

**Statement of Raymond Moore
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**Public Hearing Before the
United States Sentencing Commission**

**Current State of Federal Sentencing
February 16, 2012**

Thank you for the opportunity to testify about the current state of federal sentencing on behalf of the Federal Public and Community Defenders.

The Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and subsequent cases have brought balance, transparency, increased fairness, and the means for long term improvement. The Commission has begun to address undue severity in response to judicial feedback, but much remains to be done before it can deem judicial discretion to be a problem. The guidelines are still followed most of the time and exert a gravitational pull when they are not followed. Judges have exercised their discretion moderately, even sparingly. In our view, the Commission should act more quickly to undo the mistakes of the past, and in the meantime, judges should sentence below the guideline range more often. But *Booker* has made long term improvement possible. Attempting to undo it somewhat (as the Commission proposes), or a lot (as others would have it) is unnecessary and would be unwise and counterproductive.

The Commission proposes legislative changes aimed at constraining the discretion of judges, discretion that judges have exercised to reduce excessive guideline sentences, to impose appropriately individualized sentences, to reduce unwarranted racial disparity, and to encourage the Commission to revise guidelines that are too severe. The Commission's proposals are not supported by the evidence, and would be counterproductive. Moreover, as Henry Bemporad will explain, the Commission's proposals would spawn disruptive litigation, and almost surely be held unconstitutional. The great weight of the reliable evidence shows that the current statutory system is working quite well, and the Commission should report that evidence to Congress. Instead of seeking legislative change, the Commission should expand and accelerate its review and revision of guidelines that recommend punishment that is greater than necessary to serve the purposes of sentencing and guidelines that promote unwarranted disparities.

My testimony proceeds as follows:

- | | | |
|------|--|---|
| I. | <i>Booker</i> Has Made Long Term Improvement Possible | 4 |
| II. | The Commission Needs to Reduce Excessive Severity Before It Can Deem Judicial Discretion to be a Problem | 7 |
| III. | The System is Stable, with Improvement in the Right Direction | 8 |

A.	Judges, Prosecutors, Defense Lawyers, and Advocates for Fair Sentencing Policy Believe that the Advisory Guidelines System Best Serves the Purposes of Sentencing	8
B.	There Has Been No Undue Leniency. If Anything, Judges Have Been Overly Restrained	9
C.	Sentencing is Far More Transparent	11
D.	Judicial Variances Have Slowed Prison Population Growth and Saved the Taxpayers Over \$2 Billion Dollars	13
IV.	Racial Minorities Are Sentenced More Fairly Because of the Increased Discretion <i>Booker</i> Conferred on Sentencing Judges	14
A.	Judges Have Exercised Their Discretion After <i>Booker</i> to Substantially Reduce Unwarranted Racial Disparities	15
B.	The Commission’s Proposals Would Make It More Difficult for Judges to Correct Unwarranted Racial Disparities, While Failing to Address the <i>Real</i> Problems	18
C.	The Commission’s Proposals Focus on Constraining the Discretion of the Institutional Actor Least Likely to Exercise Racial Bias	20
D.	It Would Not Be More “Fair” to Racial Minorities to Restrict Judges’ Ability to Consider Their Individual Offender Characteristics	20
E.	The Commission’s Study Fails to Support the Conclusion that Racial Disparity Has Increased Due to Increased Judicial Discretion, or Its Proposals to Constrain Judicial Discretion	25
1.	The Commission’s study is missing variables that would change the results if they were included	26
2.	The Commission’s study inflates the weight assigned to race by omitting control variables for criminal history	27
3.	The Commission’s study masks fluctuations likely to reveal a lack of robustness	27
4.	The Pennsylvania State University Study, using a different methodology, reached conclusions that conflict with and explain the Commission’s results	28
5.	The Pennsylvania State Study points to a beneficial and targeted policy change. Rather than seek to constrain judicial discretion, the Commission	

should encourage alternatives to incarceration involving job training and placement 29

V.	The Commission’s Presentation of Rates of Below-Guideline Sentences by District is Meaningless and Fails to Support its Proposals to Constrain Judicial Discretion	30
A.	Inter-District Variation in Sentence Length is Less After <i>Gall</i> than Before the PROTECT Act	31
B.	Geographic Differences Are Warranted and Longstanding	31
C.	The Commission’s Presentation of Rates Distorts the True Picture By Omitting Any Data Regarding Government-Sponsored Rates	31
D.	“The causes of variation in the rates of departure, and their potential effect on unwarranted sentencing disparity cannot be resolved through simple examination of reported rates. . . . When assessing the role of departures in creating unwarranted sentencing disparity . . . caution is advisable and caveats are unavoidable.” U.S. Sentencing Commission, <i>Fifteen Year Review</i> at 111. “Analyzing sources of . . . regional disparity is complicated because the potential sources are so many, varied, and interacting.” <i>Id.</i> at 93. “Comparisons of the departure rates of different circuits and districts seem to me . . . unsound.” Samuel A. Alito, <i>Reviewing the Sentencing Commission’s 1991 Annual Report</i> , 5 Fed. Sent. Rep. 166 (1992)	33
VI.	The Current Appellate Standard of Review Is Working Appropriately	36
A.	The Current Standard of Review Originated in the SRA, Is More “Robust” Than That Standard, Gives Proper Deference to the Sentencing Judge, and Is Thus Constitutional	38
B.	The Government Appeals As Many Sentences As It Did Before <i>Booker</i> , and Has a High Success Rate on Appeal	41
C.	The Data Show That Courts of Appeals Have All the Tools They Need to Reverse Sentences as Procedurally or Substantively Unreasonable, and That Courts Impose a Different Sentence on Remand Over Half the Time When Reversed for Procedural Error	42
D.	The Commission Mischaracterizes Supreme Court and Appellate Decisions Regarding “Policy Disagreements.”	43
E.	Differing Appellate Outcomes Serve as a Signal to the Commission to Improve Unsound Guidelines, Not as a Signal to Enforce the Guidelines More Strictly	48

- F. If the Commission Is Concerned about Differences in Interpretations, It Should Resolve Those It Has the Power to Resolve 53
- G. Contrary to the Commission’s Suggestion, Appellate judges Do Not Support a Standard of Review to More Strictly Enforce the Guidelines 54

I. Booker Has Made Long Term Improvement Possible.

Booker opened up an honest conversation about what purposes sentences are supposed to serve, whether the guidelines actually serve those purposes, and what the Commission’s proper role is. It provides the impetus for the Commission to act like the expert body it was created to be. If the Commission embraces that role, the guidelines will earn respect on the merits, and the guidelines will be as strong and effective as they deserve to be.

The Supreme Court upheld the constitutionality of the guidelines on the condition that they be treated as advisory only, within the framework of 18 U.S.C. § 3553(a). The Court encouraged the Commission to base its decisions on data and research,¹ to listen to feedback from sentencing judges, and to revise the guidelines accordingly.² The Commission first acted on this advice by voting to reduce the crack guidelines by two levels and urging Congress to take further action,³ based on its own research and in response to judicial variances, circuit caselaw, and cases pending in the Supreme Court following *Booker*.⁴ These efforts, coupled with widespread criticism of the powder/crack disparity encouraged by the Supreme Court’s decisions in *Booker* and *Kimbrough v. United States*, 552 U.S. 85 (2007), eventually led to the Fair Sentencing Act of 2010.

¹ The Commission’s “characteristic institutional role” is to “base its determinations on empirical data and national experience.” See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). See also *Rita v. United States*, 551 U.S. 338, 349-50 (2007) (guidelines “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives,” because Commission used an “empirical approach” in developing the first set of guidelines, and “can revise the Guidelines” based on feedback from judges).

² The courts’ “reasoned sentencing judgment[s], resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors . . . should help the Guidelines constructively evolve over time.” *Rita*, 551 U.S. at 358; see also *Booker*, 543 U.S. at 264 (“[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”).

³ See 72 Fed. Reg. 28558, 28573 (May 21, 2007).

⁴ See 72 Fed. Reg. 28558, 28573 (May 21, 2007); USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, 1, 115-22 (May 2007).

The rate of non-government sponsored below-guideline sentences grew steadily though modestly through 2010.⁵ The Commission made other ameliorating changes in 2010 and 2011 in response to feedback from the district courts and courts of appeals.⁶ Prompted by a high rate of variances and numerous written opinions by judges and courts of appeals, the Commission is reviewing the guideline for possession of child pornography.⁷ The Commission has suggested that it may address the problems with the fraud guideline that have been highlighted by the courts.

After increasing nearly every quarter through fiscal year 2010, the overall rate of non-government sponsored below-guideline sentences began to drop during the first quarter of fiscal year 2011, concurrent with the reduction in the crack guidelines on November 1, 2010.⁸ As the Supreme Court said, “ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”⁹ “As the Commission perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission’s recommendations.”¹⁰

This is how Congress intended the system to work. It directed the Commission to measure whether the guidelines were effective in meeting the purposes of sentencing,¹¹ and to ensure that the guidelines reflected advancement in knowledge of human behavior.¹² The Commission would “review and revise” the guidelines “in consideration of data and comments coming to its attention.”¹³ Data and reasons from departures would alert the Commission to problems with the guidelines in operation.¹⁴ The Commission would collect and study the data

⁵ USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 4 (Oct. 31, 2011).

⁶ See USSG, amend. 742 (Nov. 1, 2010) (eliminating “recency” points from the criminal history score, citing below-guideline sentences); USSG, amend. 738 (Nov. 1, 2010) (slightly expanding the availability of alternatives to straight imprisonment, citing judicial feedback); USSG, amend. 754 (Nov. 1, 2011) (reducing large increases in immigration guideline based on stale prior convictions, citing appellate decisions finding unwarranted uniformity in requiring same increase regardless of age of conviction).

⁷ USSC, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); U.S. Sent’g Comm’n, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010).

⁸ See USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 4 (Oct. 31, 2011) (decrease from 18.7% in the fourth quarter of 2010 to 17.1% in the fourth quarter of 2011).

⁹ *Kimbrough*, 552 U.S. at 107-08.

¹⁰ *Rita*, 551 U.S. at 382-83 (Scalia, J., concurring in part and concurring in the judgment).

¹¹ 28 U.S.C. § 991(b)(2).

¹² 28 U.S.C. § 991(b)(1)(C).

¹³ 28 U.S.C. § 994(o).

¹⁴ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) (“[T]he system is ‘evolutionary’ – the Commission issues Guidelines,

and reasons, their relationship to the factors set forth in § 3553(a), and their effectiveness in meeting the purposes of sentencing.¹⁵ The Commission would revise the guidelines based on what it learned.¹⁶ The system is finally working as Congress intended.

Booker has also had a salutary influence on Department of Justice policies. In 2010, the Attorney General issued a memorandum allowing prosecutors for the first time to seek *individualized* sentences under § 3553(a) with supervisory approval.¹⁷ Just recently, citing the advisory guidelines, the Department instituted fast track programs in illegal re-entry cases nationwide, essentially acknowledging that the penalties recommended by the illegal re-entry guideline are too high.

The government's conduct at sentencing and on appeal shows that it believes that guideline sentences are often unnecessarily harsh. Prosecutors moved for sentences below the guideline range in 26.4 percent of all cases in fiscal year 2011.¹⁸ Prosecutors agreed to or did not oppose more than half of below range sentences classified as "non-government sponsored."¹⁹ The government does not appeal more below-range sentences after *Booker* than it did before *Booker*, though its success rate is as high as before *Booker*.²⁰

gathers data from actual practice, analyzes the data, and revises the Guidelines over time."); *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.) ("[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.").

¹⁵ 28 U.S.C. § 995(a)(13)-(16).

¹⁶ See S. Rep. No. 98-225, at 80 (1983) ("The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements."); *id.* at 151 ("Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines," which "will assist the Sentencing Commission in refining the sentencing guidelines."); *id.* at 182 ("research and data collection . . . functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.").

¹⁷ Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

¹⁸ USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 1 (Oct. 31, 2011).

¹⁹ *Id.*, tbl. 6.

²⁰ See USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls. 56A, 58 (government raised 156 issues on appeal, 30 involved § 3553(a), government prevailed 60% of the time); USSC, 1998 Sourcebook of Federal Sentencing Statistics, tbl. 56 (government raised 122 issues on appeal, 41 involved departures, government prevailed 61% of the time); USSC, 1999 Sourcebook of Federal Sentencing

II. The Commission Needs to Reduce Excessive Severity Before It Can Deem Judicial Discretion to be a Problem.

After twenty years of the one-way upward ratchet, the Commission has much to do before seeking to constrain judicial discretion. If the Commission wants judges to follow the guidelines more often, it should reduce unwarranted severity. The answer is not to require judges to give special “weight” to guidelines that recommend excessive terms of imprisonment, or to discourage judges, through *de novo* review, from transparently disagreeing with unjust guidelines.

The Commission has not yet addressed some of the most problematic guidelines. In addition to the child pornography and fraud guidelines, all of the drug guidelines recommend punishment that is excessive in a great many cases. As the Commission has just re-affirmed, the mandatory minimum quantity levels — to which the guidelines are tied — overstate the seriousness of the offense.²¹ The Commission claims that the problem is “significantly ameliorated” for low-level offenders by the safety valve, but African American offenders are disproportionately excluded from safety valve relief.²² As to higher level offenders, the quantities were chosen to reflect aggravated roles, but the guidelines add aggravating role adjustments and many other enhancements. And even though the mandatory minimum quantity levels overstate the seriousness of the offense, the guideline range is two levels higher than necessary to include the mandatory minimums for reasons that have nothing to do with the purposes of sentencing – to induce defendants to plead guilty or otherwise cooperate.²³

Significant progress has been made in reforming penalties for crack cocaine offenses, but unjustified severity remains, in part because the 18:1 ratio was derived from an inaccurate understanding of the quantities of crack associated with different types of offenders.²⁴

Statistics, tbl. 58 (government raised 54 issues on appeal, 25 involved departures, government prevailed 33% of the time); USSC, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 58 (under the PROTECT Act standard, government raised 173 issues on appeal, 63 involved departures, government prevailed 73% of the time).

²¹ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* at 350-51 (2011).

²² *Id.* at 351, 159-60.

²³ See Written Statement of James Skuthan Before the U.S. Sent’g Comm’n, Public Hearing on Proposed Amendments for Drugs (Mar. 17, 2011).

²⁴ Congress chose 28 grams for the five-year mandatory minimum threshold in the Fair Sentencing Act of 2010 because it read a Commission report to mean that one ounce was typical of a “wholesaler,” see Letter from Richard J. Durbin, U.S. Senator, to the Hon. William K. Sessions, III, Chair, U.S. Sent’g Comm’n (Oct. 8, 2010), but the report defines “wholesaler” as an offender who sells more than ounce “in a single transaction, or possesses two ounces or more on a single occasion.” USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 18 (2007). Since the guidelines require aggregation of amounts in multiple transactions when they are part of the “same course of conduct or common scheme or plan,” USSG § 1B1.3(a)(2), many low-level crack offenders are punished at a level Congress intended for a

The career offender guideline is a very serious problem. According to the Commission’s own research, the severe punishment recommended by this guideline, as applied to defendants who qualify on the basis of prior drug convictions —the overwhelming majority of career offenders — vastly overstates their risk of recidivism, serves no general deterrent purpose, and applies disproportionately to African Americans.²⁵ The two primary reasons that the guideline applies too broadly are the inclusion of state drug convictions, and the definition of “felony” to include state misdemeanors. Neither was intended by Congress. The directive that spawned the career offender guideline lists as predicates only specified *federal* drug felonies (and “crimes of violence,” federal or state),²⁶ and these predicates were to be defined as “felonies” by the convicting jurisdiction.²⁷

Since the Commission exceeded the directive in the very ways that make this guideline most unsound and in a manner that has a disproportionate impact on African Americans, it is free to narrow its reach. But it still has not done so. And despite the fact that the career offender guideline is followed in only a third of the cases in which it applies,²⁸ and that the risk of recidivism of most career offenders is closer to that of offenders in the criminal history category in which they would have been if not for the career offender guideline,²⁹ the Commission continues to limit departures from this guideline to one criminal history category.

III. The System is Stable, with Improvement in the Right Direction.

A. Judges, Prosecutors, Defense Lawyers, and Advocates for Fair Sentencing Policy Believe that the Advisory Guidelines System Best Serves the Purposes of Sentencing.

Seventy-five percent of district court judges believe that the post-*Booker* advisory guidelines system achieves the purposes of sentencing better than any kind of mandatory system

“wholesaler.” See Written Statement of James Skuthan Before the U.S. Sent’g Comm’n, Public Hearing on Proposed Amendments for Drugs (Mar. 17, 2011).

²⁵ See USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133-34 (2004) [Fifteen Year Review].

²⁶ 28 U.S.C. § 994(h) (listing specific federal drug felonies).

²⁷ See 28 U.S.C. § 994(h)(2) (requiring that the defendant “has previously been convicted of two or more prior *felonies*”). When § 994(h) was enacted in 1984 and today, the unadorned term “felony” was and is defined as follows: “The term ‘felony’ means any Federal or State offense classified by applicable Federal or State law as a felony.” See 21 U.S.C. § 802(13), § 951(b).

²⁸ In fiscal year 2010, 2,314 defendants were subject to the career offender guideline; only 34.3% were sentenced within the guideline range; judges departed or varied in 27.7% of cases without a government motion, and in 38% of cases with a government motion. USSC 2010 Monitoring Dataset.

²⁹ Fifteen Year Review at 133-34.

or no guidelines at all.³⁰ This is important because sentencing judges have the most reliable perspective on sentencing.³¹ Prosecutors prefer the advisory guidelines system to other available options as well.³² The Federal Defenders, the American Bar Association, and the National Association of Criminal Defense Lawyers support the advisory guidelines system,³³ as do Families Against Mandatory Minimums and the American Civil Liberties Union.³⁴

B. There Has Been No Undue Leniency. If Anything, Judges Have Been Overly Restrained.

One year after *Booker*, when the guidelines were still being enforced on appeal and reflexively followed, judges sentenced below the guideline range without a government motion in 12.5 percent of cases,³⁵ an increase from 11 percent in 2001 when the guidelines were mandatory.³⁶ In fiscal year 2011, seven years after *Booker* and four years after the Supreme Court made clear in *Gall* that judges must consider all relevant circumstances of the offense and the offender, and in *Rita* and *Kimbrough* that judges may disagree with unsound guidelines, and in all of these cases that courts of appeals must apply a deferential abuse-of-discretion standard

³⁰ See USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19.

³¹ “The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.” *Gall*, 552 U.S. at 51-52 (internal punctuation and citations omitted).

³² See Lanny A. Breuer, *The Attorney General’s Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent’g Rep. 110, 112 (2010).

³³ See Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to the Hon. F. James Sensenbrenner and the Hon. Robert C. (Bobby) Scott (Oct. 11, 2011); Testimony of James E. Felman on behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives at 21-23 (Oct. 12, 2011); Letter from Lisa Monet Wayne on behalf of the National Association of Criminal Defense Lawyers to the Hon. Jim Sensenbrenner and the Hon. Bobby Scott (Oct. 11, 2011).

³⁴ See Testimony of Mary Price, Vice President and General Counsel, Families Against Mandatory Minimums, Hearing on “Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*,” Subcomm. on Crime, Terrorism and Homeland Security House Committee on the Judiciary (Oct. 12, 2011); Written Statement of the American Civil Liberties Union, submitted to the House of Representatives, Comm. on the Judiciary, Subcomm. on Crime, Terrorism and Homeland Security, Hearing on “Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*” (Oct. 12, 2011).

³⁵ USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* vi–vii (2006).

³⁶ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 60 (2003).

of review to all sentences, the rate of sentences below the guideline range classified as non-government sponsored was 17.2 percent,³⁷ a mere 4.7 percent increase. The median decrease remains, as it was before *Booker*, at about 12 months.³⁸

This modest increase in the rate of below-guideline sentences is in spite of the fact that many guidelines continue to recommend punishment that is greater than necessary, and that the guideline calculation does not (and cannot³⁹) include most relevant mitigating factors. If anything, judges have been overly restrained.

Yet, in its submissions to Congress, the Commission presents the increase in non-government sponsored below-guideline sentences as if it were a self-evident problem — “[i]n contrast” to the apparently self-evidently appropriate higher rate of government sponsored below-guideline sentences.⁴⁰ The Commission fails to acknowledge that the increase in judicial below-guideline sentences reflects sentences that better comply with the purposes of sentencing.⁴¹

Sentence length was roughly 46 months before *Booker*, and was 42.7 months in fiscal year 2011.⁴² This decrease — a small step in the right direction — is attributable to (1) crack cases (due to variances and reduced guideline ranges), (2) a large increase in the number of immigration cases prosecuted under 8 U.S.C. § 1326(a) (with a statutory maximum of two years and a low guideline range),⁴³ and (3) slightly lower sentences in powder cocaine and marijuana

³⁷ USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 1 (Oct. 31, 2011).

³⁸ See USSC, 2003-2004 Sourcebook of Federal Sentencing Statistics, tbl. 31A; USSC, 2005-2010 Sourcebook of Federal Sentencing Statistics, tbls. 31A-31D; USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbls. 10-13 (Oct. 31, 2011) (median decrease was 13 months for 77% of below-range sentences, 11 months for 14% of below-range sentences, 18 months for 6% of below-range sentences, and 6 months for 3% of below-range sentences).

³⁹ See USSG Ch. 1, Pt. A(4)(b) (“it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision”); S. Rep. No. 98-225, at 150 (1983) (“[E]ach offender stands before the court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors – the facts in the case; the mitigating or aggravating circumstances; the offender’s characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case – cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.”).

⁴⁰ See USSC, *Mandatory Minimum Penalties in the Criminal Justice System* at 346-47 (2011); Commission Testimony at 1, 23.

⁴¹ See Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to Hon. Patti B. Saris, Chair, U.S. Sent’g Comm’n, re Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012 (Sept. 7, 2011).

⁴² See USSC, 2001-2007 Sourcebook of Federal Sentencing Statistics, tbl. 13; USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 19 (Oct. 31, 2011).

⁴³ *Id.*, figs. G, I; USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, figs. G, I (Oct. 31,

cases.⁴⁴ Average sentence length has remained the same or slightly increased for all other offenses,⁴⁵ but has substantially increased for fraud offenses⁴⁶ and child pornography offenses,⁴⁷ even as the rates of below-guideline sentences in these cases, government-sponsored and non-government sponsored, has continued to grow.

C. Sentencing is Far More Transparent.

Judges give more careful attention to sentencing because they bear greater responsibility for the sentences they impose than when the guidelines were mandatory. Judges are now required to do what Congress originally intended: “The intent of [section 3553](a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.”⁴⁸ “[T]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.”⁴⁹ Judges are required to explain all sentences, inside or outside the guideline range, in light of all of the purposes and factors set forth in § 3553(a) and the arguments made by the parties.⁵⁰ It is significant procedural error to fail to do so, and the courts of appeals readily reverse on that basis.⁵¹

During the mandatory guidelines era, the guidelines were routinely circumvented. This resulted in sentences that were more just in some cases, but it was hidden and largely up to individual prosecutors.⁵² Today, unless a mandatory minimum applies, sentences are decided by

2010).

⁴⁴ *Id.*, fig. I; USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, fig. I (Oct. 31, 2011).

⁴⁵ *Id.*, figs. C-I; USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, figs. C-I (Oct. 31, 2010).

⁴⁶ USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 19 (Oct. 31, 2011) (22.7 months); USSC, 2005 Sourcebook of Federal Sentencing Statistics, tbl. 13 (14.9 months before *Booker*, 17.2 months after *Booker*).

⁴⁷ USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 19 (Oct. 31, 2011) (119.1 months); USSC, 2005 Sourcebook of Federal Sentencing Statistics, tbl. 13 (75 months before *Booker*, 78.6 months after *Booker*).

⁴⁸ S. Rep. No. 98-225, at 77 (1983).

⁴⁹ *Id.* at 52.

⁵⁰ *See Gall*, 552 U.S. at 41, 51; *Rita*, 551 U.S. at 357.

⁵¹ *See* Appellate Decisions After *Gall* (Feb. 8, 2012), http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf.

⁵² *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 535, 557

judges in open court. Plea bargaining takes place in the shadow of the sentencing judge, applying the purposes and factors set forth in § 3553(a). Thus, while defendants continue to plead guilty at as high a rate as ever, they do so without a plea agreement more often.⁵³ This is a positive development.

The reasons prosecutors give for seeking leniency are now more honest. Until the Holder Memorandum, prosecutors were generally not permitted to move for departure based on mitigating factors, and some used substantial assistance motions to accomplish that result.⁵⁴ Since 2005, the rate of government-sponsored below-range sentences has increased by 2.6% overall.⁵⁵ The rate of cooperation departures has decreased, while the rate of government-

(1992) (study found “circumvention” based on prosecutors’ personal sense of justice, that this is not “necessarily bad” and “produces arguably just results,” but is “hidden and unsystematic” and “obscures accountability”); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 853-54 (1992) (sentences are overly severe in part because of “relevant conduct,” and thus “Guideline circumvention and judicial failure to control it must be understood against the background of the substantive justice of the sentences that would otherwise result. . . . Judges acquiesce in plea manipulation in part because the resulting disparity is less troubling to them than the excessive severity and substantive disparity that flow from working ‘by the book.’”); *Fifteen Year Review* at 87 (Commissioner Ilene Nagel and Professor Schulhofer identified “overemphasis on harm- and quantity-driven offense characteristics, and overall severity levels required by statutory minimum penalties and the guidelines pegged to them” as having “caused prosecutors, defense attorneys, and judges to search for ways to circumvent the guidelines’ strict requirements.”); *id.* at 82, 141-42 (“circumventing applicable guidelines may result in sentences, in some cases, that are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law,” but “unlike judicial departures,” this “can undo the transparency and uniformity intended by the SRA.”); Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1117-18 (2001)

⁵³ Jeffery Ulmer & Michael Light, *Beyond Disparity: Changes in Federal Sentencing After Booker and Gall?*, 23 Fed. Sent. Rep. 333, 338 (2011) (survey of practitioners and judges showed 12% increase in open guilty pleas).

⁵⁴ See, e.g., Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 Fed. Sentencing Rep. 75 (1998).

⁵⁵ The rate has moved from 23.8% in 2005, to 24.6% in 2006, to 25.6% in 2007, to 25.6% in 2008, to 25.3% in 2009, to 25.4% in 2010, to 26.4% in 2011. See USSC, 2005 Sourcebook of Federal Sentencing Statistics, tbl.26; USSC, 2006-2010 Sourcebook of Federal Sentencing Statistics, tbl.N; USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 1 (Oct. 31, 2011).

sponsored below-guideline sentences for other reasons has grown.⁵⁶ In child pornography cases, the rate for “other” reasons is 14.7%.⁵⁷

D. Judicial Variances Have Slowed Prison Population Growth and Saved the Taxpayers Over \$2 Billion Dollars.

The federal prison population grew by a whopping 400 percent during the mandatory guidelines era: by 64.4 percent from 1985 to 1990, by 52.2 percent from 1990 to 1995, by 49.6 percent from 1995 to 2000, and by 33.8 percent from 2000 to 2005.⁵⁸ The prison population grew by only 13.6 percent from 2005 through 2011,⁵⁹ and decreased by over 1,000 inmates from October 2011 to February 2012.⁶⁰

The number of defendants sentenced annually, the product of prosecutorial policies, has increased each year, before and after *Booker* was decided. Nearly 12,000 more people were sentenced in FY 2011 than in FY 2005.⁶¹ The total number of additional people sentenced during FY 2005-2011 than would have been sentenced at the FY 2004 level was 53,304.⁶² But the prison population grew by less than that during the same period — by about 33,000 inmates

⁵⁶ In 2004, before *Blakely v. Washington*, 542 U.S. 296 (2004), the rate of cooperation departures was 15.5%, and of all other government-sponsored departures was 6.4%. USSC, 2004 Sourcebook of Federal Sentencing Statistics, tbl. 26A. In 2011, the rate of cooperation departures was 11.2%; the rate of “fast track” departures was 10.8%; and the rate of below-guideline sentences sought by the government for “other” reasons (*i.e.*, § 3553(a)) was 4.4%. USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 1 (Oct. 31, 2011).

⁵⁷ *Id.*, tbl. 3.

⁵⁸ Sourcebook of Criminal Justice Statistics Online (population was 35,781 in 1985, 58,838 in 1990, 89,538 in 1995, 133,921 in 2000, 179,220 in 2005, not including those in community corrections centers or home confinement), <http://www.albany.edu/sourcebook/pdf/t6132009.pdf>.

⁵⁹ Federal Bureau of Prisons, Quick Facts About the Bureau of Prisons (Dec. 24, 2011) (203,576 inmates, not including those in community corrections centers or home confinement), <http://www.bop.gov/news/quick.jsp#1>.

⁶⁰ Federal Bureau of Prisons, Weekly Population Report (217,908 on October 20, 2011; 216,879 on February 9, 2012, including inmates in community corrections and home detention), http://www.bop.gov/locations/weekly_report.jsp (visited October 20, 2011 and February 9, 2012).

⁶¹ See USSC, 2004-2010 *Sourcebook of Federal Sentencing Statistics* tbl. 2 (70,068 in FY 2004; 72,462 in FY 2005; 72,585 in FY 2006; 72,865 in FY 2007; 76,478 in FY 2008; 81,372 in FY 2009; 83,946 in FY 2010); USSC, 2011 Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 21 (84,072).

⁶² The number of people sentenced compared to 2004 increased by 2394 in 2005, by 2517 in 2006, by 2797 in 2007, by 6410 in 2008, by 11304 in 2009, by 13878 in 2010, and by 14004 in 2011. See USSC, 2004-2010 *Sourcebook of Federal Sentencing Statistics* tbl. 2; USSC, 2011 Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 21.

from 2004 through December of 2011.⁶³ This seems to mean that, if not for the increase in the number of people being prosecuted, the prison population would be *decreasing*. In any event, it is clear that the prison population would be greater today and in years to come if not for variances permitted by *Booker*, and ameliorating changes to the guidelines prompted by those variances.

Although the extent of downward variances has been modest and steady since *Booker* was decided, these variances in the aggregate have saved tens of thousands of years of prison time and at least \$2 billion in taxpayer dollars. Counting only variances under § 3553(a) not involving any “departure,” a rough estimate is that judicial variances have resulted in over 50,000 fewer years in prison at a cost of over \$1.4 billion at the annual cost of imprisonment in 2010.⁶⁴ Government sponsored variances (not based on cooperation or “fast track”) have saved over 18,000 prison years at a cost of over \$511 million.⁶⁵ Cost savings will be greater as the cost of imprisonment increases in future years when prisoners are released earlier than they otherwise would have been.

IV. Racial Minorities Are Sentenced More Fairly Because of the Increased Discretion *Booker* Conferred on Sentencing Judges.

The Commission proposes several legislative changes to constrain judicial discretion, relying primarily on a study that purports to show a growing difference in sentence length between Black and White males after *Booker*. While Judge Saris recently said that the Commission is not contending that judges exercise racial bias in sentencing, that is the clear import of the Commission’s statement that demographic differences have grown after *Booker*, and its accompanying request that judicial discretion should therefore be constrained.

⁶³ See Sourcebook of Criminal Justice Statistics Online (170,535 in 2004), <http://www.albany.edu/sourcebook/pdf/t6132009.pdf>; Federal Bureau of Prisons, Quick Facts About the Bureau of Prisons (Dec. 24, 2011) (203,576), <http://www.bop.gov/news/quick.jsp#1>.

⁶⁴ The cost of prison per year in 2010 was \$28,284. See U.S. Courts, News, *Newly Available: Costs of Incarceration and Supervision in 2010*, http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx.

⁶⁵ The estimate for judicial variances was derived by multiplying the number of variances under § 3553(a) not involving any “departure” by the median decrease in months for each period since *Booker* was decided (12 or 13 months each period), adding the months per period to reach a total number of months (607,125), dividing by 12 months to reach a total number of years (50,594), and multiplying by the annual cost of imprisonment in 2010 (\$28,284), to reach a total cost savings of \$1,431,000,696. The estimate for government-sponsored variances was derived by multiplying the number of such variances by the median decrease in months for each period since *Booker* was decided (ranging from 10 to 15 months), adding the months per period to reach a total number of months (216,847), dividing by 12 months to reach a total number of years (18,071), and multiplying by the annual cost of imprisonment in 2010 to reach a cost savings of \$511,120,164. The numbers of judicial and government-sponsored variances is found in USSC, 2005-2010 *Sourcebook of Federal Sentencing Statistics* tbls. 31, 31C; USSC, 2011 Preliminary Quarterly Data Report, Fourth Quarter Release, tbls. 9, 12.

The Federal Public and Community Defenders, who represent people of all races in federal court, do not perceive racial bias in judges' exercise of discretion as a result of *Booker*. To the contrary, judges are treating our clients more fairly by considering them as human beings and by discounting racially biased rules.

I have studied the Commission's reports about each of its different multivariate studies of judicial decisions, the study by researchers at Pennsylvania State University on the same topic, and articles commenting on the Commission's most recent study and the Pennsylvania State study. It seems to me that it would be seriously misguided to enact legislation constraining judicial discretion on the basis of a study that does not show that judges exercise racial bias in sentencing, that has been undermined by a different peer-reviewed study, and that it appears is not even well understood. That is particularly so in light of evidence that reliably demonstrates that judges have exercised their discretion to alleviate unwarranted racial disparities built into the sentencing rules and arising from the decisions of law enforcement agents and prosecutors, and evidence that all defendants are treated with greater respect and fairness when judges consider them as individuals in ways the guidelines do not. I will first review that evidence, and then address the Commission's study.

A. Judges Have Exercised Their Discretion After *Booker* to Substantially Reduce Unwarranted Racial Disparities.

As the Commission reported in its Fifteen Year Review, a large gap in time served by African Americans and defendants of other races opened up immediately when the mandatory guidelines and mandatory minimums went into effect.⁶⁶ Before then, average time served by defendants of all races was about the same. The primary cause of the gap was new and harsh mandatory minimums and mandatory guidelines that were applied more often to African Americans than offenders of other races.⁶⁷ Some of these rules are not necessary to serve the legitimate purposes of sentencing, and therefore contribute to racial disparity in the form of unwarranted adverse impact on African American defendants.⁶⁸ These include guidelines and mandatory minimums for crack cocaine offenses,⁶⁹ the career offender guideline as applied to defendants who qualify on the basis of prior drug convictions,⁷⁰ and other guideline provisions

⁶⁶ See Fifteen Year Review, at 113-17, 131-35.

⁶⁷ Fifteen Year Review, at 48 (mandatory minimums for drug offenses and the guidelines tied to them are “a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders”); John Scalia Jr., *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. Courts*, 14 Federal Sentencing Reporter 152, 157 (1991) (gap in average time served was “the result of differing offense/offender characteristics that were formally and rigidly incorporated into Federal sentencing law and policy rather than the differences in the treatment that offenders of specific racial groups received at sentencing”).

⁶⁸ Fifteen Year Review at 113-14, 131-35.

⁶⁹ While progress has been made in reforming penalties for crack cocaine offenses, unjustified disparity remains. See note 24, *supra*.

⁷⁰ Fifteen Year Review at 133-34 (as applied to defendants who qualify on the basis of prior drug

and mandatory enhancements that apply (or in the case of safety valve, do not apply) on the basis of criminal history or weapon involvement.⁷¹

Judges have exercised their discretion after *Booker* to reduce excessively harsh punishment recommended by guidelines that disproportionately affect African Americans. In fiscal year 2010 alone, by imposing below-guideline sentences they would not (and could not) have imposed under the mandatory guidelines, judges spared more than 860 African American defendants sentenced under the crack or career offender guidelines over 3300 years of unnecessary incarceration. More than 230 defendants of other races were likewise spared over 900 years of unnecessary incarceration under these two guidelines.⁷²

The racial gap also widened as the result of decisions of law enforcement agents and prosecutors in their use of these new and harsher rules, for example, inducing defendants to sell or buy higher quantities or to cook powder cocaine into crack in order to reach a certain mandatory minimum or guideline range⁷³; bringing drug cases involving small amounts of crack

convictions, career offender guideline vastly overstates the risk of recidivism, fails to deter drug crime by others, and disproportionately impacts African Americans).

⁷¹ See USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 352-54 (2011) (“cumulative impacts” of broadly defined “felony drug offenses” under § 851, criminal history score, and ineligibility for safety valve relief “can result in disproportionate and excessively severe sentences”; “cumulative impacts of criminal history and weapon involvement [are] particularly acute for Black offenders”; “Black drug offenders qualify for the safety valve less often than any other racial group”); *id.* at 359-64 (sentences under § 924(c) and § 924(e) can be “unduly severe” and “these effects fall on Black offenders to a greater degree than on offenders of other racial groups”); Transcript of Public Hearing Before the U.S. Sent’g Comm’n, New York, NY, at 418-26 (July 9-10, 2009) (testimony of Christopher Stone, Kennedy School of Government, Harvard University) (driving under the influence, disorderly conduct, and drug possession have enormous impact on African Americans because of disparate law enforcement practices in white and black communities); Fifteen Year Review at 134 (driving offenses have an adverse impact on racial minorities and may not advance a purpose of sentencing).

⁷² These estimates were made using the Monitoring Datasets for fiscal years 2003 and 2010. They are based on the increase in the rate of non-government sponsored below-guideline sentences for crack and career offenders in fiscal year 2010 as compared to the rate in 2003 and the average extent of these reductions. Fiscal year 2003 was used as the comparison year because it preceded the Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which affected how cases were handled in anticipation of *Booker*.

⁷³ See Jon O. Newman, *The New Commission's Opportunity*, 10 Fed. Sent’g Rep. 44, 44 (1997) (“[T]he guidelines permit undercover drug enforcement agents to determine the ultimate punishment by shaping the conversation with a suspect concerning the extent of future deliveries.”); Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187; see also *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir.2000) (“This case demonstrates that the Sentencing Guidelines have a terrifying capacity for escalation of a defendant’s sentence as a result of government misconduct,” and recognizing sentencing entrapment as viable ground for downward departure). *But see United States v. Shepherd*, 857 F. Supp. 105 (D.D.C. 1994) (finding

that would otherwise be prosecuted in state court when the severe career offender guideline applied⁷⁴; charging § 851s and § 924(c)s disproportionately against African Americans⁷⁵; and filing motions for departure based on substantial assistance less frequently for African American defendants.⁷⁶ After *Booker*, judges have been able to reduce the effect of unfair use of the rules, for example, when agents fabricate or manipulate drug quantity or other aspects of the guideline range⁷⁷; when prosecutors punish defendants with harsh mandatory minimums for exercising

sentencing entrapment where defendant agreed to sell powder to undercover officer, but officer, pursuant to office “policy,” insisted she cook powder into crack, thus raising her guideline range from 46-57 months with a 5-year mandatory minimum to 108-135 months with a 10-year mandatory minimum), *rev’d*, 102 F.3d 558 (D.C. Cir. 1996); *United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996) (“while other circuits have recognized sentencing entrapment, this circuit has never acknowledged sentencing entrapment as a valid basis for a downward departure under the guidelines”); *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998) (rejecting claim that court should have departed downward because “this Circuit has rejected sentence entrapment as a viable defense”).

⁷⁴ See, e.g., *United States v. Moreland*, slip op., 2008 WL 904652 *10-13 (S.D. W. Va. Apr. 3, 2008) (defendant convicted of distributing 7.85 grams of crack subject to career offender guideline range of 262-327 months); *United States v. Ware*, No. 08-625 (E.D. Pa.) (defendant convicted of distributing 1.17 grams of crack subject to career offender guideline range of 262-327 months).

⁷⁵ See Fifteen Year Review at 90, 91, 131 (among offenders who possessed or used a gun during a drug offense, African American offenders are more likely to be charged with a mandatory minimum of five or more years under 18 U.S.C. § 924(c) rather than receive the two-level increase under the guidelines); USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 359-60, 363-64 (2011) (“stacked” § 924(c)s result in sentences that are “excessively severe and disproportionate to the offense committed,” and African Americans are charged with stacked § 924(c)s at a greater rate than defendants of other races); *id.* at 257-58 (29.9% of African American drug offenders eligible for § 851 received it, while only 25% of Whites, 19.9% of Hispanics, and 24.8% of defendants of “other” races were eligible and received it).

⁷⁶ *Id.* at 159-60, 179, 214-15, 221, 291 (African American offenders receive government-sponsored substantial assistance departures less often than defendants of other races); Fifteen Year Review at 102, 104-05 (substantial assistance motions are source of racial disparity).

⁷⁷ See *United States v. Briggs*, 397 Fed. App’x 329, 333 (9th Cir. 2010) (district court varied from 235-293 months to 132 months where drug quantity used to calculate guideline range was based on fabricated drugs in a fake stash house robbery, thus “overstating [the] defendant’s culpability”); *United States v. Diaz*, No. CR 09-284-TUC-RCC (D. Ariz. Dec. 2, 2010) (if not for the 10-year mandatory minimum likely to be triggered by massive amounts of fabricated drugs in a fake stash house robbery, downward departure would be appropriate for inexperienced defendants with little criminal history); *United States v. Oliveira*, 798 F. Supp. 2d 319, 321-22 (D. Mass. 2011) (departing from range of 168 months to 100 months because CI used involvement with defendant’s family at a sensitive time, and repeated exhortations, to encourage defendant to become involved in an area of illegal activity with which he was unfamiliar and at a level which he would not have participated but for the CI); *United States v. Oliveras*, 359 Fed. App’x 257 (2d Cir. 2010) (district court may impose a below-guideline sentence if it finds sufficient evidence that the government manipulated the defendant’s sentence); *United States v. Torres*, 563 F.3d 731 (8th Cir. 2009) (“[A] claim of sentencing factor manipulation may also be raised as a request for a variance based on § 3553(a)’s requirement that a district court consider the ‘nature and circumstances of the offense.’”); *United States v. Beltran*, 571 F.3d 1013, 1019 (10th Cir. 2009) (“a

their right to trial,⁷⁸ and when prosecutors failed to file a motion for a substantial assistance departure though the defendant cooperated.⁷⁹

The gap in time served between African American and White defendants was greatest in 1994 at 37.7 months. It has narrowed to 25.4 months in fiscal year 2010, the lowest since 1992, and that is before the Fair Sentencing Act went into effect.⁸⁰ If not for increased judicial discretion after *Booker*, the racial gap would have continued to grow.

B. The Commission’s Proposals Would Make It More Difficult for Judges to Correct Unwarranted Racial Disparities, While Failing to Address the Real Problems.

In the name of avoiding racial disparity, the Commission proposes to constrain judicial discretion in a manner that would limit the very ways in which judges have helped to narrow the racial gap. The Commission’s proposals would make it more difficult for judges to alleviate racial disparity in individual cases (by requiring the guidelines to be given special “weight” or “regard,” and requiring “greater justifications” the further a sentence is from the guideline range), and would suppress transparent criticism of unfair rules (through *de novo* review of variances based on policy disagreements). The Commission’s proposals are counterproductive and focus on the wrong problem.

As the Commission recently reported, African Americans are far more likely to be convicted of an offense carrying a mandatory minimum, and far less likely to receive relief under the safety valve or a motion for substantial assistance departure.⁸¹ In all cases in 2010, African American defendants received below-guideline sentences at a slightly lower rate than White defendants; 22.6 percent of African American defendants and 23 percent of White defendants

defendant’s claim of sentencing factor manipulation may also be considered as request for a variance from the applicable guideline range under the § 3553(a) factors”).

⁷⁸ *United States v. Angelos*, 345 F. Supp. 2d 1227, 1260 (D. Utah 2004) (imposing sentence of one day on drug counts to compensate for unfair stacking of § 924(c) counts against defendant who had the “temerity” to go to trial), *aff’d*, 433 F.3d 738 (10th Cir. 2006).

⁷⁹ See *United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Jackson*, 296 Fed. App’x 408, 409 (5th Cir. 2008); *United States v. Gapinski*, 566 F.3d 683 (6th Cir. 2009); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Doe*, 218 Fed. App’x 801, 805 (10th Cir. 2007); *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006); *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir 2006).

⁸⁰ See Amy Baron-Evans and Kate Stith, *Booker Rules*, University of Pennsylvania Law Review, Forthcoming, available at SSRN: <http://ssrn.com/abstract=1987041>. The Commission recently reported that the gap in average sentences imposed between African American and White Defendants was 27 months in fiscal year 2010. USSC, *Mandatory Minimum Penalties in the Criminal Justice System*, tbl. 7-3 (2011).

⁸¹ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 154, 159-60, 354 (2011).

received a non-government sponsored below-guideline sentence.⁸² But in cases *in which judges had the option* to impose below-guideline sentences, African American defendants received below-guideline sentences at a slightly *higher* rate than White defendants. In all cases in which a mandatory minimum did not trump or truncate the guideline range or defendants received relief from a mandatory minimum, 24.1 percent of African American defendants and 24% of White defendants received a non-government sponsored below-guideline sentence.⁸³

In other words, judges do not disfavor African American defendants or favor White defendants in their decisions to impose sentences below the guideline range. But mandatory minimum sentences prevent judges from imposing below-guideline sentences for African American defendants more often than they prevent below-guideline sentences for White defendants. Yet, the Commission proposes to constrain judicial discretion, and recommends no change to mandatory minimums for drug offenses other than a minor expansion of the safety valve which admittedly “would have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders.”⁸⁴

A recent study by researchers at the University of Michigan and the University of British Columbia compared offenders who were similar based on arrest offense, and found that “compared to white men, black men face charges that are on average about seven to ten percent more severe . . . These disparities persist after charge bargaining and, ultimately, are a major contributor to the large black/white disparities in prison sentence length.”⁸⁵ While this study, like the Commission’s study purporting to show racial disparity caused by judicial discretion, is missing variables,⁸⁶ its conclusions are consistent with the Commission’s research and data showing unexplained racial disparity in prosecutors’ charging and plea bargaining choices.⁸⁷ The authors concluded:

These findings suggest that recent debates about post-*Booker* racial disparities have, by focusing overwhelmingly on judicial departures from the Guidelines, missed a part of the picture that may be far more important—policymakers may be better off focusing on prosecutors instead. . . . [P]erhaps the most important

⁸² USSC 2010 Monitoring Dataset.

⁸³ *Id.*

⁸⁴ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 356 (2011).

⁸⁵ M. Marit Rehavi & Sonja B Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, U. of Mich. Law and Econ. Empirical Legal Studies Research Paper, at 46 (Jan. 15, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377&download=yes##. This study excluded drug offenders, as well as child pornography and immigration offenders, because of limitations in the data on drug and child pornography offenses, and because of fast track departures and deportation in immigration cases. *Id.* at 12-13.

⁸⁶ *Id.* at 24.

⁸⁷ *See supra* note 24.

thing policymakers could do to respond to post-*Booker* sentencing disparity is *not to increase constraints on judicial discretion, but to reconsider some of the existing constraints*, such as mandatory minimums.⁸⁸

The Commission's proposals are aimed at judges, but when judicial discretion is more tightly constrained, judges have less ability to correct for unwarranted disparity built into the rules or stemming from prosecutors' and agents' decisions, and prosecutors and agents have more control over sentencing outcomes.

C. The Commission's Proposals Focus on Constraining the Discretion of the Institutional Actor Least Likely to Exercise Racial Bias.

Neither judges nor prosecutors are inherently likely to exercise racial bias in their decisions. Our system, however, is designed to challenge judges to avoid racial bias, but is not designed to challenge prosecutors or law enforcement agents to avoid such bias. Judges make their decisions in the crucible of adversary testing, impose sentences in open court, explain their decisions in public, and are subject to appellate review. At all of these points along the way, judges are challenged to act on the basis of relevant factors, and only those factors, and to avoid any biases they might have. There are no such checks on the decisions of prosecutors or agents. Their decisions are made out of public view, not subjected to adversarial testing, and not subject to judicial review.

D. It Would Not Be More "Fair" to Racial Minorities to Restrict Judges' Ability to Consider Their Individual Offender Characteristics.

The Commission proposes that Congress require judges to give all of the guidelines, no matter how unfair or ineffective, more "weight" or "regard" than the purposes of sentencing or defendants' individualized circumstances, and to consider the Commission's many restrictions on sentences outside the guideline range in each case and to do so before considering the purposes and factors set forth in § 3553(a) "as a whole." If that were not enough, the Commission may ask Congress to direct the courts that they "shall recognize that the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant are not ordinarily relevant to the determination of whether to impose a sentence outside the applicable guideline range."⁸⁹ Henry Bemporad will address the legal merits of these ideas. I will address their impact on human beings.

Some have suggested that consideration of mitigating offender characteristics creates "racial and ethnic disparity."⁹⁰ The idea seems to be that racial and ethnic minorities do not have

⁸⁸ Rehavi & Starr, *supra* note 85, at 46 (emphasis added).

⁸⁹ Roundtable 1, Additional Question 4.

⁹⁰ For example, Mr. Wroblewski has suggested that the Supreme Court's decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), holding that the defendant's individual offender characteristics are "highly relevant – if not essential – to the selection of an appropriate sentence," causes "racial and ethnic disparities." Letter from Lanny A. Breuer and Jonathan Wroblewski to Hon. Patti B. Saris, Chair, U.S.

mitigating characteristics, or that they have mitigating characteristics less frequently than White defendants; therefore, it would be “unfair” for judges to consider anyone’s mitigating characteristics, no matter how relevant to the purposes of sentencing, including those of racial and ethnic minorities. Not only does this theory rely on false stereotypes, but it flies in the face of discrimination law in every area, and turns fairness on its head.

Whether consideration of any factor creates a warranted or unwarranted difference in sentencing depends on whether consideration of the factor advances the purposes of sentencing. The Supreme Court has made this abundantly clear,⁹¹ and so has the Commission.⁹² If circumstances could be considered only if they appeared equally in all races, virtually no aggravating factor in the Guidelines Manual could be considered. Proponents of this theory, however, do not apply it evenhandedly. Instead, they appear to argue that sentences should be based only on the aggravating facts of the offense and the aggravating characteristic of criminal history.⁹³ The hypocrisy is evident. One cannot accept disparate impacts of aggravating factors because they are considered relevant (especially when they are often given excessive weight), but decry the supposed disparate impacts of offender characteristics that are clearly relevant, and that judges have used to mitigate excessively harsh punishment in deserving cases.

If the Commission were to obtain legislation preventing or discouraging judges from considering individual mitigating circumstances, it would be contrary to empirical evidence that these factors are highly relevant to the purposes of sentencing. The Commission’s own research and substantial other research demonstrates that employment, education, and family ties and responsibilities all predict reduced recidivism.⁹⁴ Conversely, the Commission’s research and

Sent’g Comm’n at 4 (Sept. 2, 2011) [hereinafter Wroblewski Letter].

⁹¹ See *Pepper v. United States*, 131 S. Ct. 1229, 1242-43 (2011); *Gall v. United States*, 552 U.S. 38, 53-60 (2007).

⁹² “Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing. Membership in a particular demographic group is not relevant to the purposes of sentencing, and there is no reason to expect [that] the *average* sentence of different demographic groups are the same or different. As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group.” Fifteen Year Review at 113-14.

⁹³ Wroblewski Letter, at 4.

⁹⁴ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); USSC, *Recidivism and the “First Offender”* 8 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 4-6, 54 (1994), http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* 9, Ex. 4 (2006) (comprehensive review of programs with demonstrated effect on reducing recidivism, including community-based educational programs), www.wsipp.wa.gov/rptfiles/06-10-1201.pdf, updated by Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in*

other research shows that unnecessarily lengthy imprisonment increases the risk of recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.⁹⁵

And such legislation would harm African American offenders. With few exceptions (*i.e.*, age, educational level, marital status), the Commission does not collect data on the frequency with which different kinds of potentially mitigating offender characteristics actually occur in the

Washington State 190-91, tbl.1 (2009), www.wsipp.wa.gov/rptfiles/09-00-1201.pdf; USSC, *Symposium on Alternatives to Incarceration* 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (employment program reduced recidivism by 33%; *see also id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.); Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 *Int'l J. Offender Therapy & Comp. Criminology* 95, 99-100 (2002) (“The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.”); Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (2005) (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 *Am. Soc. Rev.* 609 (1990)); Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 *Criminology* 465, 497-500 (2006); Phyllis J. Newton, Jill Glazer, & Kevin Blackwell, *Gender, Individuality and the Federal Sentencing Guidelines*, 8 *Fed. Sent'g Rep.* 148 (1995) (“[T]he better family ties are maintained[,] the lower the recidivism rate,” and “children left without parents burden society,” but “creative alternatives to imprisonment for first-time, non-violent offenders with parental responsibilities are not generally available under the guidelines.”).

⁹⁵ *See* Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Pub. Pol'y* 589, 591-93 (2007) (“imprisonment causes harm to prisoners,” isolating them from families and friends, making it difficult to successfully reenter society, and “reinforc[ing] criminal identities” through contacts with other criminals); USSC, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (finding that “[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,” and “alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”); Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 *Fed. Sent'g Rep.* 22 (1994) (“[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.”); USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (2009) (“alternatives to incarceration can provide a substitute for costly incarceration,” and “also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.”); Laura Baber, *Results-based Framework for Post-conviction Supervision Recidivism Analysis*, *Fed. Probation*, Volume 74, Number 3 (2010) (study of 150,000 federal offenders showed 85% of people on probation and 77% of people on supervised release after a prison term remained arrest-free within the first three years of their term), <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2010-12/index.html>; Alfred Blumstein & Kiminori Nakamura, *Nat'l Inst. of Justice, 'Redemption' in an Era of Widespread Criminal Background Checks*, *NIJ Journal*, Issue No. 263, June 2009, at 10, 12-14 (risk of re-arrest for 18-20 year old offenders convicted of street crime in state court is the same as that of the general population after four to seven years of remaining arrest-free), <http://www.ncjrs.gov/pdffiles1/nij/226870.pdf>.

defendant population or in any racial group within it. And, because the Statement of Reasons form is inadequate to collect reasons for variances based on the “history and characteristics of the defendant” under § 3553(a),⁹⁶ the Commission does not know or report how frequently judges vary based on mitigating offender characteristics for all defendants or defendants of any racial group. We know based on our experience that defendants of all races and backgrounds *have* mitigating characteristics, and that judges take these into account. This is confirmed by the limited available data on reasons for below-guideline sentences.

As shown in the chart below, African American offenders received below-guideline sentences based on several mitigating offender characteristics at a rate equal to or greater than their portion of the population of defendants not convicted of an immigration offense. We excluded immigration offenders because they often have no opportunity to argue for below-range sentences based on mitigating characteristics (because of fast track plea agreements or deportation); if all offenders were included, African Americans’ portion would be greater.

African Americans – FY 2010 – Below-Range Sentences Based on Offender Characteristics	
African American % of non-immigration offenders	27.3%
Education, Vocational Skills ⁹⁷	35.7%
Need for Training, Skills, Treatment	31.3%
Previous Employment Record	25.7%
Family Ties & Responsibilities.	26.3%
Drug or Alcohol Dependence	26.2%
Rehabilitation	26.7%
Childhood Abuse	33.3%
Disadvantaged Upbringing/Lack of Youthful Guidance	33.6%
Criminal History Category Overstates Seriousness or Risk of Recidivism	27.2%

The fact is, defendants of all races and socioeconomic classes are treated with greater respect and fairness when the sentencing judge takes account of their individual strengths and needs, and these strengths and needs are not confined to the White population. For example, in *United States v. Moreland*, the judge varied from a career offender guideline range of 360 months to life to the mandatory minimum of ten years. Moreland had made “good and bad decisions in his life,” but had not “demonstrated the pattern of recidivism or violence that would justify disposal to prison for a period of 30 years to life.” His instant offense was selling 5.93 grams of crack to an undercover officer and possessing an additional 1.92 grams of crack; his two prior convictions, each over a decade old, were for delivering a marijuana cigarette and possessing 6.92 grams of crack. Moreland had “demonstrated that he has the ability and potential to become a productive member of society,” by graduating from high school, going on

⁹⁶ The form provides one check box for each broad paragraph of § 3553(a) and a small space for “facts justifying a sentence *outside the advisory system*.”

⁹⁷ Yet, the Commission’s data shows that only 28.7% of African American defendants graduated from high school, only 28.9% have some college, and only 16.2% graduated from college. USSC 2010 Monitoring Dataset.

to community college, working at several jobs, returning to school to take computer courses, and continuing his educational achievements while incarcerated. The judge therefore found that Moreland had an “excellent chance of turning his life around,” and declined to “destroy[] all hope and take[] away all possibility of useful life,” as the guideline recommended.⁹⁸

In *United States v. Shull*, the judge varied downward from a range of 78-97 months to the mandatory minimum of 60 months, taking into account that Shull, who was a passenger in a car in which crack was found, was “another drug user without an education or a job who started selling drugs,” and had since obtained his GED, completed courses and obtained certifications in several trades, and was enrolled in college taking business classes.⁹⁹ In *United States v. Hernandez*, the judge sentenced Hernandez to 405 months’ imprisonment, but the Second Circuit reversed; the judge should have considered that Hernandez was once a young drug addict who had had a difficult childhood, but that during his twenty years of imprisonment since he was first sentenced, had succeeded at numerous vocational and educational efforts, including earning an associate degree with honors and a diploma for financial planning, had tutored other inmates, and received positive performance reports for work in a variety of prison jobs.¹⁰⁰

In *United States v. Munoz-Nava*, the judge varied downward from a range of 46-57 months to one year and a day in prison, appropriately considering that Munoz-Nava had a long and consistent work history, and was the primary caretaker and sole financial support of his eight-year old son and his ailing, elderly parents, and that his brief stint smuggling drugs in the soles of his boots was “highly out of character,” and he was “committed to supporting his family by returning to his pattern of working hard at a legitimate job.”¹⁰¹ In *United States v. Davis*, the court varied downward from a range of 18-24 months’ imprisonment to time served, 200 hours of community service, and three years’ supervised release, considering that further imprisonment would be “disastrous” to Davis’ six young children and wife of fifteen years, who had together “worked night and day” to provide for their family and move them out of a homeless shelter, and who, though unemployed after an injury that required surgery and regular physical therapy, supplemented the family’s public assistance funds by working as a barber from home while devoting himself to the health and education of his children and working toward a college degree in radiology when he made the “foolish mistake” of selling a gun due to financial hardship.¹⁰²

The idea that judges should be constrained from considering the education, vocational skills, employment records, and family responsibilities of defendants like these (or other defendants who lack these strengths) because doing so causes unwarranted racial and ethnic disparities, would allow race to nullify relevant non-racial factors because of an alleged

⁹⁸ *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008).

⁹⁹ *United States v. Shull*, 793 F. Supp. 2d 1048 (S.D. Ohio 2011).

¹⁰⁰ *United States v. Hernandez*, 604 F.3d 48, 53-54 (2d Cir. 2010).

¹⁰¹ *United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008).

¹⁰² *United States v. Davis*, slip. op., 2008 WL 2329290 (S.D.N.Y. June 6, 2008).

disproportionate impact on certain racial groups. This would be contrary to discrimination law in employment and other areas, and is the antithesis of fair and racially neutral sentencing. As the Attorney General said, “equal justice depends on individualized justice, and smart law enforcement demands it.”¹⁰³

Given the severe crowding in federal prisons today, rather than seeking to prevent judges from lowering sentences for deserving offenders, the Commission should encourage judges to mitigate sentences based on additional offender characteristics, such as lack of guidance as a youth, that would also benefit defendants of all races, but especially those from poor and disadvantaged backgrounds for whom we should show special concern.

E. The Commission’s Study Fails to Support the Conclusion that Racial Disparity Has Increased Due to Increased Judicial Discretion, or Its Proposals to Constrain Judicial Discretion.

The Commission has informed Congress that “some sentencing differences may be associated with specific demographic characteristics, and these differences may be increasing post-*Booker*. For example, a recent Commission analysis found that, *after controlling for relevant factors*, Black male offenders received longer sentences than White male offenders, and that those differences in sentence length have increased steadily since *Booker*.”¹⁰⁴ Yet, the Chair of the Commission at a recent panel discussion acknowledged that the Commission’s study was missing relevant variables that judges legitimately take into account, and that the Commission does not know what accounts for the results it has reported. The Chair also said that the Commission may say in its report on post-*Booker* sentencing that Black males are not receiving longer sentences, but White males are receiving shorter sentences.

However it is spun, this study should play no part, or at least no important part, in the Commission’s account of sentencing after *Booker*. The study has been criticized and contested for numerous reasons. Like other multivariate regression research in this area, its results are problematic in light of missing data and questionable methodological choices. Moreover, other, stronger, evidence described above shows that there are much more troublesome and proven sources of unwarranted disparity, and that judges have acted to reduce these disparities under advisory guidelines. The Commission has failed to acknowledge the limitations of its study or the existence of a reputable study reaching different results. This threatens to re-ignite congressional hostility against the Judiciary and to undermine public confidence in the criminal justice system. At the very least, the Commission should forthrightly inform Congress and the public of the limitations of its study, and that a different study using accepted methodological choices reached different results. Failure to do so not only undermines confidence in the Commission, but could lead to restrictions on judicial discretion that prevent or discourage judges from correcting proven forms of racial disparity.

¹⁰³ Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

¹⁰⁴ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* at 347 (2011) (emphasis added).

The problems with the Commission’s study have been reviewed in detail elsewhere.¹⁰⁵ I will briefly review them here, and make some suggestions.

1. The Commission’s study is missing variables that would change the results if they were included.

The study is missing data on legally relevant factors that the Commission does not collect and are not included in its datasets, but that judges properly consider under § 3553(a).¹⁰⁶ Some of these factors are correlated with race, such as violence in criminal history and probably employment status. The Commission claims that its study shows *growing racial disparity* caused by increased judicial discretion from the period after the PROTECT Act to the period after *Booker* to the period after *Gall*. What has *grown* from period to period is judicial consideration of legitimate factors that are not included in the guidelines, and are therefore not included in the study. That is why, as the Commission has previously acknowledged, the omission of these factors “causes the value of the variables that are included in the model [*e.g.*, race] to be overstated,” and “could change the results of the analysis if they were included.”¹⁰⁷

The Commission should therefore correct the misimpression it has given in two formal documents submitted to Congress — that it controlled for all relevant factors.¹⁰⁸ The Commission should clearly acknowledge that its study does *not* include all relevant factors, and that if all relevant factors were included, it would change the result.

2. The Commission’s study inflates the weight assigned to race by omitting control variables for criminal history.

The Commission omitted several factors, primarily related to criminal history, that have been shown to influence sentencing decisions beyond the weight they receive under the

¹⁰⁵ See 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* 1077 (2011); Amy Baron-Evans and Kate Stith, *Booker Rules*, University of Pennsylvania Law Review, Forthcoming, available at SSRN: <http://ssrn.com/abstract=1987041>.

¹⁰⁶ USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* at 4, 9-10 (2010) [2010 Demographic Differences Report]; Fifteen Year Review at 119, 125.

¹⁰⁷ 2010 Demographic Differences Report at 9 & n.35; see also *id.* at 4, 9-10 & nn.36-39.

¹⁰⁸ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* at 347 (2011) (stating that “a recent Commission analysis found that, after controlling for relevant factors, Black male offenders received longer sentences than White male offenders, and that those differences in sentence length have increased steadily since *Booker*.”); Prepared Testimony of Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 1, 53 (Oct. 12, 2011) [Commission Testimony] (claiming that Commission study “accounts, or controls, for the effect of each factor in the analysis,” and that “[e]ach factor is separately assessed and the extent to which each factor influences the outcome is measured”).

guidelines, for example, in deciding whether to depart, the extent of departure, or where to sentence within the guideline range. The Commission states that it omitted these factors from its “refined model” because they “directly contribute to or are highly correlated with . . . the presumptive sentence.”¹⁰⁹ But the Commission included a variable for criminal history in its Fifteen Year model and included a number of variables related to criminal history in its *Booker* model.¹¹⁰ Notably, the *Booker* model found less of a Black/White difference after *Booker* and *Gall* than in 1999 when the guidelines were mandatory.¹¹¹

The authors of the Pennsylvania State University study, which was peer-reviewed, disagreed with the Commission’s omission of a control variable for criminal history. They conducted statistical tests to ensure that multicollinearity was within acceptable limits. Their study and other studies they cited “did not report severe multicollinearity with these two measures [criminal history and presumptive sentence]; however, criminal history was notably correlated with race.”¹¹² They found it important to control for criminal history beyond its influence on the presumptive guideline sentence because “sentencing variation explained by criminal history is not variation explained by race.”¹¹³ They found that “Black male disparity is more than 30% larger when a measure of criminal history is not included in the analysis.”¹¹⁴

3. The Commission’s study masks fluctuations likely to reveal a lack of robustness.

The Commission’s study masks fluctuations in race effects by offense type and year by aggregating all offense types and multiple years. Under the Fifteen Year Review and *Booker* models, the Commission found race effects for all offenses combined in some years but not in other years, and for drug offenses but not for non-drug offenses in some years, and for non-drug offenses but not for drug offenses in other years.¹¹⁵ The Commission concluded that these

¹⁰⁹ 2010 Demographic Differences Report at 19.

¹¹⁰ See 2006 Booker Report at B-23 (2006) (included criminal history points, career offender, armed career criminal, safety valve); Fifteen Year Review at D-12 (included low, medium or high criminal history category); but see 2010 Demographic Differences Report at 19-20 (excluded criminal history points, career offender, armed career criminal, safety valve).

¹¹¹ 2010 Demographic Differences Report at 14; USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 109 (2006) [2006 Booker Report].

¹¹² See 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* 1077, 1086 (2011).

¹¹³ *Id.* at 1086-87.

¹¹⁴ *Id.* at 1093.

¹¹⁵ See Fifteen Year Review at 121-27; Booker Report at 108-09, B-31.

fluctuations were “difficult to reconcile with theories of enduring stereotypes [or] overt discrimination” on the part of judges.¹¹⁶

The Commission should publish its results by offense type and year. This would permit Congress and the public to determine whether its results are robust.

4. The Pennsylvania State University Study, using a different methodology, reached conclusions that conflict with and explain the Commission’s results.

Researchers at Pennsylvania State University found an increase in Black males’ odds of imprisonment in the period after *Gall* through fiscal year 2009, but found that the sentence length difference between Black and White males had been “reduced considerably.”¹¹⁷ Specifically, they found that the difference in sentence length between Black and White males was significantly less after *Booker* and *Gall* than before *Koon*,¹¹⁸ virtually identical in the pre-Protect Act, post-*Booker*, and post-*Gall* periods,¹¹⁹ and significantly less post-*Booker* and post-*Gall* than pre-Protect Act when immigration cases were excluded.¹²⁰

The Pennsylvania State researchers’ methodology differed from the Commission’s in three significant ways. They studied the in/out and sentence length decisions separately, excluded immigration offenses, and, as noted above, included a control variable for criminal history. Notably, the Commission used these same methodologies in previous models.¹²¹

The Pennsylvania State researchers disagreed with the choices the Commission made for its refined model and showed that those choices affected the results. First, combining the in/out and sentence length decisions into one model (and counting probation as zero months) produced inflated differences in sentence length between Black and White males in all time periods, and failed to reveal that an increased race effect was specific to the in/out decision and only after *Gall*. Second, as noted above, the omission of a control variable for criminal history inflated Black male disparity by more than 30 percent.¹²² Third, the Commission’s inclusion of immigration offenders also inflated its results. The Pennsylvania State researchers found that

¹¹⁶ Fifteen Year Review at 125; *see also* 2006 Booker Report at 108.

¹¹⁷ Ulmer *et al.*, *supra* note 112, at 1100, 1105.

¹¹⁸ *Id.* at 1098-1100.

¹¹⁹ *Id.* at 1094, 1096.

¹²⁰ *Id.* at 1106.

¹²¹ The Commission studied the decisions separately in the Fifteen Year Review model. *See* Fifteen Year Review at 121-26, D-12. The Commission excluded non-citizens from its Fifteen Year Review model. *See* Fifteen Year Review at 120, D-12. The Commission used control variables for criminal history in its Fifteen Year and *Booker* models. *See* note 110, *supra*.

¹²² Ulmer *et al.*, *supra* note 112, at 1093.

immigration offenses accounted for 40 percent of the effect on sentence length for Black males.¹²³

The Commission's own studies have reached different conclusions due to changes in methodology.¹²⁴ The Pennsylvania State study reached different results than the Commission due to differences in methodology. Even without deciding which methodology is right or wrong, "[a]ny findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution."¹²⁵

5. The Pennsylvania State Study points to a beneficial and targeted policy change. Rather than seek to constrain judicial discretion, the Commission should encourage alternatives to incarceration involving job training and placement.

The Pennsylvania State study found increased odds of imprisonment for African American males in the period after *Gall*. Employment status, which is missing from the datasets,¹²⁶ strongly and appropriately influences judges' decisions to impose probation rather than a prison term.¹²⁷ While we do not know the employment status of the defendant population or of any racial group within it, African Americans have a much higher unemployment rate than members of other races in the general population.¹²⁸ It is therefore likely that the increased odds of imprisonment for African American males found by the Pennsylvania State University study is attributable to the missing employment status variable.

It is well-established that employment reduces the risk of recidivism.¹²⁹ The Defendant/Offender Workforce Development Initiative in the Eastern District of Missouri, which

¹²³ *Id.* at 1098.

¹²⁴ See Fifteen Year Review at 121, 122, 124, 126; 2006 Booker Report at 108, 109, B-31; 2010 Demographic Differences Report at 2, 14-16, 22; Commission Testimony at 53-54 & Appendix E.

¹²⁵ Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 106 (1993). See also Fifteen Year Review at 118, 127; 2006 Booker Report at 108.

¹²⁶ 2010 Demographic Differences Report at 4, 10.

¹²⁷ USSC, *Sentencing Options under the Guidelines* 16-18 (1996).

¹²⁸ U.S. Census Bureau, Statistical Abstract of the United States: 2012, at 378, tbl. 588, <http://www.census.gov/compendia/statab/2012edition.html>.

¹²⁹ See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 4-6, 54 (1994), http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf.

provides job training and placement to offenders on probation and supervised release, has reduced its recidivism rate by 33 percent, and the unemployment rate for people on probation in the district is less than half the rate in St. Louis or nationally.¹³⁰ Probation officers in many districts have received Offender Workforce Development Specialist Training, and the Federal Judicial Center has provided training for federal judges as well. It is up to the Chief Judge and Chief Probation officer in each district whether to implement the program.

The Commission should support this effort, and should encourage judges to impose alternatives to incarceration involving job training and placement.

V. The Commission’s Presentation of Rates of Below-Guideline Sentences by District is Meaningless and Fails to Support its Proposals to Constrain Judicial Discretion.

The Commission claims “growing disparities among circuits and districts” in rates of non-government sponsored below-guideline sentences as another reason judicial discretion should be constrained.¹³¹ We are equally concerned by the Commission’s presentation on this topic. The Commission gives a bare listing of rates of non-government sponsored below range sentences, which it has previously recognized shed no light on whether any differences are warranted or unwarranted. The Commission omits any data or discussion of prosecutorial policies and practices, although these differ more widely by district than judicial practices, and are the most important driver of regional differences. The Commission ignores extensive testimony and comments that provided relevant evidence regarding differences among districts. It focuses on rates to the exclusion of outcomes, and it fails to acknowledge that the Sentencing Reform Act recognized that local differences are relevant.

The Commission should either neutrally determine whether there is evidence of *unwarranted* geographic disparities, or drop this from its account of post-*Booker* sentencing.

A. Inter-District Variation in Sentence Length is Less After *Gall* than Before the PROTECT Act.

The Commission has not addressed whether *variation* among districts in sentencing *outcomes* have grown since *Booker*. The Pennsylvania State researchers have. They found that

¹³⁰ See USSC, *Symposium on Alternatives to Incarceration* 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.); see also *id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.); Scott Weygandt, Scott Anders and Felix Mata, *Missouri’s Eastern District Finds Success With Work Force Initiative*, *Corrections Today*, Volume 70, Issue 4, pp. 62-65 (Aug. 2008), <http://www.aca.org/>.

¹³¹ Commission Testimony at 1.

variation in sentence length among districts after *Gall* (6.3%) was less than before the PROTECT Act (6.6%) and only slightly more than after the PROTECT Act (5.8%).¹³²

B. Geographic Differences Are Warranted and Longstanding.

Congress directed the Commission to consider local conditions in promulgating the guidelines. *See* 28 U.S.C. § 994(c)(4), (5), (7) (directing Commission to consider “the community view of the gravity of the offense,” “the public concern generated by the offense,” and “the current incidence of the offense in the community”). Congress directed judges to consider purposes and factors that necessarily take local conditions into account. *See* 18 U.S.C. § 3553(a)(2) (requiring judges to consider the need for deterrence, just punishment, respect for law, and protection of the public); *id.*, § 3553(a)(3) (requiring judges to consider the kinds of sentences available).

The Commission did not take local differences into account in the guidelines, but prosecutors and judges always have. Regional differences remained under the mandatory guidelines, and increased in drug and immigration cases.¹³³ The Attorney General has issued a policy of “district-wide consistency,” in accordance with “district-specific policies, priorities, and practices,” and “the needs of the communities we serve.”¹³⁴

C. The Commission’s Presentation of Rates Distorts the True Picture By Omitting Any Data Regarding Government-Sponsored Rates.

In support of its claim that judicial discretion should be constrained based on “growing disparities among circuits and districts,” the Commission cites rates of judicial, but not government-sponsored, below-range sentences. The Commission states the lowest and highest rates of non-government sponsored below-guideline sentences by district for certain offenses during the “post-*Gall* period,” and lists, from highest to lowest, the rates of non-government sponsored below-guideline sentences by district in fiscal year 2010.¹³⁵ The Commission adds in its report to Congress on mandatory minimums that the difference in the highest and lowest rates of non-government sponsored below-guideline sentences by circuit was 16.8 percentage points in 2006 and 25.3 percentage points in 2010.¹³⁶

¹³² *See* 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?*, 28:6 Justice Quarterly 799, 816 (Dec. 2011).

¹³³ Fifteen Year Review at 94, 98, 99, 103-12.

¹³⁴ Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1, 3 (May 19, 2010).

¹³⁵ *Id.* at 26, 28, 31, 33, 36, 38, 41, 43, 46, 48, 50, 53; Appendix D.

¹³⁶ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* at 347 (2011) (emphasis added).

To the extent that differences in rates are at all relevant to whether judicial discretion ought to be constrained, the Commission omits the other half of the story: rates of government-sponsored below-guideline sentences. The difference between the highest and lowest government-sponsored rates of below-range sentences by district was 12.4 percentage points higher than the difference between the highest and lowest non-government sponsored rates by district in 2010.¹³⁷ And the difference between the highest and lowest rates of government sponsored below-guideline sentences by circuit grew from 25 percentage points in 2006 to 32.3 percentage points in 2010.¹³⁸

As the Commission must know, rates of government-sponsored departures and variances have a strong effect on rates of non-government sponsored departures and variances. The distorting effect of the Commission's approach is perhaps most clear in its presentation on immigration cases. The Commission has previously found that the presence of "fast track" programs in some districts and not others constitutes unwarranted geographic disparity.¹³⁹ Judges appropriately correct for this disparity, as further confirmed by the Department's recent institution of fast track programs nationwide. But the Commission's story is simply that "post-Gall," there was a difference of 65.6 percentage points between the highest and lowest rates of non-government sponsored below range sentences in illegal entry cases.¹⁴⁰ This difference is undoubtedly the result of the presence or absence of fast track programs, but the Commission leaves the impression of wide and unexplained disparities among districts.

D. "The causes of variation in the rates of departure, and their potential effect on unwarranted sentencing disparity cannot be resolved through simple examination of reported rates. . . . When assessing the role of departures in creating unwarranted sentencing disparity . . . caution is advisable and caveats are unavoidable." U.S. Sentencing Commission, *Fifteen Year Review* at 111. "Analyzing sources of . . . regional disparity is complicated because

¹³⁷ Prosecutors sought downward departures and variances in 60.4% of cases in the Southern District of California and in 3.7% of cases in the District of South Dakota, a difference of 56.7 percentage points. Judges imposed downward departures and variances in 49% of cases in the Southern District of New York and in 4.7% of cases in the Middle District of Georgia, a difference of 44.3 percentage points. See USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl. 26.

¹³⁸ In 2006, the rate of government sponsored below-guideline sentences ranged from a low of 16.4 percent in the First Circuit to a high of 41.4 percent in the Ninth Circuit. USSC, 2006 Sourcebook, tbls. N-1, N-9. In 2010, the rate of government sponsored below-guideline sentences ranged from a low of 13.5 percent in the Fifth Circuit to a high of 45.8 percent in the Ninth Circuit, a difference of 32.3 percentage points. USSC, 2010 Sourcebook, tbls. N-5, N-9.

¹³⁹ See U.S. Sent'g Comm'n, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003).

¹⁴⁰ Commission Testimony at 26.

the potential sources are so many, varied, and interacting.” *Id.* at 93. “Comparisons of the departure rates of different circuits and districts seem to me . . . unsound.” Samuel A. Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 Fed. Sen. Rep. 166 (1992).

As judges, prosecutors, and defense lawyers well know and the Commission once acknowledged, comparing rates of below-guideline sentences tells us nothing about whether any difference among districts is unwarranted.¹⁴¹ The most important of the “many, varied, and interacting” sources that contribute to differences among districts is government practices and policies. As the Commission has found, government-sponsored departures have always contributed more to inter-district variation than judge-initiated departures.¹⁴² Government practices and policies have a strong impact on judicial sentencing practices.

To begin to answer the question of whether any differences among judges in different districts are unwarranted, it would be necessary to examine prosecutorial practices and policies in different districts, the case mix in different districts, and interactions between prosecutorial and judicial practices. And, since many cases prosecuted in federal court are state cases brought to federal court, including career offender cases with harsh sentences driven by state convictions (which cause acute problems in some districts), it would also require examination of state law enforcement practices and differences in state law regarding what constitutes a felony or a misdemeanor. The Commission has not done this analysis thus far. The Commission has, however, been provided with numerous examples of what causes differences among districts. I will not repeat them here, but refer the Commission to the regional hearing statements and testimony of defense lawyers, prosecutors, and judges, and letters to the Commission and Congress, cited in the footnote.¹⁴³

¹⁴¹ See, e.g., Samuel A. Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 Fed. Sent. Rep. 166, 166-67 (1992); Hon. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 656 n.66 (2008); Vincent L. Broderick, *Local Factors In Sentencing*, 5 Fed. Sent. Rep. 314, 314 (1993); Statement of the Hon. Robert L. Hinkle Before the U.S. Sent’g Comm’n, Atlanta, Ga. (Feb. 11, 2009); Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, Hearing before the U.S. Sent’g Comm’n, at 7-11 (July 9, 2009); Tr. of Public Hearing before the U.S. Sent’g Comm’n, Chicago, Ill., at 99-100 (Sept. 9-10, 2009) (remarks of the Hon. Karen K. Caldwell, Eastern District of Kentucky); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Hearing before the U.S. Sent’g Comm’n, Denver, Colo., at 6-9 (Oct. 21, 2009).

¹⁴² Fifteen Year Review at 102-06.

¹⁴³ See Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n, re Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012 at 59-61, 63-68 (Sept. 7, 2011); Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to the Hon. F. James Sensenbrenner and the Hon. Robert C. (Bobby) Scott, Addendum 2-7 (Oct. 11, 2011), http://www.fd.org/pdf_lib/Defender%20Letter%20Oct%2011%202011.pdf.

I will address one example that members of the Department of Justice have used at least twice to support their contention that defendants' sentences depend on judges in the districts in which they are sentenced. They contend that this is demonstrated by the within-guideline rate in the Western and Southern Districts of Texas versus that in the Southern District of New York.¹⁴⁴ In addition to wrongly blaming judges in the Southern District of New York for the 17.8% of below-guideline sentences sought by prosecutors, they, like the Commission in its presentations to Congress, fail to examine or acknowledge the reasons for the differences among these very different districts.

The large majority of prosecutions in the Texas districts are low-level immigration and marijuana smuggling cases with guideline ranges so low that many offenders have already served the guideline sentence or have little time left on the guideline sentence by the time they are sentenced.¹⁴⁵ That is why there are fewer departures and variances in the Texas districts.¹⁴⁶

In contrast, the Southern District of New York has a large number of cases with high guideline ranges.¹⁴⁷ These result from the operation of the guidelines in fraud cases (in which the loss amount together with multiple enhancements often vastly overstate the seriousness of the offense¹⁴⁸), multi-defendant drug conspiracies (in which the most and least culpable defendants are often subject to similar guideline ranges¹⁴⁹), and illegal re-entry cases that are more frequently subject to the 16- and 12-level enhancements (which over-punish in most cases¹⁵⁰).

¹⁴⁴ Letter from Lanny A. Breuer and Jonathan Wroblewski to Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n (Sept. 2, 2011); Speech of Lanny A. Breuer, *American Lawyer/National Law Journal Summit*, Nov. 15, 2011).

¹⁴⁵ A 10-kilogram marijuana smuggling case has a base offense level of 14. In the Western District of Texas, 39.9% of illegal re-entry cases have a base offense level of 8 and 36.4% have a base offense level of 12. In the Southern District of Texas, 26.3% of illegal re-entry cases have a base offense level of 8 and 39.6% have a base offense level of 12.

¹⁴⁶ Letter to Lanny A. Breuer, Assistant Attorney General, from Federal Public Defenders David Patton, Henry Bemporad and Margy Meyers (Nov. 22, 2011) (discussing reasons for differences in rates between the Southern District of New York and the Western and Southern Districts of Texas), <http://sentencing.typepad.com/files/letter-to-lanny-breuer-from-defenders.pdf>.

¹⁴⁷ *Id.*

¹⁴⁸ See Frank O. Bownan, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. Rep. 167 (2008); Alan Ellis *et al.*, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34 (2011). Twenty-six percent of cases in the Southern District of New York are fraud or other white collar cases, compared to 13.3 percent nationwide. USSC, 2010 Statistical Information Packet, New York Southern, fig. A.

¹⁴⁹ See, e.g., Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (drug quantity "is not significantly correlated with role in the offense," and this "lack of association" provides "fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing."); Catharine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount is a Poor Indicator of Relative Culpability*, 4 Fed. Sent. Rep. 226 (1990). Over 36 percent of cases in the Southern District of New York are drug cases, compared to 29 percent nationwide. USSC, 2010 Statistical

Judges in the Southern District of New York appropriately correct for these widely criticized effects of the fraud, drug, and illegal re-entry guidelines. In addition, prosecutors in this district seek downward departures at a lower rate than the national average.¹⁵¹ While judges in the Southern District of New York impose below-range sentences at the highest rate in the nation, the average sentence length in this district is higher than the national average — and nearly double the average in the Texas districts.¹⁵²

The Commission should not seek legislation to constrain judicial discretion based on bare rates of judicial below-guideline sentences, especially without even examining the reasons for them.

VI. The Current Appellate Standard of Review Is Working Appropriately.

The Commission has said that the Supreme Court “has taken some of the ‘teeth’ from appellate review of federal sentencing decisions.”¹⁵³ That was the point. Appellate review before *Booker* was designed to substitute the judgment of the Commission and the courts of

Information Packet, New York Southern, fig. A.

¹⁵⁰ See Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. Rev. 719 (2010); Frank O. Bowman, III, *Only Suckers Pay the Sticker Price: The Effect of “Fast Track” Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System*, Written Statement Prepared for Hearing Before the U.S. Sent’g Comm’n (Sept. 23, 2003).

In the Southern District of New York, 57.8% of illegal re-entry cases were subject to the 16-level increase, and 6.9% were subject to the 12-level increase, in contrast to 21.6% and 14.4% subject to the 16-level increase in the Southern and Western Districts of Texas respectively, and 3% subject to the 12-level increase in each of the Texas districts. USSC, 2010 Monitoring Dataset. In the Southern District of New York, the non-government sponsored rate of below-range sentences in immigration cases was 63.9%, and the government-sponsored rate was 2.5%, but the average sentence was 23.5 months, and the median sentence was 18 months. In the Western District of Texas, the non-government sponsored rate of below-range sentences was 10.4%, the government-sponsored rate was 1.7%, the average sentence was 14.6 months, and the median sentence was 8 months. In the Southern District of Texas, the non-government sponsored rate of below-range sentences was 15.5%, the government-sponsored rate was 19.5%, the average sentence was 18.7 months, and the median sentence was 12 months. USSC, 2010 Statistical Information Packet, New York Southern, Texas Western, Texas Southern, tbls. 7, 10.

¹⁵¹ USSC, 2010 Statistical Information Packet, New York Southern, tbl. 10 (17.8% compared to 25.3% nationwide).

¹⁵² USSC, 2010 Statistical Information Packet, Texas Western, Texas Southern, New York Southern, tbl. 7 (average sentence of 54.1 months in the Southern District of New York, 28.8 months in the Western District of Texas, 28.9 months in the Southern District of Texas).

¹⁵³ Commission Testimony at 16.

appeals for that of the district court judge. That is “no longer an open choice.”¹⁵⁴ Rather than “invalidat[e] the entire Act, including its appellate provisions,” the Court adopted the reasonableness standard of review.¹⁵⁵ The reasonableness standard originated in the Sentencing Reform Act itself, but is more “robust” than that standard. The current standard’s procedural component is particularly meaningful, and rightfully so. It ensures that a district court does not treat the guidelines as mandatory, considers all relevant factors under § 3553(a), considers the parties’ nonfrivolous arguments, and explains its decision in light of the arguments and evidence presented and in terms of the sentencing law. In short, the appellate court ensures that the district court actually exercised its discretion in a constitutional and reasoned manner.

Equally important– and contrary to myth – a reversal for failure to address an argument or explain the sentence in light of the § 3553(a) considerations leads to substantively different results. When required to explain a previously unexplained sentence or address a nonfrivolous argument, district judges more often than not impose a different sentence on remand. By insisting that district judges better analyze and explain their sentences, appellate courts thus help to achieve fairer sentences, which in turn promotes respect for the law.¹⁵⁶

It is true that a district court’s ultimate judgment regarding the appropriate sentence is rarely reversed as substantively unreasonable. This is not the cause for concern that some make it out to be. It reflects the proper operation of the current constitutional standard of review. Courts of appeals properly refrain from substituting their own judgments for that of the district courts because review of the district court’s discretionary decision regarding the appropriate sentence – a judgment made in light of multifarious facts about the offense, the offender, and the factors and purposes set forth at § 3553(a) – must be deferential. It is not the court of appeals’ job to substitute their judgment for that of the district court; their job is to ensure that the district court actually exercised its discretion in light of the relevant factors.

Some, including the Commission, have suggested that there is uncertainty and disagreement among the courts of appeals regarding the operation of the current standard of review, or that there is “no appellate review at all.”¹⁵⁷ This is simply not the case. Since *Booker* was decided, the Supreme Court has provided explicit instructions regarding the respective roles of the district and appellate courts in *Rita*, *Gall*, *Kimbrough*, *Nelson*, *Spears*, and *Pepper*. The Court made abundantly clear that courts of appeals may no longer replace the judgments of the district courts with their own judgments regarding the appropriate sentence,¹⁵⁸ and may no longer

¹⁵⁴ *Booker*, 543 U.S. at 263.

¹⁵⁵ *Id.*

¹⁵⁶ *See Rita*, 551 U.S. 338, 356 (2007) (“Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.”).

¹⁵⁷ *See Commission Testimony* at 16 (quoting Judge Beam, dissenting from the denial of rehearing *en banc* in *United States v. Feemster*, 572 F.3d 455, 471 (8th Cir. 2009)).

¹⁵⁸ “The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full

enforce the guidelines. Instead, their review is deferential, recognizing that there is a range of reasonable sentences, and allowing district courts to contribute to the ongoing evolution of the guidelines.¹⁵⁹

As demonstrated below, the courts of appeals are in no way hamstrung from ensuring that district courts properly exercise their discretion under § 3553(a). They are in no way unable to exercise substantive review. They have all the tools necessary to facilitate judicial participation in the feedback loop envisioned by Congress in the SRA and the Supreme Court, and they use them. Their decisions lead to fairer sentences not just for the parties but for all those later sentenced, and help to promote respect for the law.

This Part demonstrates that:

- The current “reasonableness” standard originated in the Sentencing Reform Act itself, but is more “robust” than that standard because it now applies to all sentences, within or outside the guideline range. The “reasonableness” standard enacted in the SRA was first displaced by the Supreme Court, and then replaced by Congress in 2003, with standards of review that required courts of appeals to enforce the guidelines and the Commission’s restrictions on departures, and to substitute their own judgments for those of district court judges. Those standards are unconstitutional.
- Data show that the government (1) asks for or agrees with the vast majority of sentences imposed, including at least half of below-range sentences sought by defendants, (2) appeals as many sentences as it did before *Booker*, and (3) has as high a success rate on appeal as it did before *Booker*.
- Actual appellate decisions show that the courts of appeals have all the tools they need to reverse sentences as procedurally or substantively unreasonable, and that review for procedural error is meaningful. Courts impose a different sentence on remand over half the time when reversed for failure to adequately address a non-frivolous argument or explain the sentence in terms of § 3553(a).

knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.” *Gall*, 552 U.S. at 51-52 (internal punctuation and citations omitted). The sentencing judge is in the best position to “consider what impact, if any, each particular purpose [set forth in § 3553(a)(2)] should have on the sentence in each case.” S. Rep. No. 98-225 at 77 (1983); *see also* 18 U.S.C. § 3551(a).

¹⁵⁹ *Rita*, 551 U.S. at 358 (“The district judge’s] reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”).

- The Commission’s account of Supreme Court and appellate decisions regarding “policy disagreements” is not accurate.
- Differing appellate outcomes are a signal to the Commission to improve unsound guidelines, not a signal to enforce the guidelines more strictly. If anything, there should be *more* review of within-guideline sentences, not less.
- The Commission is aware of unwarranted disparities created by differing or erroneous judicial interpretations of its guidelines. It should correct these before proposing legislative changes that would create disarray of constitutional dimension.
- Appellate judges testifying at the Commission’s hearings did not support a standard of review more strictly enforcing the guidelines. Instead, they recognized that such a standard would be unconstitutional, and was not warranted.

A. The Current Standard of Review Originated in the SRA, Is More “Robust” Than That Standard, Gives Proper Deference to the Sentencing Judge, and Is Thus Constitutional.

The Commission has suggested that the current standard of review is not as “robust” as what Congress envisioned in the SRA and that legislative changes are needed to bring the system closer to what Congress intended. However, a brief history of the current standard of review demonstrates that the current standard is the same standard Congress enacted in the SRA, but more “robust,” while remaining constitutional.

Standard of Review 1984-2003. When Congress enacted the SRA, it intended that appellate review would “preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court.”¹⁶⁰ Thus, from 1984 to 2003, courts of appeals were directed by statute to determine whether a sentence outside the guideline range “is unreasonable, having regard for the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)],” and “the reasons . . . stated by the district court pursuant to the provisions of section 3553(c).”¹⁶¹ In reviewing a sentence within the guideline range, the court of appeals was to determine only whether it “was imposed as a result of an incorrect application of the sentencing guidelines.”¹⁶² The court of appeals was to “give due regard to the opportunity of the district court to judge the credibility of the witnesses,”

¹⁶⁰ S. Rep. No. 98-225 at 150 (1983) (emphasis supplied).

¹⁶¹ See 18 U.S.C. § 3742(e)(3) (2002); 18 U.S.C. § 3742(d)(3) (1984); Pub. L. No. 98-473, § 213(a) (Oct. 12, 1984).

¹⁶² See 18 U.S.C. § 3742(e)(2) (2002); 18 U.S.C. § 3742(d)(2) (1984); Pub. L. No. 98-473, § 213(a) (Oct. 12, 1984).

“accept the findings of fact of the district court unless they are clearly erroneous,” and “give due deference to the district court’s application of the guidelines to the facts.”¹⁶³

For the first few years, courts of appeals applied the reasonableness standard with deference to the sentencing judge’s determination under § 3553(b) that a ground for departure was not adequately taken into consideration, in kind or degree, in the guidelines, having regard for the factors set forth in § 3553(a) and the reasons stated by the judge. However, in 1992, the Supreme Court held in *Williams v. United States* (over vigorous dissent) that a departure prohibited by the Commission’s policy statements was reversible as “an incorrect application of the sentencing guidelines,” and that a court of appeals may not uphold such a departure on the basis that it was reasonable.¹⁶⁴ And in 1996, in *Koon v. United States*, the Court adopted, as the sole framework for review of departures, the Commission’s policy statements and commentary setting forth its “heartland” departure standard and restricting departures on various grounds.¹⁶⁵ While the Court said that departures were subject to “abuse-of-discretion” review, the district courts’ discretion was strictly limited by the Commission’s policy statements and commentary.¹⁶⁶ The courts of appeals reviewed district courts’ interpretation of those provisions *de novo*.¹⁶⁷ *Koon* made no mention of the statutory unreasonableness standard.

While *Williams* and *Koon* thus encouraged courts of appeals to reverse departures unless clearly permitted by the Commission, regardless of whether the departure was reasonable with regard to § 3553(a), both decisions did make clear that courts of appeals were not to substitute their own judgments for those of sentencing courts as to factual determinations and the limited discretionary judgments left open by the Commission.¹⁶⁸

Standard of Review 2003-2005. In 2003, Congress, in the mistaken belief that there had been an increase in departures because of *Koon*,¹⁶⁹ enacted a new standard of review for departures. It retained vestiges of the SRA’s unreasonableness standard, requiring courts of appeals to determine whether the basis for departure “advance[s] the objectives set forth in § 3553(a)(2),” and whether the sentence “departs to an unreasonable degree” with regard to the factors set forth § 3553(a). But, like *Williams* and *Koon*, the new standard gave the Commission’s departure provisions overriding effect by requiring courts of appeals to set aside

¹⁶³ *Ibid.*

¹⁶⁴ *Williams v. United States*, 503 U.S. 193, 200-01 & n.2, 202 (1992).

¹⁶⁵ *Koon v. United States*, 518 U.S. 81, 92-95 (1996).

¹⁶⁶ *Id.* at 95-96.

¹⁶⁷ See, e.g., *United States v. Roberts*, 313 F.3d 1050, 1053 (8th Cir. 2002); *United States v. Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002); *United States v. Harris*, 293 F.3d 863, 871 (5th Cir. 2002).

¹⁶⁸ *Koon*, 518 U.S. at 97; *Williams*, 503 U.S. at 205.

¹⁶⁹ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-60 (2003).

the sentence if the basis for departure “is not authorized by § 3553(b).” In addition, the courts of appeals were directed to substitute their own judgments for those of sentencing courts, setting aside the sentence if the departure “is not justified by the facts of the case,” and applying *de novo* review to the district court’s application of the guidelines to the facts with respect to all determinations except whether a departure was unreasonable in degree.¹⁷⁰

Standard of Review After *Booker*. The Court in *Booker* held that the availability of departures “does not avoid the constitutional issue” because departures were not permitted in every case, were unavailable in most cases, and were limited to specified circumstances.¹⁷¹ The Court excised § 3553(b) and § 3742(e) in their entirety, re-instated the reasonableness standard originally enacted in the Sentencing Reform Act of 1984 for sentences outside the guideline range, and made it applicable to all sentences, inside and outside the guideline range.¹⁷² Courts of appeals must review “all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”¹⁷³

There are two components of reasonableness review, procedural and substantive. The court of appeals “must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guideline range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain—including an explanation for any deviation from the Guidelines range.”¹⁷⁴

If the sentence “is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”¹⁷⁵ Under that standard, the court of appeals reviews the district court’s discretionary decision, involving a mixed question of law and fact based on its consideration of the factors set forth at § 3553(a), that the sentence imposed is “sufficient but not greater than necessary” to serve the statutory purposes of sentencing.¹⁷⁶ If the sentence is within the guideline range, the court of

¹⁷⁰ Pub. L. No. 108-21, § 401(d) (Apr. 30, 2003) (amending 18 U.S.C. § 3742(e)).

¹⁷¹ *Booker*, 543 U.S. at 234-35.

¹⁷² *See Booker*, 543 U.S. at 259 (excising § 3553(b) and § 3742(e)); *id.* at 261-62 (adopting the “pre-2003 text” telling courts of appeals “to determine whether the sentence ‘is unreasonable’ with regard to § 3553(a),” and applying it to all sentences “across the board.”).

¹⁷³ *Gall*, 552 U.S. at 41; *see also id.* at 46, 49, 51 (“appellate review of sentencing decisions is limited to determining whether they are ‘reasonable’” under “a deferential abuse-of-discretion standard,” “whether inside or outside the Guidelines range.”); *Rita*, 552 U.S. at 351 (“appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion”).

¹⁷⁴ *Gall*, 552 U.S. at 51.

¹⁷⁵ *Id.*; *Kimbrough*, 552 U.S. at 110.

¹⁷⁶ 18 U.S.C. § 3553(a)(2).

appeals “may, but is not required to, apply a presumption of reasonableness.”¹⁷⁷ This rebuttable presumption is “not binding,” does not reflect greater deference to the Commission than to a district judge, and has no “independent legal effect.”¹⁷⁸ “[I]f the sentence is outside the Guidelines range, the court of appeals may not apply a presumption of unreasonableness. It 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.”¹⁷⁹ The court of appeals may not substitute its own judgment for that of the district court.¹⁸⁰ The court of appeals may not apply “heightened review” to sentences outside the guideline range, such as requiring “‘proportional’ justifications” the greater the variance, or requiring that a circumstance be “‘extraordinary,’ ‘exceptional,’ or ‘unique.’”¹⁸¹ Nor may a court of appeals apply “closer review” to a district court’s determination that a guideline yields a sentence greater or less than necessary to achieve § 3553(a)’s objectives.¹⁸²

Thus, contrary to suggestions that the courts of appeals’ power has somehow been reduced or is less robust than what Congress envisioned in 1984, it has actually been *expanded* as compared to the standard Congress originally enacted. It now includes determining the procedural and substantive unreasonableness of sentences within the guideline range.

B. The Government Appeals As Many Sentences As It Did Before *Booker*, and Has a High Success Rate on Appeal.

The government has no cause to complain regarding the current standard of review. In fiscal year 2010, the government raised 156 issues on appeal; thirty of those issues involved § 3553(a), and the government won 60% of the time.¹⁸³ When the guidelines were mandatory in 1998, the government raised 122 issues on appeal; 41 of those issues related to departures, and it won 61% of the time. In 1999, the government raised 54 issues on appeal; 25 were related to departures, and it won 33% of the time. In 2003, under the PROTECT Act standard, the government raised 173 issues on appeal; 63 related to departures, and it won 73% of the time.¹⁸⁴

¹⁷⁷ *Gall*, 552 U.S. at 51.

¹⁷⁸ *Rita*, 551 U.S. at 347, 350.

¹⁷⁹ *Gall*, 552 U.S. at 51.

¹⁸⁰ *Id.*

¹⁸¹ *Gall*, 552 U.S. at 45-46, 47, 49, 52.

¹⁸² *Kimbrough*, 552 U.S. 109-10; *Spears*, 129 S. Ct. at 843.

¹⁸³ USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls.56A, 58.

¹⁸⁴ See USSC, 1998 Sourcebook of Federal Sentencing Statistics, tbl. 56 (5K2.0, 5H1.6, 5H1.4 and 5K2.13 are departure issues); USSC, 1999 Sourcebook of Federal Sentencing Statistics, tbl. 58 (5K2.0, 4A1.3, 5H1.6, and 5H1.12 are departure issues); USSC, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 58 (5K2.0, 4A1.3, 5H1.6, 5K2.13, 5H1.4, 5H1.10, and 5H1.11 are departure issues).

Since *Gall* was decided, the government has won reversal of sentences as “too low” at a far greater rate than defendants have won reversal of a sentence as “too high.” Only twelve sentences have been reversed as unreasonably high since *Gall* was decided. In contrast, the government appeals a far smaller percentage of sentences as “too low,” but nineteen of those sentences have been reversed as unreasonably low.¹⁸⁵

The government does not initiate more appeals because it asks for or agrees with the vast majority of sentences imposed. In fiscal year 2011, 56.4% of sentences were within or above the guideline range, and the government sought and received below-guideline sentences in another 26.4% of cases.¹⁸⁶ The government agreed to or did not oppose more than half of the sentences classified by the Commission as “non-government sponsored below range.”¹⁸⁷

In sum, the government does not appeal more often because it agrees with the vast majority of sentences imposed, and when it appeals, it usually wins.

C. The Data Show That Courts of Appeals Have All the Tools They Need to Reverse Sentences as Procedurally or Substantively Unreasonable, and That Courts Impose a Different Sentence on Remand over Half the Time When Reversed for Procedural Error.

The operation of the current standard further demonstrates that it enables the courts of appeals to engage in meaningful review. We have collected the appellate decisions after *Gall* in which sentences have been reversed for procedural error based on inadequate explanation or failure to address a party’s nonfrivolous arguments for a different sentence, or for substantive unreasonableness as too high or too low.¹⁸⁸ We use *Gall* as the starting date because that decision clarified that the courts of appeals may not enforce the guidelines by applying heightened standards of review to non-guideline sentences, and described procedural and substantive review in detail.

Significant Procedural Error. Fifty-five sentences outside the guideline range (above or below) and seventy-four sentences within the guideline range have been reversed for procedural error where the judge failed to adequately explain the sentence in light of the purposes and factors set forth in § 3553(a) and/or the evidence and arguments presented by the parties. Over two years ago, some appellate judges had the perception that reversal based on procedural error was a “waste of time” because the district court would impose the same

¹⁸⁵ See Appellate Decisions After *Gall* (Feb. 8, 2012), http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf.

¹⁸⁶ USSC, Preliminary Quarterly Data Report, 4th Quarter Release, tbl.1 (Oct. 31, 2011).

¹⁸⁷ See *supra* note 19.

¹⁸⁸ See Appellate Decisions After *Gall* (Feb. 8, 2012), http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf.

sentence on remand.¹⁸⁹ This perception is not accurate. Reversal for failure to adequately explain the sentence, to address a party’s nonfrivolous argument for a different sentence, or to explain why that argument was rejected, leads to a different sentence on remand more than half the time.¹⁹⁰

Substantive Unreasonableness. Courts of appeals have reversed nineteen sentences as unreasonably low, and twelve sentences as unreasonably high. Only four sentences within the guideline range have been reversed as unreasonably high, one from a circuit that has adopted a rebuttable presumption of reasonableness, and three from circuits that have not. Two of those decisions, *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), and *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), have contributed information to the Commission regarding problematic guidelines, and the Commission specifically relied on *Amezcua-Vasquez* in amending § 2L1.2. Congress expected that the “case law that is developed from . . . appeals” would be “used” by the Commission “to further refine the guidelines.”¹⁹¹ Echoing Congress, the Supreme Court encouraged the Commission to “modify its Guidelines in light of what it learns” from “appellate court decision-making.”¹⁹² These decisions demonstrate how the current standard of review, though deferential, nevertheless permits courts of appeals to provide useful information to the Commission so that it can refine and improve the guidelines.

D. The Commission Mischaracterizes Supreme Court and Appellate Decisions Regarding “Policy Disagreements.”

The Commission mischaracterizes Supreme Court law regarding policy disagreements. Without citing any decision, because there is none, the Commission stated that “the Court has increasingly encouraged the lower courts to examine federal sentencing guidelines developed as a result of ‘congressional directives,’” and that the “Court suggests this ‘policy disagreement’ analysis is appropriate because guidelines that result from congressional directive, particularly specific directives, ‘do not exemplify the Commission’s exercise of its characteristic institutional role.’”¹⁹³

The Court has said no such thing. The Court recognizes that judges may vary from the guideline range based on a “policy disagreement” not as a challenge to Congress, but because it is crucial to ensuring that the system does not violate the Sixth Amendment.¹⁹⁴ The point of

¹⁸⁹ Commission Testimony at 16.

¹⁹⁰ See Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (Nov. 2011), http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

¹⁹¹ S. Rep. No. 98-225, at 52 (1983).

¹⁹² *Booker*, 543 U.S. at 263.

¹⁹³ Commission Testimony at 17.

¹⁹⁴ See *Cunningham v. California*, 549 U.S. 270, 278-81, 286-87 & n.12 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007); *Kimbrough v. United States*, 552 U.S. 85, 91, 101-02, 110 (2007); see also *id.* at 112-14 (Scalia, J., concurring) (“I do not take this” discussion of “closer review” to be “an unannounced

these decisions is that a sentencing judge may vary from a guideline because the guideline itself, apart from case specific facts, fails to satisfy § 3553(a)'s objectives. See *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); see also *Rita v. United States*, 551 U.S. 338, 351, 357 (2007). Variances based on “policy disagreements” do not target guidelines resulting from congressional directives. Some of the guidelines that courts have found to be unsound were largely driven by congressional directives (e.g., the child pornography guideline), others were not (e.g., the crack, illegal re-entry, and relevant conduct guidelines), and others exceeded a congressional directive (e.g., the career offender guideline).

Moreover, the Court's decisions respect Congress's purpose in creating an independent expert agency charged with developing sound sentencing policy that furthers the goals of the SRA. Senators Kennedy, Hatch and Feinstein specifically encouraged the Court to adopt this type of variance in an *amicus* brief they filed in *United States v. Claiborne*, a case later replaced by *Kimbrough*.¹⁹⁵ They said that the crack-powder disparity is “completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.”¹⁹⁶ They urged reversal of the variance in Claiborne's case in part because the judge did *not* cite the crack-powder disparity, though defense counsel raised it.¹⁹⁷ They emphasized that “Congress intended the Commission to establish sentencing policies based on objective data and sound public policy, not prejudice or politics, and courts should respect that institutional role,”¹⁹⁸ but they recognized that “the guidelines do not always reflect objective data or good policy,” as the Commission's own findings regarding the crack guidelines demonstrated.¹⁹⁹ The Senators urged the Court to require district courts to “articulate reasons for a sentence that not only are applicable to the particular facts before them, but that also cite or establish principles of general applicability.”²⁰⁰ Articulation of broader principles “promotes transparency,” “facilitates the work of the Commission [in] refin[ing] the guidelines,”

abandonment of the following clear statements in our recent opinions,” which “mean that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines. If . . . the Guidelines must be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the ‘advisory’ Guidelines would, over a large expanse of their application, entitle the defendant to a lesser sentence but for the presence of certain additional facts found by the judge rather than the jury. This, as we said in *Booker*, would violate the Sixth Amendment.”).

¹⁹⁵ *Claiborne* was dismissed as moot when Mario Claiborne died, and was replaced with *Kimbrough*.

¹⁹⁶ Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance at 30, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007.

¹⁹⁷ *Id.* at 27-28.

¹⁹⁸ *Id.* at 4.

¹⁹⁹ *Id.* at 21.

²⁰⁰ *Id.* at 23 & n.5 (disagreeing with *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006)).

and provides principles “that can be followed or distinguished by other district courts in other cases.”²⁰¹

The Commission has also asserted that the courts of appeals “are divided on the question whether guidelines promulgated in response to a congressional directive are entitled to less deference than guidelines promulgated pursuant to the Commission’s ‘characteristic institutional role.’”²⁰² But the only example it has given is the circuit split concerning whether judges may vary from the illegal re-entry guideline to correct the disparity created by the existence of fast-track programs in some jurisdictions, but not others,²⁰³ a disparity identified by the Commission itself.²⁰⁴ Like any other circuit split, this one would have likely been resolved by the Supreme Court in due course, except that the Department of Justice recently issued a new policy authorizing fast track programs in every district.²⁰⁵ Now that DOJ has taken the lead, this circuit split will likely disappear.

A panel of the Sixth Circuit in *United States v. Bistline* recently reversed as substantively unreasonable a below guideline sentence for a conviction of one count of child pornography.²⁰⁶ In the process, it diverged from its own precedent and created several dramatic circuit splits: (1) holding that all policy disagreements are subject to close appellate scrutiny,²⁰⁷ (2) holding that

²⁰¹ *Id.* at 23.

²⁰² Commission Testimony at 18.

²⁰³ Seven circuits permit such variances. See *United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011); *United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008). Three do not. See *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008). Eleventh Circuit Judge Carnes concurred separately in the denial of rehearing in *Vega-Castillo* to say that the issue is “potentially meritorious,” and that he may vote for reconsideration in a case “where there is no apparent reason why the defendant would not have been offered the benefits of an early disposition program if he had been in a district with that kind of program.”

²⁰⁴ USSC, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003).

²⁰⁵ James M Cole, U.S. Dep’t of Justice, *Memorandum for All U.S. Attorneys Re: Department Policy on Early Disposition or “Fast-Track” Programs* (Jan. 31, 2012).

²⁰⁶ *United States v. Bistline*, ___ F.3d ___, 2012 WL 34265 (6th Cir. 2012), *pet. for reh’g filed*, No. 10-3106 (Feb. 6, 2012).

²⁰⁷ *Id.* at *2. Other courts of appeals have expressly recognized that the Supreme Court’s *dicta* in *Kimbrough* regarding “closer review” does not apply to policy disagreements with guidelines not developed by the Commission in its “characteristic institutional role,” *i.e.* by taking into account “empirical evidence and national experience.” *United States v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011) (recognizing that district court’s disagreement with § 2G2.2 is not subject to “closer review”

judges who seek to disagree with guidelines driven by congressional directives face an even more “formidable task,”²⁰⁸ (3) substituting its own judgment for that of the district court in

because it does not exemplify the Commission’s characteristic institutional role); *United States v. Grober*, 624 F.3d 592, 601 (3d Cir. 2010) (same); *United States v. Friedman*, 554 F.3d 1301, 1311-12 & n.13 (10th Cir. 2009) (recognizing that district court’s decision to disagree with a guideline based on a congressional directive and not developed in the Commission’s characteristic institutional role, such as the career offender guideline, is not subject to “closer review”); *see also United States v. Cavera*, 550 F.3d 180, 192 n.9 (2d Cir. 2008) (*en banc*) (recognizing that *Kimrough* distinguishes between cases where a district court disagrees with Guidelines that were formulated based on special expertise, study, and national experience and those that were not and therefore “do not exemplify the Commission’s exercise of its characteristic institutional role.”). *But see United States v. Morace*, 594 F.3d 340 (4th Cir. 2010) (indicating that it would apply “closer review” to a disagreement with § 2G2.2, but first remanded the case for the district court to provide more adequate explanation). The Sixth Circuit itself has held that a district court may exercise its discretion to disagree with a Commission policy without mentioning anything about “closer review.” *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010). And in an earlier case, the government expressly abandoned the argument, previously accepted by a panel in a decision that was vacated by the *en banc* court, *see United States v. Funk*, 534 F.3d 522 (6th Cir. 2008) (vacated), that closer review applies to a disagreement to the career offender guideline.

²⁰⁸ *Bistline*, 2012 WL 34265, at *3-5. No other court of appeals holding that a district court may disagree with a congressionally driven guideline has suggested that the district court faces a more “formidable task” subject to the closest scrutiny possible. *See, e.g., United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (district court may disagree with the career offender guideline, promulgated in response to 28 U.S.C. § 994(h); no mention of “closer review”); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (same); *United States v. Steward*, 339 Fed. App’x 650, 653-54 (7th Cir. 2009) (same); *United States v. McLean*, 331 Fed. App’x 151, 152 (3d Cir. 2009) (same); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (same); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (same); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *cf. United States v. Friedman*, 554 F.3d 1301, 1311-12 & n.13 (10th Cir. 2009) (recognizing that a district court’s decision to disagree with a guideline based on a congressional directive and not developed in the Commission’s characteristic institutional role, such as the career offender guideline, is not subject to “closer review”). Even the Sixth Circuit has previously held that a district court may disagree with a congressionally-driven guideline policy without suggesting its task is more formidable or that the review will be closer. *Camacho-Arellano*, 614 F.3d at 249-50 (fast-track policy); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (career offender guideline).

To the extent that the panel appears to require, for purposes of substantive review, greater justification the further the sentence is from the guideline, this too conflicts with every other court of appeals. They understand that, for purposes of review for substantive reasonableness and as instructed in *Gall*, they must apply deferential abuse-of-discretion review to *the district court’s* determination that its variance from a guideline, including the extent of the variance, is justified by the purposes and factors set forth in § 3553(a). *See, e.g., United States v. Friedman*, 658 F.3d 342 (3d Cir. 2011); *United States v. Townsend*, 618 F.3d 915, 918-19 (8th Cir. 2010); *United States v. Key*, 599 F.3d 469 (5th Cir. 2010); *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009); *United States v. Cavera*, 550 F.3d 180, 189-90, 193 (2d Cir. 2008) (*en banc*); *United States v. Gardellini*, 545 F.3d 1089, 1093 & n.4 (D.C. Cir. 2008); *United States v. Carty*, 520 F.3d 984, 991-93 (9th Cir. 2008); *United States v. Martin*, 520 F.3d 87, 91-93 (1st Cir. 2008); *United States v. Smart*, 518 F.3d 800, 805-10 (10th Cir. 2008); *United States v. Pauley*, 511 F.3d 468, 473-474 (4th Cir. 2007). Even the Sixth Circuit has previously accurately described the respective roles of the district and appellate courts. *See United States v. Grossman*, 513 F.3d 592, 595-96 (6th Cir. 2008).

finding that the child pornography guideline serves the purposes of sentencing,²⁰⁹ and (4) ignoring the analysis of individualized circumstances required by *Gall* and *Pepper* and indicating that instead the Commission's disfavored view of mitigating circumstances may render a variance unreasonable.²¹⁰ As long as this opinion stands, judges in the Sixth Circuit will act at their peril in varying (downward or upward) from the child pornography guideline based on a

²⁰⁹ *Bistline*, 2012 WL 34265, at *5-7. Other courts of appeals have recognized that § 2G2.2, if not carefully applied, may recommend sentences inconsistent with sentencing purposes, *see, e.g., United States v. Dorvee*, 616 F.3d 174, 184, 188 (2d Cir. 2010); *United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009) (stating its “view that the sentencing guidelines at issue [§ 2G2.2] are in our judgment harsher than necessary,” that “first-offender sentences of this duration are usually reserved for crimes of violence and the like,” and that if “sitting as the district court, we would have used our *Kimbrough* power to impose a somewhat lower sentence”); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (concluding that § 2G2.2 was not developed pursuant to Commission's characteristic role and affirming district court's decision to vary from it based on a policy disagreement); *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011) (recognizing that the guideline was not developed based on empirical data and national experience and remanding because it was not clear that the district court appreciated its authority to vary from it based on a policy disagreement); *United States v. Apodaca*, 641 F.3d 1077 (9th Cir. 2011) (guidelines “for child pornography . . . were not based on empirical data and expertise,” “provide a large number of sentence enhancements, which apply in nearly every case and cause routine offenses to generate sentence recommendations approaching (or exceeding) statutory maximums,” and [c]oncentrating offenders at the top of the sentencing spectrum in this manner [is] ‘fundamentally incompatible with § 3553(a).’); *id.* at 1085-88 (Fletcher, J., concurring) (reviewing literature casting doubt on existence of connection between consumption of child pornography and likelihood of a contact sexual offense against a child); *United States v. Regan*, 627 F.3d 1348, 1354 (10th Cir. 2010), and no other court of appeals has substituted its judgment for the district court in finding that § 2G2.2 serves sentencing purposes.

²¹⁰ *Bistline*, 2012 WL 34265, at *8-9. Other courts of appeals have reversed when judges declined to consider relevant circumstances in deference to policy statements, *see United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009); *United States v. Hamilton*, 323 Fed. App'x 27, 31 (2d Cir. 2009), and have rejected challenges to variances based on policy statements that restrict departures, *see United States v. Howe*, 543 F.3d 128, 137-39 (3d Cir. 2008) (recognizing that departure policy statements do not control variances, and that there is no requirement that a factor be present to an “extraordinary” or “exceptional” degree to support a variance under § 3553(a); affirming district court's consideration of factors discouraged by policy statements); *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008). Even the Sixth Circuit has previously recognized that policy statements restricting or discouraging departures do not control the question whether a variance is appropriate under § 3553(a). *See, e.g., United States v. Howe*, 373 Fed. App'x 578, (6th Cir. 2010) (recognizing that a district court judge can depart or vary downward based on a defendant's traumatic childhood, and that a variance under § 3553(a) is not constrained by a finding of extraordinariness); *see also United States v. Blue*, 557 F.3d 682 (6th Cir. 2009) (recognizing that a district court may vary downward for cooperation even when the requirements of the Commission's policy statement are not met). *But see United States v. Irey*, 612 F.3d 1160, 1119 (11th Cir. 2010) (reversing sentence as substantively unreasonable based in part on its holding that the district court “effectively ignored” the Commission's policy statements when it considered mitigating factors discouraged or prohibited by the Commission).

policy disagreement, or based on individualized facts of which the Commission disapproves. We doubt that it will stand for long.²¹¹ Moreover, if the opinion accurately describes the relationship between Congress and the Commission, then the guidelines should be struck down in their entirety as a violation of the separation of powers and the bicameralism and presentment requirements.²¹² Further, under the panel’s theory, when the Commission chooses, without a congressional directive, to “make[] a policy decision for reasons that lie outside its [empirical] expertise,” the result is especially vulnerable and may violate the separation of powers.²¹³

The internal inconsistencies and circuit splits created by this decision do not require emergency legislation by Congress designed to overrule the majority of circuits and enforce the guidelines through stricter appellate review of policy disagreements, which itself will create numerous splits over its constitutionality. There have always been circuit splits and other internal differences in legal interpretations, and when they reach a level of sufficient importance, they are resolved by the *en banc* circuit courts or the Supreme Court. That is how the law works.

E. Differing Appellate Outcomes Serve as a Signal to the Commission to Improve Unsound Guidelines, Not as a Signal to Enforce the Guidelines More Strictly.

Some circuits have reversed more sentences than others, or have sent stronger signals that a guideline may be unsound. For example, the Second Circuit has reversed nine sentences as procedurally or substantively unreasonable, including the sentence in *L.M. v. United States*.²¹⁴ In *L.M.*, a defendant convicted of conspiracy to distribute marijuana had cooperated with the government for seventeen years after his arrest, leading to “arrests and successful prosecutions of a number of large scale international drug dealers.”²¹⁵ Due to threats of violence against him,

²¹¹ A petition for *en banc* rehearing has been filed, and all Defenders of the Sixth Circuit have filed a brief in support of granting the petition.

²¹² The panel’s theory for effectively holding that congressionally-directed guidelines are rarely, if ever, subject to disagreement is that Congress is free to use the Commission as a conduit to enact laws styled as guidelines. *Id.* at *3-5. But those guidelines were not passed by both Houses of Congress or signed into law by the President. *INS v. Chadha*, 462 U.S. 919 (1983). Nor may Congress “borrow” the Judicial Branch’s “reputation for impartiality and nonpartisanship . . . to cloak [its] work in the neutral colors of judicial action.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

²¹³ *Bistline*, 2012 WL 34265, at *5.

²¹⁴ 2012 WL 119116 (2d Cir. Jan. 17, 2012). See also *United States v. Tutty*, 612 F.3d 128 (2d Cir. 2010); *United States v. Hernandez*, 604 F.3d 48 (2d Cir. 2010); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. DeSilva*, 613 F.3d 352 (2d Cir. 2010); *United States v. Preacely*, 628 F.3d 72 (2d Cir. 2010); *United States v. Persico*, 293 Fed. App’x 24 (2d Cir. 2008); *United States v. Pearson*, 275 Fed. App’x 48 (2d Cir. 2008); *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008); *United States v. Johnson*, 273 Fed. App’x 95 (2d Cir. 2008).

²¹⁵ *L.M.*, 2012 WL 119116, at *1.

“authorities installed a panic button in his home.”²¹⁶ Meanwhile, he had undergone a “personal transformation,” building a family and successful business.²¹⁷ The court remanded for resentencing because, “given the paucity of the district court’s explanation,” it could not “be sure that the district court arrived at a reasoned decision over which we can meaningfully exercise appellate review.”²¹⁸

In *United States v. Preacely*, the Second Circuit reversed for procedural error a below-guideline sentence of 94 months because it was not clear that the district court recognized that it could impose a sentence below the career offender guideline based on “compelling evidence” of Mr. Preacely’s rehabilitation.²¹⁹ Mr. Preacely had presented evidence that since his arrest, he had overcome his drug addiction, undergone voluntary counseling, become a model employee after completing a competitive workforce training program sponsored by the local district attorney, married his girlfriend and was a responsible father to their child, and become a youth advisor for a gang prevention program.²²⁰

Judge Lynch wrote separately to point out that the career offender guideline “appears distinctly inflated” for someone who, like Mr. Preacely “presented substantial evidence that he had reformed” and thus does not present any increased danger of committing further crimes, contrary to the underlying assumption of the career offender guideline.²²¹ If “fully credited,” Judge Lynch wrote, this evidence “would suggest that the 188-month [career offender] guideline was not after all the appropriate baseline sentence for him.”²²² Judge Lynch emphasized that he was in no way saying that the district court was *required* to credit the evidence of rehabilitation and find that the career offender guideline recommended a sentence greater than necessary to serve sentencing purposes, but that if it refused to consider the evidence that the career offender guideline was excessive in light of the parsimony command of § 3553(a), it procedurally erred.²²³

Through these decisions, the Second Circuit meaningfully illustrated the principle that requiring the district court to articulate reasons “helps to ensure that [it] actually consider[s] the

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at *2.

²¹⁹ 628 F.3d 72, 81-82 (2d Cir. 2010).

²²⁰ *Id.* at 76-77, 81-82.

²²¹ *Id.* at 84-85 (Lynch, J., concurring). Of course, that underlying assumption has been shown to be false by the Commission itself for cases in which the defendant’s prior convictions were drug offenses. *See* Fifteen Year Review at 133-34.

²²² *Id.* at 85 (Lynch, J., concurring).

²²³ *Id.*

statutory factors and reach[es] [a] reasoned decision,” “promote[s] the perception of fair sentencing,” and “assures ‘meaningful appellate review.’” *See United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008) (*en banc*).

That same circuit reversed the sentence in *United States v. Dorvee*²²⁴ as both procedurally and substantively unreasonable. The sentence was procedurally unsound because the district court was mistaken in its belief that it was imposing a below-guideline sentence.²²⁵ It was substantively unreasonable because the district court based the sentence on its assumption about the defendant’s risk of committing future crimes that was directly contrary to record evidence, ignored the parsimony clause by failing to provide any reason supporting its views on deterrence, and appeared to be improperly governed by the view that the extent of deviation from the guideline is the measure of reasonableness on appeal.²²⁶ The court went on to say that “[t]hese errors were compounded by the fact that the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires.”²²⁷ The court urged district courts “to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2.”²²⁸ In other words, the court of appeals urged the district court to actually exercise its discretion, including its authority to examine whether the applicable guideline serves sentencing purposes under § 3553(a). On remand, the district court imposed a sentence of 121 months. *Dorvee* perfectly illustrates the meaningful review available to courts of appeals.

The Commission has cited *Dorvee* as evidence that “some courts have suggested that a within guideline sentence will often be unreasonable,” as contrasted with other circuits that have ruled that § 2G2.2 is entitled to a presumption of reasonableness,²²⁹ suggesting that these differences present a problem that must be solved by legislation requiring a presumption of reasonableness. But the Tenth Circuit, which applies a presumption of reasonableness, has indicated that the argument that § 2G2.2 recommends sentences inconsistent with § 3553(a) is “quite forceful,” suggesting that it would not be an abuse of discretion for a district court to disagree with it as a matter of policy.²³⁰ And the Third Circuit, which has not adopted a

²²⁴ *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010).

²²⁵ *Id.* at 181-82.

²²⁶ *Id.* at 183-84.

²²⁷ *Id.* at 184.

²²⁸ *Id.* at 188.

²²⁹ Commission Testimony at 13. *See, e.g., United States v. Miller*, 665 F.3d 114, 120-21 (5th Cir. 2011) (declining to reject guideline as “unreasonable,” applying presumption of reasonableness though acknowledging that § 2G2.2 is not based on empirical data, and affirming within-guideline sentence as substantively reasonable).

²³⁰ *United States v. Regan*, 627 F.3d 1348, 1354 (10th Cir. 2010) (holding that the district court did not abuse its discretion in failing to consider this “forceful” argument because it was not raised below, so not reaching the question whether the presumption of reasonableness had been rebutted).

presumption of reasonableness, has emphasized that it has not held “that § 2G2.2 will always recommend an unreasonable sentence,” but that it would not be an abuse of discretion to find that § 2G2.2 recommends sentences greater than necessary to serve sentencing purposes.²³¹

Thus, although some circuits apply a presumption of reasonableness and others do not, there is not an appreciable difference in approach to the child pornography guideline.²³² Nonetheless, if the Commission is concerned that there will be differences in sentencing outcomes because some courts apply a formal presumption of reasonableness and others do not, the obvious solution is to *fix the guideline* to better serve sentencing purposes,²³³ not urge Congress to enact legislation creating a standard of review designed to enforce the guidelines, regardless of their soundness, and that will itself create numerous circuit splits over its constitutionality.

If the Commission developed a sound and well-explained set of advisory guidelines, those judges who have previously exercised their discretion to reject flawed guidelines in mine-run cases would be more apt to follow them, and judges who follow guidelines in any event will continue to do so. This is the evolutionary process envisioned by Congress, but it was stifled by a form of review that came to simply enforce the guidelines.

It is also the process expected by the Supreme Court. In *Kimbrough*, the Supreme Court expressly dismissed the concern that different sentencing judges would adopt disparate approaches to the crack cocaine guidelines, stating that “ongoing revision of the Guidelines in response to sentencing practices will help to avoid excessive sentencing disparities.” *Kimbrough*, 552 U.S. at 574. And in *Spears v. United States*, 129 S. Ct. 840 (2009), the Supreme Court effectively directed the Eighth Circuit to affirm, as within the district court’s discretion, a sentence below the guidelines in a crack case where the district judge adopted a 20:1 ratio for crack cases. *Id.* at 833-34. With these decisions, the Court made clear that if excessive disparities emerge as the result of differing methods of correcting an unsound guideline, the Commission should respond by revising the guideline, and if necessary, by asking Congress to remove legislative impediments to exercising its characteristic institutional role. If it does so, and its revisions are explained and rationally based, the incidence (and extent) of such disparities will be reduced.

This is not merely theoretical. It is the process underlying the 2010 amendments to the crack guidelines and that even now permits thoughtful evaluation by district courts of the new

²³¹ *United States v. Grober*, 624 F.3d 592, 609 (3d Cir. 2010).

²³² *But see United States v. Bistline*, ___ F.3d ___, 2012 WL 34265 (6th Cir. 2012) *pet. for reh’g filed*, No. 10-3106 (Feb. 6, 2012); *see also supra* notes 206-12 (explaining how the panel’s decision in *Bistline* conflicts with previous decisions of the same court and with those of other courts of appeals).

²³³ *See Miller*, 665 F.3d at 121 (if its decision “leads to some disparities in sentencing,” “[i]t is for the Commission to alter or amend [the guidelines]”).

18:1 ratio reflected in them.²³⁴ It is the process strongly urged by judges, defense counsel, probation officers, and academics.²³⁵ It is the process underlying revisions to other guidelines in response to sentencing data and reasons in recent amendment cycles,²³⁶ and the planned report to Congress on the guideline for possession of child pornography — a guideline that both courts and prosecutors find to be highly problematic.²³⁷ And as the Commission revises the guidelines to make more sense, judges follow them more often,²³⁸ as the Supreme Court predicted they would.

If anything, there should be *more* review of within-guideline sentences, not less.

²³⁴ See, e.g., *United States v. Shull*, 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011) (adopting 1:1 ratio); *United States v. Williams*, 788 F. Supp. 2d 847 (D.N.D. 2011) (adopting 1:1 ratio); *United States v. Whigham*, 754 F. Supp. 2d 239, 247 (D. Mass. 2010) (adopting 1:1 ratio); see also *United States v. Trammell*, 2012 U.S. Dist. LEXIS 5615 (S.D. Ohio Jan. 18, 2012) (adopting 1:1 ratio).

²³⁵ See, e.g., Testimony of the Honorable Gerald. B. Tjoflat Before the U.S. Sent’g Comm’n, at 24 (Feb. 10, 2009) (discussing need to revise drug guidelines based on empirical evidence); Testimony of the Honorable Vaughn R. Walker Before the U.S. Sent’g Comm’n, at 6-22 (May 28, 2009) (same); Testimony of the Honorable Charles Breyer Before the U.S. Sent’g Comm’n, at 110 (May 27, 2009) (“[V]ariations should be explained in detail so that . . . there will be empirical evidence on a nationwide basis to support [the Commission’s] changes.”); Testimony of the Honorable Susan Mollway Before the U.S. Sent’g Comm’n, at 123 (May 27, 2009) (“[U]sing the Commission’s voice to suggest that a particular directive isn’t based on evidence would go a long way toward educating Congress.”); Statement of the Honorable Robert L. Hinkle Before the U.S. Sent’g Comm’n (Feb. 11, 2009) (urging the Commission to revise the drug and career offender guidelines so as not to go further than Congress required); Testimony of Marilyn Grisham, Probation Officer, Before the U.S. Sent’g Comm’n, at 157, 159 (May 27, 2009) (testifying that sentences for methamphetamine and illegal re-entry are too severe and should be revised); Statement of Rachel E. Barkow, Professor of Law, Before the U.S. Sent’g Comm’n (July 10, 2009) (recommending that the Commission de-link the guidelines from mandatory minimums and “conduct a wholesale review of the current system to assess its fiscal impact and where costs could be reduced without increasing crime rates.”).

²³⁶ See USSG, amend. 742 (Nov. 1, 2010) (eliminating “recency” points from the criminal history score, citing below-guideline sentences); USSG, amend. 738 (Nov. 1, 2010) (slightly expanding the availability of alternatives to straight imprisonment, citing judicial feedback); USSG, amend. 754 (Nov. 1, 2011) (reducing large increases in immigration guideline based on stale prior convictions, citing appellate decisions finding unwarranted uniformity in requiring same increase regardless of age of conviction).

²³⁷ See U.S. Sent’g Comm’n, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); U.S. Sent’g Comm’n, Notice of Final Priorities, 76 Fed. Reg. 58,564 (Sept. 21, 2011); Letter from Jonathan Wroblewski to Hon. William K. Sessions III, Chair, U.S. Sent’g Comm’n at 6 (June 28, 2010) (urging the Commission to review and revise the child pornography guideline).

²³⁸ After increasing nearly every quarter through fiscal year 2010, the overall rate of non-government sponsored below-guideline sentences began to drop during the first quarter of fiscal year 2011, concurrent with the reduction in the crack guidelines on November 1, 2010. See U.S. Sent’g Comm’n, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 4 (Oct. 31, 2011) (decrease from 18.7% in the fourth quarter of 2010 to 17.1% in the fourth quarter of 2011).

F. If the Commission Is Concerned about Differences in Interpretations, It Should Resolve Those It Has the Power to Resolve.

The Commission has not treated circuit splits regarding guideline interpretations as emergencies. When the guidelines were mandatory, for example, it waited many years before resolving the circuit split regarding whether district courts may consider aberrant conduct as a ground for departure, an issue of significant importance given the high rate of first offenders in the federal system.²³⁹ At the regional hearings, Defenders brought to the Commission's attention that prosecutors in different districts interpret USSG § 1B1.8 differently, some deeming pre-agreement statements to be protected and others refusing protection until the defendant has a lawyer and the agreement is signed. The latter interpretation punishes defendants who choose to be cooperative before they have a lawyer to assist them. We urged the Commission to correct this problem (and the disparity caused by it) by revising § 1B1.8 to provide that, if a defendant enters a plea/cooperation agreement with the government, protection relates back to any earlier statements. It has not done so.

It was suggested by a Commissioner at the regional hearing in New York that the relevant conduct rule does not actually require judges to consider acquitted conduct when calculating the guideline range.²⁴⁰ If so, then the Commission has allowed to go uncorrected an erroneous interpretation of the guidelines that has resulted in many thousands of years of imprisonment that not only were unauthorized by jury verdicts but were unauthorized by the guidelines. Now that the guidelines are advisory, and given the entrenched state of the courts' interpretation of the relevant conduct rule, the Commission certainly cannot be sure that every court will vary downward to counteract the effect of an interpretation they do not even realize is mistaken.

If the Commission is concerned about circuit splits and unwarranted disparities caused by judicial interpretations, it should first resolve differences that it has the power to resolve before proposing legislative changes that will inevitably create true disarray of constitutional dimension.

G. Contrary to the Commission's Suggestion, Appellate Judges Do Not Support a Standard of Review To More Strictly Enforce the Guidelines.

The Commission gave the impression in its testimony before Congress that the appellate judges who testified at its regional hearings were generally frustrated that the deferential standard of review prevents them from reversing more sentences as unreasonable and that they consider review for procedural error to be meaningless.²⁴¹ Even if appellate judges had

²³⁹ The split emerged early on, *compare United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994); *see also United States v. Glick*, 946 F.2d 335 (4th Cir. 1991); *United States v. Williams*, 974 F.2d 25 (5th Cir. 1992); *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991), *with United States v. Takai*, 941 F.2d 738 (9th Cir. 1991); *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991), but the Commission did not address it until 2000. USSG, App. C, amend. 603 (Nov. 1, 2000).

²⁴⁰ Tr. of Hr'g Before the U.S. Sent'g Comm'n, at 393-94 (July 9, 2009).

expressed this view, it would not support the Commission’s constitutionally suspect proposals. In any event, the few statements plucked from the transcripts do not accurately capture the overall views expressed by the appellate judges. They recognized that the current standard is necessary if the guidelines are to remain constitutional, did not support statutory change when pressed, recognized that sentencing judges most often get it right, and urged the Commission to better explain and justify its guidelines.

The appellate judges recognized that if the guidelines are advisory—as the Supreme Court has said they must be—appellate review must be truly deferential.²⁴² Several expressed great respect for district judges, recognizing that they *should* have the discretion now afforded them because they take their sentencing responsibility very seriously and most often get it right.²⁴³ Judge Jones, cited by the Commission as one expressing concern about lack of

²⁴¹ Commission Testimony at 15.

²⁴² Tr. of Hearing Before the U.S. Sent’g Comm’n, New York, N.Y., at 65 (July 9, 2009) (Judge Fisher) (“[W]here a district court adheres to the correct processes for imposing a sentence and fully explains its reasoning, it is unlikely that the resulting sentences will be found substantively unreasonable.”); *id.* at 35-36 (Judge Kavanaugh) (“[T]he guidelines are advisory, and therefore the appellate role with respect to substantive review is going to be very, very limited.”); *id.* at 50-53 (Judge Howard) (explaining that even when he disagreed with a below-guideline sentence after *Booker*, where the district court provided an explanation for the sentence, “it was very hard for us to say that a reasonable person could not accept that explanation”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 27 (Oct. 20, 2009) (Judge Hartz) (“[N]ow that appellate courts review the length of the sentences only for substantive reasonableness, appellate review will rarely result in setting aside the sentence below.”); *id.* 40 (Judge Tacha) (“[N]ow on appellate review, what we’re really looking at is did the district judge look at the 3553(a) factors. . . . [I]t pretty much boils down to did they look at 3553(a) and do it right.”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Stanford, Calif., at 54-55 (May 27, 2009) (Judge Tallman) (“I think it’s very difficult for the court of appeals to declare it substantively unreasonable.”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 211 (Sept. 9, 2009) (Judge Sutton) (“We’re essentially engaged in abuse-of-discretion review. We can’t treat it as a math problem, *Gall* reminds us.”); *id.* at 213 (Judge Boggs) (“We’re starting over again with something of a mandate for leniency, . . . [and] judges are trying to conscientiously apply this reasonableness standard that the Supreme Court has given us.”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 227 (Nov. 20, 2009) (Judge Benavides) (“[T]here’s got to be room for discretion.”).

²⁴³ Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 211, 237 (Sept. 9, 2009) (Judge Sutton) (emphasizing that “it’s very difficult to draw distinctions between and among defendants, particularly when we’re not the ones who eye-balled the defendant. We’re not the ones who were at the hearing. We’re not the ones who heard the allocution. We’re not the ones that heard any other evidence” and “most judges in our circuit [are] paying a lot of attention to the guideline recommendations and when they’re not following them, they’re thinking pretty hard about it”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 226, 240 (Nov. 20, 2009) (Judge Benavides) (“I think it’s a healthy thing to give discretion to the district courts because they are judges [Y]ou’ve got the best of both worlds.”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 55 (Oct. 20, 2009) (Judge Tacha) (expressing confidence that judges conscientiously exercise their discretion); Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 230 (Nov. 20, 2009) (Judge Jones) (“[T]he basic responsibility in sentencing is with the district judge.”); Tr. of Hearing Before the U.S. Sent’g Comm’n, New York, N.Y., at 53 (July 9, 2009) (Judge Howard) (“I have had a chance to review a lot of sentences, even since *Gall*, and we can understand what the district court is thinking.”).

clarity,²⁴⁴ stated that “the basic responsibility in sentencing is with the district judge” and emphasized that it is the district judge who “sees the defendant, . . . see[s] the family, . . . [the] body language, all sorts of background events about the defendant that people on an appellate court simply can’t. So there’s no question in my mind that the sentencing judge is the ultimate repository of power here.”²⁴⁵

Appellate judges who were asked if there was a need for statutory reform said that there was no such need,²⁴⁶ even when pressed to agree that a stricter standard is needed because district courts may now disagree with the guidelines.²⁴⁷ Others, rather than agreeing that a stricter standard should be imposed, urged the Commission to provide justifications for its guidelines, both to assist district judges in determining whether or not to follow them and to assist the courts of appeals in reviewing sentences.²⁴⁸ Others urged the Commission to provide better data regarding the rates of, and reasons for, variances in certain cases.²⁴⁹ Judge Sutton emphasized that, while it would be helpful to have more detailed statistics from the Commission, the current system “as a matter of policy seems to be a positive one in many respects,” particularly its recognition of “individualized sentencing.”²⁵⁰ Others supported the most

²⁴⁴ Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 249 (Nov. 20, 2009) (Judge Jones) (“[I]t is very difficult to find a principle[d] basis, after *Gall* and *Kimbrough*, for saying that a sentence is unreasonable.”).

²⁴⁵ Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 230 (Nov. 20, 2009) (Judge Jones).

²⁴⁶ Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 214 (Sept. 9, 2009) (Judge Boggs); Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 54, 55 (Oct. 20, 2009) (Judge Tacha).

²⁴⁷ Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 55 (Oct. 20, 2009) (Judge Tacha).

²⁴⁸ Tr. of Hearing Before the U.S. Sent’g Comm’n, Atlanta, Ga., at 24-25 (Feb. 10, 2009) (Judge Tjoflat) (“[T]he Commission ought to tell judges, out to tell the world when they set the norm, here is why we are setting the norm and tie the setting to one of the sentencing factors in 3553(a.)”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 27 (Oct. 20, 2009) (Judge Hartz) (“What I would recommend for consideration is an expansion of the guidelines manual to include additional commentary providing the rationale for various provisions. . . . [N]ow that the guidelines are only advisory, they must not only be understandable, but also persuasive.”).

²⁴⁹ Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 210, 233-34 (Sept. 9, 2009) (Judge Sutton) (suggesting that the Commission might provide statistics showing that there are a large number of significant downward variances for certain offenses, which “would give appellate judges more comfort in continuing to affirm them or primarily affirming them,” and suggesting that appellate judges could use that information to “justify significant variances”); Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 220 (Nov. 20, 2009) (Judge Jones) (suggesting that the Commission could go “into deeper analysis when variances occur” or categorize and explain the “underlying factors that cause an enhancement or a downward departure or variance”).

²⁵⁰ Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 235 (Sept. 9, 2009) (Judge Sutton).

deferential review possible and recommended against detailed appellate involvement.²⁵¹ Judge Loken made several recommendations to *reduce* the appellate courts' involvement in sentencing appeals, not to provide stricter review authority.²⁵²

A number of appellate judges, now well over two years ago, may still have been unsure how to apply substantive reasonableness review.²⁵³ It should not be surprising that it would take some time to adjust to the reasonableness standard, after enforcing the guidelines for many years and substituting their own judgment for at least two years. Those standards were deemed unconstitutional in *Booker*.²⁵⁴ As such, even the lone appellate judge who clearly wished for greater power to reverse sentences acknowledged that his wish was unconstitutional.²⁵⁵

In any event, the appellate judges who testified at the regional hearings have now found their bearings. For example, Judge Tjoflat wondered at the regional hearing “how [] you cabin the district court,”²⁵⁶ but the Eleventh Circuit has now vacated thirteen sentences for procedural error or substantive unreasonableness, including the sentence of Jose Padilla.²⁵⁷ Similarly,

²⁵¹ Tr. of Hearing Before the U.S. Sent’g Comm’n, Atlanta, Ga., at 19-20 (Feb. 10, 2009) (Judge Shedd) (stating that he would prefer “the *most deferential* standard of review” possible, even no review at all). Judge Loken said that the mandatory guidelines had resulted in a “great deal of appellate work for a very modest benefit,” had hoped that this would end with advisory guidelines, and was sorry that it hadn’t. Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 34 (Oct. 20, 2009).

²⁵² *Id.* at 37-38, 47.

²⁵³ Tr. of Hearing Before the U.S. Sent’g Comm’n, Stanford, Calif., at 46 (May 27, 2009) (Judge Kozinski); Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 208-210 (Sept. 9, 2009) (Judge Sutton); *id.* at 214 (Judge Boggs); *id.* at 237 (Judge Easterbrook); Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 53 (Oct. 20, 2009) (Judge Tacha); Tr. of Hearing Before the U.S. Sent’g Comm’n, Austin, Tex., at 219 (Nov. 20, 2009) (Judge Jones).

²⁵⁴ *United States v. Booker*, 543 U.S. 220, 234-35, 245, 259 (2005) (excising § 3553(b) and § 3742(e)).

²⁵⁵ Tr. of Hearing Before the U.S. Sent’g Comm’n, Stanford, Calif., at 46 (May 27, 2009) (Judge Kozinski) (“Any sort of attempt to try to deduct a good formula, that’s exactly the sort of thing we’re not supposed to do on the book, and just provide some hard constraints, because at that point those things become mandatory and they become [un]constitutional.”); *id.* at 78 (“If the Sentencing Commission can’t solve the problem, Congress can’t solve the problem either because the problem then winds up being unconstitutional.”); *see also* Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 237 (Sept. 9, 2009) (Judge Easterbrook) (“I wonder whether after *Booker* it’s feasible.”).

²⁵⁶ Tr. of Hearing Before the Sent’g Comm’n, Atlanta, Ga., at 31 (Feb. 10, 2009).

²⁵⁷ *United States v. Janyousi [Padilla]*, 657 F.3d 1085 (11th Cir. Sept. 19, 2011); *United States v. Luster*, 388 Fed. App’x 936 (11th Cir. 2010); *United States v. Kirschner*, 397 Fed. App’x 514 (11th Cir. 2010); *United States v. Mattox*, 402 Fed. App’x 507 (11th Cir. 2010); *United States v. Lopez*, 343 Fed. App’x 484 (11th Cir. 2009); *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010); *United States v. Livesay*, 587 F.3d 1274 (11th Cir. 2009); *United States v. McVay*, 294 Fed. App’x 488 (11th Cir. 2008); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008); *United States v. Narvaez*, 285 Fed. App’x 720 (11th Cir. 2008);

Judges Sutton and Boggs expressed some “concern” that the reasonableness standard does not provide enough guidance,²⁵⁸ but the Sixth Circuit has now vacated thirty-six sentences for procedural error or substantive unreasonableness.²⁵⁹

In its testimony before Congress, the Commission also quoted more recent comments made by Judge Lynch at the Commission’s national training seminar last June. According to the Commission, Judge Lynch observed that “courts of appeals will usually look for any ‘procedural hook’ to justify vacating a sentence that the court of appeals believes to be too high or too low rather than holding that the sentence is substantively unreasonable,” and he described this practice as “intellectually dishonest.”²⁶⁰ Since that time, Judge Lynch sat on the panel in *United States v. Preacely*, which reversed, for procedural error, a below-guideline sentence in a career offender case because it was not clear that the district court understood that the career offender guideline is not mandatory.²⁶¹ Because the court reversed for procedural error, it did not reach the question whether the sentence was substantively unreasonable.²⁶² Judge Lynch wrote

United States v. [Julio] Magana, 279 Fed. App’x 756 (11th Cir. 2008); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008); *United States v. Prather*, 279 Fed. App’x 761 (11th Cir. 2008).

²⁵⁸ Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 205-11, 214 (Sept. 9, 2009).

²⁵⁹ *United States v. Bistline*, ___ F.3d ___, 2012 WL 34265 (6th Cir. 2012); *United States v. Wright*, 426 Fed. App’x 412 (6th Cir. 2011); *United States v. Watkins*, 2011 WL 6144314 (6th Cir. Dec. 12, 2011); *United States v. Censke*, 2011 WL 6005199 (6th Cir. Dec. 2, 2011); *United States v. Worex*, 420 Fed. App’x 546 (6th Cir. 2011); *United States v. Montague*, 2011 WL 4950057 (6th Cir. Oct. 19, 2011); *United States v. Davy*, 2011 WL 2711045 (6th Cir. July 12, 2011); *United States v. Taylor*, 648 F.3d 417 (6th Cir. 2011); *United States v. Pizzino*, 419 Fed. App’x 579 (6th Cir. 2011); *United States v. Goff*, 400 Fed. App’x 1 (6th Cir. 2010); *United States v. Wallace*, 597 F.3d 794 (6th Cir. 2010); *United States v. Rhodes*, 410 Fed. App’x 856 (6th Cir. 2010); *United States v. Temple*, 404 Fed. App’x 15 (6th Cir. 2010); *United States v. Pritchard*, 392 Fed. App’x 433 (6th Cir. 2010); *United States v. Ross*, 375 Fed. App’x 502 (6th Cir. 2010); *United States v. Worex*, 420 Fed. App’x 546 (6th Cir. 2011); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010); *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010); *United States v. Fenderson*, 354 Fed. App’x 236 (6th Cir. 2009); *United States v. Howell*, 352 Fed. App’x 55 (6th Cir. 2009); *United States v. Delgadillo*, 318 Fed. App’x 380 (6th Cir. 2009); *United States v. Simpson*, 346 Fed. App’x 10 (6th Cir. 2009); *United States v. Robertson*, 309 Fed. App’x 918 (6th Cir. 2009); *United States v. Recla*, 560 F.3d 539 (6th Cir. 2009); *United States v. Penson*, 526 F.3d 331 (6th Cir. 2008); *United States v. Stephens*, 549 F.3d 459 (6th Cir. 2008); *United States v. Peters*, 512 F.3d 787 (6th Cir. 2008); *United States v. Ortega-Rogel*, 281 Fed. App’x 471 (6th Cir. 2008); *United States v. Harris*, 339 Fed. App’x 533 (6th Cir. 2009); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008); *United States v. Hughes*, 283 Fed. App’x 345 (6th Cir. 2008); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009); *United States v. Grams*, 566 F.3d 683 (6th Cir. 2009); *United States v. Gapinski*, 561 F.3d 467 (6th Cir. 2009); *United States v. Blackie*, 548 F.3d 395 (6th Cir. 2008); *United States v. Henry*, 545 F.3d 367 (6th Cir. 2008).

²⁶⁰ Commission Testimony at 16-17.

²⁶¹ 628 F.3d 72, 81-82 (2d Cir. 2010).

²⁶² *Id.* at 83.

separately to emphasize that, though “great deference is due to the district court’s judgment as to sentencing,” the appellate court nevertheless must ensure that the district court considered evidence relevant to the § 3553(a) factors and that, if credited by the district court, suggests the career offender guideline recommends a sentence greater than necessary to serve sentencing purposes.²⁶³ He noted that if the district court misunderstood its authority, “great harm would be done if we upheld a sentence that imposed long years in prison on an offender who no longer presents a danger, when a lesser sentence would better serve the purposes of criminal law.”²⁶⁴ Far from being “intellectually dishonest,” the appellate review applied in *Preacely* embodies the principle that review for procedural error is a straightforward and meaningful way to ensure that the district court actually exercised its discretion under the factors made relevant by the statute and in light of the evidence presented. On remand, the district court sentenced Mr. Preacely to 72 months in prison, nearly two years less than the original sentence.

The Commission has also quoted the comments of dissenting judges in the Eighth and Ninth Circuits setting forth the view that substantive review is effectively “no review” at all.²⁶⁵ The judge quoted from the Eighth Circuit said that a sentencing court need only give “lip service and a bit of discussion to the relevant § 3553(a) factors” and the sentence “will almost never be reversed, procedurally or otherwise.”²⁶⁶ But the Eighth Circuit has reversed three below-guideline sentences (including one as substantively unreasonable), one within-guideline sentence, and one above-guideline sentence, demonstrating that it can exercise meaningful review under the current standard of review. The Ninth Circuit, too, has applied the current standard of review to reverse as substantively unreasonable two sentences within the guideline range, including *Amezcuva-Vasquez*,²⁶⁷ one below-guideline sentence for substantive error on the government’s appeal,²⁶⁸ and six others for procedural error.²⁶⁹ It is not accurate to suggest that there is no appellate review in those circuits.

Conclusion

²⁶³ *Id.* 84-85 (Lynch, J., concurring).

²⁶⁴ *Id.* at n* (Lynch, J., concurring).

²⁶⁵ Commission Testimony at 15-16.

²⁶⁶ *Id.* at 16.

²⁶⁷ *United States v. Amezcuva-Vasquez*, 567 F.3d 1050 (9th Cir. 2009); *United States v. Paul*, 561 F.3d 970 (9th Cir. 2009).

²⁶⁸ *United States v. Bragg*, 582 F.3d 965 (9th Cir. 2009).

²⁶⁹ *United States v. Mota*, 2011 WL 2003433 (9th Cir. May 24, 2011); *United States v. Ferguson*, 412 Fed. App’x 974 (9th Cir. 2011); *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011); *United States v. Oba*, 317 Fed. App’x 698 (9th Cir. 2009); *United States v. Medawar*, 270 Fed. App’x 488 (9th Cir. 2008); *United States v. Wahnine*, 543 F.3d 546 (9th Cir. 2008).

The system is working in a reasonably healthy way for the first time since the Sentencing Reform Act of 1984 was enacted. Instead of seeking legislative change, the Commission should fully support the existing system, encourage the dialogue that has resulted in much needed examination of troublesome guidelines, and cooperate with the interactive process by directing its energies toward amending guidelines that require punishment that is greater than necessary to serve the purposes of sentencing and guidelines that promote unwarranted disparities.