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Sentencing Commissioners
United States Sentencing Commission
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Dear Commissioners:

We write in response to two broad issues raised at the Commission's March hearing on the 2009 amendments: (1) the role of empirical evidence in guideline development and amendment, and (2) how the Commission should respond to congressional directives. We want our positions on these issues to be clear, because we believe that they would produce a more fair set of guidelines, are consistent with a strong institutional role for the Commission, and provide grounds for a productive and cooperative working relationship between the Defenders and the Commission.

Recent Supreme Court decisions highlight the importance of empirical data in the development of guidelines that are useful to judges. While making the guidelines advisory, the Court's decisions describe why judges may still find the guidelines useful when they are developed by the Commission acting in its characteristic institutional role as an independent expert agency. We believe the Court's reasoning is sound, but recognize the dilemma these decisions present for the Commission in light of mandatory minimum penalties and specific congressional directives to increase penalties, which we understand the Commission views as binding. The use of empirical evidence is central to the Commission's characteristic institutional role as defined by the Sentencing Reform Act (SRA). Guidelines that are tied to unsound congressional actions rather than empirical evidence deny judges the benefit of the Commission's unique capacities and make the guidelines less useful to judges performing their duties under § 3553(a).

The Supreme Court's decisions have re-invigorated those provisions of the SRA that direct the Commission to develop and amend the guidelines based on empirical research and feedback from judges. The leadership in Congress has indicated its willingness to respect the Commission's exercise of its characteristic institutional role. In this new environment, we believe the Commission has the opportunity to resolve the dilemma that has plagued it from its inception and establish its proper place in developing sentencing policy.

I. Empirical Data and Research Should Play the Primary Role in the Development of the Guidelines.

A. The SRA's stated purpose for establishing the Commission, as well as the duties it imposes and the powers it grants to the Commission, make clear that the guidelines were meant to be developed and amended based on empirical evidence.

We were asked at the March hearing what provisions of the SRA direct the Commission to develop guidelines based on empirical evidence. We believe these are the core provisions that define the Commission's characteristic institutional role and were meant to ensure that the guidelines provide useful advice to judges. The Commission was established for the purpose of developing sentencing policies and practices that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)," and that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A), (C). The second basic purpose of the Commission is to "develop means of measuring the effectiveness of sentencing policies in meeting the purposes of sentencing set forth in section 3553(a)(2)." 28 U.S.C. § 991(b)(2). The legislative history explains that Congress included the latter provision to emphasize "the importance of sentencing and corrections research in the process of improving the ability of the Federal criminal justice system to meet the goals of sentencing." S. Rep. No. 98-225 at 162 (1983).

To enable the Commission to carry out these purposes, Congress gave the Commission extensive research and data collection and dissemination authority, including the enumerated powers to "collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;" to "collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;" and to "collect systematically and disseminate information regarding effectiveness of sentences imposed." 28 U.S.C. § 995(a)(13), (15), (16). Congress considered these powers to be "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." S. Rep. No. 98-225 at 182 (1983).

In addition, the SRA imposes specific duties on the Commission that require it to consider empirical data. Section 994(m) required the Commission to ascertain average sentences imposed and the prison time actually served as a starting point in developing the guidelines, and then to "independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2)." Section 994(o) directs that "[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." Section 994(g) directs that "[t]he sentencing guidelines prescribed under this chapter shall be formulated to

minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission."

In addition to these provisions of the SRA requiring the Commission to develop the guidelines based on empirical data and research, the guideline development procedure outlined in the SRA contemplated that the Commission would set its own agenda and develop the content of the guidelines based on empirical data and consultation, and that, *after* that careful process, it would send the results to Congress for its review.[1] We recognize that, instead, Congress has often determined the content of the guidelines and occupied the Commission's agenda through a variety of directives and legislation. We address this problem in Part II.

B. The Supreme Court has emphasized that guideline development based on empirical data and research is what makes the guidelines useful to judges.

In our testimony before the Commission, and in arguments in courtrooms throughout the country, the Defenders emphasize that empirical data and research provide the soundest basis for guideline development and amendment. In this, we are adopting the Supreme Court's reasoning as to why, and when, courts may or may not find the guidelines' recommendations useful. Although the Court's decisions overstate the extent to which the current guidelines reflect the Commission's use of both data on pre-guidelines sentencing practice and subsequent data on rates and reasons for sentences outside the guideline range, the Court is surely correct that empirical data and research, of the type the Commission was established to conduct, provides the soundest basis for guidelines that can be useful to judges.

A brief review of the reasoning of the Court's decisions leaves no doubt as to its view of the importance of empirical evidence in guideline development. In explaining why the courts of appeals may accord a presumption of reasonableness to a within-guideline sentence, the Court relied heavily upon the Commission's use of, and ability to use, empirical data. This made it "fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve §3553(a)'s objectives." *Rita v. United States*, 127 S. Ct. 2456, 2464-65 (2007). In reaching this conclusion, the Court relied upon the original Commission's description of its "empirical approach" to guideline development, which began "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." *Id.* at 2464, quoting USSG § 1A1, intro. to comment., pt. A, ¶ 3. The Court, relying on the SRA, also emphasized that "the Commission's work is ongoing," and that "[t]he statutes and the Guidelines themselves foresee continuous evolution" of the guidelines based on collection and examination of sentencing results and judges' stated reasons for imposing sentences outside the guideline range. *Id.* at 2464.

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[1] The guidelines shall be promulgated pursuant to notice and comment procedures. 28 U.S.C. § 994(x). The Commission shall periodically review and revise the guidelines "in consideration of comments and data coming to its attention," and in doing so, to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). After this development and promulgation process, the Commission shall submit amendments to Congress for its review. 28 U.S.C. § 994(p).

Later cases emphasize the connection between the use of empirical data in the development of a particular guideline and the usefulness of that guideline's recommendation.[2] In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Court analyzed in great detail whether the SRA procedures were the basis for the guideline in question. It then concluded that "[t]he Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses." *Id.* at 567. The Court noted that "the Commission fills an important institutional role: it has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" *Id.* at 574. But where a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role," because the Commission "did not take account of 'empirical data and national experience,'" the court is free to conclude that the guideline recommendation does not offer useful advice as to the sentence that best complies with § 3553(a).[3] *Id.* at 575.

The Supreme Court is not alone in highlighting the importance of empirical data in guideline development and amendment. Empirical data and scientific research are generally accepted as the foundation of sound policy development. The Commission has repeatedly proven the value of empirical analyses in Working Group Reports and Reports to Congress. Research on the relative harmfulness of powder and crack cocaine, and the quantities of drugs associated with offenders performing various functions, was central to the Commission's recommendation that crack cocaine penalties be reduced, as the Supreme Court recognized in *Kimbrough*. Data from the Commission's recent *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (Nov. 2008) was relied upon by the Court in *Chambers v. United States*, 129 S. Ct. 687 (2009). The need for reliable information on the projected impact of sentencing policy changes on prison populations has been recognized by Congress and is a core research capacity of the Commission. *See* 18 U.S.C. § 4047.

Other sentencing commissions have used empirical research and prison population projections to write guidelines to successfully control prison overcrowding.[4] The Virginia

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[2] In *Gall v. United States*, 128 S. Ct. 586 (2007), the Court said that the guidelines are "the product of careful study, based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," but that "not all of the Guidelines are tied to this empirical evidence." *Id.* at 594 & n.2.

[3] The lower courts have applied this reasoning to all of the guidelines. *See, e.g., United States v. Mondragon-Santiago*, __ F.3d __, 2009 WL 782894 (5th Cir. Mar. 26, 2009); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008); *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008); *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008).

[4] Sean Nicholson-Crotty, *The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time*, 50 Crime & Delinquency 395 (2004); Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. Crim. L. & Criminology 696 (1995).

Criminal Sentencing Commission used empirical data, similar to that used in the Commission's recidivism reports,[5] to write guidelines that assist judges in identifying offenders who require incarceration due to special risks, and offenders for whom alternative sanctions can safely be used.[6] Moreover, experience suggests that advisory guidelines have some advantages over presumptive guidelines, and if developed with empirical data and feedback from judges, can successfully achieve proportionate punishment and avoid unwarranted disparities.[7] The SRA's promise of guidelines based on empirical research has yet to be realized, but remains a powerful argument in favor of advisory guidelines and a Commission that acts as an independent expert agency.

C. The evidence upon which the Commission relies should be reliable and material to the question before the Commission.

We are aware that the Commission has before it a range of empirical data and other information when amending the guidelines. It is not enough, however, that empirical data or other information be considered; it should be reliable and material to the specific question before the Commission. As noted above, the primary purpose of the Commission is to establish policies and practices that meet the purposes of sentencing. The empirical data that is material to this purpose evaluates the effectiveness of a current guideline at achieving its goals, or illuminates whether a proposed amendment would make the guideline more or less effective. Given that judges have an additional duty to impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing, amendments that increase penalties require particular justification. We do not believe, for example, that information about the harms caused by a category of crime, or a generalized need to deter, is a sufficient basis for upward guideline amendments in the absence of empirical data demonstrating that current penalties fail to punish adequately for those harms or that marginally increased penalties would better deter.

Departure and variance rates are an example of the kind of data the Commission should consider. The Supreme Court in *Rita*, 127 S. Ct. at 2464, and the Commission have both recognized that departures and variances are "an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines," and that "such feedback enhance[s] its ability to fulfill its ongoing statutory

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[5] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); USSC, *Recidivism and the First Offender* (May 2004); USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005).

[6] Brian J Ostrom et al., Nat'l Ctr. for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). *Available at* http://www.vcsc.state.va.us/risk_off_rpt.pdf.

[7] Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the post-Blakely Era,* 17 Fed. Sent. Rep. 233, 237 (2005) (noting "another strength of advisory guidelines systems is the potential for judicial 'buy-in' to the system, if judges are involved in their construction and allowed regular meaningful feedback. This can lessen the 'gaming' that may occur in presumptive systems.").

responsibility under the Sentencing Reform act to periodically review and revise the guidelines." USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, at 5 (Oct. 2003). A "high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly." *Id.* The original Commission indicated that the guidelines should "specify an augmentation" only when "the sentencing data...permit the Commission to conclude that the factor [is] empirically important." *See* USSG, Ch. 1, pt. A, § (4)(b).

The discussion at the March hearing of whether individuals who suffer non-monetary harm as a result of identity theft should be treated as "victims" under USSG § 2B1.1 provides an apt example of immaterial evidence presented in support of a penalty increase in the absence of empirical evidence that current penalties are too low. The Commission heard testimony about non-monetary harms that can result from identity theft. But we are unaware of any data suggesting that judges find the currently available penalties under the guidelines inadequate to punish for these harms. Moreover, the question the Commission was given by Congress concerned whether an increase in penalties would better *deter* these crimes. We presented a review of the best criminological research on this question, which concludes that no increase in deterrence results from a marginal increase in punishment. We also pointed to the Commission's own data showing that offenders likely to be convicted of identity theft present a low risk of recidivism. None of this research was refuted by better evidence. This leads to the conclusion that no amendment is necessary, based on the seriousness of the offense, the need for general deterrence, or the need to protect the public from further crimes of the defendant.

The overarching problem is that the Commission has never articulated a consistent methodology for evaluating the guidelines' effectiveness.[8] This presents several dangers, including that guideline amendment will proceed *ad hoc,* resulting in anomalous and disparate approaches. Thus, we urge the Commission to explain in the commentary of each guideline what purpose or purposes the guideline is intended to serve, how the specific guideline elements are meant to achieve those purposes, and on what basis the Commission concluded that the guideline would be effective. This would permit judges to recognize whether a guideline works as intended in a particular case. It would enable the Commission to explain to Congress why a particular directive may be inconsistent with a guideline's overall approach. And it would make clear what empirical evidence is relevant to evaluating how a guideline is working and whether amendment is needed.

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[8] *See, e.g.*, Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines,*40 Am. Crim. L. Rev. 19 (2003); Aaron Rappaport, *Unprincipled Punishment: The U. S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 Buff. Crim. L. Rev. 1043 (2003).

D. Extreme or hypothetical cases should not be used to increase guideline ranges. Representative case examples can clarify how the current guidelines operate and how a proposed amendment would operate.

At the March hearing, we also were asked to clarify our position on the use of case examples. We believe that guideline ranges should not be increased based on sensational, extreme, or hypothetical cases in the absence of empirical data showing that an increase is necessary. However, we believe that case examples can be useful in clarifying whether a guideline should be amended at all, and if so, how broad or narrow the language of the amendment should be. For this reason, we regularly survey the Defender community, and conduct further research, to determine how the current guidelines operate in practice, and how a proposed amendment would operate in practice. For example, we provided the Commission with numerous examples of cases involving the distribution of Schedule III, IV and V substances, including online pharmacy cases, to inform the Commission how the guidelines currently operate, what kinds of cases and defendants would be affected by amending the guidelines, and how they would be affected.[9] Case examples can provide useful insights that may not be evident in the available data, such as the examples of cases involving submersible vessels presented this year, and the examples of disaster fraud cases presented last year.

II. Congressional Directives and Commission Responses

A. Congress has given the Commission conflicting directives.

The Commission is bound to comply with congressional directives. However, the Commission has been given conflicting directives, and the question is often not *whether* it will comply but with *which* of conflicting directives it will comply. The Commission's answer determines whether it acts in the characteristic institutional role defined by the core provisions of the SRA or acts as a conduit for policies of the political branches. We understand the Commission's dilemma: specific, unambiguous directives from Congress have been held to bind the Commission to actions that it has itself determined are contrary to the goals of the SRA. *See United States v. LaBonte*, 520 U.S. 751 (1997), discussed further below. Such directives create a conflict with the Commission's role as an independent expert agency. We believe the Commission should interpret directives, when possible, to avoid conflict with its institutional role.

We understand that the Commission exercises powers delegated to it by Congress. But this delegation was part of a comprehensive reform package resulting from a careful, decade-long deliberative process leading to passage of the SRA in 1984. Because they are so fundamental, the provisions of the SRA defining the Commission's institutional role are more general than many later directives. But this does not make them hollow abstractions that carry

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[9] *See* Written Statement of Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee Before the United States Sentencing Commission, Public Hearing on Proposed Amendments for 2009, March 17-18, 2009, Re: Ryan Haight Online Pharmacy Consumer Protection Act of 2008; Letter from Amy Baron-Evans and Jennifer Coffin to the Commission Re: Public Comment Testimony Related to Briefing on Online Pharmacy Consumer Protection Act of 2008, December 8, 2008.

little force in defining the procedures for amending the guidelines or their substance. The overall framework of the SRA establishes expectations about how the Commission performs its duties and what the guideline recommendations represent. Specific directives and other congressional actions, on the other hand, have often been enacted piecemeal and hastily, with little or no evidence or deliberation. They should not be read as eclipsing the SRA if such a reading can possibly be avoided.

The potential conflict between congressional actions and the Commission's intended role under the SRA cannot be wished away by imagining that any congressional policy or directive must result in guideline recommendations that comply with judges' duties under § 3553(a).[10] This theory was considered and rejected by the Supreme Court in *Kimbrough* and it is implausible on its face. Congress has not imposed upon itself the same purposes or duties that the SRA imposes on the Commission. It is under no obligation to ensure that the guidelines meet the purposes of sentencing, to review the guidelines as a whole, to conduct empirical research, or to consult with criminal justice authorities and all stakeholders. It is under no obligation to ensure appropriately different sentences for criminal conduct of different seriousness. Its directives are not reviewable by the courts to ensure even a rational relationship with the purposes of sentencing. To the contrary, Congress is free to legislate piecemeal in response to a highly publicized case, or in response to lobbying by the Department of Justice or interest groups seeking sentence increases for purposes other than those set forth in § 3553(a). While the SRA demonstrates that Congress *can* legislate thoughtfully, considerable history shows that it does not always do so. That is one reason why it created the Commission.

B. The Commission should take steps to reduce the conflict between the SRA and subsequent legislation.

1. Oppose specific directives and mandatory minimum penalties.

Early in the guidelines era commentators recognized that congressional interference with the work of the Commission is a "betrayal of sentencing reform."[11] One original Commissioner even resigned over this issue, warning that congressional micro-management was emerging as a fatal flaw in guideline amendment.[12] The remaining Commissioners tended to emphasize the

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[10] We were disappointed to see the Commission make such an argument, contrary to its own research on the disparity created by the 100 to 1 quantity ratio for powder and crack cocaine. *See* Brief for the United States Sentencing Commission as *Amicus Curiae* in Support of Respondent at 28, *Rita v. United States*, 127 S. Ct. 2456 (2007) (No. 06-5754).

[11] *See, e.g.*, Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 30 Fed. B. News & J. 158 (1993).

[12] Paula Yost, *Sentencing Panel Member Resigns over Research*, Wash. Post, Aug. 23, 1989, at A25 (reporting Commissioner Block's resignation "over what he said is a lack of commitment by commissioners to base decisions on research and scientific data when amending sentencing guidelines"); Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or*

role of research in their public descriptions of guideline development and ignore or understate the role of Congress.[13] They did, however, make a vigorous public case for the role given the Commission by the SRA and they attempted to convince Congress to allow the Commission to perform this role.

In 1991, the Commission published an excellent report that explained how the guidelines and mandatory penalties were "policies in conflict" and how congressional micro-management seriously compromised the Commission's ability to develop guidelines to achieve the purposes of the SRA.[14] The report noted that, while preferable to mandatory minimum penalties, specific directives led to "technical and conceptual difficulties" that resulted in anomalies in the guideline structure. It noted that "to the extent that the Sentencing Commission finds it necessary to deviate from a literal interpretation of a specific statutory instruction in order to implement that directive consistent with the Sentencing Reform Act and overall guidelines scheme, there is an increased likelihood of litigation." Finally, it noted that specific directives are "potentially in tension with the fundamental [SRA] objectives of delegating to an independent, expert body in the judicial branch of government the finer details of formulating sentencing policy and revising that policy in light of actual court sentencing experience over time."[15]

We join the repeated requests of the Judicial Conference and other stakeholders that the Commission update and reissue its report on mandatory minimum penalties. The report should be expanded to explain the detrimental role played by specific congressional directives in shaping the guidelines. This analysis can build on the database of directives that the Defenders have assembled and are happy to share. The Commission should continue to oppose mandatory minimums, as well as specific directives that interfere with its ability to perform its role.

Sunset?, 27 Am. Crim. L. Rev. 289, 318-23 (1989) (discussing problems of political expediency and disarray of research activities with respect to amendments).

[13] In addition to the explanation found in the Introduction to the *Guidelines Manual*, the Commission issued a report that emphasized research and extensive consultation conducted prior to guideline implementation, but said little about the role of mandatory minimums. USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 24 n.122 (mentioning the effect of mandatory minimums on guideline development only in a footnote).

[14] Congress did not require the Commission to calibrate the guidelines to mandatory minimums. Accordingly, the Judicial Conference has urged the Commission, when deciding whether to amend the guidelines in response to a mandatory minimum, to make an assessment based on its own expert opinion and independent of any potentially applicable mandatory minimum. *See* Comments of the Criminal Law Committee of the Judicial Conference (March 16, 2007). If the resulting guideline is lower than the mandatory minimum, then, under USSG § 5G1.1, the mandatory minimum trumps only when it applies. *Id.*

[15] USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

2. Narrowly construe specific directives and seek reconsideration.

In *United States v. LaBonte*, 520 U.S. 751 (1997), the Supreme Court voided guideline commentary that was not strictly consistent with a directive the Court believed to be unambiguous. Because it found the directive unambiguous, the majority did not address important questions raised by Justice Breyer's dissent about the scope of the Commission's "broad delegated authority" to "reconcile Congress' general objectives . . . with a host of more specific statutory instructions."[16] *Id.* at 778 (Breyer, J., dissenting). Now that the Court has made the guidelines advisory, and has made clear that their usefulness depends on whether they are based on empirical data and national experience and designed to achieve the purposes of sentencing, the need for the Commission to reconcile specific directives with the SRA's core objectives is more crucial than ever if the guidelines and the Commission are to be relevant.

The Commission should interpret its authority to reconcile competing directives in the manner most consistent with it characteristic institutional role under the SRA. If the directive is one to study and amend if appropriate, the Commission should not amend unless careful study shows it to be necessary to satisfy sentencing purposes. If the directive is an express instruction to increase, but careful study shows that an increase is not necessary, the Commission should seek reconsideration, explaining to Congress why the directive is unsound. Congress specifically encouraged the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy." *See* 28 U.S.C. § 995(a)(20).

Occasionally, the Commission receives internally conflicting directives, as in the Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326 (Sept. 26, 2008).[17]

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[16] "Without broad delegated authority, it would not be possible to reconcile Congress' general objectives . . . with a host of more specific statutory instructions. Thus the very nature of the task, along with the structure of the Sentencing Act, indicates a congressional intent to delegate primarily to the Commission the job of interpreting, and harmonizing, the authorizing Act's specific statutory instructions—subject, of course, to the kind of judicial supervision and review that courts would undertake were the Commission a typical administrative agency." *LaBonte*, 520 U.S. at 778 (Breyer, J., dissenting). The Commission is not, of course, a typical administrative agency; it is not subject to many provisions of the Administrative Procedures Act. The Supreme Court has clearly held, however, that judges may review and reject a guideline as categorically unsound, *i.e.*, unsound even when applied to a "mine run" or ordinary case for which it was intended. *See Spears v. United States*, 129 S. Ct. 840, 843-44 (2009); *Kimbrough*, 128 S. Ct. at 575; *Rita*, 127 S. Ct. at 2465, 2468.

[17] Congress directed the Commission to "review" the guidelines and policy statements applicable to convictions under certain statutes "in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements," Pub. L. No. 110-326, § 209(a), and also directed the Commission, in determining "the appropriate sentence for the crimes enumerated," to consider "the extent to which the guidelines and policy statements may or may not account for" a set of thirteen factors "in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data." *Id.* § 209(b).

The Commission should explain to Congress that its intent to increase penalties is not supported by "current knowledge of human behavior as it relates to the criminal justice system," 28 U.S.C. § 991(b)(2), particularly empirical research relevant to the other directive to amend the guidelines if needed to create an effective deterrent, and that there is no evidence that increased penalties are needed to achieve any other purpose of sentencing.

C. If the Commission feels bound to increase penalties in response to a congressional directive, that should be clearly stated in the commentary to the guideline as the basis for amendment.

If the Commission believes itself bound to increase penalties in response to some types of congressional directives, it should make that clear in the commentary and reasons for amendment. Otherwise, the Commission may create a false impression that it amended the guideline according to the evidence-based procedures set forth in the SRA.[18] The Commission should avoid general references to sentencing purposes or *post hoc* rationalizations for an amendment that was, in fact, directed by Congress if the empirical evidence does not show the amendment to be necessary to achieve sentencing purposes.

When defendants receive a mandatory minimum sentence, Congress's responsibility for the sentence is clear. Many judges have felt compelled to explain to defendants and their families that their hands are tied; they must impose the mandatory sentence even though their judgment is that the sentence is unfair and excessive.[19] Given the role defined for the Commission by the SRA, judges should be able to expect that the guidelines reflect more than hastily enacted directives from Congress. Defendants should be able to expect that a sentence within the guidelines reflects the judgment of the sentencing court that the sentence is "sufficient, but not greater than necessary," to achieve the purposes of sentencing, informed by the independent findings of an expert agency that was charged with marshalling the best empirical research available for the development of federal sentencing policy. If these expectations are unfounded, the Commission must dispel those impressions or risk violating the warning in *Mistretta*: "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Mistretta v. United States*, 488 U.S. 361, 407 (1987).

In testimony at the regional hearing in Atlanta, Defenders presented detailed suggestions for how the Commission might seize the opportunity provided by *Booker* and the new Congress

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[18] The reasons should be stated in the commentary of the guideline itself, first, because many judges, lawyers and probation officers are unaware of Appendix C or find it to be inaccessible; and second, because the historical reasons for a guideline should be clear and understandable to anyone applying it.

[19] David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1 (2008); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U.L. REV. 645 (2004).

to achieve systemic changes that would finally allow it to play the role defined for it by the SRA. These included several of the suggestions reiterated here and many more. The changes we propose incorporate many of the Commission's own historic positions and seek to enhance the Commission's crucial institutional role as an independent expert agency in the Judicial Branch. We support the Commission in developing guidelines whose recommendations can win the respect of judges, not because they carry the force of coercive *ipse dixit*, but because they provide useful information -- generated by the Commission's unique institutional competence and empirical data -- regarding what sentence would best comply with § 3553(a).

Very truly yours,

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