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Public Hearing Before the
United States Sentencing Commission

"The Sentencing Reform Act of 1984: 25 Years Later"
New York, New York
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Thank you for holding this hearing and for inviting me to testify on behalf of the Federal Public and Community Defenders regarding how the federal sentencing system is working twenty-five years after the Sentencing Reform Act was enacted and what changes we believe should be made to improve it. The Defenders are required to "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful." 28 U.S.C. § 994(o).

I first want to express our appreciation for the Commission's work on crack cocaine sentencing. In the Eastern District of Virginia, where I am the Federal Public Defender, we have the highest number of crack cocaine prosecutions in the country. Since 1995, the Commission has worked to expose the inequities in sentencing crack cocaine offenders, and took the first step to remedy that injustice in 2007 by reducing the guideline range for crack offenders by two levels. I had the honor of arguing *Kimbrough v. United States*, 128 S. Ct. 558 (2007), in which the Supreme Court held that the district court had properly accorded weight to the Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a). The Department of Justice under President Obama has recently announced its belief that the disparity in crack and powder cocaine sentences is unwarranted and must be eliminated. Without the Commission's empirical research, none of this would have been possible.

We believe that the federal sentencing system is working much better as a result of the Supreme Court's decisions rendering the guidelines advisory. Judges must now impose a sentence that is sufficient, but not greater than necessary, to achieve just punishment, respect for law, deterrence, protection of the public, and rehabilitation. In addition to the guideline range, judges must now consider all of the circumstances of the offense, and the history and characteristics of the defendant, and can openly disagree with a guideline sentence, even in an ordinary case.[1] Consequently, sentencing in federal court has become more just, honest, and focused on the purposes of sentencing. Except when a mandatory minimum statute applies, judges are no longer required to impose sentences that are too severe. Now that judges may consider all relevant factors in sentencing, the number of sentences outside the guideline range has moderately increased. We believe that this is healthy. With increased judicial feedback, the guidelines can "constructively evolve over time, as both Congress and the Commission

[1] *See Cunningham v. California*, 549 U.S. 270, 279-81 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).

foresaw."[2] "[A]dvisory guidelines . . . and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'"[3] As "the Commission revis[es] the advisory Guidelines to reflect actual sentencing practices consistent with the statutory goals," "district courts will have less reason to depart from the Commission's recommendations."[4]

One of the benefits of advisory guidelines is that judges can now act as a check on prosecutorial control of sentencing. When the guidelines were mandatory, judges could not easily compensate for the disparate effects of prosecutors' influence over the guideline range, and mechanisms in the guidelines intended to ameliorate those effects did not work as intended, or worked only in one direction.[5] While prosecutors still largely control the facts that set the guideline range, judges must now consider other factors that are relevant to just punishment, thus reducing unwarranted disparity and excessive uniformity. In addition, judges can now directly reduce prosecutor-created disparity by correcting for unwarranted disparity among co-defendants,[6] by taking cooperation into account when relevant to sentencing purposes despite the absence of a government motion,[7] and by lessening unwarranted disparity created by the absence of a fast track program.[8]

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[2] *Rita*, 127 S. Ct. at 2469.

[3] *Kimbrough*, 128 S. Ct. at 573-74, quoting *Booker*, 543 U.S. at 264.

[4] *Rita*, 127 S. Ct. at 2482-83 (Scalia, J., concurring).

[5] "Disparate effects of charging and plea bargaining [were] a special concern in a tightly structured system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced. While the guidelines contain some mechanisms to ameliorate the effects of disparate charging and plea bargaining practices – such as the relevant conduct and multiple count rules, and judicial review of plea agreements -- some of these mechanisms are not working as intended. By their nature, some of these mechanisms tend to work in one direction. The relevant conduct rule, for example, can increase sentences [b]ut there is no guidelines mechanism to decrease sentences for an offender who, for example [is] subject to multiple consecutive mandatory penalty enhancements." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 92 (Nov. 2004) (hereinafter "Fifteen Year Review").

[6] *Gall*, 128 S. Ct. at 600; USSC, 2008 Sourcebook, Table 25B (1,607 variances to avoid unwarranted disparity among defendants).

[7] *See United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Jackson*, 296 Fed. Appx. 408, 409 (5th Cir. 2008); *United States v. Doe*, 218 Fed. Appx. 801, 805 (10th Cir. 2007); *United States v. Nuno-Alvarez*, 182 Fed. Appx. 630, 631 (8th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006); USSC, 2008 Sourcebook, Table 25B (142 variances for cooperation without government motion).

[8] *See United States v. Rodriguez*, 527 F.3d 221, 225, 227 (1st Cir. 2008); *United States v. Seval*, 293 Fed. Appx. 834, 836 (2d Cir. 2008); *United States v. Ossa-Gallegos*, 491 F.3d 537, 538 (6th Cir. 2007) (en banc).

Mandatory minimums remain the most serious impediment to justice in federal sentencing and the main cause of over-incarceration. As the Commission projected and as shown by later research, mandatory minimums are the primary cause of the nearly five-fold increase in the prison population since 1987.[9] As the Commission found in 1991:

- the "lack of uniform application [of mandatory minimums] creates unwarranted disparity in sentencing"
- "honesty and truth in sentencing . . . is compromised [because] the charging and plea negotiation processes are neither open to public view nor generally reviewable by the courts"
- the "disparate application of mandatory minimum sentences . . . appears to be related to the race of the defendant"
- "offenders seemingly not similar nonetheless receive similar sentences," thus creating "unwarranted sentencing uniformity"
- "Since the power to determine the charge of conviction rests exclusively with the prosecution for the 85 percent of the cases that do not proceed to trial [now 96%], mandatory minimums transfer sentencing power from the court to the prosecution."

See USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* ii-iv (1991). These problems remain, and if anything, have grown over time. We are pleased that the Commission plans to conduct a new study of mandatory minimums, and that the Attorney General has expressed concern about mandatory minimums as well.

Recent testimony on behalf of the Department of Justice by the U.S. Attorney from Oregon asserted that judges are creating "disparity" when they sentence below the guideline range.[10] There is no basis to believe that judges' decisions to impose sentences below the guideline range are unwarranted, *i.e.*, based on irrelevant factors unrelated to the purposes of sentencing. In my experience, judges take their obligation to apply the § 3553(a) purposes and factors very seriously. Assuming for the sake of argument that some disparity is caused by sentences below the guideline range, the government moves for such sentences far more often than judges impose such sentences without a government motion. Since *Booker* was decided, in the District of Oregon itself, the rate of judicial below-guideline sentences has *decreased*, while the government rate has substantially *increased*.[11] Thus far in 2009, the government in this district moved for a below-guideline sentence based on substantial assistance or fast track in 21.5% of cases, and for other reasons in 11.8% of cases.[12] At the same time, it was said,

[9] USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements at 70, June 18, 1987; Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Federal Sentencing Reporter 29 (1993).

[10] *See* USSC Hearing, Testimony of Karin Immergut at 2, May 27, 2009.

[11] While the judicial rate decreased from 22.9% in 2005 to 19.4% in 2008 to 18.7% as of the second quarter of 2009, the government rate increased from 21.8% in 2005 to 32.6% in 2008 to 33.3% as of the second quarter of 2009. USSC, Federal Sentencing Statistics by State, District and Circuit, 2005-2008; USSC, Preliminary Quarterly Data Report, 2d Quarter Release.

prosecutors now routinely charge mandatory minimums in child pornography cases, routinely file § 851 notices in drug cases, and some AUSAs require either a plea to a mandatory minimum or an agreement to a guideline sentence with no ability to argue for departure or variance under Rule 11(c)(1)(C).[13]

While this testimony fails to show that judges are exercising discretion in a way that is unwarranted, it highlights a different problem – the use of mandatory minimums to control sentencing outcomes, in the prosecutor's sole discretion. Our office just had a case that arose after the Department of Justice announced its belief that the disparity in sentencing between crack and powder cocaine is unjust and must be eliminated. The case involved more than 50 grams of crack (by the client's uncounseled admission), and the client had two prior felony drug offenses too old to count for career offender purposes. If crack were treated like powder, he would have faced a statutory range of 0-20 years, with no possibility of a § 851 enhancement. If the case were treated the same as before the administration's announcement of support for sentencing equity in crack cases, he would have been given the opportunity to plead to the 10-year mandatory minimum and no § 851 enhancements would have been filed. Instead, the government insisted that the client plead to a 20-year mandatory minimum based on one § 851 enhancement. The government suggested that this was generous, since the client avoided the second § 851 with mandatory life, and that it was just following the Ashcroft policy. Its previous position in similar cases was not to file any § 851s if the client agreed to plead.

Sentencing belongs in the hands of neutral judges charged with consulting the advisory guidelines and imposing a sentence consistent with § 3553(a), in public view and subject to appellate review, not in the hands of prosecutors who use mandatory minimums for plea bargaining advantage. "[T]he goal of sentencing justice becomes more elusive when a sentence is determined not through the expert analysis of the Sentencing Commission and the disinterested discretion of the sentencing judge, but rather through the decisions of a prosecutor who is neither encouraged nor equipped to consider questions of sentencing justice."[14]

I. The Commission Should Urge Congress to Repeal Mandatory Minimums.

The Defenders are pleased that the Commission intends to conduct a new study of mandatory minimums, including a review of the safety valve provision of 18 U.S.C. § 3553(f), and urge the Commission to report its study to Congress and recommend that it repeal mandatory minimums. Attorney General Holder recently said that the "Department firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and free from unwarranted racial and ethnic disparities."[15] Mandatory minimum laws are not tough, they are draconian, and they

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[12] The "other gov't sponsored" category has increased from 1.7% in 2005 to 10.5% in 2008 to 11.8% as of the second quarter of 2009. *Ibid*.

[13] Testimony of Karin Immergut at 8, May 27, 2009.

[14] Michael A. Simons, *Prosecutors as Sentencing Theorists: Seeking Sentencing Justice*, 16 George Mason Law Review __ (forthcoming 2009).

[15] Statement of Eric H. Holder Jr., Attorney General of the United States, Before the United States Senate Committee on the Judiciary, Washington, D.C., Wednesday, June 17, 2009.

are used in ways that are unpredictable and unfair, that have a racially disparate impact, and that have a corrosive effect on the accuracy and integrity of the entire criminal justice process.

A. Mandatory Minimums Are Unnecessarily Harsh and Are the Primary Cause of Over-Incarceration in the Federal System.

Mandatory minimums directly and indirectly cause over-incarceration. They directly take the sentencing function from judges and require imposition of a mandatory minimum term, even when that term is above the sentence recommended by the guidelines and above the sentence the judge would find is sufficient but not greater than necessary. They indirectly, but substantially, impact severity and over-incarceration because the Commission has incorporated mandatory minimums into the guidelines.

Of 24,321 defendants convicted of drug trafficking in FY 2008, the vast majority, 16,787 (69%) were subject to a mandatory minimum of five, ten, or more than ten years.[16] Yet, 20,149 of drug trafficking offenses (82.9%) involved no weapon, and 15,396 of drug trafficking offenders (63.3%) had 0-3 criminal history points.[17] Mandatory minimums also apply to a variety of other offenses, including firearms offenses, immigration offenses, child pornography, and aggravated identity theft.

The federal prison population is currently at 206,786 inmates,[18] a nearly five-fold increase since mandatory minimums and mandatory guidelines became law. The major cause of the prison population explosion is the increase in sentence length for drug trafficking, from 23 months before the guidelines to 73 months in 2001.[19] About 75% of this increase was due to mandatory minimums, and 25% was due to guideline increases above mandatory minimum levels.[20] Today, the average sentence length for drug trafficking is even higher than in 2001, at 83.2 months.[21]

Mandatory minimums require sentences that are far longer than necessary to satisfy any purpose of sentencing. They rarely reflect the seriousness of the offense. In basing mandatory minimums on drug quantity, Congress thought that the ten-year mandatory minimum would apply to "major traffickers," defined as "manufacturers or the heads of organizations," and that the five-year mandatory minimum would apply to "serious traffickers," defined as "managers of

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[16] USSC, 2008 Sourcebook, Table 43.

[17] *Id*., Tables 37, 39.

[18] http://www.bop.gov/locations/weekly_report.jsp.

[19] Fifteen Year Review at 48. The average time served in drug cases before mandatory minimums were enacted and the guidelines were promulgated was about 23 months. USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements at 69-70, June 18, 1987.

[20] *Id*. at 54.

[21] USSC, 2008 Sourcebook, Table 14.

the retail level traffic . . . in substantial street quantities."[22] This conclusion was reached hastily, without hearings or any empirical research, and without foresight that the statute would ultimately be used to prosecute low level offenders, *i.e.*, street level dealers and couriers, far more often than high level offenders.[23] Because Congress was mistaken, street level dealers, couriers and other minor participants (*e.g.*, lookout, renter, enabler) in both crack and powder cocaine offenses receive mandatory minimum sentences of five or ten years or more in a substantial percentage of cases.[24] 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."[25] Culpability is an important measure of offense seriousness, but mandatory minimums do not account for role in the offense or any other pertinent measure of culpability, such as *mens rea*, motive, addiction, or the government's role in facilitating the crime or influencing the quantity.

Besides the fact that these quantity-based punishments were based on mistaken information about the amounts of drugs associated with different functions in the drug trade, quantity is an arbitrary measure of offense seriousness because it is often controlled by law enforcement.[26] Drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.[27]

Arbitrariness pervades mandatory minimums for other crimes as well. The mere possession of a firearm, even by a co-defendant, and even if never brandished or used in any way, is subject to five, ten or more consecutive mandatory years of imprisonment. Child pornography offenders who "receive" images are subject to a five-year mandatory minimum, while those who "possess" images are not, though there is no meaningful difference in these

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[22] USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 118-21 (1995); 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

[23] The largest proportion of powder offenders are couriers and mules and the largest proportion of crack offenders are street level dealers. USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 20-21, 85 (May 2007).

[24] USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, Figs. 2-4, 2-12, 2-13 (May 2007). Those categorized as "wholesalers" also were frequently subject to mandatory minimums. However, the most frequent function of over one third of crack defendants classified as "wholesalers," and nearly 8% of powder defendants classified as "wholesalers," was actually less serious, such as street-level seller. For more than 50% of these defendants, law enforcement initiated a sale of greater than one ounce, thus placing them in the "wholesaler" category. *Id*. at 23-24, A-5 to A-7 (May 2007).

[25] Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009).

[26] 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).

[27] Fifteen Year Review at 50, 82.

offenses, thus giving prosecutors the choice to subject similarly situated defendants to either 0-10 years or 5-20 years.

Mandatory minimums do not effectively prevent crime through deterrence or incapacitation. As long as there is demand, drug sellers are easily replaced.[28] All of the empirical research shows that sentence length has no impact on deterrence.[29] Locking up non-violent, low-level offenders for long periods does not accomplish rehabilitation. Instead, it can lead to increased risk of recidivism, by disrupting employment, reducing prospects of future employment, breaking family and community ties, and exposing less serious offenders to more serious offenders.[30]

The safety valve does not solve the problem. In FY 2008, only 5,764 (35%) of defendants subject to a mandatory minimum qualified for the safety valve, while 10,369 (65%) did not. *Id*., Table 44. Yet, 82.9% of all drug trafficking offenses involved no weapon, 52% of all drug trafficking offenders had 0-1 criminal history points, and another 11.3% had 2-3 criminal history points. *Id*., Tables 37, 39. By requiring no more than 1 criminal history point, the safety valve excludes many offenders who were not involved in any violence and whose role in the offense was not serious. The safety valve does not distinguish between high- and low-level offenders based on role in the offense, but instead distinguishes among low-level offenders who differ little from each other, *i.e.*, by one criminal history point.[31] And while the percentage may be small, 260 people were excluded from safety valve eligibility because of an offense the Commission classifies as "minor," presumably mostly traffic offenses.[32] Further, African Americans are less likely to receive safety valve relief because they have a higher risk of arrest and prosecution than similarly situated Whites.[33] As long as mandatory minimums remain, the safety valve should at least be expanded to include Criminal History Category II.

The safety valve should also be expanded to all mandatory minimums. At present, it applies only to offenses under 21 U.S.C. §§ 841, 844, 846, 960 and 963. The Defender in one district reports that prosecutors routinely include as an object of a drug conspiracy a violation of

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[28] *Id*. at 134. *See also* USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported dealers were immediately replaced).

[29] *See* Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006); David Weisburd et. al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

[30] *See* Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Public Policy 589 (2007).

[31] *See* Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-99 (2000).

[32] USSC, *Impact of Prior Minor Offenses on Eligibility for Safety Valve*, March 2009, http://www.ussc.gov/general/20090316_Safety_Valve.pdf.

[33] *See* Fifteen Year Review at 134.

21 U.S.C. § 860 for the apparent purpose of preventing application of the safety valve to members of a conspiracy who did not sell drugs within 1000 feet of a protected location.

Whatever expansion of the safety valve might be done is welcome, but it is an incomplete solution that cannot cure the fact that mandatory minimums do not accurately reflect the purposes of sentencing across the board, and prevent judges from imposing sentences that are proportional and just. *See* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 (Jan./Feb. 1999) (The safety valve "is a small, tentative step in the right direction. A more complete solution would be to abolish mandatory minimums altogether.").

B. Mandatory Minimums Result in Disproportionate Punishment, Unwarranted Disparity, and Distortion of the Criminal Justice Process.

Mandatory minimum statutes, whether used according to DOJ charging policy or as inevitably used in practice, result in disproportionately harsh punishment, create unwarranted disparity, and distort the criminal justice process. The first priority of those concerned about unwarranted disparity and disproportionate punishment should be the repeal of mandatory minimum statutes.

1. Mandatory Minimums Override the Commission's Judgment.

Since 1989, prosecutors have been directed to charge the "most serious readily provable offense."[34] As stated in the 2003 Ashcroft Charging Memorandum, prosecutors are to "charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence," including any "charge involv[ing] a mandatory minimum sentence that exceeds the applicable guideline range."[35] The use of § 851s (doubling the mandatory minimum or requiring mandatory life) and § 924(c)s (adding a consecutive minimum of 5, 7, 10, 25 or 30 years, or more if stacked) are "strongly encouraged" whenever available, but can be foregone, only through a negotiated plea, to provide an incentive to plead guilty.[36]

This policy, in principle and in practice, inevitably results in disproportionately harsh punishments. According to the Commission, the guideline ranges it has established represent the

[34] *See* Memorandum from Richard Thornburgh, Attorney Gen., to Federal Prosecutors (Mar. 13, 1989), reprinted in 6 Fed. Sent'g Rep. 347, 347-48 (1994) (Thornburgh Bluesheet) ("a federal prosecutor should initially charge the most serious, readily provable offense or offenses . . . . [C]harges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons.").

[35] Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Part I, Sept. 22, 2003 (Ashcroft Memo).

[36] *Id*.

severity of punishments appropriate for the seriousness of various crimes.[37] When prosecutors are directed to charge and pursue mandatory minimums that "exceed[] the applicable guideline range," they are in effect directed to seek sentences that in the Commission's view are disproportionately severe given the seriousness of the crime. The Department itself has equated sentences within the guideline range with sentences that carry out the purposes of sentencing.[38] It is ironic, and disappointing, that the Department has suggested that judicial decisions to sentence below the guideline range based on mitigating factors present in the case result in disparity and excessively lenient sentences,[39] while at the same time directing its own prosecutors to seek sentences that are above the guideline range and thus excessively severe and disparate by its own definition.

In practice, a significant portion of offenders are convicted of charges that carry mandatory minimum sentences above the applicable guideline range. The Commission's data show that in 2008, 11,372 offenders were affected by mandatory minimums that trumped the otherwise applicable guideline range: 8,292 were convicted of a charge with a mandatory minimum above the top of the applicable guideline range, and the remaining 3,080 were convicted of a charge with a mandatory minimum that truncated the bottom of the range. At the same time, judges imposed sentences below the guideline range based on the purposes of sentencing and relevant mitigating factors in 9,972 cases. The government's use of mandatory penalties to override the guidelines had an adverse impact on African-American defendants. While African Americans constituted 24% of all federal offenders, they were 31% of those affected by statutory trumps. Eliminating the crack/powder disparity would not change this result. Excluding cases where available data indicate that crack was the most serious drug involved in the offense, 8,942 offenders were affected by mandatory minimum trumps: 6,605 were convicted of a charge with a mandatory minimum above the top of the applicable guideline range, and the remainder with the bottom of the range truncated.[40]

2. Mandatory Minimums Are Used As a Bargaining Tool, or as Harsh Punishment for Those Who Exercise Their Constitutional Rights, Without Regard to What Punishment is Just.

If prosecutors strictly applied the Department's stated policy to pursue all charges resulting in the harshest sentence in every case, the guidelines would be irrelevant in a very large portion of cases and the Bureau of Prisons would be overwhelmed. Once charged, however, counts carrying the harshest possible penalties can be dropped in return for substantial assistance, under a fast track program authorized by the Attorney General, or otherwise to save time and

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[37] *See* USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* at 20 (1991) ("the guidelines not only ensure that like offenses are treated alike, but also that a logical, proportionate relationship exists among offenses according to their relative seriousness").

[38] Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing (January 28, 2005).

[39] Testimony of Karin Immergut at 2, 6-7, 9-10.

[40] This data was obtained from the USSC FY 2008 Monitoring Datafile and analyzed by Paul J. Hofer.

maintain case volume.[41] As the Commission's research has shown, in practice the applicable statutory penalties are not always imposed. In 1995 and 2000, § 851 enhancements were imposed on less than 7% of defendants who could have received them.[42] Charges under § 924(c) are not imposed in the majority of cases in which they are potentially applicable, and when they are charged or imposed, they have a disparate impact on African Americans.[43] The point is not that these charges *should* be pursued in every case. Of course they should not be. The point is that, as every participant in the federal criminal justice system knows, mandatory minimums are charged, or threatened to be charged, not because they result in sentences that fairly and effectively achieve the purposes of sentencing, but to induce cooperation and the waiver of constitutional rights.

In practice, most prosecutors file, or threaten to file, charges with harsh mandatory minimum sentences for the purpose of extracting guilty pleas, cooperation, appeal waivers, and various other concessions. Indeed, the Department has sought more and harsher mandatory sentencing laws (and guidelines), "not because the enhancements are inherently just or required for adequate deterrence, but precisely because higher sentences provide increased plea bargaining leverage."[44] *See* Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. Pa. L. Rev. PENNumbra 226, 236 (2007). *See also* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (Feb. 2005) (same).

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[41] *See* Ashcroft Memo ("charges might be dismissed" if the office is "over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office"); Thornburgh Bluesheet ("approval to drop charges . . . might be given because the United States Attorney's Office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office").

[42] Fifteen Year Review at 89.

[43] *Id.* at 90.

[44] *See, e.g., Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004: Hearing on H.R. 4547 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) (statement of Catherine M. O'Neil, Assoc. Deputy Att'y Gen.) (arguing in support of increased mandatory minimum sentences in some drug cases, because the threat of longer sentences allows the government to move "effectively up the chain of supply using lesser distributors to prosecute larger dealers, leaders and suppliers"); Sue Reisinger, *Government Seeks Tougher Sentences*, NAT'L L.J., Mar. 10, 2003, at A20 (quoting a senior Justice Department official as arguing for across-the-board economic crime sentence increases to provide leverage to secure cooperation from smaller-time defendants); Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary, 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia) (arguing against a reduction in the penalties for crack cocaine, in part because it would reduce incentives for defendants to cooperate with prosecutors); Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov't Reform, 106th Cong. 62 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Div., Dep't of Justice) (stating that mandatory-minimum sentences for drug crimes provide "an indispensable tool for prosecutors" to induce defendants to cooperate).

In those rare cases when a defendant declines to accept a guilty plea under the government's terms, mandatory minimums are often used to impose enormously unjust sentences.[45] For example, in *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), after the defendant declined a plea to drug trafficking and one § 924(c) count with a 16-year sentence, the government stacked five § 924(c) counts, which would have resulted in a 105 year sentence. The defendant was acquitted of two of the counts, resulting in a 55 year sentence for a twenty-four-year-old first offender with a good job and two young children. In *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008), a 53-year-old woman with no prior convictions received a 45-year sentence, ten years of which was for drug conspiracy and possession with intent to distribute drugs, and thirty years of which was for two counts of possessing guns in furtherance of drug dealing. There was "no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house." In *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), a severely mentally ill 52-year-old woman who had led a completely law-abiding life was sentenced to 159 years in prison, 150 years of which was for seven stacked § 924(c) counts. She was unable to plead guilty on the prosecutor's terms because she held a fixed belief, due to her mental illness, that she was innocent. The prosecutor, taking the position that she had no one to blame but herself, concluded, in his sole discretion, that she should be imprisoned for the rest of her life.

The judges and courts in these cases found that the sentences were excessive and cruel, but could do nothing about them. The excessive penalties available under mandatory minimum statutes vest prosecutors with enormous power to impose trial penalties that are not necessary to protect the public, and that experienced neutral judges cannot check. This has turned the law of sentencing away from just punishment and made it into a system of carrots and sticks administered by prosecutors, to the detriment of justice.

3. Charging and Plea Bargaining Practices Differ Among Districts, U.S. Attorneys, and Prosecutors.

Although it has been suggested that the Department's charging and plea bargaining policies were intended to produce consistency, it has never worked that way. The "experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that the Justice Department cannot meaningfully restrain local United States Attorney's Offices from adopting locally convenient plea bargaining practices." Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 193 (2005).

[45] "And those who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006).

Based on a recent survey of the Federal Public and Community Defenders, some U.S. Attorney's Offices file a single drug trafficking count, and threaten to add additional charges, including conspiracy counts with a higher mandatory minimum, one or more § 924(c)s, and/or one or more § 851s. The price to avoid additional charges may be only a guilty plea, or a guilty plea and cooperation, and usually requires at least a waiver of appeal (which varies in its details), but often a waiver of collateral review and any future motion to reduce sentence under § 3582(c). Other U.S. Attorney's Offices file all counts and enhancements carrying the maximum possible sentence at the outset. Some bargain away one or more counts or enhancements in return for a guilty plea or cooperation or other concessions. Others refuse to bargain away anything, so that the defendant must either cooperate and hope for a substantial assistance motion (starting at the fully enhanced minimum), or go to trial and receive an astronomical sentence if found guilty.

Other U.S. Attorney's offices only sometimes file mandatory minimums. This may be on a case by case basis, or pursuant to office policy for certain types of cases. In a few districts, § 851s are never or rarely filed, even if the defendant goes to trial.

Often what is charged depends on the prosecutor, with more experienced prosecutors using judgment and moderation, and inexperienced prosecutors adhering to the Ashcroft policy in its most rigid form. The charging policy often depends on who the U.S. Attorney is. For example, a new U.S. Attorney in the Northern District of California recently instituted a more coercive policy than was previously in effect. Defendants must quickly agree, without meaningful discovery, to plead and cooperate and forego motions to suppress, or have all possible charges and enhancements filed.[46] While this has been highly controversial in the Northern District of California, it is standard in some other districts.

Similarly, the government's policies regarding motions for substantial assistance under § 5K1.1 and § 3553(e) vary widely from one district to another, both in what qualifies as substantial assistance and the extent of the requested reduction. Some offices require a controlled buy, some require the wearing of a wire, some require testimony, some require only a debriefing, and in some offices, what is required varies by the prosecutor or simply varies from case to case. Some offices prosecute a high volume of low-level dealers and do not often seek cooperation. Others reward the higher ups with lower sentences than low-level participants.

The overwhelming majority of Defenders said that nothing has changed as a result of *Booker*. Those districts that rigidly filed all possible counts and enhancements before *Booker* continue to do so after *Booker*, and those that showed flexibility before *Booker* continue to show flexibility after *Booker*. However, a handful of districts have adopted harsher charging policies in response to *Booker*. In one district, the threat of § 851s is

[46] *See* Dan Levine, *Told Not to Fight, Defense KOs Marijuana Case*, The Recorder, May 22, 2009 (subscription); Dan Levine, *Russoniello Pressed on Drug Policy*, The Recorder, April 21, 2009) (subscription); Dan Levine, *Feds Prevail on "snitch or else" Challenge*, The Recorder, April 16, 2009) (subscription).

now used to induce waiver of appeal, collateral attack and any future § 3582(c), whereas previously § 851s were avoided through a guilty plea without more. In another district, the government has always filed § 851s in every case but bargained them away, and now will not bargain them away. Five districts reported that the government more frequently charges, or threatens to charge absent agreement to a guideline or above-guideline sentence, a five-year mandatory receipt count in child pornography cases. Two Defenders reported that the government is now more frequently insisting on agreement under Rule 11(c)(1)(C) in return for dropping a mandatory minimum.[47]

4. Mandatory Minimums Threaten the Integrity and Accuracy of the Criminal Justice Process.

The threat of unduly harsh punishment is used to pressure defendants into cooperating with the government and giving up constitutional rights that are important to the fairness and truth-seeking function of the system. The threat of filing harsher mandatory minimum charges, § 851s, and § 924(c)s is routinely used to induce defendants to plead guilty. Threats of filing mandatory minimum charges or enhancements are used to dissuade defendants from filing motions to suppress unconstitutionally obtained evidence, to induce defendants to waive their rights to appeal the sentence (even if the guideline range is incorrectly calculated or the facts are clearly erroneous), to attack the sentence collaterally, and even to move for resentencing under 18 U.S.C. § 3582(c)(2) if the applicable guidelines are ever amended and the amendment made retroactive. Defendants are required to agree to forego just arguments for sentences below the recommended guideline range in return for the government's agreement not to file counts carrying mandatory minimums and enhancements.

Recent research has shown that federal trial and acquittal rates are at an all-time low because it has become far too costly to go to trial, even for those with an excellent defense and even sometimes for the actually innocent. When the difference between the sentence after trial and the sentence after plea is as high as it is in the federal system, and prosecutors have a monopoly on granting the discount, the system produces less reliable results. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 117 (2005). "[P]lea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences. And those who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial. Plea bargaining therefore fails to serve the interests of the public, as it tends to undermine the legitimacy and accuracy of the criminal justice system." Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006).

[47] In contrast, five Defenders reported that the government agrees to C pleas more often after *Booker* when sought by the defense. Every other district reported that the government never or rarely agrees to a C plea and/or that judges in the district do not accept them and never have.

Mandatory minimums also threaten the truth-seeking function of the criminal justice system by creating a powerful incentive for informants and cooperators to provide exaggerated and false information, information that in most cases will never be tested because the risk of challenging it is too great. The Innocence Project has found that in more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant.[48] This demonstrates that the adversary system is not enough to correct prosecutors' or juries' mistaken judgments regarding the veracity of these witnesses.[49] While surveys show that most prosecutors believe they can tell which witnesses are truthful,[50] research shows that the average person can tell whether they are being told the truth only about 55% of the time, and that the more confident one is that he can tell a truth from a lie, the more likely it is that he is wrong.[51]

The risk of false and embellished testimony is heightened in cases involving mandatory minimums because the penalties are so severe, cooperation is the only way out, and, in drug cases, actual drugs need not be found. In a case in the Western District of Louisiana, Judge Melancon found that the drug trafficking convictions of a mother and her sons was based on an entirely false story manufactured by informants housed together in a federal facility. These informants traded photographs of the defendants and their home and colluded together to produce their story out of whole cloth. The judge overturned the convictions, reviewed several other similar cases in the district, and found that the problem was "systemic."[52] In other cases, informants make up, exaggerate, or instigate the drug amount, for the very purpose of serving up a higher mandatory minimum or guideline sentence.[53] Mandatory minimums should be repealed because they create too great an inducement to lie.

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[48] http://www.innocenceproject.org/understand/Snitches-Informants.php.

[49] *See also, e.g., United States v. Wallach*, 935 F.2d 445, 455-57 (2d Cir. 1991) (reversing convictions based on perjured testimony of key witness who received favorable treatment on his own criminal charges in exchange for his testimony, and noting that "given the importance of [the witness's] testimony to the case, the prosecutors may have consciously avoided recognizing the obvious – that is, that [the witness] was not telling the truth"); *United States v. Kimble*, 719 F.2d 1253, 1256-57 (5th Cir. 1983) ("admitted that he perjured himself, he admitted lying in over thirty different statements motivated by his sense of self-preservation.").

[50] Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth-Telling and Embellishment*, 68 Fordham L. Rev. 917, 943-45 (1999).

[51] Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 Cardozo L. Rev. 809, 810 (2002).

[52] *See United States v. Colomb*, No. 02-CR-60015, Order Ruling on Defendant's Motion for New Trial (W.D. La. Aug. 31, 2006), available on PACER, Docket No. 531; Order dismissing charges with prejudice, (W.D. La. Dec. 15, 2006), available on PACER, Docket No. 558.

[53] *See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided

II. The Commission Should Review and Revise, and/or Report to Congress Regarding the Need to Revise, All Guidelines that Are Based on Mandatory Minimums or Congressional Directives.

We are pleased that the Commission intends to review child pornography offenses and possibly promulgate amendments and/or report to Congress as a result of that review. We urge the Commission to do the same with all of the guidelines that are based on mandatory minimums or specific congressional directives. It may help Congress see the wisdom of repealing mandatory minimums and specific directives if the Commission were to propose a replacement set of guidelines that recommend punishment that is sufficient to achieve sentencing purposes, while reducing the prison population.

Even if Congress does not repeal mandatory minimums in the near future, the Commission should amend the drug guidelines. Linking the drug guidelines to mandatory minimums maintains proportionality only with mandatory punishment levels that are arbitrary and overly severe, and then magnifies that disproportionality by spreading it to every offender at every quantity level. In addition, this inevitably drives up the severity of the guidelines for all offenses to maintain proportionality among punishments for different crimes. As the Judicial Conference has said, "the goal of proportionality should not become a one-way ratchet for increasing sentences."[54]

In 1995, the Commission found that use of the carrier medium in determining the quantity of LSD, as the mandatory minimum statute does, was inappropriate, and amended the LSD guidelines to use a presumptive-weight methodology instead. The Supreme Court approved the Commission's action in *Neal v. United States*, 516 U.S. 284 (1996). In *Kimbrough*, the Court relied on *Neal* to reject the government's argument that judges could not disagree with the crack guidelines because this would create sentencing "cliffs." 128 S. Ct. at 573. If the drug guidelines were amended across the board to reflect a more accurate measure of culpability, such as functional role, there would be "cliffs" from the mandatory minimums, but the "cliffs" would be caused by mandatory minimums that fail to reflect the seriousness of the offenses subject to them. *Cf.* USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (1991) ("The 'cliffs' that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.").

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to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline range from 87-108 months to 168-210 months).

[54] Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law to Members of the Sentencing Commission, March 8, 2004.

Linking the drug guidelines to mandatory minimums conflicts with directives to the Commission to avoid *unwarranted* disparities, to ensure that the guidelines meet the purposes of sentencing set forth in § 3553(a)(2), to reflect advancement in knowledge of human behavior, and to minimize prison overcrowding. *See* 28 U.S.C. § 991(b)(1)(A), (B) & (C), § 994(g).

No statute required or requires the Commission to link the guidelines to mandatory minimums. The general introductory phrase in § 994(a), stating that the Commission shall promulgate guidelines "consistent with all pertinent provisions of any Federal statute," does not prevent the Commission from de-linking the drug guidelines from mandatory minimums, or proposing to do so. First, the guidelines need not be tied to mandatory minimums to be "consistent with" them, as the guidelines explicitly provide that a mandatory minimum trumps a lower guideline range. *See* USSG § 5G1.1(b). Just two years ago, with regard to new mandatory minimums under the Adam Walsh Act, the Commission proposed as a legitimate option that it "could decide not to change the base offense levels and allow § 5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." *See* 72 Fed. Reg. 4372-01, 4382 (Jan. 30, 2007). The Criminal Law Committee of the Judicial Conference supported this option for the same reasons it has always opposed mandatory minimums, and also noted that basing the drug guidelines on mandatory minimums "leaves the court without guidance on what the appropriate guideline range should be in cases where the mandatory minimum term does not apply."[55]

Second, this phrase, "consistent with all pertinent provisions of any Federal statute," replaced the former phrase, "consistent with all pertinent provisions of this title and title 18, United States Code," by way of the Feeney Amendment in April 2003. *See* P.L. 108-21 § 401(k) (April 30, 2003). There is no mention of it in the legislative history, and there does not appear to be any basis to conclude that it meant the Commission must tie the drug guidelines to mandatory minimums. It seems unlikely that Congress meant to tell the Commission to do what it had already done in 1987.

Again, we support the Commission in its efforts to review and amend and/or report to Congress on the child pornography guidelines, and urge the Commission to do the same with all guidelines that are based on mandatory minimums or specific congressional directives.

III. Appellate Review

The Commission has asked how the Supreme Court's cases have affected appellate review.

[55] Comments of the Criminal Law Committee of the Judicial Conference on Sentencing Commission amendments: Incorporation of Mandatory Minimum Terms of Imprisonment created or increased by the Adam Walsh Child Protection Act of 2006 (March 16, 2007).

A. Procedural Review

The courts of appeals must now "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines 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 the chosen sentence-including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 128 S. Ct. 586, 597 (2007).

These requirements for procedural review have meaningfully improved sentencing. Judges must now address the parties' arguments and explain their sentences in terms of the purposes and factors set forth in § 3553(a), whether within or outside the guideline range. This indirectly but significantly affects the substance of the sentence because judges must consider the parties' arguments and explain their reasons for accepting or rejecting those arguments, and must explain their reasons for the particular sentence imposed in terms of § 3553(a).[56] This has made sentencing more transparent and more understandable to the defendants being sentenced. When the guidelines were mandatory, the sentencing hearing was focused solely on the guidelines' rules. Lawyers, probation officers and judges discussed technicalities that the defendant often did not understand and that seemed to have little to do with him. Judges now explain why they are imposing the sentence in terms not only of the guidelines, but all of the relevant circumstances of the offense and the defendant's life, and what the sentence is meant to accomplish. This shows respect to the defendant and his family and goes a long way to promoting respect for law.

The courts of appeals continue to review the correctness of the guideline calculation, and appear to be engaging in careful review of factfinding to ensure its accuracy.[57]

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[56] *See, e.g., United States v. Persico*, 293 Fed. Appx. 24 (2d Cir. 2008) (remanding where court failed to give reason for 50 month upward variance); *United States v. Carter*, 564 F.3d 325 (4th Cir. 2009) (court failed to provide sufficient reasons for imposing probationary sentence where guideline range was 37 to 46 months); *United States v. Tisdale*, 245 Fed. Appx. 403, 412 (5th Cir. 2008) ("failure to offer any reason whatsoever for rejecting the defendants' § 3553(a) arguments or any explanation for following the guidelines range constitutes failure to consider the § 3553(a) factors"); *United States v. Gapinski*, 561 F.3d 467, 477-78 (6th Cir. 2009) (court failed to explain reason for rejecting defendant's argument for lower sentence based on cooperation); *United States v. Oba*, 317 Fed. Appx. 698 (9th Cir. 2009) (court failed to adequately explain upward variance where factors were already considered in guidelines and did not address 3553(a) arguments); *United States v. Narvaez*, 285 Fed. Appx. 720, 725 (11th Cir. 2008) ("district court gave absolutely no reason for imposing the 210-month [guideline] sentence," though the defendant made arguments relating to several 3553(a) factors").

[57] *See, e.g., United States v. Correy*, __ F.3d __, 2009 WL 1693285 (1st Cir. June 18, 2009) (the district court erred in failing to engage in a credibility analysis related to individualized drug-quantity determinations, and the PSR, which simply recited the allegations in the indictment, was an insufficient basis for a determination as to drug quantity for which each individual defendant

B. Substantive Review

The Supreme Court struck the right balance in its deferential abuse of discretion standard of substantive review.[58] For all of the reasons the Court identified, sentencing is properly the function of the district court judge, not the court of appeals:

> 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 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, 128 S. Ct. at 597-98 (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).

The Supreme Court put an end to *de novo* review, and the similar "extraordinary circumstances" review, to avoid the constitutional problem with judicial factfinding under mandatory guidelines. *See Gall*, 128 S. Ct. at 595-96; *Rita v. United* States, 127 S. Ct. 2456, 2465-67 (2007); *Booker v. United States*, 543 U.S. 220, 259-60 (2005). For the same reason, judges must be permitted to find that the guideline sentence fails properly to reflect § 3553(a) considerations even in a factually ordinary case.[59] A stricter standard

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was responsible); *United States v.Delgado-Martinez,* 564 F.3d 750 (5th Cir. 2009) ("it is clear that the district court committed a significant procedural error by calculating Delgado-Martinez's Guidelines range based on the improper two-point probation enhancement").

[58] The court of appeals is to consider "the totality of the circumstances, including the extent of any variance from the Guidelines range," may apply a "presumption of reasonableness" to a sentence within the guideline range, "may not apply a presumption of unreasonableness" to a sentence outside the guideline range," and "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." *Gall*, 128 S. Ct. at 597. "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Rita,* 127 S. Ct. at 2472. A "major departure should be supported by a more significant justification than a minor one." *Gall*, 128 S. Ct. at 597.

[59] *See Cunningham*, 549 U.S. at 279-81 (judges' authority to sentence outside the guideline range based solely on general policy objectives, without any factfinding anchor, is necessary to avoid a Sixth Amendment violation); *Rita*, 127 S. Ct. 2465, 2468 (because the guidelines may not be presumed reasonable at sentencing, sentencing judges are permitted to find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations," that the guidelines "reflect an

does not appear to be possible, as evidenced by the discussion among the justices regarding whether a constitutional system can tolerate substantive review at all.

Substantive review will become more meaningful as lawyers, judges, and courts of appeals become more accustomed to applying sentencing purposes. For example, in a recent Ninth Circuit case, the guideline sentence in an illegal re-entry case included a 16-level enhancement based on a 25-year-old aggravated assault conviction. The Ninth Circuit reversed, finding that the sentence was substantively unreasonable. The instant offense was less serious than re-entry soon after committing a serious crime. Other unscored convictions did not support a need for deterrence where they were 15-35 years old and did not harm others. The guideline sentence did not avoid unwarranted similarities among differently situated offenders. It was not reasonable for the defendant's record of harmlessness to others for the past 25 years to subject him to the same severe enhancement applied to a recent violent offender. *See United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009).

C. The Commission Can Contribute to Meaningful Review by Supporting and Explaining its Guidelines.

The Commission can improve both sentencing and appellate review by supporting and explaining its guidelines. It is difficult for lawyers or judges to explain why a guideline sentence is or is not appropriate without an explanation from the Commission of what purpose or purposes the guidelines are meant to serve and on what basis. As Judge Tjoflat said in Atlanta, both sentencing and appellate review would be improved if the Commission explained the underpinning of its guidelines. Judges could then evaluate whether to follow the guideline based on the reasons and empirical data given, and could better articulate why or why not they were following the guidelines' advice. There would then be a rationale for reviewing sentences on appeal.[60] Judge Tjoflat noted that we are still "a long way from that" because all of the participants are still viewing sentencing as "just too mechanical."[61]

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unsound judgment," or that the guidelines "do not generally treat certain defendant characteristics in the proper way"); *Kimbrough*, 128 S. Ct. at 570 (reiterating that a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," and thus, "courts may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines."); *id*. at 564, 575 (because "the cocaine Guidelines, like all other Guidelines, are advisory only," a conclusion that a sentencing judge was barred from disagreeing with the crack guidelines in a "mine-run case" was error because it rendered the guidelines "effectively mandatory."); *Spears*, 129 S. Ct. at 842 ("'The only fact necessary to justify such a variance is the sentencing court's disagreement with the guidelines-its policy view that the 100-to-1 ratio creates an unwarranted disparity.'").

[60] USSC, Public Hearing, Atlanta, Georgia, February 10-11, 2009, at 14, 23-24.

[61] *Id.* at 25.

When the guidelines were mandatory, judges were required to apply, and appeals courts to enforce, rules that were not explained and not understood. Now, judges must impose a sentence that is sufficient but not greater than necessary to satisfy sentencing purposes, and courts of appeals must "determine whether the sentence 'is unreasonable' with regard to § 3553(a)." *Booker*, 543 U.S. at 261. If the Commission wants judges to intelligently consider the guidelines, and to facilitate appellate review, it should base the guidelines on empirical data and research and clearly explain how they advance the statutory purposes.

The Commission should 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 the evidence upon which the Commission relied to conclude that the guideline would be effective in achieving that purpose or those purposes. If a guideline does not serve any purpose of sentencing based on research, the Commission should revise it. If the guideline is based only on a congressional directive or a mandatory minimum statute, the Commission should say so. This would improve the ability of judges to decide on a reasoned basis whether or not to follow the guideline in a particular case, and to explain their sentences, and it would give the courts of appeals a rationale for reviewing the reasonableness of the sentence.

D. Appeal Waivers Result in Inconsistent Development of the Law and Injustice.

The government insulates sentences from appellate review by extracting appeal waivers, often in return for dropping or foregoing mandatory minimum charges or enhancements. In some districts, defendants are required to waive their right to appeal any sentence up to the statutory maximum; in others, they are required to waive appeal of any sentence within or below the guideline range. In some districts, but not others, defendants are required to waive even ineffective assistance claims on collateral review, and even any future right to file a motion to reduce sentence under § 3582(c).

The waiver is usually required to be accepted before the presentence report is prepared, so that the defendant cannot know what possible errors will be made in calculating the guideline range, deciding the propriety of a departure, or the effect of the other sentencing factors under § 3553(a), assuming that the defendant is not also required to waive arguments for departure or variance.

In 2005, Professor Nancy King and former Commissioner Michael O'Neill published an empirical analysis of appeal and post-conviction review waivers. They concluded:

> The increased use of stipulations, combined with waiver of review, increases the risk that sentences not in compliance with the law will proliferate without scrutiny. The uneven practice among cases and courts of trading sentencing concessions for waivers also suggests that waivers are undercutting efforts to advance consistency in federal sentencing.

See Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 213 (2005). The authors based their conclusion on their findings that (1) in nearly two-thirds of the cases settled by plea agreement, the defendants waived their rights to review; (2) the frequency of waiver varies substantially among the circuits, and among districts within circuits; (3) the government appears to provide some sentencing concessions more frequently to defendants who sign waivers than to defendants who do not, including agreeing to C pleas, downward departures, safety valve credit, and a variety of stipulations; (4) many defendants who waive their rights to review obtain clauses in their agreements that limit their exposure to unexpected negative results at sentencing; (5) some defendants appear to receive neither greater certainty nor leniency in return for signing wide-open and unlimited waivers of their rights to review; (6) three-quarters of the defendants who waived appeal also waived collateral review, and of these, fewer than one-third preserved the right to raise a claim of ineffective assistance; and (7) waivers have been enforced to bar a variety of claims, including claims of ineffective assistance at sentencing and assertions of constitutional violations under *Blakely* and *Booker*. *Id*. at 210-13.

E. Statistics Show that the Rate of Sentencing Appeals Has Returned to its pre-*Booker* Equilibrium.

According to Commission statistics, the number of cases sentenced has increased every year from 2004 to 2008.[62] In 2004, there were 69,932 cases and 4,500 appeals by defendants. Thus, roughly 6.4% of sentences were appealed by defendants in 2004. That percentage rose to 8.5% in 2005 and to 11.2% in 2006, then decreased to 9% in 2007 and 8.2% in 2008. The rate of government appeals showed a similar trend, at .19% and .18% in 2004 and 2005 respectively, increasing to .29% in 2006, then decreasing to .24% in 2007 and .19% in 2008.[63] Likewise, according to the Administrative Office of the U.S. Courts, the number of sentencing appeals nationwide was about the same in FY 2008 as it was in FY 2004, after spiking in 2005 and 2006.[64]

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[62] *See* USSC, Sourcebook, Table 3, FY 2004-2008 (increasing from 69,932 to 72,408 to 72,518 to 72,765 to 76,428).

[63] *See* USSC, Sourcebook, Tables 56 and 56A, FY 2004-2008.

[64]

Fiscal Year	Sentence	Sentence and Conviction
2004	3336	6336
2005	4732	8243
2006	4556	8079
2007	3647	7283
2008	3118	6836

Annual Report, Table S-6, http://www.uscourts.gov/judbususc/judbus.html.

When the law shifts, the rate of appeals rises. When the system is left alone, the system regains its equilibrium. Any change in the system would increase the number of appeals once again.

IV. The Commission Should Eliminate Policy Statements Restricting Consideration of Offender Characteristics and Offense Circumstances.

The Defenders believe that the Commission should delete policy statements that prohibit, discourage or restrict consideration of offender characteristics and offense circumstances (Chapter 5, Part H and Chapter 5, Part K.2), while retaining encouraged departures in Chapters 2 and 4, and clarifying the language of USSG §§ 1B1.1 and 1B1.4 to make it consistent with current law. My colleagues who have testified before you in previous hearings have explained the reasons for this position, and I incorporate their testimony by reference.[65] I would like to add a few thoughts and attempt to answer some of the questions the Commissioners have asked.

The primary reason that the Commission should eliminate the restrictive policy statements is that they conflict with the plain language of § 3553(a)(1) and with the Supreme Court's remedy for the Sixth Amendment violation caused by mandatory guidelines. The "availability of a departure in specified circumstances does not avoid the constitutional issue." *United States v. Booker*, 543 U.S. 220, 233 (2005). Limitations on factors judges may consider to impose sentence outside the guideline range, whether above or below it, are not permissible. *Id*. at 266.

The existence of restrictive policy statements in the Guidelines Manual alongside § 3553(a)(1) created confusion and unfairness after *Booker* as some judges and courts of appeals thought that the policy statements were still controlling. The Supreme Court then made clear that this was incorrect,[66] and the courts of appeals are finally clearing up the misunderstanding, holding that restrictive policy statements do not override § 3553(a)(1) and may not be used to deny a sentence outside the guideline range.[67]

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[65] *See* Joint Statement of Thomas W. Hillier II and Davina Chen at 31-36, Public Hearing Before the United States Sentencing Commission, May 27, 2009; Testimony of Alan Dubois and Nicole Kaplan at 47-50, Public Hearing Before the United States Sentencing Commission, February 10, 2009.

[66] *See Gall v. United States*, 128 S. Ct. 586 (2007) (upholding a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit or deem "not ordinarily relevant"); *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007) (court may conclude that the guidelines "do not generally treat certain defendant characteristics in the proper way.").

[67] *See, e.g, United States v. Chase*, 560 F.3d 828 (8th Cir. 2009); *United States v. Hamilton*, slip op., 2009 WL 995576, *3 (2d Cir. April 14, 2009); *United States v. Simmons*, __ F.3d__, 2009 WL 1363544 (5th Cir. May 18, 2009); *United States v. Hawes*, 309 Fed. Appx. 726, 732 n.2 (4th Cir. 2009).

The question has been asked whether judges rely on § 3553(a) more often than departures set out in the Guidelines Manual, and if so, if this is because they face a stricter standard of review. The standard of review is the same for a departure or a variance: "the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions-whether inside or outside the Guidelines range."[68] But the policy statements themselves, the circuit caselaw interpreting them, or both, prohibit or strongly discourage departure. This is why, for example in the Fourth Circuit, only 2.5% of below-guideline sentences are based in whole or in part on a "departure," while 9.8% of below-guideline range sentences are based on § 3553(a). The caselaw strictly interpreting the policy statements is still on the books and is not going to change. Thus, the departure analysis is seen by most judges and lawyers as a pointless exercise and a waste of time.

The primary reason that the Commission *can* eliminate the restrictive policy statements is that it was never required to promulgate them. Title 28 U.S.C. § 994(c), (d) and (e) contain directives to the Commission to consider whether to include certain factors in the formal guideline rules regarding kind and extent of sentence.[69] These directives have nothing to do with sentences outside the guideline range. In fact, there is no provision in the Sentencing Reform Act directing the Commission to take any action with respect to reasons for sentences outside the guideline range. The *only* provisions having to do with sentences outside the guideline range are the directives *to judges* in § 3553(a) and § 3553(b), the latter of which has been excised.

The original Commission decided to include only criminal history and role in the offense in the formal guideline rules. As Justice Breyer explained at the time, the Commission adopted "offender characteristics rules [that] look primarily to past records of conviction," but "do not take formal account of . . . the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider. In a word, the offender characteristics rules reflect traditional compromise." *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988).

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[68] *Gall*, 128 S. Ct. at 596.

[69] *See* § 994(c) & (d) ("*in establishing categories of offenses* for use in the guidelines and policy statements governing the *imposition* of sentences of probation, a fine, or imprisonment, governing the *size* of a fine or the *length* of a term of probation, imprisonment, or supervised release, and governing the *conditions* of probation, supervised release, or imprisonment . . ."); § 994(e) ("assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment* . . ."); S. Rep. No. 98-225 at 51 (1983) ("sentencing *guidelines* will recommend to the sentencing judge an appropriate kind and range of sentence for a given *category of offense committed by a given category of offender*. The guidelines will be supplemented by *policy statements* that will address questions concerning the appropriate use of the sanctions of criminal forfeiture, order of notice to victims, and order of restitution and the use of conditions of probation and post-release supervision.").

Why the Commission went further to promulgate policy statements restricting consideration of factors for purposes of departure is not at all clear. It is particularly mysterious because, even if the Commissioners misunderstood 28 U.S.C. § 994(c), (d) and (e) as having to do with sentences outside the guideline range (which it seems they did not, according to Justice Breyer's article), the plain language of 28 U.S.C. § 994(d) and (e) and their legislative history make clear that Congress's purpose in directing the Commission to assure that the guidelines were entirely neutral as to certain factors and that other factors were generally inappropriate "in recommending a term of imprisonment or length of a term of imprisonment" was "of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 98-225 at 175 (1983). "This qualifying language in subsection (d), when read with the provisions in proposed Section 3582(c) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that 'might be good for him.'" *Id.* at 171 n.531.

Since Congress mentioned several times in the legislative history that these factors might be used in the guidelines to recommend a sentence of probation, the question was raised whether Congress meant to disallow consideration of mitigating factors for defendants who are not statutorily eligible for probation. That was not Congress's intent. While Congress gave examples of when the factors listed in § 994(e) might call for probation, it also suggested that they might call for intermittent confinement. *See* S. Rep. No. 98-225 at 174 (suggesting that a defendant with family ties and responsibilities might be sentenced to confinement on evenings and weekends). Congress did not intend to place these factors off limits for purposes of mitigating the sentence for any kind of offender. Instead, it was concerned that they not be misused to incarcerate the disadvantaged, as may previously have been done, on the theory that prison might be rehabilitative. Congress certainly did not intend to allow consideration of mitigating factors for white collar offenders for whom probation is ordinarily allowed by statute, but not for drug offenders when subject to a statutory maximum that disallows probation. *See id.* at 173 (Commission might recommend that a drug dependent defendant be placed on probation with community treatment and a brief stay in prison for drying out).

For these reasons and the reasons stated in my colleagues' previous testimony, we recommend the following:

- The Commission should delete Chapter 5, Part H (Specific Offender Characteristics) and Chapter 5, Part K.2 (Other Grounds for Departure) and move them to a historical note. The restrictions are inconsistent with current law, and the encouraged departures are complicated and unnecessary.

- The Commission can retain encouraged "departures" in the Chapter 2 and Chapter 4 guidelines. These do not purport to prohibit the courts from considering factors they must consider under § 3553(a) and Supreme Court law.

- The Commission should delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders. This limit was adopted in response to, but was not required by, the PROTECT Act. It is inconsistent with current law, and the courts ignore it. It is inconsistent with the Commission's own research showing that the criminal history category for career offenders is often several categories higher than their recidivism rate would justify.[70]

- The Commission should revise USSG § 1B1.4 to clarify that the information to be used in imposing sentence applies to determination of "an appropriate sentence . . . within the applicable guideline range, or outside that range," rather than "within the guideline range, or whether a departure from the guidelines is warranted." The robbery example is not appropriate, as the factors judges may consider in sentencing outside the guideline range are now unlimited. The guideline can state that the court may not determine the kind or length of the defendant's sentence "because of" race, sex, national origin, creed, religion or socioeconomic status. The proposed language is set forth in the Appendix.

- The Commission should also revise Application Note 1(E) to USSG § 1B1.1 to simplify it and bring it in line with current law and practice. The proposed language is set forth in the Appendix.

[70] Fifteen Year Review at 134.

APPENDIX

§1B1.1. Application Instructions

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Commentary

Application Notes:

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E) "Departure" means (i) for purposes of the "departure" provisions of the Guidelines Manual other than §4A1.3 (Departures Based on Inadequacy of Criminal History Category), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3, assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.

"Downward departure" means departure that effects a sentence less than the sentence recommended by the applicable guideline range . "Depart downward" means grant a downward departure.

"Upward departure" means departure that effects a sentence greater than the sentence recommended by the applicable guideline range. "Depart upward" means grant an upward departure.

§1B1.4. Information to be Used in Imposing Sentence

(a) In determining an appropriate sentence to impose within the applicable guideline range, or outside that range, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

(b) Race, Sex, National Origin, Creed, Religion, and Socio- Economic Status. The court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion or socioeconomic status.

Commentary

Application Notes:

1. Subsection (a) distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within or outside that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to impose a sentence outside the guideline range.

2. Subsection (b) restates former policy statement 5H1.10. It makes clear that the court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion, or socioeconomic status. Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." See 28 U.S.C. § 994(d).