



September 26, 2019

Support the Prohibiting Punishment of Acquitted Conduct Act, S. 2566

On behalf of FreedomWorks' activist community, I urge you to contact your senators and ask them to cosponsor the Prohibiting Punishment of Acquitted Conduct Act, S. 2566. Introduced by Sens. Chuck Grassley (R-Iowa) and Dick Durbin (D-Ill.) and cosponsored by Sens. Mike Lee (R-Utah) and Patrick Leahy (D-Vt.), the Prohibiting Punishment of Acquitted Conduct Act would prohibit the practice of federal judges increasing sentences for charges for which the defendant has been acquitted.

The presumption of innocence is a bedrock principle of America's criminal justice system that has its roots in the Fifth and Sixth amendments. In *Coffin v. United States* (1895), the Supreme Court firmly established the presumption of innocence, noting that this cornerstone tradition dates back to Roman and English law. Just as important is the requirement that the federal government proves its case beyond a reasonable doubt and the Sixth Amendment guarantee to a jury trial.

Despite these traditions and constitutional protections, federal law, in 18 U.S.C. 3661, allows federal judges to enhance a sentence for conduct for which the defendant was acquitted, or found "not guilty."

Generally, federal judges follow sentencing guidelines to decide the punishment of a convicted defendant. However, a federal judge may add additional time for acquitted conduct if the prosecution proves by a preponderance of the evidence -- a threshold substantially lower than proof beyond a reasonable doubt -- that the defendant is guilty of a crime of which he or she was acquitted. As former Sen. Orrin Hatch (R-Utah) wrote last year, "Judges should not wield that kind of veto" over a jury.

Although the Supreme Court has allowed federal judges to sentence based on acquitted conduct, past and current justices have blasted this veto power over juries. When the Supreme Court denied the certiorari petition in *Jones v. United States* (2014), Justice Antonin Scalia wrote, "This has gone on long enough." In this case, three petitioners were convicted of distribution of

crack cocaine but acquitted of a conspiracy charge. The sentencing judge, however, took the conspiracy charge into account when handing out the 15- to 19-year prison sentences. Had the conspiracy charge not been a factor in sentencing, the guideline range was 2 to 6 years.

The Supreme Court had been waiting for a case to review acquitted conduct sentencing based on grounds that it violates the Sixth Amendment. When that opportunity came, the High Court punted. “The present petition presents the nonhypothetical case the Court claimed to have been waiting for,” wrote Justice Scalia, who was joined by Justices Ruth Bader Ginsburg and Clarence Thomas. “And it is a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense.”

Obviously, Justices Ginsburg and Thomas are still on the Supreme Court today. Additionally, Justices Neil Gorsuch and Brett Kavanaugh have questioned this constitutionally troubling practice. Sitting on the U.S. Court of Appeals for the Tenth Circuit, Justice Gorsuch wrote in December 2014 that federal judges using acquitted conduct for harsher sentences “rests in part on a troublesome foundation.”

Similarly, while sitting on the U.S. Court of Appeals for the D.C. Circuit, Justice Kavanaugh testified to the U.S. Sentencing Commission, “I think acquitted conduct should be barred from the Guidelines calculation. I don't consider myself a particular softy on sentencing issues, but it really bothers me that acquitted conduct is counted in the Guidelines calculation.”

Congress, however, shouldn't wait on the Supreme Court to do its job. Acquitted conduct sentencing must be addressed to resolve this clear conflict with the Sixth Amendment. For these reasons, I urge you to contact your representative and senators and ask them to cosponsor the Prohibiting Punishment of Acquitted Conduct Act, S. 2566.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adam Brandon', written in a cursive style.

Adam Brandon
President, FreedomWorks