminal justice system, harsh sentences seem to be a fair trade-off. More importantly, Congress has spoken. The enhancement represents a major national policy goal.

Much of the counter-terrorism effort is focused on prevention,²⁵⁶ the “goal of all goals,” in the words of former Attorney General Alberto Gonzales.²⁵⁷ The criminal law reflects this focus, particularly through the crimes involving “material support” to terrorists.²⁵⁸ In *Holder v. Humanitarian Law Project*,²⁵⁹ the Supreme Court upheld a material support statute in the face of a serious First Amendment challenge.²⁶⁰ It also

²⁵² See *Kimbrough v. United States*, 552 U.S. 85, 97–99 (2007). See McLoughlin, *supra* note 18, at 59–60 (discussing interaction between Congress and Commission).

²⁵³ 28 U.S.C. § 994(p) (2006).

²⁵⁴ See *Kimbrough*, 552 U.S. at 99.

²⁵⁵ See, e.g., Editorial, *Bombs at the Marathon*, N.Y. TIMES, Apr. 16, 2013, at A26, available at <http://www.nytimes.com/2013/04/16/opinion/bombs-at-the-boston-marathon.html> (discussing the Boston Marathon bombing).

²⁵⁶ Chesney, *supra* note 15, at 429–33.

²⁵⁷ *Id.* at 425.

²⁵⁸ Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 680–92 (2009).

²⁵⁹ 130 S. Ct. 2705 (2010).

²⁶⁰ *Id.* at 2722–30.

gave a clear signal of endorsement of the concept of prevention.²⁶¹ If prevention is at the heart of counter-terrorism, harsh sentences seem appropriate here as well.

It is true that the enhancement has been the object of a number of criticisms. These range from constitutional objections,²⁶² to a critique of arbitrariness,²⁶³ to a penological view of undue harshness.²⁶⁴ There are answers to these critiques. For example, the advisory nature of the Guidelines cuts against the constitutional argument.²⁶⁵ The notion that the enhancement represents somehow “inferior” policy stands in direct contrast to its congressional origins. Still, there is a constitutional risk in emphasizing Congress’s role, or in any push towards treating this guideline as somehow binding. *Booker* forbids this result. Yet if trial courts feel they have to apply the enhancement and appellate courts make sure they do, the result is a mandatory guideline.²⁶⁶ It falls to the courts to navigate these uncertain waters. They need to give meaningful application to the enhancement, exercise their congressionally mandated role under § 3553(a), and remain faithful to their larger duty to do justice.

First, let us consider how trial judges should approach application of the enhancement. Policy issues should be out of bounds. These arguments include whether the enhancement is unworthy of respect, whether it is unduly harsh, and whether its use of criminal history is arbitrary. On the other hand, individual concerns, such as the need to “provide just punishment,”²⁶⁷ and the need to “protect the public from further crimes of the defendant,”²⁶⁸ ought to permit differentiation. This focus on the defendant is emphasized by the fact that § 3553(a) begins with the admonition that the court shall impose a sentence sufficient, but not greater than necessary, to comply with the more specific factors of § 3553(a).

It will be helpful to apply these general considerations to a specific class of cases: prosecutions for provision of “material support” to terrorists and terrorist organizations.²⁶⁹ Some cases are straightforward, such as the provision of funds or other material.²⁷⁰ The issue becomes more difficult in the area of preventive prosecutions. The definition of

²⁶¹ *Id.* at 2726–27.

²⁶² *See supra* Part II.B.

²⁶³ *See supra* text accompanying notes 180–84.

²⁶⁴ *See supra* text accompanying notes 182–84.

²⁶⁵ *See, e.g.*, *United States v. Ashqar*, 582 F.3d 819, 824 (7th Cir. 2009) (“We have rejected variants of this [constitutional] argument countless times, and we do so again here.”).

²⁶⁶ *United States v. Jayyousi*, 657 F.3d 1085, 1130 (11th Cir. 2011) (Barkett J., dissenting) (warning against sentencing practices that “inappropriately [treat] the Guidelines as mandatory”).

²⁶⁷ 18 U.S.C. § 3553(a) (2006).

²⁶⁸ *Id.* § 3553(a)(2)(C).

²⁶⁹ *Id.* §§ 2339A–2339B.

²⁷⁰ *See United States v. El-Mezain*, 664 F.3d 467, 483–84 (5th Cir. 2011).

material support includes “personnel,” “which may include oneself.”²⁷¹ Thus, defendants who have sought military training abroad,²⁷² or sworn an oath to al-Qaeda while expressing a willingness to lend their talents to it in the future,²⁷³ have been the subject of material support prosecutions. The material support statutes are the principal means of getting at would-be terrorists, including those in the early stages of development.²⁷⁴ If convicted, these individuals are subject to the enhancement.²⁷⁵ It is cases like these that may call for differentiation and an application of the enhancement that permits it through downward deviation.

There will, of course, be hard cases. The surviving Boston Marathon bomber faces serious penalties if found guilty.²⁷⁶ What of his friends, who allegedly helped conceal evidence after the fact, at his request?²⁷⁷ Are they equally deserving of a substantially enhanced sentence? They can probably be fitted under the enhancement, subject to statutory maximums. The question is whether they should be and how § 3553(a)’s call for differentiation should apply.

What room, if any, is there in this scenario for appellate courts? One might contend that, if the trial court follows the *Gall* sequence and uses the magic words of incantation of § 3553(a), such room does not exist. However, as the cases discussed in Part III indicate, appellate courts seem willing to use “substantive reasonableness” review to per-

²⁷¹ 18 U.S.C. § 2339(A)(b)(1).

²⁷² It should be noted that some such cases will involve more than seeking military training. For example, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2011), did not solely involve seeking military training abroad. In his case Mehanna had, for example, engaged in substantial Internet activity that allegedly constituted support for al-Qaeda. Professor Chesney discusses the case of Hamid Hayat, who apparently received training abroad, expressed pro-jihad sentiments, and indicated a desire to engage in violent acts in the United States. See Chesney, *supra* note 15, at 487–92. Dissenting in the Ninth Circuit’s affirmance of Hayat’s conviction, Judge Tashima stated, “To paraphrase a famous line, in this case, the government has concluded that it is not for it to say *what* offense Hamid Hayat has committed, but it is satisfied that he committed *some* offense, for which he should be punished.” *United States v. Hayat*, 710 F.3d 875, 904 (9th Cir. 2013).

²⁷³ *United States v. Farhane*, 634 F.3d 127, 133 (2d Cir. 2011).

²⁷⁴ See generally Chesney, *supra* note 258, at 680–92 (discussing the purpose and application of various material support statutes).

²⁷⁵ For example, in *Mehanna* the judge’s discussion of sentencing makes it clear that he began with the enhancement. See Transcript of Disposition at 11–12, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012). The judge ultimately did not apply the Guidelines but arrived, nonetheless, at a sentence of 210 months. See *id.* at 69–70, 74.

²⁷⁶ See Indictment, *United States v. Tsarnaev*, No. 1:13-cr-10200 (D. Mass. June 27, 2013) (charging violations of eight federal laws).

²⁷⁷ Maria Sacchetti, *Tsarnaev School Friends Indicted*, BOSTON GLOBE, Aug. 9, 2013, at A1, available at <http://www.bostonglobe.com/metro/2013/08/08/dzhokhar-tsarnaev-college-friends-indicted-for-allegedly-impeding-boston-marathon-bombing-investigation/NGumWgr1IOjTj0GaHDv5HJ/story.html>.

form a searching inquiry into a given application of § 3553(a) and preserve a meaningful role for the enhancement.²⁷⁸

The answer to this dilemma, I contend, is to recognize the validity of a special role for appellate courts in reviewing sentences in terrorism cases. Judge Motz was right in suggesting this happens,²⁷⁹ but wrong in saying it is a bad idea. Let us start with the fact that the concept of the enhancement did not originate with the Sentencing Commission, but with Congress. As argued above, this fact should entitle the enhancement to more deference, not less.²⁸⁰ Congress is the ultimate source of basic sentencing policies and, with the President, shares the central role in national counter-terrorism policy.

Still, as recognized throughout this Article, any such approach runs into the *Booker* problem. In particular, pushing the appellate role too far may be in direct conflict with *Gall*. Congress's role in directing the creation of an enhancement may not provide an escape route from that conflict. It is true that the Court has noted that "Congress has shown that it knows how to direct sentencing practices in express terms."²⁸¹ But after *Booker*, Congress cannot direct the manner in which a judge applies a sentencing factor if that application involves fact-finding. Thus, the congressional imprimatur only goes so far.

On the other hand, *Gall* does not always impose an absolute ban to a substantial appellate role. The Court's discussion of reasonableness review emphasized deference and warned against de novo review.²⁸² However, the Court stated that in reviewing outside-Guidelines sentences "appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines."²⁸³ One is tempted to throw up one's hands and say that you can find in *Booker* and its progeny anything you want. However, Judge Barkett may be right in viewing a special standard of appellate review of sentencing in terrorism cases as contrary to *Booker*.²⁸⁴

It is at this point that considerations of national security deference tilt the balance in favor of that special standard. The Supreme Court has, on several occasions, appeared to utilize a form of national security deference that makes the difference in close cases. For example: *Holder v. Humanitarian Law Project*²⁸⁵ illustrates this in the substantive area of

²⁷⁸ See *supra* Part III and cases cited *supra* notes 203–247.

²⁷⁹ See *United States v. Abu Ali*, 528 F.3d 210, 271–72 (4th Cir. 2008) (Motz, J., dissenting).

²⁸⁰ See *supra* text accompanying notes 181–188.

²⁸¹ *Kimbrough v. United States*, 552 U.S. 85, 103 (2007).

²⁸² See *Gall v. United States*, 552 U.S. 38, 56, 59 (2007).

²⁸³ *Id.* at 47.

²⁸⁴ See *United States v. Jayyousi*, 657 F.3d 1086, 1130 (11th Cir. 2011).

²⁸⁵ 130 S. Ct. 2705 (2010).

protected speech; *Ashcroft v. Iqbal*²⁸⁶ seems to be an example in the pleading context. National security deference is clearly present in last term's standing discussion in *Clapper v. Amnesty International*,²⁸⁷ where the old chestnuts of *Schlesinger v. Reservists Committee to Stop the War*²⁸⁸ and *United States v. Richardson*²⁸⁹—which might have been seen as generalized grievances²⁹⁰—were repackaged as representing national security standing denials.²⁹¹ Going from a national security standing to a national security scope of review in sentencing cases is not a big jump. What remains to be seen is an explicit recognition of the concept. The appellate courts need not adopt a per se rule. They can allow for differentiation when it is clearly warranted under § 3553(a). However, terrorism cases will be different.

CONCLUSION

The uncertain judicial role in federal sentencing practice is here to stay. So is the terrorism enhancement. They clash, in what might be called a judicial perfect storm. This Article advances the view that the enhancement must play a meaningful role, at both the trial and appellate levels. It falls to the courts to give effect to this important component of national counter-terrorism policy. There must be room for differentiation in sentencing in terrorism cases. There must also be room for searching appellate review to ensure that differentiation does not involve nullifying the enhancement. Any special rule for terrorism cases may be in tension with *Booker* and its progeny. But *Booker* is already in tension with itself. Thus, although the approach advocated here highlights that tension, it did not create it.

²⁸⁶ 556 U.S. 662 (2009).

²⁸⁷ See 133 S. Ct. 1138 (2013).

²⁸⁸ 418 U.S. 208 (1974).

²⁸⁹ 418 U.S. 166 (1974).

²⁹⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 93–94 (4th ed. 2011) (discussing *Schlesinger* and *Richardson* in the context of generalized grievances). Indeed, the Court in *Richardson* referred to the plaintiff as one seeking “to air his generalized grievances about the conduct of government.” 418 U.S. at 175.

²⁹¹ *Clapper*, 133 S. Ct. at 1147.

APPENDIX²⁹²
SENTENCING TABLE
 (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

²⁹² U.S. SENTENCING GUIDELINES MANUAL, SENTENCING TABLE, ch. 5, pt. A (2013), available at http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_PDF/Sentencing_Table.pdf.

