

Testimony of Mary Price,  
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Hearing on “Uncertain Justice: The Status of Federal Sentencing and the  
U.S. Sentencing Commission Six Years after *U.S. v. Booker*”

Subcommittee on Crime, Terrorism and Homeland Security  
House Committee on the Judiciary

October 12, 2011

Chairman Smith, Ranking Member Conyers, and members of the committee, my name is Mary Price and I am grateful for the opportunity to submit this statement on behalf of Families Against Mandatory Minimums (FAMM). Last month, FAMM celebrated its 20<sup>th</sup> year of fighting for individualized and proportionate sentences.

FAMM has enjoyed working with members of this committee over the past 20 years to make our federal sentencing laws more just and rational. As they know, FAMM is not opposed to punishment for those who violate our nation's laws. Nor do we oppose harsh punishment, including lengthy prison sentences, for those who pose a threat to our communities. For 20 years, however, we have sought to reform certain purportedly "tough on crime" policies, such as mandatory minimum sentencing laws, that have failed to live up to their sponsors' promises while imposing extraordinary social and economic costs.

We are especially proud of the successful bipartisan reforms, such as the federal safety valve, which has given courts much needed discretion to impose individualized and just sentences in certain cases without jeopardizing public safety. The safety valve was a congressional effort to ameliorate unduly harsh mandatory minimums that were applied to low-level, first-time, nonviolent drug offenders. It directs judges to waive drug mandatory minimums and has been used in more than 74,000 convictions since 1995.<sup>1</sup> This reform has enabled the government to provide more appropriate sentences for non-violent, low-level drug offenders and save millions of dollars in taxpayer money while continuing to protect public safety. The safety valve demonstrated that, while mandatory sentences might ensure a superficial uniformity, everyone recognizes that judicial discretion can ensure that meaningful differences between offenders are not ignored.

We applaud the Committee for calling this hearing and exercising its important oversight role on matters of criminal justice generally, and federal sentencing policies in particular. We are concerned, however, that today's hearing is aimed not at collecting evidence and data about federal sentencing policies and soliciting ideas for improvement, but rather at building a case for specific changes that will hurt, not improve, the administration of justice and upset the Constitution's separation of powers. Specifically, we think that any effort to make the sentencing guidelines mandatory or more binding on sentencing judges will:

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<sup>1</sup> U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 44 (2010), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/SBTOC10.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm); U.S. SENTENCING COMMISSION, 1997-2009 SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS, Table 44 (1997-2009), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/archives.cfm](http://www.ussc.gov/Data_and_Statistics/archives.cfm); U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 39 (1996), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/1996/sourcebk.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1996/sourcebk.htm).

(1) Rest necessarily on faulty premises, namely, that (a) the Sentencing Reform Act was to ensure that disparity (as opposed to *unwarranted* disparity) was to be avoided at all costs; (b) sentencing courts have disregarded the guidelines in the wake of *Booker*; (c) unwarranted disparity created by the courts has increased steadily since *Booker*; and (d) increased judicial discretion since *Booker* has resulted in greater racial disparity in sentencing; and

(2) Do more harm than good by concentrating extraordinary authority in the hands of federal prosecutors, a move that, in addition to posing a serious threat to our Constitution's structural separation of powers and fundamental individual rights, including the right to jury trial, also will exacerbate the problem of unwarranted disparity that *Booker*'s critics allegedly seek to fix.

Before explaining why we think some of the proposals we expect will be presented to the Committee at today's hearing are wrongheaded, we believe it is important to consider the context in which today's hearing takes place. First, 2.3 million Americans are currently in our federal and state prisons and jails.<sup>2</sup> One in 31 adults is either in prison or jail, on parole or probation.<sup>3</sup> "Indeed, the United States leads the world in producing prisoners, a reflection of a relatively recent and now entirely distinctive American approach to crime and punishment. Americans are locked up for crimes — from writing bad checks to using drugs — that would rarely produce prison sentences in other countries. And in particular they are kept incarcerated far longer than prisoners in other nations," according to a *New York Times* report.<sup>4</sup>

The federal prison population stands today at 217,827 prisoners<sup>5</sup> -- a five-fold increase since mandatory minimums and guidelines were enacted.<sup>6</sup> These prisoners strain the capacity of the Bureau of Prisons to house them. According to the Director of the Bureau of Prisons, who testified before Congress earlier this year:

The current Continuing Resolution presents significant challenges for the BOP, as the number of inmates has increased, resulting in additional operational and staffing costs. System-wide, the BOP is operating at 35 percent over its rated capacity. Crowding is of

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<sup>2</sup> PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4* (2009), available at [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf).

<sup>3</sup> *Id.* at 5.

<sup>4</sup> "Inmate Count in U.S. Dwarfs Other Nations'," Adam Liptack, *New York Times*, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=print>.

<sup>5</sup> FEDERAL BUREAU OF PRISONS, WEEKLY POPULATION REPORT (Oct. 6, 2011), available at [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp) (last visited October 11, 2011).

<sup>6</sup> Michael Nachmanoff, Fed. Pub. Defender, E. Dist. of Va., The Sentencing Reform Act of 1984: 25 Years Later, Testimony before the U.S. Sentencing Commission (July 9, 2009), available at [http://www.ussc.gov/AGENDAS/20090709/Nachmanoff\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Nachmanoff_testimony.pdf).

special concern at higher security facilities -- with 50 percent overcrowding at high security facilities and 39 percent at medium security facilities. The BOP must manage severe crowding by double and triple bunking inmates. As of January 2011, 94 percent of high security inmates were double bunked and 16 percent of medium security inmates and almost 82 percent of low security inmates were triple bunked, or housed in space not originally designed for inmate housing.<sup>7</sup>

This incarceration-reliant, budget-busting approach has prompted a backlash from many conservatives who once supported any and all policies that purported to “get tough” on crime. More and more conservatives are recognizing the limitations of a prison-first response to every crime problem, as well as the danger of increasing over-criminalization: the continual expansion of the federal criminal code with new, often vague prohibitions. For example, Right on Crime brings together prominent conservatives concerned about criminal justice policies, the burgeoning criminal code, and over-reliance on prisons.<sup>8</sup>

Notwithstanding this backdrop, the Committee hearing is expected to focus largely on proposals that we fear do not simply purport to reduce unwarranted sentencing disparity, but that do so by making guidelines more mandatory and thereby virtually ensuring higher across-the-board sentences while hardening unwarranted sentencing disparity and uniformity.

Second, we would note that the Committee hearing occurs at a time when criminologists of all stripes are both excited and confounded by the historic decrease in the nation’s crime rate. Many left-leaning experts believed crime would rise because of the severe economic downturn of the past few years. Many right-leaning experts predicted danger because economically depressed states finally began to reduce their prison populations in favor of less expensive alternatives. As one reporter noted,

Nationally, the drop in violent crime not only calls into question the theory that crime rates are closely correlated with economic hardship, but another argument as well, said Frank E. Zimring, a law professor at the University of California, Berkeley.

As the percentage of people behind bars has decreased in the past few years, violent crime rates have fallen as well. For those who believed that higher incarceration rates

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<sup>7</sup> Statement of Harley G. Lappin, Director of the Federal Bureau of Prisons, Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies 1 (March 15, 2011), *available at* [http://appropriations.house.gov/\\_files/031511BOPDirectorStatement.pdf](http://appropriations.house.gov/_files/031511BOPDirectorStatement.pdf).

<sup>8</sup> RIGHT ON CRIME, STATEMENT OF PRINCIPLES, *available at* <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/>.

inevitably led to less crime, ‘this would also be the last time to expect a crime decline,’ he said.<sup>9</sup>

The historic drop in crime, which admittedly cannot continue forever, is important to keep in mind because we believe that several of the proposals for reform that the Committee is expected to consider will ensure longer sentences for more offenders, regardless of whether any evidence is offered to suggest that these longer sentences will reduce crime.

## **1. The Faulty Premises of the Need for *Booker* “Fixes”:**

### **a. The Sentencing Reform Act (SRA) sought to eliminate all disparity.**

According to critics, since the Supreme Court handed down its opinions in *United States v. Booker*, 543 U.S. 220 (2005), courts have increasingly disregarded the federal sentencing guidelines, have drifted farther from guideline-based sentences, and injected race into their sentencing decisions. These critics call for so-called “*Booker* fixes” in order to restore the guidelines to their true form as they believe it is enunciated in the Sentencing Reform Act, enacted by Congress in 1984.

These critics, however, are off the mark because they distort the stated goals and history of the SRA. Congress never intended that the guidelines would be the beginning and the end of each sentencing inquiry. Rather, the authors of the SRA clearly anticipated disparity and did not assume the infallibility of the Sentencing Commission’s guideline ranges in each and every case. Of course, Congress intended the Commission to craft guidelines that reduced *unwarranted* disparities, but as the Senate Committee Report for the SRA stated, “[t]he key word in discussing unwarranted disparities is ‘unwarranted.’ The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentencing of persons convicted of similar offenses who have similar records.”<sup>10</sup> Put simply, the Congress that enacted the SRA – and created the federal guidelines – did not believe the guidelines would be sacrosanct, nor did they elevate uniformity over individualization. Rather, Senate drafters of the SRA stated:

The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which guidelines and policy statements apply. *Either he may decide that the guideline recommendation appropriately reflects*

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<sup>9</sup> Richard A. Oppel, Jr., Steady Decline in Major Crime Baffles Experts,” *New York Times*, May 23, 2011, available at <http://www.nytimes.com/2011/05/24/us/24crime.html>.

<sup>10</sup> S. Rep. No. 98-225, at 161 (1983).

*the offense and offender characteristics or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance.*”<sup>11</sup>

Indeed, Congress has expressly directed the Commission to ensure that individual offender circumstances be considered at sentencing, telling the Commission to “maintain[] sufficient flexibility to permit individualized sentences when warranted by aggravating or mitigating factors not taken into account in the establishment of general sentencing practices.”<sup>12</sup>

**b. Judges have disregarded the sentencing guidelines after *Booker*.**

Another faulty premise of *Booker* critics is that “courts have increasingly disregarded the federal sentencing guidelines.”<sup>13</sup> Lest one thinks this criticism is driven by concern about consistency and uniformity, we are told that “*the most notable fact* about guideline departures...is their direction. Virtually all of them favor the criminal.”<sup>14</sup> We are told that “the criminal is winning the departure game,” that this represents “a partisan result,” and that the “umpire” – presumably, the federal courts – are “playing favorites.”<sup>15</sup> This charge should be easy to prove. Sentencing statistics should reveal a high rate of court-sponsored departures and a clear drop in overall sentence length since *Booker*.

But that is not what the data show. Instead, the Sentencing Commission’s statistics reveal that post-*Booker* judges have sentenced within, above or below the guidelines at the behest of prosecutors 83 percent of the time in the third quarter of this year.<sup>16</sup> Judicial variances have fallen to 16.9 percent of all federal cases,<sup>17</sup> and these variances have not been significantly longer than pre-*Booker* departures. Pre-*Booker*, median judicial departures produced 10-12 month sentence reductions; post-*Booker*, almost 90% of below-guideline sentences included reductions of only 10-13 months.<sup>18</sup> The *average sentence* in the four years prior to *Booker* was

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<sup>11</sup> *Id.* at 52 (emphasis added).

<sup>12</sup> 28 U.S.C. § 991(b)(1)(B).

<sup>13</sup> Matt Miner, It’s Time to Fix Our Sentencing Laws, National Law Journal, September 26, 2011, available at, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202516629242&Its\\_time\\_to\\_fix\\_our\\_sentencing\\_laws&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202516629242&Its_time_to_fix_our_sentencing_laws&slreturn=1).

<sup>14</sup> William G. Otis, The Slow, Sad Swoon of the Sentencing Suggestions, *Engage*, June 2011, p. 30 (emphasis added).

<sup>15</sup> *Id.*

<sup>16</sup> U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 3RD QUARTER RELEASE, PRELIMINARY FY2011 DATA THROUGH JUNE 30, 2011, 12, Table 4 (2011), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2011\\_3rd\\_Quarter\\_Report.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_3rd_Quarter_Report.pdf) [hereinafter FY2011 3RD QUARTER REPORT].

<sup>17</sup> *Id.*

<sup>18</sup> Thomas W. Hillier, II, Public comment to U.S. Sentencing Commission from Federal Public Defender, Western D. of Washington 77-78 (Sept. 7, 2011), available at [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20110826/Defender-Priorities-Booker-Cover-Comments\\_2011-2012.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/Defender-Priorities-Booker-Cover-Comments_2011-2012.pdf).

46 months.<sup>19</sup> The average sentence today is 43.3 months.<sup>20</sup> This 2.7-month drop from the pre-*Booker* average is due to crack cocaine reforms and an increase in the prosecution of low-level immigration cases. Congress directed the Commission to lower the crack cocaine guidelines. As a result, average crack sentences have dropped from 130 months pre-*Booker* to 100 months today.<sup>21</sup> Prosecutors are bringing 40 percent more low-level immigration cases today than before *Booker*.<sup>22</sup> These low-level cases have shorter guideline ranges. Average immigration sentences have dropped from 29 months before *Booker* to 18 months today.<sup>23</sup>

Setting aside these offenses, the average sentences for all major offenses are the same or higher today than before *Booker*.<sup>24</sup> Average sentences for high-dollar fraud offenses have increased 28 percent from 89 months prior to *Booker* to 123 months today.<sup>25</sup> Average sentences for child pornography offenses, a mere two percent of the federal docket, have increased from 75 months before *Booker* to almost 120 months today, a 37.5 percent increase in sentence length.<sup>26</sup>

It is true that below-guideline sentences by judges rose in the years following *Booker*, but they now appear to be on the decline. The rate of below-guideline sentences increased from 12.7 percent just after *Booker* to 18.7 percent at the end of 2010, but has dropped to 16.9 percent in the third quarter of 2011.<sup>27</sup>

### **c. Unwarranted disparity created by the courts has increased since *Booker***

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<sup>19</sup> U.S. SENTENCING COMMISSION, 2001 – 2005 SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS, Table 13 (2001-2005), available at [http://www.ussc.gov/Data\\_and\\_Statistics/archives.cfm](http://www.ussc.gov/Data_and_Statistics/archives.cfm).

<sup>20</sup> FY2011 3RD QUARTER REPORT at 31, Table 19.

<sup>21</sup> U.S. SENTENCING COMMISSION, FINAL QUARTERLY DATA REPORT, FY2010, 38, Figure 1, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2010\\_Quarter\\_Report\\_Final.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_Final.pdf).

<sup>22</sup> Cf. U.S. SENTENCING COMMISSION, FY 2005, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, OVERALL FISCAL YEAR 45-46 (of 10,229 illegal re-entry cases, 20.9% received no prior conviction enhancement), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Guideline\\_Application\\_Frequencies/2005/05\\_glinexgline.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2005/05_glinexgline.pdf) with U.S. SENTENCING COMMISSION, FY 2010, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS 47 (of 19,767 illegal re-entry cases, 29% received no prior conviction enhancement), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Guideline\\_Application\\_Frequencies/2010/10\\_glinexgline.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf);

<sup>23</sup> FY2011 3RD QUARTER REPORT, at 36, Figure G.

<sup>24</sup> See *id.* at 34, Figure E (firearm offenses); 35, Figure F (alien smuggling); 38, Figure I (non-cocaine drug offenses).

<sup>25</sup> U.S. SENTENCING COMMISSION, FY2006-2010 DATAFILES; U.S. SENTENCING COMMISSION, FY06 – USSC FY10, Figure 5 to Sentencing Trends (on file with James E. Felman).

<sup>26</sup> U.S. SENTENCING COMMISSION, FY2005-2010 SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS, Table 13 (2005-2010), available at

[http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/SBTOC10.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm) and [http://www.ussc.gov/Data\\_and\\_Statistics/archives.cfm](http://www.ussc.gov/Data_and_Statistics/archives.cfm); FY2011 3RD QUARTER REPORT, at 31, Table 19.

<sup>27</sup> FY2011 3RD QUARTER REPORT at 12, Table 4.

If the critics of *Booker* want to make the case that an increase in below-guideline sentences violates the noble purpose of the SRA, they will have to do more than simply show that such variances have created disparities. They will have to demonstrate that these variances are producing *unwarranted* disparities, *i.e.*, similar defendants were treated differently and/or different defendants were treated similarly.

The most recent examples of unwarranted disparity put forth by *Booker*'s critics have proven unpersuasive. At a Senate Judiciary Committee hearing on fraud in January, Senator Charles Grassley (R-Iowa) stated:

Finally, Mr. Chairman, I'd like to note that regardless of the substantive laws we pass, the investigative and law enforcement resources appropriated, and the prosecutions brought so far, criminal fraud will not be adequately deterred unless we revisit the Supreme Court's decision in *United States v. Booker*. In that case, the Supreme Court held that mandatory Sentencing Guidelines violated the Sixth Amendment. Now that the Guidelines have been held to be merely advisory, the disparity and unfairness in judicially imposed sentences that we sought to eliminate on a bipartisan basis are returning, especially in two areas: child pornography and fraud cases of the type we are discussing today. If potential fraudsters view the lenient sentences now being handed down as merely a cost of doing business, efforts to combat criminal fraud could be undermined.

Supporting this position is a Reuters analysis of 15 insider trading cases that were brought by the United States Attorney in New York in 2009 and 2010, which concluded that in 13 of them, or 87 percent, the sentences imposed were lighter than the terms prescribed by the Sentencing Guidelines, and seven, nearly half, contained no prison term. By contrast, in other cases, New York federal judges issued sentences below those called for in the guidelines 57 percent of the time, in itself a shocking change from the system that the Sentencing Reform Act of 1984 created until the Supreme Court's *Booker* decision. Nationwide, 42 percent of all federal sentences were below the guidelines. Federal judges often seem not to understand the seriousness of these crimes.<sup>28</sup>

The use of the Reuters "study" failed to prove that judges are recklessly substituting their judgment for that of the guidelines. First, just weeks after the article was published, the U.S. Attorney for the Southern District of New York, Preet Bharara, dismissed the Reuters analysis as "skewed" in testimony before the Sentencing Commission because it did not take into account

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<sup>28</sup> U.S. SENATE COMMITTEE ON THE JUDICIARY, HEARING ON PROTECTING AMERICAN TAXPAYERS: SIGNIFICANT ACCOMPLISHMENTS AND ONGOING CHALLENGES IN THE FIGHT AGAINST FRAUD (Jan. 26, 2011), (Statement of the Hon. Chuck Grassley), *available at* <http://judiciary.authoring.senate.gov/hearings/testimony.cfm>.

the number of below-guideline sentences requested by government prosecutors.<sup>29</sup> Furthermore, FAMM analyzed all of the cases and sentences referenced in the Reuters article and found:

- in five of the cases, the government sought a downward departure to reward the assistance provided to the government in the investigation and/or prosecution of others. In one other case, prosecuted in both Canada and the United States, the defendants cooperated extensively with Canadian authorities and pled guilty in the United States case.
- in three of the remaining eight cases, the probation officer recommended a below guideline sentence, notwithstanding the calculated guideline range.
- in seven of the eight remaining cases, the government did not object to the below guideline sentence when given the opportunity to do so by the judge. In the eighth case, when asked, the prosecutor reiterated his position that the guideline range was appropriate but did not further object to the sentence when given the opportunity or raise additional arguments.
- in two of the eight cases, the government issued a press release hailing the sentence.
- in one of the eight cases, the government pointed to the “just below guideline sentence” approvingly in court documents filed in another of the cases.
- in none of the cases did the government appeal the below guideline sentence.<sup>30</sup>

While these Reuters study cases are relied on by advisory guideline critics for the need to harden up sentencing because judges are varying too much from the guidelines, clearly the variances are not owned entirely by the judiciary and should not serve as fodder for backward looking reforms. Rather they should signal what appears to be significant problems with the guidelines in these kinds of cases, problems that are recognized by all parties in litigation.

Another example, cited by majority witness Matt Miner in a recent editorial for *The National Law Journal*, is the sentencing of Richard Christman for a child pornography offense. Miner, a white collar lawyer at White & Case in Washington, D.C. and most recently former Republican staff director for the Senate Judiciary Committee, writes:

One of Congress’ purposes in creating the guidelines was to create uniformity and certainty in sentencing. The bizarre sentencing history of Richard Christman helps demonstrate how compromised Congress’ goal has become. Christman, who pleaded guilty to child pornography possession, was sentenced to 57 months in October 2005.

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<sup>29</sup> U.S. SENTENCING COMMISSION, PUBLIC HEARING TRANSCRIPT, HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES 60-61 (Feb. 16, 2011), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20110216/Hearing\\_Transcript.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Hearing_Transcript.pdf).

<sup>30</sup> Mary Price, Summary Analysis of the Reuters Insider Trading Cases (draft paper on file with the author).

But at a resentencing following a reversal of that sentence on procedural grounds, he was sentenced to a mere five days -- by the same judge. If a single federal judge cannot sentence the same defendant consistently in the same case, something is very wrong.<sup>31</sup>

Mr. Miner failed to point out several important facts about the case.

First, the judge involved admitted to having improperly considered unsubstantiated *ex parte* opinion evidence at the first sentencing. She revealed to the parties that she had heard from probation and pre-trial officers that they felt that the defendant had probably molested children, something that had not been alleged or charged by the government or admitted by the defendant who pled guilty to viewing child pornography.<sup>32</sup> She told the parties that, had she not received and credited these “feelings,” she would have imposed a lower sentence on the defendant. The 57-month sentence was, unsurprisingly, vacated on appeal and the case remanded for resentencing.<sup>33</sup> On remand, the judge imposed the five-day sentence and 15 years of supervised release and based the variance on a thorough consideration of sentencing factors.

Second, and even more significant, was Mr. Miner’s failure to mention that on appeal, the five-day sentence was vacated by the court of appeals as unreasonably low and the case was *remanded and reassigned to a different judge*.<sup>34</sup>

While Mr. Miner calls for congressional intervention to cure excesses of judicial discretion, clearly the courts of appeals, the first stop for prosecutors seeking reversal of unreasonably low sentences, know how to address them when they see them. In other words, the judicial system has its own mechanisms in place to address untoward sentences.

Moreover, contrary to Senator Grassley’s charge that federal judges do not understand the seriousness of fraud and child pornography offenses, and Mr. Miner’s suggestion that the system has been broken by judges, the comments made by the great majority of federal judges at sentencing hearings across the country suggest otherwise. Average sentences for high-level fraudsters and child pornography offenders have risen since *Booker* by 28 percent and 37.5 percent, respectively. I have read countless trial transcripts, seeking to understand why judges do what they do, and what I find are judges intent on following the law, abiding when they can by the guidelines when they help and sentencing outside the guidelines for good cause when necessary.

When they are unhelpful, as for example, in some high loss fraud cases where guideline sentences for first time non-violent offenders can reach or exceed statutory maximums, judges

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<sup>31</sup> Matt Miner, It’s Time to Fix Our Sentencing Laws, National Law Journal, September 26, 2011, available at, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202516629242&Its\\_time\\_to\\_fix\\_our\\_sentencing\\_laws&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202516629242&Its_time_to_fix_our_sentencing_laws&slreturn=1).

<sup>32</sup> *United States v. Christman*, 509 F.3d 299 (6<sup>th</sup> Cir. 2007)

<sup>33</sup> *Id.* at 312.

<sup>34</sup> *United States v. Christman*, 607 F.3d 1110 (6<sup>th</sup> Cir. 2010).

are forced to vary from them.<sup>35</sup> When judges depart from the guidelines in these two areas, they frequently appear to be acting to *prevent* disparity, i.e., the *unwarranted* disparity between the sentences for these offenses and the sentences recommended for more serious, often violent crimes. Put simply, without judges interceding, the current guidelines would impose longer prison terms on some first-time, non-violent insider traders and viewers (not traffickers) of child pornography than murderers, rapists, and pedophiles.

Such overwrought guidelines sometimes conflict with the commandment in 18 U.S.C. § 3553 that judges impose a sentence that is “sufficient but not greater than necessary” to achieve the purposes of punishment. Where such conflicts arise, judges are obliged to follow the law.

#### **d. Increased discretion since *Booker* has resulted in greater racial disparity in sentencing**

*Booker* critics also claim that court-driven racial disparity is on the rise. Critics cite a 2010 demographic study by the Sentencing Commission for the proposition that sentencing disparity due to race has increased under advisory guidelines. To begin with, the Commission study *warns readers to interpret its findings with caution* because it admittedly did not control for relevant legal reasons, including defendants’ past and current violence, some criminal history, and employment record that could not be measured by the Commission because they are not followed in its own database of legally relevant characteristics.<sup>36</sup> Fortunately, a more comprehensive study was conducted out of Pennsylvania State University, and it concluded that there have been no post-*Booker* increases in racial disparity in sentencing.<sup>37</sup>

It is worth noting that racial gaps in sentence lengths were non-existent before the passage of mandatory minimum laws in 1986 and 1988. In 1987, when judges had full

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<sup>35</sup> See, e.g., *United States v. Parris*, 573 F. Supp.2d 744,754 (E.D.N.Y. 2008) (stating “the Sentencing Guidelines for white-collar crimes [can produce] a black stain on common sense.”); *United States v. Adelson*, 441, F.Supp.2d 506, 512 (S.D.N.Y. 2006) (considering fraud guideline calculation that called for a life sentence for a first time fraud conspirator, lamenting “the utter travesty of justice that sometimes results from the guidelines’ fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.”).

<sup>36</sup> U.S. SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS 4, 9-10 & nn. 37-39 (2010), available at [http://www.ussc.gov/Research/Research\\_Publications/2010/20100311\\_Multivariate\\_Regression\\_Analysis\\_Report.pdf](http://www.ussc.gov/Research/Research_Publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf).

<sup>37</sup> Jeffery T. Ulmer, Michael T. Light, & John Kramer, *The Liberation of Federal Judges -- Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, JUSTICE QUARTERLY (forthcoming 2011), <http://www.informaworld.com/smpp/content~content=a934522285>; see also Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity In the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC’s 2010 Report*, 10 CRIMINOLOGY & PUB. POL’Y \_\_ (forthcoming 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1675117](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675117) [hereinafter “Alternative Analysis”]. Notably, the Penn State Study found that below-guideline sentences sponsored by the government “are a greater site of racial disparity than judge initiated deviations.” Alternative Analysis, at 39. Their results suggest that “disparity against Hispanic males in the prosecutorial use of substantial assistance departures has considerably increased since *Gall*.” *Id.*

sentencing discretion, the average time served by Black, White, and Hispanic defendants was identical: 26.96 months. After the creation of guidelines and mandatory minimums, average time served for Blacks began a steady upward climb and has remained over 25 months higher than average time served for Whites or Hispanics.<sup>38</sup> That gap should narrow because of the passage of the Fair Sentencing Act and its conforming crack guideline amendments.

If the critics of the advisory guideline system are as concerned as FAMM is about the racially discriminatory impact of sentencing policies, they should join us in opposing mandatory minimum sentences. They also should oppose a restoration of mandatory guidelines. After all, the Commission already found that the crack cocaine guideline was the single greatest contributor to racial disparity in the mandatory guideline era.<sup>39</sup> The Career Offender guideline, according to the Commission, is another source of racial disparity.<sup>40</sup> Moreover, the Commission concluded in 2004 that, under mandatory guidelines, “[t]oday’s sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did factors taken into account by judges in the discretionary system in place immediately prior to the guidelines implementation.”<sup>41</sup> There are very good reasons to be concerned about racial discrimination in federal sentencing; skin color should not determine sentence length. It is more than a little curious, however, that when looking for evidence of racial bias, those who see a post-*Booker* molehill did not acknowledge the pre-*Booker* (and mandatory minimum-created) mountain.

## **2. Booker “fixes” will do more harm than good.**

### **a. They will concentrate extraordinary authority in the hands of federal prosecutors, raising serious constitutional concerns**

FAMM respects the vital role that federal prosecutors play in keeping our nation and communities safe. We have no doubt that the overwhelming majority of prosecutors are dedicated to seeking justice and doing so ethically. This nation was founded, however, on a clear-eyed understanding of the danger of investing any one government official (or branch of government) with too much power.

Mandatory sentencing regimes – both mandatory minimum sentencing laws and mandatory federal guidelines – transfer sentencing authority from trial judges to federal

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<sup>38</sup> Federal Public Defenders, Average Time Served by Black, White, and Hispanic Offenders FY1984-2010, compiled from U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles; 1991-2010 U.S. Sentencing Commission Monitoring Datafiles (on file with author).

<sup>39</sup> U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM xvi (2004) [hereinafter FIFTEEN YEAR REPORT].

<sup>40</sup> FIFTEEN YEAR REPORT, at 133-34.

<sup>41</sup> *Id.* at 135.

prosecutors. That prosecutors already have extraordinary power is not a new discovery. More than 70 years ago, former U.S. Supreme Court Justice and Nuremberg trial prosecutor Robert Jackson gave a speech at the Justice Department to a group of U.S. Attorneys. He stated:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.<sup>42</sup>

To this awesome authority – what Justice Jackson described as “more control over life, liberty, and reputation than any other person in America” – the critics of *Booker* want reforms that would end up awarding even greater power to control what punishments are imposed. These critics ignore the fact that prosecutors already exercise significant sentencing influence through their investigative and charging decisions. Unlike court-imposed sentences that are imposed publicly and can be appealed, prosecutors’ exercises of discretion are made in private and are unreviewable.

For this reason, many legal scholars and jurists, including Justice Anthony Kennedy, have described as “misguided” the “transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant.” As Justice Kennedy said:

Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.<sup>43</sup>

As others have noted, “prosecutors are influenced by ordinary human motivations that may at times cause a loss of perspective – career advancement, path dependence, immodesty,

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<sup>42</sup> Robert H. Jackson, “The Federal Prosecutor,” an address delivered at The Second Annual Conference of United States Attorneys 2 (April 1, 1940), available at <http://www.justice.gov/ag/aghistorical/jackson/1940/04-01-1940.pdf>.

<sup>43</sup> Hon. Anthony M. Kennedy, “Speech at the American Bar Association Annual Meeting,” Aug. 9, 2003, available at [http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp\\_08-09-03.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html).

occasional vindictiveness, and so on – leading to the misapplication of mandatory minimums”<sup>44</sup> or guidelines.

The rise of mandatory sentencing policies and resulting increase in prosecutorial authority poses serious threats to our constitutional structure and rights. First, the extraordinary power vested in single individuals within the executive branch implicates the separation of powers doctrine. As a scholar from the Cato Institute has pointed out:

Liberal society has long been concerned with arbitrary, oppressive action stemming from the accumulation of too much power in too few hands. The Framers’ solution was to create a system of checks and balances, distributing power across government institutions in a manner that precludes any entity from exercising excessive authority and sets each body as a restraint on the others.

As a matter of history and experience, an autonomous court system under the guidance of impartial jurists is considered the most indispensable aspect of American constitutional democracy. An independent judiciary was meant to protect individuals from the prejudices and heedlessness of political actors and the public. The courts were historically entrusted with certain fundamental legal decisions, including dispositive criminal justice issues that demanded evenhanded judgment, such as the imposition of punishment on another human being. “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” There is “wisdom, even the necessity, of sentencing procedures that take into account individual circumstances,” drawing upon the judge’s familiarity with each case and “face-to-face contact with the defendants, their families, and their victims.”<sup>45</sup>

By taking away this critical authority from the judiciary and giving it to the executive branch, mandatory sentencing regimes have undermined a fundamental guarantee of individual liberty.

Mandatory sentencing regimes have also created a serious but quiet constitutional crisis: the evisceration of the Sixth Amendment’s right to jury trial. Since the guidelines were adopted, federal criminal trials have slowly disappeared. Before the guidelines, more than 12 percent of

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<sup>44</sup> Erik Luna, Professor of Law, Washington and Lee University School of Law Adjunct Scholar, The Cato Institute, Testimony before the U.S. Sentencing Commission, Mandatory Minimum Sentencing Provisions Under Federal Law 4-5 (May 27, 2010), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20100527/Testimony\\_Luna.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Luna.pdf).

<sup>45</sup>*Id.* at 5-6.

federal offenders were convicted by trial;<sup>46</sup> by 1996, the percentage was less than 9 percent;<sup>47</sup> by 2006, the percentage was less than 5 percent.<sup>48</sup> One could draw from such statistic that federal law enforcement has perfected the art of identifying only the truly guilty. However, “those who have studied this phenomenon quite reasonably attribute it to the adoption of new sentencing laws that have greatly enhanced the plea-bargaining leverage enjoyed by prosecutors.<sup>49</sup> The erosion of one of our most basic freedoms – the right to have one’s innocence and guilt decided by an impartial jury of one’s peers – is left unaddressed by those critics of *Booker* who seek a return to mandatory or more binding guidelines.

**b. Contrary to their proponents’ intentions, Booker “fixes” will likely lead to more instances of disparity and unwarranted disparity**

Critics of *Booker* often fail to state the obvious: prosecutors, not judges, are responsible for more sentencing disparities and the size of these disparities are greater on average than those created by the courts. For this reason, seeking to “solve” sentencing disparity by focusing on judicial departures is like trying to eliminate highway traffic fatalities by painting brighter yellow lines. There are bigger problems.

Whereas courts post-*Booker* have sentenced below the guidelines in just 14.6 percent of all federal cases, ***prosecutors have requested below-guideline sentences in 25.3 percent of all federal cases***, through substantial assistance, “fast-tracking” immigration cases, and other government-sponsored motions.<sup>50</sup> And though the length of court-initiated, below-guideline

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<sup>46</sup> See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 1987 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 5.22 (1987).

<sup>47</sup> U.S. SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 15 (Figure C) (1996), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/1996/sourcbk.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1996/sourcbk.htm).

<sup>48</sup> See U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK ON FEDERAL SENTENCING STATISTICS 25 (2006), Table 10 (2006) (95.7% of convictions obtained by plea of guilty, 4.3% obtained by trial verdict), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2006/SBTOC06.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2006/SBTOC06.htm).

<sup>49</sup> Kate Stith, “The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Judicial Discretion, February 2004, available at <http://ssrn.com/abstract=1099064> (quoting Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U.P.A. L. REV. 79, 54 (2004); see also Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137 (1995) (showing that guidelines give prosecutors “greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2551-54 (2004) (discussing how the costs of going to trial affect plea bargaining); Mary Pat Flaherty & Joan Biskupic, *Prosecutors Can Stack the Deck*, WASH. POST, Oct. 7, 1996, at A1 (describing cases in which the maximum sentence imposed by the federal sentencing guidelines influenced a defendant’s decision to plea bargain); Marc Miller & Ronald Wright, *Prosecutor Rex*, PHILA. INQUIRER, Dec. 19, 2003, at A39 (suggesting that wide margins between sentences after trials and sentences after plea bargains can unduly sway defendants towards plea bargains).

<sup>50</sup> U.S. SENTENCING COMMISSION, 2005-2010 SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS, Table 26 (2005-2010), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/SBTOC10.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm) and [http://www.ussc.gov/Data\\_and\\_Statistics/archives.cfm](http://www.ussc.gov/Data_and_Statistics/archives.cfm); FY2011 3RD QUARTER REPORT Table 2.

variances grew slightly after *Booker*, prosecutor-driven requested departures produce some very attractive sentence reductions, including 29-31 months for substantial assistance motions, 7-8 months for fast track cases, and 10-16 months in other cases.<sup>51</sup>

In 2004, the Commission found “that disparate treatment of similar offenders is common at presentencing stages. Disparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced.”<sup>52</sup>

Prosecutors not only have the power to create disparities when they like, they have the authority to object to and appeal disparities they don’t like. When they appeal, the government wins 60 percent of the time.<sup>53</sup> Frequently, however, they do not use this authority. The government appealed only 86 sentences of the 81,859 imposed in 2010. Notably, only 30 of those appeals involved below-guideline variances under 3553(a).<sup>54</sup>

### **3. The Commission Holds the Key – fashioned by Congress -- to Ensuring Relevant Guidelines that Judges Can Follow.**

FAMM endorses the American Bar Association proposal that the Commission lead the effort, as intended by the SRA, to gather, evaluate, and act on the information gleaned from the sentencing decisions of judges and empirical research.<sup>55</sup> As Mr. Felman points out in his testimony, there is still much to learn from judges about why they choose to follow or not follow sentencing guidelines and “any serious study of sentencing practices under advisory guidelines remains incomplete in the absence of data that shed light on *why* these conscientious men and women are sentencing as they are.”<sup>56</sup>

Congress should recognize that sentences that vary widely from particular guidelines, and the fact that such sentences exist, might contain important information about the appropriateness of a given guideline. As the Supreme Court has said, when judges sentence outside the guideline range based upon the purposes and factors set forth in § 3553(a), those judges are providing ‘relevant information’ to the Commission so that the guidelines can ‘constructively evolve over

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<sup>51</sup> Thomas W. Hillier, II, Public comment to U.S. Sentencing Commission from Federal Public Defender, Western D. of Washington 78 (Sept. 7, 2011), *available at* [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20110826/Defender-Priorities-Booker-Cover-Comments\\_2011-2012.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/Defender-Priorities-Booker-Cover-Comments_2011-2012.pdf).

<sup>52</sup> FIFTEEN YEAR REVIEW, at 92.

<sup>53</sup> *Id.*

<sup>54</sup> U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 58.

<sup>55</sup> *Hearing before the Subcomm. on Crime, Terrorism and Homeland Security Committee on the Judiciary, The Status of Federal Sentencing and the United States Sentencing Commission Six Years After U.S. v. Booker* 10-14 (Oct. 12, 2011) (testimony of James Felman on Behalf of the American Bar Ass’n).

<sup>56</sup> *Id.* at 11.

time, as both Congress and the Commission foresaw.”<sup>57</sup>

The authority the Commission can draw on to credit the feedback from the courts is found at 28 U.S.C. § 994(o), which provides in part that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provision of this section.”<sup>58</sup> Complaints about judicial departures or variances from the calculated guidelines, particularly variances that address guideline sentences that are considered unduly long in light of the considerations and mandate of § 3553(a), miss the point. As the Supreme Court pointed out in *Rita v. United States*, 551 U.S. 338 (2007), the sentencing decisions were to be treated as a kind of feedback system.<sup>59</sup> Instead, for many years, Congress sought to hamper this exercise of judicial discretion, claiming that judges were engaging in exercises of undue leniency by abusing their departure authority.

Thus, another, healthier, way to look at such variances, is as valuable feedback from the front lines. This “feedback” from the courts should inform Congress and the Commission when a particular guideline results in sentences that are too severe for too many defendants who are subject to it. If the Commission were to respond to this feedback by using it to identify, investigate, and adjust problematic guidelines – as it did with crack cocaine sentences – it is likely that compliance with the guidelines will increase. The Commission has begun the healthy process of recognizing and crediting such feedback. For example, in 2010, the Commission, following a review of sentencing data, public testimony and comment, and the findings of a survey of judges, made probation and split sentences more widely available if such sentences would better accomplish specific treatment of defendants with substance abuse issues.<sup>60</sup> Similarly, citing “case law and public comment regarding the magnitude of the enhancement” in amendments pending before Congress now, the Commission proposes to ameliorate certain harsh criminal history rules in cases involving illegal reentry that have the effect of calling for unduly long sentences.<sup>61</sup>

Such evolution of guideline recommendations is a natural and intended consequence of what was contemplated by the Congress in the SRA as an ongoing dialogue of sorts between the Commission and the courts. Congress would be best served by taking a step back and allowing the process to play out, in a way impossible to achieve in the mandatory guideline years. It is

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57. *The Sentencing Reform Act of 1984: 25 Years Later: Public Hearings Before the United States Sentencing Commission*, 111th Cong. 4 (2009) (statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, 4) (citing *Rita v. United States*, 551 U.S. 338, 358 (2007)), available at [http://www.ussc.gov/AGENDAS/20090709/Bunin\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Bunin_testimony.pdf). [hereinafter Bunin]

58. 28 U.S.C. § 994(o) (2006).

59. *Rita*, 551 U.S. at 357-58.

60. U.S.S.G App. C, amend. 738 (Nov. 1, 2010) (Reason for Amendment).

61. U.S. SENTENCING COMMISSION, AMENDMENTS TO THE SENTENCING GUIDELINES 77 (Apr. 28, 2011) (Reason for Amendment 6, Illegal Reentry).

most likely that it will find the guidelines and judicial decisions will align as the Commission adjusts guidelines that are not useful and judges find the resulting amended guidelines of more benefit to them as they search for the correct sentence in all cases.

Thank you for considering our views.